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When Mohammed Goes to the Mountain: The Evidentiary Value of a View

LAYNE S. KEELE*

INTRODUCTION

“If the hill will not come to Mahomet, Mahomet will go to the hill.”¹ “The courts, like [Mohammed²] have sensibly recognized that if a thing cannot be brought to the observer, the observer must go to the thing.”³ An official excursion by a fact-finder to a site that bears relevance to litigation is known as a “view.”⁴ Views have long been recognized as appropriate procedure in certain circumstances, going back virtually to

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1. Francis Bacon, *Essays, Civil and Moral*, in 3 HARVARD CLASSICS pt. 1 (Charles W. Elliot ed., 1910), available at <http://www.bartleby.com/3/1/12.html>.

2. In modern texts, Bacon’s reference to “Mahomet” and the “hill” are often turned into “Mohammed” and the “mountain.” See, e.g., *Masat v. United States*, 745 F.2d 985, 988 (5th Cir. 1984); *Manu Int’l, S.A. v. Avon Prods., Inc.*, 641 F.2d 62, 66 (2d Cir. 1981); *Enviro Air, Inc. v. United Air Specialists, Inc.*, 322 F. Supp. 633, 635 (S.D. Ohio 1970).

3. CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 216, at 346 (John W. Strong ed., 5th ed. 1999).

4. See ROBERT S. HUNTER, FEDERAL TRIAL HANDBOOK—CIVIL § 43:1 (4th ed. 2003) (“A view is a procedure sometimes followed in the trial of a case wherein the jury goes to the site of an occurrence that is important in the trial of the case.”); MCCORMICK, *supra* note 3, § 216, at 346 (“Venturing forth to observe places or objects which are material to litigation but which cannot feasibly be brought, or satisfactorily reproduced, within the courtroom, is termed a ‘view.’”). It should be stated here that, for purposes of this Note, and except where otherwise noted, a reference to a view refers to all types of views, whether in criminal or civil cases, and whether in a bench trial or a jury trial. A few jurisdictions may distinguish their treatment of views according to these distinctions. See *State v. Slorah*, 106 A. 768, 772 (Me. 1919) (noting that in criminal cases, to receive testimony in any form during a view is reversible error); ROBERT E. JONES ET AL., RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL TRIALS AND EVIDENCE, §§ 8:745–46 (2003) (comparing views in bench trials to jury views). However, the differences do not typically involve the evidentiary effect of a view, and are therefore beyond the scope of this Note. See *Barnett v. Commonwealth*, 403 S.W.2d 40, 45 (Ky. 1966) (noting that with regard to evidentiary effect, there is no reason for any difference between civil and criminal proceedings); *State v. Pauline*, 60 P.3d 306, 323 n.15 (Haw. 2002) (“Our discussion regarding views applies to all viewings, whether by the judge or by the jury.”). In addition, there is much support for the proposition that no distinction should be made among these types of views. See, e.g., 4 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1163, 1169 (Chadbourn rev. 1972 & Supp. 1989) (stating that, in a bench trial, the “judge may have a view, just as the jury might,” as long as the judge “observe[s] the usual rules of fairness for a jury view”); *United States v. Walls*, 443 F.2d 1220, 1223 (6th Cir. 1971) (noting that principles of judge view and jury view are the same); *United States v. Harris*, 141 F. Supp. 418, 419 (S.D. Cal. 1955) (“That this was not a criminal case tried in a Federal Court is not important for it deals with the very nature of evidence.”).

the advent of the jury trial.⁵ However, courts are divided regarding the evidentiary value that is to be accorded a view.⁶ Some jurisdictions take the position that views are always to be accorded full evidentiary status.⁷ Other jurisdictions maintain that views never provide evidence themselves, but are merely a context in which to understand the evidence that has been or will be introduced at trial.⁸ Still other jurisdictions take a middle road, stating that views may provide evidence in some, but not all, circumstances.⁹

Although there is uncertainty as to which side constitutes the majority,¹⁰ this Note argues that a view provides evidence similar to any other piece of real evidence, and just as with any other piece of real evidence, the weight that should be accorded the evidence obtained from a view will vary with the circumstances. Part I of this Note will provide a brief overview of views. Part II will summarize where courts stand today regarding the evidentiary effect of the view. Part III will analyze *Snyder v. Massachusetts*,¹¹ the most frequently cited Supreme Court case relating to this issue. Part IV will demonstrate that a view should always be considered a source of evidence and will consider the evidentiary weight that should be accorded a view. Finally, Part V will discuss the practical implications that a court's position on this issue may have.

I. INTRODUCTION TO A VIEW

A. General Characteristics

When the object in question cannot be brought into a courtroom because of physical limitations or inconvenience, a trier of fact may leave the courtroom and make an

5. 4 WIGMORE, *supra* note 4, § 1162; *see also* T. W. HUGHES, AN ILLUSTRATED TREATISE ON THE LAW OF EVIDENCE, pt. 3, ch. 1, § 4, at 166 (1907).

6. *See* JOHN M. MAGUIRE, CASES AND MATERIALS ON EVIDENCE 141 (1973) (noting that courts are divided on the question); 75 AM. JUR. 2D *Trial* § 264; *United States v. Suarez*, 846 F. Supp. 892, 894 (D. Guam 1994) ("There has long been a debate in the case as to whether a 'view' constitutes independent evidence.").

7. *See, e.g.*, *Lillie v. United States*, 953 F.2d 1188, 1190 (10th Cir. 1992).

8. *See, e.g.*, *Simmons v. State*, 717 N.E.2d 635, 639 (Ind. Ct. App. 1999).

9. *See, e.g.*, *Price Bros. Co. v. Phila. Gear Corp.*, 649 F.2d 416, 419 (6th Cir. 1981).

10. *Compare* *United States v. Gray*, 199 F.3d 547, 549 (1st Cir. 1999) ("Although our [previous] unconditional statement . . . that a jury view does not itself constitute or generate evidence may represent the majority position . . .") (internal quotations and citations omitted), *with* *Barron v. United States*, 818 A.2d 987 (D.C. 2003) ("[M]ost courts now characterize jury views as evidence."). While at least one court did change its position on the matter during the intervening time between *Gray* and *Barron*, *see* *State v. Pauline*, 60 P.3d 306, 325 (Haw. 2002), it is greatly doubted that the position of the majority actually changed between 1999 and 2003. *See also* 4 WIGMORE, *supra* note 4, § 1168, at 388 ("The theory that a jury's view does not involve the obtaining of evidence . . . has in most jurisdictions been repudiated."); MCCORMICK, *supra* note 3, § 216, at 347 ("[P]robably a majority [of jurisdictions] holds that a view is not itself evidence."); 1 KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 5.17 (5th ed. 2000 Supp. 2003) ("Ordinarily, when the jury takes a view the court explicitly instructs them that they are not to consider what they see as evidence in the case . . .").

11. 291 U.S. 97 (1934), *overruled in part* by *Malloy v. Hogan*, 378 U.S. 1 (1964).

official visit to the location of the object or site in question.¹² Virtually all jurisdictions have statutory laws that permit courts to conduct views, but it is often said that even in the absence of statutory permission, the courts would have inherent power to conduct such views.¹³ In addition, at least one court indicated that the *Federal Rules of Evidence* authorize a view of a location in question,¹⁴ although this assertion is questioned.¹⁵ Regardless of whence a court's authorization to conduct a view is derived, the ability of the court to conduct a view is virtually universally acknowledged.¹⁶

Views may be disruptive and expensive, and are becoming less common,¹⁷ particularly as technology advances to bring accurate representations of objects and locations into a courtroom.¹⁸ Thus, when computer animations, video, audio, and photographs are adequate, a view, with the time and expense that it requires, is disfavored.¹⁹ However, despite all of the technological advances that have come about in recent years, views may still serve a valuable purpose to fact-finders. Sensations that are not easily reproduced in a courtroom, such as smell and touch, may be useful to the determination of a case.²⁰ In addition, views may be helpful to a fact-finder where photographs, video, audio, computer imaging, and other aids are inadequate or misleading.²¹ Although it has been stated that views are "often time-consuming,"²² views may actually save a significant amount of time in the trial.²³

12. 4 WIGMORE, *supra* note 4, § 1162; *see also* *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1266–67 (9th Cir. 2001).

13. McCORMICK, *supra* note 3, § 216, at 346; *see also* 4 WIGMORE, *supra* note 4, § 1163, at 362, 367.

14. *See Johnson v. William C. Ellis & Sons Iron Works, Inc.*, 604 F.2d 950, 957–58 (5th Cir. 1979).

15. 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE* § 5176 (1978 & Supp. 2003).

16. *See* HUGHES, *supra* note 5, pt III, § 9, at 169; *see also* 22 WRIGHT & GRAHAM, *supra* note 15, § 5176 n.4 (“[T]he cases . . . all assume that a view may properly be taken . . .”).

17. TANFORD, J. ALEXANDER, *THE TRIAL PROCESS: LAW, TACTICS, AND ETHICS* 62 (3d ed. 2002).

18. *See* 1 O'MALLEY, ET AL., *supra* note 10 (noting that, in ordinary cases, photographs and plats are often adequate).

19. *See* 3 BURR W. JONES, *JONES ON EVIDENCE, CIVIL AND CRIMINAL* § 15:22, at 58 (Spencer A. Gard ed., 6th ed. 1972).

20. *See*, for example, a case reported to have been filed in the summer of 2003, in which two people suffered burns in a hot spring in Nevada. The newspaper report of the story noted that “the heat of the springs can be felt standing beside them.” Mark Vanderhoff, *Warning: Wilderness*, RENO GAZETTE-JOURNAL, August 21, 2002, available at <http://www.rgj.com/news/stories/html/2002/08/21/22036.php>.

21. *See, e.g.*, *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1266 (9th Cir. 2001) (“If a picture is worth a thousand words, then the real thing is worth a thousand pictures.”); *Rygg v. County of Maui*, 122 F. Supp. 2d 1140, 1147 (D. Haw. 2000) (“The site visit gave the Court a much better perspective of the entire park and beach . . . than was depicted by the photographs and video, especially because the park area is actually much more compact than depicted in the photographs and video.”); *Clarke v. Bruckner*, 93 F.R.D. 666, 671 (D.V.I. 1982) (“No number of photographs or drawings could give the jury as truthful a picture of the scene as a visit to the site.”); *United States v. Skinner*, 425 F.2d 552, 555 (D.C. Cir. 1970)

The decision of whether to conduct a view is left to the informed discretion of the trial judge.²⁴ While the discretion of a trial judge in this respect is broad,²⁵ courts and commentators have listed several factors that may play a role in the judge's consideration: the adequacy of other evidence such as testimony and visual aids,²⁶ the centrality of the object or site to be viewed to the litigation,²⁷ whether there has been a substantial change in the condition of the site or object,²⁸ the amount of time that a view would require,²⁹ the expenses that would be incurred as a result of the view,³⁰ the distance from the court of the location to be viewed,³¹ the inconvenience that would be caused by the view,³² the additional clarity to be gained from the view,³³ and the risk of prejudicial effect from the view.³⁴

B. The History of the View

1. The Early History of the View

Views have been recognized as an appropriate procedure since the beginning of the jury trials.³⁵ The power to conduct a view was considered at common law to be a part of the court's inherent power, although statutory regulation of the procedural details

(stating that a demonstration "vividly portrayed that essential third dimension which a picture lacks").

