

**I AM A CAMERA: SCRUTINIZING THE ASSUMPTION THAT
CAMERAS IN THE COURTROOM FURNISH PUBLIC VALUE BY
OPERATING AS A PROXY FOR THE PUBLIC**

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The United States Supreme Court has held that the public has a constitutional right of access to criminal trials and other proceedings, in large part because attendance at these events furnishes a number of public values. The Court has suggested that the press operates as a proxy for the public in vindicating this open court guarantee. That is, the Court has implied that any value that results from general public attendance at trials is replicated when members of the media attend and report on trials using the same means of perception as other members of the public.

The concept of “press-as-proxy” has broken down, however, when the media has attempted to bring cameras into the court. The addition of cameras to the experience is thought to change the identity of action between the public generally and the photographic press specifically during the trial process. Despite its skepticism about cameras, the Court has held there is no constitutional bar to their admission at criminal trials. But its wary acceptance of the technology has not translated into the recognition of a constitutional right to bring cameras into courts. Instead, the Justices have developed a sort of constitutional demilitarized zone, in which cameras are neither prohibited nor mandated. Individual states may adopt camera admissions policies that reflect their policy preferences. State rulemakers addressing the camera issue typically perform a cost-benefit analysis. The primary cost—possible interference with Sixth Amendment fair trial guarantees—has been provisionally disproven in a number of studies. The primary benefit—achievement of the public values identified by the Court in the access cases—is typically assumed to exist but lacks empirical documentation. The assumption of a public value is impliedly grounded in the press-as-proxy conceit: if actual public attendance furnishes value and if the press is a viable proxy for the

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public, and if the camera-bearing press functions identically to other media, then cameras must furnish relevant public values. Using the conceit to prove public value, and survey data to prove a negligible public cost, every state has admitted cameras to one or more levels of their courts.¹

This Article does two things. First, it examines the access cases to distill the specific values the Supreme Court has identified as relevant byproducts of open courtrooms; the possibility of realizing these values has dictated the constitutional scope of public access. The values fall along a spectrum: those this Article deems “information-dependent” depend on the transmission of objective information, while those this Article deems “response-dependent” depend on subjective citizen opinion and engagement. Second, the Article scrutinizes the assumption that as long as cameras do not impose a demonstrable fair trial cost, they achieve the relevant public values by virtue of the press-as-proxy conceit. Studies suggest that, at least as currently produced, television news with live footage is actually inferior to print, audio, or footage-free television at achieving the information-dependent values the Court has identified as the basis for access.² These same studies indicate that it may be superior to other media at fostering opinion development and emotional engagement. At a minimum, studies of typical television news demonstrate that it does not uniformly replicate the values furnished by the camera-free press. In other words, the press-as-proxy conceit is not valid for the camera-bearing press.

Dismantling the press-as-proxy conceit for cameras wipes out the underlying basis for existing state camera policies, most of which rely on the proxy as evidence of public value. Further, it represents an obstacle to possible claims of a First Amendment right of the press to record and televise court proceedings. The invalidity of the proxy does not mean that cameras are categorically incompatible with court proceedings, but it underlines the need for empirical research into claims that cameras should be admitted because they furnish public value. The Article concludes that policymakers weighing the costs and benefits of camera admission—and courts weighing a First Amendment broadcast access right—are hamstrung by the lack of empirical research into the value of cameras in the courtroom. The issue is timely. A significant number of states continue to bar or effectively block trial court cameras, inviting continued pro-camera ef-

¹ See *infra* note 90 and accompanying text.

² See *infra* Part IV.

forts.³ And the campaign for televising Supreme Court arguments and lower federal court trials continues unabated, despite the apparent institutional resistance from the Justices and the Judicial Conference.⁴ Advocates frustrated by unsuccessful policy arguments for more camera access to the federal courts may eventually consider a constitutional argument as an alternate means of securing camera admission to these proceedings.⁵

Part I of this Article reviews the Court's public access cases to tease out the distinct public values that are thought to result from opening courtrooms. These values include: transmission of information, scrutiny of the legal system, checks on judicial abuse, discharge of citizen duties, confidence in the system, and catharsis in response to significant community events. These values serve both First Amendment free speech goals and Sixth Amendment fair trial goals. The first three values—referred to here as “information-dependent”—are more likely to be realized when members of the public receive objective information about the legal system, whereas the latter values—referred to here as “response-dependent”—may emerge as a result of subjective opinion development and emotional engagement, even in the absence of objective information. In its latter-day cases on access to court proceedings, the Court has conditioned that right on the historic openness of the proceeding at issue and the positive contribu-

³ See *infra* note 124. As recently as February 2013, for instance, the Chief Judge of the New York State Court of Appeals asked legislators to amend state laws that now obstruct camera use in the trial courts. Michael Virtanen, *N.Y. Chief Judge: Open Courts to Cameras Again*, ELMIRA STAR-GAZETTE, Feb. 13, 2013.

⁴ See, e.g., Adam Liptak, *Bucking a Trend, Supreme Court Justices Reject Video Coverage*, N.Y. TIMES, Feb. 19, 2013, at A15 (reporting that a number of Justices in the past two years have either reaffirmed their opposition to cameras or adopted an anti-camera stance contrary to their Senate confirmation testimony, and quoting one First Amendment expert who has called the opposition inconsistent with free speech values).

⁵ The possibility of forcing the Justices to accept a First Amendment right of cameras at oral argument is remote. See Alicia M. Cohn, *Justice Scalia: Cameras in Supreme Court Would 'Miseducate' Americans*, HILL (July 26, 2012, 4:15 PM), <http://www.thehill.com/video/in-the-news/240519-justice-scalia-cameras-in-supreme-court-would-miseducate-americans> (quoting Justice Scalia's view that “[t]he First Amendment has nothing to do with whether we have to televise our proceedings”); Mike Dorf, *Cameras in Courtrooms*, DORF ON L. (Feb. 19, 2013, 12:30 AM), <http://www.dorfonlaw.org/2013/02/cameras-in-courtrooms.html> (observing that the Supreme Court is unlikely to find its own refusal to allow cameras at its proceedings to violate the First Amendment). But as discussed *infra* notes 79–87 and accompanying text, the Court's trial access cases open the door to a general argument that the First Amendment mandates some camera access rights, particularly at the trial level. In fact, camera proponents denied admission to lower federal trial courts have in the past made just this case, and have won general agreement on the point from at least one appeals court judge. See *infra* note 87.

tion to the public values that would result from opening the proceeding.

Part II demonstrates the Court's implicit assumption that the general press operates as a proxy for the public when it attends and reports on trials using the same means of perception and communication as members of the general public. It then examines the Court's differential treatment of cameras to show that the press-as-proxy conceit comes undone when the media seek to film trials. The link breaks because of the perceived unique costs associated with filming and televising court proceedings. However, this Part demonstrates that in cases following the declaration that cameras are not a per se fair trial violation, the Court has left largely undisturbed the assumption that cameras are an adequate proxy for the public on the benefit side of the ledger. The inadvertent preservation of the proxy for the broadcast press gives rise to a presumption that courtroom cameras produce the same public values that justify general public access to courts.

Part III shows that camera advocates have leaned heavily on the proxy in their campaign to change state court camera rules. Advocates consistently invoke the press-as-proxy conceit to suggest that camera recording of trials furnishes the same public benefits as technology-free media attendance at trials. Policymakers adopting pro-camera rules have followed suit, alluding to the public value of cameras without scrutinizing the basis for the claim. This equation—a documented absence of cost and an assumed benefit—has yielded a nationwide trend in favor of cameras.

Part IV examines the accuracy of the broadcast-press-as-proxy conceit. It reviews communications studies research into viewer recall, comprehension, and response to television news. Studies indicate that live footage used in television news does not add to—and in fact detracts from—viewer recall and understanding of information in a story. This literature suggests that several of the public values thought to justify camera access to trials are demonstrably *not* achieved by television news featuring courtroom footage. Consequently, this Part indicates that the press-as-proxy conceit is deeply flawed for television news featuring live footage.

The Article concludes that policymakers deciding whether cameras furnish a net public benefit cannot rely on the assumption that television news featuring live footage is a proxy for public attendance at trials. If the proxy is invalid as evidence of public value, those considering camera access—whether state rulemaking bodies weighing the soundness of a camera policy or courts asked to recognize a First Amendment right to film trials—require empirical studies of the like-

likelihood that actual television news reports integrating courtroom footage furnish public value. This type of study has been neglected to date, largely because the press-as-proxy conceit has been used in its place as proof of benefit. The dismantling of the proxy highlights the urgent need for research on the efficacy of televised court proceedings in achieving public values.

I. THE PUBLIC VALUES ASSOCIATED WITH ACCESS TO COURTROOMS

In a line of cases stretching from 1948⁶ to 1986,⁷ the Supreme Court has considered multiple times the constitutional justifications for the “public trial” guarantee. As a matter of text and history, the right was long grounded in the Sixth Amendment.⁸ For years, the Court interpreted the public trial right with primary reference to the protection of individual defendants, while acknowledging that public values were created as a byproduct of the right.⁹ But because a Sixth Amendment-centered right of access prioritizes a criminal defendant over the public generally, the Court has been asked several times to curtail public attendance—and media participation—where it is alleged to jeopardize fair trial rights.¹⁰ Eventually, the Court resolved this ongoing tension when it recognized a freestanding First Amendment guarantee of public access to trials, subject to measures necessary to guarantee Sixth Amendment rights.¹¹ Throughout the access cases, the Court has repeatedly stated that access is justified because of its potential to furnish to the public specific, constitutionally prized, values.¹² These values are public information; public scrutiny of the legal system; checks on judicial abuse; citizen participation in government; public confidence in the legal system; and community therapy in response to significant events.¹³ Having expanded the access right from a pure Sixth Amendment mechanism to a combined Sixth Amendment-First Amendment mechanism, the Court eventually suggested that First Amendment-based access claims

6 *In re Oliver*, 333 U.S. 257 (1948).

7 *Press-Enter. Co. v. Superior Court (Press-Enter. II)*, 478 U.S. 1 (1986).

8 *See infra* notes 15–19 and accompanying text.

9 *See infra* notes 18–23 and accompanying text.

10 *See infra* notes 19–23 and accompanying text.

11 *See infra* notes 24–26 and accompanying text.

12 *See infra* Part I.B.

13 *See infra* Part I.B.

turned on the likelihood that access would make a “positive contribution” to the public values.¹⁴

A. *Public Access: The Sixth Amendment Baseline and the First Amendment Enhancement*

The Sixth Amendment explicitly guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”¹⁵ After the federal government adopted a public trial guarantee in 1791, most states followed suit with similar state constitutional provisions.¹⁶ In 1948, based on the Sixth Amendment public trial guarantee, the Court invalidated the conviction of a petitioner who was tried and convicted in the chambers of a Michigan judge acting pursuant to the state’s “One-Man Grand Jury” mechanism.¹⁷ At a minimum, the Court suggested, the public trial guarantee meant that “relatives, friends, and counsel” of a defendant were entitled to attend his trial.¹⁸ How far beyond this group the Sixth Amendment mandate extended the scope of the “public” entitled to attend was unclear. In other settings, the Court had signaled that the guarantee was widely available—it observed in a case affirming the right of trial attendees to report on what they saw and heard in the courtroom, it observed that “[w]hat transpires in the courtroom is public property.”¹⁹ Despite this generous description, the derivation of the right from the defendant-protective Sixth Amendment left open the possibility that segments of the public unaligned with the defendant could be excluded consistent with the Sixth Amendment.

The Court tackled that issue in *Gannett Co. v. DePasquale*, where a trial judge closed a pretrial suppression hearing at the unopposed request of a murder defendant.²⁰ The Court determined that the Sixth Amendment “public trial” guarantee was held by the defendant and not by individual members of the public such as the journalists who challenged the closure after the fact.²¹ The decision, which drew three concurrences and a partial dissent from four members of the

14 *Press-Enter. Co. v. Superior Court (Press-Enter. I)*, 464 U.S. 501, 518 (1984) (Stevens, J., concurring).

15 U.S. CONST. amend. VI.

16 *In re Oliver*, 333 U.S. 257, 267 (1948).

17 *Id.* at 260.

18 *Id.* at 271–72.

19 *Craig v. Harney*, 331 U.S. 367, 374 (1947).

