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## Does the First Amendment's "Right of Access" Require Court Proceedings to be Televised? A Constitutional and Practical Discussion

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### I. INTRODUCTION

The frenzy of political activity seen in 2005 triggered the resurgence of a familiar topic in the national legislature – televised court proceedings. Renewed interest may have come as a result of the recent Supreme Court nominations and related hearings, or it may have been because the opportunity seemed ripe for long-standing advocates to push the topic to the forefront once again. Regardless of the reason, the evidence is undeniable: the end of 2005 saw a flurry of bills introduced – three in the House<sup>1</sup> and two in the Senate<sup>2</sup> – that would allow televised court proceedings in the federal court system, and both Chief Justice John Roberts and Justice Samuel Alito were asked about televised proceedings at least once during their confirmation hearings.<sup>3</sup> This interest has clearly held into 2006, as the questioning of Justice Alito<sup>4</sup> and the still-active bills demonstrate.<sup>5</sup>

The changing composition of the Court and the continued debate have provided a fertile ground for discussion and reflection on the role the modern media plays in our system of justice. These events have provided a springboard for the dialogue that follows. The goal of this article is to provide a comprehensive overview of the current status of electronic media in both state and federal (and trial and appellate) courtrooms, and to consider the implications of various “access” programs around the nation. This article also aims to provide a thorough discussion of the pros and cons of broadcasted proceedings.<sup>6</sup> In doing so, this article will include the precedential, pragmatic, and constitutional arguments promulgated by both sides of the debate.<sup>7</sup> Finally, this article will look to current views in the

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1. H.R. 1751, 109th Cong. § 22 (2005); H.R. 2422, 109th Cong. (2005); H.R. 4380, 109th Cong. (2005).

2. S. 1768, 109th Cong. (2005); S. 829, 109th Cong. (2005).

3. *Nomination of John G. Roberts Before the S. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter Roberts Hearings]; *Nomination of Samuel A. Alito Before the S. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter Alito Hearings].

4. See Alito Hearings, *supra* note 3.

5. See *supra* notes 1-2 and accompanying text.

6. See *infra* notes 303-27, 336-75 and accompanying text.

7. See *infra* Part VI.

Court,<sup>8</sup> in the legislature,<sup>9</sup> and within the judicial conference<sup>10</sup> in predicting the likelihood of change in courts' current practices.

## II. INTRODUCING THE CONTENDERS

Proponents of broadcasted proceedings argue that opening the courts to electronic media furthers many of the basic tenets of our government; namely, accountability, openness, and fully informed public debate.<sup>11</sup> These arguments, and particularly those advanced by members of Congress, contain veiled admonishments directed at the courts and at critics, suggesting that it is time to end an era of aloofness, distance from the public, and general inaccessibility.<sup>12</sup> The arguments draw both from practical considerations and constitutional text, making the suggestion that public attendance (both in-person and through its surrogate, the media) serves dual purposes: first, it provides an educational opportunity for those in the audience, and second, it allows the public to fulfill its role as established in the Constitution, operating as an independent oversight board and providing accountability to the court system.<sup>13</sup>

On the other side, critics of the recent legislative proposals (and those concerned about the principle of broadcasted judicial proceedings in general) readily and ably respond to the claims of proponents. Among the critics are no lesser lights than the late Chief Justice William Rehnquist, Justice David Souter, the Judicial Conference and the Criminal Defense Bar.<sup>14</sup> These heavyweights have the other half of academia backing their position, and are quick to refute the contention that all will be well with the world when

8. See *infra* notes 448-66 and accompanying text.

9. See *infra* notes 467-91 and accompanying text.

10. See *infra* notes 443-47 and accompanying text.

11. See generally 151 Cong. Rec. 121, S10426-S10430 (2005) (statements of Sen. Specter and Sen. Leahy), available at <http://www.fas.org/sgp/congress/2005/s1768.html>. *Cameras in the Courtroom: Hearing on S. 829 Before the S. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter Statement of Feingold] (statement of Sen. Russ Feingold) ("[C]ourt proceedings are public hearings, and the American people have the right to actively observe the operations of all branches of our government.").

12. Press Release, Congressman Steve Chabot (Nov. 9, 2005) (on file with author) [hereinafter Statement of Chabot] ("It is good public policy for Congress to facilitate through media access to the courtroom. The ability of people to exercise their right to freedom of speech, freedom of the press, and to petition the Government for redress of grievances.").

13. See, e.g., AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE 118 (1998) ("The Framers undeniably saw the jury as serving *the public*, both in its capacity to monitor and help administer government, and in its educative role for the actual jurors.").

14. See Bruce Moyer, *More Judgeships, Circuits, and Cameras?*, 53 FED. LAW. 10 (2006) ("The Judicial Conference and the criminal bar oppose the legislation, citing a number of concerns, including the intimidation of jurors and witnesses.").

cameras are allowed into the federal courtrooms. The critics raise substantial and valued concerns, among them the potential for intimidation of jurors and witnesses, the possibility of a biased jury, grandstanding by the judge and/or the participating attorneys, and lastly, the threat to general courtroom decorum and the likelihood of chilled advocacy and judicial questioning.<sup>15</sup>

These arguments act as support or as criticism for present court practices, which, as seen below, vary widely among the states and between the state and federal court systems.<sup>16</sup> However, before looking to these venerated institutions, we travel to the Supreme Court to consider – and appropriately so – precedent.<sup>17</sup> The current practice adopted by the Court is introduced first, for this colors the policies of the lower courts.

### III. PRESENT PRACTICES IN THE SUPREME COURT

While state and appellate courtroom practice varies widely, the High Court – at least for the time being – sides with the critics.<sup>18</sup> The Court has stuck fast to its position – in fact, many of the bulletins that the Court publishes explicitly state that cameras are allowed nowhere inside the building.<sup>19</sup> This long-standing tradition is meant to preserve the decorum and dignity of the courtroom and is not to be taken as an exclusionary measure that aims to close the doors of the High Court completely.<sup>20</sup> Indeed, visitors are welcomed to the Court, both to view the building and to hear oral arguments.<sup>21</sup>

However, those who make the trek to the courtroom doors are not necessarily guaranteed a seat. The Visitors Guide to Oral Argument at the Supreme Court of the United States explicitly states:

All oral arguments are open to the public, but seating is limited and on a first-come, first-seated basis . . . . Visitors should be aware that cases may attract large crowds, with lines forming before the building opens . . . . Court police officers will make every effort to

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15. See *infra* notes 433-41 and accompanying text.

16. See *infra* Part V.

17. See *infra* notes 19-22 and accompanying text.

18. See generally *infra* notes 433-41 and accompanying text.

19. See, e.g., Public Information Office of the Supreme Court of the United States, *A Reporter's Guide to Applications Pending Before The Supreme Court of the United States*, 15, <http://www.supremecourtus.gov/publicinfo/reportersguide.pdf> [hereinafter *Reporter's Guide*]; *Visitor's Guide to Oral Argument at the Supreme Court of the United States*, 3 (reminding visitors that no electronic devices are allowed in the courtroom at any time), <http://www.supremecourtus.gov/visiting/visitorsguidetooralargument.pdf> [hereinafter *Visitor's Guide*].

20. See *Visitors Guide*, *supra* note 19, at 2-3.

21. See generally *Reporter's Guide*, *supra* note 19.

inform you as soon as possible whether you can expect to secure a seat in the Courtroom.<sup>22</sup>

In fact, the Court has such limited space that it allows two lines to form before oral argument: one for spectators who wish to view the entire proceedings, and one for those who only wish to see a three minute portion of the proceedings.<sup>23</sup> Space limitations often preclude citizens from viewing particularly well-publicized and closely followed cases in full.<sup>24</sup> Indeed, the Courtroom certainly is no Super Bowl stadium: official publications of the Court state that the dimensions of the room measure 82 by 91 feet.<sup>25</sup> The practical limitations become substantive limitations for potential viewers; it should not come as much of a surprise that there are documented instances of spectators "paying off" others waiting in line in order to guarantee access to a seat, even for a mere three minutes.<sup>26</sup>

These limitations obviously create tensions between accommodating visitors who are interested in viewing the "open" Court and keeping the court orderly and operational.<sup>27</sup> Such tensions are exacerbated by the fact that the Court could become more open through the public's surrogate, the media.<sup>28</sup> The conflict between public access, both through direct public attendance and through the media acting on behalf of the public, and the expectations of judges and defendants in the administration of justice has heightened as a growing percentage of the general public gets their

22. *Visitors Guide*, *supra* note 19, at 2.

23. *See id.*

24. There are approximately 300 seats available in the Supreme Court. The number of spectators for major cases invariably outnumbers the seats inside the Court, and as a result the Supreme Court developed the three-minute line. This, to many, is an incredibly unsatisfactory solution: spectators are permitted to view court proceedings in three minute intervals and are then herded out for the next rotation of eager citizens. *See* Joseph D. Whittaker, *Crowd Waits All Night for Bakke arguments*, WASH. POST, Oct. 13, 1977, at A8; Todd Piccus, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 TEX. L. REV. 1053, 1090 (1993) (noting that "[e]ven with the three-minute rule, a total of 200 spectators were turned away from oral arguments in *Regents of the University of California v. Bakke*").

25. *The Court Building* 3 <http://www.supremecourtus.gov/about/courtbuilding.pdf> [hereinafter *The Court Building*].

26. Piccus, *supra* note 24, at 1091 (noting that Randall Terry, director of the anti-abortion group Operation Rescue, was so bent on gaining admission to the oral argument of *Webster v. Reproductive Health Services* that he bought the eleventh space in line for \$100).

27. The reference to "open court" comes directly out of our Founding document. Article III expressly states that, at least in the case of treason, the courts shall be open. U.S. CONST. art. III, § 3, cl. 1.

28. *See generally* MARJORIE COHN & DAVID DOW, *CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE* 41 (1998) ("In the event a courtroom cannot accommodate all members of 'the public,' the media are often considered 'surrogates' for the public.").

information primarily through electronic media and television.<sup>29</sup> The conflict continues to play out in the decisions of the courts and through the ongoing academic and (rightfully) public discussion. This interplay is first discussed through the jurisprudence of the Supreme Court below.

#### IV. THE JURISPRUDENCE OF MEDIA IN THE COURTS

The tension between the rights of the public to an open government and the right of the criminal defendant to a fair trial has been present throughout our Nation's history.<sup>30</sup> These rights clash particularly forcefully when the media becomes involved, as the potential for prejudice is arguably more likely with highly publicized criminal trials.<sup>31</sup> Nonetheless, both the public and the defendant are provided with basic rights under the Constitution, and both sets of rights must be concurrently recognized and respected.<sup>32</sup> Cases arising within this last century have emphasized the discordance that can result in trying to honor both sets of rights.<sup>33</sup> The discussion that follows describes the constitutional provisions employed by the judiciary and others, some successfully and others not, in the attempt to make courtrooms fully available to members of the public.

