

REPORT OF
THE COMMITTEE TO STUDY EXTENDED MEDIA COVERAGE
OF CRIMINAL TRIAL PROCEEDINGS IN MARYLAND

Submitted by the Committee to Study Extended Media Coverage, a Subcommittee of
the Legislation Committee of the Maryland Judicial Conference

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EXECUTIVE SUMMARY

The Committee to Study Extended Media Coverage was established in August 2007 as a subcommittee of the Legislation Committee of the Maryland Judicial Conference. The Committee was asked to study whether extended coverage, including still photography and electronic broadcasting, was appropriate for criminal trial courts in Maryland. Committee members and staff researched the history of extended coverage; reviewed literature that analyzed the impact of extended coverage on trial participants and the viewing public; solicited and received written testimony from interested parties; and conducted a public hearing. At the hearing, all witnesses who represented participants in the criminal justice process, including prosecutors, the public defender, the state bar association and victims' rights advocates, were opposed to allowing television to broadcast Maryland criminal proceedings. All witnesses who represented media interests testified in favor of allowing criminal proceedings to be broadcast.

The Committee weighed the potential benefits of extended media coverage - primarily increased public awareness of the criminal trial process - against its potential to adversely impact trial participants, interfere with the fact-finding process, and impair public confidence in the criminal justice system. After completing its review, the Committee determined that the putative benefits of electronic media coverage are illusory, while the adverse impacts on the criminal justice process are real. The Committee, therefore, concluded unanimously that the current statutory ban on cameras in criminal trial courts should remain in effect.

Maryland was once among those states that incorporated into its canons of judicial ethics a ban on extended coverage of court proceedings on the grounds that such coverage was calculated degrade the court and foster public misconceptions about the nature of its proceedings. The Court of Appeals of Maryland began to reconsider this position in 1979, around the same time that the national Conference of Chief Justices determined that the question was more one of court administration than judicial ethics and suggested that each state should be free to experiment with cameras in their courts. In 1981, the Supreme Court expressly sanctioned such experimentation in criminal cases, distancing itself from an earlier plurality decision that came within a single vote of declaring that televised criminal trials were inherently prejudicial and, therefore, forbidden by the United States Constitution.

In 1980, Maryland joined several other states that were already experimenting with extended coverage. The Court of Appeals suspended the ethical prohibition on cameras in the courtroom and established an eighteen month experimental program in virtually all state courts. The Legislature quickly intervened, amending what is now MD. CODE ANN., CRIM. PROC. §1-201 (2001), to provide that “extended coverage of criminal proceedings in the trial courts of this State is prohibited.” The legislation did not affect extended coverage of civil cases or appellate proceedings, which is currently permitted and governed by Maryland Rule 16-109, made permanent in 1984.

An express ban on electronic media coverage of criminal trial proceedings, or rules so restrictive so as to effectively deny such coverage, remains intact in fifteen states, the

District of Columbia, and in all federal trial courts. The rules and procedures in the thirty-five states that allow broadcast coverage of criminal trials reveal tremendous variations. There are significant differences among these states on such things as the extent to which judges have discretion to deny or limit the coverage, whether witnesses must consent to being recorded, whether jurors may be photographed, or whether pretrial proceedings may be shown. It is, therefore, difficult to generalize as to the practice in these states.

The arguments for and against broadcast coverage 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 the belief that televised trials serve to educate the public and inspire confidence in the criminal justice system. Opponents raise concerns about the corrupting influence of television generally, and the adverse impact that cameras can have on trial participants.

The Committee sought to test the strength of each of these arguments, and then to balance the potential public benefits of extended coverage against the potential costs to the trial process. The Committee benefitted from efforts undertaken elsewhere to poll trial participants to determine whether they were actually affected by the presence of cameras, and to poll members of the general public to discover whether broadcast coverage has had any impact on them. Studies that analyzed the content of actual news stories were also useful in assessing their efficacy as educational tools. Based upon its review, the Committee concluded that trial participants are adversely affected by the presence of cameras; that as used by the media, audio-visual coverage of court proceedings has little

educational value; and that such coverage may, in fact, diminish the public's confidence in the criminal process.

The constitutional claims of camera proponents were easily resolved. Neither the First nor the Sixth Amendment extends a right to the commercial press to televise trials. The First Amendment is satisfied as long as media representatives are allowed in the courtroom and can report what they see and hear while there. Likewise, the Sixth Amendment right to a public trial is satisfied by the mere presence of the public and a free press to safeguard the rights of the accused. The constitution, therefore, favors neither side in the cameras debate.

The Committee agreed in principle with the media's contention that broadcast coverage has the potential to educate the public. In practice, however, television coverage of court proceedings has most often been used to entertain rather than to educate its viewers. Broadcasters favor sensational and violent cases over matters that have the potential to impact the greater community, such as those involving political corruption or civil rights. Comparative content analysis in one study indicated that television is far more likely to focus on violent crime than the print media, but that as a general rule, newspaper reports were more than twice as likely to contain explanatory content than were television stories. The same study reported that in television news stories, racial minorities are nearly twice as likely to be portrayed as perpetrators of crime than are whites, a finding substantially at odds with national crime statistics.

Research has also demonstrated that the amount of information conveyed about the

trial process varies inversely to the amount of camera footage available. Television reporters typically use videotape as a backdrop, talking over all but the most dramatic in-court statements or exchanges. Video thus is used to reinforce a verbal presentation, rather than to add informative content to the story. In contrast, when the press has no courtroom footage to show, it often supplements its coverage to provide the public with information derived from sources outside the courtroom, such as expert analysis of the process or a discussion of broader societal issues suggested by the case.

Data from several sources revealed that even where cameras are allowed, television coverage of actual trial proceedings are rare. Television coverage is reserved for pretrial and sentencing proceedings, both of which can be long on drama, but short on educational value. By focusing on these proceedings, extended coverage has a far greater potential to distort the process than to explain it. Arraignments and pretrial release hearings, for example, tend to be one-sided affairs where the prosecution is permitted to recite bald allegations and prejudicial details regarding the defendant's criminal history. When the uninformed viewing public makes up its mind based on such incomplete, inaccurate, or irrelevant information, it may be surprised or disappointed when the jury comes to a different result.

Undue emphasis on the sentencing phase of the proceedings has a similar impact. The media's impatience with trial matters leaves the viewing public without the information disclosed during the trial that may aggravate or mitigate the punishment. More important, sentencing proceedings are the most vulnerable to commercial exploitation, largely at the

expense of victims of the violent crimes favored by the media. The sentencing judge or jury in these types of cases hear the most humiliating and heart rending victim impact testimony that is of no interest to the general public, except to satisfy a prurient interest in the suffering of others. A voyeuristic public may be entertained, but it is neither educated nor informed by these proceedings.

Available data also seem to refute media arguments that extended coverage of criminal proceedings operates to enhance public confidence in the courts. After a 10 year experiment with cameras in their state's courtrooms, nearly two-thirds of New York voters surveyed concluded that cameras get in the way of a fair trial. More than half of those polled thought it had a negative impact on New York's criminal justice system. National polling data obtained after the O.J. Simpson trial was similar. More than two-thirds of those polled reported that they lost confidence in ability of the criminal justice system to come to a fair result when the broadcast media focuses significant attention on a case, and more than one-half of the respondents believed that the television coverage of the trial had an impact on the result.

The Committee was thus unconvinced that extended coverage of criminal proceedings provides any real educational benefits or enhances public confidence in the courts or the criminal justice system. It was, however, convinced that many of the detrimental effects feared by camera opponents are being realized in jurisdictions that allow cameras in its courts. Survey data collected from trial participants indicates that jurors, witnesses, lawyers and judges are aware of and are affected by the presence of cameras,

and that the presence of cameras can adversely impact the court's ability to guarantee its litigants a fair and impartial trial, free from extraneous outside influence.

As might be expected, lay trial participants - jurors and witnesses - appear to be the most affected by the presence of broadcast media. Data collected from several sources indicated that nearly all jurors were aware of the presence of the cameras, and that a substantial number of them felt nervous or self-conscious as a result. Some also reported that the presence of cameras had an impact on their ability to concentrate on the trial testimony. Many confirmed the fears of witnesses who testified before the Committee that the presence of cameras for only part of the proceeding can serve to make that testimony seem more important than testimony in which the media showed no active interest. Research also indicated that a substantial portion of the population would be less willing to serve on a jury if they knew the trial would be televised.

Equally troubling is the impact that extended coverage can have on witnesses. Prosecutors, defense attorneys and victim advocates who provided written and oral testimony to the Committee all expressed concern that the mere prospect of television coverage could discourage witnesses from coming forward with their evidence. Several surveys corroborated these concerns, suggesting that nearly one-half of those polled would be less willing to appear in court if they believed their testimony would be televised. The presence of broadcast media in the courtroom also had a demonstrated impact on those witnesses who agreed to or were compelled to testify. Again, data from multiple sources reveal that many witnesses reported being, and were perceived by others to have been,

more distracted, self-conscious or nervous in front of television cameras.

Camera proponents correctly observed that these adverse impacts on witnesses and jurors are not universal. Many of those surveyed reported being completely unaffected by the presences of broadcast media, and a substantial number who acknowledged an impact reported that they are only slightly affected by the cameras. It was the view of the Committee, however, that procedures designed to ensure a fair trial before an impartial jury, like criminal jury verdicts themselves, cannot be determined by consensus or majority vote. In the context of a criminal trial, even slight disruptions or distractions can have a significant impact on the proceeding, which is quite literally a matter of liberty, life and death. Assessments of the strengths and weaknesses of a litigant's case or determinations of witness credibility often turn on subtle observations made during a lengthy trial. A distracted or nervous witness presents differently than one who is unaffected by the prospect of widespread publicity, particularly to a distracted or self-conscious jury. The fact that it is difficult to assess the cumulative impact of these extraneous influences does not make them less real.

The same may be true for attorneys and judges caught in the spotlight. Many commentators express concern for those who might seek advantage from the potential publicity, including elected prosecutors and judges seeking to curry favor with voters, and defense attorneys looking to impress future clients. While arguably less susceptible to distractions than lay witnesses and jurors, lawyers and judges are nonetheless subject to a human tendency to act differently in front of a television camera. Whether the result is a

more flamboyant presentation, a reluctance to ask a question that might be misconstrued by a poorly informed audience, or a more hard-nosed presentation or disposition, the potential for cameras to impact the participants and, therefore, affect the trial result is a serious concern.