22. MCCORMICK, *supra* note 3, § 216, at 346.

23. Hulen D. Wendorf, *Some Views on Jury Views*, 15 BAYLOR L. REV. 379, 384 (1963) ("The clarification of the issues effected by a view may often actually save a great deal of time.").

24. *United States v. Harris*, 141 F. Supp. 418, 419 n.1 (S.D. Cal. 1955) (listing a number of cases that discuss the broad discretion of the trial judge in granting or denying a view); MCCORMICK, *supra* note 3, § 216, at 346.

25. MCCORMICK, *supra* note 3, § 216, at 346.

26. *See, e.g., United States v. Marler*, 583 F. Supp. 1456, 1460 (D. Mass. 1984) (view was unnecessary in light of government's schematic drawings and photographs, in conjunction with testimony); TANFORD, *supra* note 17, at 62.

27. 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, § 403.07[4] (Joseph M. McLaughlin ed., 2d ed. 2003).

28. *See, e.g., Bundy v. Dugger*, 850 F.2d 1402, 1422 (11th Cir. 1988) (significant alteration to the scene listed as one of the reasons for affirming the trial judge's denial of the defendant's request for a view); TANFORD, *supra* note 17, at 62.

29. *See Wendorf, supra* note 23, at 390.

30. *Id.*

31. *Auto Owners Ins. Co. v. Bass*, 684 F.2d 764, 769 (11th Cir. 1982) (holding that the trial judge did not abuse his discretion in denying a view where, among other concerns, the location to be viewed was 30–35 miles away).

32. *Holmes v. Combs*, 90 N.E.2d 822, 824 (Ind. App. 1956) (no abuse of discretion in denying a view where the "weather was bad").

33. *State v. Stewart*, 360 N.W.2d 430, 432 (Minn. App. 1985) (trial court did not abuse its discretion in denying view where it determined that a view would not be helpful to the jury).

34. JONES ET AL., *supra* note 4, § 8:721.

35. 4 WIGMORE, *supra* note 4, § 1162; *Waddell v. State*, 501 A.2d 865, 867 (Md. Ct. Spec. App. 1985).

has existed in England for over 250 years.³⁶ Historically, in English practice, a view could be demanded by either party.³⁷ However, the Statute of Anne, enacted in 1710, explicitly vested in the trial court discretion over whether to conduct a view.³⁸ Under the Statute of Anne, views were conducted before the trial, and by only a portion of the jurors.³⁹ The view was originally limited to real property actions,⁴⁰ but was later extended to encompass a wider variety of actions.⁴¹

2. The History of Views in America

In the United States, the authority to conduct views began as a common-law power that was inherent in the courts.⁴² Initially, views were almost always granted upon the request of either party.⁴³ They have since come to be seen as a matter within the trial judge's discretion,⁴⁴ although "the practice is now very generally, if not universally, regulated by statutes."⁴⁵ The types of actions in which views were allowed were limited in the past,⁴⁶ but most current statutes do not limit the types of actions in which a view can be conducted or the type of property that can be viewed.⁴⁷

The assault on the evidentiary value of views came about when courts began to question the general use of real evidence,⁴⁸ since such evidence could not be incorporated into the record for appellate review.⁴⁹ As a result, some courts completely

36. 4 WIGMORE, *supra* note 4, § 1163; Note, *View by a Judge Sitting in Lieu of a Jury*, 59 W. VA. L. REV. 379, 381 (1957).

37. 4 WIGMORE, *supra* note 4, § 1163.

38. *Id.*

39. *Id.*

40. "Real" actions are those actions relating to land, as distinguished from personal actions, which are based on a personal right. BLACK'S LAW DICTIONARY 34 (8th ed. 2004).

41. 3 JONES, *supra* note 19, § 15:20.

42. *Springer v. Chicago*, 26 N.E. 514, 517 (Ill. 1891).

43. *Polk's Lessee v. Minner*, 1 Del. Cas. 59, 1 (1795) ("As to the view, I think the granting of views here has been upon more general principles; granting of views here is of course, but not so in England, for they are not granted there but upon sufficient cause shown, and I think they are often improperly granted here in cases where it is not necessary.").

44. 4 WIGMORE, *supra* note 4, § 1164; *see also* *Gonzalez-Perez v. Gomez-Aguila*, 296 F. Supp. 117, 119 (D.P.R. 2003) (holding that trial judge has inherent power to decide whether to allow a jury view at all).

45. JONES, *supra* note 19, § 15:21.

46. *Id.* § 15:20, at 53.

47. *Id.* § 15:21, at 55.

48. Real evidence is physical evidence that "plays a direct part in the incident in question." BLACK'S LAW DICTIONARY 599 (8th ed. 2004). It overlaps with and is sometimes used synonymously with "demonstrative evidence." *Id.* at 596. Real evidence is also sometimes called "autoptic preference," although Wigmore argues that the two should be distinguished. 4 WIGMORE, *supra* note 4, § 1150. Hughes makes a distinction between immediate real evidence, or autoptic preference (that is, evidence that is perceived directly by the court without witness testimony), and reported real evidence (where the existence of the evidence is conveyed by a witness or documents), HUGHES, *supra* note 5, § 1. According to Hughes, the term "real evidence" has come to be synonymous with "immediate real evidence." *Id.* at § 2.

49. 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 13 (John Henry Wigmore ed., 16th ed. 1899) ("In one or two jurisdictions the notion has of late obtained a

excluded all real evidence as a method of proof.⁵⁰ Although this doctrine was eventually repudiated,⁵¹ it left behind a remnant: in repudiating the doctrine, some courts declared that views were not evidence, effectively evading the objection that views could not be accurately preserved for appellate review.⁵² These courts stated that the purpose of views is “to enable the jury, by the view . . . to better understand and comprehend the testimony of the witnesses respecting the same, and thereby the more intelligently to apply the testimony[,] not to make them silent witnesses in the case.”⁵³ Thus, two paths began to diverge, one in which courts held that a view constituted independent evidence and the other in which courts held that a view was simply meant to form a context that would aid the jury in understanding the evidence that had been or would be introduced.⁵⁴

II. THE CURRENT POSITIONS OF COURTS

Today, courts are split on the issue of whether a view is treated as evidence,⁵⁵ and it can be difficult to precisely pin down their position.⁵⁶ The positions taken by the courts today are: (1) a view is never independent evidence, but is intended solely to provide a context in which to apply the evidence produced during the trial; (2) a view may or may not be independent evidence, depending on the situation; and (3) a view is always independent evidence.

footing that autoptic preference is to be excluded as a method of proof because it is impossible to transmit . . . on appeal”); HUGHES, *supra* note 5, § 10.

50. 1 GREENLEAF, *supra* note 49, HUGHES, *supra* note 5, § 10.

51. 1 GREENLEAF, *supra* note 49.

52. *Id.*; HUGHES, *supra* note 5, § 10.

53. *Close v. Samm*, 27 Iowa 503, 505 (1869).

54. *See* 4 WIGMORE, *supra* note 4, § 1168, at 385-88.

55. *Lillie v. United States*, 953 F.2d 1188, 1190 (10th Cir. 1992) (“We acknowledge that jurisdictions vary as to whether a view is treated as evidence”); 75 AM. JUR. 2D *Trial* § 264 (1992 & Supp. 2003); 5 ROBERT A. BARKER & VINCENT C. ALEXANDER, *NEW YORK PRACTICE SERIES* § 11:22 (Supp. 2003).

56. *See* 22 WRIGHT & GRAHAM, *supra* note 15, § 5176 n.6 (noting “how difficult it can be to pin down the position of any court on this question” and that “[t]he position of federal courts is unclear”); Thomas P. Hardeman, *The Evidentiary Effect of a View: Stare Decisis or Stare Dictis?*, 53 W. VA. L. REV. 103 [hereinafter *Evidentiary Effect*] (discussing lack of clarity of the West Virginia decisions); Thomas P. Hardeman, *The Evidentiary Effect of a View—Another Word*, 58 W. VA. L. REV. 69, 73 [hereinafter *Another Word*] (noting the “seeming inconsistencies” in West Virginia cases). The Supreme Court appears to have had difficulty determining the position of the Massachusetts courts in *Snyder v. Massachusetts*, 291 U.S. 97 (1934), with the majority stating that the “Supreme Judicial Court of Massachusetts has said of a view that its chief purpose is to enable the jury to understand better the testimony which has or may be introduced,” *id.* at 121 (internal quotations omitted), and the dissent arguing that “[i]n Massachusetts, what the jury observes in the course of a view is evidence in the case,” *id.* at 125 (Scalia, J., dissenting). It is probably this lack of clarity regarding the positions of a number of jurisdictions that leads to the uncertainty regarding which position represents the majority of jurisdictions. *See supra* note 10 and accompanying text.

A. The Position That a View Is Not Evidence

A significant number of states take the position that a view is not evidence.⁵⁷ For example, in *Gilbert v. City of Caldwell*,⁵⁸ the court was asked to reverse its previous positions and “adopt the approach that a view may constitute evidence.”⁵⁹ The court did not reverse its position, noting that “a view is not characterized as evidence because . . . it cannot be included in the record.”⁶⁰ The court admitted, however, that the logic of this objection had been questioned.⁶¹ Similarly, the court in *State v. Overkamp* stated that a “view cannot replace testimony; the visual observations of the trier cannot be substituted for testimony; and the only legitimate purpose of an inspection is to illustrate the evidence and provide a base for understanding and comprehending testimony upon the record.”⁶²

57. For example, there is authority in the following states that a view does not constitute evidence: Arkansas, *Potter v. Bryan Funeral Home*, 817 S.W.2d 882, 884 (Ark. 1991); Florida, *McCullum v. State*, 74 So. 2d 74, 76 (Fla. 1954); Idaho, *State v. McClurg*, 300 P. 898, 911 (Idaho 1931), *overruled on other grounds by State v. McMahan*, 65 P.2d 156 (Idaho 1937); Indiana, *Simmons v. State*, 717 N.E.2d 635, 639 (Ind. Ct. App. 1999) (“A jury’s view of a place is not intended as evidence . . .”); Iowa, *State v. Hicks*, 277 N.W.2d 889, 893 (Iowa 1979); Kentucky, *Barnett v. Commonwealth*, 403 S.W.2d 40, 44–45 (Ky. 1966) (“[A] jury view is not to be equated with the reception of evidence . . .”); Louisiana, *Cox v. Moore*, 805 So. 2d 277, 281 (La. App. 2001); Minnesota, *Northwestern Mut. Life Ins. Co. v. Sun Ins. Office*, 88 N.W. 272, 273 (Minn. 1901); Nevada, *Love v. Mt. Oddie United Mines Co.*, 184 P. 921, 926 (Nev. 1919) (“It is the rule in this state that a view cannot be considered as evidence . . .”); New Jersey, *State v. Coleman*, 214 A.2d 393, 398 (N.J. 1965); Ohio, *State v. Richey*, 595 N.E.2d 915, 927 (Ohio 1992); Oregon, *Crane v. Oregon R.R. & Navigation Co.*, 133 P. 810, 814 (Or. 1913); Pennsylvania, *Avins v. Commonwealth*, 108 A.2d 788, 790 (Pa. 1954); Rhode Island, *In re Blackstone Valley Dist. Comm’n*, 490 A.2d 974, 975 (R.I. 1985) (an eminent domain case); South Carolina, *State v. Mouzon*, 485 S.E.2d 918, 920–21 (S.C. 1997); South Dakota, *Beatty v. Depue*, 103 N.W.2d 187, 190 (S.D. 1960); Washington, *State v. Bernson*, 700 P.2d 758, 767 (Wash. Ct. App. 1985); and Wisconsin, *Am. Family Mut. Ins. Co. v. Shannon*, 356 N.W.2d 175, 179 (Wis. 1984).