##### A. *The Sixth Amendment*

The Constitution, and in particular the Bill of Rights, confers many benefits on both specific individuals and the general public. Some provisions are aimed specifically at government or the accused, while others

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29. See, e.g., *Chandler v. Florida*, 449 U.S. 560, 562 (1981) ("Over the past 50 years, some criminal cases characterized as 'sensational' have been subjected to extensive coverage by news media, sometimes seriously interfering with the conduct of the proceedings and creating a setting wholly inappropriate for the administration of justice.").

30. Nadine Strossen, *Free Press and Fair Trial: Implications of the O.J. Simpson Case*, 26 U. TOL. L. REV. 647 (1995) ("As the O.J. Simpson trial has made dramatically clear, a defendant's fair trial rights may be in tension with the First Amendment rights of the press and the public—the rights to report and receive information about the trial.").

31. In fact, this tension is recognized by judges themselves. For example, the Honorable David B. Sentelle has noted that:

All judges recognize the tension between this duty and the rights owed to the public in general, and news media in particular, to disseminate information concerning such trials. In the United States, this tension is enhanced by the primacy of the constitutional protection of freedom of the press under our First Amendment.

Hon. David B. Sentelle, *The Courts and the Media*, 48 FED. LAW. 24, 25 (2001).

32. *Television on Trial*, ECONOMIST, Dec. 19, 1998, at 23 ("There will always be some conflict between the media and courts. But there can and must be an accommodation with television, as there has been with newspapers.").

33. See generally *Chandler v. Florida*, 449 U.S. 560 (1981); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Estes v. Texas*, 381 U.S. 532 (1965); *Patton v. United States*, 281 U.S. 276 (1930).

simply announce broad, generalized principles to be followed by all.<sup>34</sup> The protections provided by each amendment and to *whom* those protections are given are by no means crystal clear. Though the interpretation of the various provisions may well be settled (at least for the time being), there are often a fair number of dissenting voices, calling out for a different application or interpretation of a particular provision.<sup>35</sup> Such voices will be duly noted and acknowledged in the discussion that follows.

The idea of constitutionally guaranteed public access is certainly not distanced from the ambiguities that arise in trying to interpret and apply the Constitution. In fact, the phrase "public trial" in the Sixth Amendment has caused considerable dispute: does the Amendment provide rights to the defendant alone, or also to the general public?<sup>36</sup> This ambiguity in the Sixth Amendment first came before the Court in the case of *Patton v. United States*, which raised the issue of whether a defendant had the right to waive a trial by jury.<sup>37</sup> In determining that a trial by jury was traditionally and modernly "a valuable privilege bestowed upon the person accused" alone, the Court dispensed of a potential public right, stating that the Sixth Amendment guarantees were exclusive to the defendant.<sup>38</sup> This decision was reaffirmed some forty-nine years later in *Gannett v. DePasquale*, which rejected the argument that the Sixth Amendment confers a right on the general public that criminal trials be open and pronounced that:

Among the guarantees that the Amendment provides to a person charged with the commission of a criminal offense, and to him alone, is the "right to a speedy and public trial, by an impartial jury." The Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee, like the others enumerated, is personal to the accused.<sup>39</sup>

Though *Patton*<sup>40</sup> and *Gannett* are still good law for their Sixth Amendment holdings, considerable disagreement remains on the subject of

34. See, e.g., U.S. CONST. amend. I ("Congress shall make no law . . ."); U.S. CONST. amend. VI ("the accused shall enjoy . . ."); U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

35. See *infra* notes 282-302 and accompanying text.

36. U.S. CONST. amend. VI.

37. *Patton*, 281 U.S. at 293 (noting that the crucial inquiry is whether "the effect of the constitutional provisions in respect of trial by jury to establish a tribunal as part of the frame of government, or only to guarantee to the accused the right to such a trial").

38. *Id.* at 296.

39. *Gannett v. DePasquale*, 443 U.S. 368, 379-80 (1979).

40. *Patton* was overruled by the Supreme Court on other grounds. See *Williams v. Florida*, 399



whether the Sixth Amendment right is specific to the accused. Consider, for example, Justice Blackmun's concurrence in *Richmond Newspapers*, in which he unequivocally stated:

I, of course, continue to believe that *Gannett* was in error, both in its interpretation of the Sixth Amendment generally, and in its application to the suppression hearing, for I remain convinced that the right to a public trial is to be found where the Constitution explicitly placed it—in the Sixth Amendment.<sup>41</sup>

Disagreement with *Patton* and *Gannett* can also be heard on the academic front: in suggesting that the Framers were aiming to both promote the public good and protect the rights of the accused, scholars Akhil Reed Amar and Alan Hirsch state:

The fundamental point is simply this: The jury trial is not just by the people, but *for* them as well. If so, it is not for the defendant (or the government) to waive. That perspective seems sound in theory. In practice, the Supreme Court has held otherwise. In the 1930 case of *Patton v. United States*, the Court held that the jury trial right belongs to the defendant alone, to waive as he pleases. However, the Court's opinion does not survive scrutiny . . . . The Court's decision offers a classic illustration of the danger of viewing individual constitutional clauses in isolation. Focusing on the Sixth Amendment, the Court ignored the clear words of Article III: "The Trial of *all* Crimes . . . shall be by Jury." The debates at the state conventions to ratify the Constitution establish beyond any doubt that these words were understood as words of obligation.<sup>42</sup>

These two eminent scholars go on to argue that to read the Sixth Amendment as done in *Patton* would have caused many of the influential voices at the time of the Founding to "protest mightily."<sup>43</sup> Professors Amar and Hirsch do not stand alone: members of the judiciary also recognize the

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U.S. 78, 92 (1970) (overruling *Patton* in finding that juries of less than twelve are constitutional).

41. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 603 (1980) (Blackmun, J., concurring).

42. AMAR & HIRSCH, *supra* note 13, at 116-17 (1998).

43. *Id.* at 117. However, the Supreme Court has also stated that the Framers surely considered this tension. The Honorable David Sentelle notes that the opinion in *Nebraska Press Association v. Stuart* explicitly recognized the tension between defendant's rights and the public's rights. See Sentelle, *supra* note 31, at 25 (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976), which states: "The problems presented by this case are as old as the Republic. Neither in the Constitution nor in contemporaneous writings do we find that the conflict between these two important rights was anticipated, yet it is inconceivable that the authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press").

difficulties caused between the Supreme Court's jurisprudence and an absolutist approach to the First Amendment, but are generally more cautious in their advocacy, understanding that some of their biggest opponents on the topic are also their colleagues.<sup>44</sup>

Despite the historical evidence proffered by some and the ongoing dissent of others on the bench, the fact remains: the Sixth Amendment provides no rights to the general public, and thus precludes the possibility of establishing a public right of access through this amendment.<sup>45</sup> However, all hope has not been lost for the proponents – enter the First Amendment.

### B. *The First Amendment*

The first major challenge specifically dealing with media courtroom access under the First Amendment came in the case of *Estes v. Texas*.<sup>46</sup> Billie Sol Estes' trial was a showcase for everything and anything that could go wrong in a televised trial.<sup>47</sup> Estes, on trial for swindling, became

44. See Sentelle, *supra* note 31, at 25 (explaining that while “[s]ome jurists, notably the late Justices Hugo L. Black and William O. Douglas, have advanced an absolutist view that the First Amendment prohibits virtually any control of the media by the courts under any circumstances,” the fact remains that “historically, particularly in fairly recent years, that absolutist position has been in tension with judicial views of the fair trial requirements of the Sixth Amendment of the Constitution”).

45. *Richmond Newspapers*, 448 U.S. at 603 (Blackmun, J., concurring) (“The court, however, has eschewed the Sixth Amendment route.”). Justice Blackmun continues by noting that other constitutional sources backing the right of access pale in comparison:

The plurality turns to other possible constitutional sources and invokes a veritable potpourri of them – the Speech Clause of the First Amendment, the Press Clause, the Assembly Clause, the Ninth Amendment, and a cluster of penumbral guarantees recognized in past decisions. This course is troublesome, but it is the route that has been selected and, at least for now, we must live with it.

*Id.*

46. 381 U.S. 532 (1965). This was the first Supreme Court case involving the interplay between public and press rights and courtroom decorum, but it wasn't the first judicial challenge. In fact, certiorari was denied in a case involving a contempt order as a result of pre-trial radio broadcasts. Justice Frankfurter dissented from the denial, stating that “[o]ne of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there.” *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 920 (1950).

47. The Court stated as much when it enumerated some of the dangers presented by cameras. First, it noted that:

The potential impact of television on the jurors is perhaps of the greatest significance . . . . If the community be hostile to an accused[,] a televised juror, realizing that he must return to neighbors who saw the trial themselves, may well be led “not to hold the balance nice, clear and true between the State and the accused . . . .”

*Estes*, 381 U.S. at 545. Second, the Court explained:

[W]hile it is practically impossible to assess the effect of television on jury attentiveness, those of us who know juries realize the problem of jury ‘distraction.’ . . . Human nature being what it is, not only will a juror’s eyes be fixed on the camera, but also his mind will

infamous through the pretrial publicity – the clerk of the court had compiled some eleven volumes of press clippings.<sup>48</sup> When the time for the actual trial came, the courtroom was filled beyond capacity.<sup>49</sup> Despite the notoriety of the case, or perhaps because of it, the trial judge denied the defendant’s motion to prevent telecasting, and allowed the media in without restrictions.<sup>50</sup> Justice Clark described the scene of the courtroom as one of chaos:

[A]t least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge’s bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings.<sup>51</sup>

Justice Clark continued by explaining the damaging effect that the pretrial publicity and unrestricted media access to pretrial proceedings had on the defendant’s trial, emphasizing that both witnesses and jurors were made painfully aware of the public importance of the trial.<sup>52</sup>

After the pre-trial debacle, the trial judge imposed limitations on the camera crews and news teams, but it appeared that the damage had been done.<sup>53</sup> Technological difficulties caused additional problems, as only portions of the trial were recorded, and newsroom editing resulted in a

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be preoccupied with the telecasting rather than with the testimony.