For all of these reasons, the Committee found that broadcast news coverage of criminal matters neither educates the public nor instills confidence in the system's ability to accomplish the sole objective of a criminal trial - to fairly and reliably determine guilt. The Committee concluded that the State's prosecutors, public defenders, organized bar and victims' rights advocates were properly concerned that the potential to prejudice the trial significantly outweighs any purported public benefits of extended coverage. The current ban on cameras in criminal trial proceedings in Maryland should remain in effect.

I. INTRODUCTION

A. *The Committee's Charge.* The Committee to Study Extended Media Coverage (the "Committee") was established on August 22, 2007, as a subcommittee of the Legislation Committee of the Maryland Judicial Conference. The Committee was authorized to receive information regarding the appropriateness, feasibility and utility of allowing television cameras to record and broadcast criminal trial proceedings in the State of Maryland. The Committee was instructed to report its findings, in writing, to the Chief Judge of the Court of Appeals of Maryland, the Chief Judge of the District Court of Maryland, the Conference of Circuit Court Judges, and the District Court Administrative Judges Committee by February 1, 2008.

B. *The Committee's Study.* The Committee's review focused primarily on the proposed use of audio-visual recording for broadcast television, although at all times it considered the propriety of all manner of "extended coverage," as defined by the Maryland Rules.¹ The Committee held four meetings, beginning September 17, 2007, and reviewed literature from a variety of sources, including case law, articles in law journals and media publications, a 1980 report of the Public Awareness Committee of the Maryland Judicial Conference,² and a growing body of reports, surveys, and analyses of media coverage in

¹Md. Rule 16-109.1(a) defines "extended coverage" to mean "any recording or broadcasting of proceedings by the use of television, radio, photographic, or recording equipment by: (i) the news media, or (ii) by persons engaged in the preparation of educational materials films or recordings with the written approval of the presiding judge."

²Public Awareness Committee of the Maryland Judicial Conference, *Report on*

other jurisdictions. A selected bibliography is included with this report as Attachment A.

The Committee also solicited and received written and oral testimony from the public. Oral testimony was taken at a public hearing on November 5, 2007, pursuant to notices posted in the Maryland Register and circulated among the media and organizations with an interest in the criminal justice system. Ten individuals - representing the media and organizations whose members appear regularly in criminal trial courts - testified before the Committee. All those who represented media interests testified in favor of permitting extended coverage in criminal trial courts; all those who represented organizations whose constituents participate regularly in criminal trials - including the Maryland State's Attorneys' Association, the Office of the Public Defender of Maryland, the Maryland State Bar Association, and the Maryland Crime Victims Resource Center (formerly known as the Stephanie Roper Committee) - testified against allowing cameras into the courtroom. A list of witnesses who provided oral and written testimony is attached to this report as Attachment B.

C. *The Committee's Recommendation.* The Committee recommends that the

the Proposed Modification of the Maryland Canons of Judicial Ethics To Permit Extended Media Coverage of Court Proceedings, submitted April 29, 1980 (the "1980 Report").

Maryland Judiciary oppose any revision to Md.CODE ANN., CRIM. PROC. §1-201 (2001), that would allow extended coverage of criminal trial proceedings. To reach this conclusion, the Committee weighed the potential benefits to such coverage - primarily increased public awareness of the criminal justice process - against the potential for harm to the fact-finding process and the public's confidence in the criminal justice system. The Committee's review of data collected elsewhere indicates that despite the widespread use of cameras, the educational benefits of camera coverage are marginal at best, and may actually work to erode public confidence in the courts. The data also show that electronic media coverage can have a substantial negative impact on criminal trial participants, including jurors, witnesses, attorneys and judges. As the risk of compromising the fact-finding process far outweighs the illusory benefits of extended coverage, the Committee concluded unanimously that the current ban on extended coverage in all criminal trial proceedings should remain in effect.

II. A HISTORY OF EXTENDED MEDIA COVERAGE

A. *The Supreme Court Frames the National Debate.* The first widespread prohibition on extended media coverage was adopted seventy years ago when the American Bar Association approved Canon 35 of its Canons of Professional Ethics, declaring that such coverage degraded the court and fostered public misconceptions about the judicial process.³ Since then, the issue has traveled a winding path, which at its latest

³Canon 35, restated in 1941, 1952, 1958, 1963, and 1972 provided:
"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

turn finds some manner of extended coverage available, in widely varying degrees, in all fifty states.

For the last 40 years, the debate has been framed largely by two United States Supreme Court cases, *Estes v. Texas*, 381 U.S. 532 (1965), and *Chandler v. Florida*, 449 U.S. 560 (1981). In *Estes*, the Court reversed a guilty verdict of a notorious swindler after concluding that the manner in which his trial was recorded and broadcast deprived him of his right to a fair trial. *Estes*, 381 U.S. at 534. The Court's plurality opinion came within a single vote of holding that televised criminal trials are inherently prejudicial to the defendant and, therefore, would always violate the due process clause of the Fourteenth Amendment.

In *Chandler*, the Court was again asked to overturn a guilty verdict in a case tried before cameras in 1978. Refusing to reverse the conviction of several police officers accused of using agency equipment to commit burglary, the Court refined its earlier analysis and concluded that it would find no absolute constitutional ban on cameras at criminal trials absent "unimpeachable empirical support for the thesis that the presence of

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). The impetus for Canon 35 is assumed to be the carnival atmosphere that attended the Lindbergh baby kidnapping trial of Bruno Hauptmann. See *Estes v. Texas*, 381 U.S. 532, 596 (1965)(Appx. to opinion of Harlan, J., concurring).

electronic media, *ipso facto*, interferes with trial proceedings.” *Chandler*, 449 U.S. at 576, n. 11. As broadcast coverage of criminal trials was then in its infancy, the Court deemed the data too “limited” and “non-scientific” to order a halt to state court experimentation with cameras in their courts. *Id.*

Although it settled the constitutional question, the Court refused to resolve the ultimate question left to the states: whether broadcast coverage of criminal trials is appropriate practice for the judiciary, and an appropriate public policy choice for states. The nine separate opinions filed in these cases stand as a testament to the difficulties inherent in these questions, then and now.⁴

The justices whose votes overturned the conviction in *Estes* grounded their analysis in the fundamental proposition that the sole purpose of a criminal proceeding is to fairly and reliably determine guilt. *Estes*, 381 U.S. at 540; *Id.* at 565 (Warren, C.J., concurring). Rules of evidence and other procedural safeguards have evolved over centuries to facilitate this function, protecting the fact-finding process from extraneous influences. *Id.*; see *Estes*, 381 U.S. at 592 (Harlan, J., concurring). As electronic media coverage injects outside

⁴Even the four justices who would have affirmed the *Estes* conviction agreed “that the introduction of television into a courtroom is, at least in the present state of the art, an extremely unwise policy.” 381 U.S. at 601 (Stewart, dissenting)

influences irrelevant to and disruptive of this process, the plurality concluded, it should be prohibited. *Id.* at 544.

The nature and potential for mischief of extended coverage were detailed in three separate, but equally passionate opinions, all of which have retained their vitality to this day. The *Estes* plurality expressed concern that the presence of cameras would have an adverse impact on jurors, witnesses, judges, attorneys and defendants, as well as the public's confidence in the judicial process, and foreshadowed precisely the claims made to the Committee 42 years later. Central to the plurality's theme was the fear that trial participants would be distracted in the performance of their respective roles, not only by broadcast equipment, but by the mere knowledge that everything going on around them was being played out on a world-wide stage. *Id.* at 546.

Concern was expressed for jurors, who in the absence of broadcast coverage carry out their solemn duty in virtual obscurity. Aware that the eyes of the community are upon them and that their neighbors could hold them accountable for their verdict, jurors might experience increased pressure to convict or acquit, influencing, if only subtly, their votes as to guilt or innocence. *Id.* at 545. There was also a fear that television coverage of ongoing trials could frustrate sequestration orders and taint subsequent jury pools and witness testimony in the event of a re-trial. *Id.* at 546.

The potential impact that cameras could have on witnesses was deemed "incalculable". *Id.* at 547. Knowing that their words and images were being broadcast to a large audience could embarrass and frighten some, or embolden others, thereby affecting

their demeanor on the witness stand and the substance of their testimony, interfering with the jury's ability to accurately assess witness credibility. Even in 1965, before witness intimidation became a national epidemic, "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." *Id.*

Concern was also expressed about the impact that cameras might have on the trial judge, who might be distracted from the fundamental duty to guarantee a fair trial. In addition to distractions inherent in the need to supervise the media's coverage to safeguard the rights of the parties and their witnesses, the potential use of broadcast coverage for political purposes, particularly in states where judges are elected, was especially troublesome for the plurality. *Id.* at 548.

Finally, the potential to distract and confound the defendant and his attorney was noted. Television coverage was seen as a form of psychological harassment, with the "heightened public clamor" of a broadcast trial impairing the ability of the accused to concentrate on the life or death task at hand, and to assist a distracted attorney in his own defense. *Id.* at 549.

In response to the state's argument that these observations "are for psychologists because they are purely hypothetical," the opinion of the Court concluded:

But we cannot afford the luxury of saying that, because these factors are difficult of ascertainment in particular cases, they must be ignored....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.

Estes, 381 U.S. at 550.

These arguments were rejected by the four justices who dissented in *Estes*, and whose views ultimately became the opinion of a majority of the Supreme Court in *Chandler* sixteen years later. Although the *Chandler* majority did not “ignore or discount the potential danger to the fairness of trial,” 447 U.S. at 582, it refused to establish a *per se* constitutional rule forever barring cameras “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.” *Chandler*, 449 U.S. at 575. Responding directly to the potential impact on trial participants feared by the *Estes* plurality, the Court observed:

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 [in other types of cases]. 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.

Chandler, 449 U.S. at 575

The Court found, however, that there had as yet been no such demonstration, and declined to reverse a conviction in the absence of a showing that actual prejudice resulted from the broadcast coverage. *Id.* at 581. The Court expressly encouraged the states to continue with their camera experiments, *id.* at 582, and many did so.

