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IN THE HOT BOX AND ON THE TUBE: WITNESSES' INTERESTS IN TELEVISED TRIALS

Stacy R. Horth-Neubert

INTRODUCTION

In the 16 years since the Supreme Court authorized state experimentation with cameras in the courtroom in *Chandler v. Florida*,¹ state rules in this area have been continuously revised and scrutinized.² While much attention has been paid to the effect of broadcast media coverage on defendants,³ victim-witnesses,⁴ jurors,⁵ and the

1. 449 U.S. 560, 583 (1981) (holding that the Constitution does not prohibit states from permitting cameras in the courtroom).

2. For summaries of the general history of cameras in the courtroom, see, e.g., *Chandler*, 449 U.S. at 562-66; Douglas S. Campbell, *Free Press v. Fair Trial: Supreme Court Decisions Since 1807* (1994); Carolyn Stewart Dyer & Nancy R. Hauserman, *Electronic Coverage of the Courts: Exceptions to Exposure*, 75 Geo. L.J. 1633, 1641-46 (1987); Christo Lassiter, *TV or Not TV—That is the Question*, 86 J. Crim. L. & Criminology 928, 936-59 (1996) [hereinafter Lassiter, *The Question*]; Peter O'Connell et al., Radio-Television News Directors Association, *News Media Coverage of Judicial Proceedings with Cameras and Microphones: A Survey of the States 1-14* (1997) [hereinafter RTNDA Survey]; Ann J. Reavis et al., National Forum on Cameras in the Courtroom, *Cameras in the Courtroom 6-26* (1996) [hereinafter National Forum Survey]; Kelli L. Sager & Karen N. Frederiksen, *Televising the Judicial Branch: In Furtherance of the Public's First Amendment Rights*, 69 S. Cal. L. Rev. 1519, 1521-29 (1996); Thomas H. Tongue & Robert W. Lintott, *The Case Against Television in the Courtroom*, 16 Willamette L. Rev. 777, 777-79 (1980); Kathe Aschenbrenner Pate, Comment, *Restricting Electronic Media Coverage of Child-Witnesses: A Proposed Rule*, 1993 U. Chi. Legal F. 347, 352-58.

3. See, e.g., *Chandler*, 449 U.S. at 574; Alberto Bernabe-Riefkohl, *Prior Restraints on the Media and the Right to a Fair Trial: A Proposal for a New Standard*, 84 Ky. L.J. 259, 260-65 (1995-1996); Christopher K. DeScherer & David L. Fogel, *Sixth Amendment at Trial*, 84 Geo. L.J. 1222 (1996); Lassiter, *The Question*, *supra* note 2, at 938-46; National Forum Survey, *supra* note 2, at 17-19; Tongue & Lintott, *supra* note 2, at 794-96; Charles H. Whitebread & Darrell W. Contreras, *Free Press v. Fair Trial: Protecting the Criminal Defendant's Rights in a Highly Publicized Trial by Applying the Sheppard-Mu'Min Remedy*, 69 S. Cal. L. Rev. 1587 (1996); Gregory K. McCall, Note, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 Colum. L. Rev. 1546 (1985); Courtroom Television Network, *Facts and Opinions About Cameras in the Courtroom 20* (1995) [hereinafter Court TV]; Christo Lassiter, *Put the Lens Cap Back on Cameras in the Courtroom: A Fair Trial is at Stake*, 67 Jan N.Y. St. B.J. 6 (1995) [hereinafter Lassiter, *Lens Cap*]; Martha White, *Fair Trial, Free Press: Can They Coexist?*, Hum. Rts. Fall 1995, at 6.

4. See, e.g., Christo Lassiter, *TV or Not TV—Statutory Appendix*, 86 J. Crim. L. & Criminology 1002, 1011-12 (1996) [hereinafter Lassiter, *Appendix*]; Pate, *supra* note 2, at 363-64; cf. Dyer & Hauserman, *supra* note 2, at 1686-92; Jennifer Green et al., *Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*, 5 Hastings Women's L.J. 171, 205-08 (1994).

5. See, e.g., Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals, Fed'l Jud. Center 38, 40-42 (1994) [hereinafter Federal Judicial Center Study]; New York State Committee to Review Audio Visual Coverage of Court Proceedings, *An Open Courtroom: Cameras in New York Courts 1995-97*, at 51-56 (1997) [hereinafter New York

court itself,⁶ the focus has now expanded to acknowledge the interests of non-party witnesses.⁷

This trend has been characterized by a recognition of witnesses' privacy interests, such as informational privacy (i.e., private facts), safety, and youth.⁸ While even non-televised compelled testimony has always been recognized as having potentially significant privacy implications,⁹ broadcast coverage has been seen as particularly invasive.¹⁰

State Committee Report] (Note that this report is now moot because the New York State Legislature failed to pass a bill to renew the state's experimental law that allowed trial courts to admit the broadcast media. See *Little Things Mean So Much*, *Newsday*, July 20, 1997, at G03.); Dyer & Hauserman, *supra* note 2, at 1692-94; National Forum Survey, *supra* note 2, at 34-35; Tongue & Lintott, *supra* note 2, at 788-90.

6. See, e.g., *Estes v. Texas*, 381 U.S. 532, 548 (1965) (plurality opinion) (stating that broadcast poses dangers to the "solemn decorum of court procedure"); Lassiter, *The Question*, *supra* note 2, at 971-72; National Forum Survey, *supra* note 2, at 33-34; Tongue & Lintott, *supra* note 2, at 797-99.

7. See, e.g., Federal Judicial Center Study, *supra* note 5, at 38-40; New York State Committee Report, *supra* note 5, at 56-60; Dyer & Hauserman, *supra* note 2, at 1685-86; Tongue & Lintott, *supra* note 2, at 790-94; McCall, *supra* note 3, at 1552-54. For purposes of this Note, "non-party witness" will not include victims in either criminal or civil trials. Victims and parties would presumably have different interests in the litigation, and different expectations of privacy, than a witness who is merely circumstantially involved in the particular litigation. Because the focus of this Note is on the interests of these non-party witnesses, the analysis will be equally applicable to both the civil and criminal context, except to the extent that certain concerns—i.e., retaliatory threats to a witness' safety—may arise more frequently in criminal trials.

The focus of this Note is further limited to those situations where the decision allowing a particular trial to be broadcast has already been made, and further, where adequate procedures are in place for a judge to make this ruling. State rules allowing camera coverage of trial court procedures necessarily require, either explicitly or implicitly, that the judge make a pre-trial determination that the outcome will not be materially affected by the coverage, because the Supreme Court requires a fair trial to remain the court's primary goal. *Chandler v. Florida*, 449 U.S. 560, 574 (1981) ("Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law."); *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) ("The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927):

Every procedure which would offer a possible temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

cited in *Estes v. Texas*, 381 U.S. 532, 543 (1965) (plurality opinion). Therefore, this Note will assume that such a finding has been made, and the only concern at issue here is the witnesses' interests in privacy and related matters.

8. See *infra* Part II.

9. See, e.g., *State v. Green*, 395 So. 2d 532, 536 (Fla. 1981) ("We realize that courtrooms are intimidating and that apprehension accompanies most individuals who must participate . . . This, however, is not a product of electronic media's presence. Courtrooms were intimidating long before the advent of the electronic media."); see also *Estes*, 381 U.S. at 591 (Harlan, J., concurring) (noting that testifying "even at its traditional best is a harrowing affair").

10. Dyer & Hauserman, *supra* note 2, at 1697-98 ("[I]t seems clear, simply by virtue of audience size, that television coverage has a greater impact on participants than radio or local newspaper coverage . . ."); see also New York State Committee Re-

Witnesses in televised trials may receive more public recognition than they would in non-televised proceedings.¹¹ This exposure may leave them more open to questioning and criticism from members of the public who watch the trial and, later, recognize the witness.¹² "Since witnesses . . . are, in a real sense, simply performing a required public duty, to subject them to this type of badgering imposes a particularly invidious form of privacy invasion."¹³

In response to the perception that broadcast coverage of a witness' testimony invades a witness' privacy rights more than testifying in a non-broadcast—but open—trial, states are increasingly revising their rules to require that witnesses' consent be considered when determining whether to allow broadcasters to televise their testimony.¹⁴ Although the intention behind the movement is noble, the effort has been largely undisciplined. A sparse number of state statutes list factors for courts to consider before allowing television coverage of a trial as a whole,¹⁵ but most states have provided no guidance on how the presiding judge should exercise her discretion on the question of allowing individual witnesses to exempt themselves from coverage.¹⁶

This lack of guidance is especially troubling in the area of cameras in the courtroom, because any decision to bar broadcast coverage of a witness affects the First Amendment rights of the broadcast media. "Because the gravamen of the claimed injury is the publication of information . . . the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press."¹⁷ The Court has recognized that when First Amendment rights attach, a government interest in privacy must be compelling, and the means in place to protect that interest narrowly tailored, before those rights may be infringed.¹⁸

port, *supra* note 5, at 41-42 ("[T]elevision is more graphic because it provides the exact words and demeanor of witnesses and other trial participants . . .") (discussing testimony of Eleanor Alter, Esq., a matrimonial lawyer, to the New York Committee, November 12, 1996).

11. Shelly Byron Kulwin, Note, *Televised Trials: Constitutional Constraints, Practical Implications, and State Experimentation*, 9 Loy. U. Chi. L.J. 910, 917 (1978); McCall, *supra* note 3, at 1553-54.

12. Kulwin, *supra* note 11, at 917.

13. *Id.*

14. See Lassiter, *Appendix, supra* note 4, at 1013 ("The trend is to place the exclusion within the discretion of the judges and to permit exclusion of cameras in the courtroom once the witness proponent has met its assigned burden of proof to show good cause."); see also *infra* Part I.A.

15. See, e.g., Cal. Rules of Court: State 980(e)(3) (1997) (listing factors judges should consider when deciding whether to admit cameras, including, *inter alia*, privacy rights of witnesses).

16. See *infra* Part I.B.

17. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 489 (1975).

18. *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989).

Broadcast has historically received more limited First Amendment protections than print media.¹⁹ Further, there is no absolute right for the press—or the public, for that matter—to even attend,²⁰ let alone broadcast,²¹ trial court proceedings. Nevertheless, a presumption of openness exists in our trial court system.²² Therefore, if a judge has decided that broadcast coverage will not influence the outcome of a trial,²³ and has accordingly admitted the broadcast media, the issue boils down to pitting a witness' privacy rights against a broadcaster's First Amendment rights.

Although the Supreme Court has not specifically addressed the question in this context, it has not been silent on the balance of equities when these two rights collide. In deciding cases involving the publication of allegedly private facts,²⁴ the Supreme Court has explicitly balanced privacy interests against countervailing free press rights.²⁵ The Court has laid down certain minimum levels of protection for First Amendment rights within which a state may not punish—or prohibit—the publication of sensitive, and arguably private, information.

19. National Forum Survey, *supra* note 2, at 20; *see also* Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 386-90 (1969) (discussing the reasons for broadcast media receiving less First Amendment protections than other media).

20. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 n.18 (1980) (plurality opinion). *But see* Sager & Frederiksen, *supra* note 2, at 1529-42 (presenting an argument that allowing electronic media coverage of judicial proceedings is required under the First Amendment).

21. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 610 (1978) (“[T]here is no constitutional right to have [testimony of live witnesses] recorded and broadcast.”).

22. *Richmond Newspapers*, 448 U.S. at 573.

23. Such a finding would be consistent with several recent studies that indicate—as even opponents of cameras in the courtroom acknowledge—television coverage has no significant impact on the outcome of trials. *See, e.g.*, Lassiter, *The Question*, *supra* note 2, at 964-65 (“The results from the state studies were unanimous: the impact of electronic media coverage of courtroom proceedings, whether civil or criminal, shows few side effects.”) (citing J. Stratton Shartel, *Cameras in the Courts: Early Returns Show Few Side Effects*, *Inside Litig.*, at 1, 19 (1993)); *see also* Sager & Frederiksen, *supra* note 2, at 1544 (“The impact of electronic media coverage of courtroom proceedings—whether civil or criminal—is virtually nil.”); Court TV, *supra* note 3, at ii & 4-5 (asserting that “empirical evidence” shows that “24 of the 25 states focusing on this issue concluded that cameras did not pose a problem regarding jurors and witnesses”). Federal surveys show similar results. Lassiter, *The Question*, *supra* note 2, at 965.

24. *See, e.g.*, Florida Star v. B.J.F., 491 U.S. 524 (1989) (finding no liability for publication of a rape victim's name when the name was obtained from police reports); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) (finding no liability for publication of a deceased rape victim's name when the name was obtained from court documents available to the public); *see also infra* note 131 and accompanying text.

25. *See, e.g.*, Florida Star, 491 U.S. at 530 (balancing individual's privacy right against press right to disseminate newsworthy information); Cox Broad., 420 U.S. at 491 (same); *see also* Gilbert v. Medical Econs. Co., 665 F.2d 305, 307 (10th Cir. 1981) (same); Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975) (same); *infra* notes 124-25.

This Note advocates the incorporation of the Supreme Court's privacy law constitutional standards into this area as guiding principles for deciding whether to allow witnesses to prevent the broadcast of their own testimony in trials that are otherwise open to broadcast. When the testimony is likely to touch on issues that would fall within the Supreme Court's framework of permissible state privacy protection, states may allow judges to honor the requests of a witness who asks that those portions of her testimony not be broadcast.²⁶ If, however, the testimony does not concern information that the state has explicitly deemed "private," or that is recognized as a compelling state interest, states should not allow judges to prohibit the broadcast of that witness' testimony, thereby defeating the state policy judgments that opened the courtroom to broadcast media in the first instance.²⁷

Accordingly, this Note argues that rules allowing judges to bar the broadcast of a particular non-party witness' testimony in a televised trial should be narrowly tailored to protect a strong government interest. It concludes that the states should create explicit guidelines to direct judges' decisions in this area, and that states should look to their own—or other states'—privacy laws for guidance in this endeavor. Part I surveys current state law with regard to witness consent and cameras in the courtroom, looks at the potential concerns that a witness may have when she is compelled to testify, and canvasses the special needs of certain witnesses, such as police informants, undercover agents, and children. Part II examines privacy caselaw and how it attempts to strike a balance between the privacy interests of witnesses and the First Amendment interests of the media. Part II also considers how concerns about "private facts" differ from other concerns witnesses may have, such as safety and the continued viability of

26. Some states, including New York, have provided judges with the power to order television stations to obscure the identity of witnesses in lieu of completely barring the broadcast of their testimony. See New York State Committee Report, *supra* note 5, at 13-14 & nn.34-39 (discussing New York's use of the so-called "blue dot" method of obscuring identity). This procedure appears to meet the broadcasters halfway by allowing them to at least broadcast the audio and the obscured video image of the witness. Use of the "blue dot" or other obscuring methods presents many of the same problems of editorial interference as completely prohibiting the broadcast of witnesses' testimony, see *infra* Part III, and note 106; it is probably the most narrowly tailored means of protecting substantial state interests, however, when privacy rights or other interests of witnesses can be adequately protected by simply obscuring their identity.