*Id.* at 545. Thirdly, “new trials plainly would be jeopardized in that potential jurors will often have seen and heard the original trial when it was telecast.” *Id.* The Court also expressed concern about the effects of broadcasting on witnesses, stating that “[s]ome [witnesses] may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization.” *Id.* at 547. Finally, the Court noted that news media creates an additional responsibility for the trial judge, and, most importantly, has an exacting effect on the defendant, stating that the media’s “presence is a form of mental – if not physical – harassment, resembling a police line-up or the third degree . . . . The heightened public clamor resulting from radio and television coverage will inevitably result in prejudice . . . . Furthermore, telecasting may also deprive an accused of effective counsel.” *Id.* at 549. In the end, the Court concluded that “[t]o the extent that television shapes [public] sentiment, it can strip the accused of a fair trial.” *Id.* at 550.

48. *Id.* at 535.

49. *Id.* (“All available seats in the courtroom were taken and some 30 persons stood in the aisles.”).

50. *Id.* at 535-36.

51. *Id.* at 536.

52. *Id.* at 536-37 (noting that the witnesses and jurors’ faces were broadcasted on the evening news).

53. *Id.* at 537 (explaining that when the trial started, the courtroom had been altered to contain news media to a newly-constructed booth).

skewed version of the trial being shown to the public.<sup>54</sup> The jury convicted Estes, but he appealed on the grounds that the media frenzy and unrestrained press violated his due process rights under the Fourteenth Amendment.<sup>55</sup> The trial court and Texas Court of Criminal Appeals rejected Estes' contention, but the United States Supreme Court reversed.<sup>56</sup>

In analyzing Estes' constitutional claim, Justice Clark, writing for the majority, began with a discussion of the Sixth Amendment, explaining that the right to a "public trial" is one held by the accused, historically intended to guarantee a fair adjudication.<sup>57</sup> The Court continued by stating that though "[t]he free press has been a mighty catalyst in awaking public interest in governmental affairs, . . . including court proceedings" that ability "must necessarily be subject to the maintenance of absolute fairness in the judicial process."<sup>58</sup> Indeed, the Court did not hesitate in using strong language to suggest that cameras were simply not conducive with the guarantee of a fair trial.<sup>59</sup> The holding reflects this view – the Court ultimately determined that the media presence did in fact violate Estes' Due Process rights, and reversed his conviction.<sup>60</sup>

The Court's disdain toward televised proceedings may have been, in part, a result of the newness of camera use during trials. At the time of the *Estes* trial, only two states allowed cameras and radio reporters in their courtrooms, and only with restrictions.<sup>61</sup> The federal courts had a complete prohibition on visual media.<sup>62</sup> However, the *Estes* Court indicated that "newness" was not the issue; rather, it was the "insidious influences" that

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54. *Id.* at 537-38. As a result of continuing problems with telecasts, only the opening and closing arguments of the state and the announcement of the jury verdict were televised live. *Id.* at 537.

55. *Id.* at 534-35.

56. *Id.* at 535.

57. *Id.* at 538-39.

58. *Id.* at 539.

59. *Id.* at 540 ("[This trial] is weighty evidence that our concepts of a fair trial do not tolerate such an indulgence.").

60. *Id.* at 534-35.

61. *Id.* at 540. See also Gregory Curtis, *TV on Trial*, 23 TEXAS MONTHLY, July 1995, at 5; RONALD L. GOLDFARB, *TV OR NOT TV* 24 (1998) (explaining that the sensational trials of the early twentieth century caused the adoption of professional codes of responsibility across the nation). Leading the forefront of reform was the 1937 Canon 35 of the Canons of Judicial Ethics, which prohibited photography while the court was in session and barred the broadcast of court proceedings. *Id.* The ABA actively supported this Canon, issuing opinions denouncing courts that allowed such practices to continue. *Id.* This standard was well entrenched at the time of the *Estes* decision, and likely was a compelling factor in the Court's decision. *Id.*

62. *Estes*, 381 U.S. at 540.

cameras and other visual media had on “the administration of justice.”<sup>63</sup> Such language indicated that the Court would be unwilling to change its stance in the future, even if technology were to advance. Despite these strong sentiments,<sup>64</sup> time takes its toll on us all, and appears to have softened the Court to a full change of heart a mere fifteen years later.<sup>65</sup>

This brings us to *Richmond Newspapers, Inc. v. Virginia*, the seminal case in declaring courtroom access a constitutional right.<sup>66</sup> By this time, the Court’s composition had changed dramatically: Justice Clark, the author of the majority opinion in *Estes* had since retired, as well as the four other justices who constituted the majority faction in *Estes*: Chief Justice Warren, Justice Douglas, Justice Harlan, and Justice Goldberg.<sup>67</sup> The retiring Court members were replaced respectively by Justice Thurgood Marshall, Chief Justice Warren Earl Burger, Justice John Paul Stevens, Justice Lewis Powell, and Justice Harry Blackmun.<sup>68</sup> This new, arguably more progressive Court may have had a much more liberal view on the use of media in public affairs, or may very well have been affected by the advances in technology over the past fifteen years. At any rate, by the time *Richmond Newspapers* made its way in front of the bench, the Court’s position on courtroom broadcasts was ripe for change.

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63. *Id.* at 541 (citing Justice Douglas, *The Public Trial and the Free Press*, 33 ROCKY MT. L. REV. 1 (1960)).

64. Indeed, the *Estes* opinion would suggest that cameras would never be an option. Consider the following: “As has been said, the chief function of our judicial machinery is to ascertain the truth. The use of television, however, cannot be said to contribute materially to this objective.” *Id.* at 544. Or consider the Court’s closing statements:

It is said that the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today.

*Id.* at 551-52.

65. In fact, in Justice Stevens’ concurrence he refers to *Richmond Newspapers* as a “watershed case,” noting that in the past the Court had never recognized a right to access certain information, but that “[t]oday, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 582-83 (1980) (Stevens, J., concurring).

66. *Id.* Though at least one other case had come up before *Richmond Newspapers*, it dealt exclusively with the right of access at pretrial hearings and motions, as distinguished from the right of access at the actual trial itself. *Gannett Co. v. DePasquale*, 443 U.S. 368, 370-71 (1979). As a result, this was the first time the Court had dealt with an access issue since the *Estes* case (indeed, the Chief Justice notes as much when he states that “the precise issue presented here has not previously been before this Court for decision”). *Richmond Newspapers*, 448 U.S. at 563-64.

67. Justice Black left the bench in 1971, but given that he dissented in *Estes*, his departure was not as instrumental in bringing a change on the Court with regards to this particular issue. Members of the Supreme Court of the United States, <http://www.supremecourtus.gov/about/members.pdf> (last visited Sept. 26, 2006).

68. *Id.*

*Richmond Newspapers* arose after a trial judge closed his courtroom to the public for the fourth run of a murder trial.<sup>69</sup> After closing the courtroom, the newspaper moved to intervene nunc pro tunc, and after the motion was granted, the paper appealed the trial closure order.<sup>70</sup> The Virginia appellate and supreme court ruled against the newspaper, and the United States Supreme Court granted review.<sup>71</sup>

The very first paragraph of the majority's analysis made it apparent that the Court had undergone a drastic change of view in the fifteen years since *Estes*. Chief Justice Burger began the lead opinion with history, noting that criminal trials in both the United States and England have been presumptively open.<sup>72</sup> As the Chief Justice explained, this presumption has held for centuries for several reasons: first, open courts assure the public and the defendant that the proceedings will be conducted fairly; second, there is a "therapeutic value" in allowing the community to reconcile the emotions that arise with particularly heinous crimes; and third, it reassures the public that government systems are working effectively and correctly, and provides a form of legal education to the public.<sup>73</sup> After the historical overview and accompanying support, the Chief Justice noted that the Bill of Rights, including, of course, the First Amendment, was enacted against this backdrop of traditional courtroom openness.<sup>74</sup>

Burger then turned to the text of the First Amendment, stating that "[i]n guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so

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69. *Richmond Newspapers*, 448 U.S. at 559-60.

70. *Id.* at 562.

71. *Id.*

72. *Id.* at 565-67. Public attendance at trials was, for some time in English history, actually compulsory. *Id.* at 565 (citing *Daubney v. Cooper*, 10 B. & C. 237, 240 (K.B. 1829)). Though this requirement was later relaxed, the importance of public attendance never waned – emphasized by Lord Coke and later memorialized in a opinion by the English Courts that stated that the presumptive openness of the trial is an essential quality in a court of justice. *Id.* (citation omitted). Finding extensive support in early American history, the Court noted that there is "nothing to suggest that the presumptive openness of the trial . . . was not also an attribute of the judicial systems of colonial America." *Id.* at 567 (citation omitted). Indeed, the idea that "[t]his legacy of open justice was inherited by the English settlers in America" is commonplace throughout the *Richmond Newspapers* decision. *Id.* at 590.

73. *Id.* at 569-72. In his concurrence, Justice Brennan noted that these factors make the case for a "right of access" especially persuasive. He also stated that "the case for a right of access has special force when drawn from an enduring and vital tradition of public entrée to particular proceedings or information. Such a tradition commands respect in part because the Constitution carries the gloss of history." *Id.* at 589 (Brennan, J., concurring) (citation omitted). Brennan later rephrases this right of access as "the right to report about the administration of justice." *Id.* at 592 (Brennan, J., concurring).

74. *Id.* at 575.

as to give meaning to those explicit guarantees.”<sup>75</sup> Through this focus on the First Amendment, the Chief Justice referenced precedential decisions that suggested that, in interpreting the First Amendment, “[i]t must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.”<sup>76</sup> Under this framework, the Amendment had been read to provide a “right to ‘receive information and ideas.’”<sup>77</sup> The Chief Justice used this precedent in determining that:

Free speech carries with it some freedom to listen . . . . What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time the Amendment was adopted.<sup>78</sup>

As is often the case, the language of the opinion foreshadowed the inevitable conclusion: after the historical and precedent-based discussion, the Court reversed the lower courts, holding that “[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.”<sup>79</sup>

Though *Richmond Newspapers* did not declare an explicit right of access to media,<sup>80</sup> it did declare that the public’s right of access is a

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75. *Id.* (citing *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (“[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”)). Burger later explained that the right of assembly also guaranteed in the First Amendment is intertwined with the rights of speech and of the press, and is necessarily implicated in the newly created “right of access” to courtrooms. Burger noted that:

People assemble in public places not only to speak or take action, but also to listen, observe . . . a trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.

*Id.* at 578.

76. *Id.* at 576 (citing *Bridges v. California*, 314 U.S. 252, 263 (1941)).

77. *Id.* (citing *Kleindienst v. Mandel*, 408 U.S. 753 (1972)). See also *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting) (“[P]ublic debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression.”).