B. *Extended Coverage in Maryland.* The tide had actually begun to turn in favor of cameras even before the *Chandler* decision in 1981. The impetus for this change came in 1978, when the national Conference of State Chief Justices approved a resolution

allowing each state to regulate extended coverage in its courts.⁵ Thereafter, many states, including Maryland, began to consider extended coverage in their courts. In fact, Maryland was among the states already experimenting with extended coverage when the *Chandler* decision was published.

⁵Resolution I, Television, Radio, Photographic Coverage of Judicial Proceedings, adopted at the 13th Annual Meeting of the Conference of Chief Justices, August 2, 1978; see *Chandler*, 449 U.S. at 564.

Prior to 1980, the Maryland Code of Judicial Conduct included Canon XXXIV, incorporating verbatim the prohibitions of the ABA's Canon 35.⁶ By Rules Order dated November 10, 1980, however, a sharply divided Court of Appeals suspended the application of Canon XXXIV, and authorized an 18 month long experiment with extended coverage in virtually all Maryland trial and appellate court proceedings. The Court's decision to embark on this experiment was not without controversy. Two of its members refused to sign the order, and a third dissented insofar as the experiment allowed television coverage in trial courts. A substantial majority of Maryland judges also opposed the introduction of cameras into the criminal trial courts,⁷ as did the State Legislature.

The Maryland Judiciary began its study of the issue in 1979, shortly before the Court of Appeals received a media petition seeking to modify or repeal Canon XXXIV. See 1980

⁶See n. 3, *supra*. The Maryland State Bar Association adopted the ABA Canons of Ethics in 1953. Report of the 58th Annual Meeting of the Maryland State Bar Association (1953), p. 203. The Court of Appeals formally adopted it as Rule 1231 in 1971, renumbering Canon 35 as Canon XXXIV.

⁷Almost two-thirds (63.3%) of the 139 Maryland judges who responded to a survey in 1981 believed that television cameras should be barred from all state courts. Only 24.5% held a contrary view. Gina Daddario, *Cameras in the Courtroom as Viewed by Maryland Judges* (Thesis, M.A - U.Md. 1982), p. 45.

Report, p. 1. The Court held the petition in abeyance pending its receipt of a report from the Public Awareness Committee of the Maryland Judicial Conference. When filed on April 29, 1980, that report included the committee's recommendation (by a 9-3 vote), that Maryland join the growing number of states experimenting with extended coverage. *Id.* at 32.

The Public Awareness Committee considered many of the issues that most troubled the *Estes* plurality and today's opponents of cameras, including the potential impact of electronic media coverage on trial participants, the potential for prejudicial pretrial publicity, and the probability of commercial exploitation by the media. 1980 Report, pp. 12-30. As the Supreme Court would do nearly one year later in *Chandler*, however, the committee concluded:

From the preceding discussion, it is apparent that additional knowledge must be acquired concerning the realization of perceived benefits and the impact of perceived dangers if an intelligent decision is ultimately to be made. Much of what we have discussed can properly be labeled as conjecture, speculation or prophecy. There is a dearth of empirical data scientifically gathered and evaluated.

1980 Report, p. 30.

The Public Awareness Committee believed that Maryland should be among those states developing the data necessary to test predictions as to the benefits and burdens of extended coverage. When recommending the eighteen month experiment, the 1980 committee noted that there might come a time when the Court of Appeals would need to revisit the issue: "[w]e are convinced that if an *experiment* is authorized, it will be just that, and we need not withhold our approval because of apprehension arising out of the 'foot-in-

the-door' phenomenon." *Id.* at 33 (emphasis in original).

The recommendation of the Public Awareness Committee was accepted by the Court of Appeals, and is now embodied in Rule 16-109 (formerly Rule 1209), Maryland Rules of Procedure (2007), first adopted in November 1980. Rule 16-109 authorizes extended coverage in all trial and appellate courts, provided that a request is submitted at least five days in advance. Rule 16-109.c. In trial courts, written consent to such coverage is required of all non-governmental parties, and victim witnesses are given the right to terminate or limit coverage of their testimony. Rule 16-109.d, e. The trial judge can also limit or terminate the coverage upon finding that it would be unfair or dangerous to allow it. Rule 16-109.f(1). Finally, the Rule sets standards for the press and the technology to be used in the courtroom. Rule 16-109.f(9).

The Maryland experiment with extended coverage in its criminal trial courts was short lived. Within months of the rules order authorizing the experiment, MD. ANN. CODE ART. 27, §467B (1981), was amended to provide that "extended coverage of criminal proceedings in the trial courts of this State is prohibited." Article 27, §467B has been revised and re-enacted without substantive change as §1-201 of the Criminal Procedure Article, retaining the ban on extended coverage of criminal trial proceedings. The statutory prohibition did not extend to civil trials or to appellate proceedings, and by Rules Order dated May 4, 1984, extended coverage in these courts was made permanent. The successor to Canon XXXIV was eventually deleted from the Maryland Rules and Canons of Judicial Ethics by Rules Order dated January 11, 1993, "on the ground that it raises a

question of court administration rather than ethics....especially since Md. Code Art. 27, sec. 467B prohibits (with limited exceptions) media coverage of criminal trials.”

Since 1981, the Legislature has entertained efforts made on behalf of media interests to revise §1-201 to allow electronic media coverage of criminal proceedings. House Bill 81, introduced in the 2006 legislative session, for example, would have permitted the presiding judge in a criminal trial to grant a media request for audio or visual recording, on 24-hours notice, in all proceedings, except juvenile causes and sex offense prosecutions. During the 2007 session, the House Judiciary Committee considered HB 207, which sought to amend §1-201 to permit extended coverage of criminal sentencing hearings. HB 207 has been re-introduced as HB 77 in the 2008 session. A copy of HB 77 is included with the report at Attachment C.

The Maryland Judiciary opposed the prior bills, in principle and as written. As was the case at the Committee’s public hearing, all witnesses testifying before the House Judiciary Committee in support of HB 207 were representatives of the commercial press. Joining the Judiciary in opposition were the Maryland State’s Attorneys Association, the Maryland State Bar Association, several individual state’s attorneys, and the Maryland State Police.

C. *Extended Coverage in Other States.* As of this writing, some manner of extended coverage is available in all fifty states and in some federal courts, but with an endless and ever-changing variety of authorizations and restrictions. In some states extended coverage is authorized by court rule, while in others it is by statute. There are

both permanent and experimental programs, experimental programs that have become permanent, and in one state, an experimental program that expired without being renewed by its legislature. Some jurisdictions permit coverage only of appellate proceedings, others of appellate and civil trial proceedings, and some permit coverage in all of their courts, subject to innumerable exceptions regarding who and what can be recorded and broadcast.

As in Maryland, an express ban on extended coverage of criminal trial proceedings, or rules so restrictive as to effectively deny such coverage, remains intact in fifteen states, the District of Columbia, and in all federal trial courts.⁸ In addition to the District of Columbia, two other Maryland neighbors, Pennsylvania and Delaware, prohibit camera coverage of all criminal trial matters. Pa.R.Cr.P 112(A); Canon 3A(7), Del. Judges' Code of Jud. Conduct. By statute in Virginia, and by court rule in West Virginia, extended coverage in the trial courts is permitted, largely in the discretion of the presiding JUDGE. VA. CODE ANN. §19.2-266 (1992); Canon 3B(12), West Va. Code of Judicial Conduct.

The rules and procedures of the thirty-five states that permit broadcast coverage of criminal trials reveal tremendous variations as to the extent to which judges can permit or

⁸RTNDA, *Cameras in the Court: A State-By-State Guide*, http://www.rtna.org/pages/media_items/cameras-in-the-court-a-state-by-state-guide55.php (12/13/07). These 15 states are Alabama, Arkansas, Delaware, Illinois, Louisiana, Maine, Maryland, Minnesota, Mississippi, Nebraska, New York, Oklahoma, Pennsylvania, South Dakota, and Utah. *Id.*

limit the coverage, whether and to what extent witnesses and jurors can be shown, and the types of cases, such as sex offenses, family law, and trade secret matters, that are subject to mandatory exclusions. It is, therefore, difficult to generalize as to practice in the courts of these states.

There are states as varied as Florida, which has a judicially created presumption that camera coverage should be allowed in all cases; California, which expressly forbids such a presumption and grants the presiding judge broad discretion to permit or deny extended media coverage; and Rhode Island, which grants the trial judge absolute and unreviewable discretion to exclude electronic media from all or any part of a proceeding.⁹ Many states prohibit coverage of pre-trial hearings and jury close-ups; others do not. Some states allow the parties, including a criminal defendant, to veto a media request to cover the proceedings or allow witnesses to refuse to permit their images or words to be broadcast. Others require a case-by-case determination and a showing of prejudice. A Table prepared by the National Center for State Courts Knowledge and Information Services outlining generally the degree of extended coverage permitted in each state is attached to this report as Attachment D.

Even within states, the nature and extent of permissible coverage is not static. In response to what some viewed as media excesses during the 1995 televised criminal trial of O.J. Simpson, the California Judicial Council undertook a thorough review of its rules

⁹See Rule 2.450, Rules of Judicial Administration, Florida Rules of Court (2008); *Florida v. Palm Beach Newspapers*, 395 So. 2d 544 (1981); Rule 1.150, California Rules of Court (2008); R.I. Supreme Court Rules, Art. VII (1993).

regarding cameras in its courts. A majority of California's judges, prosecutors and public defenders sought an outright ban on extended coverage. The Judicial Council refused to go that far, but it did amend its rules to make it clear that the trial judge had virtually unfettered discretion to refuse to allow the proceedings to be broadcast, or to terminate such coverage once it began. The rules were also amended to forbid showing jurors and spectators. Rule 1.150, California Rules of Court (2007).

In 1997, the State of New York became the first state to rescind the media's statutory license to bring cameras into the courtroom after its legislature refused to renew an experimental program it had sponsored for 10 years. N.Y. Jud. Law §218 (1987). The New York legislature had authorized this program on four prior occasions, and in 1997, its own task force recommended that such coverage be made permanent. New York State Committee to Review Audio-Visual Coverage of Court Proceedings, *An Open Courtroom - Cameras in New York Courts*, Fordham Univ. Press (1997)(the "New York Report"). The Legislature nonetheless sided with its bench, the bar, and public opinion, all of which polled strongly in opposition to continuing broadcast coverage of trial proceedings in New York. The statewide experiment was allowed to sunset in 1997.