27. See, e.g., New York State Committee Report, *supra* note 5, at 7-17 (examining arguments supporting the admission of cameras to the courtroom, such as public education about and scrutiny of the court system, judicial accountability, cathartic and deterrent effects, prompting witnesses to come forward, and greater accuracy of news reports); Lassiter, *The Question*, *supra* note 2, at 959-65 (examining arguments supporting cameras in the courtroom); National Forum Survey, *supra* note 2, at 26-31 (same); Frances Kahn Zemans, *Public Access: The Ultimate Guardian of Fairness in Our Justice System*, 79 *Judicature* 173, 174-75 (1996) (same); Susan E. Harding, Note, *Cameras and the Need for Unrestricted Electronic Media Access to Federal Courtrooms*, 69 *S. Cal. L. Rev.* 827, 845-50 (1996) (same).

ongoing criminal law enforcement investigations. Part III explores two additional First Amendment concerns that may arise when a state allows judges unfettered discretion to prevent the broadcast of a particular witness during a televised trial. This Part first considers how the doctrine of prior restraints relates to the analysis presented in this Note; it then focuses on a long-standing rule requiring courts to abstain from making editorial decisions regarding the content of past and future publications. Part III argues that forbidding the broadcast of any individual witness in a trial that is otherwise televised is an editorial judgment and, arguably, a prior restraint, and is therefore improper for judges to make absent a compelling state interest. Part IV asserts that states should use the Supreme Court's privacy law jurisprudence to guide the exercise of judicial discretion in ordering that the testimony of individual witnesses not be broadcast. Finally, Part IV applies this framework to a representative sample of privacy concerns that may arise in televised trials.

I. NON-PARTY WITNESSES: STATE LAW AND POTENTIAL CONCERNS

States have chosen a variety of methods for addressing the concerns of non-party witnesses in televised trials. This part looks at the multifarious rules of court and state statutes that govern the admission of the broadcast media to state courtrooms, and analyzes the interests that non-party witnesses may have when their testimony is broadcast.

A. *State Law Treatment of Witnesses' Consent/Objection to the Broadcast of Their Testimony*

According to recent surveys of state rules governing cameras in the courtroom,²⁸ forty-seven states allow some form of broadcast coverage of court proceedings.²⁹ This number is misleading, however, because most states have restrictions that, more often than not, lead to the exclusion of cameras. For example, three of these states limit television coverage to appellate proceedings, where there is no live testimony.³⁰ Twenty-six states have categorical exemptions for trials

28. This part will refer to two recent surveys of the rules relating to cameras in the courtroom, the National Forum on Cameras in the Courtroom survey, and the Radio and Television News Director's Association survey, both at *supra* note 2. Although some of the state laws used in these surveys have now changed, the surveys are useful to illustrate the many restrictions already placed on the broadcast media in this context.

29. See National Forum Survey, *supra* note 2, at 22-23; RTNDA Survey, *supra* note 2, at B-1; Court TV, *supra* note 3, at 1. States forbidding all broadcast coverage of court procedures are Indiana, Mississippi, and South Dakota, as well as the District of Columbia. National Forum Survey, *supra* note 2, at app. A.; RTNDA Survey, *supra* note 2, at B-2. & n.**.

30. These states are Delaware, Illinois, and Louisiana. RTNDA Survey, *supra* note 2, at B-4. In addition, Nebraska permits only audio coverage of the few trial proceed-

involving particular subject matter,³¹ such as juvenile proceedings,³² sex crime trials,³³ and trials involving trade secrets.³⁴ Ten states require some form of consent from the litigating parties before they will allow the broadcast of certain types of proceedings.³⁵

The surveys show that seventeen states that allow broadcasters to air testimonial proceedings currently consider or require some form of consent from witnesses.³⁶ Some of these states employ "rights to object," which allow witnesses to make an affirmative showing of good cause to prevent their testimony from being broadcast, and are, in effect, implied consent rules—unless a witness shows good cause, they will be assumed to have consented.³⁷ Several states also have either categorical exemptions or presumptions of valid objection to coverage

ings of which it allows electronic media access. *Id.* at B-3 n.1A. Also, while it allows trial coverage of civil proceedings, Maryland limits coverage in the criminal context to appellate proceedings, and has substantial categorical exclusions of the types of civil trials that may be broadcast. National Forum Survey, *supra* note 2, at app. A.

31. National Forum Survey, *supra* note 2, at app. A.

32. The following 18 states limit or prohibit coverage of juvenile proceedings: Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Iowa, Maine, Maryland, Minnesota, Missouri, New Jersey, North Carolina, Oregon, Rhode Island, Tennessee, Virginia, and Wisconsin. RTNDA Survey, *supra* note 2, at B-22.

33. The following 14 states limit or prohibit coverage of sex crime trials: Arkansas, Connecticut, Hawaii, Maine, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Virginia, and Wisconsin. *Id.* at B-23.

34. The following eleven states limit or prohibit coverage of trials involving trade secrets: Connecticut, Hawaii, Iowa, Maine, Maryland, Minnesota, New Jersey, North Carolina, Oregon, Virginia, and Wisconsin. *Id.* at B-24.

35. National Forum Survey, *supra* note 2, at app. A. The following five states require the consent of a criminal defendant before a trial may be televised: Alabama, Arkansas, Minnesota, Oklahoma, Tennessee. RTNDA Survey, *supra* note 2, at B-10. In addition, Alabama, Arkansas, and Minnesota require the prosecutor's consent in criminal trials. *Id.* at B-11. The following five states generally require the consent of the parties in a civil case or a criminal appeal: Alabama, Arkansas, Maryland (civil cases only), and Minnesota (trials), Texas. *Id.* at B-12. Oklahoma, Pennsylvania, and Utah require consent of litigants, in civil cases and criminal appeals, on a more limited basis. *Id.* Finally, the following five states require the consent of counsel in civil trials and all appeals: Alabama, Arkansas, Maryland (civil trials), New York, and Texas. *Id.* at B-14.

36. The states are: Alabama, Alaska, Arkansas, Iowa, Kansas, Maryland, Minnesota, Missouri, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, and Utah. RTNDA Survey, *supra* note 2, at B-15 to B-16; see also National Forum Survey, *supra* note 2, at app. A (listing 16 states that required consent as of January 1, 1996); cf. New York State Committee Report, *supra* note 5, at 5 & 78-79 (recommending that state judges continue to consider the consent of witnesses as a factor, as they have under an experimental provision allowing cameras in the courtroom); Katherine H. Flynn, *General Provisions: Establish Factors for Courts to Consider When Determining Whether to Allow Filming or Videotaping in the Courtroom; Allow for Citations When Court Orders Related to Media Cameras in the Courtroom are Violated*, 13 Ga. St. U. L. Rev. 83, 86 nn.28-29 (1996) (looking at Georgia's new statute, 1996 Ga. Laws 734, which became effective July 1, 1996 and lists the consent or objection of non-party witnesses as a factor judges must consider).

37. Dyer & Hauserman, *supra* note 2, at 1656.

for certain types of witnesses such as police informants,³⁸ undercover agents,³⁹ relocated witnesses,⁴⁰ and juveniles.⁴¹ Other states require that the court look at safety concerns of witnesses when considering television coverage of their testimony.⁴²

Although a growing number of states assign authority to the judge to exclude cameras when witnesses object,⁴³ only a handful of states explicitly admonish judges to consider the privacy interests of witnesses.⁴⁴ While "every state that permits camera coverage requires that witnesses be shielded when appropriate to protect their safety, to protect those who are children, and to protect those for whom the camera will, indeed, pose a particular burden,"⁴⁵ judges are given little guidance on when these dangers, and risks of privacy infringements, are sufficiently likely so as to require that cameras be turned off. Bur-

38. New York State Committee Report, *supra* note 10, at 14; Lassiter, *Appendix, supra* note 4, at 1012-13; RTNDA Survey, *supra* note 2, at B-23. These states are Arkansas, Iowa, Kentucky, Maryland, Michigan, Minnesota, New Mexico, North Carolina, Virginia, Wisconsin, and Wyoming. RTNDA Survey, *supra* note 2, at B-15 nn.45-46, B-23.

39. New York State Committee Report, *supra* note 5, at 14; Lassiter, *Appendix, supra* note 4, at 1012-13; RTNDA Survey, *supra* note 2, at B-24. These states are Arkansas, Hawaii, Iowa, Kansas, Maryland, Michigan, Minnesota, Missouri, New Mexico, New York, North Carolina, Virginia, Wisconsin, and Wyoming. RTNDA Survey, *supra* note 2, at B-15 nn.45-46, B-24.

40. Lassiter, *Appendix, supra* note 4, at 1012-13; RTNDA Survey, *supra* note 2, at B-23. These states are Iowa, Kansas, Maryland, Michigan, Minnesota, New Mexico, North Carolina, and Wisconsin. RTNDA Survey, *supra* note 2, at B-15 nn.45-46, B-23.

41. New York State Committee Report, *supra* note 5, at 15-18; Lassiter, *Appendix, supra* note 4, at 1012; RTNDA Survey, *supra* note 2, at B-25. These states are Hawaii, Kansas, Maryland, Michigan, New Mexico, North Carolina, and Virginia. RTNDA Survey, *supra* note 2, at B-15 n.46, B-16 n.52, B-25.

42. Lassiter, *Appendix, supra* note 4; *see also* New York State Committee Report, *supra* note 10, at 14 (recommending that New York judges consider witnesses' concerns regarding safety). These states are Arizona, Hawaii, Maryland, Massachusetts, New Jersey, New York, and Vermont. Lassiter, *Appendix, supra* note 4.

43. Lassiter, *Appendix, supra* note 4, at 1013 (noting the "trend" towards placing exclusion within the judge's discretion).

44. *See, e.g.*, Lassiter, *Appendix, supra* note 4, at 1022-23 (listing rules for Alaska and Arizona which require judges to consider witnesses' privacy); *see also* Photographic and Electronic Coverage of the Courts, Me. Rules of Ct., Administrative Orders of the Supreme Judicial Ct., app. A, Rule 1 (requiring judges in Maine to consider witnesses' privacy); Utah Code of Judicial Adm'n R. 4-401 (April 1, 1997), Utah Order 97-8, Amendment to Rule 4-401 Media in the Courtroom (requiring judges in Utah to consider witnesses' privacy); *cf.* Dyer & Hauserman, *supra* note 2, at 1655-56 ("Human concerns such as the privacy, emotional well-being, or physical safety of participants are rarely mentioned as factors judges should consider when deciding whether to permit electronic coverage.").

It should be noted, however, that many states require a witness' consent before that witness' testimony may be broadcast; because no inquiry is made into the witness' reasons for denying consent, privacy rights may still be protected by the witness herself. States that require a non-party witness' consent as at least a limited precondition to broadcast of their testimony are: Alabama, Kansas, Minnesota, Missouri, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas (civil), and Utah. RTNDA Survey, *supra* note 2, at B-15 to B-16.

45. Court TV, *supra* note 23, at 5.

dens of proof for exemptions are often unclear, and many states simply grant judges broad discretion to exempt individuals, and fail to provide criteria for evaluating privacy issues.⁴⁶

B. *Potential Concerns for Witnesses Whose Testimony May be Broadcast*

Witnesses may have a wide variety of reasons for wanting to prevent the broadcast of their trial testimony. Although some commentators have suggested that a flat rule be adopted requiring the judge to exempt all witnesses who object to coverage,⁴⁷ or for those who can show "good cause,"⁴⁸ most states have simply allowed judges the discretion to consider any reason a witness may proffer.⁴⁹ This section first analyzes the private facts concerns raised by testimony that is broadcast; it then examines more commonly recognized witness concerns, such as protecting a witness' safety and preserving the integrity of ongoing criminal investigations.

1. Private Facts and Anonymity

Non-party witnesses generally have a less direct interest in the subject of a trial than a party, victim, or defendant;⁵⁰ yet courts may call upon these very witnesses to testify about intimate, personal details of their lives.⁵¹ Moreover, most witnesses would probably prefer to avoid exposure in the press.⁵² They may be subpoenaed to testify, however, and therefore cannot protect themselves from this exposure.⁵³

The nature of broadcasting may itself be seen as an additional invasion of privacy. Television presents a witness' own voice and image,

46. Dyer & Hauserman, *supra* note 2, at 1669. Many states allow judges to exempt witnesses from coverage for "good cause," Lassiter, *Appendix, supra* note 4, at 1013 & n.62 (Hawaii, Iowa, Missouri, New Mexico, North Dakota, Vermont, Wisconsin, and Wyoming ("for cause")), or because such a ruling would serve the "interests of justice," Lassiter, *Appendix, supra* note 4, at 1013 & n.62 (Alaska and Connecticut). These terms are seldom defined.

47. Nancy T. Gardner, Note, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 Mich. L. Rev. 475, 497 (1985).

48. Dyer & Hauserman, *supra* note 2, at 1697.

49. *See supra* note 46.

50. Scott M. Matheson, Jr., *The Prosecutor, The Press, and Free Speech*, 58 Fordham L. Rev. 865, 884 (1990). Privacy concerns may be stronger in some cases than others. For a compelling account of the need to acknowledge and guard privacy concerns in the context of the sexual crimes of war, see Green et al., *supra* note 4, at 207-08 (suggesting the use of in camera proceedings to protect the privacy interests of victims and witnesses—to prevent the "detrimental psychological impact of a public hearing").