58. 732 P.2d 355 (Idaho App. 1987). In *Gilbert*, which was a land damages case, the trial court took a view, which the court, in its findings, characterized as evidence. *Id.* at 366–67. The Gilberts, appealing from the amount awarded as damages, argued to the court of appeals that the judge erred in this characterization. *Id.* at 367. The court of appeals affirmed, stating that this characterization was error, but that it was harmless because “if we disregard that ‘evidence’ there otherwise remains substantial and competent evidence to support the trial court’s findings.” *Id.*

59. *Id.* at 366–67.

60. *Id.* at 367.

61. *Id.*

62. 865 S.W.2d 376, 378 (Mo. App. 1993) (quoting *Koplar v. State Tax Commission*, 321 S.W.2d 686, 696 (Mo. 1959)). In *Overkamp*, the defendant, convicted of “failing to keep a proper lookout” while driving a vehicle, appealed the conviction based on the fact that the judge characterized the view as evidence. *Id.* at 377. However, the appellate court concluded that sufficient evidence aside from the view existed, so that the error was harmless. *Id.* at 378.

Very few federal courts take the position that a view is never evidence. Although one district court did hold that a view could never constitute evidence,⁶³ the court was located in the Sixth Circuit, which has since ruled that views may sometimes be used as evidence.⁶⁴ The Seventh Circuit may accept the proposition that views are not evidence, although it has not specifically held this. In *EEOC v. Mercy Hospital*,⁶⁵ the Seventh Circuit stated that views are certainly proper when taken “for the purpose of weighing the testimony of witnesses and to better understand the evidence submitted at trial,”⁶⁶ but it expressly avoided the question of whether a view could ever be used as substantive evidence.⁶⁷

In *EEOC*, there was a dispute as to the difficulty of operating several pieces of equipment. The judge took a view so that he could “go and do a hands-on examination of these machines,” and “carefully explained that the sole purpose of his view was to better understand the testimony of hospital employees concerning the degree of difficulty involved in operating various pieces of equipment.”⁶⁸ The judge then went to the hospital and personally operated the equipment. Although one may be hard-pressed to imagine a situation in which such an experience plays no role whatsoever in the judge’s conclusions as to the difficulty of operating the equipment,⁶⁹ the trial judge’s statement that he did not consider the view as evidence was enough to convince the Seventh Circuit. It stated that the district court “considered its observation only for the purpose of weighing the testimony of witnesses and to better understand the evidence submitted at trial. Clearly it was proper for the district court to have considered its observations for such a limited purpose.”⁷⁰

B. Positions That a View May Be Evidence

Some courts take the position that views may sometimes constitute evidence and sometimes may not. Some state courts distinguish between views in eminent domain

63. *Park-in Theatres v. Ochs*, 75 F. Supp. 506, 511 (S.D. Ohio 1948) (“When a jury views the premises the court explicitly instructs them that they are not to consider what they see as evidence in the case.”).

64. *Price Bros. v. Phila. Gear Corp.*, 649 F.2d 416 (6th Cir. 1981).

65. 709 F.2d 1195 (7th Cir. 1983).

66. *Id.* at 1200.

67. *Id.* In *Vector Pipeline, L.P. v. 68.55 Acres of Land*, 157 F. Supp. 2d 949, 955 (N.D. Ill. 2001), a district court in the Seventh Circuit concluded that a view could be substantive evidence. The court based this conclusion on the Seventh Circuit’s “favorabl[e]” citation of *In re Application to Take Testimony*, 102 F.R.D. 521, 524 (E.D.N.Y. 1984), in *Devin v. DeTella*, 101 F.3d 1206, 1209 n.2 (7th Cir. 1996). *Vector Pipeline*, 157 F. Supp. 2d at 955. However, the Seventh Circuit’s citation to *In re Application* was not favorable, but the case was instead simply mentioned in a footnote as a case that was cited by the petitioner, and one that “hardly support[ed] petitioner’s claim of evolving consensus in support of an accused’s absolute constitutional right to be present at a jury view.” *Devin*, 101 F.3d at 1209 n.2.

68. *Id.* at 1199.

69. See *infra* notes 139-43 and accompanying text regarding the practical effect of an instruction that a view is not considered evidence.

70. *EEOC*, 709 F.2d at 1200.

cases and other views,⁷¹ others distinguish between “evidentiary” and “non-evidentiary views,”⁷² and others are somewhat ambiguous.⁷³ At least one state seems to lean toward avoiding views altogether.⁷⁴

The First Circuit intimated that views may sometimes provide independent evidence and at other times cannot. In *Clemente v. Carnicon-Puerto Rico Management Assocs.*,⁷⁵ the court stated without discussion that “the rule in this circuit is that a view does not itself constitute or generate evidence.”⁷⁶ However, four years later, in *United States v. Gray*,⁷⁷ the First Circuit took the position that views may sometimes constitute independent evidence.⁷⁸ In *Gray*, a criminal defendant’s motion for a view was granted, and the defendant objected to the court’s instruction that the view was not evidence in the case.⁷⁹ The First Circuit, although it found that the instruction was not prejudicial, agreed with the defendant’s assertion that its previous position was incorrect by contemporary standards.⁸⁰ Although the First Circuit specifically noted that it was going no further than to remove the blanket prohibition against treating views as sources of evidence,⁸¹ much of its rhetoric indicates that it believes that a view will always constitute the taking of evidence.⁸²

The Sixth Circuit weighed in on the issue in *Price Bros. v. Philadelphia Gear Corp.*⁸³ There, the court stated that where a view is used as evidence in a case,

71. *E.g.*, *Chicago v. Koff*, 173 N.E. 666, 667–68 (Ill. 1930); *Reed v. Cent. Maine Power Co.*, 172 Atl. 823, 825 (Me. 1934).

72. Some states that have taken this position are: Colorado, *Zambakian v. Leson*, 246 P. 268, 269–70 (Colo. 1926) (stating that a view is not evidence unless the fact is an “absolute physical one”); Georgia, *Hensley v. Henry*, 541 S.E.2d 398, 402 (Ga. Ct. App. 2000) (distinguishing between “evidentiary” views and “scene” views); and Virginia, *P. Lorillard Co. v. Clay*, 104 S.E. 384, 387 (Va. 1920) (noting that in some cases, a view aids the jury in the application of testimony and in others, a view furnishes a distinctly additional source of proof).

73. Massachusetts has stated that a view is not evidence in the “strict and narrow sense of the word,” but that it may be used by the jury in reaching a verdict. *Commonwealth v. Jefferson*, 635 N.E.2d 2, 5 (Mass. App. Ct. 1994).

74. Texas has “denounced” views, *Jones v. State*, 843 S.W.2d 487, 499 (Tex. Crim. App. 1992), and Texas courts look upon the view with a “peculiar horror.” *Mauricio v. State*, 104 S.W.3d 919, 921–22 (Tex. App. 2003) (arguing, however, that a view is sometimes appropriate and calling for a change in Texas law).

75. 52 F.3d 383 (1st Cir. 1995).

76. *Id.* at 386. However, the court cited no previous opinion that had established the rule in that circuit. *See id.*

77. 199 F.3d 547 (1st Cir. 1999).

78. *Id.* at 548 (“Our review of the relevant case law and commentary now leads us to conclude that it is unrealistic to exclude a view from the status of evidence in every circumstance. We do not go further in this opinion than to remove the blanket prohibition.”).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 548–49 (discussing the positions of the “experts” that a view should be treated as any other evidence, stating that they found “no reason to disagree with the experts,” and noting that the practical effect of a view is that of evidence).

83. 649 F.2d 416 (6th Cir. 1981).

procedural safeguards must be taken, but where the view is only to “assist the fact finder,” safeguards are less important.⁸⁴

In *Price Bros.*, the defendant was the manufacturer of some components in a machine used by the plaintiff. Without the knowledge or consent of the parties, the trial judge sent his law clerk to the plaintiff’s business to view the machine in operation.⁸⁵ On a prior appeal, because the record was void of any reference to the visit, the Sixth Circuit remanded for an evidentiary hearing to determine whether the clerk actually visited the plant and, “[m]ost importantly, . . . whether the trip, if made, was at the direction of the trial judge.”⁸⁶ After the evidentiary hearing, the Sixth Circuit stated that the presumption of prejudice from off-the-record fact gathering was overcome by the undisputed testimony at the evidentiary hearing because “[t]he law clerk’s testimony and the statement of the trial judge establish that the sole purpose of the clerk’s trip was . . . to understand the evidence to be produced at trial. There is no indication that the trial judge considered the law clerk’s report as evidence”⁸⁷ The court continued:

Where the purpose of a view is to assist the fact-finder . . . and the view itself is not considered as evidence, then the potential for prejudice to a party not present at a view is minimized. In contrast, where the fact-finder’s observations upon a view are used as evidence to determine the facts, then the procedural safeguards of a trial . . . must apply.⁸⁸

Judge Merritt, concurring with the decision on other grounds, understandably stated that he would have required a “more forceful and conclusive showing” that there was no prejudicial error.⁸⁹ The majority holding in *Price Bros.* essentially permits trial judges to order views on their own initiative, without notification to the parties and without providing the parties opportunity to attend.⁹⁰ Under *Price Bros.*, as long as the judge makes clear in the record that his view was not for the purpose of providing evidence or, in the case of a jury trial, instructs the jury to the same effect, any error created by the view is considered harmless. This is an especially inapposite result when one considers that an earlier Sixth Circuit case, in avoiding a determination on the issue, stated, “however a view is characterized, ‘its inevitable effect is that of evidence.’”⁹¹

84. *Id.* at 419.

85. *Id.* at 420.

86. *Price Bros. v. Phila. Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980). Note that this is slightly different from the Sixth Circuit’s later assertion that it had remanded to determine whether the visit was at the direction of the trial judge and “most importantly, what use the trial judge made in deciding the case of whatever the law clerk had observed.” *Price Bros.*, 649 F.2d at 420.

87. *Price Bros.*, 649 F.2d at 420.

88. *Id.* at 419.

89. *Id.* at 424–25.

90. See *infra* notes 220–25 and accompanying text.

91. *United States v. Walls*, 443 F.2d 1220, 1223 (6th Cir. 1971) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 121 (1934) (finding reversible error in taking a view without presence of the criminal defendant or counsel)).