D. *Extended Coverage in the Federal Courts.* The federal judiciary, like New York, experimented with extended coverage, but declined to continue the program when its study period expired. Also as in New York, the decision to halt electronic media coverage was made notwithstanding a Federal Judicial Center ("FJC") research report recommending that cameras become permanent fixtures in federal courtrooms. Federal

Judicial Center, *Electronic Media Coverage of Federal Civil Proceedings* (1994)(the “FJC Report”). As in Maryland, there have been recurring legislative efforts to overrule the federal judiciary’s determination of the practice appropriate for its courts, including the *Sunshine in the Courtroom Act*, S.B. 352/H.R. 2128, 110th Congress (2007), pending as of this writing. The Federal Judicial Conference opposes these congressional efforts to require extended coverage in federal trial courts. The United States Department of Justice, like the Maryland States’ Attorneys, has also gone on record in opposition to the pending federal legislation.¹⁰

Electronic media coverage of federal criminal trial proceedings has been prohibited by the Federal Rules of Procedure since 1946. See FJC Report, p. 3. In 1972, the U.S. Judicial Conference incorporated into its Code of Conduct the then-current version of former ABA Canon 35, making it clear that the prohibition applied to civil cases as well. *Id.* In 1988, the federal judiciary appointed a committee to revisit the issue, and that committee recommended a three year pilot program, for civil cases only, in several federal district and circuit courts of appeals. *Id.* at 4. The program was in effect from 1991 through 1994, after which it was evaluated by the FJC through analysis of data obtained through surveys and interviews of trial participants.

The evaluation and a recommendation to continue the program was submitted to the Federal Judicial Conference, but

¹⁰Statement of Hon. John C. Richter, United States Attorney, W.D. of Oklahoma, on behalf of the U.S. Department of Justice, H.R. Jud.Comm. Hearing on H.R. 2128, 110th Cong. (9/27/07).

After reviewing the FJC's report, the Conference decided in September 1994 that the potentially intimidating effect of cameras on some witnesses and jurors was cause for considerable concern in that it could impinge on a citizen's right to a fair and impartial trial. Therefore, the Conference concluded that it was not in the interest of justice to permit cameras in federal trial courts.

Statement of Hon. John R. Tunheim, Judge, United States District Court for the District of Minnesota, on behalf of the Judicial Conference, H.R. Jud.Comm. Hearing on H.R. 2128, 110th Cong. (9/27/07).

Noting that appellate proceedings do not involve witnesses and juries, the Conference agreed to permit the judges of each circuit court of appeals to decide for themselves whether to permit still photography and broadcast coverage of their proceedings, and several now do. Broadcast coverage of the U.S. Supreme Court is still prohibited, although the Court on occasion releases same day audio recordings of its oral arguments.

III. SUMMARY OF ISSUES AND CONCLUSION

The ultimate issue considered by the Committee is whether extended coverage is appropriate for all or any part of criminal trial proceedings. To make this determination, the Committee was required to balance the value inherent in public trials against the potential for disruption that some types of publicity can bring to the fact-finding process. After engaging in this analysis, the Committee determined that the balance tips decidedly against allowing extended coverage of Maryland criminal proceedings.

The competing positions in the national debate have been summarized as follows:

Support for simulcast television coverage of trials is grounded in the U.S. Constitution's First Amendment right to freedom of the press, the Sixth Amendment right to a public trial, Fifth and Fourteenth Amendment Due

Process concerns of fairness, and the speculative belief that televised trials both educate the public as well as inspire confidence in the outcome of the specific trial televised. Opposition to simulcast coverage of trials is based on traditional concerns about the prejudicial impact on the trial, the lost dignity and decorum and the corrupting influence of television.

Christo Lassiter, *Cameras and the Infusion of Political Bias Into the Courtroom*, 5 Intl. J. L. & Info. Tech. 28, 32-4 (1997)(“Lassiter”).

The arguments of those in favor of opening Maryland’s criminal courts to cameras were best summed up in the Position Paper of the Media Regarding Cameras in Maryland’s Criminal Courtrooms (11/12/07) (the “Media Position Paper”), submitted to the Committee on behalf of interests that own or operate more than 25 television and radio stations in the Maryland/D.C. area, the Baltimore Sun, the Washington Post, and a variety trade organizations:

The arguments for allowing cameras in the courtroom are basic: Citizens should be able to see what goes on at trial. The exclusion of cameras from trials not only ignores the public nature of a trial, but increases America’s ever-growing distaste for, and distrust in, the judicial system. The Constitution also demands a fair trial - a public trial is a fair trial.

Media Position Paper, pp. 1-2.

The written testimony of Maryland Attorneys Melvin J. Sykes and George W. Liebmann, dated November 2, 2007, included a comprehensive list of arguments against allowing cameras in Maryland’s criminal courts, including : (a) cameras endanger the privacy and security of witnesses and jurors; (b) cameras invite “grandstanding” by counsel and judges; (c) cameras would increase the number of cases requiring sequestration of jurors; (d) cameras would subject the judge to intense media pressure to allow

broadcasting, and create collateral issues and concomitant delays before and during trial; (e) cameras give the media unfettered discretion to decide what trials and excerpts are selected for broadcast, and whether flattering or unflattering pictures or performances by particular trial participants are selected for broadcast; (f) cameras subject jurors to pressure towards a popular result; and (g) cameras introduce the possibility of fame to witnesses and jurors, expanded legal practice to attorneys, judicial or political promotion to judges and prosecutors, all of which could potentially distort the behavior of trial participants and, therefore, distort outcomes.

To reconcile the competing positions of camera proponents and opponents, the Committee studied each of their arguments and, where available, information derived from jurisdictions that permit extended coverage. At first glance, the task seemed to require the Committee to do little more than to re-plow ground already tilled in 1980. Upon closer review, however, it became clear that the Committee now had much of what the Supreme Court and the Judiciary lacked in 1980: empirical data collected and analyzed in the years since the issues were first addressed by the Supreme Court. Particularly revealing were content analyses of actual news stories that tested common assertions as to the nature and benefits of extended coverage. This information was useful in assessing the respective claims of those with a direct stake in this debate, and helped convince the Committee that there is much to be risked but little to be gained from inviting electronic media into the State's criminal courts. For the reasons discussed below, the Committee agrees with the statement made recently to Congress on behalf of the U.S. Department of Justice:

[A]ny risk to judicial decision-making, fairness of jury deliberations, and access to and accuracy of witness testimony that can be so easily avoided simply is not a risk worth taking. Altering outcomes to satisfy the appetite and hunger for increased entertainment, sensational footage, and reality television simply is not good public policy.

Statement of Hon. John C. Richter, United States Attorney, W.D. of Oklahoma, on behalf of the U.S. Department of Justice, H.R. Jud. Comm. Hearing on H.R. 2128, 110th Cong. (9/27/07).

IV. DISCUSSION

A. *The Constitution Is Neutral on the Question of Cameras.* In support of the claim that the media has a right to broadcast criminal trials, camera proponents often point to the U.S. Constitution and its First Amendment protections of the freedom of the press and the Sixth Amendment right to a public trial. It appears settled, however, that the Constitution confers no special benefits on broadcast media and favors neither side in the debate over cameras in the courtroom.

The First Amendment claims are easily resolved. Whatever else can be said of the six opinions filed in *Estes*, all nine Supreme Court justices agreed that “[t]here is no claim here based upon any right guaranteed by the First Amendment.” *Estes*, 381 U.S. at 604 (Stewart, J., dissenting). The opinion of the Court responded to the claim that the First Amendment extends a right to televise from the courtroom by observing simply that “[t]his is a misconception of the rights of the press.” *Id.* at 539. The reasoning was summarized by the Chief Justice:

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.

Id. at 585.¹¹

The *Estes* court also squarely addressed the contention that the Sixth Amendment's guaranty of a right to a public trial confers upon the press the right to broadcast criminal proceedings. To the contrary, the Sixth Amendment was a response to coerced confessions and secret tribunals, and thus "is a 'guarantee to an accused' designed to 'safeguard against any attempt to employ our courts as instruments of persecution.'" *Id.* at 583, quoting *In re Oliver*, 333 U.S. 257, 270 (1948). The opinion of Justice Harlan best captured what had already been said by the others:

¹¹ See *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16, 23 (2d Cir. 1984)("[t]here is a long leap ...between a public right under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised. It is a leap that is not supported by history."); *U.S. v. Edwards*, 785 F.2d 1293, 1295 (5th Cir. 1986)("No case suggests that this right of access includes a right to televise, record or otherwise broadcast trials.")

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, certainly does not require that television be admitted to the courtroom.... 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.... 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.

Id. at 588-89 (citations omitted).

The U.S. Constitution, therefore, neither requires nor prohibits extended media coverage of criminal cases. The question whether such coverage is appropriate for criminal courts in Maryland thus depends upon the balancing of its other stated justifications - educating the public and promoting its confidence in the courts - against its potential to impede or impair the fact-finding process.

B. No Public Education Benefits Are Being Realized. The most significant arguments made in support of broadcasting trials are that it has the potential to educate the public and to restore its confidence in our legal system. In this regard, both the Media Position Paper and the 1980 Report refer to Judge Irving R. Kaufman, who expressed concern that “the inadequate and confusing communication between the judiciary and the populace is a principal cause of modern discontent with our legal system.” 1980 Report, p. 28, *quoting* 63 ABA J. 1567 (Nov. 1977); Media Position Paper, p. 7. The judicial branch of government, therefore, must rely on the media to help ensure its legitimacy. As explained by the authors of one recent study:

Justice is a process. When the populous feel confident that justice has been invoked they are often more willing to accept the outcome, even if they disagree....Therefore, the work of the justice system cannot happen in a vacuum and the courts rely on the media as one mechanism to publicize its responses to the social problem of crime and the pursuit of justice. Without such a vehicle of communication, the public's ability to evaluate the justice system is limited.