78. *Richmond Newspapers*, 448 U.S. at 576. See also *id.* at 587 (Brennan, J., concurring) (“[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government.”).

79. *Id.* at 581.

80. One could plausibly apply this principle to argue that the statements made in *Richmond Newspapers* are not limited to the public and printed press alone – the opinion suggests that there is room for other rights in the First Amendment, and that may possibly include a right of access to electronic media for both trial and appellate proceedings. See, e.g., 151 CONG. REC. S10426 (daily ed. Sept. 26, 2005) (statement of Sen. Specter) (“In a very fundamental sense, televising the Supreme Court has been implicitly recognized – perhaps even sanctioned – in a 1980 decision by the

guaranteed constitutional right, a major step in and of itself.<sup>81</sup> In fact, an expanded definition of the right appears to have been contemplated in a case following closely on the heels of *Richmond Newspapers*,<sup>82</sup> which condoned, if not advocated, the use of electronic media in the courtroom. The case was *Chandler v. Florida*,<sup>83</sup> which bore witness to the changing views of the Court and the advances in the use of technology in courtrooms. The climate in courtrooms across the nation was indeed changing, as the number of states employing televisions in the courtrooms had increased from a mere two at the time of the *Estes* decision<sup>84</sup> to sixteen at the time Florida adopted an experimental program allowing media access.<sup>85</sup> The number grew from sixteen to thirty by the time of the Supreme Court decision in *Chandler*.<sup>86</sup> Despite this growth, the Florida program came under fire for televising a dramatic burglary trial involving two police defendants.<sup>87</sup> In a pretrial motion, defendants sought to have the experimental program declared

Supreme Court of the United States entitled *Richmond Newspapers v. Virginia*. In this case, the Supreme Court noted that a public trial belongs not only to the accused, but to the public and the press as well; and that people now acquire information on court procedures chiefly through the print and electronic media.”). However, as mentioned in the discussion above regarding the Sixth Amendment, such an extension of the “right of access” would not come without resistance. Indeed, even the right as it stands now is not without its share of dissenters.

81. See generally *Richmond Newspapers*, 448 U.S. at 582-83 (Stevens, J., concurring) (“Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.”). But see *id.* at 605 (Rehnquist, J., dissenting) (“I do not believe that either the First or the Sixth Amendment, as made applicable to the States by the Fourteenth, requires that a State’s reasons for denying public access to a trial, where both the prosecuting attorney and the defendant have consented to an order of closure approved by the judge, are subject to any additional constitutional review at our hands.”).

82. In fact, the close of the *Richmond Newspapers* opinion rejects the State’s argument that because a “right of access” is not enumerated in the Constitution or the Bill of Rights, it necessarily does not exist. *Id.* at 579-80. In doing so, the Court referred to a basic premise behind the Bill of Rights: though the Bill of Rights enumerated some basic guaranteed principles, it did not “preclude[] recognition of important rights not enumerated.” *Id.* at 579.

83. 449 U.S. 560 (1981).

84. *Estes v. Texas* 381 U.S. 532, 540 (1965) (“[A]t this time those safeguards do not permit the televising and photographing of a criminal trial, save in two states and there only under restrictions.”).

85. *Chandler*, 449 U.S. at 565. Six states had adopted rules regarding electronic coverage of trials, while ten other states were “experimenting with such coverage.” *Id.*

86. *Id.* at 560 n.6 (“As of October 1980, 19 States permitted coverage of trial and appellate courts, 3 permitted coverage of trial courts only, 6 permitted appellate court coverage only,” and “the Maryland Court of Appeals authorized an 18-month experiment with broadcast coverage of both trial and appellate court proceedings.”). In fact, the Court notes this changing climate later in its opinion, referring to “state experimentation with an evolving technology” and holding that, “in terms . . . of mass communication, [this technology] was in its relative infancy in 1964, and is, even now, in a state of continuing change.” *Id.* at 574.

87. *Id.* at 567.



unconstitutional.<sup>88</sup> The trial court denied the defendants' relief, and the state supreme court refused to rule on the question, stating that it was not directly relevant to the proceedings.<sup>89</sup> The trial ensued, televised over the defendants' continued objections, and the jury eventually returned a guilty verdict.<sup>90</sup> The verdict of the trial court was subsequently appealed but was affirmed by the state appellate court and the state supreme court, and finally by the United States Supreme Court.<sup>91</sup>

Throughout the appeals process, the *Chandler* defendants contended that the holding in *Estes* created a per se ban on televised criminal trials, arguing that televised proceedings were an inherent violation of a defendant's Due Process rights.<sup>92</sup> In rejecting the defendants' contention, the Court looked closely at the six concurring opinions in *Estes*, and ultimately determined that the *Estes* Court rendered a fact-based ruling rather than a per se ban.<sup>93</sup>

The Court then declined to adopt a per se rule that televised proceedings inherently violate a defendant's constitutional due process rights, noting that "an absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter."<sup>94</sup> In condoning the use of cameras in the courtroom, the Court essentially shifted the burden of proof from the media to the defendant, stating that "the appropriate safeguard against such prejudice [caused by publication] is the defendant's right to demonstrate that the media's coverage of his case – be it printed or broadcast – compromised the ability of the particular jury that heard the case to adjudicate fairly."<sup>95</sup>

Of final note, and of particular importance to critics, is the Court's express acknowledgment of the Florida Supreme Court's rejection of the notion that there is a "state or federal constitutional right of access on the part of photographers or the broadcast media to televise or electronically record and thereafter disseminate court proceedings."<sup>96</sup> Because the Florida

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88. *Id.*

89. *Id.*

90. *Id.* at 567-68.

91. *Id.* at 568-69.

92. *Id.* at 570.

93. *Id.* at 570-71, 573 ("[A]t least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed upon the fundamental right to fair trial assured by the Due Process Clause of the Fourteenth Amendment." (citation omitted)).

94. *Id.* at 574-75.

95. *Id.* at 575.

96. *Id.* at 569 (noting that the Florida Supreme Court carefully framed its holding, it cited to the opinion, which stated "[w]hile we have concluded that the due process clause does not prohibit electronic media coverage of judicial proceedings per se, by the same token we reject the argument of the [Post-Newsweek stations] that the first and sixth amendments to the United States

Supreme Court based its experimental program on its right to supervise administrative matters within state courts and not on any "constitutional imperative," the High Court sidestepped the question of whether such rights could be implied.<sup>97</sup> However, the language of the opinion suggests that they would not find such a right on this occasion, as they cite to the Florida decision and their former ruling in *Nixon v. Warner Communications, Inc.* favorably.<sup>98</sup>

Even if the Court were to eventually extend the "right of access" from *Richmond Newspapers* to include appellate proceedings and the electronic media,<sup>99</sup> the right would by no means be absolute. Several of the Justices noted such in their respective opinions in *Richmond Newspapers*. Justice Stewart suggested that "[j]ust as a legislature may impose reasonable time, place, and manner restrictions upon the exercise of First Amendment freedoms, so may a trial judge impose reasonable limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public."<sup>100</sup> This and other statements seem to reconcile the damaging effects the media had in the *Estes* case with the newly pronounced right of access in *Richmond Newspapers*. However, the "time, place, and manner" rule can work both ways: at least one lower federal court has upheld a per se ban on cameras in the courtroom, determining it to be a

Constitution mandate entry of the electronic media into judicial proceedings" (citation omitted)).

97. *Id.* at 570.

98. *Id.* at 569 ("The Florida court relied on our holding in *Nixon v. Warner Communications, Inc.*, . . . where we said: 'In the first place, . . . there is no constitutional right to have [live witness] testimony recorded and broadcast. Second, while the guarantee of a public trial, in the words of Mr. Justice Black, is 'a safeguard against any attempt to employ our courts as instruments of persecution,' it confers no special benefit on the press. Nor does the Sixth Amendment require that the trial—or any part of it—be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.'" (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 610 (1978)).

99. At least as to the media, most courts feel that that extension of *Richmond Newspapers* to encompass a right to broadcast proceedings would stretch that decision too far. See COHN & DOW, *supra* note 28, at 43 (citing *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985) ("There is a long leap . . . between a public right under the First Amendment . . . to see a given trial televised. It is a leap that is not supported by history. It is a leap we are not yet prepared to take.")). However, Cohn and Dow note that at least one federal trial court has taken that leap, holding that "the press has a presumptive right to televise trials and the public has the right to see them on television." *Id.* (citing *Katzman v. Victoria's Secret*, 923 F. Supp. 580, 589 (S.D.N.Y. 1996)).

100. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 600 (1980) (Stewart, J., concurring). See also *id.* at 588 (Brennan, J., concurring) ("[B]ecause 'the stretch of this protection is theoretically endless,' it must be invoked with discrimination and temperance."); *id.* at 581 (citation omitted) (noting that a court is presumably open "[a]bsent an overriding interest articulated in the findings . . .").

reasonable time, place and manner restriction rather than a violation of the First Amendment.<sup>101</sup>

Substantive considerations such as “time, place, and manner restrictions” may play a role in limiting the “right of access” to the courtrooms, but they are certainly not the only restrictions – current court rules and the limited precedent are factors that limit the right as well.<sup>102</sup> Indeed, these procedural limitations and practical considerations dictate that the right of access is not absolute. This applies even in the Supreme Court, where regulations allow the Marshal of the Supreme Court to declare at any time that the Court building and grounds will be closed to the general public.<sup>103</sup> This allowance is made “[i]n order to protect the Supreme Court Building and grounds, to protect the persons and property therein, or to maintain suitable order and decorum.”<sup>104</sup>

Given these considerations, the Supreme Court precedents may leave one uneasy. At this juncture it may be appropriate to look at how the states and the federal court system have incorporated this “right of access” in their courtrooms.

## V. AN OVERVIEW OF FEDERAL AND STATE PRACTICES

### A. *Technological Change and the Rise, Fall, and Revival of Experimentation*

The observation may be made from the discussion that follows that many of the more restrictive state rules are premised on Canons found in state judicial codes of conduct.<sup>105</sup> This is no coincidence – Canon 3A(7) carries with it a laudable pedigree.<sup>106</sup> Its predecessor, Canon 35, can be traced directly back to the press frenzy that occurred at the *Hauptmann* trial.<sup>107</sup>

The *Hauptmann* trial was, ironically, a trial made for TV. Bruno Hauptmann was charged with the kidnapping and murder of young Charles

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101. *United States v. Hastings*, 695 F.2d 1278, 1279 (11th Cir. 1983), *cert. denied*, 461 U.S. 931 (1983).