C. The Position That a View Is Evidence

The current trend on this issue is to consider views as evidence.⁹² While one would be hard-pressed to find any cases from recent years where a court changed its position to hold that a view cannot constitute evidence,⁹³ there are some cases in which the opposite is true.⁹⁴ Some state courts hold to the position that a view is independent evidence,⁹⁵ but this appears to be the minority position among those state courts that have explicitly spoken to the issue.

The majority of federal courts hold that a view is independent evidence, although the reasoning of the federal courts varies.⁹⁶ The Second Circuit,⁹⁷ the Ninth Circuit,⁹⁸

92. *United States v. Gray*, 199 F.3d 547, 548 (1st Cir. 1999); JONES ET AL., *supra* note 4, § 8:745.

93. There are examples of recent decisions in which courts maintained their position that a jury view cannot be considered evidence, e.g., *Simmons v. State*, 717 N.E.2d 635, 639 (Ind. Ct. App. 1999); *State v. Mouzon*, 485 S.E.2d 918, 920-21 (S.C. 1997), but there do not seem to be any recent decisions reversing course to come into this camp.

94. E.g., *United States v. Gray*, 199 F.3d 547, 548 (1st Cir. 1999); *State v. Pauline*, 60 P.3d 306, 322-25 (Haw. 2002).

95. Among these are: *Alabama, W. Ry. of Ala. v. Still*, 352 So. 2d 1092, 1097 (Ala. 1977); *Alaska, Bowlin v. State*, 823 P.2d 676, 678 (Alaska Ct. App. 1991); *Arizona, State v. Martin*, 489 P.2d 254, 256 (Ariz. 1971); *California, Vaughn v. Dekreek*, 83 Cal. Rptr. 144, 148 (Cal. Ct. App. 1969) (view constituted "independent and substantial evidence"); *Connecticut, McGar v. Bristol*, 42 A. 1000, 1001 (Conn. 1899); *Hawaii, State v. Pauline*, 60 P.3d 306, 322-27 (Haw. 2002) (thoroughly reviewing the various positions taken on the subject); *Kansas, City of Topeka v. Martineau*, 22 P. 419, 420 (Kan. 1889); *Nebraska, Stull v. Dept. of Rds & Irrigation*, 263 N.W. 148, 149 (Neb. 1935); *New Hampshire, Chouinard v. Shaw*, 104 A.2d 522, 523 (N.H. 1954); *Oklahoma, Yeager v. State*, 278 P. 665, 669-70 (Okla. Crim. App. 1929); *Tennessee, Marion County v. Cantrell*, 61 S.W.2d 476, 477 (Tenn. 1933) (stating that the object of a jury view is to make clear the situation, and thus a view certainly constitutes evidence); *Utah, Harper v. Summit County*, 963 P.2d 768, 780 (Utah 1998) (disapproved on other grounds by *Culbertson v. Bd. of County Comm'rs*, 44 P.3d 642, 657 (Utah 2001)); and *West Virginia, State v. Thomas*, 374 S.E.2d 719, 722 (W. Va. 1988) ("The view offered the jury additional significant evidence.").

96. A few of the holdings have apparently depended on the law of the forum state. *See, e.g., New Hampshire Ball Bearings v. Aetna Cas.*, 848 F. Supp. 1082, 1086 (D.N.H. 1994) (citing only New Hampshire case law for the proposition that a "view can be considered as evidence"). Others have simply relied on their own opinions. *See, e.g., United States v. Harris*, 141 F. Supp. 418, 419 (S.D. Cal. 1955).

97. In *Leo Spear Construction Co. v. Fidelity & Casualty Co. of New York*, 446 F.2d 439 (2d Cir. 1971), the court stated that "testimony, together with the Court's examination of the site, provided a sufficient basis for the Court's conclusions." *Id.* at 444. The court continued, "[i]n allowing the inspection of the site to influence its determination of value, the Court acted properly, since in no respect did it ignore the other evidence of value . . ." *Id.* Although an earlier Second Circuit opinion, *Schonfeld v. United States*, 277 F. 934, 938 (2d Cir. 1921), indicated that views are not evidence but are to help the jury understand the evidence, and this opinion has never been explicitly overruled, it is hard to reconcile *Schonfeld* with *Leo Spear*.

98. The court seemed to assume in *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252 (9th Cir. 2001), that a view is evidence. There, where the trial judge had taken an improper off-the-record view, the Ninth Circuit stated that there is not "anything wrong with official

and the D.C. Circuit⁹⁹ have all indicated that a view does in fact constitute evidence.¹⁰⁰ The Tenth and Eleventh Circuits have expressly stated that views are evidence. The Tenth Circuit, in *Lillie v. United States*,¹⁰¹ held that views are always evidence. Accordingly, the court stated, “[W]e disagree with the Sixth Circuit holding in *Price Bros.* to the extent it indicates that a view sometimes is not evidence.”¹⁰² Thus, in *Lillie*,¹⁰³ where the judge had taken a view without notifying the parties or giving them an opportunity to be present, the judge engaged in off-the-record fact gathering, and the case was remanded for a new trial.

The Eleventh Circuit discussed views in the highly-publicized Ten Commandments monument case of *Glassroth v. Moore*,¹⁰⁴ where “[t]he judge unquestionably made important factfindings as a result of what he saw when he viewed the monument and the rotunda,” and the appellant argued that such factfindings were unwarranted.¹⁰⁵ The court agreed with the Tenth Circuit’s opinion in *Lillie*, and stated that “[j]ust as pictures . . . submitted as exhibits are evidence, so too is what the judge saw when he viewed the actual monument and its setting.”¹⁰⁶

III. SNYDER

The Supreme Court’s 1934 decision in *Snyder v. Massachussetts*¹⁰⁷ is frequently cited by those analyzing the evidentiary effect of a view.¹⁰⁸ Interestingly, the case is cited in support of both the theory that a view does not provide independent evidence,¹⁰⁹ as well as the theory that a view does constitute a source of evidence.¹¹⁰

excursions by a judge or jury to view evidence that simply cannot, because of physical limitations, be brought into a courtroom,” *id.* at 1266–67, and that “the court’s site visit improperly exposed him to factual evidence not part of the record.” *Id.* at 1267.

99. In *United States v. Skinner*, 425 F.2d 552, 555 (D.C. Cir. 1970), the court stated that a demonstration is evidence similar to a viewing by the jury, and the appellate court is “required to give full credit to all reasonable inferences deducible therefrom.”

100. Though some other courts have spoken vaguely to the issue, the law in those circuits is veiled. The Fourth Circuit *might* have implied that a view constitutes evidence in *Small v. Hunt*, 98 F.3d 789, 798, when it stated, “[a] district court’s use of evidentiary findings from an improper view is reviewed under the standard governing the erroneous admission of evidence.” The Fifth Circuit’s opinion in *Johnson v. William C. Ellis & Sons Iron Works, Inc.*, 64 F.2d 950, 957–58 (5th Cir. 1979), indicated that the Federal Rules of Evidence may govern the admissibility of views. The Eleventh Circuit, in *Brundy v. Dugger*, 850 F.2d 1402, 1422 (11th Cir. 1988), stated in a habeas case that the trial court’s decision to deny the defendant’s request for a view was not an issue of state law, but was “an evidentiary ruling” that could be grounds for habeas relief if it denied the defendant of fundamental fairness.

101. 953 F.2d 1188 (10th Cir. 1992).

102. *Id.* at 1190.

103. *Id.*

104. 335 F.3d 1282 (11th Cir. 2003).

105. *Id.* at 1289.

106. *Id.* at 1289–90.

107. 291 U.S. 97 (1934), *overruled in part by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

108. *See, e.g., Glassroth*, 335 F.3d at 1289; *United States v. Gray*, 199 F.3d 547, 549 (1st Cir. 1999); *Lillie*, 953 F.2d at 1190; *Barron v. United States*, 818 A.2d 987, 991 (D.C. 2003); *State v. Pauline*, 60 P.3d 306, 323 (Haw. 2002).

109. *See, e.g., State v. Merritt*, 212 P.2d 706, 714 (Nev. 1949) (arguing that *Snyder* recognizes that things perceived at a view would not become evidence until regularly and

Because bits and pieces of the holding may be used out of context to support either side of the issue, an in-depth examination of *Snyder* is warranted to determine what light, if any, the case may have shed on the evidentiary value of a view.

Snyder was a 5–4 decision, with the majority opinion written by Justice Cardozo, and a dissent authored by Justice Roberts, in which Justices Brandeis, Sutherland, and Butler concurred. The case has since been overruled in part by *Malloy v. Hogan*,¹¹¹ but the part of the ruling that has been overruled is at most tangential to the present issue.¹¹² For present purposes, *Snyder* is still good law.¹¹³

Snyder involved the prosecution and conviction of the defendant Snyder for murder during an attempted robbery.¹¹⁴ During the trial, a motion to view the crime scene was granted, and the court, while prohibiting the defendant from attending the view in person, allowed his counsel to accompany the jury on the view.¹¹⁵ Snyder moved that he should be allowed to attend the view, invoking constitutional grounds, but this motion was denied.¹¹⁶ During the view, both the prosecutor and Snyder's counsel called attention to various points of interest.¹¹⁷ At the close of evidence, the judge in the case instructed the jury that "[t]he view, the testimony given by the witnesses and the exhibits comprise the evidence that is before you."¹¹⁸ The defendant was convicted, and the Supreme Judicial Court of Massachusetts affirmed.¹¹⁹ The Supreme Court granted certiorari to decide whether Snyder was denied due process of law under the Fourteenth Amendment when his request to accompany the jury on the view was refused.¹²⁰

factually introduced and admitted at trial), *overruled on other grounds* by *Steward v. State*, 346 P.2d 1083 (Nev. 1959); *State v. Richey*, 595 N.E.2d 915, 927 (Ohio 1992) (citing *Snyder* for the proposition that "[a] view of a crime scene is neither evidence nor a crucial stage in the proceedings"); 75 AM. JUR. 2D *Trial* § 264 (1992 & Supp. 2003) (citing *Snyder* for the proposition that "a jury on a view is not receiving evidence").

110. *See, e.g.*, *United States v. Harris*, 141 F. Supp. 418, 419 (S.D. Cal. 1955) (stating that *Snyder* declared that a view of a premises is evidence); *Pauline*, 60 P.3d at 323 (opining that *Snyder* asserted that, in reality, a view must be treated as evidence).

111. 378 U.S. 1 (1964).

112. The part of the holding of *Snyder* later overruled was its indication that the Fourteenth Amendment may not have reinforced certain assurances of the Bill of Rights. *See id.* at 6 (stating that the Fourteenth Amendment extends the scope of the Fifth Amendment privilege to include protection from states). However, for purposes of addressing the issues, the Court assumed that the Fourteenth Amendment did reinforce the Bill of Rights as against the states. *See Snyder*, 291 U.S. at 105–06.

113. *See Devin v. DeTella*, 101 F.3d 1206, 1209 (7th Cir. 1996) ("[W]e believe that the holding of *Snyder* is equally valid today."); *United States ex rel. Devin v. Godinez*, No. 93-C-6649, 1996 WL 148038, at *7 (N.D. Ill. Mar. 29, 1996) ("*Snyder* is still good law"). Courts have questioned the validity of *Snyder*. *See United States v. Walls*, 443 F.2d 1220, 1223 n.3 (6th Cir. 1971); *In re Application to Take Testimony in Criminal Case Outside Dist.*, 102 F.R.D. 521, 524 (E.D.N.Y. 1984), but the Supreme Court has not yet explicitly overruled this portion of the case.