51. Kulwin, *supra* note 11, at 918.

52. Matheson, *supra* note 50, at 884.

53. *Id.*

which some argue removes the last "shield of privacy."⁵⁴ For this reason, several courts have found privacy interests to be sufficiently compelling to justify prohibiting the broadcast of a trial *in toto*.⁵⁵ This is more frequent than might be suggested by the small number of states that *require* judges to look at the privacy interests of witnesses when considering whether to admit electronic media to a trial.⁵⁶

Many of the arguments for protecting privacy, however, exaggerate the magnitude of the exposure of private information in the trial setting. For example, Christo Lassiter states, "As a general rule, we do not allow television cameras in medical operating rooms or bedrooms. . . . Courtrooms are no different. Like an operating room, the business of criminal trials is quite serious, like bedrooms, much of what makes the events interesting is quite private."⁵⁷ While clearly using hyperbole to illustrate his point, Lassiter fails to acknowledge the vast difference between *observing first hand* enormously private events, like a medical operation, and *hearing* (and viewing via television) important and relevant testimony about such events. Moreover, this argument ignores the relevance of the judiciary's position as a branch of the government,⁵⁸ that trials are, by long-standing tradition, public events, and that the public relies on the press to observe and report on such government proceedings.⁵⁹ Nevertheless, the issue of a witness' privacy is one that has drawn increasing attention, and is con-

54. McCall, *supra* note 3, at 1553; *see also supra* note 10 and accompanying text (discussing the view that broadcast is more invasive of privacy than other forms of media). There are those, however, who do not find this to be a persuasive perspective. In James L. Hoyt, *Prohibiting Courtroom Photography: It's Up to the Judge in Florida and Wisconsin*, 63 *Judicature* 290 (1980), the author quotes a memorandum that indicates that at least one state requires witnesses to show cause before the cameras may be turned off for them, precisely because the state does not honor an objection to the camera itself:

Cause . . . is intended to require that there be some reasonable basis *other than the desire not to be photographed* to justify prohibiting the photographing of a participant. Cause may include a reasonable fear of physical harm, the protection of a minor's reputation, a reasonable fear of undue embarrassment, or the like.

Id. at 294 (quoting Beilfuss, C.J., Memo to All Wisconsin Judges, "Standards on Use of Audio or Visual Equipment in the Courtrooms" (April 21, 1978) (emphasis added)).

55. DeScherer & Fogel, *supra* note 3, at 1226 & n.1986 (citing the following cases: *United States v. Jones*, 965 F.2d 1507, 1513 (8th Cir. 1992); *United States v. De Los Santos*, 810 F.2d 1326, 1333 (5th Cir. 1987) (per curiam)); Gardner, *supra* note 47, at 489.

56. *See supra* note 44 and accompanying text.

57. Lassiter, *Lens Cap*, *supra* note 3, at 11.

58. Ruth A. Strickland & Richter H. Moore, Jr., *Cameras in State Courts: A Historical Perspective*, 78 *Judicature* 128, 160 (1994) ("The courtroom is not sacrosanct; it belongs to the people just as any part of government does."); *see also infra* notes 150-51 and accompanying text.

59. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) (noting the public's reliance on the press to monitor and report on government operations).

sidered by most to be a valid concern requiring a response from the court system.

2. Safety

There are numerous potential safety concerns that may face certain witnesses if their testimony is televised. Special provisions are often made for witnesses who are police informants,⁶⁰ undercover police officers,⁶¹ and relocated witnesses.⁶² All of these witnesses may face a threat of physical harm, not only from those against whom they are testifying, but also from others who may recognize them. Inmate-witnesses who testify regarding jailhouse crimes may also face the prospect of physical danger—from their fellow inmates—if their testimony is aired.⁶³ In a similar vein, the state likely has a compelling interest in protecting a witness' safety if an assailant is still at large.⁶⁴

Other witnesses may fear harassment by members of their communities. The Supreme Court has recognized this fear as a legitimate concern when considering the propriety of allowing cameras in the courtroom.⁶⁵ Similar fears have led courts to close trials to spectators as well as the electronic media.⁶⁶

3. Criminal Law Enforcement

Many witnesses involved in criminal law enforcement must also be protected: undercover police officers involved in ongoing undercover operations, police informants, and relocated witnesses.⁶⁷ Restricting access to such testimony is primarily intended to protect the anonymity required to maintain the integrity of continuing criminal investigations.⁶⁸ For example, an undercover officer who investigates drug operations may fear that by testifying she will expose her identity to the public, thereby jeopardizing the integrity of her ongoing covert

60. *See supra* note 38.

61. *See supra* note 39.

62. *See supra* note 40.

63. *See, e.g.*, *State v. Palm Beach Newspapers, Inc.*, 395 So. 2d 544, 549 (Fla. 1981) (stating that a bare assertion of fear of reprisal by an inmate-witness in a jail-house murder trial may, in some cases, be enough to justify exclusion of the broadcast media during that witness' testimony).

64. Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 Wash. L. Rev. 683, 706 (1996).

65. *Estes v. Texas*, 381 U.S. 532, 547 (1965) (plurality opinion) (noting that harassment by pranksters may be difficult to prove).

66. *See, e.g.*, *People v. Hagan*, 248 N.E.2d 588 (N.Y. 1969) (closing the courtroom to spectators because a witness feared reprisal for testifying against alleged murderers of Malcolm X).

67. *See supra* notes 60-62.

68. Dyer & Hauserman, *supra* note 2, at 1686; *see also* Robin Zeidel, Note, *Closing the Courtroom for Undercover Police Witnesses: New York Must Adopt a Consistent Standard*, 4 J.L. & Pol'y 659, 660-62 (1996) (explaining the perceived need for anonymity for undercover officers in order to ensure their safety and the integrity of their undercover operations).

investigations of the defendant's friends or family—people who are likely to watch the trial.⁶⁹ Thus, a judge may wish to prohibit the broadcast of this agent's testimony, in order to preserve the agent's other criminal investigations. Four states have statutes that permit judges to bar cameras for this type of testimony,⁷⁰ while other states have similar provisions in their judicial codes governing cameras in the courtroom.⁷¹ At least one commentator urges the adoption of a *per se* rule requiring courts to be closed to both the press and the public for these witnesses.⁷²

4. Children

States have long felt a special obligation to protect child witnesses from exposure to the press and public. "A child witness is not a miniature version of an adult witness. . . . They have vulnerabilities, needs and limitations not found among adult witnesses."⁷³ Moreover, because of their minority, children are not capable of giving meaningful consent to having their testimony televised.⁷⁴ Even the Supreme Court has stated that protecting minors constitutes a compelling government interest for purposes of satisfying strict scrutiny.⁷⁵

69. Zeidel, *supra* note 68, at 660-61 (discussing the concerns of undercover agents investigating drug operations who must testify against drug defendants). Of course, this concern would be present even if the testimony is not broadcast, because the same people may attend a trial, and see the officer in person. It seems reasonable to assume, however, that if the people are in fact involved in illegal drug operations, they will not want to associate themselves with the defendant by attending a trial. They would not, however, risk such association by viewing the broadcast of the trial in the privacy of their own homes. In this way, broadcast coverage has a different impact on this witness than other forms of media. *See supra* notes 54-55 and accompanying text; *infra* note 86 and accompanying text.

70. Lassiter, *Appendix, supra* note 4, at 1012.

71. For a complete list, see *supra* notes 38-40. This type of witness would be a good candidate for the "blue dot" compromise struck in New York. *See supra* note 26. The witness' primary concern is in the protection of her identity, not in the privacy of her testimony. Thus, even though the state has a valid interest in protecting the witness, the option of simply obscuring her face may mean that cameras need not be turned off entirely.

72. James F. Fagan, Jr., *Close that Door! Closure of Courtroom During Testimony of an Undercover Police Officer*, 26 Suffolk U. L. Rev. 619, 636-39 (1992).

73. Pate, *supra* note 2, at 360 (quoting Ellen Matthews & Karen Sayowitz, *Child Victim Witness Manual*, 12 Cal. Center for Jud. Educ. and Res. J. 1, 7 (Winter/Spring 1992)).

74. Pate, *supra* note 2, at 361-62.

75. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). In order to pass "strict scrutiny" review by a court, the government must demonstrate a compelling state interest in regulating an activity, and a narrowly tailored means of effectuating that interest. *See, e.g., Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 101-02 (1979) (applying strict scrutiny in a case involving First Amendment rights); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) (same); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (same); *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (same).

States have addressed concerns about child witnesses by adopting rules requiring that the public be excluded from matters involving juveniles, such as family court⁷⁶ and juvenile court proceedings.⁷⁷ Many commentators urge all states to adopt rules protecting minors from television coverage.⁷⁸

5. Psychological Effects on Witnesses

Even in its earliest case dealing with cameras in the courtroom, *Estes v. Texas*,⁷⁹ the Supreme Court was concerned with the psychological impact of cameras on witnesses. The Court expressed its concern about a wide range of possible psychological effects, including fear, embarrassment, and memory loss, as well as reactions of witnesses to the camera, such as boastfulness and insincerity.⁸⁰ The Court noted that these responses could impede the fact-finding process.⁸¹

The same pressure that may result in these adverse side effects, however, has also long been seen as an important means of obtaining the truth. For instance, knowing that many people could be watching may make a witness less likely to stretch the truth.⁸² Moreover, at least one Supreme Court justice has noted that broadcasting trials may improve the quality of testimony by moving all the trial participants to perform their duties more conscientiously.⁸³ Witnesses may, in other words, feel more accountable for their actions.⁸⁴

76. States prohibiting coverage of adoption proceedings are: Alaska, Arizona, Arkansas, Connecticut, Idaho, Iowa, Maine, Missouri, North Carolina, Maryland, Oregon, Rhode Island, and Virginia. RTNDA Survey, *supra* note 2, at B-19 to B-21. States prohibiting coverage of child custody proceedings are: Alaska, Arkansas (guardianship), Connecticut, Idaho, Iowa, Maine, Maryland, Minnesota, Missouri, New Jersey, North Carolina, Oregon, Rhode Island (if minor is a participant), Pennsylvania, and Virginia. *Id.* States prohibiting coverage of divorce proceedings are: Alaska, Arkansas, Connecticut, Iowa, Maine, Maryland, Minnesota, Missouri, New Jersey, North Carolina, Oregon, Pennsylvania, Virginia, and Wisconsin. *Id.*

77. These states are Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Iowa, Maine, Maryland, Minnesota, Missouri, New Jersey, New York, North Carolina, Oregon, Rhode Island, Tennessee, Virginia, and Wisconsin. New York State Committee Report, *supra* note 5, at 15-18; RTNDA Survey, *supra* note 2, at B-22.

78. See, e.g. National Forum Survey, *supra* note 2, at 42 (recommending that states "not allow minors . . . or child witnesses to be televised"); Pate, *supra* note 2, 367 (advocating the adoption of a binding rule of court prohibiting television coverage of a minor's testimony in all court proceedings).

79. 381 U.S. 532 (1965) (plurality opinion).

80. *Id.* at 547 ("Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization.").

81. *Id.*

82. 6 John Henry Wigmore, Evidence § 1834, at 435-36 (J. Chadbourn rev., 1976) (stating that publicity "produces in the witness' mind a disinclination to falsify").

83. See, e.g. *Estes*, 381 U.S. at 583 (Warren, J., concurring).

84. Paul Thaler, The Watchful Eye, American Justice in the Age of the Television Trial 116 (1994).

Nevertheless, states have recognized the negative impact that publicly broadcast testimony might have on witnesses,⁸⁵ and such concerns will likely persist. This perceived impact is often thought to be compounded by the addition of a television camera to the already high-pressure atmosphere of the trial: "One only has to see a televised football game. All the fans come to see the game but the game is forgotten immediately and their attention is captured by the camera, as soon as they find that they are on television."⁸⁶ Such arguments propel debate about the merits of cameras in the courtroom.

a. *Examples of Psychological Effects*

The most commonly recognized psychological effects that broadcast coverage is thought to have on witnesses relate largely to the way a witness will testify in the presence of a television camera. Another concern is that witnesses will be reluctant to come to court if they think their testimony may be televised. The next part summarizes the various potential psychological effects.⁸⁷

85. See, e.g., *United States v. Hastings*, 695 F.2d 1278, 1284 (11th Cir. 1983) (upholding a per se ban on cameras in federal courtrooms as a sustainable time, place and manner restriction, stating in conclusory fashion that cameras could have a negative impact on witnesses); *In re Photographic and Electronic Coverage of Courts*, 8 Media L. Rep. (BNA) 1556, 1558-59 (Me. 1982) (discussing possible negative impact of electronic coverage); *In re Post-Newsweek Stations Florida, Inc.*, 370 So. 2d 764, 775 (Fla. 1979) (outlining psychological effects of television coverage on trial participants); see also, Lassiter, *Lens Cap*, *supra* note 3, at 9 ("Cameras in the courtroom have a 'chilling effect' on witnesses and other participants.").

86. Judge Nauman Scott of the Western District of Louisiana, *quoted in* Laralyn M. Sasaki, Note, *Electronic Media Access to Federal Courtrooms: A Judicial Response*, 23 U. Mich. J.L. Reform 769, 789 (Summer 1990). It is important to recognize the difference, however, between a *game* and a *trial*: a courtroom has a *judge* controlling the proceedings and directing the behavior of trial participants. *Cf.* *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966) ("The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court."); *Court TV*, *supra* note 3, at 6 ("[T]he judge has the responsibility and authority to control courtroom decorum regardless of the presence of cameras."). Moreover, witnesses are not merely watching others "play," but are themselves active participants, trying to listen, respond to questions, and follow instructions. It would take a mentally dexterous witness to be able to do all this and still manage to "ham it up" for the camera.