20 443 U.S. 368, 376 (1979).

21 *Id.* at 379.

Court, was widely decried by commentators.²² Many complained that if the access right was held exclusively by the defendant, he could waive it and thereby effectively shut the public out of the court proceeding.²³

Just a year later, the Court responded to these complaints and its own internal divisions by dramatically expanding the constitutional foundation of the public trial guarantee. The public at large held a distinct right of access to trials, it determined, by virtue of the First Amendment.²⁴ The rights of free speech, press, and assembly assure a “right of access to places traditionally open to the public, as criminal trials have long been.”²⁵ At the same time, the Court held that upon a finding that openness could compromise fairness, public access might have to give way.²⁶

After identifying this First Amendment-derived basis for the open trial guarantee, the Court eventually extended the open trial guarantee to voir dire²⁷ and some preliminary criminal hearings;²⁸ it has also remarked in dicta that the presumption applied to civil as well as criminal proceedings.²⁹

B. The Public Values Associated with Access to Court Proceedings

In its cases establishing the scope of the public access right under the Sixth and First Amendments, the Court has discussed repeatedly the values that can be realized when the public has access to trials.³⁰ Roughly categorized, they include public information, public scruti-

²² See, e.g., Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1568–69 (2010) (describing media criticism of the *DePasquale* decision).

²³ Bill Barnhart, *Justice Stevens and the News Media: An Exercise in Exposition*, 106 NW. U. L. REV. 657, 684–85 (2012).

²⁴ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality opinion).

²⁵ *Id.* at 577.

²⁶ *Id.* at 581 n.18.

²⁷ *Press-Enter. I*, 464 U.S. 501, 508–09 (1984).

²⁸ *Press-Enter. II*, 478 U.S. 1, 9–14 (1986).

²⁹ *Richmond Newspapers*, 448 U.S. at 580 n.17 (plurality opinion).

³⁰ See *infra* notes 32–69 and accompanying text. Moreover, constitutional imperatives are satisfied if the courtroom is open and creates the opportunity for public value, whether or not the value actually materializes in any particular proceeding. See, e.g., *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 610 (1978) (“The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.”).

ny, checks on judicial abuse, discharge of citizen duties, public confidence, and community therapeutic value.³¹ Each is discussed below.

Conveyance of Information to the Public. The Court has noted repeatedly that open trials are beneficial because they provide to the public information about how the courts and legal system function. In *Estes v. Texas*, despite finding that the media had overreached in the case before him, Justice John Marshall Harlan II stated that “[m]any trials are newsworthy.”³² *Sheppard v. Maxwell*, overturning the denial of a habeas petition filed by a murder defendant convicted after intense and unruly media behavior in the courtroom, nevertheless echoed this point.³³ The Court observed that the press has a role in judicial administration because it “publish[es] information about trials.”³⁴ In *Nebraska Press Ass’n v. Stuart*, the Court reversed a state trial judge’s gag order on the press, extending protection for “[t]ruthful reports of public judicial proceedings” that inform the public.³⁵ Concurring in the judgment, Justice William Brennan extolled the press for contributing to “public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system.”³⁶ In *DePasquale*, the Court denied that the general public had a Sixth Amendment right to attend trials, but observed that public trial access was nevertheless valuable because it “[gave] the public an opportunity to observe the judicial system.”³⁷ The dissenters in that case agreed that crime, prosecutions, and the judicial proceedings surrounding them are legitimate matters of public concern, and that open trials “provide a means for citizens to obtain information about the criminal justice system.”³⁸ In *Richmond Newspapers, Inc. v. Virginia*, recognizing a First Amendment foundation for a public access right, the Court repeated that opening trials leads to “public understanding of the rule of law and to comprehension of the functioning of the en-

31 In a single stray dictum, Chief Justice Burger mentioned that trials were historically a way to “pass[] the time” as a form of entertainment, but as that justification appears just once and is not developed throughout the cases, its weight as a policy basis for opening trials seems slight. *Richmond Newspapers*, 448 U.S. at 572 (plurality opinion) (quoting 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1834, at 436 (James H. Chadbourn rev., 1976)).

32 381 U.S. 532, 589 (1965) (Harlan, J., concurring).

33 384 U.S. 333, 338 (1966).

34 *Id.* at 350.

35 427 U.S. 539, 559 (1976).

36 *Id.* at 587 (Brennan, J., concurring in judgment).

37 *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979).

38 *Id.* at 448 (Blackmun, J., dissenting).

ture criminal justice system;³⁹ this public information function was thought to operate both with regard to “the system in general and its workings in a particular case.”⁴⁰

Public Scrutiny. The Court has suggested that public access to trials can lead to public scrutiny of individual proceedings and of the criminal justice system as a whole.

The trial-specific value of public scrutiny was introduced in *In re Oliver*.⁴¹ The Court amplified the theme in *DePasquale*, when it determined that the guarantee of openness in the Sixth Amendment was designed for the benefit of the individual defendant in each trial. The public was on hand during criminal trials to “see [that the accused was] fairly dealt with and . . . [to] keep his triers keenly alive to . . . the importance of their functions.”⁴² *Richmond Newspapers* reaffirmed this trial-specific public scrutiny value, noting that public attendance historically “gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.”⁴³

A second “scrutiny” value, focusing on oversight of the criminal justice system as an institution, also arises in the access cases. Effectively granting habeas review in *Sheppard* because of media run amok, the Court observed that the press was typically an integral part of effective judicial administration because it “subject[s] the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.”⁴⁴ This theme is one of the most prominent throughout the access cases. In *Cox Broadcasting Corp. v. Cohn*, when the Court condoned the publication of a rape victim’s name after it was circulated in open court, it remarked that “the function of the press . . . bring[s] to bear the beneficial effects of public scrutiny upon the administration of justice.”⁴⁵ It appears in *Nebraska Press Ass’n*, when the Court

39 448 U.S. 555, 573 (1980) (plurality opinion) (quoting *Neb. Press Ass’n*, 427 U.S. at 587 (Brennan, J., concurring in judgment)).

40 *Id.* at 572. Notably, at least one Justice has taken issue with a “public education” justification for courtroom access premised on merely acquainting the public with the trial process. “[T]he function of a trial is not to provide an educational experience; and there is a serious danger that any attempt to use a trial as an educational tool will both divert it from its proper purpose and lead to suspicions concerning the integrity of the trial process,” worried Chief Justice Warren. *Estes v. Texas*, 381 U.S. 532, 575 (1965) (Warren, C.J., concurring).

41 333 U.S. 257, 273 (1948).

42 443 U.S. at 380 (quoting *In re Oliver*, 333 U.S. at 270 n.25).

43 448 U.S. at 569 (plurality opinion).

44 *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

45 420 U.S. 469, 492 (1975).

said that “truthful reports of public judicial proceedings [by the press] . . . subject[] the . . . judicial process[] to . . . public scrutiny and criticism.”⁴⁶ Justice Brennan added in concurrence that press coverage of public trials can “improve the quality of [the justice] system by subjecting it to the cleansing effects of exposure and public accountability.”⁴⁷ It appears in *DePasquale*, where the Court declined to find an access right held by the public but acknowledged that “[o]penness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, [and] cause all trial participants to perform their duties more conscientiously.”⁴⁸ The *DePasquale* minority specifically asserted that access was not for the benefit of the accused, but instead to allow for a public quality control function over the criminal justice system as a whole; Bentham had argued that public trials “relat[ed] to the integrity of the trial process,” and the minority agreed that they “safeguard the integrity of the courts.”⁴⁹ *Richmond Newspapers* repeated the justification that openness guaranteed systemic public scrutiny, because media presence “historically has been thought to enhance the integrity and quality of what takes place.”⁵⁰ Concurring in the judgment, Justice Brennan said that “[p]ublicity serves to advance several of the particular purposes of . . . the judicial[] process. Open trials play a fundamental role in furthering the efforts of our judicial system to assure [fair proceedings].”⁵¹

Checks on Judicial Abuse. The Court has emphasized repeatedly that open court proceedings furnish an antidote to judicial abuses. Preventing or responding to judicial abuse arguably overlaps with the public scrutiny values, but the Court has highlighted it as a specific value. The Court has noted more than once that Bentham conceptualized open trials as a check on possible judicial abuse.⁵² In *Richmond Newspapers*, Justice Brennan pointed out that the threat of judicial abuse of power is offset by “contemporaneous review in the forum of public opinion.”⁵³

46 427 U.S. 539, 559–60 (1976).

47 *Id.* at 587 (Brennan, J., concurring in judgment).

48 *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979).

49 *Id.* at 423, 448 (Blackmun, J., concurring in part and dissenting in part).

50 *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980) (plurality opinion).

51 *Id.* at 593 (Brennan, J., concurring in the judgment).

52 *Id.* at 589–90; *DePasquale*, 443 U.S. at 448 (Blackmun, J., dissenting).

53 *Richmond Newspapers*, 448 U.S. at 592 (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)). *But see infra* note 77 (questioning whether consideration of public opinion is appropriate in judicial decision making).

Discharge of Citizen Duties. The Court has often suggested that open access to trials provides public value by giving citizens the information and motivation necessary to effectively participate in government. In his *DePasquale* concurrence, Justice Lewis Powell argued that open courtrooms give citizens access to “information needed for the intelligent discharge of . . . political responsibilities.”⁵⁴ The dissenters in *DePasquale* agreed that opening courtrooms produced information on crime, prosecutions and judicial proceedings essential in order for citizens to weigh in on “public business.”⁵⁵ They observed that open trials serve “an important educative role” because “[j]udges, prosecutors, and police officials often are elected or are subject to some control by elected officials, and a main source of information about how these officials perform is the open trial.”⁵⁶ Concurring in *Richmond Newspapers*, Justice Brennan stated that “valuable public debate . . . must be informed,”⁵⁷ and added that because adjudicating cases is a governmental function, citizens have a stake in knowing about it.

Public Confidence. The notion that open trials further public confidence in the legitimacy of the judicial system was articulated in Justice Harry Blackmun’s *DePasquale* dissent, to bolster the minority view that the Sixth Amendment open trial guarantee was held by the public as well as the accused. He explained that public witness to the appearance that justice was being done was essential to “public confidence” in “the rule of law and in the operation of courts.”⁵⁸ A plurality of the Court embraced the “public confidence” justification for opening trials in *Richmond Newspapers*. Public trials lead to acceptance of “the process and its results,” which leads to “confidence in judicial remedies.”⁵⁹ Concurring in the judgment, Justice Brennan agreed that in a civilization “founded upon principles of ordered liberty,” the community must “share the conviction that they are governed equitably.”⁶⁰ Declaring that cameras were not a per se violation of the Sixth Amendment, the Court repeated this theme in *Chandler v. Florida*, citing the Florida Supreme Court’s conclusion that tele-

54 443 U.S. at 398 (Powell, J., concurring) (quoting *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting)).

55 *Id.* at 412–13 (Blackmun, J., concurring in part and dissenting in part) (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975)).

56 *Id.* at 428.

57 448 U.S. at 587 (Brennan, J., concurring in judgment) (emphasis added).

58 *DePasquale*, 443 U.S. at 448 (Blackmun, J., dissenting).

59 *Richmond Newspapers*, 448 U.S. at 571–72 (plurality opinion) (quoting 6 WIGMORE, *supra* note 31, § 1834, at 438).

60 *Id.* at 594 (Brennan, J., concurring in judgment).

vised proceedings would lead to public “confidence in the [trial] process.”⁶¹ Notably, language in these opinions suggests that as with the “public scrutiny” value, the “public confidence” designed to be achieved by open courtrooms denotes confidence in the system as a whole, as well as confidence in particular trial outcomes.⁶² The Court has theorized that the public would be more accepting of even unpopular results in specific cases if they resulted from open, rather than closed, proceedings.⁶³

Community Therapy. The Court fully elaborated the value of community therapy or social catharsis in *Richmond Newspapers*, stating that public trials had an important “therapeutic” function. Public trials provide an outlet for the community impulse to vengeance in response to a “shocking crime,” the Court said.⁶⁴ It pointed to expert views that “[t]he accusation and conviction or acquittal, as much perhaps as the execution of punishment, operat[e] to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and perhaps, to satisfy that latent ‘urge to punish.’”⁶⁵ The Court suggested that because community members have ceded to the state the function of imposing punishment, they need assurance that the state is carrying out that function in order to secure the continued acquiescence in the state monopoly on violence.⁶⁶ Although this theory was fully articulated in *Richmond Newspapers*, the Court had subtly alluded to it in previous cases. For instance, mentions of a “proper public interest in [the] testimony” of the accused⁶⁷ and to the need for public confidence in the “ability of the courts to administer the criminal laws,”⁶⁸

61 *Chandler v. Florida*, 449 U.S. 560, 565 (1981) (citing *In re* Petition of Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 780 (Fla. 1979)).