102. S. CT. BLDG. REG. 2, <http://www.supremecourtus.gov/publicinfo/buildingregulations.pdf> (last visited Sept. 27, 2006). *See also* 40 U.S.C. § 6102(a) (2005).

103. S. CT. BLDG. REG. 2, <http://www.supremecourtus.gov/publicinfo/buildingregulations.pdf> (last visited Sept. 27, 2006).

104. *Id.*

105. *Id.*

106. As mentioned, Canon 3A(7) is based on Canon 35, which was adopted in 1937.

107. CHARLOTTE A. CARTER, *MEDIA IN THE COURTS* 4 (1981) (noting that directly prior to the formulation and adoption of the Canon, “the Criminal Law Section at the 1935 ABA Convention appointed a Special Committee on Publicity in Criminal Trials to conduct an in-depth study of the abuses at the Hauptmann trial”). This study resulted in the Hallam Report. *Id.*

Lindbergh.<sup>108</sup> Charles was the 20 month-old son of Col. Charles Lindbergh, the first man to fly solo across the Atlantic (and a world-wide celebrity for it) and his wife, Anne Morrow Lindbergh, daughter of a prominent banker and diplomat.<sup>109</sup> Because of the prominence of the Lindberghs, the trial was a "must-see" for New York's top celebrities, who, along with the trial, brought in spectators that filled the courtroom beyond capacity each day.<sup>110</sup> Though there were some complications with the single camera in the courtroom,<sup>111</sup> printed press coverage seemed to be the true problem. Commentators have since referred to this press coverage as "excessive, frequently inflammatory, and at times, downright irresponsible."<sup>112</sup> This sentiment applied to activities well beyond the media. Indeed, the scene as a whole was one fit for the circus: vendors waited outside the courthouse selling their wares, and the overflow audience took to chanting "Kill Hauptmann! Kill the German." during jury deliberations.<sup>113</sup> The Judicial Conference watched the debacle unfold from their ivory tower, and, rightfully dismayed, decided to take action.<sup>114</sup> The Conference empowered a task force to research the effects of the media on trial proceedings.<sup>115</sup> After the expected results were returned showing that media coverage had an adverse effect on trials, the Conference drafted the first formal proposal against media access to courts.<sup>116</sup>

The drafted proposal became Canon 35,<sup>117</sup> which prohibited cameras and radio broadcasting of trial proceedings, declaring that such practices "detract from the essential dignity of the proceedings."<sup>118</sup> The Canon also pronounced that media practices degraded the court and created

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108. GOLDFARB, *supra* note 61, at 18.

109. COHN & DOW, *supra* note 28, at 15; GOLDFARB, *supra* note 61, at 8; Lindbergh Baby Kidnapping, <http://www.celebritymorgue.com/lindbergh-baby/> (last visited Sept. 26, 2006).

110. COHN & DOW, *supra* note 28, at 15.

111. *Id.* ("One camera was discreetly placed inside a wall clock; another was mounted on the balcony railing and tucked under a large wooden box in a humorous attempt to conceal it. The 'hidden' camera was impossible to miss. Efforts to augment the dim courtroom lighting by installing high-intensity bulbs in overhead fixtures helped boost temperatures in the gallery to uncomfortable levels.")

112. *Id.* at 16.

113. *Id.*

114. CARTER, *supra* note 107, at 4.

115. *Id.*

116. *Id.*

117. *Id.* at 4-5 (explaining that though the recommendations from the Hallam Report were not made public, they were heavily relied on in formulating Canon 35, which was officially adopted in 1937).

118. 62 A.B.A. Rep. 1134-35 (1937).

misconceptions in the public eye.<sup>119</sup> Despite the Canon's advisory nature, it was soon adopted in part or in full by a majority of the states.<sup>120</sup>

The Canon was later modified to add television broadcasts to the list of prohibited practices.<sup>121</sup> This change was heavily endorsed; as noted in the *Estes* discussion above, at the time of that trial only two states were actively allowing cameras in the courtroom.<sup>122</sup> The practice was later reaffirmed in 1972, when the American Bar Association adopted Canon 3A(7), which essentially restated the ban on television, audio and visual media recording.<sup>123</sup>

However, as technology continued to improve throughout the 1970s, the adamant wide-spread opposition to cameras in the courtroom began to wane. Attention to technological change was reflected in the early 1980s, as commentators applauded the advances in film and electronic equipment, emphasizing that recording devices were no longer “bulky, noisy, or obtrusive.”<sup>124</sup> They were not mistaken; cameras were much more mobile, practically soundless, and no longer required bright, flashing lights.<sup>125</sup> This presented a strong case for proponents of media in courtrooms, as a substantial part of the *Estes* decision rested on the physical distractions caused by cameras.<sup>126</sup> Indeed, these technological advances may have contributed to state judges reconsidering the possibility of televised court proceedings. This is reflected in the Judicial Conference meetings of 1978, when some semblance of a national consensus in favor of televised proceedings was officially recognized – it was that year when the Conference of State Chief Judges adopted a resolution encouraging states to experiment with the use of media in judicial proceedings.<sup>127</sup> The resolution eventually led to the repeal of the ABA standard and the variety of practices we see today.<sup>128</sup>

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119. GOLDFARB, *supra* note 61, at 24.

120. CARTER, *supra* note 107, at 6.

121. *Id.* (“As a result of one committee’s report in 1952, the ABA’s House of Delegates amended Canon 35 by inserting a phrase banning the ‘televising’ of court proceedings.”).

122. *Id.* at 7. During “the 1950s Colorado, Oklahoma, and Texas were permitting electronic recording equipment and cameras in their courtrooms.” *Id.* However, at the time of the *Estes* decision the Court noted that “[t]he current situation in Oklahoma [was] unclear “because of conflicting Oklahoma court decisions.” *Estes v. Texas*, 381 U.S. 532, 582 (1965).

123. GOLDFARB, *supra* note 61, at 24.

124. CARTER, *supra* note 107, at 18.

125. *Id.* (citing Ronald F. Loewen, *Cameras in the Courtroom*, 17 WASHBURN L.J. 504, 510 (1978)).

126. *Id.* See also *Estes*, 381 U.S. at 536.

127. See *Chandler v. Florida*, 449 U.S. 560, 564 (1981); GOLDFARB, *supra* note 61, at 24.

128. See Letter from Robert D. Evans, Director, Governmental Affairs Office of the American Bar Association, to the Hon. Charles E. Grassley, United States Senator in the 106th Congress (Sept. 25, 2000), available at <http://www.abanet.org/poladv/congletters/106th/cameras092500.html> [hereinafter “ABA letter”]; see also *infra* notes 134-240 and accompanying text.

## B. State Practice

The colonial history that anchors the United States Constitution<sup>129</sup> and that colored the *Richmond Newspapers* opinion has been no less influential in state courts and practices. From the beginning, states recognized the principle that courts should be open to the public.<sup>130</sup> In fact, many states explicitly granted access to the courts in their founding documents.<sup>131</sup> This history colors the contemporary practices of states, as many expanded these principles as we became a more media-centered society.

Modernly, all states subscribe to the idea of "open courts" to at least some degree.<sup>132</sup> Most states have a constitutional or statutory provision announcing that courts shall be public and open.<sup>133</sup> However, these declarations do not come without a caveat: particularly sensitive proceedings, such as those involving sexual abuse, abortion or divorce, for example, may be closed to the public upon the court's discretion.<sup>134</sup> Caveat aside, many states have carved out a niche for the media to operate within the courtroom. This is evidenced through legislative enactments,<sup>135</sup> court rules,<sup>136</sup> and judicial codes of conduct.<sup>137</sup> Other states have maintained

129. See *infra* notes 243-62 and accompanying text.

130. See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 237 (2005).

131. For example, the 1677 Concessions and Agreements of West New Jersey stated that "in all publick courts of justice for tryals of causes . . . inhabitants of the said Province may freely come into, and attend the said courts," and the Pennsylvania Frame of Government of 1682 provided "[t]hat all courts shall be open . . ." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 567-68 (1980) (citation omitted).

132. See *infra* notes 133-40 (noting various constitutional, statutory, and local court rules providing for some version of an "open court").

133. See, e.g., *Richmond Newspapers*, 448 U.S. at 567-70.

134. See, e.g., N.Y. JUD. CT. ACTS LAW § 4 (McKinney 2003) ("The sittings of every court within this state shall be public, and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, criminal sexual act, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court.").

135. See, e.g., N.Y. JUD. CT. ACTS LAW § 281 (expired July 1, 1997); N.Y. CIV. RIGHTS § 52 (McKinney 1992); 22 N.Y.C.R.R. §§ 29.1-29.2; see generally *infra* notes 135-209 and accompanying text.

136. See, e.g., ALASKA R. OF ADMIN. 50; ARIZ. SUP. CT. R. 122; Ark. Ct. Admin. Order No. 6 (2006); CAL. R. OF CT. 980; DEL. SUP. CT. R. 84; FL. R. JUD. ADMIN. 2.170; HAW. R. S. CT. 5.1-2; IDAHO CT. ADMIN. R. 45-46; IOWA CT. R. 25.2; KAN. SUP. CT. R. 1001; Mich. Sup. Ct. Admin. Order No. 1989-1; MO. CT. R. 16; N.H. SUP. CT. R. 19; N.M. SUP. CT. GEN. R. 23-107; N.C. SUPER CT. R. 15; UTAH CT. R. 4-401; N.D. SUP. CT. ADMIN. R. 21; NEV. SUP. CT. R. pt. IV; OHIO SUPERINTENDENCE CT. R. 12; OR. R. OF APP. P. 8.35; TENN. SUP. CT. R. 30; WIS. SUP. CT. R. 61.01-61.12; WASH. CT. R. 16; WYO. CT. R. 804; Me. Admin. Order JB-05-15 (2005); MISS. SUP. CT. R. 3; see generally *infra* notes 135-209 and accompanying text.

137. See, e.g., ALA. CANONS OF JUD. ETHICS, Canon 3A(7); COL. CODE JUD. CONDUCT, Canon 3(A)(7); LA. JUD. CANON 3, available at [http://www.lasc.org/press\\_room/policy\\_for\\_media.asp](http://www.lasc.org/press_room/policy_for_media.asp);

positions similar to that espoused by the Supreme Court,<sup>138</sup> prohibiting electronic media in part<sup>139</sup> and, in some cases, in whole.<sup>140</sup> The following discussion summarizes a variety of methods employed by the states at the trial court level, first describing the two typical centrist positions and then briefly focusing on the extremes.