Wendy Pogorzelski and Thomas W. Brewer, *Cameras in Court/How Television News Media Use Courtroom Footage*, 91 *Judicature*, no. 3 (2007)(“Pogorzelski & Brewer”), p. 125

Experience teaches, however, that despite having decades to prove its potential, the claim that electronic media coverage educates the public is more aspirational than real. In actuality, audio-visual coverage of trial proceedings restricts, rather than enhances the flow of information about the legal process. It typically consists of little more than sound bites and snippets, lacking in context and content, intended more to entertain than to inform. This results in a dangerous potential to distort what actually happens inside the courtroom.

When it considered the question of extended coverage in 1980, the Public Awareness Committee heard much from the commercial media about the educational benefits of televised trials. The Media Position Paper now relies heavily on that committee's work. *E.g.*, Media Position Paper, pp. 7-9. Nearly a generation later, this committee also harkens back, but with a slightly different focus. In 1980, the Public Awareness Committee observed:

It would have been refreshing to hear something about the motivation of securing higher ratings and increased revenues. The experience of the television industry in particular is interesting - the ratings battle; the seemingly endless search for the unusual, the bizarre, the sensational; the spectacle of

the frenzied mob of cameramen and reporters pushing and shoving for the desired “shot” or statement - these are all too fresh in memory. Will only the most sensational bits of a trial be selected for broadcast, thus satisfying commercial demands but doing little to convey an accurate or informative picture of the true nature of court proceedings? How will public confidence be enhanced by the broadcast of a 30, 60, or 90-second vignette, sandwiched between kitty litter ads?

1980 Report, p. 26.

These questions now have largely been answered through analyses of data collected since the Public Awareness Committee studied this issue in 1980. The results are not encouraging and reveal that extended coverage conveys neither an accurate nor an informative picture of the nature of court proceedings. In fact, it may do just the opposite.

In 1994, the Federal Judicial Center contracted with the Center for Media and Public Affairs to undertake a comprehensive analysis of courtroom footage obtained during the federal judiciary’s pilot program. It sought to determine how the footage was used by the media, the type and quality of information provided about the cases it covered, and the quality of the information that the stories conveyed about the legal process. After reviewing broadcast footage from ninety television news stories provided voluntarily by the media,¹²

¹²Only 58% of the media sources responded to the FJC’s request for footage, some only to say that they had none available. The FJC noted that “it is conceivable - though we have no reason to believe this - that stations refrained from sending broadcast tapes containing uses of footage they thought would be lacking in educational value.” FJC Study, p. 33, n. 29.

the FJC study determined that in-court recordings were used more to "add[] color or emotion rather than substance to the discussion" and that "the coverage did a poor job of providing information to viewers about the legal process." FJC Study, p. 35, 36.

The FJC study found that the broadcast stories about proceedings covered by electronic media used an average of 56 seconds of courtroom footage per story, but that reporters narrated over 63% of that footage. *Id.* at 34. This left only 21 seconds of actual courtroom audio for use in a typical news story. In other words, "most footage was accompanied by the 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." *Id.* at 36.

With respect to the nature of the information conveyed, the study found that plaintiffs and their attorneys were given more air time than defendants and their counsel; 95% of first day stories neglected to mention that the proceeding was civil rather than criminal; almost three-quarters failed to mention whether a jury was present; and more than two-thirds neglected to mention the next step in the litigation process. *Id.*, p 36. Based on these and other factors, the FJC concluded:

[T]he 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.

Id.

The results of a recently published content analysis of 201 newscasts of the homicide trial of several New York City police officers charged in the 1999 shooting death

of Amadou Diallo were similar: “For every ten minutes of news coverage, the public heard two minutes of actual court proceedings. Broadcasting audio from inside the courtroom is the purest form of communication...but was the least used.” Pogorzelski & Brewer, p. 129. It is not surprising, therefore, that after observing electronic media coverage of their proceedings for ten years, 80% of New York’s state court judges somewhat or strongly agreed with the statement that such coverage “is more likely to serve as a source of entertainment than education for the viewing public”. NY Report, p. 99. Even more of New York’s judges (87%) somewhat or strongly agreed that television coverage “transforms sensational criminal trials into mass-marketed commercial products.” *Id.*

Despite concluding that television news coverage did a poor job of educating the public, the FJC nonetheless recommended keeping cameras in federal civil trial courts. In this context, the recommendation may not be surprising. When balancing the putative educational benefits of news coverage against its deleterious effects in civil cases, the FJC’s findings arguably are neutral. In a civil case, the fact that electronic media coverage only added color or emotion while doing little to educate the public may not as strongly implicate the traditional concerns about the impact of television on a criminal defendant’s fundamental right to a fair and impartial trial. When balancing these interests in the criminal context, however, the question becomes whether the unrealized potential to educate the public is sufficient to outweigh the potential adverse impact to trial process.

Before answering this question, it is necessary to know what is actually being reported from inside the criminal courts, and by whom. In 2002, researchers conducted a

comparative content analysis on 279 newspaper articles and 719 television newscasts of criminal proceedings from five different media markets in an effort to provide an answer.

C. Danielle Vinson & John S. Ertter, *Entertainment or Education, How Do the Media Cover the Courts?*, Harvard Intl. J. Press/Politics 7:80 (Fall 2002). They concluded that while there did not appear to be “a flagrant attempt to make court reporting entertaining,”

[T]here is unmistakable, if somewhat subtle, evidence that news organizations do prefer to report on what will interest us, regardless of its importance or implications for us, and they are partial to stories and sources that are most accessible and therefore easiest to cover. The most frequent subjects of coverage are violence and the unusual, while cases with broader consequences or that happen more routinely are neglected. ***Our study suggests that audiences can gain some knowledge of the judicial process through the media, especially newspapers. However, they are likely to learn about the most unusual cases that have the least significance to the community or to the public.

Id. at 94-5.

Some of the trends observed in this study were disturbing, if not unexpected.¹³ The most common topics for media coverage were murder and violent crimes, rather than less dramatic matters “such as constitutional questions or white-collar crime, which may be harder to explain but often have a greater impact on the public.” *Id.* at 84. Television reporting tended to focus more on violent crime (75%) than did newspapers (54%), with

¹³Responding to the public education arguments made in *Estes*, for example, Justice Harlan observed: “[T]hey 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 appear on the television screen, or the details of the particular crime involved, than by innate curiosity to learn about the workings of the judicial process itself.” 381 U.S. at 594.

62% of television coverage focused on the top national stories involving people who are now household names (e.g., O.J. Simpson, Reginald Denny, the Menendez brothers, and Lorena and John Bobbitt). *Id.* In contrast, barely 20% of media coverage was reserved for stories that the authors suggest might have been of greater significance in that they could have a broader impact on the largest number of people, such as cases involving political corruption, judicial misbehavior, and civil rights. *Id.*

In stories where the race of the principals was revealed, racial minorities were more likely to be portrayed as perpetrators of crime (58.5%) than whites (41.5%), a result substantially at odds with national crime statistics,¹⁴ while whites were more likely to be portrayed as crime victims (78.5%) than were minorities (21.5%). *Id.* at 86. The authors also noted that while matters of race are of significant concern in the U.S. and, therefore, legitimate topics for news reporting, “the way these stories were covered did little to highlight the issue of race relations and almost nothing to analyze the causes of tensions beyond the immediate case.” *Id.* at 85.

It was also clear from the analysis that the media tended to focus its coverage more narrowly when cameras were allowed in the courtroom, communicating less information to viewers than it did in stories for which video footage was not available. This phenomenon

¹⁴National crime statistics show that white arrestees outnumber minority arrestees by more than 2:1. FBI, *Crime in the United States 2002*, United States Department of Justice (http://www.fbi.gov/ucr/cius_02/html/web/arrested/04-table43.html); Bureau of Justice Statistics, *Victim Characteristics*, United States Department of Justice (2005)(http://www.ojp.usdoj.gov/bjs/cvict_v.htm#race)

was best exemplified by comparing the separate trials of John and Lorena Bobbitt. Cameras were not allowed in the trial of John Bobbitt for his alleged sexual assaults on his wife because of Virginia's prohibition on extended coverage in sex offense cases. Cameras were permitted to record the trial of Lorena Bobbitt for allegedly mutilating her husband, as that was not deemed a sexual assault.

When audio-visual coverage of the proceedings was available, the media was found to have used only the most graphic and dramatic excerpts from the testimony, reporting little more about the substance of the proceedings. When they had no such footage, broadcast news organizations were required to supplement their coverage from sources outside the courtroom, and often did so with expert commentary or by focusing on broader issues, such as the incidence of marital rape and sexual assault. *Id.* at 91-2. This may help explain why, as a general rule, newspaper reports were more than twice as likely to contain explanatory content, including explanations of the law or the judicial process, than were television stories. *Id.* at 88-9.

This study verified data developed elsewhere indicating that media interest is highest in pre- and post-trial proceedings, typically arraignments and sentencing hearings, and lowest during the actual trial itself. The study showed that 70% of all stories concerned arraignments and verdicts, while less than 20% was devoted to the actual trial process. *Id.* at 87.

This pattern reflects audience and news-gathering considerations rather than educational concerns. The beginning and end of the process are usually most interesting and predictable, making them easier to cover. In the early stage of a trial, the facts of the case are new, and there is some suspense in

how judges will rule on pretrial motions. At the end of a case, the verdict is the climax and may be accompanied by dramatic emotional responses from defendants and plaintiffs and their supporters in the courtroom.

Id. at 87-8.

Data reported by the California Judicial Council was similar. In California, 58% of all coverage requests were for pretrial proceedings, verdicts and sentencing hearings, with arraignments accounting for 28% of the total. Requests to cover actual trials accounted for only 12% of the total. *Cameras in the Courtroom, Report on Rule 980*, prepared by the AOC/California Judicial Council (May 2000), p. 2.