62 *Richmond Newspapers*, 448 U.S. at 572 (plurality opinion) (“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”).

63 *Id.* at 571 (“A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.”). *But see infra* note 74 (discussing that many viewers of the Casey Anthony murder trial were convinced after following the trial that she had killed her child and were therefore outraged by the “not guilty” verdict, which apparently reflected jurors’ finding of insufficient evidence rather than actual innocence).

64 *Richmond Newspapers*, 448 U.S. at 571 (plurality opinion).

65 *Id.* (quoting Gerhard O. W. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 6 (1961)).

66 *Id.* (observing that a community unaware that society’s agreed response to a crime is “underway” will be tempted to pursue vigilante justice).

67 *Gannett Co. v. DePasquale*, 443 U.S. 368, 394 (1979) (Burger, C.J., concurring).

68 *Id.* at 429 (Blackmun, J., concurring in part and dissenting in part).

and “in the rule of law”⁶⁹ seem targeted at the concept that the public is entitled to assurance that the state is properly conducting its role as enforcer of social norms.

In sum, the Court has alluded to six distinct public values that are the goal and justification for allowing the public free access to criminal and civil trials, pretrial hearings, and voir dire. The benefits derived from public access to trials include conveyance of information about the justice system, public scrutiny of the justice system, checks on judicial abuse, citizen participation in the justice system, confidence in the justice system, and community therapy in response to significant events.

The six values can be fairly described as sitting along a spectrum. At one end are the information, scrutiny, and prevention of judicial abuse values, which will not materialize absent retention and comprehension of objective information about legal rules and legal actors—what can be called “information-dependent values.” At the other end are the discharge of duties, public confidence, and community therapy values, which depend less on acquiring objective information and more on the development of subjective opinion and emotional engagement with the system—what can be called “response-dependent values.”

C. *The First Amendment Test for Expanding Access*

The Court has indicated that requests to expand the First Amendment access right to courtroom proceedings beyond the basic right to attend criminal trials, voir dire, and some preliminary hearings are subject to two limiting principles. In *Globe Newspapers Co. v. Superior Court*, decided two years after *Richmond* established a First Amendment right of access to criminal trials, Justice Brennan noted that access to other court proceedings should be determined based on whether the proceeding was historically considered open⁷⁰ and

⁶⁹ *Id.* at 448.

⁷⁰ The cases do not make clear whether the two-part test, historical pedigree and “significant role” in self-government, is conjunctive or disjunctive, instead describing the considerations as “complementary.” *Press-Enter. II*, 478 U.S. 1, 8 (1986) (discussing the two considerations that the Court has traditionally emphasized when dealing with claims of a First Amendment right of access to criminal proceedings). Further, *Press-Enterprise II* suggests some disagreement over the kind of historical pedigree sought as a justification for access. The majority in that case found the historical consideration satisfied by a common-law trend among multiple states to open pretrial proceedings to the public. *Id.* at 10–11. In contrast, Justice Stevens in dissent suggested that the historical consideration requires the access at issue to have been part of the legal fabric at the time the First Amendment was adopted. *Id.* at 22–23.

whether access to the proceeding would “play[] a particularly significant role in the functioning of the judicial process and the government as a whole.”⁷¹ The “significant role” as described by Brennan included “[p]ublic scrutiny,” “public respect for the judicial process,” “public . . . participat[ion],” and “checks [on] the judicial process”⁷²—in short, what this Article has described as the public values. Elaborating on the application of this test where an access claim is premised on the First Amendment, Justice John Paul Stevens explained that “a claim to access cannot succeed unless access makes a positive contribution to [the] process of self-governance,”⁷³ an apparent reference to the public values that justify access. This “positive contribution” consideration dictates that access will not be granted absent an indication that opening the proceeding may furnish a public value the Court has identified as relevant.⁷⁴

⁷¹ 457 U.S. 596, 606 (1982).

⁷² *Id.*

⁷³ *Press-Enter. I*, 464 U.S. 501, 518 (1984) (Stevens, J., concurring).

⁷⁴ The Court has not made clear whether realization of a single public value satisfies the “positive contribution” test, or whether multiple or even all of the values would have to be realized. Notably, the information-dependent values are in some tension with the response-development values. At one end of the spectrum, the Court seems to be endorsing rational responses to court proceeding, while at the other, it acknowledges a place for emotional responses. This conflict is not surprising, as it replicates an evolution in the Anglo-Saxon approach to appropriate methods of public decision-making in trials. Trials were originally seen as opportunities for the public to develop and impose normative opinions about the accused without full consideration of the facts, as Chief Justice Warren observed in his *Estes* concurrence. *Estes v. Texas*, 381 U.S. 532, 557–58 (1965) (Warren, C.J., concurring). But over time, the trial process evolved from

[a] ritual practically devoid of rational justification to a fact-finding process, the acknowledged purpose of which is to provide a fair and reliable determination of guilt.

An element of rationality was introduced in the guilt-determining process in England over 600 years ago when a rudimentary trial by jury became the principal institution for criminal cases.

Id. at 557 (emphasis added) (footnotes omitted) (internal quotation marks omitted).

The modern disdain for emotional decisionmaking has been said to explain some judges’ instinctive opposition to televising trial footage:

[P]rint is associated with rationality, while images are associated with irrationality. Reading and writing are understood to be one step removed from an event; there is a process involving thinking that occurs between a person and the event he or she is learning about. . . . Photographic images, on the other hand, appear to reproduce reality, and can create an impression that one is actually experiencing the event being depicted. Thus, images can create visceral reactions. The imagined viewer of images—irrational, emotional—is opposed to the rational citizen imagined by much of democratic theory.

Katrina Hoch, *Images and Judges: Why Cameras and Courtrooms Conflict* 11–12 (Feb. 11, 2008) (unpublished paper presented at the National Communication Association 94th Annual Convention) (on file with the National Communication Association).

At the same time, the Court itself has specifically identified “community therapy”—an experience that is emotion-dependent—as one of the justifications for opening trials.

II. THE PRESS-AS-PROXY CONCEIT: ITS CONSTRUCTION AND ITS LIMITS

In its access cases, the Court has stated that although access rights belong to the public, the press can and does serve as the custodian of those public rights in many circumstances.⁷⁵ The Court seems to have accepted the press as a proxy for the public on the theory that individual members of the press act no differently than individual members of the public would in the same setting.⁷⁶ In contrast, when the press has sought to behave unlike the public—specifically by recording court proceedings with cameras and using the footage to communicate about those proceedings—the Court has not seen the press as a harmless stand-in.⁷⁷ Instead, it has questioned whether institutionally distinct behavior, camera use, imposes costs that mere public attendance would not. As it has amassed experience with cameras, the Court has accepted that cameras do not impose costs in every circumstance. But in the years following recognition of a general public

Thus, the Court may be said to be working at cross-purposes in its development of the public values. This tension complicates the inquiry into “positive contributions” made by the broadcast press. As will be discussed *infra* at Part IV, television is inferior to other media at conveying specific objective facts, but superior in engaging emotions. Because of the way that viewers process information, emotional news stories tend to interfere with cognition of objective information; in contrast, stories that convey complex or abstract information are considered dull and tend to be ignored. A recent example makes the point: according to several reports, the vast majority of those who followed the trial of Casey Anthony for the murder of her daughter were convinced that she had committed the crime and were outraged at the jury’s “not guilty” finding. Andrew Malcolm, *Casey Anthony Found Not Guilty; Twitter Erupts in Outrage*, L.A. TIMES (July 5, 2011, 12:41 PM), <http://latimesblogs.latimes.com/washington/2011/07/casey-anthony-found-not-guilty-twitter-erupts-in-outrage.html>. Jurors interviewed at the close of trial concluded that the state simply had not met its burden of proof. Jamal Thalji & Leonora LaPeter, *Casey Anthony Juror #2 Says the Jury Wanted to Find Her Guilty, but the Evidence ‘Wasn’t There,’* TAMPA BAY TIMES (July 6, 2011, 8:11 PM), <http://www.tampabay.com/news/courts/casey-anthony-juror-2-says-the-jury-wanted-to-find-her-guilty-but-the/1179177>. Thus, the jury’s legal conclusion was not necessarily inconsistent with the possibility that Anthony had actually taken her child’s life, but that subtlety eluded much of the viewing public. Because television coverage of the case so successfully provided emotional engagement and community catharsis, but so poorly conveyed objective information about the legal system, it led to a disconnect that arguably undermined public confidence in the justice process. See, e.g., Hoch, *supra*, at 9 (“The on air audience will reach a conclusion and if the actual jury reaches a different conclusion, the audience may come to distrust the process of judicial administration.”).

Should the Court be asked to evaluate a First Amendment right to televise trial footage, application of the *Globe’s* “positive contribution to public value” test might require the Court to explicitly prioritize among the information-oriented values and the emotion-oriented values in order to determine whether television—a medium seemingly incapable of achieving both values simultaneously—clears the hurdle. See *infra* Parts IV.A and IV.B.

⁷⁵ See *infra* notes 91–102 and accompanying text.

⁷⁶ See *infra* notes 96–102 and accompanying text.

⁷⁷ See *infra* notes 103–18 and accompanying text.

First Amendment right of access to courtrooms and the lifting of the Sixth Amendment prohibition on camera access, it has not clarified whether camera perception of, and communication about, courtroom proceedings are sufficiently similar to public perception and communication to sustain the proxy for the broadcast press in order to prove public value.

The viability of the proxy is crucial. At present, the Court has delegated to the states authority to decide for themselves as a matter of policy whether to admit cameras.⁷⁸ If the proxy is not valid, the policies that have been promulgated in reliance on it are dubious.

A less immediate but more important reason to examine the validity of the proxy is a constitutional one. Having lifted the Sixth Amendment ban on cameras⁷⁹ and recognized a general public First Amendment access right,⁸⁰ the Court has opened the door to arguments for a First Amendment right of camera access. In two 1978 cases, one involving camera access to prisons and one involving audi-

⁷⁸ *Chandler v. Florida*, 449 U.S. 560, 582 (1981). Cameras are not permitted as a rule in federal courts, although federal rule-makers have permitted experimental camera access. Beginning in 1991, the Federal Judicial Center devised a three-year pilot program in which six district courts and two appellate courts were permitted to admit cameras. MOLLY TREADWAY JOHNSON & CAROL KRAFKA, FED. JUDICIAL CTR., ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS I (1994). At the close of the program, the Judicial Conference considered and rejected a recommendation to open all federal courts to camera coverage. *History of Cameras in the Federal Courts*, U.S. COURTS, <http://www.uscourts.gov/Multimedia/Cameras/history.aspx> (last visited Nov. 23, 2013). Eventually, the Conference voted to allow every court of appeals to decide for itself whether to admit cameras; the Second and Ninth Circuits voted to permit camera coverage. *Id.* The Judicial Conference initiated a second experiment in 2011, providing for taped footage from fourteen federal courts to be uploaded onto a government website for public viewing. *See Cameras in Courts*, U.S. COURTS, <http://www.uscourts.gov/Multimedia/Cameras.aspx> (last visited Nov. 23, 2013). Because cameras are generally prohibited in federal trial courts, whereas they are permitted in state courts that choose to admit them, this Article refers throughout to “states” and “state courts.” However, if and when the Judicial Conference revisits the possibility of changing its rule to a pro-camera presumption, the same argument made in the Article—that proof of public value requires independent evidence and cannot be provided by assuming that the broadcast press is a proxy for the public—would apply.

Interestingly, one might argue that some of the public values identified by the Court as the basis for public access to trials have less purchase in the federal setting. Because Article III judges have life tenure and are intended to occupy a “special, countermajoritarian” position in government, public scrutiny of and exercise of duties with regard to federal judges may not be as salient as those values are for state court judges, who because of limited terms subject to reappointment or election are meant to be directly accountable to public opinion. *See Hoch, supra* note 74, at 7.