## 1. State Trial Courts

Idaho provides a ready example of media receptiveness coupled with some aspects of restraint: state courts there are actively fostering positive relationships with the media through a standing Courts/Media committee established by the Idaho Supreme Court in 1998.<sup>141</sup> Idaho courts allow cameras and other recording devices in the courtroom, subject to the discretion of the presiding judge.<sup>142</sup> Like Idaho, Missouri rules require a media representative to obtain permission from the presiding judge before filming, and the judge may prohibit media access if he concludes that “coverage would materially interfere with the rights of the parties to a fair trial.”<sup>143</sup> These Missouri rules are lengthier than those seen in Idaho, meticulously detailing the technical requirements for cameras and audio equipment and setting limitations on the number of recording devices allowed in the courtroom during proceedings.<sup>144</sup> Alaska,<sup>145</sup> Arkansas,<sup>146</sup> Arizona,<sup>147</sup> Colorado,<sup>148</sup> Connecticut,<sup>149</sup> New Hampshire,<sup>150</sup> California,<sup>151</sup>

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MASS. JUD. CANON 3(A)(7); MONT. CANONS OF JUDICIAL ETHICS, Canon 35; N.J. CODE JUD. CONDUCT, Canon 3(A)(9); PENN. CODE JUD. CONDUCT, Canon 3(A)(7); *see generally infra* notes 135-209.

138. *See* Reporter’s Guide, *supra* note 19.

139. *See, e.g.*, ILL. SUP. CT. R. 63(A)(7); N.Y. JUD. CT. ACT § 218 (expired June 30, 1997); N.Y. CIV. RIGHTS § 52; 22 N.Y.C.R.R. §§ 29.1-29.2.

140. *See* D.C. SUPER. CT. R. CRIM. P. 53(b); D.C. SUPER. CT. R. CIV. P. 203(b).

141. Brian Kane, *A Balancing Act*, 48-DEC. ADVOC. 9 (2005) (describing a recently published comprehensive guide that explains current court rules and procedures for media entities).

142. IDAHO CT. R. 45(a) (allowing cameras and other electronic recording devices only after a request has been submitted and approved by the presiding judge; the judge may exclude any electronic devices if the “interests of the administration of justice requires”).

143. MO. CT. R. 16.02(b).

144. MO. CT. R. 16.04.

145. ALASKA R. OF ADMIN. 50.

146. Ark. Ct. Admin. Order No. 6 (2006).

147. ARIZ. SUP. CT. R. 122 (suggesting that the judge weigh six factors in determining whether electronic media coverage would be appropriate in the particular case).

148. COL. CODE JUD. CONDUCT, Canon 3(A)(7); Hon. Mary J. Mullarkey, *Media Alert* (2002), available at <http://www.courts.state.co.us/exec/media/notices/cameras.doc>.

149. THE COMMISSION ON OFFICIAL LEGAL PUBLICATIONS, CONNECTICUT PRACTICE BOOK, 66-68 (2006), available at <http://www.jud.state.ct.us/Publications/PracticeBook/PB1.pdf>.

150. N.H. SUP. CT. R. 19 (“With prior notice to the clerk, and the consent of the court, any person may record and photograph, or broadcast by radio or television, the oral proceedings of the supreme court, provided that the orderly procedures of the court are not impaired or interrupted.”).

151. CAL. R. CT. 980 (allowing media coverage at the discretion of the judge).

Hawaii,<sup>152</sup> Indiana,<sup>153</sup> Iowa,<sup>154</sup> Kentucky,<sup>155</sup> Maine,<sup>156</sup> Massachusetts,<sup>157</sup> Michigan,<sup>158</sup> Minnesota,<sup>159</sup> New Mexico,<sup>160</sup> North Dakota,<sup>161</sup> Ohio,<sup>162</sup> Oklahoma,<sup>163</sup> South Carolina,<sup>164</sup> Tennessee,<sup>165</sup> Texas,<sup>166</sup> Washington,<sup>167</sup> Wyoming<sup>168</sup> and West Virginia<sup>169</sup> all follow this approach as well.

New York takes a more restrained approach, allowing cameras only when the New York Court of Appeals chooses to adopt an experimental program that permits trial judges to exercise discretion in allowing cameras into the courtroom.<sup>170</sup> Given that New York's regulation is prescribed by legislative act, a whole new set of issues arises: namely, whether it is the job of the legislature or judicial branch to decide if the courts should be open to television media. Regardless, the New York legislature appears to have adopted a policy of restraint and respect for its co-equal branch, condoning court broadcasts only when they have first been authorized by the sitting judge.<sup>171</sup> The experimental program described in the New York statute was adopted throughout most of the 1990s, but the courts allowed the trial

152. HAW. R. SUP. CT. 5.1-5.2.

153. Indiana Supreme Court, *Guidelines for the Use of Electronic Recording Devices During Supreme Court Oral Arguments*, <http://www.in.gov/judiciary/supreme/guidelines.html> (last visited Jan. 31, 2006).

154. IOWA CT. R. 25.2.

155. State Justice Institute, *Reporter's Handbook on Covering Kentucky Courts* 7-8 (2004), available at <http://courts.ky.gov/research/publications.htm> (follow "reporters handbook" hyperlink).

156. Me. Sup. Ct. Admin. Order JB-05-15 (2005).

157. MASS. SUP. JUD. CT. R. 1:19(a).

158. Mich. S. Ct. Admin. Order No. 1989-1 (1989).

159. MINN. CODE JUD. CONDUCT, Canon 3A(11); *Procedures for Requesting Cameras in Minnesota Courtrooms*, available at [http://www.courts.state.mn.us/documents/cio/Cameras\\_in\\_the\\_Courtroom\\_Policy.doc](http://www.courts.state.mn.us/documents/cio/Cameras_in_the_Courtroom_Policy.doc).

160. N.M. SUP. CT. GEN. R. 23-107.

161. N.D. SUP. CT. ADMIN. R. 21.

162. OHIO SUPERINTENDENCE CT. R. 12.

163. Okla. Stat. tit. 5, ch. 1, app. 4, Canon 3.

164. S.C. APP. CT. R. 605.

165. TENN. SUP. CT. R. 30. Though this rule is issued by the Supreme Court of Tennessee, it applies to all courts within the state.

166. TEX. R. CIV. P. 18(C); TEX. R. APP. P. 14. Interestingly, Texas had adopted the old ABA Canon for a time, and then returned back to its former position. Carter, *supra* note 107, at 7 (noting that Texas adopted the Canon in 1974, a few years after the Supreme Court's decision in *Estes v. Texas*).

167. WASH. CT. R. GEN. 16.

168. WYO. UNIFORM R. FOR DIST. CT. 804; WYO. R. CRIM. P. 53.

169. W. VA. TRIAL CT. R. 8.01.

170. N.Y. JUD. CT. ACTS LAW § 218 (McKinney 2003). As with Idaho and Missouri, the onus in New York is on the media representative to request permission to film or audiotape a proceeding.

171. *Id.*



program to expire in 1997, which reinstated the ban on cameras in trial court rooms.<sup>172</sup>

Like New York, Delaware has no overarching scheme controlling media coverage, but has temporarily adopted an experimental program allowing audio and visual coverage at the discretion of the sitting judge.<sup>173</sup> Louisiana draws a distinction between trial and appellate proceedings, completely barring visual and audio recording from appellate courtrooms, and allowing trial proceedings to be recorded only when both parties have consented and the judge has permitted such.<sup>174</sup> Louisiana guidelines impose the additional condition that the recorded proceedings will be kept private until after the trial and all direct appeals have been finalized or exhausted.<sup>175</sup> Maryland, Rhode Island, and Pennsylvania have more moderate hybrid approaches, allowing outside recording devices in only civil, not criminal, trial proceedings, and allowing television coverage at the appellate level upon a request to the judge.<sup>176</sup>

Utah and D.C. courts employ the two most restrictive policies.<sup>177</sup> In Utah, filming, video taping, and audio taping are all prohibited except to preserve the record, and still photography is only allowed for ceremonial or court approved programs.<sup>178</sup> The District of Columbia is the most prohibitive of all court systems, adopting an absolute ban on the use of audio and visual media in the courtroom, regardless of whether a proceeding is taking place or not.<sup>179</sup> Limited photography is permitted under Juvenile Court Rule 53(b)(2), but appears to apply only to areas outside the courtroom.<sup>180</sup> Electronic media is strictly forbidden at the appellate level as well.<sup>181</sup> Illinois, South Dakota, and Maryland follow a similar prohibitive

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172. For the ten years spanning 1987-97, New York courts had such an experimental program, but allowed the program to expire. See N.Y. JUD. CT. ACTS LAW § 218 (expired June 30, 1997); N.Y. CIV. RIGHTS LAW § 52.

173. DEL. ADMIN. DIRECTIVE NO. 155 (2004). It appears that the Permanent Advisory Committee has since allowed the Directive to expire, as it was not renewed after May 16, 2005. Alabama has a similar guideline to those seen in New York and Delaware, allowing media coverage only if the supreme court has adopted a program allowing for such media access. ALA. CANONS JUD. ETHICS, Canon 3A(7) (1976).

174. LA. JUD. CANON 3, available at [http://www.lasc.org/press\\_room/policy\\_for\\_media.asp](http://www.lasc.org/press_room/policy_for_media.asp).

175. *Id.*

176. PENN. R. CRIM. P. 112; PENN. R. CIV. P. 7 (rescinded June 23, 1975); PENN. CODE JUD. CONDUCT, Canon 3(A)(7); R.I. SUPER. CT. R. CRIM. P. 53; R.I. SUP. CT. R. art. VII; MD. R. 16-109. For an explanation of the Maryland rule, see *Cameras in the Courtroom: Rules and Guidelines for Their Use*, available at [http://www.courts.state.md.us/publications/cameras\\_in\\_ctroom.pdf](http://www.courts.state.md.us/publications/cameras_in_ctroom.pdf).