The Committee is concerned that by focusing on only the most dramatic events of a criminal proceeding, particularly the arraignment phase, media coverage is more likely to distort public perception of the criminal justice process than it is to educate the public about it. This may be true in part because of the data suggesting that explanatory content decreases in inverse proportion to the amount of video available. It may also be true because of the nature of the pretrial process, which typically consists of a preview of the prosecution's case with little input from the defendant, who usually must wait for trial to demonstrate any weaknesses in the state's case. Pretrial release matters also give the prosecution an opportunity to get before the public prejudicial details regarding the defendant's prior criminal history which are typically inadmissible at trial. By emphasizing pretrial matters at the expense of trial coverage, the entire process can be distorted to the prejudice of the defendant and to the detriment of public confidence in its courts. The authors of the Harvard Journal study thus concluded:

While [there] were exceptions, there were cases in which many people were not happy with the verdicts. Because the media, especially television, tended to focus on the dramatic evidence against the defendant, the audience may have made up its mind on the person's guilt and been surprised when the jury decided otherwise or opted for lesser charges based on evidence that did not make the evening news....Cameras in the courtrooms may well contribute to this because they allow reporters to pick and choose what portions of the trial to show and do not force them to explain why things occurred.

Id. at 95.

While undue emphasis on pretrial matters can be most prejudicial to the accused and the public's view of the criminal justice process, sentencing proceedings are the most vulnerable to commercial exploitation, largely at the expense of victims of the violent crimes to which the media devotes the most attention. By their nature, sentencing hearings are emotional affairs. For the first time in the case, the judge, the jury in a capital case, and the general public are permitted to hear heart rending victim impact testimony, including medical and psychological information and testimony from family members and survivors of the victims. Rules of evidence are also relaxed for defendants at sentencing hearings, and they are also permitted to offer testimony regarding highly personal and often traumatic details of their lives in an effort to mitigate the sentence or establish their prospects for rehabilitation.

These are not legal matters or issues of public concern and, from the standpoint of public education, may be the least informative of all criminal proceedings. Such intimate details typically consist of "nothing of interest to the general public beyond that of prurient voyeurism." Lassiter, p. 31. Testifying at the Committee hearing on behalf of the Maryland

Crime Victims Resource Center, Attorney Pauline A. Mandel spoke of the re-traumatization that crime victims suffer when having to relate to strangers in an open courtroom humiliating details of their victimization. Ms. Mandel predicted that having those details and their emotional presentations video-taped, aired repeatedly, and placed in the public domain for eternity can only serve to add to the victim's loss of self-respect, dignity, and control, and may ultimately discourage them from participating in the criminal justice process altogether. The Committee agrees that this as a high price to pay for the public's entertainment.¹⁵

Testifying at the Committee's public hearing, WBAL-TV News Director Michelle Butt suggested that by broadcasting verdicts and sentencing, television helps to "vindicate the community interest" in the proceedings. Coupled with their concerns about pretrial publicity, this is precisely the type of prejudice most feared by camera opponents.

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.**.... 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 pretrial publicity.

¹⁵Ms. Mandel also suggested that broadcasting victim impact testimony may run afoul of the spirit if not the letter of Article 47 of the Maryland Declaration of Rights, which requires that victims "be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process."

Estes, 381 U.S. at 593 (Harlan, J. concurring)(citations omitted)

Finally, the Media Position Paper suggests that taped proceedings might be made available as teaching aids in schools, including law school trial advocacy courses. Media Position Paper, p. 7. The Committee heard from no educators on this issue, and was not made aware of any such use of extended coverage in the 27 years that it has been available in civil cases in Maryland. A similar argument was made to the New York committee reviewing audio-visual coverage at the end of its 10-year trial run. The responses of law school educators were not persuasive. Only five of the ten law schools contacted by the New York committee reported using videotapes of court proceedings regularly, and they were primarily interested in recordings of appellate proceedings. NY Report, p. 30. One experienced trial practice professor concluded bluntly that videotapes of courtroom proceedings “have very little educational value.” *Id.* at n. 10 (quoting letter from Richard L. Ottinger, Dean, Pace University College of Law). Like the claims that extended coverage educates the public, the claim that it might help educate the next generation of lawyers is without factual foundation.

C. *Extended Coverage Decreases Public Confidence in the Courts.* Claims about the educational benefits of extended coverage are joined with the argument that the lack of camera coverage in criminal proceedings helps to erode public confidence in our courts. Witnesses at the Committee’s public hearing thus spoke of a “shroud of secrecy” hanging over criminal proceedings in Maryland, and lingering questions about “why judges alone should be insulated from the press.” Testimony of Attorneys Paul Milton and Nathan

E. Siegel (11/5/07). This theme is echoed in the Media Position Paper, which argues that the exclusion of cameras “increases America’s ever growing distaste for, and distrust in, the judicial system.” Media Position Paper, pp. 1-2. Little is offered in support of these alarming pronouncements.

Hyperbole notwithstanding, the criminal courts in Maryland, the fourteen other states that bar or substantially restrict electronic media coverage, the District of Columbia, and the federal judicial system are not conducted in secret. These courts are all open to the public, including any member of the media that wishes to attend and thereafter report with impunity everything they see and observe, whether in print, on the radio, on television or on their websites.

There also is no evidence that there is a crisis of public confidence in our judicial institutions. While the level of public confidence in all of the nation’s major institutions has room for improvement, national polling results in recent years indicate that more Americans have “a great deal of confidence” in their courts and the criminal justice system than they do in the press, Wall Street, and the U.S. Congress, all of which provide daily fare in the broadcast media.¹⁶

¹⁶Harris Poll, Feb.6-12, 2007 (<http://www.pollingreport.com/institut.htm> 12/3/07). It should be noted, however, that public confidence in “television news,” as opposed to “the press” generally, is about equal to that in the criminal justice system. See also Gallup Poll, June 11-14, 2007 (63% of those polled have some, quite a lot, or a great deal of confidence in both the criminal justice system and television news); National Center for State Courts, *How the Public Views the Courts* 12 (1999).

More to the point, national polling data indicate that the American public does not believe that cameras belong in the courtroom. One study examined public opinion after the trials of O.J. Simpson in California, and William Kennedy Smith in Florida, in an effort to determine the impact that televised court proceedings have on the public. Ralph E. Roberts,

Jr., Comment, *An Empirical and Normative Analysis of the Impact of Televised Courtroom Proceedings*, 51 S.M.U. L.Rev. 621 (1998). Polling data from several sources, including CNN/USA Today Gallup, CBS News, Newsweek and the Los Angeles Times, confirmed that a majority of Americans do not believe that such trials should be televised, and that televising them diminishes their confidence in the criminal justice system. This and other studies indicate that the potential viewing public - like their judges, prosecutors, defense attorneys, and law enforcement - do not consider it wise to allow cameras in their criminal courtrooms.

At the beginning of the Simpson trial, nearly 70% of those polled stated that they did not think that the trial should be televised. *Id.* at 641. Nearly three-quarters of the Gallup poll participants likewise believed that the Smith trial should not have been broadcast, although some of this may be attributable to the fact that it was a rape trial. *Id.* at 643. With respect to O.J. Simpson, 54% of the respondents in one poll believed that televising the trial had an impact on the trial; in another poll, 48% reported that they thought that the impact on the trial was negative. *Id.* at 641. A majority, over 80% in one poll, believed that the trial was fair, but nearly 70% nonetheless reported having less confidence that the

criminal justice system can come to a fair decision when a case is given significant attention by the broadcast media. *Id.* at 652; 665. Nearly 50% of respondents lost confidence in the ability of defense counsel to defend their clients without resorting to unethical or irresponsible tactics, one-third lost confidence in the ability of prosecutors to try their cases without doing the same, and 42% lost confidence in the ability of police officers to perform their duties in a professional and ethical manner. *Id.* at 653-55 (citing CNN/USA Gallup Poll, October 5-7, 1995).

While debate continues as to whether the O.J. Simpson case was an aberration or “the blueprint for Court TV’s commercialized success,” Lassiter, p. 57, these results are consistent with those from a New York state study of voter attitudes towards cameras in the courts generally. Marist Institute for Public Opinion, *Television Cameras in the Courts*, December 1996 (the “Marist Poll”)(reprinted as Appendix B to the New York Report, p. 113).

The Marist poll of registered voters reported that 61% of the participants thought that allowing television cameras into the courtroom was a bad idea; 65% believed that television was more apt to sensationalize than to increase the accuracy of news coverage; 61% said cameras in the courts were used more to entertain than to educate; 62% believed that cameras get in the way of a fair trial; 52% thought cameras in New York courts had a negative impact on its criminal justice system; 70% would not want their case to be televised if a litigant in a civil case; 69% would not want their case televised if a defendant

in a criminal case; and 68% would not want their case televised if they were a victim of a crime.

There is no reason to believe that Maryland voters would respond differently to those polled in New York, or in connection with the Simpson and Smith trial. While consideration of voter preference as such is a matter for the Legislature, the Committee is properly concerned that by opening Maryland's criminal courts to cameras, popular discontent with the notion of televised trials, and the public's belief that they are inimical to the interests of justice, can only further public dissatisfaction with its judicial system. If after 40 years of experimentation, the public still perceives extended coverage to be detrimental to the cause of justice, then it follows that allowing extended coverage the public's confidence in its system of justice will be further eroded.

D. *Cameras Negatively Impact Trial Participants.* Whatever might be said for the public education benefits of extended coverage, it remains necessary to balance those benefits against the potential harm that might be done to the primary mission of a criminal trial - to fairly and reliably determine guilt. In this regard, the principal concern is the effect, if any, that the presence of cameras can have on trial participants, including jurors, witnesses, lawyers and judges.

Proponents and opponents of cameras appear to agree that the presence of cameras will have some effect on these participants. Proponents, for example, suggest that the presence of cameras trials "may actually 'sharpen' [the] performance of trial participants." Media Position Paper, p. 5, *quoting* 1980 Report, p. 29. Opponents, in turn,

revert to the litany of harms predicted by the *Estes* plurality, such as distracting jurors and intimidating or emboldening witnesses. Once again, the data compiled and analyzed over the ensuing decades are useful, and tips the balance in favor of preserving the status quo in Maryland.

The suggestion by the camera proponents that televised trials might cause witnesses to be more truthful and judges and lawyers to better prepare was addressed by Justice Harlan in 1965, who deemed the argument “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.” *Estes*, 381 U.S. at 595. Even so, by making the argument the media representatives necessarily concede an essential point argued by critics of extended coverage: the mere presence of television cameras inexorably alters human behavior.