⁷⁹ *Chandler*, 449 U.S. at 575.

⁸⁰ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 597–98 (1980) (Brennan, J., concurring in judgment).

otaping of tapes played in open court, the Justices rejected First Amendment access rights for audio or videotaping devices.⁸¹ However, those cases preceded the recognition of a First Amendment right to courtroom access⁸² and the clear elimination of a Sixth Amendment camera ban.⁸³ Those developments arguably throw a shadow on the earlier anti-camera rulings, decided when Sixth Amendment pressure against cameras was weightier and First Amendment interests in trial coverage were slighter. Camera advocates have tried to exploit this constitutional uncertainty in the past. The Florida court that adopted the camera policy challenged in *Chandler* was asked by the news media to declare a First Amendment right of camera access.⁸⁴ The state court rejected that argument but changed the rule nonetheless for policy reasons.⁸⁵ Reviewing the Florida policy, the Supreme Court acknowledged that a First Amendment argument had been made below, but conspicuously declined to comment.⁸⁶ The question appears to remain open, and litigants have revived the argument from time to time in the federal courts of appeal.⁸⁷ A First Amendment argument for camera admission would have to pass the complementary *Globe* tests of historical acceptance and positive contribution to the public values to succeed.⁸⁸ If the majority in *Press-*

81 *Houchins v. KQED, Inc.*, 438 U.S. 1, 15–16 (1978) (plurality opinion); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 591 (1978).

82 *Richmond Newspapers*, 448 U.S. at 576 (plurality opinion).

83 *Chandler*, 449 U.S. at 575.

84 *In re* Petition of Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 774 (Fla. 1979).

85 *Id.*

86 *Chandler*, 449 U.S. at 569–70.

87 *See, e.g.*, *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984) (denying CNN's argument that it had a First Amendment right to film the libel trial of renowned General William Westmoreland against CBS); *but see id.* at 24 (Winter, J., concurring in judgment) (finding a First Amendment right of the press to film trials, bounded in this case by legitimate time, place, or manner restrictions). *See also* *United States v. Edwards*, 785 F.2d 1293, 1294 (5th Cir. 1986) (rejecting argument of reporter that he had a First Amendment right to tape and televise the trial of former Louisiana Governor Edwin Edwards); *United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir. 1983) (denying press a First Amendment right to film the trial of federal judge Alcee Hastings).

88 *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605–06 (1982). Notably, well before the Court had established a First Amendment right of access to the courtroom in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980), Justice Stewart sensed in his colleagues' *Estes* opinions an expectation that the press should prove that its coverage furnished public value. This expectation, borne out in *Globe*, struck him as impermissible censorship:

While no First Amendment claim is made in this case, there are intimations in the opinions . . . which strike me as disturbingly alien to the First and Fourteenth Amendments' guarantees against federal or state interference with the free communication of information and ideas. The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of

Enterprise II was correct that “history” included prevailing trends among the states,⁸⁹ cameras arguably clear that hurdle, having been admitted in at least one court in every state over the past several decades.⁹⁰ The remaining question is whether they make a positive contribution to the public values that underlie access. If the proxy is valid, the answer is yes. If the proxy is invalid, further proof would be needed to support a First Amendment camera access argument. This Part reviews the history of the proxy, its suspension when cameras are at issue, and the possibility of its revival in light of a provisional consensus that cameras do not threaten trial fairness.

A. Court Assumption That Press Acts as Proxy

Throughout the line of cases assessing the rights of the press to access government locations and materials, the Court has repeatedly asserted that the press right of access is identical to the public right of access.⁹¹ Further, it has assumed that because reporters are members of the public employing the same modes of perception as the public, they effectively carry out their role as an agent of the public. In fact, as seen in the Court’s discussion of public benefits in the access cases, it often refers to the benefits of public attendance and press coverage interchangeably.⁹²

justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms. And the proposition that non-participants in a trial might get the ‘wrong impression’ from unfettered reporting and commentary contains an invitation to censorship which I cannot accept.

Estes v. Texas, 381 U.S. 532, 614–15 (1965) (Stewart, J., dissenting) (citation omitted).

Justice Stewart retired the year before the Court decided *Globe*, which established the positive contribution to public value requirement for requests to extend access beyond physical attendance at criminal trials. *Globe*, 457 U.S. at 606.

⁸⁹ *Press-Enter. II*, 478 U.S. 1, 10–11 (1986).

⁹⁰ See *Cameras in the Court: A State-by-State Guide*, RADIO & TELEVISION DIGITAL NEWS ASS’N (Sept. 16, 2013, 1:30 PM), http://www.rtdna.org/article/cameras_in_the_court_a_state_by_state_guide_updated (providing a summary of each state’s policies regarding the use of cameras and other electronic devices in courtrooms).

⁹¹ See *infra* notes 99–102.

⁹² Although the Court has emphasized that the press is entitled to the same rights as the general public to access courtrooms and other government institutions, it has never held that the press is entitled to access over and above that given to the public. In *Estes*, the Court made clear that newspaper, television, and radio reporters all have the same privilege to attend court proceedings: “[a]ll are entitled to the same rights as the general public.” 381 U.S. at 540. The Court reiterated this view in *Saxbe v. Wash. Post Co.*, holding that media requests for exceptions to a prison access policy would not be granted to provide additional media access. 417 U.S. 843, 849–50 (1974). Justice Powell, dissenting, agreed that “neither any news organization nor reporters as individuals have constitutional rights superior to those enjoyed by ordinary citizens.” 417 U.S. at 857 (Powell, J.,

The notion that the press is an appropriate proxy to assert the public's access rights appears to rest on two dynamics: attendance limitation and perception replication.

First, members of the press are, for institutional reasons, more likely to be physically present in the courtroom (or other government location) than are members of the public. The media is tasked with attending trials and visiting government institutions, whereas the average American lacks the time, proximity and financial resources to be on hand. "No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic," Justice Powell, dissenting, observed in *Saxbe v. Washington Post Co.*⁹³ The point was repeated in *Cox*: "[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations."⁹⁴ Concurring in *DePasquale*, Justice Powell repeated that "each individual member [of the public] cannot obtain for himself the information needed for the intelligent discharge of his political responsibilities."⁹⁵

Second, the Court has suggested that the press is an appropriate proxy for the public because reporters in the courtroom and elsewhere will use the sensory powers of observation and communication that members of the public would have used if present. "Those who see and hear what transpired [in the courtroom] can report it with impunity," a plurality of the Court noted in *Estes*, quoting *Craig v. Harney*.⁹⁶ Pointedly, it has described the press as the "eyes and ears" of the public. "[T]he role of the media is important; acting as the 'eyes and ears' of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business."⁹⁷ For instance, where the media was present in open court to hear Richard Nixon's White House tapes played and to view exhibits shown during testimony, the Court held that the public's access rights were satisfied because the reporters "listen[ed] to the tapes," read a

dissenting). "The underlying right is the right of the public generally," he concluded. *Id.* at 864.

⁹³ *Id.* at 863.

⁹⁴ *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

⁹⁵ *Gannett Co. v. DePasquale*, 443 U.S. 368, 398 (1979) (Powell, J., concurring) (internal quotation marks omitted).

⁹⁶ 381 U.S. at 585 (Warren, C.J., concurring) (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)).

⁹⁷ *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978) (plurality opinion).

transcript of the tapes, and were able to “report on what [they had] heard.”⁹⁸

Taken together, these two dynamics have led the Court to treat the press as a proxy for the public in accessing courtrooms and other government proceedings. Members of the Court have made the point repeatedly in the cases.

In seeking out the news the press . . . acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government The press is the necessary representative of the public’s interest . . . and the instrumentality which effects the public’s right.⁹⁹

“[P]eople now acquire [information about trials] chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public . . . so that they may report what people in attendance have seen and heard.”¹⁰⁰

“[T]he institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the ‘agent’ of interested citizens, and funnels information about trials to a large number of individuals.”¹⁰¹

“[T]he press serves as the information-gathering agent of the public”¹⁰² In sum, so long as the press is exercising ordinary human means of perception and communication, the Court has assumed that it is essentially identical to the public and necessarily able to vindicate their access rights.

B. The Advent of Cameras and the Suspension of the Press-as-Proxy Conceit

Although the Court has enthusiastically embraced the idea that the press operates as the public’s proxy to attend, observe and report on courtroom proceedings, it has balked when the media has asked to bring cameras along. The proxy short-circuits, it appears, because the Court suspects technology has the potential to impose a unique cost: it can distort trial processes and outcomes, and thus undermine Sixth Amendment interests.¹⁰³ That is, although the press functions identically to the public when it uses ordinary means of perception to

98 *Nixon v. Warner Commc’ns Inc.*, 435 U.S. 589, 609 (1978).

99 *DePasquale*, 443 U.S. at 398 (Powell, J., concurring) (quoting *Saxbe*, 417 U.S. at 863–64 (Powell, J., dissenting)); *Houchins*, 438 U.S. at 39 n.36 (Stevens, J., dissenting) (quoting *Saxbe*, 417 U.S. at 863–64 (Powell, J., dissenting); *Saxbe*, 417 U.S. at 863–64 (Powell, J., dissenting)).

100 *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion).

101 *Id.* at 586 n.2 (Brennan, J., concurring in judgment).

102 *Nixon*, 435 U.S. at 609.

103 *See infra* notes 105–09.

observe and report on trials, it functions in a fashion distinct from the public when it uses technological means of perception to record and broadcast trials. Cameras themselves, disaggregated from the public, have been subjected to a distinct constitutional analysis.

The Court's first foray into the issue, a review of a Texas fraud conviction challenged on Sixth Amendment grounds after pretrial and trial proceedings were televised,¹⁰⁴ reveals a deep skepticism about cameras. "It is common knowledge that 'television . . . can . . . work profound changes in the behavior of the people it focuses on,'" the Court observed.¹⁰⁵

Those who see and hear what transpired [in a courtroom] can report it with impunity . . . [b]ut the television camera, like other technological innovations, is not entitled to pervade the lives of everyone in disregard of constitutionally protected rights. . . . Since the televising of criminal trials diverts the trial process from its proper end, it must be prohibited.¹⁰⁶

Concurring, Justice Harlan agreed, citing both the potential cost to a fair trial and the alien nature of the cameras themselves. "[A]t its worst, television is capable of distorting the trial process so as to deprive it of fundamental fairness. . . . The rights to print and speak . . . do not embody an independent right to bring the mechanical facilities of the broadcasting and printing industries into the courtroom."¹⁰⁷ Chief Justice Earl Warren objected to cameras because they could detract from the dignity of the court. Televising trials might "cause the public to equate the trial process with the forms of entertainment regularly seen on television," "to develop the personalities of the trial participants, so as to give the proceedings more drama," and ultimately, cause "the public [to] inherently distrust our system of justice because of its intimate association with a commercial enterprise."¹⁰⁸ In the end, the Court in *Estes* overturned the conviction at issue because of the cameras present at proceedings.¹⁰⁹

¹⁰⁴ *Estes v. Texas*, 381 U.S. 532, 534–35 (1965).

¹⁰⁵ *Id.* at 569 (Warren, C.J., concurring) (quoting Kenneth B. Keating, *Not 'Bonanza,' not 'Peyton Place,' but the U.S. Senate!*, N.Y. TIMES, April 25, 1965 (Magazine), at 67, 72).

¹⁰⁶ *Id.* at 584–85 (Warren, C.J., concurring) (internal citation omitted).

¹⁰⁷ 381 U.S. at 588–89 (Harlan, J., concurring). On the other hand, Justice Harlan admitted that televising trials could furnish public value because these reports "might well provide the most accurate and comprehensive means of conveying [trial] content to the public. Furthermore, television is capable of performing an education function by acquainting the public with the judicial process in action." *Id.* at 589.

¹⁰⁸ *Id.* at 574 (Warren, C.J., concurring).