114. 291 U.S. at 102.

115. *Id.* at 103.

116. *Id.*

117. *Id.* at 103–04.

118. *Id.* at 104.

119. *Id.* at 102–03.

120. *Id.* at 103.

The Court assumed that the Fourteenth Amendment conferred to those being tried in state proceedings the benefits that the Confrontation Clause of the Sixth Amendment conferred to those being tried in federal proceedings,¹²¹ and noted that the Confrontation Clause is subject to exceptions.¹²² The Court also stated that, for Fourteenth Amendment due process purposes, it was first necessary to determine whether Snyder's presence at the view was a requirement for him to obtain a fair trial.¹²³

First, the Court considered whether there could be a fair hearing if a defendant were absent from a view "where nothing is said by any one to direct the attention of the jury to one feature or another."¹²⁴ It concluded that the Fourteenth Amendment (and thus, the Sixth Amendment) does not assure the right to be present at such a view, since "[t]here is nothing he could do if he were there, and almost nothing he could gain."¹²⁵ The Court next turned to views where counsel are permitted, without any comment on the evidence, to point out to the jury particular features of the scene.¹²⁶ The Court concluded that, "[f]ar from being harmful, [the fact that counsel pointed out various features] supplies an additional assurance that nothing helpful to either side will be overlooked upon the view."¹²⁷

Contrary to the implication of at least one commentator,¹²⁸ the Snyder Court's conclusion that the defendant did not have a constitutional right to attend the view in no way hinged upon whether the view in the case was termed "evidence."¹²⁹ Rather, it hinged upon the Court's conclusion that a view is not part of a "trial" in the common law sense of the word, so that a defendant's Sixth Amendment right does not apply to a view.¹³⁰ Some courts have held that the question of whether a view is part of a trial

121. *Id.* at 105–06. Some courts have implied that if the defendant's presence at a view is not guaranteed by the Confrontation Clause, then it must be the case that its "sole purpose . . . is to enable the jurors to more accurately understand and more fully appreciate the testimony of witnesses given before them." *People v. Thorn*, 50 N.E. 947, 951 (N.Y. 1898). However, it does not necessarily have to be one or the other. Wigmore argues that the Confrontation Clause was meant to apply to the taking of testimonial evidence, in order to secure opportunity for cross-examination, which is not an issue during a view. 6 WIGMORE, *supra* note 4, § 1803, at 341–42.

122. *Snyder*, 291 U.S. at 107.

123. *Id.* at 107–08.

124. *Id.* at 108.

125. *Id.*

126. *Id.* at 110.

127. *Id.* at 113.

128. MCCORMICK, *supra* note 3, § 216 n.1 (stating that the *Snyder* Court carefully limited its holding to the facts of that case, including "the fact that a view is not deemed evidence in Massachusetts").

129. *Snyder*, 291 U.S. at 113.

130. *Id.* However, a number of state courts have concluded that a view is part of a trial in their respective states. *See, e.g.,* *Noell v. Commonwealth*, 115 S.E. 679, 682 (Va. 1923) (stating that "in jurisdictions where it has been looked upon as equivalent to taking evidence, the courts have generally held [that a view is part of the trial]"), *overruled on other grounds by* *Jones v. Commonwealth*, 317 S.E.2d 482 (Va. 1984); *see also* *State v. Rogers*, 177 N.W. 358, 359 (Minn. 1920) (stating that several courts have held that a view is part of the trial because it is ordered by the court). Whether the holding of *Snyder* on this issue makes good policy is beyond the scope of this Note.

depends upon whether it is to be evidence in the case.¹³¹ The Supreme Court, however, indicated in *Snyder* that these issues are unrelated for purposes of the Federal Constitution.¹³² Thus, the Court stated, “[w]e may assume that the knowledge derived from an inspection of the scene may be characterized as evidence. Even if this be so, a view is not a ‘trial’ nor any part of a trial in the sense in which a trial was understood at common law.”¹³³

The Court went on to say that, while a “defendant in a criminal case must be present at a trial when evidence is offered,”¹³⁴ “the solution of the problem is not to be found in dictionary definitions of evidence or trials,”¹³⁵ since the tyranny of labels is a “fertile source of perversion in constitutional theory.”¹³⁶ The Court concluded its discussion of this issue by stating:

We find it of no moment that the judge in this case described the view as evidence. The Supreme Judicial Court of Massachusetts has said of a view that its chief purpose is to enable the jury to understand better the testimony which has or may be introduced. Even so, its inevitable effect is that of evidence, no matter what label the judge may choose to give it. Such is the holding of many well-considered cases.¹³⁷

In the end, the Court concluded that the exclusion of the defendant from the view did not violate his constitutional rights:

The least a defendant must do, if he would annul the practice upon a view which the Commonwealth has approved by the judgment of its courts, is to show that in the particular case in which the practice is exposed to challenge there is a reasonable possibility that injustice has been done. No one can . . . have even a

131. *See, e.g.*, *State v. Slorah*, 106 A. 768, 772 (Me. 1919) (stating that conflicting opinions as to whether the accused has a right to be present at a view arise, at least in part, from differing conceptions as to the purpose of the view); *Rogers*, 177 N.W. at 359 (stating that courts that hold that a view is part of a trial also hold that it is the taking of evidence); *Noell*, 115 S.E. at 682 (stating that the question of whether a view is part of a trial hinges upon whether a view is a source of evidence, and that “it is never questioned that if evidence is taken during the view in the prisoner’s absence, he cannot be convicted”). *Corpus Juris Secundum* states that some authorities hold, on the grounds that a view is not the taking of evidence and not part of a trial, that the accused has no right to be present during a view. 23A C.J.S. *Criminal Law* § 1162 (1989 & Supp. 2003).

132. It is clear that the *Snyder* Court did not perceive its ruling that a view is not a part of a trial within the constitutional sense to compel a finding that a view is not evidence, *see Snyder*, 291 U.S. at 113, nor, presumably, would an opposite ruling have compelled them to hold that a view is evidence. *See id.*

133. *Id.*

134. *Id.* at 114. It is this concept that is often used by courts that consider views as evidence to require, barring extreme circumstances, a criminal defendant’s presence at a view, or by courts that do not consider a view as evidence to justify the taking of a view in the absence of a criminal defendant. *See supra* note 131.

135. *Id.* at 115.

136. *Id.* at 114.

137. *Id.* at 121 (internal citations omitted).

passing thought that the presence of Snyder would have been an aid to his defense.¹³⁸

IV. VIEWS SHOULD ALWAYS BE CONSIDERED EVIDENCE

A view should always be considered evidence. The arguments that are advanced in favor of this position are logical and in keeping with common sense. In addition, the arguments that are advanced to support the position that a view cannot be evidence are outdated and subject to a number of valid criticisms. However, while a view should always be considered evidence, its evidentiary value should never become disproportionate to the other evidence that is introduced.

A. Reasons That Views Should Be Considered Evidence

The strongest argument that a view should be considered evidence is pragmatic. The "inevitable effect" of a view "is that of evidence, no matter what label the judge may choose to give it."¹³⁹ The above statement by the Supreme Court illustrates the practical effect of a view on a jury. "[I]t is unreasonable to assume that jurors, however they may be instructed, will apply the metaphysical distinction suggested and ignore the evidence of their own senses when it conflicts with the testimony of the witnesses."¹⁴⁰ A number of well-reasoned cases make this argument,¹⁴¹ as do virtually all of the commentators.¹⁴² To say that, in reaching their conclusions, jurors are able to,

138. *Id.* at 113.

139. *Id.* at 121.

140. MCCORMICK, *supra* note 3, § 216, at 347. Perhaps this argument loses some force in a bench trial, where the judge is the finder of fact. However, there is no reason to think that a judge is more able to, or for that matter should, set aside what he or she sees and knows to be true, and instead embrace testimony that is contrary to what was seen. *See* Lillie v. United States, 953 F.2d 1188, 1190 (10th Cir. 1992) (stating that, for a judge or jury, any kind of presentation to help determine the truth or understand and assimilate the evidence is itself evidence); *State v. Pauline*, 60 P.3d 306, 323 n.15 (Haw. 2002) (treating bench trials and jury trials alike in the evidentiary value of a view). In addition, it should be remembered that the strongest argument for not considering a view to be evidence (that is, that there can be no record made for appeal) also loses force in a bench trial. *See infra* note 165.

141. *See, e.g., Lillie*, 953 F.2d at 1190 (stating that a distinction between whether a view is evidence or not is only semantic, because any kind of presentation like this is itself evidence); *see also* Glassroth v. Moore, 335 F.3d 1282, 1289 (11th Cir. 2003) (agreeing with *Lillie*); *United States v. Gray*, 199 F.3d 547, 549 (1st Cir. 1999); *Wall v. United States Mining Co.*, 232 F. 613, 616 (C.C.D. Utah 1905) ("Indeed, any other rule is incapable of practical application.").

142. *Gray*, 199 F.3d at 548. For examples of some commentators' views on the issue, *see* 3 JONES, *supra* note 19, § 15:24, at 61; MCCORMICK, *supra* note 3, § 216, at 347; 2 WEINSTEIN & BERGER, *supra* note 27, § 403.07[4]; and 4 WIGMORE, *supra* note 4, § 1168, at 385-86 (stating that the suggestion that a view merely enables the jury to comprehend the testimony "is simply not correct in fact").

or should, disregard the things that they saw during a view is a form of judicial naivety, which may come at the expense of the parties involved.¹⁴³

Even if the fact-finder were somehow able to make such a metaphysical distinction between a non-evidentiary view and an evidentiary one, the view should still be called evidence. After all, “[i]t would be pointless and largely negate the benefits of a view to send the jury out to view and then instruct that no weight could be given . . . to what was perceived at the scene.”¹⁴⁴ In addition, other real objects are considered evidence so long as they are small enough to be brought into a courtroom and admitted into evidence.¹⁴⁵ It is inherently unjust to prohibit the admission of evidence on the basis of its size, and it “defies logic for courts to seek the truth only to the extent that it fits through the courtroom doors.”¹⁴⁶ While there are certainly practical considerations of jury supervision and procedure to be taken into account when an examination of the evidence requires leaving the courtroom,¹⁴⁷ and those considerations may at times outweigh the probative value of the evidence under a Rule 403 balancing test,¹⁴⁸ this is cause for denying the motion for a view, not for mislabeling it. There is no legitimate reason that small objects can be evidence where large objects cannot.¹⁴⁹ “The acceptance of photographic evidence plus small objects cannot be successfully distinguished from jury views,”¹⁵⁰ at least as far as their evidentiary effect.¹⁵¹

B. The Arguments That Views Are Not Evidence Are Without Merit

Those who take the position that a view does not constitute the taking of evidence usually base that argument on three related grounds. The first, and arguably the strongest, is that there is no record of a view that is preserved for appeal.¹⁵² The second is that a view effectively turns the presiding judge or jury member into a “silent

143. See *infra* notes 226–30 and accompanying text (discussing courts that have concluded that errors were harmless based on the fact that the jury had been instructed that the view was not evidence).