There is some data, for example, that suggest that the presence of electronic media has a positive effect on lawyer preparation, although the results are mixed. In the 1994 FJC study, for example, 64% of the judges polled said that cameras motivate attorneys to come to court better prepared, at least to some extent, but only 17% thought this to be so to a “great” or “very great” extent. FJC Report, table 2, p. 15. The results of a 1996 Fordham University survey of New York state judges are less compelling, as only 35% of those judges agreed with the statement that lawyers came to court better prepared when television cameras were present. NY Report, p. 110.

Lawyers held a different view, as only 23% of those polled for the FJC study agreed that cameras caused them to arrive at court better prepared, while 71% took a contrary position. FJC Report, table 4, p. 20. These figures are consistent with the survey results from an earlier Florida study in which 73% of the attorneys surveyed said that the presence of cameras did not cause them to come to court better prepared. *A Sample Survey of the Attitudes of Individuals Associated With Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts*, Florida Judicial Planning Coordination Unit, Office of the State Courts Administrator (1978)(“Florida Survey”), section 2, p. 5, attached to the Media Position Paper as Attachment G.

The disparity between the responses of judges and lawyers points to some limitations on participant surveys that test perceived, rather than actual, impacts of extended coverage on courtroom participants. See FJC Report, p. 8. An actor’s perception of how the presence of cameras affects his or her own performance may differ dramatically from how others perceive that impact. The difference in the responses between judges and attorneys on the question of lawyer preparedness in the FJC study, for example, was repeated when each group was asked whether the presence of cameras caused attorneys to be more theatrical in their presentations: 64% of the federal trial judges polled said that to some extent it did; only 20% of the lawyers agreed. FJC Study, p. 15; 21. This may reflect a natural tendency to downplay or under-report negative impacts on a participant’s own performance, as individuals often are not as quick to recognize their personal shortcomings as they are to recognize them in others. Despite these limitations,

the data are helpful, and clearly indicate that the presence of cameras in the courtroom has a significant impact on the behavior of trial participants, and that the impact is detrimental to the fact-finding process.

Impact on Jurors

Available data appear to corroborate the historical concern of opponents of extended coverage that electronic media interferes with the ability of individual jurors to focus on the trial, free from distractions and extraneous influences. Over the years, many jurors and the professionals who observed them have reported that jurors are often distracted, nervous or self-conscious in the presence of cameras. The proper functioning of the jury, “the nerve center of the fact-finding process,” is thereby impaired. *Estes*, 381 U.S. at 545.

These problems began to show as early as 1978, when the Florida judiciary commissioned a study to sample attitudes of individuals who had participated in trials at which extended coverage was permitted. Fully 80% of the jurors polled reported being aware of the presence of extended coverage, although most only slightly so; 33% of them were self-conscious and 25% were nervous as a result, in responses ranging from “slightly” to “extremely”. Florida Survey, section one, pp.3-6. Twenty-two per cent (22%) of the jurors reported that this presence disrupted the trial, 23% were distracted by it, and nearly 16% indicated that it affected their ability to concentrate on the trial testimony. *Id.*, p. 3-7. Nearly 27% of the jurors reported feeling that the presence of cameras or radio during testimony of witnesses made that testimony more important, *id.*, p. 9, confirming a fear expressed by the representative of the Office of the Public Defender at the Committee’s

November 5, 2007 hearing that the media could guide the jury as to what is and, by its absence, is not important evidence to consider. Testimony of Attorney Kelly A. Casper (11/5/07). As noted by one judge interviewed by the FJC for its study, “the click of a still camera at certain points in a proceeding ‘puts an exclamation point on certain testimony.’” FJC Study, p. 26.

The FJC Study also explored some of these issues in 1994, testing the perceptions of judges and lawyers rather than asking members of the jury to self-report their potential lapses. When asked whether the presence of cameras served as a signal to jurors that a witness or argument is particularly important, 37% of the trial judges found that they did, at least to some extent. FJC Study, table 2, p. 14. Corroborating the concern expressed in *Estes* and by committee witnesses that increased publicity increases the chance of juror prejudice, 40% of the federal judges believed that the presence of electronic media increased the jurors’ sense of responsibility for their verdict, at least to some extent. *Id.*; *Estes*, 381 U.S. at 545. And confirming what Florida jurors reported previously, 32% percent of the attorneys in the civil cases tried before cameras during the federal pilot program believed that jurors were somewhat to greatly distracted by the cameras. FJC Study, table 4, p. 20. In a separate study of jurors in California conducted long before the O.J. Simpson affair, 21% of jurors polled perceived a negative effect from electronic or photographic media presence. Ernest H. Short & Assoc., Inc. *Evaluation of California’s Experiment With*

Extended Media Coverage of Courts, submitted to the California Administrative Office for the Courts (Sept. 1981), p. 223.¹⁷

Finally, but no less alarming, is the fact that of the registered voters polled in connection with the New York legislature's review of its experimental program, 43% said that they would be less willing to serve on a jury if there were television cameras in the courtroom. NY Report, p. 118. Equally disconcerting is that for some, the opposite might also be true. Citing the dismissal of two jurors from the O.J. Simpson jury because they were writing books about the trial, Professor Lassiter expressed a concern that some might be motivated to serve on juries in celebrated cases more by greed than by civic duty.

¹⁷Attachment C to the Media Positions Paper. The Media Position Paper reported other survey results, but with the exception of the Florida material, it did not include the underlying data. The Committee, therefore, had some difficulty analyzing statements such as "93% of the jurors and witnesses responding indicated that the presence of the media equipment did not distract them." or that "[a] 1981 evaluation of the ongoing California experiment revealed that electronic media coverage generally was not distracting to the participants." Media Position Paper, p. 12.

Lassiter, p. 78-9. This was of sufficient concern that the California legislature made it a criminal offense for a witness to sell his or her their story within a year of the trial, or a juror to do so prior to being discharged from service. Cal. Penal Code §132.5; 1122.5 (West Supp. 1995). The fact that some might be reluctant to serve while others may be too eager to do so can have serious consequences for courts and litigants in need of a disinterested cross-section of the community for their juries.

The Committee recognizes that these survey results are limited, and that they obviously indicate that many jurors claim or are perceived to be unaffected by the presence of cameras. Procedures designed to ensure a fair trial before an impartial jury, however, like jury verdicts themselves, cannot be determined by consensus or majority vote. Both the prosecution and the defense are entitled to twelve neutral and fully attentive jurors, free from outside influence and fully engaged in their solemn undertaking, which are quite literally matters of liberty, life and death. In this arena, even slight disruptions or distractions can be fatal. If cameras discourage citizens from participating as jurors, or distract, unnerve or influence jurors to any discernable degree while serving, the state and the courts will have failed in their fundamental obligation to provide a fair trial to every individual accused of committing a crime. Again, it is the view of the Committee that in the absence of any countervailing benefits from the broadcast trial coverage, this is too high a price to pay for the entertainment of the general public.

Impact on Witnesses

Data collected over the years also confirm that extended coverage has an impact on witness behavior, as predicted by the plurality in *Estes* and feared by camera opponents who testified before the Committee. This includes verification that the presence of cameras can discourage witness participation, and affect the quality and character of the testimony of those who do appear.

The potential to discourage witnesses from coming forward is a key concern of the law enforcement community, even after the witness intimidation legislation enacted in 2005. MD. CODE ANN., CRIM. LAW §§9-302, 9-303(2007Supp). The written testimony of Baltimore County State's Attorney Scott D. Shellenberger was typical:

Every day prosecutors in my office have to beg and cajole witnesses to ignore stories [of murders of witnesses] and come to court. That job would be exponentially more difficult if potential witnesses knew their testimony might be recorded and broadcast. Witnesses who fear for their safety, and the safety of their families, have a disturbing tendency to develop memory problems. The prospect of having their testimony broadcast is sure to have an additional amnesiac effect.

The Marist Institute poll conducted in New York illustrates the State's Attorney's point clearly: 54% of the respondents, including 64% of the female respondents, stated that they would be less willing to testify as a witness to a crime if there were television cameras in the courtroom. NY Report, p. 122. A Northwestern University College of Criminal Justice survey conducted in 1991 yielded similar results, putting this number at 48%. NY Report (Minority Report), p. 234. These figures are also corroborated by the perceptions of the judges who participated in the FJC study, 46% of whom said that the presence of cameras, at least to some extent, made witnesses less willing to appear in the civil cases

covered by the study. FJC Report, table 2. p 14. Together with the fact that 68% of those polled would not want their case televised if a victim of a crime, the concerns of law enforcement and the victim's rights community appear justified, particularly in today's "stop snitching" environment. NY Report, p. 121.

The effect on witnesses who choose or are forced to testify is equally clear, both as reported by the witnesses and as perceived by others. With results ranging from "slightly" to "extremely", a substantial number of witnesses participating in the 1978 Florida survey reported that they were aware of the presence of audio-visual media (80%); that it disrupted the trial (43%); that it distracted them (39%); that it made them self-conscious (53%, with more than one-quarter "moderately," "very" or "extremely" so); and made them nervous (46%, with more than one-fifth reporting being "moderately," "very" or "extremely" nervous); Florida Survey, section 1, pp. 3-7. Again, the effects as perceived by others was even more disconcerting, as 76% of the Florida attorneys surveyed said that the presence of cameras and broadcast media made witnesses more nervous (42% "moderately", "very," or "extremely" so); *id.*, section 2, p.2; 75% of the attorneys thought that it made witnesses more self-conscious; *id.* section 3, p. 1; and 62% reported that the witnesses were distracted. *id.*, section 2, p. 3.

The judges and lawyers who participated in the federal pilot project in 1994 observed a similar impact on the witnesses in the civil cases tried before television cameras. Among the judges, all of whom participated voluntarily and thus were predisposed toward allowing cameras into their courts, 64% reported that the presence of electronic media makes

witnesses more nervous than they otherwise would be, at least to some extent, and 41% noted that the witnesses were to some extent distracted by the cameras. FJC Report, table 2, p. 14. Forty per cent (40%) of the attorneys agreed that witnesses were more nervous, and 32% reported noticing that witnesses were to some extent distracted by the presence of electronic coverage. *Id.*, table 4, p. 20.