¹⁰⁹ *Id.* at 534–35 (majority opinion). The actual holding of the case was ambiguous. Four members of the Court seemed to find camera presence a per se constitutional violation. Justice Tom Clark authored the majority opinion; Chief Justice Warren and Justices William Douglas and Arthur Goldberg joined and concurred to underline the view that cam-

In the following years, the Court dealt several times with media requests to use technology outside of the trial setting, where Sixth Amendment concerns were ostensibly absent and the benefit of cameras might be expected to hold sway. In those cases, too, the Court seemed inhospitable to camera use. In *Houchins v. KQED, Inc.*, the media sought to take photographs at a county jail as part of its coverage of local prison conditions.¹¹⁰ The jail policy permitted the press and public to tour the facilities but prohibited cameras and other recording devices.¹¹¹ The Court upheld the prohibitions against a First Amendment challenge, finding that the public interest in jail facilities did not justify a constitutional “right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes.”¹¹² Because the prison was entitled to control access to its facilities, and because it extended the same access to both the press and the public, the First Amendment was satisfied.¹¹³ Notably, the Court found persuasive the sheriff’s explanation that admitting cameras and expanding media access in other respects would impose a cost by undermining the primary purpose of the jail, securing inmates.¹¹⁴ A similar calculation was made in *Nixon*, where the media sought to make secondary copies of Richard Nixon’s White House tapes, which had been played in open court.¹¹⁵ Members of the media wanted their own copies of the sound recordings so that they could broadcast portions on the air, but the Court was unmoved.¹¹⁶ It held that the press, like other members of the general public, was entitled to hear the tapes in court but not to take physical custody of government evidence in order to make live broadcast possible.¹¹⁷ The Court held that constitutional access requirements were met by the airing of the tapes in open court and providing transcripts to all in attendance.¹¹⁸ In sum, when the

eras were a per se Sixth Amendment violation. *Id.* at 565 (Warren, C.J., concurring). Justices Stewart, Black, Brennan and White did not find it constitutionally problematic. *Id.* at 602 (Stewart, J., dissenting). Justice Harlan, in concurrence, appeared to find the cameras a fair trial violation in the circumstances of the case without reaching a final conclusion that cameras were facially unconstitutional. *Id.* at 587 (Harlan, J., concurring).

110 438 U.S. 1, 3 (1978) (plurality opinion).

111 *Id.* at 5.

112 *Id.* at 9.

113 *Id.* at 6, 8–9.

114 *Id.* at 5.

115 *Nixon v. Warner Commc’ns*, 435 U.S. 589, 609 (1978).

116 *Id.* at 609–10.

117 *Id.* at 609.

118 *Id.*

press initially asserted that its role as a proxy for the public's access rights included a right to use mechanical means of perception and communication, the Court suspended the proxy and excluded the camera or audiotape device.

C. Opening the Door for a New Press-as-Proxy Conceit

In 1980, the Court recognized a First Amendment basis for public access to trials in *Richmond Newspapers*.¹¹⁹ In 1981, the Justices retreated from their suggestion in *Estes* that cameras amounted to a per se Sixth Amendment violation.¹²⁰ They held that absent conclusive evidence that cameras inherently threatened trial fairness, there existed no constitutional basis for oversight of state court administrative authority.¹²¹ In reaching its conclusion, the Court cited numerous studies conducted between *Estes* and the adoption of the Florida rule, all purporting to show that cameras did not necessarily alter the behavior of trial participants and therefore did not as a matter of law distort trial outcomes and jeopardize Sixth Amendment fair trial guarantees.¹²² As a result, cameras were deemed constitutionally permissible.¹²³

Once the Court concluded that cameras were sufficiently cost-free to lift the facial Sixth Amendment prohibition, the press-as-proxy conceit would seem to suggest that camera-bearing press are entitled to the same access rights as camera-free press acting as the public's agent. The Court did not, however, make that constitutional leap. While it observed in *Chandler* that camera advocates had unsuccessfully pressed the Florida Supreme Court to recognize such a right, it was silent on the question of a First Amendment camera right. Instead, it referred the issue to the states for individual consideration on policy grounds. The constitutional status of cameras was left for another

119 *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573–76 (1980).

120 *Chandler v. Florida*, 449 U.S. 560, 570–73 (1981).

121 *Id.* at 582–83 (1981).

122 Most of the studies involved were ex post surveys of parties who had participated in televised trials asking their self-assessment of the camera's effect on their behavior. *See, e.g.*, Alex Kozinski & Robert Johnson, *Of Cameras and Courtrooms*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1107, 1112–14 (2010) (summarizing study results that consist of surveys among jurors, judges, witnesses and attorneys who have participated in camera trials). These kinds of studies, which have been replicated many times in states considering camera admission, have been described as unreliable. *See, e.g.*, Christo Lassiter, *TV or not TV—That is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928, 966–67 (1996) (explaining that surveys are flawed because respondents are inherently biased in favor of believing that they participated objectively in a trial, and because of the small sample size involved in most such studies).

123 *Chandler v. Florida*, 449 U.S. at 582–83.

day, and camera advocates ran with the argument the Court expressly identified as the sole basis for camera admission: cameras were good policy.¹²⁴

III. INVOCATION OF THE PRESS-AS-PROXY CONCEIT TO PERSUADE POLICYMAKERS THAT CAMERA-ENHANCED NEWS COVERAGE FURNISHES PUBLIC VALUE

In the onslaught of state camera initiatives that followed, the press-as-proxy conceit has been repeatedly invoked to furnish proof of public value. Notably, the camera debate has long been framed as a straightforward cost-benefit measurement, weighing unfair trials against public value.¹²⁵ Perhaps because *Estes* signaled that cost was the dispositive constitutional factor, camera advocates have worked hard over the years to prove that televised trials do not carry this cost.¹²⁶ Public value was not seen as an obstacle, very possibly because of the Court's general acquiescence in the press-as-proxy conceit.¹²⁷

124 Every state allows cameras in either its trial or appellate courts or both. *See supra* note 90. However, in practice, a number of states continue to effectively block much coverage of trial court activity. *See, e.g.*, LEGISLATIVE COMM. OF THE MD. JUDICIAL CONFERENCE, REPORT OF THE COMMITTEE TO STUDY EXTENDED MEDIA COVERAGE OF CRIMINAL TRIAL PROCEEDINGS IN MARYLAND 12–13 (2008), *available at* <http://www.courts.state.md.us/publications/pdfs/mediacoveragereport08.pdf> (“[A]n express ban on extended coverage of criminal trial proceedings, or rules so restrictive as to effectively deny such coverage, remains intact in fifteen states, the District of Columbia, and in all federal trial courts.”). Further,

[t]he rules and procedures of the 35 states that permit broadcast coverage of criminal trials reveal tremendous variations as to the extent to which judges can permit or limit the coverage, whether and to what extent jurors can be shown, and the types of cases, such as sex offenses, family law, and trade secret matters, that are subject to mandatory exclusions. It is, therefore, difficult to generalize as to practice in the courts of these states.

There are states as varied as Florida, which has a judicially created presumption that camera coverage should be allowed in all cases; California, which expressly forbids such a presumption and grants the presiding judge broad discretion to permit or deny extended media coverage; and Rhode Island, which grants the trial judge absolute and unreviewable discretion to exclude electronic media from all or any part of a proceeding. Many states prohibit coverage of pre-trial hearings and jury close-ups; others do not.

....

In 1997, the State of New York became the first state to rescind the media's statutory license to bring cameras into the courtroom after its legislature refused to renew an experimental program it had sponsored for 10 years.

Id. at 13–15 (footnotes omitted).

125 *See* Kozinski & Johnson, *supra* note 122, at 1114 (“[O]n balance there is more to be gained than lost by permitting electronic media coverage of judicial proceedings . . .” (quoting *In re* Petition of Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 780 (Fla. 1979))).

126 *See supra* note 122 and accompanying text.

127 *See supra* notes 92–102 and accompanying text.

As a result, advocates seem to have taken the public value of cameras for granted, and offer virtually no proof that it exists. As demonstrated below, members of the press, members of the bar, and state and federal court rulemaking bodies have made two consistent arguments on behalf of camera admission. First, they contend that admission of cameras will necessarily achieve the public values identified by the Court.¹²⁸ Second, they imply that cameras furnish public values because the taping and eventual television broadcast of trial footage is a close proxy for public attendance at, and communication about, trials.¹²⁹ Relying solely on this broadcast press-as-proxy conceit, they have persuaded policymakers that courtroom cameras furnish the same public value as general public and general press attendance at trials.

A. *Camera Advocates Contend Televised Trials Furnish the Public Values Associated with Open Courtrooms*

In the years since the Supreme Court condoned camera admission, advocates from the press, the bar, and the academy have worked to persuade state and federal court rulemaking bodies that filming trials for later broadcast—whether in gavel-to-gavel coverage or for use as clips during standard television news coverage¹³⁰—will furnish the same set of public values identified by the Court in its cases opening court proceedings to the general public. One report said that the media’s “most significant arguments” in favor of cameras is that they will drive public education and public confidence;¹³¹ that is, that they will furnish the information-dependent and response-dependent public values.

The advocates’ position is summarized by Ninth Circuit Court of Appeals Judge Alex Kozinski, who has argued that cameras are essential to letting the public “appreciate our justice system, and the legal

128 See *infra* notes 132–49 and accompanying text.

129 See *infra* notes 150–56 and accompanying text.

130 Part IV below focuses primarily on studies of standard television news, which feature very short clips of courtroom action within a story, usually clocking in at under two minutes. The viewer response to gavel-to-gavel coverage may be considerably different, but has not been studied extensively. Moreover, typical use of camera footage is in short stories shown during half-hour or hour-long newscasts, rather than unfiltered, full-length trials. This Article suggests that policymakers require more fully developed empirical evidence about how the news media use courtroom footage. Among the issues that should be documented is the proportion of trials that are televised in their entirety compared with those covered in short form during standard broadcasts.

131 LEGISLATIVE COMM. OF THE MD. JUDICIAL CONFERENCE, *supra* note 124, at 22.

regime that it upholds.”¹³² Three states in the forefront of the camera initiative, Colorado, Oklahoma, and Florida, all explained their decision to admit cameras by focusing on the public values presumed to be furnished by television coverage of court proceedings. In its 1956 decision to admit cameras to court proceedings, the Colorado Supreme Court pointed to the information conveyance and citizen discharge of duties values to justify camera admissions.¹³³ It observed that

there is a constant regard for the necessity of educating and informing our people concerning the proper functioning of all three branches of government. There is no field of governmental activity concerning which the people are as poorly informed as the field occupied by the judiciary.

It is highly inconsistent to complain of the ignorance and apathy of voters and then to “close the windows of information through which they might observe and learn.”¹³⁴

Ruling in 1958 that the trial court had not abused its discretion in permitting camera coverage of a burglary trial, the Oklahoma Supreme Court in *Lyles v. State* alluded to multiple public values: public scrutiny generally, judicial oversight specifically, and conveyance of information about the legal system.¹³⁵ Broadcast coverage of trials provided an antidote to secrecy and a safeguard against judicial abuses by allowing the public “to see how justice is done in the courts of their country,” the court held.¹³⁶ Further, cameras “educat[e] and inform[] our people concerning the proper functioning of the courts. . . . There is no field of government about which the people know so little as they do about the courts. There is no field of government about which they should know as much, as about their courts.”¹³⁷ And the Florida Supreme Court, which adopted the camera access policy that led to the *Chandler* decision, was swayed in part by arguments of its chief justice that televised broadcast of criminal trials could bolster public confidence in the system and provide community therapy. In a speech later quoted back to the court by media petitioners, the justice had stated that televised “trials could be very helpful in making people familiar with the results of a criminal offense, [knowledge that might have] ‘a soothing influence’ on peo-

¹³² Kozinski & Johnson, *supra* note 122, at 1129.

¹³³ *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 296 P.2d 465, 469 (Colo. 1956).

¹³⁴ *Id.*

¹³⁵ 330 P.2d 734, 742–43.

¹³⁶ *Id.* at 740.