87. These reactions to testifying implicate more than the interests of the witness, because they have a direct impact on the effectiveness, and perhaps even the veracity, of the witness' testimony. See *McCall*, *supra* note 3, at 1554 ("These camera-induced alterations in demeanor may, in turn, affect the factfinder's evaluation of the witness' testimony." (emphasis added)). For purposes of this Note, however, it is assumed that the judge has already decided that the effect of the camera at trial—in contrast to the pressures of testifying that are present even without the camera—will be insubstantial; therefore, the focus here is on witnesses' concerns. See *supra* note 7 (setting forth the limits on the scope of this Note).

i. *Nerves/Fear*

Many commentators consider the intimidation of witnesses a negative psychological effect of having cameras in the courtroom.⁸⁸ It is recognized widely that witnesses may be tense or nervous about testifying.⁸⁹ This may be particularly true if witnesses are asked to reveal personally embarrassing information.⁹⁰ Some critics of cameras in the courtroom, pointing to "socio-psychological studies," contend that the loss of anonymity due to the broadcast makes it more likely that a witness will alter his or her testimony to conform to popular beliefs in order to "avoid public ostracism."⁹¹ Also troubling to many observers is that, for some witnesses, anxiety may cause them to "ham[] it up" for the cameras, thereby undermining their credibility.⁹²

Many argue, however, that the witnesses' uneasiness is due to the inherent pressures of trial testimony, rather than to the camera itself. "There is no evidence that [the nervousness of some witnesses in high-profile cases] is related to the camera, or that they would be less nervous in the presence of the judge, jury, defendant and three dozen furiously-scribbling reporters."⁹³ Moreover, a simple remedy to the problem of witnesses who act up when nervous is for the presiding judge to instruct witnesses not to play to the camera.⁹⁴ In any event, the overall effect of this phenomenon may be minimal, because "for every person who shows off, usually to his or her detriment, there are others who will be on their best behavior."⁹⁵

ii. *Honesty/Accuracy*

Perhaps as a result of the intimidation witnesses feel knowing their testimony will be broadcast, some commentators and courts contend that "witnesses may alter their story to accommodate a television audience."⁹⁶ The problem may be particularly acute in high-profile trials, which are likely to garner the greatest degree of media attention.

88. Jonathan M. Remshak, *Truth, Justice, and the Media: An Analysis of the Public Criminal Trial*, 6 Seton Hall Const. L.J. 1083, 1084 (1996); see also Dyer & Hauserman, *supra* note 2, at 1672 ("The intimidating effect may be significant.").

89. National Forum Survey, *supra* note 2, at 32.

90. New York State Committee Report, *supra* note 5, at 4 ("Some witnesses in civil proceedings may reasonably fear injury to their personal or professional reputation if certain aspects of their past are thrust before a television audience.").

91. McCall, *supra* note 3, at 1553 (citation omitted).

92. National Forum Survey, *supra* note 2, at 32; see also *supra* note 87.

93. Court TV, *supra* note 23, at 5; see also *State v. Green*, 395 So. 2d 532, 536 (Fla. 1981) (noting that courtrooms filled with spectators, including media, are intimidating even without a camera, and the camera does not add to the tension already present).

94. National Forum Survey, *supra* note 2, at 43. Of course, the fact that a judge has instructed a witness not to act up is no guarantee that that witness will comply. It would be peculiar, however, to bar the broadcast of a trial due to an assumption that the judge's *explicit orders* would not be obeyed.

95. New York State Committee Report, *supra* note 5, at 2.

96. Lassiter, *Lens Cap*, *supra* note 3, at 7.

When a witness in a highly publicized and televised trial must testify about embarrassing or traumatic personal experiences, "the accuracy of that testimony may be jeopardized."⁹⁷

This point, however, is also contested, as noted above.⁹⁸ Some commentators assert that rather than inhibit truthful testimony, broadcast coverage of a trial will actually encourage candor.⁹⁹

iii. *Not Coming Forward/Failure to Testify*

Whether or not a witness is actually fearful or anxious, she may, nevertheless, be reluctant to testify while the cameras are rolling. For example, in the criminal context:

[O]ne of the serious problems of law enforcement is that many persons who witness crimes do not want to "get involved," particularly if they live or work in the area so as to be subject to retaliation. This problem easily could be compounded by the realization of these persons that "to get involved" may result in the televising of their testimony.¹⁰⁰

The dilemma is not unique to criminal trials, however; some commentators believe the problem has less to do with the subject matter of the testimony than with the broadcast itself. A witness may be reluctant to testify simply because a trial is televised; if so, the trial process may be fettered, and the search for the truth interrupted.¹⁰¹ This reluctance may have its strongest effect on those who have not been called to testify, but would have come forward on their own if not for the presence of the electronic media.¹⁰²

Once again, however, there is disagreement about the extent—and even the *existence*—of this problem. Wigmore represents the view of those who see mass media exposure as a means of ensuring that all potential witnesses are made aware of the proceedings: "[Publicity] secures the presence of those who by possibility may be able to furnish testimony in chief or to contradict falsifiers and yet may not have

97. McCall, *supra* note 3, 1553; *see also* New York State Committee Report, *supra* note 5, at 72 ("Where the witness' testimony is highly personal in nature, concerns were voiced that the presence of cameras will make it more difficult for witnesses to tell their story fully and honestly.").

98. *See supra* note 82 and accompanying text.

99. *Id.*; *cf. Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979) (asserting that openness in court proceedings aids in the search for the truth, and inspires witnesses and other trial participants to perform their functions more conscientiously); *United States v. Cojab*, 996 F.2d 1404, 1407 (2d Cir. 1993) (same).

100. Tongue & Lintott, *supra* note 2, at 791; *see also* New York State Committee Report, *supra* note 5, at 38 (reporting the belief that "there is a 'significant risk' that cameras will have a chilling effect on a victim or a witness' willingness to report a crime or testify in court").

101. *Estes v. Texas*, 381 U.S. 532, 547 (1965) (plurality opinion).

102. McCall, *supra* note 3, at 1554 ("The presence of cameras may . . . deter some witnesses from coming forward at all.").

been known beforehand to the parties to possess any information."¹⁰³ Thus, the wider the media exposure, the better the chances for achieving a full accounting of the facts.

b. *Are Potential Psychological Effects Really a Problem?*

There are indications that the fear of any psychological impact of cameras on witnesses is much exaggerated. The conclusion of a Federal Judicial Center study of cameras in federal civil courts, examining reports and conclusions of twelve states, indicates that most trial participants believe broadcast coverage has little or no detrimental effect on those participants.¹⁰⁴ Proponents of cameras in the courtroom argue that the various states that have studied these potential effects have found that witnesses behave the same regardless of the presence of a camera.¹⁰⁵ For example, the April 1997 report of the New York State Committee to Review Audio Visual Coverage of Court Proceedings concluded that "witness intimidation is neither borne out by the record in New York nor sufficiently strong to warrant barring cameras from the courtroom across-the-board."¹⁰⁶ Indeed, even the Supreme Court has noted that whether there is in fact any psychological impact on the participants of a trial is, at the very least, debatable.¹⁰⁷

To the extent that psychological effects of broadcast coverage are real, however, they are likely to overlap with privacy concerns. For example, assume a witness expresses a fear that she will not be able to accurately testify because she is nervous due to the camera's presence. In order to even reach the stage at which the judge must decide whether privacy concerns require the camera be turned off, the judge must have already decided that the witness' fear will not have a significant impact on her testimony.¹⁰⁸ Thus, the real consideration for the judge is whether the state protects witnesses with a fear of cameras. This is, in essence, a question of the privacy interests of the witness: does the state recognize a right to privacy for witnesses who fear cameras such that the witness should be allowed to defeat the state's pol-

103. 6 John Henry Wigmore, *Evidence* § 1834, at 436 (J. Chadbourne Rev., 1976).

104. Federal Judicial Center Study, *supra* note 5, at 7; *see also* Court TV, *supra* note 23, at 5.

105. Court TV, *supra* note 23, at 4-5.

106. New York State Committee Report, *supra* note 5, at 73. The New York State Committee Report also recognized that devices that block the face of the witness, while allowing television viewers to see the witness' mannerisms and to hear her voice, have been used by several states, and may present a useful compromise between the rights of the witness and the rights of the public to observe trials, vis-à-vis the press. *See, e.g.*, New York State Committee Report, *supra* note 5, at 13-14 (discussing use of the "blue dot" technique of obscuring identity of testifying witness); *see also supra* note 26.

107. *Chandler v. Florida*, 449 U.S. 560, 578 (1981).

108. *See supra* note 7 (discussing the necessity of the judge's pre-trial determination that the camera will not effect the trial processes).

icy judgments that allow the camera in the courtroom in the first place?

Part III of this note argues that this question must be answered by looking to the Supreme Court's decisions in the area of privacy law, and developing explicit state guidelines that direct judicial discretion in prohibiting the broadcasting of a witness' testimony.

II. STATE AND SUPREME COURT TREATMENT OF INFORMATIONAL PRIVACY CONCERNS

States have traditionally protected the privacy rights of their citizens by allowing private causes of action.¹⁰⁹ The Supreme Court only fairly recently become involved in privacy law jurisprudence.¹¹⁰ This part briefly analyzes the major Supreme Court cases dealing with private facts causes of action, and examines the traditional approach to privacy law that states have taken. Although privacy law jurisprudence relates to post-publication causes of action, this part argues that these approaches may be translated into the pre-publication questions relevant to non-party witnesses in televised trials.

A. *The Supreme Court's Approach to Privacy Law: Strict Scrutiny*

The Supreme Court has not thoroughly explored the area of private facts causes of action, leaving this area for the states to flesh out.¹¹¹ The few constitutional rules that the Court has established, however, have informed the states' formulation of private facts jurisprudence,¹¹² and are vital to the present analysis.

First, the Court has recognized a state's legitimate interest in protecting privacy.¹¹³ The Court has allowed states to protect this interest by providing a cause of action for invasion of privacy when the media publicly discloses private facts.¹¹⁴ In a series of decisions, however, the Supreme Court has established that such a cause of action must be narrowly drawn to minimize its infringement of free speech.¹¹⁵ This

109. Prosser and Keeton on the Law of Torts § 117, at 850-51 (5th ed. 1984); Prosser, *Privacy*, 48 Cal. L. Rev. 383, 386 (1960).

110. The Supreme Court first addressed the privacy cause of action in the 1936 case *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). Lorelei Van Wey, Note, *Private Facts Tort: The End is Here*, 52 Ohio St. L.J. 299, 302 (1991).

111. See *Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989) (noting that the Court's cases have "carefully eschewed" reaching any constitutional decision on whether the prohibition or punishment of the publication of true facts could ever be consistent with the First Amendment).

112. See *infra* Part II.B.

113. See *Florida Star*, 491 U.S. at 533 (noting that "press freedom and privacy rights are both 'plainly rooted in the traditions and significant concerns of our society'" (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975))) (emphasis added).

114. *Id.*

115. For a detailed account of the Supreme Court's cases in this area, see Van Wey, *supra* note 110, at 303-12 (discussing, in this order, the following series of Supreme Court cases: *Cox Broad.*, 420 U.S. 469; *Landmark Communications, Inc. v. Virginia*,

means state rules establishing the cause of action must recognize liability only when such liability is necessary to further a compelling state interest.

The Supreme Court has further recognized that the necessary balancing between a state's legitimate interest in protecting privacy and the free speech rights involved in publication requires state rules in this area to take a case-by-case approach.¹¹⁶ In this way, the Court attempts to minimize the infringement on free speech—the unavoidable result of such a cause of action. Thus, even when a state interest is important enough to allow some encroachment on First Amendment rights, if the remedy suppresses more speech than necessary, the Supreme Court regularly condemns it as an overbroad protection of that interest.¹¹⁷

Also relevant to this analysis is the Supreme Court's decision to place the responsibility with states to prevent the public disclosure of information contained in official government documents, rather than permitting states to punish the publication of that private information.¹¹⁸ This tactic further illustrates the Court's reluctance to interfere with the media's use of publicly available information.

In sum, if a state wishes to protect privacy through a cause of action for its invasion, the cause of action must fit within a strict set of parameters laid out by the Supreme Court. First, in order for courts to adequately analyze the sufficiency of the claim, the state must clearly articulate the interest in privacy that the cause of action is intended to protect. Additionally, the state interest in privacy must be a compelling one and the means used to protect that interest must be narrowly drawn, encroaching as little as possible on free speech rights. Finally,

435 U.S. 829 (1978); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Florida Star*, 491 U.S. 524; see also Karen Rhodes, Note, *Open Court Proceedings and Privacy Law: Re-examining the Bases for the Privilege*, 74 Tex. L. Rev. 881, 888-90 (1996) (discussing the Supreme Court's cases involving causes of action for invasion of privacy).

116. See *Florida Star*, 491 U.S. at 539 (noting the "impermissibility of categorical prohibitions upon media access where important First Amendment interests are at stake").

117. See, e.g., *id.* at 532 (striking down a statute prohibiting publication of rape victims' names); *Daily Mail*, 443 U.S. at 106 (striking down a statute prohibiting publication, without written approval of the juvenile court, of the name of a youth charged as a juvenile offender); *Landmark Communications*, 435 U.S. at 838 (striking down a statute prohibiting publication of confidential proceedings against state judges); *Oklahoma Publ'g*, 430 U.S. at 311-12 (striking down a statute that prohibited publication of the name of a juvenile charged with a crime); *Cox Broad.*, 420 U.S. at 497 (striking down statute prohibiting publication of a rape victim's name). *But cf.* *Huskey v. NBC*, 632 F. Supp. 1282, 1295 (N.D. Ill. 1986) (finding that an injunction against showing footage of a particular plaintiff (not in a witness/trial situation) would be narrowly tailored to serve plaintiff's privacy interest without unduly infringing First Amendment rights).

118. *Cox Broad.*, 420 U.S. at 496; see also *infra* notes 166-67 and accompanying text.

the facts of each case must be analyzed, and a compelling state interest be established, before liability may be found.

The Supreme Court has also stated that a claim to privacy is diminished when the information pertains to a public trial.¹¹⁹ It has further ruled that a state may not generally penalize the publication of information contained in public court documents, or stated in open court.¹²⁰ These decisions favor allowing the press a "free hand" with the broadcast of witness testimony.¹²¹

Some Supreme Court rulings, however, support a more limited right to the broadcast of witness testimony. In one such ruling, mentioned above, the Court made states responsible for preventing the public disclosure of information in this context; states may not wait and punish the publication of such material.¹²² When judges prohibit the *broadcast* of one witness' testimony, however, in a trial otherwise open to broadcasters, they are *not* preventing the disclosure of the private information. This is because other media may publish the private information, and because it is, by definition, "public" information if it is stated in open court.¹²³

The next section will show how these basic tenets, laid out by the Supreme Court, have influenced the way states have tailored their protections of privacy.

B. *States' Approach to Privacy Law: The Second Restatement of Torts*

The large majority of states protect privacy interests of individuals by providing a common law or statutory cause of action for the publi-

119. See, e.g., *Cox Broad.*, 420 U.S. at 493 (quoting with approval Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 216-17 (1890) ("[T]he right to privacy is not invaded by any publication made in a court of justice . . .")); see also *infra* notes 150-51 and accompanying text.