144. Wendorf, *supra* note 23, at 393.

145. *Id.* at 383 (“[C]ourts have long admitted in evidence objects small enough to be brought into the courtroom.”).

146. *State v. Pauline*, 60 P.3d 306, 325 (Haw. 2002).

147. *Gray*, 199 F.3d at 550.

148. See FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

149. *Pauline*, 60 P.3d at 324.

150. Wendorf, *supra* note 23, at 383.

151. See *State v. McCausland*, 96 S.E. 938, 939 (W. Va. 1918) (“The reason the jury is taken to view the ground is simply because it is physically impossible to bring it into the courtroom, and it is therefore necessary, in order that the jury may have all of the light obtainable upon the subject to which the inquiry is directed, that it be taken and shown these objects which form a part of the subject of inquiry.”).

152. See *Park-in Theatres, Inc. v. Ochs*, 75 F. Supp 506, 512 (S.D. Ohio 1948) (questioning how a decision based on a view could be reviewed by a higher court).

witness”¹⁵³ in the case, since the parties cannot know exactly what the jurors perceive during the view, or what conclusions they draw from it.¹⁵⁴ Related to both of these is the idea that a judgment must be based “upon testimony given in open court,”¹⁵⁵ where there are procedural safeguards.¹⁵⁶

The Indiana Supreme Court found great merit in the argument that views cannot be considered evidence because there is no record of a view for appeal. Initially, the court had held in *Evansville, Indianapolis, and Cleveland Straight Line Railroad Co. v. Cochran*¹⁵⁷ that a view was to be considered evidence and that deference should be given to a jury that has had a view, since some of the evidence by which the verdict was reached was not in the record. In *Jeffersonville, Madison, and Indianapolis Railroad Co. v. Bowen*,¹⁵⁸ the court was persuaded by the appellant’s arguments, and overruled *Cochran*. The appellant in *Bowen* argued that a defendant may be convicted and hanged on insufficient evidence, but the judgment could not be reversed as long as the prosecutor had obtained a view during the trial.¹⁵⁹ The appellant further argued that calling a view evidence eliminates the benefit of appeal, and that, since the conducting of views is under the trial court’s discretion, a trial court may effectively deprive a party of its right to appeal.¹⁶⁰ The Indiana Supreme Court stated, “These reasons have so much force in them that we feel compelled to overrule [*Cochran*].”¹⁶¹

In *Hart v. State*,¹⁶² the Texas Court of Appeals made an intelligent reply to the argument that a view cannot be put on the record for appeal, although the case involved a slightly different context. There, in an assault with intent to murder case, the defendant objected to the display of the victim’s clothes, in part “[b]ecause such testimony [was] not of such a character as can be incorporated in the record for the Court of Appeals.” The court replied that if the admissibility of evidence depends upon its ability to be incorporated into the record, then the pointing out of a defendant in court is not admissible.¹⁶³ The court continued:

A witness's countenance, tone of voice, mode and manner of expression, and general demeanor on the stand oftentimes influence the jury as much in estimating the weight they give and attach to his testimony as the words he utters, and yet they cannot be sent up with the record, though [it is the duty of the jury] to

153. *Close v. Samm*, 27 Iowa 503, 508 (1869), available at 1869 WL 388, at *2 (the purpose of a view is “not to make them silent witnesses in the case, burdened with testimony unknown to both parties, and in respect to which no opportunity for cross-examination or correction of error, if any, could be afforded either party”).

154. 3 JONES, *supra* note 19, § 15:24, at 61.

155. *State v. Pauline*, 60 P.3d 306, 322 (Haw. 2002) (citing *McCamman v. Davis*, 127 N.W. 329, 330 (Mich. 1910)).

156. *Id.*

157. 10 Ind. 560 (1858), available at 1858 WL 4285.

158. 40 Ind. 545 (1872), available at 1872 WL 5422.

159. *Id.* at 548.

160. *Id.*

161. *Id.*

162. 15 Tex. Ct. App. 202 (1883), available at 1883 WL 8999.

163. While a limited and imperfect recording of this type of identification is possible through directives such as “Let the record reflect . . .,” transcriptions and other recordings of views are similarly possible. See *infra* note 167 and accompanying text.

consider them in passing upon his testimony. How they have impressed the jury and influenced their verdict are facts known only to themselves—facts which must necessarily be unknown to the defendant, to the trial court, and to this court . . . and yet they are and always have been the best and most legitimate sources from which a correct estimate of the value of oral evidence is drawn. . . . A juror . . . often sees, and rightly sees and acts upon, many things which cannot be incorporated in the record.¹⁶⁴

This same analysis is adopted by many courts and commentators in refuting the argument that, because a view cannot be incorporated into the record, it cannot constitute evidence.¹⁶⁵ In addition, an appellate court need not give unreviewable weight to a jury's conclusions simply because there was a view in the case.¹⁶⁶

The First Circuit made an additional reply to the argument that a view cannot be incorporated into the record. The court stated that this argument loses force as technology advances, since "[a] record of a view can be made . . . through the use of video or other photographic equipment, as well as through transcription of any remarks made."¹⁶⁷

A third reply to this argument is that cases are tried in an effort to get at the truth in the first court of record, even though the reviewing court may not have all of the advantages afforded to the trial court.¹⁶⁸ There are inherent imperfections in appellate review, and "this is a price we must pay if we hope to obtain the most socially desirable results in the greatest possible number of cases."¹⁶⁹ Surely the answer is not to impose the imperfections inherent in appellate review upon the trial court as well.

The second argument against the evidentiary effect of a view, that the fact-finder becomes a "silent witness," is also without merit. During the course of a trial, many things may be seen by the fact-finder of which the parties may not be aware,¹⁷⁰ particularly in the context of real evidence or visual aids such as photographs and

164. *Hart*, 1883 WL 8999, at *17 (internal citations omitted).

165. *See, e.g.*, *State v. Pauline*, 60 P.3d 306, 323 (Haw. 2002); 1 GREENLEAF, *supra* note 49; 4 WIGMORE, *supra* note 4, § 1168, at 385–86. Also, in bench trials, this argument loses much of its force, since the impressions gained from a view may be incorporated into the record. For example, in *Rygg v. County of Maui*, 122 F. Supp. 2d 1140, 1161 (D. Haw. 2000), the transcript specifically contained the impressions that the trial judge gained in his view.

166. *See infra* Part IV.C.

167. *United States v. Gray*, 199 F.3d 547, 549 (1st Cir. 1999). The First Circuit did not condition the treatment of a view as evidence upon the view being recorded, but was simply noting "that the concern expressed by some about the problem of creating a record is not without solutions." *Id.* at 550 n.1. A similar argument is also made by Wendorf, *supra* note 23, at 384 (stating that the objection to a lack of record "can be adequately answered by providing a summary of the view proceedings in the record"), and in *Pauline*, 60 P.3d at 324 (Haw. 2002) ("[G]iven the advancement in technology, recording a view today is much easier and more comprehensive."). California requires the proceedings at a view to be recorded to the same extent as the proceedings in the courtroom. CAL. CIV. PROC. CODE § 651(b) (West 1976).

168. *Evidentiary Effect*, *supra* note 56, at 114.

169. *Id.*

170. *Hart v. State*, 1883 WL 8999, at *17.

videos.¹⁷¹ The thoughts that go through a fact-finder's mind and the conclusions drawn from the evidence received are not testimony taken in open court.¹⁷² Observation of a thing that is viewed out of court no more turns the jurors into silent witnesses than observation of a thing that is viewed in court.¹⁷³

Finally, the argument that evidence should be taken in court where there are procedural safeguards cannot prevail. Procedural safeguards may be imposed on a view in order to minimize the danger of impropriety,¹⁷⁴ and using a fear of procedural defects as a means to argue that a view is not evidence simply encourages the omission of proper procedural safeguards when taking a "non-evidentiary view."¹⁷⁵ A number of courts and commentators have listed some safeguards that may be fitting.¹⁷⁶ Professor Wendorf's analogy is appropriate: "The fact that pigs will eat gardens is not a really good reason for slaughtering all swine. It may be a perfectly good reason for building fences."¹⁷⁷ As discussed earlier, a fear of procedural defects may be a reason to deny a motion for a view, but it is not a reason to argue that a view is not evidence.¹⁷⁸ By

171. See *Mauricio v. State*, 104 S.W.3d 919, 921 (Tex. Crim. App. 2003) (noting that jurors may see something that the attorneys have missed in photographs, videos, or any other evidence).

172. See *Hart*, 1883 WL 8999, at *17 (noting that the influence that such evidence has had on a jury and how it has affected their verdict are "facts which must necessarily be unknown to the defendant, to the trial court, and to this court").

173. It is true that what a jury sees during a view may be harder to control, but this danger can be minimized with appropriate procedural safeguards, see *infra* notes 174, 176 and accompanying text, and views may actually aid the jury in reaching the truth more than photographs and video, which are subject to manipulation through lighting, angles, and processing, and which may convey an impression that is not completely accurate. See *Rygg v. County of Maui*, 122 F. Supp. 2d 1140, 1147 (D. Haw. 2000); *Clarke v. Bruckner*, 93 F.R.D. 666, 671 (D.V.I. 1982) ("No number of photographs or drawings could give the jury as truthful a picture of the scene as a visit to the site.").

174. See *United States v. Gray*, 199 F.3d 547, 550 (1st Cir. 1999) ("Precautions . . . must be taken to minimize problems, because jury supervision is more difficult outside the courtroom.").

175. See *Price Bros. v. Phila. Gear Corp.*, 649 F.2d 416, 419 (6th Cir. 1981) (implying that, "[w]here the purpose of a view is to assist the fact finder . . . and the view itself is not considered evidence," some procedural safeguards may be omitted); *Southland Enters., Inc. v. United States*, 24 Cl. Ct. 596, 602 (1991) (citing *Price Bros.* for the proposition that it "is likely that evidentiary viewings require procedural safeguards," thus arguably implying that non-evidentiary viewings do not require such safeguards).

176. See, e.g., Wendorf, *supra* note 23, at 399 (calling for the admonishment of the jury against independent examination, exploration, or experiment and calling for attendance by the judge); *State v. Pauline*, 60 P.3d 306, 325 (Haw. 2002) (stating that view should be conducted at an appropriate time in the trial, without undue emphasis); *Clemente v. Carnicon-P.R. Mgmt. Assocs.*, 52 F.3d 383, 386 (1st Cir. 1995) (stating that (1) counsel should be alerted to a proposed view as early as possible, (2) counsel should be allowed to attend the view, (3) interaction between jurors and parties may be limited, (4) the judge should attend the view, and (5) the court reporter should attend to record the view).