¹³⁷ *Id.* at 742.

ple.”¹³⁸ State court policymakers following suit after *Chandler* have agreed that televised court proceedings furnish the relevant public values. Sharing the positive experience of the Iowa courts with camera coverage of court proceedings, Iowa Supreme Court Chief Justice Mark Cady testified in 2011 that the benefits of expanded camera coverage would include “a well-informed citizenry,” and “[public] confidence in the courts,” driven by “the public’s understanding of our job and the information the public has about how we are doing our job. . . . [The media’s] efforts increase the visibility of . . . courts and . . . court procedures.”¹³⁹ California Rule of Court 1.150¹⁴⁰ governing camera admission instructs judges asked to permit cameras to consider, among other factors, the “importance of maintaining public trust and confidence in the judicial system;” and “the importance of promoting public access to the judicial system.”¹⁴¹ The now-defunct New York rule of court permitting cameras specifically stated that it was promulgated “to comport with the legislative finding that an enhanced public understanding of the judicial system is important in maintaining a high level of public confidence in the Judiciary.”¹⁴²

Judicial policymakers have concluded that courtroom cameras furnish public value in large part because media petitioners and bar group opinion leaders have told them so. Recent examples are plentiful. Seeking to amend the rules of the Supreme Court of Arizona in 2008, the Arizona Broadcasters Association, in comments, contended that allowing cameras in the court “will allow the broadcast media to provide better and more informative news coverage of judicial proceedings to the public.”¹⁴³ Seeking camera admission in Maryland state court in 2008, Michelle Butt of WBAL-TV suggested that television “‘vindicate[s] the community interest’ in the proceedings.”¹⁴⁴ Explaining the evolution in its policy since including a camera ban in the 1937 version of the Canons of Judicial Ethics, the ABA testified in

138 Petition for Modification of Canon 3A(7) of the Code of Judicial Conduct at 14 n.18, 370 So. 2d 764 (Fla. 1979) (No. 46835).

139 *Access to the Court: Televising the Supreme Court: Hearing Before the Subcomm. on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 112th Cong. 10–11 (2011) (statement of Sup. Ct. of Iowa C.J. Mark Cady).

140 CA. R. CT. 1.150.

141 *Id.* 1.150(e)(3).

142 N.Y. COMP. CODES R. & REGS. tit. 22, § 131.1(a) (2012). New York has since rescinded its rule permitting cameras in trial courts. See *supra* note 124.

143 Art Brooks, Comment to R-07-0016, *Petition to Amend Rule 122, Rules of the Supreme Court*, COURT RULES FORUM (May 15, 2008, 2:42 PM), <http://azdnn.dnnmax.com/AZSupremeCourtMain/AZCourtRulesMain/CourtRulesForumMain/CourtRulesForum/tabid/91/forumid/7/postid/442/view/topic/Default.aspx>.

144 LEGISLATIVE COMM. OF THE MD. JUDICIAL CONFERENCE, *supra* note 124, at 32.

a 2005 Senate hearing on cameras in the courtroom that “[c]ourts that conduct their business openly and under public scrutiny protect the integrity of the . . . judicial system by guaranteeing accountability to the people they serve.”¹⁴⁵ Moreover, televised courtroom proceedings “benefit the public because of the invaluable civic education that results when citizens witness federal courts in action. . . . [creating] informed, engaged and civic-minded citizens.”¹⁴⁶ And, when the American Judicature Society adopted a pro-camera stance for federal court proceedings, it argued that the policy would provide the “public understanding of . . . the [court] process” required to create “public respect and support.”¹⁴⁷ Further, extended television coverage

can educate the public about what actually goes on in our courts . . . let[ting the public] see for [itself] that, in fact, cases are routinely decided fairly and impartially, in accordance with the rule of law—that decisions are reached based on the facts and the applicable law, without regard to outside influences.¹⁴⁸

Finally, it said that “exposure assists in identifying and improving deficiencies.”¹⁴⁹

B. Camera Advocates Rely on the Press-as-Proxy Conceit to Prove That Broadcasting Court Proceedings Furnishes Public Value

Advocates who assert that broadcast proceedings furnish public value often intimate that televised proceedings replicate the experience that members of the public would have if they attended trials in person. In fact, some advocates argue that camera-enhanced reporting of court proceedings is superior to camera-free media coverage. As Kozinski has remarked,

For the vast majority of the population—those lacking the time or resources to travel to this out-of-the-way destination—the trial will be experienced, if at all, via second-hand accounts in the press.

. . . [C]ameras have become an essential tool to give the public a full and fair picture of what goes on inside the courtrooms that they pay for.¹⁵⁰

145 *Allowing Cameras and Electronic Media in the Courtroom: Hearing Before the Subcomm. on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 106th Cong. 69–70 (2000) (statement of Robert D. Evans, Dir. of Gov’t Affairs Office, Am. Bar Ass’n).

146 Letter from Robert D. Evans, Dir. of Gov’t Affairs Office, Am. Bar Ass’n, to Senator Arlen Specter, Chairman, Comm. on the Judiciary, U.S. Senate (Nov. 17 2005), http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/judiciary/051117letter_cameras.authcheckdam.pdf.

147 *Cameras in our Federal Courts—the Time Has Come*, AM. JUDICATURE SOC’Y (Feb. 21, 2010), <https://www.ajs.org/judicature-journal/editorial/cameras-in-our-federal-courts>.

148 *Id.*

149 *Id.*

150 Kozinski & Johnson, *supra* note 122, at 1109.

In the petition asking Florida to admit cameras, *Post-Newsweek* argued that absent cameras, television trial coverage was reduced to film of “witnesses and lawyers entering and leaving the courthouse, jurors boarding buses, defendants and their families walking to lunch with wan smiles.”¹⁵¹ Camera footage, in contrast, would permit the media to “cover the actual events of the trial,” and the “drama of the courtroom will be more newsworthy than the reporter’s [stand-up] account of events.”¹⁵² An Arizona television station seeking camera admission stated that “[television] coverage is the most direct and accurate tool available to allow citizens who cannot attend courtroom proceedings in person to see for themselves what transpires in the courtroom and observe the administration of justice first-hand.”¹⁵³ The editor of the *Arizona Republic*, seeking art for the news pages and video for the paper’s on-line edition, agreed that

[t]he public has come to rely on visual images as an information source more than ever before. Newspaper readership surveys show that readers are increasingly pressed for time. Photographs help the public process information and draw attention to important articles. On the Internet, camera coverage provides an in-depth source of information for readers who want to go beyond the information presented in the print edition. Photographs convey moods and emotions that are often difficult to capture with text alone.¹⁵⁴

Absent cameras, “the public is often deprived of photographic news reports, which sometimes can be the most efficient means of learning about the inner workings of the judicial system.”¹⁵⁵

151 Petition for Modification of Canon 3A(7) of the Code of Judicial Conduct at 14 n.18, *In re* Petition of Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764 (Fla. 1979) (No. 46835).

152 *Id.* at 11.

153 Brief for Petitioner at 8, *In re* Petition to Amend Rule 122, Rules of the Supreme Court of Arizona (Ariz. 2007) (No. R-07-0016), available at http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1117234892158.pdf.

154 See Lovely, Comment to *R-07-0016, Petition to Amend Rule 122, Rules of the Supreme Court, COURT RULES FORUM* (May 19, 2008, 12:47 PM), <http://azdnn.dnnmax.com/AZSupremeCourtMain/AZCourtRulesMain/CourtRulesForumMain/CourtRulesForum/tabid/91/forumid/7/postid/442/view/topic/Default.aspx> (statement of *Arizona Republic* Editor Randy Lovely).

155 *Id.* In one of the very few efforts to document the asserted role of the press as proxy in furnishing public value, Lovely said that “studies have concluded that camera coverage improves the public’s knowledge of the judiciary and helps citizens relate the legal system to their everyday lives.” *Id.* The “studies” he cited were reports prepared by camera proponents expressing their view that televised coverage of courts would furnish public benefits; none cited empirical evidence of how the media actually used footage or how viewers actually responded to it. See Brief for Petitioner at 6, *In re* Petition to Amend Rule 122, Rules of the Supreme Court of Arizona (2007) (No. R-07-0016) (citing *In re* Petition of WMUR Channel 9, 813 A.2d 455, 460 (N.H. 2002), available at http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1117234892158.pdf (citing opinions of camera proponents that televised trials furnish public value)); N.Y. STATE

The Colorado court seemed to agree that the broadcast press was a close proxy for the public, suggesting that cameras were a “window” through which observers could “observe and learn,” and that cameras would assure “people . . . free observation and the utmost freedom of discussion of the proceedings of public tribunals that is consistent with truth and decency tends to the public welfare.”¹⁵⁶

In sum, this selection of pro-camera arguments made and accepted by state and federal court rulemakers reveals that while advocates have made broad claims about the public value furnished by courtroom cameras, these claims lack documentary proof. Instead, advocates rely almost exclusively on the assumption that the broadcast media act as a close proxy for the public, equal to the general press proxy endorsed by the Court. Constructing their public policy argument in this fashion has placed significant weight on the viability of the broadcast-press-as-proxy conceit. If it fails, advocates have virtually no proof of public value furnished by cameras. As discussed below, empirical evidence on viewer response to television news reveals deep flaws in the broadcast-press-as-public-proxy conceit. This casts doubt on the wisdom of camera admission policies and represents a steep barrier to the eventual recognition of a First Amendment right of camera access.

IV. DISPROVING THE PRESS-AS-PROXY CONCEIT IN CAMERA-ENHANCED NEWS COVERAGE

The broadcast-press-as-proxy conceit—invoked by camera advocates as far back as *Estes*¹⁵⁷—seems uncontroversial and intuitive on its face: “Of all the media of information, none portrays the courtroom scene, the spoken word and the appearance of the participants so accurately as the television camera. There is no chance for mistake or erroneous interpretation,” the camera advocates asserted in that case.¹⁵⁸ Advocates have been implying for some time that cameras are inherently likely to realize public values in the same way that actual

COMM. TO REVIEW AUDIO-VISUAL COVERAGE OF COURT PROCEEDINGS, AN OPEN COURTROOM: CAMERAS IN NEW YORK COURTS 70–71 (1997) (summarizing views of camera proponents that televised trials will furnish public value). *But see* LEGISLATIVE COMM. OF THE MD. JUDICIAL CONFERENCE, *supra* note 124, at 22–33 (finding that the only four available academic studies touching on the use of television footage to cover legal issues did not support the claim that cameras in the courtroom furnished “public value”).

¹⁵⁶ *In re* Hearings Concerning Canon 35 of the Canon of Judicial Ethics, 296 P.2d 465, 469–70 (Colo. 1956).

¹⁵⁷ 381 U.S. 532 (1965).

¹⁵⁸ Brief for Respondent at 24, *Estes v. Texas*, 381 U.S. 532 (1965) (No. 256) 1965 WL 115506, at *24.

public attendance or camera-free media would.¹⁵⁹ But this implication wilts under empirical scrutiny. As discussed in Part I, the list of public values identified by the Court as the goals and justifications of courtroom access falls into roughly two categories: information-dependent values and response-dependent values. Television news is demonstrably *worse* than public attendance or camera-free media at transmitting objective information, and thus does not realize the information-dependent values.¹⁶⁰ Why? At least as currently produced, it appears to actually inhibit information comprehension and retention when compared with other media.¹⁶¹ Further, although television generally has the power to drive viewer response, the production techniques used to present courtroom footage arguably drain the unique potency of the medium.¹⁶² This empirical background casts significant doubt on the broadcast-press-as-proxy conceit that camera advocates have been using to furnish proof of public value. This Part analyzes current understandings of viewer response to television to demonstrate that the proxy is deeply flawed. Without the proxy as an evidentiary crutch to prove public value, camera advocates must independently document value to justify camera admission as a desirable policy, and a fortiori if they wish to argue in the future for a constitutional right of access for cameras.

A. Television and the “Information-Dependent” Public Values

Researchers agree that the baseline for measuring the efficacy of various types of television news against print or radio is to start with the verbal portion of the story; the text or script is considered the “target message,” while the visual portion of the story is contextual.¹⁶³

159 *Id.*

160 *See infra* notes 163–200 and accompanying text.

161 *See infra* notes 174–200 and accompanying text.

162 *See infra* notes 201–12, 216, 219 and accompanying text.