177. See generally UTAH CT. R. 4-401; D.C. SUPER. CT. R. CRIM. P. 53(b).

178. UTAH CT. R. 4-401(1)(A)-(B).

179. D.C. SUPER. CT. R. CRIM. P. 53(b); D.C. SUPER. CT. R. CIV. PROC. 203(b).

180. D.C. SUPER. CT. JUVENILE PROC. R. 53(b).

181. D.C. SUPER. CT. R. CRIM. P. 53(b); D.C. SUPER. CT. R. CIV. PROC. 203(b).

structure, but allow for coverage at the appellate level and state supreme court levels.<sup>182</sup>

The default rule is exactly the opposite in Florida. There, the state judicial rules expressly and unequivocally allow electronic media and still photography in all judicial proceedings without a prior request to the presiding judge.<sup>183</sup> Of course, the judge is granted discretion in limiting media coverage in the interests of courtroom decorum, controlling the proceedings, and ensuring the fair administration of justice in the case before the court.<sup>184</sup> Kansas follows similar guidelines, but while Florida allows any person to record the proceedings,<sup>185</sup> Kansas courts allow only "news media and educational television stations" to document the courtroom event.<sup>186</sup> The following states follow the general default rule espoused by Kansas and Florida, and all of these court rules allow for the judge to later limit media access if necessary: Georgia,<sup>187</sup> Mississippi,<sup>188</sup> Montana,<sup>189</sup> Nebraska,<sup>190</sup> Nevada,<sup>191</sup> New Jersey,<sup>192</sup> North Carolina,<sup>193</sup> Oregon,<sup>194</sup> Vermont,<sup>195</sup> Virginia,<sup>196</sup> and Wisconsin.<sup>197</sup>

Of course, media coverage that would interfere with jury selection, bench conferences, or attorney client communication is expressly prohibited in all of the states.<sup>198</sup> Many court rules also provide for exclusion of select testimony based upon objections from certain classes of persons: namely, victims, informants, undercover agents, relocated witnesses, or juveniles.<sup>199</sup>

182. MD. CODE CRIM. P. § 1-201; ILL. SUP. CT. R. 63(A)(7); S.D. CODE JUD. CONDUCT, Canon 3B(13).

183. FL. R. JUD. ADMIN. 2.170.

184. *Id.* at 2.170(a).

185. *Id.* at 2.170(b).

186. KAN. SUP. CT. R. 1001. Though this rule is promulgated by the supreme court of Kansas, it applies to all judicial proceedings within the state.

187. GA. SUP. CT. R. 75, 90. These rules are exclusive to the supreme court.

188. MISS. SUP. CT. R. FOR ELECTRONIC AND PHOTOGRAPHIC COVERAGE OF JUD. PROCEEDINGS 3.

189. MONT. CANONS OF JUD. ETHICS, Canon 35.

190. NEB. CT. R. 17, 18.

191. NEV. SUP. CT. R. pt. IV.

192. N.J. CODE JUD. CONDUCT, Canon 3(A)(9).

193. N.C. SUPER CT. R. 15.

194. OR. R. OF APP. PROC. 8.35; OR. UNIFORM TRIAL CT. R. 3.180.

195. VT. R. CRIM. P. 53; VT. R. CIV. P. 79.2, 79.3.

196. VA. CODE ANN. § 19.2-266 (2006).

197. WIS. SUP. CT. R. 61.01-61.12.

198. *See, e.g.*, MO. CT. OPERATING R. 16.02(d)-(e); IDAHO CT. R. OF ADMIN. 45(c)(1).

199. *See, e.g.*, ALASKA R. OF ADMIN. 50.; Ark. Ct. Admin. Order No. 6 (2006); MISS. SUP. CT. R. FOR ELECTRONIC AND PHOTOGRAPHIC COVERAGE OF JUD. PROCEEDINGS 4; MO. CT. OPERATING R. 16.03(c); VA. CODE ANN. § 19.2-266.

Finally, even though state rules may seem progressive, benches within the state may have more restrictive rules.<sup>200</sup>

## 2. State Appellate Courts

It is clear that state practices at the trial level vary widely, from the broad allowance in Florida<sup>201</sup> to the complete ban in our nation's capital.<sup>202</sup> The variation among the states is evidence of the ongoing debate over cameras in the courtroom, and suggests that there is room for change as well. In fact, this change seems to be occurring more quickly among appellate courts within the states. The number of states that have adopted more liberal standards at the appellate level outnumbers those that impose more restrictive standards.<sup>203</sup>

Modern allowances for media coverage in appellate courtrooms often mirror those seen in the trial rules. In fact, many of the court rules promulgated by the supreme court of each state cover both trial and appellate proceedings.<sup>204</sup> For those states that have exclusive appellate rules, the guidelines tend to err on the side of admission.<sup>205</sup> States adopting the "request first, then granted" approach include Connecticut,<sup>206</sup> Georgia appellate courts,<sup>207</sup> Maryland,<sup>208</sup> Minnesota,<sup>209</sup> South Carolina,<sup>210</sup> and West

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200. See, e.g., U.S. DIST. CT, N.D. ALA. LOCAL CT. R. 83.2 (stating that "whether or not court is actually in session, there shall be no radio or television broadcasting or taking of photographs in or from the courtrooms or their environs during the progress of, or in connection with, any judicial proceeding").

201. FL. R. JUD. ADMIN. 2.170.

202. D.C. SUPER. CT. R. CRIM. P. 53(b); D.C. SUPER. CT. R. CIV. P. 203(b).

203. See *infra* notes 205-19 and accompanying text (noting the practices of numerous states with regard to the use of media coverage in appellate courtrooms).

204. See ALA. CANONS OF JUD. ETHICS, Canon 3A(7); ALASKA R. OF ADMIN. 50; ARIZ. SUP. CT. R. 122; Ark. Sup. Ct. Admin. Order No. 6 (2006); CAL. R. CT. 980; COL. CODE JUD. CONDUCT, Canon 3(A)(7); DEL. SUP. CT. R. 84; FL. R. JUD. ADMIN. 2.170; HAW. R. S. CT. 5.1-2; IDAHO CT. ADMIN. R. 45-46; IOWA CT. R. 25.2; KAN. SUP. CT. R. 1001; LA. CODE JUD. CONDUCT, Canon 3(9), available at [http://www.lasc.org/press\\_room/policy\\_for\\_media.asp](http://www.lasc.org/press_room/policy_for_media.asp); Me. Admin. Order JB-05-15 (2005); MASS. SUP. JUD. CT. R. 1:19(a); MASS. JUD. CANON 3(A)(7); Mich. Admin. Order No. 1989-1; MISS. SUP. CT. R. 3; MO. CT. R. 16; MONT. CANONS OF JUDICIAL ETHICS, Canon 35; N.H. SUP. CT. R. 19; N.J. CODE JUD. CONDUCT, Canon 3(A)(9); N.M. SUP. CT. GEN. R. 23-107; NEV. SUP. CT. R. pt. IV; N.C. SUPER CT. R. 15; N.D. SUP. CT. ADMIN. R. 21; OHIO SUPERINTENDENCE CT. R. 12; OR. R. OF APP. P. 8.35; Okla. Stat. tit. 5, ch. 1, app. 4, Canon 3; PENN. R. CIV. P. 7; PENN. CODE JUD. CONDUCT, Canon 3(A)(7); TENN. SUP. CT. R. 30; TEX. R. CIV. P. 18(C); TEX. R. APP. P. 14; UTAH CT. R. 4-401; WASH. CT. R. 16; WYO. CT. R. 804; WIS. SUP. CT. R. 61.01-61.12; STATE JUSTICE INSTITUTE, REPORTER'S HANDBOOK ON COVERING KENTUCKY COURTS (2004), available at <http://courts.ky.gov/research/publications.htm> (follow the "Reporter's Handbook" hyperlink); *Procedures for Requesting Cameras in Minnesota Courtrooms*, available at [http://www.courts.state.mn.us/documents/cio/Cameras\\_in\\_the\\_Courtroom\\_Policy.doc](http://www.courts.state.mn.us/documents/cio/Cameras_in_the_Courtroom_Policy.doc).

205. For example, Georgia Supreme Court rules provide that proceedings "may be broadcast by television and radio, recorded electronically, and photographed" as long as the coverage does not distract "from the dignity of the Court proceedings." GA. SUP. CT. R. 75.

206. THE COMMISSION ON OFFICIAL LEGAL PUBLICATIONS, *supra* note 149 at 66-68.

207. GA. SUP. CT. R. 75.

Virginia.<sup>211</sup> Interestingly, both Illinois and New York allow coverage of only appellate proceedings, severely restricting or completely banning media access to trial proceedings.<sup>212</sup> Unrestrictive default rules that allow media in unless the court determines otherwise have been approved by the Georgia Supreme Court,<sup>213</sup> Illinois,<sup>214</sup> Nebraska,<sup>215</sup> Rhode Island,<sup>216</sup> South Dakota,<sup>217</sup> and Vermont.<sup>218</sup>

### C. Federal Practice

The federal court system has been much more reluctant to experiment with electronic media inside the courtroom. This is evidenced in recent history. Recall the discussion of Canon 3A(7) above: while the states moved away from the strict ban endorsed by the Canon,<sup>219</sup> federal courts clung tightly to the principle, continually reaffirming the initial prohibition on media access adopted in 1946.<sup>220</sup> The policy, which was most recently reaffirmed by the Judicial Conference in 1994 after a three year pilot program allowing experimentation ended, bans all photography, radio, and television broadcasting within the courtroom.<sup>221</sup>

208. MD. CT. R. 16-109.

209. MINN. CODE JUD. CONDUCT, Canon 3A(11).

210. S.C. APP. CT. R. 605(f)(1) (requiring that a written request be submitted to the presiding judge before recording devices are allowed in the courtroom).

211. W. VA. TRIAL CT. R. 8.01.

212. ILL. SUP. CT. R. 63(A)(7); N.Y. JUD. CT. ACT § 281 (expired June 30, 1997); N.Y. CIV. RIGHTS LAW § 52 (McKinney 1992); 22 N.Y. Comp. Codes R. & Regs. tit. 22, §§ 29.1-29.2.

213. GA. SUP. CT. R. 75-90.

214. ILL. CODE JUD. CONDUCT, Canon 3(A)(7).

215. NEB. SUP. CT. R. 17(c) ("Expanded media coverage of a proceeding shall be permitted in all judicial proceedings unless the court concludes, after objection and showing of good cause, that under the circumstances of the particular proceeding such coverage would materially interfere with the rights of the parties to a fair trial.").

216. R.I. SUP. CT. R. art. VII.

217. S.D. CODIFIED LAWS § 15-24-6(c) (2003) ("Except as otherwise provided by these rules, electronic recording by moving camera, still camera, and audio tape, and broadcasting will be permitted of all judicial proceedings in the courtroom during sessions of the Supreme Court.").

218. VT. R. APP. P. 35.

219. See *supra* notes 134-208 and accompanying text.

220. MOLLY TREADWAY JOHNSON & CAROL KRAFKA, ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS 3 (1994).

221. Administrative Office of the U.S. Courts, Office of Public Affairs, *Background on Cameras in the Federal Courts*, [http://www.judges.org/nccm/research/court\\_media\\_rules/admin\\_office\\_u\\_s\\_cts\\_cameras.htm](http://www.judges.org/nccm/research/court_media_rules/admin_office_u_s_cts_cameras.htm) (last visited Sept. 26, 2006) [hereinafter *Background on Cameras in the Federal Courts*].