120. See *Florida Star*, 491 U.S. 524; *Daily Mail*, 443 U.S. 97; *Landmark Communications*, 435 U.S. 829; *Oklahoma Publ'g*, 430 U.S. 308; *Cox Broad.*, 420 U.S. 469. But cf. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978) (holding that trial court could properly deny the media's request to make copies of tapes played in open court).

121. Cf. *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) ("[W]here there was 'no threat or menace to the integrity of the trial,' . . . we have consistently required that the press have a free hand . . .") (quoting *Craig v. Harney*, 331 U.S. 367, 377 (1947)).

122. See *supra* note 118 and accompanying text.

123. Of course, many see an additional privacy "invasion" presented by the actual *broadcast* of the testimony, see *supra* notes 10-11 and accompanying text, as opposed to the mere reporting of the information about which the witness testified. This privacy interest, however, is certainly not more weighty than those privacy interests already recognized by the states and may, in fact, be *less* weighty, see *infra* note 188 and accompanying text (analyzing protections—and the lack thereof—for a person's visual image when it is electronically recorded in a public place). Therefore, the privacy concern raised by the nature of broadcast itself is analyzed here as simply another privacy interest that may enter into the judge's calculations—and not one that carries any more weight than any other personal privacy interest.

cation of private facts about a person.¹²⁴ These rules are frequently modeled after the invasion of privacy tort outlined in the Restatement of Torts.¹²⁵ Such a cause of action typically requires a showing that the disclosure was highly offensive to a person of reasonable sensibilities and was of no legitimate public concern.¹²⁶ This contemplates protection for "intimate physical details the publicizing of which would be *not merely embarrassing* and painful but deeply shocking to the average person subjected to such exposure."¹²⁷ Examples of pro-

124. See, e.g., *Forsher v. Bugliosi*, 608 P.2d 716, 725 (Cal. 1980) (recognizing a cause of action for invasion of privacy); *Barbieri v. News-Journal Co.*, 189 A.2d 773, 774 (Del. 1963) (same); *Cason v. Baskin*, 20 So. 2d 243, 248 (Fla. 1944) (same); *Cabaniss v. Hipsley*, 151 S.E.2d 496, 500 (Ga. Ct. App. 1966) (same); *Beaumont v. Brown*, 257 N.W.2d 522, 527 (Mich. 1977) (same), *overruled on other grounds*, *Bradley v. Board of Educ.*, 565 N.W.2d 650, 658 (Mich. 1997); see also *infra* note 125. Some states, however, have no cause of action for the public disclosure of private facts. See, e.g., *Estate of Benson v. Minnesota Bd. of Med. Practice*, 526 N.W.2d 634, 637 (Minn. Ct. App. 1995) (noting that Minnesota does not recognize a separate cause of action for invasion of privacy, but that these claims may be brought as personal injury causes of action); *Howell v. New York Post Co.*, 612 N.E.2d 699, 703 (N.Y. 1993) (rejecting common law cause of action for invasion of privacy, concluding the legislature is better equipped to design such a cause of action); *Hall v. Post*, 372 S.E.2d 711, 714 (N.C. 1988) (rejecting cause of action for private facts invasion of privacy as inconsistent with First Amendment protections of free speech). Nevertheless, because no particular set of privacy protection guidelines is necessary to effectuate the goals of the Note, it is irrelevant that some states have no cause of action in this area.

125. Restatement (Second) of Torts § 652D (1976) [hereinafter Restatement]; see, e.g., *Beard v. Akzona, Inc.*, 517 F. Supp. 128, 131 (E.D. Tenn. 1981) (explicitly and favorably referring to the Restatement version of private facts tort when discussing its own state's formulation of the privacy cause of action); *Ozer v. Borquez*, 940 P.2d 371, 377 (Colo. 1997) (en banc) (same); *Goodrich v. Waterbury Republican-American, Inc.*, 448 A.2d 1317, 1329 (Conn. 1982) (same); *State of Hawai'i Org. of Police Officers v. Society of Prof'l Journalists-Univ. of Hawai'i Chapter*, 927 P.2d 386, 406 (Haw. 1996) (same); *Miller v. Motorola, Inc.*, 560 N.E.2d 900, 901 (Ill. App. Ct. 1990) (same); *Near E. Side Community Org. v. Hair*, 555 N.E.2d 1324, 1334-35 (Ind. Ct. App. 1990) (same); *Finlay v. Finlay*, 856 P.2d 183, 189 (Kan. Ct. App. 1993) (same); *Household Fin. Corp. v. Bridge*, 250 A.2d 878, 882-83 (Md. 1969) (same); *Corcoran v. Southwestern Bell Tel. Co.*, 572 S.W.2d 212, 214 (Mo. Ct. App. 1978) (same); *Board of Dentistry v. Kandarian*, 886 P.2d 954, 957 (Mont. 1994) (same); *Montesano v. Donrey Media Group*, 668 P.2d 1081, 1084-85 (Nev. 1983) (same); *Moore v. Sun Publ'g Corp.*, 881 P.2d 735, 743 (N.M. Ct. App. 1994) (same); *Killilea v. Sears, Roebuck & Co.*, 499 N.E.2d 1291, 1294 (Ohio Ct. App. 1985) (same); *Curran v. Children's Serv. Ctr. of Wyoming County, Inc.*, 578 A.2d 8, 12 (Pa. Super. Ct. 1990) (same); *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 682-83 & n.21 (Tex. 1976) (same); *Zinda v. Louisiana Pac. Corp.*, 440 N.W.2d 548, 555 (Wis. 1989) (same). Note that even when a state does not explicitly refer to the Restatement, its formulation of the cause of action may nevertheless overlap or follow the Restatement.

126. See Restatement, *supra* note 125, § 652D (a) & (b). For an example of how this analysis works in practice, see *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993).

127. *Haynes*, 8 F.3d at 1234-35 (emphasis added); see also *Gilbert v. Medical Econs. Co.*, 665 F.2d 305, 308 (10th Cir. 1981) ("In our view, this standard properly restricts liability for public disclosure of private facts to the extreme case, thereby providing the breathing space needed by the press to properly exercise effective editorial judgment.").

ected information include sexual relations, family problems, issues concerning a person's home life, socially ostracizing diseases, and intimate personal correspondences.¹²⁸

The Restatement implicitly recognizes the important free speech rights implicated by overprotecting privacy interests of peculiarly sensitive persons.¹²⁹ Consequently, states following the Restatement also incorporate its narrow construction of the privacy right.¹³⁰ As noted above, the Supreme Court has consistently applied strict scrutiny to cases that threaten First Amendment rights, including cases that involve the publication of private facts.¹³¹ Therefore, the Restatement has balanced these competing interests, and has drawn the line between what is and what is not to be considered "private" at "common decency, *having due regard to the freedom of the press . . . but also due regard to the feelings of the individual and the harm that will be done to him by the exposure.*"¹³² In this way, the Restatement attempts to mirror the Supreme Court's efforts in balancing the rights of the individual and the press in privacy cases.

C. *How Privacy Law Relates to Witnesses' Rights in Televised Trials*

The Restatement recognizes that "it is not enough that the publicity would be highly offensive to a reasonable person. . . . When the subject-matter of the publicity is of legitimate public concern, there *is no* invasion of privacy."¹³³ Cameras are admitted to a courtroom precisely because state legislatures have determined that trials are of legitimate public concern, and therefore, absent any prejudice to the

128. Restatement, *supra* note 125, § 652D cmt. b., at 386.

129. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975); see Restatement, *supra* note 125, § 652D cmt. c, at 387 ("Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part.").

130. See, e.g., *Forsher v. Bugliosi*, 608 P.2d 716, 725 (Cal. 1980) (analyzing First Amendment implications of private facts invasion of privacy cause of action); *Industrial Found. of the S. v. Texas Indust. Accident Bd.*, 540 S.W.2d 668, 684 (Tex. 1976) (same).

131. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (requiring restriction on speech be "narrowly tailored to a state interest of the highest order"); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104-05 (1979) (holding that a state cannot prosecute a newspaper for publication of lawfully obtained information identifying a juvenile suspect in a homicide case, absent a need to further a state interest of the highest order); cf. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (holding that a state cannot fine a newspaper for reporting that a judge was under investigation); *Oklahoma Publ'g Co. v. District Court*, 430 U.S. 308 (1977) (holding that a judge cannot prohibit publication of information that has been publicly revealed at a hearing); see also *supra* note 115.

132. Restatement, *supra* note 125, § 652D cmt. h, at 391 (emphasis added); see, e.g., *Gilbert v. Medical Econs. Co.*, 665 F.2d 305, 307 (10th Cir. 1981) (balancing individual's privacy right against press right to disseminate newsworthy information); *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957, 961 (D. Minn. 1948) (same).

133. Restatement, *supra* note 125, § 652D cmt. d, at 388 (emphasis added).

parties, broadcast of the trial serves the public interest.¹³⁴ When judges block the broadcast of one witness' testimony they are merely preventing a form of publication—broadcast—that they have previously decided to allow. The camera was permitted in the first instance presumably because the state has determined that the benefits of the camera outweigh the risks, and the judge has found the risks in the case to be insubstantial.¹³⁵

When a judge considers the interests of a child witness or an undercover officer in preventing broadcast, such concerns are likely to amount to compelling state interests weighing heavily in favor of excluding cameras for this testimony.¹³⁶ When the only interest protected by pulling the plug on television coverage is the personal privacy right of a witness, however, the balance weighs more heavily in favor of protecting the First Amendment. A judicial rule with the potential to restrict free speech must be narrowly tailored to minimize the constitutional infringement. It is in such situations that the Supreme Court's existing protections for privacy should inform the outcome of a judge's decision to allow camera coverage: states should clearly tell judges which types of disclosures will warrant the extreme measure of defeating a state's policy judgment to allow television coverage of trials.¹³⁷

III. OTHER FIRST AMENDMENT CONCERNS RAISED BY ALLOWING JUDGES UNFETTERED DISCRETION TO PROHIBIT THE BROADCAST OF A WITNESS' TESTIMONY

As discussed in part II, the Supreme Court has been cautious in allowing state and federal governments to interfere with the media's free speech rights by providing a privacy cause of action.¹³⁸ The Supreme Court has required states to formulate rules that are nar-

134. *See supra* note 27 (listing arguments supporting cameras in the courtroom).

135. There may be situations where the judge has admitted cameras on the assumption that there would be no coverage of a particular witness—in other words, prejudice only occurs if this witness is shown, but coverage of the rest of the trial is not problematic. This will not, however, affect the analysis here. The judge may—in fact she *must*—always order cameras off if real prejudice will occur. *See supra* note 7. The focus here is on situations in which the outcome of the case will not be affected, but the witness' privacy will be affected.

136. *See supra* notes 60-78 and accompanying text (discussing interests related to safety, criminal law enforcement, and child witnesses).

137. *Cf. Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371 (8th Cir. 1990) (permitting closure in case involving admission of disabled child to public school); *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977) (permitting ban on media access to death row inmates); Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 *Stan. L. Rev.* 927, 958 (1992) ("In some rare instances, the privacy interests of witnesses . . . may justify excluding both the press and the public. In these cases, the courts should use the same criteria as those cases which justify restrictions on publication, and apply the compelling interest standard.") (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-08 (1982)).

138. *See supra* Part II.

rowly tailored to serve a compelling state interest.¹³⁹ The Court's reluctance to hamper free speech has not, however, been confined to the privacy arena, where causes of action act as post-publication "punishments" of speech. This part looks at two other areas of the Court's jurisprudence where it has subjected to strict scrutiny rules that may infringe on First Amendment rights: pre-publication restrictions on the press, known as "prior restraints," and judicial interference with the editorial process.

This part argues that blocking the broadcast of a witness' testimony in a trial otherwise open to the broadcast media is an editorial judgment and is analogous to a prior restraint, both of which constitute violations of the First Amendment. Consequently, rules governing the broadcast of witness testimony must include explicit state guidelines that elucidate what interests the state wishes to protect consistent with the First Amendment.

A. *Prior Restraints on Publication and Editorial Control of Content*

As the previous discussion illustrates, the Supreme Court has held that the First Amendment provides protections for the media in state-created invasion of privacy causes of action.¹⁴⁰ This evinces the Court's reluctance to allow state and federal governments to interfere with the media's free speech rights. This is particularly true when the government attempts to prohibit or inhibit the exercise of free speech, in contrast to allowing some form of post-speech punishment. "Regardless of how beneficent-sounding the purposes of controlling the press might be, we . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press."¹⁴¹ This section looks at two areas of Supreme Court jurisprudence that illustrate the Court's strong protections of free speech: attempts to issue prior restraints on the publication of information, and attempts to interfere with editorial decisions.

1. Prior Restraints

As noted above, a prior restraint is a pre-publication restriction placed on the dissemination of information.¹⁴² Prior restraints traditionally have been considered "the most serious and the least tolera-

139. See *supra* note 115 and accompanying text.

140. See *supra* Part II.

141. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring).

142. Bernabe-Riefkohl, *supra* note 3, at 268 (citing *Near v. Minnesota*, 283 U.S. 697, 721 (1931)); see also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 598 (1976) (Brennan, J., concurring) ("Prior restraints are particularly anathematic to the First Amendment . . ."); Marc A. Franklin & David A. Anderson, *Mass Media Law* 79 (5th ed. 1995) ("It has become almost axiomatic that . . . 'prior restraints' . . . are especially objectionable under the First Amendment.").

ble" form of First Amendment infringement.¹⁴³ The Supreme Court has consistently held that any prior restraint on expression is presumptively invalid.¹⁴⁴

Prior restraints have been especially difficult for both commentators and the Court to categorize with precision.¹⁴⁵ It is useful, however, to look at prior restraints as two general types of impediments to publication: the prior restraint in the form of a court injunction prohibiting the publication of information, and the traditional prior restraint of a licensing scheme that requires pre-publication government approval of speech.

143. *Nebraska Press*, 427 U.S. at 559; see also Franklin & Anderson, *supra* note 142, at 80 (stating that "it has never been doubted that the First Amendment was intended to at least forbid prior restraints").

144. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (stating that the government carries a heavy burden of showing justification for a prior restraint); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (stating that there is a heavy presumption against any prior restraints on expression (citing *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968)); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."); *Near*, 283 U.S. at 713 (stating that the chief purpose of the free press guarantee is to prevent "previous restraints" upon publication). For explanations of the kind of information that might warrant a prior restraint, see *New York Times*, 403 U.S. at 730 (Stewart, J., concurring) (stating that a prior restraint will not be tolerated unless the "disclosure . . . will surely result in direct, immediate, and irreparable damage to our Nation or its people"); cf. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (holding that a statute authorizing a prior restraint on the media may only be justified if "the words [of the publication] are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent"); *United States v. Progressive, Inc.*, 467 F. Supp. 990, 1000 (W.D. Wis.), *dismissed*, 610 F.2d 819 (7th Cir. 1979) (finding that an injunction against the publication of an article containing basic instructions on how to make a hydrogen bomb was warranted because of "likelihood of direct, immediate and irreparable injury to our nation and its people"). In *Progressive*, the injunction was later lifted because another magazine had already published similar information. Steven H. Shiffrin & Jesse H. Choper, *The First Amendment: Cases, Comments, Questions* 362 n.e (2d ed. 1996). For a survey of the Supreme Court's prior restraint jurisprudence, see Bernabe-Riefkohl, *supra* note 3, at 268-74, and Floyd Abrams, *Prior Restraints*, 261 *Prac. L. Inst.* 375 (1988).

145. See, e.g., John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 *Yale L.J.* 409, 437 (1983) (describing the prior restraint doctrine as "so variously invoked and discrepantly applied, and so often deflective of sound understanding, that it no longer warrants use as an independent category of First Amendment analysis"); Harry Kalven, Jr., *Forward: Even When a Nation is at War*, 85 *Harv. L. Rev.* 3, 32 (1971) (stating that "it is not altogether clear just what a prior restraint is or just what is the matter with it"). Compare *Near*, 283 U.S. at 722-23 (declaring unconstitutional a prior restraint in the form of an injunction), and *New York Times*, 403 U.S. at 714 (same), with *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973) (declaring constitutional a prior restraint in the form of an injunction).

a. *Classic Prior Restraints: Injunctions*

The commonly recognized illustration of a "prior restraint" is a court injunction against the publication of information.¹⁴⁶ One of the most well known examples of this sort of pre-publication restriction on the press is found in the *Pentagon Papers* case.¹⁴⁷ There, the Court struck down an injunction that sought to prohibit the publication of an article based on a secret government study of United States involvement in the Vietnam War. In its per curium opinion, the Court stressed that any system of prior restraints bears "a heavy presumption against its constitutional validity."¹⁴⁸

Prior restraints are particularly offensive to the First Amendment when the information sought to be suppressed relates to public court proceedings. For example, the American Bar Association Standards prohibit almost all prior restraints on the media:

Absent a *clear and present danger* to the fairness of a trial or other compelling interest, no rule of court or judicial order should be promulgated that prohibits representatives of the news media from broadcasting or publishing *any information in their possession* relating to a criminal case.¹⁴⁹

Attempts to censor media reports concerning judicial proceedings are subject to these extraordinary safeguards because such reports about the government and its operations are at the core of what the First Amendment was designed to protect:¹⁵⁰ this information facilitates self-government. Communications concerning judicial proceedings have therefore received "special protection" by the Court, as prior restraints in this area are particularly offensive to the constitutional protections of the press.¹⁵¹

146. See, e.g., *Near*, 283 U.S. at 722-23 (striking down a statute that allowed the court to prevent publication of material it deemed detrimental to public morals). That case contains the Supreme Court's first detailed discussion of the doctrine of prior restraints. Bernabe-Riefkohl, *supra* note 3, at 271.

147. *New York Times*, 403 U.S. 713.

148. *Id.* at 714 (quoting *Bantam Books*, 372 U.S. at 70); see *supra* note 144.

149. Standards for Criminal Justice (Amer. Bar Assoc. 1980) 8-3.1 (emphasis added).

150. See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that amendment was to protect the free discussion of government affairs." (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966))).

151. *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 559 (1976) ("For the same reasons [that reports about judicial proceedings have received special protections from punishment] the protection against prior restraint should have particular force as applied to reporting of criminal proceedings . . ."); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("The special protected nature of accurate reports of judicial proceedings has repeatedly be recognized.").

b. *The Prior Restraint Through Licensing: The Problem of Unfettered Discretion*

Rules that require government approval before free speech rights may be exercised are called licensing schemes. The Supreme Court has said that such attempts to exercise control over speech are the principal evil that the First Amendment was designed to address.¹⁵² The Supreme Court has recognized, however, that the government may have an important interest in regulating competing uses of public forums; therefore the Court allows some government licensing to address these problems.¹⁵³ Because of the potential injury licensing schemes pose to First Amendment interests, however, the Court requires that the discretion given to government officials not be overly broad.¹⁵⁴

In order to minimize the risk to First Amendment freedoms, a licensing law that impacts free speech must contain "narrow, objective, and definite standards to guide the licensing authority."¹⁵⁵ Such curtailment of discretion is necessary or "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great."¹⁵⁶ Moreover, such schemes have been subject to strict scrutiny in the courts: the plan must be narrowly tailored to advance a "significant" government interest.¹⁵⁷

152. *Near v. Minnesota*, 283 U.S. 697, 713 (1931); see also Laurence H. Tribe, *American Constitutional Law* § 12-31, at 724 (1978) ("When the first amendment was approved by the First Congress, it was undoubtedly intended to prevent government's imposition of any system of proper restraints similar to the English licensing system under which nothing could be printed without the approval of the state or church authorities.").

153. *Cox v. New Hampshire*, 312 U.S. 569, 574-76 (1941).

154. *Forsyth County v. National Movement*, 505 U.S. 123, 130 (1992) (citing *Freedman v. Maryland*, 380 U.S. 51, 56 (1965)); see also Tribe, *supra* note 152, § 12-35 ("[W]hile legislatures 'ordinarily may delegate power under broad standards . . . , [the] area of permissible indefiniteness narrows . . . when the regulation . . . potentially affects fundamental rights,' like those protected by the first amendment." (quoting *United States v. Robel*, 389 U.S. 258, 274-75 (1967) (Brennan, J., concurring))).

155. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969).

156. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

157. *Forsyth County*, 505 U.S. at 130 (citing *United States v. Grace*, 461 U.S. 171, 177 (1983)). The Court in *Forsyth County* also states that the licensing scheme must not be based on the content of the speech. The decisions at issue in this Note require the judge to look at the content of a witness' testimony when deciding whether or not to allow the testimony to be broadcast. The Court's disapproval of content-based decisions by government officials, including judges, provides further support for the proposition that the constitutional validity of the decisions at issue in this Note should not be taken for granted; on the contrary, such decisions demand scrutiny. See *Forsyth County*, 505 U.S. at 135 (stating the rule that the First Amendment forbids the government from discriminating based on content); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (same); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) (same).

2. Editorial Control of the Content of Publications

The Supreme Court's rule in this area is easily summarized: "The Government has been prohibited from interfering with the editorial process by entering the composing room to give directives as to the content of expression."¹⁵⁸ Closely related to the doctrine of prior restraints discussed above, this general principle has been applied with equal weight to all branches of government.¹⁵⁹ "[O]ne of the most basic principles of First Amendment jurisprudence"¹⁶⁰ is that courts should not enter into editors' decision-making processes by attempting to decide what information can and should be published. To do so would make courts pre-publication censors.¹⁶¹

Both common sense and the First Amendment provide the basis for this widely accepted principle. Unlike journalists, judges are not trained to know what information is or is not "important" to the general public, in contrast to what would be of interest only because it is sensational.¹⁶² These are journalistic distinctions that are inherently editorial in nature and are, therefore, best left to the media to decide.¹⁶³ To permit the courts to make these distinctions could invite censorship.¹⁶⁴ It is not difficult to imagine a situation where a judge erroneously felt she alone was best equipped to decide what the coverage should be so that the media's story matches the judge's own perception of the most "accurate" depiction of the events taking place in the trial.¹⁶⁵

Courts may guard against the dissemination of private information by controlling its release in court documents and proceedings. Once it is in any way made known to the public, however, it is the media that must be relied upon to decide what to broadcast.¹⁶⁶ This is true even when the information is disclosed during a judicial proceeding over which the judge otherwise has plenary control.¹⁶⁷ "There is no special

158. *Goldblum v. National Broad. Corp.*, 584 F.2d 904, 907 (9th Cir. 1978) (summarizing the Supreme Court's rule in this area).

159. *See Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986) (stating that courts, like all branches of government, are forbidden from affecting the content or tenor of media reports).

160. *Bernabe-Riefkohl*, *supra* note 3, at 289 n.159.

161. *Id.*

162. *Dyk*, *supra* note 137, at 958-59. Whether or not judges—or anyone—agrees with journalists' decisions on what is "sensational" is, of course, another matter.

163. *Id.*

164. *Id.*

165. *Cf.* New York State Committee Report, *supra* note 5, at 36-38 (discussing arguments of opponents of cameras in the courtroom, including, *inter alia*, that broadcast coverage of trials may give viewers a false impression of the justice system because it does not show viewers exactly what the jury sees).

166. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)).

167. *Cf. Estes v. Texas*, 381 U.S. 532, 614 (1965) (Stewart, J., dissenting) ("The Constitution does not make us arbiters of the image that a televised state criminal trial projects to the public.").

perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."¹⁶⁸ Nevertheless, the judge may still be called upon to exercise what appears to be an editorial judgment in choosing which witnesses' testimony will be broadcast and which will not in situations where the broadcast itself could have a measurable impact on a particular witness.¹⁶⁹

B. *Potential Constitutional Problems with Allowing Judges Discretion to Block the Broadcast of Witnesses' Testimony*¹⁷⁰

A conventional violation of the doctrine against prior restraints is presented if the judge prevents the media from broadcasting testimony that it has already recorded. If the judge allows the television crew to record a witness' testimony, that videotape is information the press actually has "in hand," and any judicial interference with the media's use of the videotape would constitute a prior restraint: it is a pre-publication—pre-broadcast—restriction because the judge is

168. *Craig v. Harney*, 331 U.S. 367, 374 (1947); see also *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

169. See *Chandler v. Florida*, 449 U.S. 560, 574 (1981) (noting that trial courts must be vigilant in preserving fair trial right of a defendant); cf. *State v. Palm Beach Newspapers*, 395 So. 2d 544, 549 (Fla. 1981) ("The electronic media's presence in Florida's courtrooms is desirable, but it is not indispensable. The presence of witnesses is indispensable. That difference should always affect but never control a trial judge in his approach to the exercise of his discretion in excluding electronic media coverage of . . . any witness.").

170. In addition to the problems discussed in this section, there may also be a potential procedural due process concern at play in the judge's decision to prevent the broadcast of a witness' testimony. When a state sets a system whereby cameras are admitted to trial courts, it has arguably set up a benefit that may not be denied without adequate procedures, and the First Amendment certainly sets up a right—free speech—that may not be infringed without due process of law. The Supreme Court has found that the Constitution requires particular procedures be followed before free speech may be curtailed; these procedures have been summarized, in relevant part, as follows:

(1) The burden of proof must rest on government to justify any restraint on free expression prior to its judicial review and on government to demonstrate the particular facts necessary to sustain a limitation on expressive behavior; . . . (6) A scheme of censorship or licensing must assure a "prompt final judicial decision" reviewing any "interim and possibly erroneous denial of a license;" (7) If a prior restraint is ordered by a court, the state must either stay the order pending its appeal or provide immediate appellate review.

Tribe, *supra* note 152, § 12-36, at 735-36 (citations omitted). If the judge makes no findings of fact about why the press should not be allowed to show a particular witness' testimony, the first constitutional requirement listed above is violated. If the state provides no procedures for appealing the judge's decision, the sixth and seventh requirements are violated. This problem is exacerbated by the fact that many state rules in this area make unreviewable any judicial decision regarding the operation of cameras in the courtroom. See, e.g., *Lassiter, Appendix, supra* note 4, at 1023 (summarizing Arizona's rule that grants judges "sole discretion" to prohibit the broadcast of a witness, and making judges' decision "not subject to judicial review").

preventing the broadcast of the witness' testimony, as opposed to imposing or allowing some form of later punishment. There do not appear to be any cases that address this problem. Judicial decision such as this is arguably permissible because there is no constitutional right to broadcast a witness' testimony.¹⁷¹ Nevertheless, because it is a prior restraint on the media, it should bear a heavy presumption against its validity.¹⁷²

Even if the judge makes her decision before the camera records the witness' testimony, thereby preventing the press from actually obtaining the information it seeks to broadcast (i.e., the videotape of the witness' testimony), a prior restraint problem is arguably presented. In its licensing cases, discussed above,¹⁷³ the Court was concerned about situations where the government had broad discretion in deciding questions that could potentially impact the free exercise of First Amendment rights. It reasoned that unfettered governmental discretion to suppress speech would present an impermissible danger to free speech rights.¹⁷⁴ The same may be said in the situation where a judge is given *no* guidance on how to evaluate a witness' request that her testimony not be broadcast. When there are no "narrowly drawn, reasonable and definite standards"¹⁷⁵ the risk is high that the judge will make her decision based on factors that do not rise to the level of a compelling—or even a valid—state interest.

In the area of liability for the publication of private information, the press has been the beneficiary of the presumption against the validity of prior restraints. Given the notion that a prior restraint is a drastic action, courts have generally refused to allow prior restraints designed to protect individual privacy, finding that any alleged harm is either inadequate or too speculative to warrant this form of government intervention.¹⁷⁶ Thus, a court will generally require more than a claim that publication will cause an invasion of privacy before it will permit a prior restraint.¹⁷⁷

Moreover, the information at issue here is at the core of the First Amendment's protections because it concerns the operations of a branch of the government.¹⁷⁸ Thus, any pre-publication restriction that relates to a judicial proceeding, and is placed upon the media by a court, should be regarded with skepticism. The nature of the informa-

171. See *supra* note 21.

172. See *supra* note 148 and accompanying text.

173. See *supra* notes 152-57 and accompanying text.

174. See *supra* note 156 and accompanying text.

175. *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951).

176. *Abrams*, *supra* note 144, at 422; see also, *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 569 (1976) (stating that the probability of harm in this case was not enough to show "the degree of certainty our cases on prior restraint require").

177. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); see *supra* note 144.

178. See *supra* notes 150-51 and accompanying text.

tion at stake—i.e., a witness' testimony—when looked at in combination with the First Amendment problems present in judicial decisions regarding the broadcast of a witness' testimony, strongly supports placing the onus on states to articulate clear rules designed to protect the free speech interests implicated by a witness' request that her testimony not be televised.