163 *See, e.g.*, Doris A. Graber, *Say It With Pictures*, 546 ANNALS AM. ACAD. POL. & SOC. SCI. 85, 91 (1996) (finding that audiovisuals add a new layer of information); W. Gill Woodall et al., *From the Boob Tube to the Black Box: Television News Comprehension from an Information Processing Perspective*, 27 J. BROADCASTING 1, 8 (1983) (“Thus, an episodic memory trace of television news could be made up of two parts: the visual context (pictures, film/videotape images, diagrams, and graphs) and verbal information that constitutes the target.”). One study revealed that twenty-one percent of viewers could not recall even one news item in a broadcast within one hour of its airing. Kathy Kellerman, *Memory Processes in Media Effects*, 12 COMM. RES. 83, 97–98 (1985). Others have found that viewers retain just thirty-four to thirty-eight percent of the information conveyed on television news. *Id.* at 98. And, in a study sponsored by the National Association of Broadcasters, survey takers found that more than half the viewers they interviewed could not recall a single news story from a broadcast they had watched. *Id.* Another study found that six to seven

The impact of news can be assessed along two axes: viewer recall and comprehension and viewer response. Several studies have shown that given identical verbal texts, television viewers recall far less than print readers.¹⁶⁴ In addition, correlational studies show that newspaper readers are much better informed than viewers of television news.¹⁶⁵

The cognitive information retention results are initially surprising, given current understandings of how information is stored in memory. The prevalent theory, known as dual-coding, hypothesizes that “audiovisual information is stored in memory in two separate but associated codes—one verbal and one visual—whereas text-only information is stored in a verbal code only. During recall, the visual memory code serves as an extra retrieval cue, which could enhance recall.”¹⁶⁶ Therefore, because television (unlike print or radio) operates on both a verbal and visual level, it presents “dual-coding” opportunities and in theory, could achieve superior recall by viewers.¹⁶⁷

Further, one inherent characteristic of live footage—concreteness—is generally thought to enhance recall. “Concrete” information—information rich in detail and specifics about people and actions¹⁶⁸—prompts deeper processing and is more likely to be recalled, studies show. For instance, one study showed that concrete nouns, such as dog or apple, are better recalled than abstract nouns, such as truth or justice.¹⁶⁹ This dynamic would appear to give television news a recall edge over print news, as studies suggest that pictures can help viewers “concretize” abstract or unfamiliar concepts

weeks after exposure, viewers had better recall of actual facts from stories without visual footage, and better recall of images from stories with visual footage. John Newhagen & Byron Reeves, *The Evening's Bad News: Effects of Compelling Negative Television News Images on Memory*, 42 J. COMM. 25, 38 (1992). Consequently, it is unsurprising that in election coverage, it was more likely that television viewers would be familiar with a candidate's personal biography and personal qualities than his specific stands on issues, whereas newspaper readers were more likely to know of a political party's positions on the issues. See Steven Chaffee & Stacey Frank, *How Americans Get Political Information: Print Versus Broadcast News*, 546 ANNALS AM. ACAD. POL. & SOC. SCI. 48, 51–53 (1996) (comparing media and types of information people gain by accessing different source material).

164 Juliette H. Walma van der Molen, *Assessing Text-Picture Correspondence in Television News: The Development of a New Coding Scheme*, 45 J. BROADCASTING & ELECTRONIC MEDIA 483, 483 (2001); see also Prabu David, *Role of Imagery in Recall of Deviant News*, 73 JOURNALISM & MASS COMM. Q. 804, 806 (1996) (“Since deviance and imagery are very closely intertwined in the typical news story, better recall for deviant news can be attributed to the automatic activation in the visual subsystem from deviant and imagistic verbal stimuli.”).

165 Walma van der Molen, *supra* note 164, at 483.

166 *Id.* at 484.

167 *Id.* (citing ALLAN PAIVIO, *MENTAL REPRESENTATIONS: A DUAL CODING APPROACH* 146–50 (1986)).

168 Woodall et al., *supra* note 163, at 16.

169 David, *supra* note 164, at 806.

and thus improve recall and comprehension. For instance, one study found that pictures helped viewers recall subjects outside their normal experience, such as foreign affairs.¹⁷⁰

But television's unique advantage over print—the ability to deploy visual images—does not seem to pay off consistently in improved recall when viewers are tested. Although television news is able to concretize unfamiliar or abstract information by giving viewers visual cues, researchers have found that “visuals are most frequently used to illustrate the person and place concrete details of news stories which viewers are most likely to remember anyway.”¹⁷¹ This may be a function of the relative ease of capturing visuals of people and places when compared with finding visuals that depict abstract concepts. As one television pioneer remarked early on, “comings and goings make easy pictures; the issues usually do not.”¹⁷² And even concretizing visuals appear to achieve limited recall of fine details. One study showed that viewers watching “sound bites” of speakers recalled the gist of the speaker's message but did not recall the speaker's name, title, or political affiliation presented in subtitles on the screen while footage rolled.¹⁷³

Communications studies theories suggest that the gap between television's unique educational potential and its actual inferiority to print results from limits on human ability to process divergent informational cues. The limited-attentional-capacity theory instructs that a viewer required to process inconsistent verbal and visual cues will exceed his processing capacity and will default to the verbal cue.¹⁷⁴ However, the more visual and verbal information reinforce each other—a concept described as semantic overlap or redundancy—the better the viewer recall.¹⁷⁵ Semantic overlap exists in a televised newscast when the verbal information relayed to the viewer by an anchor or by a reporter stand-up or voiceover is consistent with or exemplifies the visual information presented in a still photo or moving image within

170 Kellerman, *supra* note 163, at 102 (citing Allan Paivio, *Mental Imagery in Association Learning and Memory*, 76 PSYCH. REV. 241 (1969)).

171 Woodall et al., *supra* note 163, at 16.

172 Mickie Edwardson et al., *Visualization and TV News Information Gain*, 20 J. BROADCASTING 373, 374 (1976) (quoting Robert MacNeil, *The News on TV and How It is Unmade*, 237 HARPER'S MAG. 72, 75 (1968)) (discussing comments of former NBC board chairman Walter Scott).

173 Mickie Edwardson et al., *Audio Recall Immediately Following Video Change in Television News*, 36 J. BROADCASTING & ELECTRONIC MEDIA 395, 397, 407 (1992).

174 *Id.*

175 *See, e.g.*, Juliette Walma van der Molen & Marlies E. Klijn, *Recall of Television Versus Print News: Retesting the Semantic Overlap Theory*, 48 BROADCASTING & ELECTRONIC MEDIA 89, 90 (2004) (summarizing the history of research on semantic overlap theory).

the story.¹⁷⁶ When visual and verbal information is redundant, retention is greater than it would be for the same story without a visual.¹⁷⁷ For instance, a television news story on a gas shortage accompanied by footage of a line of cars at the pump will be recalled and understood better than a verbal-only story on the same issue.¹⁷⁸ However, where a visual has an attenuated or unclear link with the verbal, viewers can misunderstand the story as a whole.¹⁷⁹ For instance, if the same gas line footage were used to accompany a story about the threat of war in the Middle East, it would be ripe for misunderstanding.¹⁸⁰ And, if the visual is actively inconsistent with the verbal, retention declines further; in fact, the retention rate drops below that for print news stories.¹⁸¹

A leading study on semantic overlap is instructive. That study presented readers with three different versions of three different news stories.¹⁸² The first story was on a state visit by Israeli Prime Minister Yitzhak Rabin to Egypt to discuss reducing tension in the Middle East stemming from settlement policy in the occupied territories.¹⁸³ The verbal cues for the story were consistent throughout the three experimental versions of the story.¹⁸⁴ The first version of the story was accompanied by pictures of Israeli settlements; the second, by pictures of an honor guard receiving Rabin, of him appearing with Egyptian officials before cameras and at a press conference; the third, by pictures of Jewish children trying a new kosher soda.¹⁸⁵ The second story involved Russian President Boris Yeltsin seeking economic assistance for Russia because of difficulties related to government reforms while at a worldwide summit meeting.¹⁸⁶ Version one was accompanied by pictures of Russian shops and homes; version two, by pictures of President Yeltsin at a world economic summit meeting with other government leaders at a banquet and at a press conference; version three, by pictures of Yeltsin playing tennis and pictures of luxury goods.¹⁸⁷ The third story involved a state visit by El Salvadoran Presi-

176 Hans-Bernd Brosius et al., *How Do Text-Picture Relations Affect the Informational Effectiveness of Television Newscasts?*, 40 J. BROADCASTING & ELECTRONIC MEDIA 180, 183-84 (1996).

177 *Id.*

178 Woodall et al., *supra* note 163, at 15.

179 *Id.*

180 *Id.*

181 Walma van der Molen & Klijn, *supra* note 175, at 102.

182 Brosius et al., *supra* note 176, at 186-88.

183 *Id.* at 187.

184 *Id.*

185 *Id.*

186 *Id.*

187 *Id.*

dent José Napoleón Duarte to Germany, at which he discussed disturbances and human rights abuses in El Salvador.¹⁸⁸ Version one was accompanied by pictures of confrontations between protesters and government troops; version two, by pictures of Duarte arriving in Germany and of meetings and press conferences with German officials; and version three, by pictures of a fashion show and a press ball.¹⁸⁹

After viewing the newscast with all three items, subjects were asked both free recall and cued recall questions. The cued recall questions were designed to test retention of specific information conveyed in the reports, such as “What was the reason for the Israeli prime minister’s journey to Egypt?” and “What is the Russian government doing to improve the current situation?”¹⁹⁰ The questionnaire also asked the subjects for their general opinion on the topics covered, such as “How great are the prospects for a lasting peace in the Middle East?” and “Do you think that Yeltsin has the situation under control?”¹⁹¹ For the free recall questions, those who saw the semantically overlapping stories scored an average of 8.56, those who saw the standard picture stories scored an average of 6.36, and those who saw the text-picture divergent stories scored an average of 5.04.¹⁹² A group who heard radio only scored 6.60, an insignificant difference from the standard picture group.¹⁹³ The same ranking was found for cued recall—semantically overlapping stories were recalled best (10.16); standard picture stories were recalled less well and similar to picture-less radio stories (7.16); and stories with text-picture divergence were recalled least well, and less well than verbal-only stories heard on the radio (5.80).¹⁹⁴

The researchers summarized that “[t]he common habit of TV journalists of using standard news pictures is not justified based on the present findings. The advantage that a visual medium like television offers for using pictures is only sensibly exploited when the pictures illustrate the news text.”¹⁹⁵

The semantic divergence effect seems magnified when the visual image competing for attention is “vivid,” that is a picture or clip that compels attention and features powerful mental images. While vivid

188 *Id.*

189 *Id.*

190 *Id.* at 188.

191 *Id.*

192 *Id.* at 189–91.

193 *Id.*

194 *Id.*

195 *Id.* at 192.

visuals arouse emotion and can galvanize action, as discussed in Part IV.B below, they detract from recall and understanding when they do not reinforce text.¹⁹⁶ For example, a news story about traffic density in cities explained verbally that the two main problems that resulted were noise and air pollution.¹⁹⁷ The accompanying footage showed children running into the road while a car approached.¹⁹⁸ More than half those who watched the story later responded that child safety was the main problem to arise from urban traffic.¹⁹⁹ As one expert has summarized, the studies indicate that “viewers caught up in the dramatic aspects of a story tend to lose sight of important complexities of the situation spelled out in the narrative.”²⁰⁰

B. Television and the “Response-Development” Values

While viewers of standard television news are less likely to retain or understand objective information than those who use other media, studies indicate that television news may be more effective in leading viewers to take action or develop opinions than its non-visual media counterparts.²⁰¹

This phenomenon may be explained in part by television news’s preference for “vivid” visuals that “compel[] attention and encourage[] the creation of powerful mental images.”²⁰² Vivid footage—measured by its emotional interest, potential to trigger images, and sensory, spatial or temporal proximity—has been found to make a stronger impression on viewers than pallid information.²⁰³ For example, the use of vivid imagery such as air crash footage and disaster footage can engage viewers and mobilize them to action. Television viewers informed of an impending saltwater intrusion into the Mississippi River in a story including vivid footage of shoppers buying water in bulk were more likely to stock up on bottled water than were newspaper readers informed of the same threat by stories including maps of Louisiana and still pictures of shoppers buying water.²⁰⁴

¹⁹⁶ Newhagen & Reeves, *supra* note 163, at 38.

¹⁹⁷ Hans-Bernd Brosius, *The Effects of Emotional Pictures in Television News*, 20 COMM. RES. 105, 115 (1993).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Graber, *supra* note 163, at 90.

²⁰¹ *See infra* notes 202–12 and accompanying text.

²⁰² Woodall et al., *supra* note 163, at 16.

²⁰³ *See id.* at 16–17 (discussing the effects of vivid footage).

²⁰⁴ J. William Spencer et al., *The Different Influences of Newspaper and Television News Reports of a Natural Hazard on Response Behavior*, 19 COMM. RES. 299, 314 (1992).