The observations of New York's judges were similar, as 40% somewhat or strongly agreed that witnesses were more nervous in front of cameras; 32% somewhat or strongly agreed that they were distracted by cameras; 22% agreed that witness testimony was more guarded in the presence of cameras, and 32% reported that witnesses' privacy was violated in televised proceedings. In contrast, only 3% of the New York judges thought that witnesses were more truthful in front of the camera. NY Report, p. 110.

As predicted by the *Estes* plurality, there is evidence that electronic media coverage has also served to embolden witnesses. Anyone who followed the O.J. Simpson trial is familiar with Kato Kaelin, one of many trial witnesses who parlayed his televised testimony into national celebrity. This phenomenon, which Professor Lassiter calls "technological witness marketing," manifests itself "when witnesses consider the economic value of their information ahead of a civic duty to testify." Lassiter, p. 66. This was most evident in the O.J. Simpson trial, where more than thirty books and other marketing deals were reportedly arranged by witnesses even before the case went to the jury. *Id.* Even if such witnesses come to court intending to testify truthfully, their pecuniary interest in the proceedings has the potential to taint their credibility and seriously impair the search for truth.

It is important to note that virtually all of the data collected thus far was collected before the wide-spread use of the internet. The current ability of even the most elementary computer user to broadcast audio-visual material around the world for immediate and permanent circulation can only serve to exacerbate witness concerns. Their testimony, particularly victim testimony, often concerns the most intimate, embarrassing and humiliating experiences known to humankind. The notion that their day's testimony might become tonight's YouTube "most viewed" video favorite cannot be comforting, and may cause them to minimize the impact of their experience or opt out of participating altogether.

As with the impact of extended coverage on jurors, the question is not whether all or even most witnesses are affected, but whether there is a sufficient concern that the integrity of the trial process can be sufficiently influenced by the presence of cameras in the courtroom to outweigh any perceived public benefits of electronic media coverage. Juror determinations of witness credibility often turn on subtle observations of demeanor, body language, audible inflection and tone, and the like. The distracted, nervous and self-conscious witness necessarily presents as a different witness than might otherwise be the case, particularly to a distracted, nervous or self-conscious jury. It is no surprise, therefore, that neither prosecutors nor defense attorneys want to accept the risk of media-struck witnesses at criminal trials in Maryland.

Impact on Attorneys

Several arguments are traditionally made regarding the potential negative impact that extended coverage can have on attorneys participating in televised trials. These range

from simple concerns about the distracting influence of electronic coverage, to the more nefarious fears of “showboating” by elected prosecutors to garner votes, or by defense attorneys hoping to attract clients. Proponents, on the other hand, argue that the presence of cameras may cause attorneys to come to court better prepared. Again, the data, while limited, indicate that this potential for harm is real, and is being realized. The alleged benefit of better preparation, however, is not. See pp. 37-38, *supra*.

More than 59% of the attorneys surveyed for the Florida study reported being slightly to greatly distracted by the presence of television, radio, or photographic coverage. Florida Study, section 2, p. 6. More than one-quarter (27%) of the attorneys who participated in the FJC study reported that the attorneys were distracted, at least to some extent. FJC Study, table 4, p. 21. Neither figure should make victims of crime or criminal defendants confident that their televised cases would get the trial attorneys’ undivided attention.

A majority (55%) of the court personnel surveyed for the Florida study believed that the presence of cameras or radio made the attorneys actions more “flamboyant” than they otherwise would have been. While only 20% of the attorneys polled in Florida agreed that this was so for them, 45% said that it was true of opposing counsel. Florida Study, sec. 2, p. 2. These results were consistent with those found by the FJC, where 64% of the judges, but only 21% of the lawyers, reported that cameras caused attorneys to become more theatrical in their presentations. FJC Study, table 2, p. 15; 20.

More difficult to assess are claims that both prosecutors and defense attorneys might be more or less willing to negotiate guilty pleas depending on the extent to which the

case might be covered by the media. Elected prosecutors may feel the need to show that they are tough on crime, if given the opportunity to make that showing on a nightly news broadcast. Witness reluctance to recount the details of their victimization on camera may at times have the opposite effect, encouraging prosecutors to offer lower recommended dispositions to spare their victims further humiliation. Defense attorneys, on the other hand, score no points with the public by appearing with clients who are entering guilty pleas. In any case, the introduction of television coverage into the calculus of plea negotiations does little for the victim or the defendant, or to advance the cause of justice.

Impact on Judges and the Court

Most difficult to measure is the potential impact that extended coverage might have on the presiding judge. As with attorneys, the concerns range from simple distractions in the performance of their primary obligation to ensure a fair trial, to the potential to alter their behavior or their rulings in response to the extra-judicial spotlight. The criminal arena is rife with opportunity for prejudicial impact, from avoiding unpopular decisions, to declining to ask a question that might be misconstrued by a poorly informed audience, or to imposing harsher sentences to curry favor with an electorate. While the Committee is confident in the ability of Maryland judges not to succumb to these human temptations, it must acknowledge the threat to judicial independence, and the threat to the public's confidence in its judiciary, that could result from extended coverage.

The fact that judges actually put personal considerations aside matters little if the viewing public is not convinced that this is the case. Los Angeles County Superior Court

Judge Lance Ito, the presiding judge in the O.J. Simpson case in 1995, may have had only the pursuit of justice in mind when making his rulings in that case. To the tens of millions of viewers watching the recurring adventures of “The Dancing Itos” on NBC’s Tonight Show, however, he was perceived as doing anything but that. The same might be said of Broward County, Florida Circuit Court Judge Larry Seidlin, dubbed the “cry-baby judge” and “Larry the Cable Judge” on websites and weblogs for his February 2007 antics during the televised hearings to determine custody of the remains of celebrity Anna Nicole Smith. What little positive impact that these cases might have had on the public’s understanding of the legal process pales in comparison to the negative impact on the public’s confidence in its judges and its legal institutions to promote justice with dignity, free from outside influence.

Finally, the Committee must acknowledge some concern for the burdens of extended coverage on the court system generally. As part of its charge, the Committee was asked to comment on the potential financial costs to the Judiciary and local governments that might accompany extended coverage of criminal trial proceedings. This proved difficult in light of uncertainty as to the nature and extent of such coverage. If such coverage is limited to sentencing proceedings, as currently proposed, the costs would appear to be minimal, assuming that the media would be wholly responsible for the equipment needed to record and broadcast the hearings. If coverage is to extend to all criminal proceedings, the costs could be significant.

The Media Position Paper, for example, proposes an eighteen month study permitting extended coverage of most criminal trials. Media Position Paper, p. 22-3. It

suggests that each court should have a media coordinator, presumably to receive and disseminate information on media requests, coordinate pooling arrangements, and supervise logistical considerations for the media. *Id.* The Committee does not agree with the media's suggestion that this could be done at no cost to the state, particularly in the larger jurisdictions where requests for coverage can be expected to be more frequent.

To the extent that some portions of the proceedings are excluded from coverage, such as pretrial matters, jury selection, bench conferences and attorney-client discussions, or that there are restrictions on showing certain participants, such as jurors, undercover officers, or victims, each court might have to acquire and staff equipment to monitor audio-visual feeds to ensure compliance. This, too, would have associated costs, the determination of which will require additional investigation.

V. CONCLUSION

The Committee weighed the potential benefits of extended media coverage, primarily media claims that extended coverage would educate the public about and instill public confidence in its criminal justice system, against competing claims made by legal professionals that such coverage would adversely impact trial participants, interfere with the fact-finding process, and impair public confidence in the criminal justice system. After reviewing the history of extended coverage, hearing the testimony of witnesses who appeared before the Committee, and analyzing studies of the use and affect of extended coverage on trial participants and the public, the Committee determined that the putative benefits of electronic media coverage are illusory, while the adverse impacts on the criminal

justice process are real. The Committee thus concluded that the State's prosecutors, public defenders, organized bar, and victims' rights advocates were properly concerned that the potential of television broadcasting to prejudice the trial broadcasting substantially outweighs any purported public benefits of extended coverage. The Committee recommends, therefore, that the current ban on cameras in criminal trial courts in Maryland remain in effect.

Respectfully submitted,

THE COMMITTEE TO STUDY EXTENDED
MEDIA COVERAGE OF CRIMINAL TRIAL
PROCEEDINGS IN MARYLAND

Hon. Nathan Braverman, Chair
Hon. Krystal Q. Alves
Hon. Jean Szekeres Baron
Hon. Thomas C. Groton, III
Hon. Diane O. Leasure
Hon. Emory A. Plitt, Jr.

**REPORT OF
THE COMMITTEE TO STUDY EXTENDED MEDIA COVERAGE
OF CRIMINAL TRIAL PROCEEDINGS IN MARYLAND**

ATTACHMENT A

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**REPORT OF
THE COMMITTEE TO STUDY EXTENDED MEDIA COVERAGE
OF CRIMINAL TRIAL PROCEEDINGS IN MARYLAND**

ATTACHMENT B

**PUBLIC HEARING
COMMITTEE TO STUDY EXTENDED MEDIA COVERAGE**

Judicial Education and Conference Center
Annapolis, Maryland
November 5, 2007

WITNESS LIST

Oral Testimony In Favor of Allowing Extended Coverage:

James Astrachan, Esquire - Maryland, D.C., Delaware Broadcasters Association
Irwin Kramer, Esquire - The Legal Television Network
Bryan Sears - Society of Professional Journalists
Nathan E. Siegel, Esquire - MD/DC Press Association
Paul Milton, Esquire - MD/DC Press Association
Michelle Butt - WBAL-TV, Baltimore

Oral Testimony in Opposition to Allowing Extended Coverage:

Pauline Mandel, Esquire - Maryland Crime Victims Resource Center
Kelley Casper, Esquire - Office of the Public Defender of Maryland
John McCarthy, Esquire - Maryland State Bar Association
Hon. Frank Weathersbee - Maryland State's Attorneys Association

Written Testimony Received From:

Astrachan, J., Carolan, J, and Siegel, N., (on behalf of news organizations)(in favor)
Mark Hertzberg - Photo-Journalist (in favor)
Val Hymes - Journalist (in favor)
Hon. Scott D. Shellenberger - State's Attorney for Baltimore County (opposed)
Chief Jeffrey Spaulding - Maryland Chiefs of Police Association (no position)
George W. Liebmann, Esquire and Melvyn J. Sykes, Esquire (opposed)