177. Wendorf, *supra* note 23, at 385.

178. See *supra* text accompanying notes 147–49. Also, errors that occur during views as a result of procedural defects should be subject to a harmless error analysis. See, e.g., *Devin v. DeTella*, 101 F.3d 1206, 1210 (7th Cir. 1996); *Lillie v. United States*, 953 F.2d 1188, 1192

using a fear of procedural defects as a justification for not considering a view as evidence, one simply allows the courts to conduct a view without applying appropriate procedural safeguards.¹⁷⁹

C. Evidentiary Weight of Views

Perhaps the thrust of the debate over the evidentiary value of a view is implicitly about the weight that should be accorded a view.¹⁸⁰ Some courts have the mistaken impression that, if a view is called evidence, the result of the trial court must be accorded extraordinary deference.¹⁸¹ This simply is not the case. Rather, a view should be considered evidence, and should have the evidentiary effect that any other similar evidence would have under the circumstances – no more and no less.¹⁸²

Many courts that hold that a view is merely a context in which to understand evidence introduced at trial seem to actually mean that a view in a certain case is merely illustrative evidence or background evidence.¹⁸³ Naturally, a view that is illustrative or contextual would carry less evidentiary weight than a substantive view.

While a view would rarely be sufficient evidence upon which to base a verdict, it is possible to conceive of such instances. Thus, if the sole issue in a case is whether there

(10th Cir. 1992); *Pauline*, 60 P.3d at 326 (Haw. 2002); see also *Rushen v. Spain*, 464 U.S. 114, 118 (1983) (“Cases involving [the deprivation of the right to be present at every stage in a trial] are . . . subject to the general rule that remedies should be tailored to the injury suffered . . .”) (quoting *United States v. Morrison*, 449 U.S. 361, 364 (1981)). *Snyder* implicitly approved this standard. See *Snyder v. Massachusetts*, 291 U.S. 97, 118 (1934) (criticizing the trial judge’s “blunder” during the view in stating that one of the objects was not present at the time of the murder, but holding that the “verdict is not upset . . . if there was no substantial harm”).

179. See *infra* notes 220–25 and accompanying text.

180. Think, for example, about the concern that led the Indiana Supreme Court to conclude that a view is not evidence—that the appeals process would be nullified. See *supra* notes 157–61 and accompanying text; see also *Tarpley v. Hornyak*, No. M2002-01466-COA-R3-CV, 2004 WL 508509, at *3, *11 (Tenn. Ct. App. Mar. 15, 2004) (concluding that “the proper purpose of a view is to enable the judge to better understand the evidence that has been presented in court,” but noting that “the real issue in this case is whether a [fact-finder] can base its judgment solely on personal observations made during a view”).

181. See, e.g., *EEOC v. Mercy Hosp. & Med. Ctr.*, 709 F.2d 1195, 1200 (7th Cir. 1983) (stating that in jurisdictions where a view is held to be evidence, findings are entitled to great weight on appeal where a view is had); *Beneduci v. Valadares*, 812 A.2d 41, 47 (Conn. App. Ct. 2002) (“Conclusions based on [views] are entitled to great weight on appeal.”) (quoting *Castonguay v. Plourde*, 699 A.2d 226, 262 (Conn. App. Ct. 1997)).

182. Naturally, the circumstances will vary with the type of view that is taken.

183. See *Tarpley*, 2004 WL 508509, at *6 (“[C]ourts stating observations from a view are not evidence are often actually stating that such observations cannot be used as . . . competent evidence.”). Illustrative evidence, like a photograph of a crime scene, illustrates the testimony of witnesses. Illustrative evidence requires an eyewitness who can affirm that a view would fairly and accurately depict the property. See *Wetherill v. Univ. of Chicago*, 565 F. Supp. 1553, 1561–62 (N.D. Ill. 1983). Note also that photographs, just like views, may sometimes be illustrative evidence and other times may provide independent evidence. See *United States v. Rembert*, 863 F.2d 1023, 1028 (D.C. Cir. 1988).

exists a window in one wall of a building,¹⁸⁴ whether a defendant was selling grain by a false measure,¹⁸⁵ or anything else that is determinable in and of itself through the view,¹⁸⁶ then the jury's decision should be given great deference, since the jurors had the opportunity to examine firsthand the object in question.¹⁸⁷ If, however, the view is "essentially background in nature,"¹⁸⁸ similar to an expert witness's explanation of terms of a trade,¹⁸⁹ then the fact that the jury took a view should carry very little weight, not only with the jury but also with a reviewing tribunal. Similarly, if the issue in the case is something for which an expert witness is required (for example, the value of a certain piece of land or the probable speed at which a car was traveling as ascertained from the length of skid marks), then a view should be treated like any other evidence in the case, and the jury's personal opinions would be insufficient to support a verdict not based at least in part on the expert testimony.¹⁹⁰

In the end, the weight that should be accorded a view by a reviewing tribunal is directly proportional to the view's probative value.¹⁹¹ Thus, a California court wisely stated, "a view of the scene [is] independent evidence on which a finding may be made and sustained. But this is only true to the extent that a view of the premises has probative value as to a particular issue."¹⁹² Similarly, a judge in the Circuit Court for the District of Utah, after concluding that his own view did provide evidence, stated, "[u]nder these circumstances, and concerning a matter involving special knowledge . . . it would be a great presumption on my part to attach material weight to impressions

184. This is a hypothetical often used by courts to argue that a view is evidence. See, e.g., *Denver, Tex. & Ft. Worth R.R. Co. v. Pulaski Irrigating Ditch Co.*, 52 P. 224, 226 (Colo. Ct. App. 1898); *Yeager v. State*, 278 P. 665, 669 (Okla. Crim. App. 1929).

185. See *Hart v. State*, 15 Tex. Ct. App. 202 (1883), available at 1883 WL 8999.

186. Courts have used numerous illustrations of purely physical issues in an effort to persuade readers that the contention that a view cannot be evidence is ridiculous. Some of these illustrations include: the color of an object, *Carpenter v. Carpenter*, 101 A. 628, 631 (N.H. 1917); the hilliness of a farm, *Washburn v. Milwaukee & Lake Winnebago R.R. Co.*, 18 N.W. 328, 330 (Wis. 1884); that a building was burned, *id.*; that a bullet caused a hole in a door panel, *People v. Milner*, 54 P. 833, 839 (Cal. 1898); and whether a piece of land is a marsh, *Hatton v. Gregg*, 88 P. 592, 593-94 (Cal. Ct. App. 1906).

187. This assumes, of course, that there is no evidence that the conditions of the place viewed were changed, that the jury was taken to the wrong place, or that the jury had been duped in some other way.

188. FED. R. EVID. 401 advisory committee notes. Views of real estate are listed among charts, photographs, and murder weapons as *evidence* that is universally offered and accepted, and is essentially background in nature. *Id.* (emphasis added).

189. *Lillie v. United States*, 953 F.2d 1188, 1190 n.4 (10th Cir. 1992).

190. MCCORMICK, *supra* note 3, § 216, at 347. This reasoning provides a response to the concern of the Tennessee Court of Appeals in *Tarpley* that, if views are a source of evidence, the court would be forced to affirm the ruling of the trial court even though it was "particularly troubled by the trial court's determination of causation . . . [that relied] only on his own observations and expertise." *Tarpley v. Hornyak*, No. M2002-01466-COA-R3-CV, 2004 WL 508509, at *12 (Tenn. Ct. App. Mar. 15, 2004).

191. See *Sylva v. Kuck*, 49 Cal. Rptr. 512, 519 (Cal. Dist. Ct. App. 1966); *Wall v. U.S. Mining Co.*, 232 F. 613, 617 (C.C.D. Utah 1905).

192. *Sylva*, 49 Cal. Rptr. at 519 (citations omitted).

gained by my own inspection.”¹⁹³ Thus, a view should never become disproportionate to other evidence,¹⁹⁴ but, where appropriate, should be able to provide at least a partial basis for a verdict.¹⁹⁵ Just as a jury should always consider all of the sources of evidence in conjunction with one another,¹⁹⁶ so should a reviewing tribunal.

V. PRACTICAL IMPLICATIONS

One may wonder whether there is a practical difference between the two positions, or if, as the Tenth Circuit has said, this is only a game of semantics,¹⁹⁷ especially if, as the Supreme Court held in *Snyder*,¹⁹⁸ this issue makes no difference in a criminal defendant’s constitutional right to attend a view.¹⁹⁹ However, if it can be said that there are no practical effects resulting from having taken one position over the other, one wonders why some courts have recently bothered to explicitly reverse their positions,²⁰⁰ and why the Tenth Circuit bothered to disagree with the Sixth Circuit “to the extent it indicate[d] that a view sometimes is not evidence.”²⁰¹

In fact, in many circumstances, the distinction is one of semantics. For instance, a court that considered a view to be evidence could have reached the same holding as the Sixth Circuit reached in *Price Bros.* by calling the view harmless error.²⁰² Such a court could have viewed the admission of the law clerk’s report under the standard of erroneous admission of evidence,²⁰³ and found that the verdict was supported by other substantial evidence. However, there are several situations in which the difference carries practical implications, and these differences merit consideration of the issue.

A. The Defendant’s Right to Be Present

One major ramification of the distinction is that, notwithstanding *Snyder*, many state courts that deny a criminal defendant the right to attend a jury view do so on the basis

193. *Wall*, 232 F. at 617.

194. *Wendorf*, *supra* note 23, at 392.

195. *Id.* at 393.

196. SEYMOUR DWIGHT THOMPSON, A TREATISE ON THE LAW OF TRIALS IN ACTIONS CIVIL AND CRIMINAL § 895, at 684 (1889) (“But the evidence which the jurors may acquire from making the view is not to be elevated to the character of exclusive or predominating evidence. They are not to disregard other evidence in regard to the character and value of the property; and an instruction which conveys to them the impression that they may do so is erroneous.”).

197. *Lillie v. United States*, 953 F.2d 1188, 1190 (10th Cir. 1992). While the Tenth Circuit did state that the difference was one of semantics, it is possible that it was simply referring to the effect that an instruction that a view is not evidence would have on a jury, and not to overall practical differences between the two positions. *See id.*

198. 291 U.S. 97 (1934).

199. *See supra* notes 128–37 and accompanying text.

200. *See, e.g., United States v. Gray*, 199 F.3d 547, 548 (1st Cir. 1999); *State v. Pauline*, 60 P.3d 306, 325 (Haw. 2002).

201. *Lillie*, 953 F.2d at 1190.

202. For a description of *Price Bros.*, see text accompanying notes 83–91.

203. *Lillie*, 953 F.2d at 1192.

that a view is not called evidence in that jurisdiction.²⁰⁴ Similarly, some of the courts that have held that the defendant has a right to attend a view have done so because they consider a view to be evidence.²⁰⁵ For instance, the court in *In re Application to Take Testimony in Criminal Case Outside District* stated, “[a]uthorities now generally agree that the view provides independent evidence. *Snyder*, indicating that the defendant does not have to be present, is no longer useful since it is inconsistent with general modern principles.”²⁰⁶

Similarly, in *State v. Francisco*,²⁰⁷ the jury was to take a view of a bullet-riddled car and the defendant chose not to attend the view so that the jury would not see him in restraints.²⁰⁸ The Washington Court of Appeals held that, while a criminal defendant is guaranteed the right to be present at every critical stage of a trial, a view is not part of the trial and has no evidentiary value.²⁰⁹ The defendant argued that the view was a means by which the state introduced evidence that could not be brought into the courtroom. The court replied, “[w]e disagree. The jury was instructed that the view was not evidence.”²¹⁰ In *State v. Cassano*,²¹¹ a statute specifically conferred upon the defendant the right to be present during a jury view.²¹² The defendant was denied this right at trial, and the Ohio Supreme Court held that this did not materially prejudice the defendant because, *inter alia*, a view of a crime scene was not considered evidence.²¹³

Since a view may have a very real and even dramatic outcome on a jury despite any label that is put on it,²¹⁴ it would seem to be good policy to allow the parties to be

204. See *supra* note 131; *Stephenson v. State*, 742 N.E.2d 463, 493–94 (Ind. 2001) (stating that a defendant has no right to attend a view because a view is not evidence); 22 WRIGHT & GRAHAM, *supra* note 15, § 5176 n.6 (Supp. 2004).