The emotional charge carried by vivid television visuals can arouse viewers to pay more attention. Perhaps for that reason, emotional footage has been seen as a “catalyst for political learning.”²⁰⁵ “Drama . . . inspires political action[,] . . . arouses empathy and spurs the will to help.”²⁰⁶ While recall of specifics from a television news story may be minimal, as discussed above in Part IV.A, in the long-term, viewers emerge with “general judgments about the content of an item.”²⁰⁷ Television news can motivate citizen participation; one study showed that although reading print news is a greater predictor of citizen knowledge about party positions on issues, watching television news correlated with “voting on the basis of personal qualities” of candidates.²⁰⁸

Further, some of the most derided characteristics of television news—its tendency to sensationalize stories and incorporate “opinionation” (whether opinions are introduced via anchor cross-talk or the integration of punditry into newscasts)—can actually provide cues to political action. A 1981 study of local news in Houston showed that nearly half of the air time was devoted to sensational news. However, many of the facially sensational stories offered “opinion resources.”²⁰⁹ These resources included instruction on how citizens could participate in a civic activity, information on how a political process operated, or broad background on a social issue relevant to a more specific story.²¹⁰ In fact, sensational stories were more likely to include instruction on civic action than were non-sensational stories.²¹¹ In the same vein, opinionation in television news can improve engagement. In a study, those who do not identify with a political party were more motivated to pay attention to discussions about the Iraq war when those discussions were not neutral but involved the expression of opinion about the war.²¹²

205 George E. Marcus & Michael B. MacKuen, *Anxiety, Enthusiasm and the Vote: The Emotional Underpinnings of Learning and Involvement During Presidential Campaigns*, 87 AM. POL. SCI. REV. 672, 672 (1993).

206 Graber, *supra* note 163, at 90 (citation omitted).

207 Brosius, *supra* note 197, at 109.

208 Chaffee & Frank, *supra* note 163, at 53.

209 C. Richard Hofstetter & David M. Dozier, *Useful News, Sensational News: Quality, Sensationalism and Local TV News*, 63 JOURNALISM Q. 815, 818–19 (1986).

210 *Id.* at 817.

211 *Id.* at 818–19.

212 Lauren Feldman, Annenberg Sch. for Commc’n, Univ. of Pa., *The Effects of Journalist Opinionation on Learning from Televised News 2* (Apr. 22, 2008) (paper presented at May 2008 Annual Meeting of the Int’l Commc’n Ass’n), http://citation.allacademic.com/meta/p_mla_apa_research_citation/2/3/3/8/6/pages233868/p233868-1.php.

In short, while television news has been shown inferior to other media in transmitting the objective information required for the Court's information-dependent public values, it is ideally suited to achieve response-dependent values.

C. Replication of the Information-Conveyance and Opinion-Development Potential of Television News in Stories Using Courtroom Footage

The studies surveyed above indicate that general television news featuring live footage or photos is worse than other media at conveying information but potentially better at engaging emotion and developing opinion. There is little specific data on whether the production techniques that yield these results appear in trial-specific news stories that feature courtroom footage. However, four broad studies that consider television trial coverage hint that trial stories feature the same characteristics that inhibit the transmission of information in other broadcast news.

One study examined coverage from the trial of New York police officers charged with the murder of Amadou Diallo.²¹³ The Diallo study considered newscasts from five local television stations over the twelve-day course of the trial.²¹⁴ Researchers found that during 201 newscasts aired during the twelve-day trial, the majority of the coverage "consisted of reporter or anchorperson voice-overs and footage from outside the courtroom."²¹⁵ The average story length was 3:35 minutes, and on average each story contained seventy-eight seconds of courtroom footage; forty-seven seconds of the courtroom footage featured live sound, while thirty-one seconds were visual only, accompanied by a reporter voiceover.²¹⁶ The study did not compare the visual and verbal messages to test for semantic overlap.

Another study considered selected news stories that resulted from the 1994 federal pilot project allowing cameras in the courtroom.²¹⁷ Researchers reviewed ninety of the news stories featuring taped court

²¹³ Wendy Pogorzelski & Thomas W. Brewer, *Cameras in Court: How Television News Media Use Courtroom Footage*, 91 JUDICATURE 124, 125 (2007).

²¹⁴ *Id.*

²¹⁵ *Id.* at 129.

²¹⁶ *Id.*

²¹⁷ JOHNSON & KRAFKA, *supra* note 78, at 34–37. The survey is somewhat problematic: first, it was conducted by the Center for Media and Public Affairs (an advocacy group that supported camera admission); second, it relied on the media to voluntarily submit tapes of its news coverage, meaning that the dataset was not comprehensive; and third, the federal pilot project only permitted cameras into civil trials, leaving trends in criminal coverage undocumented.

footage that aired during the three-year pilot period.²¹⁸ Of the news stories using courtroom clips, the clips occupied fifty-nine percent of the total air time with just thirty-seven percent of those clips featuring live sound and the balance using video only accompanied by a reporter voiceover.²¹⁹ The study did not compare the verbal text and the visual cues to assess redundancy. Sixty-two percent of the stories explained what the plaintiff sought to achieve by suing,²²⁰ and ninety-four percent of those explanations were provided by reporters rather than by a clip of a participant stating those goals in the proceeding.²²¹ The study summarized that court footage was used to “add[] color or emotion rather than substance to the discussion” and that the stories did a “poor job of providing information to viewers about the legal process.”²²²

A third notable study reviewed television reporting of civil litigation generally, without restricting the dataset to stories featuring filmed court proceedings. This study covered eleven selected media markets in 2004 and nine Midwest media markets in 2006 and 2007.²²³ Researchers found that where a story used videotape or still photography, ten percent of the stories featured action in a courtroom (including sketches in courts that did not allow cameras);²²⁴ the most common type of imagery to accompany stories was video or a photograph of the harm that led to the suit.²²⁵

A fourth study analyzed content of local television (both with and without court footage) and newspaper coverage of court proceedings in five different media markets.²²⁶ It found that television news is weighted more heavily towards violent crime coverage than newspapers.²²⁷ Notably, it studied television coverage of the related criminal trials of John and Lorena Bobbitt.²²⁸ John was charged with sexually assaulting his wife; she, with genitally mutilating him after the alleged assault.²²⁹ His trial did not permit cameras; hers did.²³⁰ The research-

218 *Id.*

219 *Id.* at 34.

220 *Id.* at 35.

221 *Id.* at 35.

222 *Id.* at 35–36.

223 Herbert M. Kritzer & Robert E. Dreschel, *Reporting Civil Litigation on Local News 3–4* (William Mitchell Coll. of Law Legal Studies Research Paper Series, Paper No. 96, 2008).

224 *Id.* at 9.

225 *Id.*

226 C. Danielle Vinson & John S. Ertter, *Entertainment or Education: How do Media Cover the Courts?*, 7 HARV. INT'L J. PRESS/POL. 80, 80 (2002).

227 *Id.* at 84.

228 *Id.* at 89.

229 *Id.*

ers found that the footage-free television coverage of essentially the same series of events integrated comments from experts on marital abuse and contextualized marital rape beyond the facts of the Bobbitt case.²³¹ In contrast, television coverage of the trial where cameras were admitted was restricted to the events taking place in the courtroom. “The sound bites from the networks ran as long as thirty seconds—an eternity when compared to the ten-second sound bites allotted to the candidates during most of the presidential campaigns of the 1990s.”²³² Further, the footage itself was emotionally charged.

The inflections in [Lorena Bobbitt’s] voice and her dramatic pauses after each word built up tension that reached a peak on the final word of her sentence. . . . Instead of having the reporters mention that the witnesses had been emotional, television news showed Lorena Bobbitt crying and shaking on the witness stand.²³³

While the second series of stories concentrated on courtroom testimony, none of them addressed marital abuse as a societal topic, as the camera-free stories had done.²³⁴

These studies suggest (in a very attenuated and preliminary way) that television news coverage of court proceedings using footage from in-court cameras is unlikely to furnish the information-dependent public values identified by the Court as justifying access. The footage is generally reduced to a very short clip, and it seems that reporters often lay a voiceover on top of the live sound in the clip, increasing the opportunity for semantic divergence and decreasing the likelihood of recall or comprehension. Further, footage does not seem to be selected to enrich the informational content of coverage, but rather to enhance the emotional experience of watching the story. And there is some evidence that when footage is available, reporters narrow their focus to in-court events rather than seeking to place stories in social context.

On the other hand, the studies suggest that television news stories incorporating courtroom footage may be successful in furnishing the response-dependent public values identified by the Court. Clips seem to be selected for their emotional weight and provocative content, and are thus more likely to engage viewers and to elicit a response. This conclusion is counterbalanced by evidence that while some stories present unvarnished clips of court proceedings—as in

²³⁰ *Id.*

²³¹ *Id.* at 90.

²³² *Id.* at 91.

²³³ *Id.*

²³⁴ *Id.* at 92.

the Lorena Bobbitt trial coverage—others use the footage as a visual backdrop for reporter voiceovers. That production technique can sap the footage of its response-dependent value. Most courtroom images capture a sitting witness or judge or a stationary attorney—these images are made engaging in large part because of the participants’ speech. For instance, researchers examining the Bobbitt trial footage were impressed that her “voice and her dramatic pauses after each word built up tension that reached a peak on the final word of her sentence.”²³⁵ The majority of stories lose this component because the footage is accompanied by a reporter voiceover rather than by live sound.

In sum, these studies give a very preliminary indication that television news using courtroom footage, like other television news, typically pairs divergent words and pictures that confuse viewers, meaning that it does not make a significant contribution to the information-dependent public values. They illustrate that television has the potential to contribute to response-dependent public values, but because the most vivid part of a televised court scene—the inflected words of the trial participants—is often suppressed to allow for reporter voiceovers, television footage of court scenes may lack the vividness that is thought to drive the response-dependent public values in other television news. The studies strongly suggest that the press-as-proxy conceit is invalid for television news. At the very least, they show that the proxy cannot be assumed in the absence of documentary evidence that television news uses footage in ways likely to capitalize on either its information-dependent potential or its response-dependent potential. State camera rules generated in reliance on the proxy are therefore subject to policy-based criticisms. And future First Amendment arguments for mandatory camera access at the state or federal level may be destined to fail if advocates robbed of the proxy cannot proffer freestanding evidence of a “positive contribution”²³⁶ to self-governance made by cameras.

CONCLUSION

The Court has endorsed a hybrid Sixth Amendment-First Amendment right of the public to attend and discuss trials and other court proceedings. Public attendance at trials is thought to furnish a variety of public values, some information-dependent (conveyance of

²³⁵ *Id.* at 91.

²³⁶ *Press-Enter. I*, 464 U.S. 501, 518 (1984).

information, public scrutiny of the system, and checks on judicial abuse) and others response-dependent (discharge of citizen duties, public confidence in the system, and community therapy). The Court has recognized that the press is an appropriate proxy for members of the public and that its presence at trials can help realize the public values that justify open access. However, the Court has suspended the proxy when the press seeks to use cameras and other technological means of perception and communication. This suspension was initially motivated by fears that cameras would undermine Sixth Amendment fair trial guarantees. That fear has been tamped down sufficiently to allow states latitude to adopt their own policies on cameras. It might seem that absent a Sixth Amendment cost, camera-bearing press can invoke the press-as-proxy conceit to argue for a First Amendment right of access. Armed with the Court's non-constitutional blessing to seek policy-based access to state courts, advocates have not pressed the First Amendment access argument. Instead, they have successfully petitioned state courts to permit cameras, by provisionally disproving a fair trial cost and invoking the proxy conceit as evidence of a public benefit.

Communications studies literature indicates that the broadcast press is not a good proxy for the public. Television news in general (and trial news specifically) does not deploy imagery to reinforce public understanding, but to detract from it. As a result, it does not make a "significant contribution" to the information-dependent public values. Further, although television news has the potential to engage citizens emotionally, production techniques that dampen the vivid qualities of courtroom footage mean that television is not successful in achieving the response-dependent public values.

The demonstrable invalidity of the press-as-proxy conceit for televised trials casts doubt on the public value furnished by cameras, and on the soundness of current state court camera policies. And it spells doom for any First Amendment right of access. Absent this longstanding proxy, policymakers and judges asked to expand courtroom camera programs should demand empirical evidence that televised trials furnish the public values that justify courtroom access.