Most importantly, however, is the nature of the imposition on free speech that is presented by a judge's decision to prevent the broadcast of a witness' testimony. Such a ruling presents many of the same problems the prior restraint cases are meant to address. For example, prior restraints in any form are potentially threatening to First Amendment freedoms because they involve abstract assessments balancing the value of speech against its possible social harm, and are particularly susceptible to overenforcement.¹⁷⁹ In other words, because the harm the speech will allegedly cause has not yet come to pass, the assessment of this harm is purely speculative. The speculative nature of the inquiry makes it more likely that judges will be inclined to prohibit speech that would not, in fact, have caused any harm. When a judge decides that a witness' privacy interests outweigh the press' free speech rights—and the right of the public to view the "speech"—she is engaging in precisely the sort of abstract balancing of interests that inspired the current abhorrence of prior restraints. Moreover, given both her personal involvement in the litigation and her duty to ensure a fair trial,¹⁸⁰ it would be only natural for the judge to be inclined to overprotect the rights of the parties before her, including witnesses who implore the judge to protect their "privacy."¹⁸¹

Furthermore, conflicts with the prior restraints doctrine are not the only problems presented by granting judges unfettered discretion in deciding which witnesses' testimony may be broadcast. A judge's decision allowing the broadcast of some testimony, and denying the broadcast of other testimony due to a witness' privacy interest, is a forbidden editorial judgment about which parts of a trial are more "newsworthy." The judge is deciding which testimony is important enough—"newsworthy" enough—that the public's right to know outweighs any possible privacy interest of the witness. This type of ruling can only be justified as necessary to protect compelling state interests in privacy if the judge is constrained in her reasoning by clear state guidelines that explicate exactly what kinds of information will be deemed protected for privacy reasons, and what categories of witnesses will be deemed worthy of protection.

179. Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 *Minn. L. Rev.* 11, 49-63, 93 (1981).

180. *See supra* note 7.

181. *See supra* note 165 and accompanying text.

IV. STATES MUST ARTICULATE CLEAR GUIDELINES FOR DECIDING PRIVACY VERSUS FREE SPEECH QUESTIONS RAISED BY BROADCASTING WITNESSES' TESTIMONY

As seen above, in cases that present a threat to First Amendment interests—whether post-publication causes of action,¹⁸² or pre-publication government interference with the content or dissemination of information¹⁸³—the Supreme Court has consistently required state rules to be narrowly tailored to protect a compelling government interest. This part concludes that existing privacy jurisprudence, which balances precisely the interests at stake in judicial determinations to prevent the broadcast of a witness' testimony, should form the basis for new state guidelines.

A. The Supreme Court's Treatment of Privacy Causes of Action, Prior Restraints, and Editorial Decisions Supports a Requirement that Rules Allowing Judges to Prohibit Broadcast Coverage of Witnesses be Narrowly Tailored to Protect a Compelling State Interest

The Supreme Court has held that the method by which state governments may protect personal privacy rights is to control the dissemination of private information implicated in government actions, including court proceedings.¹⁸⁴ The Court has maintained that the publication of information available to the public generally may not be penalized;¹⁸⁵ therefore, dissemination of information concerning events that take place in open court is presumed to be protected.¹⁸⁶ When access to a trial has not been restricted, the witnesses' testimony is part of the information available to the public. This factor weighs in favor of requiring that state rules relating to the broadcast of witness testimony be narrowly tailored in order to protect the interest in publication that the Court has already recognized.

The traditional rule that there is no protected privacy interest in a person's likeness or image¹⁸⁷ provides further support for protections for the press' free speech in televised trials. Moreover, witnesses have

182. See *supra* Part II.

183. See *supra* Part III.

184. See *Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975); *supra* Part II.A.

185. *Florida Star*, 491 U.S. at 541; *Cox Broad.*, 420 U.S. at 494-95; see also *Forsher v. Bugliosi*, 608 P.2d 716, 726-27 (Cal. 1980). Note that the Court considers civil actions for damages to be "punishments" of speech, as evidenced in these cases.

186. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

187. See Restatement, *supra* note 125, § 652D cmt. b (stating that because "there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye," he therefore "cannot complain when his photograph is taken while he is walking down the public street and is published"). There are, however, protections for a person's likeness or image if it is appropriated for commercial purposes. See Restatement, *supra* note 125, § 652C; see, e.g., *White v. Samsung Elec. America Inc.*, 989 F.2d 1512 (9th Cir. 1993); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

ordinarily not been able to object to the fact that they are compelled to testify in front of the public and press.¹⁸⁸ Therefore, if a person has no protected interest in preventing the broadcast of her image when she is filmed while appearing in a public place, a person should have no protected interest in the video image of her testimony in a public, broadcasted trial.¹⁸⁹

It is true that the broadcast media enjoys less hearty First Amendment protections than other media and has no constitutional right to broadcast trial testimony.¹⁹⁰ Nevertheless, strict scrutiny applies to government-imposed regulations on broadcast speech if that speech touches on important public issues.¹⁹¹ Judicial proceedings are clearly part of the legitimate public interest. Indeed, "[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served."¹⁹² When a state has decided that cameras should be allowed in the courtroom, and a judge has found that no prejudice to the trial's outcome will result from the broadcast coverage, the public interest is presumably being served by such a broadcast. Again, this factor supports the protection of the press' right to choose which witnesses to broadcast during televised trials.

Furthermore, as a general proposition, editorial judgments are deemed to be beyond the scope of judicial powers.¹⁹³ Once a trial is opened to the broadcast media, the selection of which information to broadcast is an editorial judgment. Consequently, when states allow judges discretion to bar the broadcast of a particular witness' testimony who will presumably withhold consent based upon an interest in maintaining privacy of information—information that will be publicly available to all observers of the trial present in the courtroom, both public and press—those states are allowing judges to engage in an ad hoc balancing of First Amendment editorial rights and free speech on the one hand, and privacy rights on the other. This sort of balancing not only treads upon the province of the editor, but also bears a striking resemblance to a prior restraint on press.¹⁹⁴ Judges should, therefore, be guided by rules modeled after privacy case law, where both the Supreme Court and state courts have frequently embarked upon just such a balancing.

Current methods of resolving conflicts between First Amendment rights and witnesses' privacy rights are inadequate. Requiring the

188. This is due to the presumption of openness in trial court proceedings. *See Richmond Newspapers*, 448 U.S. at 575.

189. *See supra* note 123.

190. *See supra* note 19.

191. *Federal Communications Comm'n v. League of Women Voters*, 468 U.S. 364, 380-81 (1984).

192. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975); *see supra* note 27.

193. *See supra* Part III.B.2.

194. *See supra* note 179 and accompanying text.

consent of witnesses in a televised trial will result in a greater degree of infringement of broadcasters' speech than necessary to protect the witnesses' interests. Such infringement is, therefore, constitutionally overbroad. In states that do not require an affirmative showing of good cause in order to prevent the broadcast,¹⁹⁵ requiring consent allows witnesses who would not, in fact, be adversely affected by the broadcast coverage of their testimony to nevertheless preclude that coverage.¹⁹⁶ The scope of a consent requirement may well be permissibly narrow when employed to safeguard interests such as safety and criminal law enforcement, because these are interests that implicate concerns widely recognized as meriting special protections.¹⁹⁷ If the sole interest protected is personal privacy, however, the balance tips in favor of the First Amendment rights of the press and public, especially given the Supreme Court's reluctance to recognize a constitutional protection of private information.¹⁹⁸

Overbreadth in state rules poses particularly difficult problems when it has the potential to infringe upon freedom of speech and freedom of the press.¹⁹⁹ State action that has such potential is subject to strict scrutiny in the courts: the state rules must be promulgated to promote a compelling government interest and must be *narrowly tailored* to protect that interest.²⁰⁰ This strict scrutiny analysis is present both in the Supreme Court's cases regarding the publication of private information and in the areas of pre-publication interference with speech such as editorial judgments and prior restraints—which pose even more serious threats to First Amendment rights. In other words, this strict scrutiny analysis is incorporated into all of the areas of the Court's jurisprudence that relate to the question of judicial discretion to block the broadcast of witnesses' testimony. Thus, when personal privacy interests are the sole concern of a witness objecting to television coverage of her testimony, judicial discretion must be guided by explicit and detailed state guidelines on what private information is protected by that particular state, and decisions must be made on a case-by-case basis.²⁰¹

195. See *supra* note 46. Requiring good cause to be shown is problematic in its own right for non-party witnesses, because these witnesses will typically not have the advice of counsel. Dyer & Hauserman, *supra* note 2, at 1654.

196. McCall, *supra* note 3, at 1564.

197. See *supra* Part I.B & *infra* Part IV.C.1.

198. See *supra* Part II.A.

199. See *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (“[T]he sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.”).

200. *Id.* at 541.

201. States that have no privacy cause of action still presumably have an interest in protecting privacy. See *supra* note 125 (listing several states that have declined to adopt a cause of action for invasion of privacy based on the publication of private facts). When creating the guidelines called for in this Note, these states may find it

B. *States Should Look to Privacy Law Protections of Free Speech in Deciding Whether Witnesses Should be Able to Block the Broadcast of Their Testimony*

The Supreme Court has time and time again shown its reluctance to stay the free hand of the press. It frowns upon prior restraints. It prohibits courts from engaging in editorial judgments. It severely limits the protections states may give in the form of privacy causes of action. In all of these areas, the Supreme Court has said that First Amendment free speech rights must be protected by strict scrutiny of state rules that have the potential to inhibit free speech: the rules must be necessary to protect a compelling state interest, and must be narrowly tailored to minimize the injury to press.

When the decision has been made to allow a trial to be televised, all further decisions relating to the form and content of the trial's broadcast belong in the hands of the media. The only justification for a departure from this general principle is that such a departure is essential to protect a compelling state interest. Moreover, that departure must be carefully circumscribed to achieving its goals; it may not impinge any more than necessary on the freedom of the press to report on the events transpiring in the courtroom.

In order to ensure that they remain faithful to the Supreme Court's protections of the First Amendment, states should look to an area in their own jurisprudence that has already attempted to emulate that Court's decisions: laws protecting private facts. Here the balance between privacy and the First Amendment has already been struck, the precision cuts made, and the interests protected. By looking to these laws, states should be able to more easily delineate the exact contours of their state's interests in privacy, shortening the rope of judicial discretion that could previously have been used to choke off the First Amendment rights of broadcasters covering televised trials.²⁰²

C. *Application of Privacy Law Analysis to Particular Categories of Witnesses*

The foregoing analysis does not dictate any particular conclusion for the states; it allows states to decide for themselves—within the bounds of the Supreme Court's First Amendment parameters—what

useful to look both to other states' privacy laws and to the Supreme Court's jurisprudence in this area.

202. There is clearly a risk that if states adopt the explicit guidelines called for in this Note, judges may be less inclined to allow the broadcast media access to trials in the first place. The question of whether judges should be allowed broad discretion to forbid camera coverage of trials is not within the limited scope of this Note. Nevertheless, if a judge does not allow cameras in the courtroom for the sole purpose of pacifying a witness who would not otherwise satisfy the state's guidelines for protecting witnesses' privacy, that judge would be deliberately side-stepping the state's policy judgments regarding both cameras in the courtroom and the legitimate privacy interests of witnesses.

interests in privacy are worthy of state protection. This section takes a broad look at how employing a privacy law-based approach would affect the general categories of witnesses. It then examines some hypothetical situations with potential privacy implications and explores how an application of the privacy law-based framework may play out for the affected witnesses.

1. Witnesses with Concerns Relating to Safety, Law Enforcement, Youth, and Similar Considerations

Although First Amendment rights are implicated by a restriction on the coverage of witnesses in these categories, judicial discretion in preventing the broadcast of the testimony of these witnesses should usually be permissible. These witnesses are likely to advance state interests of the "highest order," such as safety, effective criminal law enforcement, and the protection of minors.²⁰³

Even in these categories, however, blanket rules are likely to be overbroad, infringing more speech than necessary to protect the important state interests.²⁰⁴ For example, most state rules regarding "juveniles" protect all youths under the age of eighteen.²⁰⁵ It is not difficult to imagine a case in which a confident seventeen-year-old is called to testify about some important but mundane fact in a criminal trial, such as the exact time the defendant clocked into work on the day of the crime. This testimony would touch on no "private" matters, would likely last only a matter of minutes, and would not involve a witness who was likely to be intimidated by the camera. In this situation, a blanket rule forbidding the coverage of the testimony of "minors" would clearly restrict more speech than necessary to serve the state interest in protecting child witnesses. Therefore, even in situations where the witness' interests are likely strong enough to outweigh the freedom of the press, decisions should always be made on a case-by-case basis, thereby ensuring that the rulings will be narrowly tailored to protect only those witnesses who truly need protection.

2. Witnesses With Concerns Relating Only to Privacy

Looking to their own state's explicit guidelines regarding the limits of protected privacy, judges will be able to analyze the anticipated content of testimony, and rule accordingly. The effect of having a uniform set of guidelines within each state will be to rein in judicial dis-

203. See *supra* Part I.B.2-4.

204. See *supra* note 196 and accompanying text.

205. See, e.g., Alaska Stat. § 25.20.010 (Michie 1996) (making age of majority 18 years old); Ark. Code. Ann. § 9-25-101 (Michie 1987) (same); Cal. Family Code § 6500 (West 1994) (same); Mich. Comp. Laws § 722.52 (1993) (same); Mont. Code Ann. § 41-1-101 (1995) (same); N.M. Stat. Ann. § 28-6-1 (Michie 1978) (same); cf. Ala. Code § 26-1-5 (1996) (making age of majority 19 years old); Wyo. Stat. Ann. § 14-1-101 (Michie 1977) (same).

cretion that can lead to the overprotection of privacy rights—at the expense of First Amendment rights. Setting specific guidelines will also ensure more uniformity among judges' rulings within each state,²⁰⁶ will give television stations notice of the type of information each state considers private, and will help witnesses conserve their energies in objecting only when there is a reasonable likelihood that their objections will be heeded.