205. 23A C.J.S. *Criminal Law* § 1162 (1989 & Supp. 2003). In *Martin v. State*, 287 S.E.2d 244, 246–47 (Ga. Ct. App. 1981), the court distinguished between an “evidentiary view” and a view of a crime scene, holding that a defendant has a right to be present at the former but not the latter.

206. 102 F.R.D. 521, 524 (E.D.N.Y. 1984). The court does not expressly identify these principles, and cites only to Wigmore’s general discussion of views, 4 WIGMORE, *supra* note 4, §§ 1162–69, for its assertion regarding *Snyder*. In *re Application to Take Testimony*, 102 F.R.D. at 524; see also *United States v. Walls*, 443 F.2d 1220, 1223 (6th Cir. 1971).

207. 26 P.3d 1008 (Wash. Ct. App. 2001).

208. *Id.* at 1012.

209. *Id.* Many courts have held that, where the defendant has a right to be present at a view, he may waive it for tactical reasons, such as to avoid having the jury see him in restraints. See *People v. Cooper*, 809 P.2d 865 (Cal. 1991) (applying in non-capital cases); *T.D.T. v. State*, 561 So. 2d 1333 (Fla. Ct. App. 1990); *Harwell v. England*, 217 S.E.2d 154 (Ga. 1975); *People v. King*, 534 N.W.2d 534 (Mich. Ct. App. 1995); *Jones v. Commonwealth*, 317 S.E.2d 482 (Va. 1984). See generally 23A C.J.S. *Criminal Law* § 1162 (1989 & Supp. 2003) (“Authorities differ as to whether the presence of an accused is necessary when the jury are taken to view the scene of the crime; however, it is generally held that whatever right he has may be waived.”).

210. *Francisco*, 26 P.3d at 1013.

211. 772 N.E.2d 81 (Ohio 2002).

212. *Id.* at 96.

213. *Id.*

214. See *supra* notes 139–43 and accompanying text.

present during the view.²¹⁵ This would be especially true of a criminal defendant, and such a defendant may even have rights to be present at a view.²¹⁶ However, it is illogical to think that a defendant's rights depend solely on the way a view is characterized. It would be absurd to argue that a defendant has no right (constitutional or otherwise) to attend a view if the view is characterized as "a context in which to apply the evidence," but that the same defendant would have a right to attend the same view if it were called "evidence,"²¹⁷ particularly if the practical effect of the view on a fact-finder is the same.²¹⁸

Parties could waive their right to attend the view, even if it were constitutional,²¹⁹ and there may at times be legitimate reasons for excluding parties from a view, but the groundless assertion that a view is not evidence is not such a legitimate reason. The idea that a view is not evidence simply does not make sense,²²⁰ and it is improper for a court to attempt to legitimize the exclusion of a party from a view based on this unfounded assertion.

215. *Starr v. State*, 115 P. 356, 366 (Okla. Crim. App. 1911) ("[i]t would be better and safer for him to accompany the jury, if convenient."). In *Snyder*, the Supreme Court did not comment on what the better practice may have been, but simply on Constitutional minimums. See *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("[P]rocedure does not run foul of the Fourteenth Amendment because another method may seem . . . to be fairer or wiser . . .").

216. See *supra* note 134 and accompanying text. There is some argument that a defendant may now have constitutional rights to attend a view. See *United States v. Walls*, 443 F.2d 1220, 1223 n.3 (6th Cir. 1971) (requiring the presence of the defendant based on its "supervisory authority" over the district courts, but questioning "whether evolving Constitutional principles have eroded the basis for the majority's position in *Snyder*"); *In re Application to Take Testimony in Criminal Case Outside Dist.*, 102 F.R.D. 521, 524 (E.D.N.Y. 1984) ("*Snyder*, indicating that the defendant does not have to be present, is no longer useful since it is inconsistent with general modern principles."). See generally 1 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 401.11, at 284 n.13 (5th ed. 2001) (doubting whether *Snyder* would be followed today); MCCORMICK, *supra* note 3, §216, at 346-47 (when the view itself is deemed to constitute evidence, "the right of the defendant to be present in all probability possesses a constitutional underpinning"). However, MCCORMICK does not cite any authorities for this proposition, but rather attempts to distinguish *Snyder*. *Id.*

217. The *Snyder* Court stated that:

To say that the defendant may be excluded from the scene if the court tells the jury that the view has no other function than to give them understanding of the evidence, but that there is an impairment of the constitutional privileges of a defendant thus excluded if the court tells the jury that the view is part of the evidence—to make the securities of the constitution depend upon such quiddities is to cheapen and degrade them.

Snyder v. Massachusetts, 291 U.S. 97, 121-22 (1934).

218. See *supra* notes 139-43.

219. *Taylor v. United States*, 414 U.S. 17, 20 (1973) (holding that, at least in non-capital cases, a defendant waives his right to be present where he is voluntarily absent from the proceedings).

220. See *supra* Part IV.A-B.

B. Procedural Safeguards

Another real-world result of a court's position on this issue is the role that procedural safeguards play in the view process. When a view is not considered evidence, procedural safeguards will likely be seen as less vital,²²¹ which is particularly disturbing in light of the fact that the view will almost certainly have the same effect on the fact-finder as it would have had if it been termed "evidence."²²² Parties are then robbed of safeguards that perhaps should have been implemented. For instance, one court stated, "[j]udges may even make site visits without the parties themselves present, provided the visit is not evidentiary."²²³ The court cited *Price Bros.*,²²⁴ discussed above.²²⁵ The court went on to state that it "is likely that evidentiary viewings require procedural safeguards," implying that views that are not considered evidentiary need not apply such safeguards.²²⁶ This reasoning is flawed. Views should be called evidence, and proper safeguards should be applied when a view is taken.

C. Prejudicial Error

Courts have also held that, where a view is not considered evidence, any error that may have resulted from the view is less likely to be prejudicial. *Price Bros.*²²⁷ is one example of this.²²⁸ Another example is *State v. Palmer*,²²⁹ which indicated that an instruction that a view was not evidence reduced the prejudice that may have arisen when the jury viewed locations that had not been previously agreed upon.²³⁰ However, from a practical perspective, it is doubtful that such an instruction had any real impact on the jurors' perceptions.²³¹

221. See *Price Bros. v. Phila. Gear Corp.*, 649 F.2d 416, 419 (6th Cir. 1981) (implying that where the purpose of a view is not to provide evidence, safeguards are less necessary). While the Sixth Circuit recognized that some views may provide evidence, other jurisdictions in which views never provide evidence would no doubt see less need to implement fundamental safeguards.

222. See *supra* notes 139–43 and accompanying text.

223. *Southland Enters., Inc. v. United States*, 24 Cl. Ct. 596, 601 (1991).

224. 649 F.2d at 420–21.

225. See *supra* notes 83–91 and accompanying text. While non-party views are clearly contrary to our adversarial system, see *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1266–67 (9th Cir. 2001) (denouncing off-the-record fact gathering); *Lillie v. United States*, 953 F.2d 1188, 1191 (10th Cir. 1992) (same), what is worse is that if *Price Bros.* allows for such views, then it could also be argued that *Price Bros.* allows a judge to send her law clerk to take a view without notice to the parties, provided the judge explicitly states that the view was not evidentiary.

226. *Southland Enters., Inc.*, 24 Cl. Ct. at 602.

227. 649 F.2d 416 (6th Cir. 1981).

228. See *supra* note 88 and accompanying text.

229. 687 N.E.2d 685 (Ohio 1997).

230. 22 WRIGHT & GRAHAM, *supra* note 15, § 5176 n.6 (Supp. 2004).

231. See *supra* notes 139–43 and accompanying text.

D. Whether a View May Be Conducted

Another practical effect of this issue relates to a court's discretion to grant or deny motions for views. For instance, in *State v. Fricks*,²³² the Washington Supreme Court's position that a view does not constitute evidence required the trial court to deny the defendant's motion for a view of the location in question. In that case, the defendant was on trial for robbery.²³³ He claimed to have seen a broken window from a certain location and there was conflicting evidence as to whether this window was visible from that location.²³⁴ The defendant moved for a view and the trial court denied the motion.²³⁵ On appeal, the Supreme Court of Washington stated that "[t]his was not a proper case for a jury view" because the "purpose of a jury view is to aid the jury in better understanding the evidence, not to take new evidence," and "[i]n this case a jury view would only serve to let the jurors make their own observation of whether the broken window could be seen."²³⁶

E. Procedure

Finally, the question of whether a view is evidence can have practical effects when it comes to procedural matters. In South Carolina criminal prosecutions, the defendant is allowed the final closing argument if he has introduced no evidence.²³⁷ In *State v. Mouzon*,²³⁸ the defendant in a South Carolina criminal case made a motion for a view, which was granted. The judge in the trial court characterized the view as evidence, and subsequently denied the defendant's request to make the final closing argument.²³⁹ The South Carolina Supreme Court held that this was error, because "[a] viewing of the scene of the crime is not regarded as evidence."²⁴⁰

In *United States v. Harris*,²⁴¹ the court concluded that, since a view is evidence, it comprises part of the case of the requesting party. Thus, a view should take place during the presentation of the case of the party who offers it so that the court will be able to consider all of the evidence of a party's case-in-chief if the other party makes a motion for a directed verdict.

232. 588 P.2d 1328 (Wash. 1979).

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* This last statement may lead one to question the accuracy of the earlier proposition that it is the goal of the trial court to get at the truth. See *supra* notes 168-69 and accompanying text. There could hardly be stronger evidence as to the visibility of the window than an in-person examination.

237. *Id.* at 921.

238. 485 S.E.2d 918 (S.C. 1997).

239. *Id.* at 920.

240. *Id.*

241. 141 F. Supp. 418, 419 (S.D. Cal. 1955).

CONCLUSION

Views, whether taken by a judge or by a jury, are evidence. Not only is any other rule impractical, as the Supreme Court noted in *Snyder*,²⁴² but to hold that a view is not evidence is unfair to a party whose evidence is too large to be brought into a courtroom. In addition, there are no forceful arguments for the proposition that a view should not be treated as evidence, particularly if the view is taken under procedural safeguards and some type of recording of the view is made to the extent that it is reasonable to do so.

Views have been around for many years, and although technology has to some degree obviated them, views are likely to be an important part of many trials for years to come. After all, “[i]f a picture is worth a thousand words, then the real thing is worth a thousand pictures.”²⁴³

242. 291 U.S. 97, 121 (1934).

243. *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1266 (9th Cir. 2001).