Although this Note does not advocate the adoption of any particular set of privacy law principles, it is useful to explore some hypothetical situations in which a witness is likely to object to the broadcast of her testimony due to privacy concerns. The Restatement (Second) of Torts § 652D is the most common formulation of the private facts invasion of privacy cause of action,²⁰⁷ and it will, therefore, be used in these hypothetical examples to guide the judge's decision on the question of whether to broadcast the testimony.

a. *Witness #1: The Privacy of an Abortion*²⁰⁸

Witness #1 has been subpoenaed to testify at a civil trial. The plaintiff in the case, an abortion-rights activist, is suing a group of anti-abortion protesters for invasion of privacy and intentional infliction of emotional distress. The acts that led to the lawsuit stem from a particular protest in front of the plaintiff's gynecologist's office, in which the defendant protesters carried signs bearing the plaintiff's name and indicating that the plaintiff was about to undergo an abortion. The name of Witness #1 was also listed on the signs; however, she has chosen not to join in plaintiff's lawsuit. Witness #1 will be called by the plaintiff to testify regarding the circumstances of her name being placed on the protesters' signs, and defense attorneys plan to cross-examine her about the fact that she did undergo an abortion. Witness #1 has strong personal reasons for not wanting her abortion to be publicly known.

The judge has decided to allow the trial to be televised, largely because both parties have consented, glad for the broadcast exposure of their respective causes. Witness #1 has asked the judge to bar the broadcast of her testimony because it invades her right to privacy.

The Restatement says publicity must be "highly offensive to the ordinary reasonable man"²⁰⁹ in order to be protected²¹⁰ and requires that it is of no legitimate public concern.²¹¹ In a privacy cause of ac-

206. Cf. Pate, *supra* note 2, at 358-59 (noting that lack of uniformity discourages reluctant witnesses from coming forward); Gardner, *supra* note 47, at 506-09 (discussing merits of a uniform set of guidelines governing cameras in the courtroom).

207. See *supra* notes 124-25 and accompanying text.

208. This hypothetical is based loosely on the facts of *Doe v. Mills*, 536 N.W.2d 824 (Mich. App. 1995).

209. Restatement, *supra* note 125, § 652D cmt. c, at 387.

210. Restatement, *supra* note 125, § 652D(a).

211. Restatement, *supra* note 125, § 652D(b).

tion, a court may find that it is a question of fact whether or not the publicity was "highly offensive;"²¹² it is a close question that calls for a policy judgment. As such, it would be reasonable for a state to conclude that the unauthorized or unwanted publication of information of this nature is highly offensive.

Assuming that the state finds this information is private, it still must determine if the publicity relates to a matter of legitimate public concern. A state inclined to protect such information could look to its traditional handling of a person's medical treatment or condition, which is not considered a matter of legitimate public concern.²¹³ Moreover, the Restatement protects information related to sexual relations.²¹⁴ Thus, this state may find that "abortion concerns matters of sexual relations and medical treatment, both of which are regarded as private matters,"²¹⁵ and is thus protected under existing state rules.²¹⁶ It would be reasonable for a state to recognize that these are important privacy interests,²¹⁷ and as such, should be protected when they arise in the context of the broadcast of a witness' testimony if that witness so desires.

212. See, e.g., *Mills*, 536 N.W.2d at 829.

213. *Id.* at 830; see also *Swickard v. Wayne County Med. Exam'r*, 475 N.W.2d 304, 310-14 (1991); cf. Restatement, *supra* note 125, § 652D cmt. b, at 386 (listing "unpleasant . . . or humiliating illnesses" as a normally private matter).

214. Restatement, *supra* note 125, § 652D cmt. b, at 386; see *Mills*, 536 N.W.2d at 829.

215. *Mills*, 536 N.W.2d at 830.

216. There may be disagreement over whether or not abortion is a matter of "legitimate public concern." Some states may decide that the public's interest in the abortion controversy is high indeed, and therefore there is no invasion of privacy by exposing the identity—whether it be on placards used during a protest or on the airwaves during the broadcast of a trial—of someone who has an abortion. A state may very well reach the opposite conclusion, however, and find that the identity of such a person is *not* a matter of public concern. The argument of these states may parallel the following:

The fact that [persons] engage in an activity in which the public can be said to have a general interest does not render every aspect of their lives subject to public disclosure. Most persons are connected with some activity . . . as to which the public can be said as a matter of law to have a legitimate interest or curiosity. To hold as a matter of law that private facts as to such persons are also within the area of legitimate public interest could indirectly expose everyone's private life to public view.

Virgil v. Time, Inc., 527 F.2d 1122, 1131 (9th Cir. 1975). Whatever specific decision a state makes is irrelevant to this analysis so long as the states lay down specific guidelines that embrace these sorts of questions, and protect the competing rights of privacy and free speech.

217. Restatement, *supra* note 125, § 652D cmt. h, at 391 ("In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores.").

b. *Witnesses #2 and #3: The Privacy of Sexual Orientation*²¹⁸

Witnesses #2 and #3 have been called to testify at a civil trial. The plaintiffs are challenging, on equal protection grounds, a recently enacted amendment to the state constitution that prohibits the state government from establishing homosexuals and bisexuals as a protected minority class. The court challenge to the amendment will be televised with the consent of both the plaintiff and the defendant; it will be a bench trial.

Witness #2 is a gay father of two. He was in his late 20's when he came to terms with his sexual identity; he and his wife divorced when their children were very young. Although his wife is the primary caregiver to their children, now in their teens, he has been a significant presence in their lives. The children visit Witness #2 and his long-time partner every other weekend, and spend two months of every summer with them.

The plaintiffs have called Witness #2 to rebut one of the state's arguments in support of the amendment, namely, that the amendment is necessary to promote the physical and psychological well-being of children. He will testify that his children have not been adversely affected by their familial situation, and that he and his partner provide a stable, loving, and nurturing environment for the children. In addition, he will tell the court that he and his former wife have been able to reach an amicable agreement about the manner in which to raise the children, that is, their religious affiliation and moral upbringing. His family and close friends know his sexual orientation, but his employer and most others do not. Witness #2 has endeavored to keep his sexual orientation secret, to the extent that it is possible. He has asked that his testimony not be televised in order to protect his own privacy, as well as the privacy of his children and his partner.

Witness #3 is a 20-year-old college student who was raised by an openly lesbian couple. He has also been called by the plaintiffs to rebut the argument that the amendment is necessary to protect the traditional family. Witness #3 will testify that although being raised by two women presented some problems of social acceptance among others, he was not harmed physically or psychologically by the composition of his family. He will testify that he is not gay, he was never mistreated as a child, and he loves his parents.

Witness #3 has become an outspoken advocate for the rights of gays, lesbians, and bisexuals. Although most of his friends at school do not know that Witness #3 was raised by a lesbian couple, he has made no secret of his work for the gay rights movement. Neverthe-

218. This hypothetical is based loosely on the facts of *Evans v. Romer*, No. Civ. A. 92 CV 7223, 1993 WL 518586 (Colo. Dist. Ct. 1993), *aff'd*, 882 P.2d 1335 (Colo. 1994), *aff'd*, 116 S.Ct. 1620 (1996).

less, he has asked that his testimony not be broadcast, claiming that the broadcast would invade his privacy.

An amendment to a state's constitution is unquestionably a matter of legitimate public interest. This does not, however, necessarily mean that a state cannot or should not honor the requests of Witnesses #2 and #3. Each witness presents his own unique set of considerations.

As previously noted, information regarding a person's sexual relations is generally considered private, and worthy of protection.²¹⁹ In the case of Witness #2, apart from the fact that he is testifying in an important case,²²⁰ there seems to be no reason to find that his sexual orientation is a matter of public concern.²²¹ He has told only his family and close friends²²² and, therefore, seems to fall within the realm of protected privacy. Additionally, the judge may consider that the privacy interests of the witness' children add to her inclination to block the broadcast coverage of this witness' testimony. Once again, it would be reasonable for a state to conclude that it considers this type

219. See *supra* note 214 and accompanying text.

220. The Restatement does state that people who are involuntary participants in a judicial proceeding that attracts public attention "are regarded as properly subject to the public interest," and the "authorized publicity is not limited to the event that itself arouses the public interest." Restatement, *supra* note 125, § 652D cmt. f, at 389; see also *infra* note 226 and accompanying text. If this particular aspect of the invasion of privacy cause of action—for publication of private facts—is incorporated without modification into the regulation of broadcast coverage, the result may seem unfair; after all, the court itself is ultimately in control of what information will be broadcast during the proceeding. This, then, is a situation where the state may decide that its guidelines relating to the broadcast of witness' testimony should depart from the requirements of an invasion of privacy cause of action. If, however, the privacy interests are not such that they meet the Supreme Court's requirements for closing the courtroom altogether, see, e.g., *Waller v. Georgia*, 467 U.S. 39, 48 (1984) (stating that strict scrutiny applies to attempts to close courtroom to press and spectators); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-08 (1982) (holding that strict scrutiny applies to the closure of (criminal) trials, and the determination to close a trial or any portion thereof, must be made on a case-by-case basis), the information about Witness #2 will presumably be reported in other media, and will therefore be made public. Thus, a specific guideline directing judges to block the broadcast of this type of testimony will fail to protect the privacy interests of this witness. Predicaments such as this, however, are presented in every trial. States will have to weigh the arguments relating to the qualitative difference between cameras and other media when deciding this type of question. See *supra* note 54 and accompanying text; cf. *State v. Green*, 395 So. 2d 532, 536 (Fla. 1981) (finding that "the single addition of the camera in the courtroom in these circumstances should not increase tension significantly, given the fact that electronic media will report the proceedings whether or not its camera is actually in the courtroom").

221. Cf. *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 772-73 (1983) (finding the newsworthiness of a college student body president's sex change operation was a question of fact; it was not necessarily newsworthy despite the fact that the person was in a political position that garnered public attention).

222. See Restatement, *supra* note 125, § 652D cmt. b, at 386 (contrasting facts left "open to the public eye," which are not protected, with those "reveal[ed] only to . . . family [and] close personal friends," which are generally protected).

of information protected privacy,²²³ and, therefore, the judge should honor this witness' request not to have his testimony broadcast.

Witness #3 presents a different set of questions and circumstances. The Restatement does not protect information a person has already made public.²²⁴ It also contains less protection for people who voluntarily thrust themselves into the public eye.²²⁵ By publicly campaigning for gay rights, Witness #3 has likely made himself a public figure on this issue. Also, although he has not put information relating to the sexual orientation of his parents into the public arena, this information is closely associated with the cause he has chosen to champion. Moreover, in the case of a voluntary public figure, "the legitimate interest of the public in the individual may extend beyond those matters which are themselves made public, and to some reasonable extent may include information as to matters that would otherwise be private."²²⁶ Hence, the judge could reasonably conclude that consistent with her state's guidelines on the broadcast of witness' testimony in televised trials—guidelines which incorporate that state's privacy protections from its tort of invasion of privacy—Witness #3's request to prohibit the broadcast of his testimony in this important trial should be denied.²²⁷

c. *Witness # 4: The Privacy of the Average Person*²²⁸

Witness #4 has been called to testify in a murder trial. She is a working woman in her late-forties. She is married and has two grown children.

The defendant in the case is charged with the shooting of a store clerk during an armed robbery. A security camera has captured the event on film. The defense contends that the man pictured in the black-and-white video tape is not the defendant. The defense plans to call a witness who will testify that the defendant was wearing a red jacket on the day of the murder. Eye witnesses to the murder did not see the killer's face, but will testify that he was wearing a black jacket during the shooting. The trial has garnered media attention because the victim was a newlywed, and the crime took place on Christmas Eve.

223. See *supra* note 217.

224. Restatement, *supra* note 125, § 652D cmt. b, at 385.

225. *Id.* cmt. e, at 389.

226. *Id.*; see *id.* cmt. h, at 391.

227. Cf. *Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665 (1984) (finding that the sexual orientation of a San Francisco man who saved the life of President Ford during an assassination attempt, and was later the subject of national press, was newsworthy and not private, even though he had not previously revealed his homosexuality to relatives in the Midwest).

228. This hypothetical was inspired by the facts and reasoning of *People v. Solomon*, 524 N.Y.S.2d 1012 (1988).

Witness #4 has been subpoenaed to testify for the prosecution in this murder case. She will testify that as she was leaving the store, just moments before the shooting, she saw the defendant enter the store wearing a black jacket—the security video shows Witness #4 leaving the store at the same moment the killer entered.

The judge has determined that Witness #4 faces no risk to her safety if her testimony is broadcast, and Witness #4 herself does not fear for her safety. She has, however, expressed to the judge her wish that her testimony not be broadcast—she simply does not want to be on television.

In this situation, none of the Restatement indicia of an invasion of privacy is present. A court may find significant the fact that “it does not appear that this case will deal with any explicit sexual testimony or graphic depiction of nudity,”²²⁹ which are possibly the most common types of protected information. Additionally, the media interest stems not from any private information that may be revealed by the witness, but rather from the nature of the crime itself.²³⁰ The court could reasonably conclude that Witness #4’s objection does not stem from a privacy concern at all—at least not one protected by the state’s formulation of the law of invasion of privacy, and, consequently, its protection of witnesses.

Moreover, Witness #4 has become involved in a matter of legitimate public concern—a brutal crime; she was “so unfortunate as to be present when [the crime was] committed.”²³¹ Therefore, Witness #4 herself is “regarded as properly subject to the public interest.”²³² It would be reasonable for the court to conclude that this witness’ objection to broadcast coverage should not be allowed to defeat the state’s policy judgments that allowed the broadcast media access to this courtroom.²³³

CONCLUSION

We live in a world where “the general public does not believe that the media version of an event is the way they would see it themselves. Like it or not, America sees the world through the lens of a camera, and there is nothing like seeing it for yourself.”²³⁴ If we are truly to value the public’s right to evaluate and critique our government in general, and the court system in particular, we must give people the maximum amount of information consistent with the protection of other competing rights. When the face-off is between the First Amendment and personal privacy interests, that balance is a precari-

229. *Solomon*, 524 N.Y.S.2d at 1013.

230. *Id.*

231. Restatement, *supra* note 125, § 652D cmt. f, at 389.

232. *Id.*

233. See *supra* note 27.

234. *Zemans*, *supra* note 27, at 173.

ous one, requiring precise rulings that minimize the damage to either right. Given the many restrictions already placed on television coverage of trials, states should pay scrupulous attention to their own guidelines to ensure that decisions affecting the many people that make up "the public" are not subsumed by the more immediately sympathetic witness pleading "privacy."

Notes & Observations