The now defunct experimental program in the federal courts deserves more than a passing mention. Even though some have suggested that the federal courts have remained firm throughout time in their position, a detailed look at the history of the Judicial Conference suggests that this may not be the case.<sup>222</sup> In fact, former Chief Justice William Rehnquist exhibited some interest in at least investigating the possibility when he appointed the Ad Hoc Committee on Cameras in the Courtroom in 1988.<sup>223</sup> Shortly thereafter, the committee's recommendation of a pilot program was adopted by the Judicial Conference,<sup>224</sup> which officially commenced in July of 1991 and allowed two circuit courts of appeals – the Second and Ninth – and six district courts to permit cameras in the courtroom at the authorization of the judge.<sup>225</sup> This tightly controlled program<sup>226</sup> lasted for over three years and was considered to be a success by some.<sup>227</sup> In fact, the official evaluation that was produced after the program summarized the effect of the program as follows:

Overall, attitudes of judges toward electronic media coverage of civil proceedings were initially neutral and became more favorable after experience under the pilot program.

Judges and attorneys who had experience with electronic media coverage under the program generally reported observing small or no effects of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice.

Judges, media representatives, and court staff found the guidelines governing the program to be generally workable.<sup>228</sup>

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222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* See also JOHNSON & KRAFKA, *supra* note 220, at 4 (noting that these eight courts were selected from a volunteer group on the basis of size, civil caseload, proximity to metropolitan areas, and regional and circuit representation).

226. JOHNSON & KRAFKA, *supra* note 220, at 5 (providing specific details of the program and the appropriate protocol to be followed by participating judges).

227. *Background on Cameras in the Federal Courts*, *supra* note 221; *Cameras in the Courtroom: Hearing on S.829 Before the S. Comm. on the Judiciary*, 109th Cong. 44-45 (2005) (statement of Judge Diarmuid O'Scannlain on Behalf of the Judicial Conference of the United States Regarding S.829 as applied to Federal Trial Courts) [hereinafter *O'Scannlain statement*] (stating that the Judicial Conference proposed that cameras be allowed in appellate proceedings, but prohibited the use of cameras in district court proceedings because "the potential intimidating effect of cameras on some witnesses and jurors was cause for considerable concern").

228. JOHNSON & KRAFKA, *supra* note 220, at 7.

Despite this initial optimism, the Judicial Conference reviewed the data and concluded that the intimidating effect of cameras on some witnesses and jurors raised substantial concerns, and as a result allowed the program to expire.<sup>229</sup> The Judicial Conference's rationale only partially explained why they rejected the recommendation of the Court Administration and Case Management Committee to allow photography, recording, and broadcasting of civil proceedings.<sup>230</sup> By focusing on the effects on jurors and witnesses, the Judicial Conference failed to provide any rationale supporting the extension of the ban to appellate proceedings.

The Conference appeared to have reconsidered their absolute ban a couple years following the expiration of the pilot program.<sup>231</sup> In March of 1996, the Conference adopted a resolution that allowed for some flexibility at the appellate level, granting each court of appeals the ability to "decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments . . . ."<sup>232</sup> Despite this grant of authority, the Judicial Conference stood fast by their original opinion with regards to trial courts, urging the courts of appeals (at the very same meeting adopting the resolution for appellate courts) to adopt policies that reflected the Conference's 1994 decision to prohibit the use of photography and radio and television coverage in U.S. district courts.<sup>233</sup>

Under the 1996 grant of authority, two circuits – the Second and Ninth, which notably were the two participants in the appellate program – have allowed for media to broadcast the proceedings after approval is received from the presiding judge.<sup>234</sup> The other circuits do not appear to be joining them any time soon; all eleven have adopted policies expressly prohibiting cameras.<sup>235</sup>

Of additional note is the current stance of the Judicial Conference's traditional ally: the American Bar Association. The ABA, which, you may remember, was the original drafter of Canon 35, has since changed its tune.<sup>236</sup> As mentioned above, the Association changed its policy in the early 1980s, and has since been an advocate for media broadcasts, particularly

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229. Background on Cameras in the Federal Courts, *supra* note 221.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. See Jim Snyder, *Specter, others push for Courtroom Cameras*, THE HILL, Nov. 8, 2005, available at [http://www.hillnews.com/thehill/export/TheHill/Business/110805\\_cameras.html](http://www.hillnews.com/thehill/export/TheHill/Business/110805_cameras.html).

236. ABA letter, *supra* note 128.

with regards to appellate and Supreme Court proceedings.<sup>237</sup> In 1989, the ABA Task Force on Outreach to the Public submitted a proposal to the ABAs policy-making body, recommending that oral arguments of the Supreme Court be televised.<sup>238</sup> The Association also endorsed the federal pilot program in 1991, and expressed disappointment when the pilot program was discontinued and the ban reinstated.<sup>239</sup> The ABA recommended additional experimentation in 1995, and again in 2000, to no avail.<sup>240</sup> In its proposals, the ABA championed the two-prong argument we have seen from others, stating that:

Courts that conduct their business openly and under public scrutiny protect the integrity of the federal judicial system by guaranteeing accountability to the people they serve. Court proceedings that are accessible and visible benefit the public because of the invaluable civic education that results when citizens witness federal courts in action.<sup>241</sup>

These policies factor into both sides of the arguments for and against media coverage. A full discussion of these arguments follows, pulling from both historical and contemporary sources to present the pros and cons of media coverage of broadcasted proceedings.<sup>242</sup>

## VI. THE FIGHT BEGINS: ARGUMENTS FOR ACCESS MEET EQUALLY STRONG RESISTANCE

### A. Trial Courts

#### 1. Historical Background

Public trials hold a revered position in our nation's history.<sup>243</sup> Even at the time of our Founding, there was no question in citizens' minds that the public jury was to play a prominent part in the nation's new government.<sup>244</sup> Indeed, as the new Constitution was being drafted, Alexander Hamilton

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237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *See infra* Part VI.

243. AMERICAN BAR ASSOCIATION, *DIALOGUE ON THE AMERICAN JURY: WE THE PEOPLE IN ACTION I* (2005).

244. ALEXANDER HAMILTON ET AL., *THE FEDERALIST* 412-13 (J.R. Pole ed., 2005).

noted that there was no argument among the drafters over the value of trial by jury,<sup>245</sup> stating that:

[I]t would be altogether superfluous to examine to what extent [a trial by jury] deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to, as a defense against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than beneficial, as all are satisfied of the utility of the institution, and of its friendly aspect to liberty.<sup>246</sup>

Here Hamilton suggested that a trial by jury – which was ultimately worded as an “open” trial in Article III<sup>247</sup> – provided a form of accountability.<sup>248</sup> Nationalist Hamilton was not engaging in mere puffery; his views were espoused by other prominent Founding voices. For example, consider Thomas Jefferson, who also believed that the jury acted as an accountability mechanism, describing trial by jury as “the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”<sup>249</sup> In fact, the jury was active in securing basic rights even before our nation’s Founders incorporated it so prominently in the Fifth, Sixth, and Seventh Amendments.<sup>250</sup> One instance is particularly notable: the jury played a direct role in honoring nascent First Amendment rights of the public and the press when acquitting publisher John Peter Zenger in 1735 after he had been put on trial for printing articles critical of the New York governor.<sup>251</sup>

As seen in statements by the Founders and others,<sup>252</sup> the original purpose of an “open court” was both to prevent wayward judicial action behind closed doors and to “assure that the public was informed about and could participate in the workings of the judicial system.”<sup>253</sup> This two part argument, promoting access for accountability and education, prevails to this

245. *Id.* at 443 (“The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.”).

246. *Id.*

247. U.S. CONST. art. III.

248. *See generally* HAMILTON ET AL., *supra* note 244.

249. AMERICAN BAR ASSOCIATION, *supra* note 243, at 1.

250. *Id.* at 3.

251. *Id.*

252. *See, e.g.*, LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 5 (1852) (describing a jury as “a barrier against the tyranny and oppression of government”).

253. GOLDFARB, *supra* note 61, at 2.



day. The argument however, has gracefully matured, as each part has had its turn in the spotlight. At the time of the Founding, accountability was the name of the game, and history appropriately sets the background here.

Prior to the American Revolution, the judiciary was considered the least active branch in the colonial government, and, correspondingly, was the least respected.<sup>254</sup> In fact, judges at that time were more likely to side with King George III of England than with the revolutionary leader George Washington.<sup>255</sup> Judges were appropriately juxtaposed against juries, as juries provided a means – albeit incomplete – of holding judges accountable.<sup>256</sup> As a result, juries were highly regarded at the time the Constitution was drafted, and both state constitutions and the federal Constitution contained multiple guarantees of trial by jury.<sup>257</sup> The opportunity for ordinary citizens to govern through the mechanism of jury service was not a favor to the citizen alone; the Framers envisioned that this service would provide a “check” on deviant judges that may be susceptible to financial or social status bribes.<sup>258</sup>

The “judicial bicameralism”<sup>259</sup> seen between a judge and a jury was accentuated by public participation through audience attendance, and public attendance was guaranteed for all through the public’s surrogate, the press.<sup>260</sup> However, the press was not foolproof, and oftentimes was unable to fully and accurately convey court proceedings to the public without displaying some level of partiality.<sup>261</sup> Judges were aware of these limitations of the press during the first two centuries of our nation. For example, consider the trial of Aaron Burr for the deadly duel shooting of Alexander Hamilton. Knowing of the mass public interest in the trial, Chief Justice John Marshall moved the trial from a small Virginia courtroom to the Virginia House of Delegates hall to accommodate the interested viewers that traveled from far and wide to view the trial.<sup>262</sup> Such a move, though unusual, recognized that “[a] trial is a public event. What transpires in the

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254. AMAR, *supra* note 130, at 207-09.

255. *Id.* at 207 (“In ten of the thirteen colonies, the sitting chief justice or his equivalent ultimately chose George III over George Washington.”).

256. *Id.* at 233 (“Before 1776, colonial jurors had stood shoulder to shoulder with colonial assemblymen to defend American self-governance against a formidable alliance of unrepresentative imperial officers and institutions – King George, his ministry, the English Privy Council and its Board of Trade, Parliament, colonial governors, and colonial judiciaries.”).

257. *Id.* at 234, 236. *See also* U.S. CONST. art. III; U.S. CONST. amend. V, VI, VII.

258. AMAR, *supra* note 130, at 237 (“Unchecked by a jury, a judge might be tempted – quite literally – to go easy on his wealthy friends . . . . Particularly in the case where government officials had committed crimes against the citizenry, judges acting alone might be overly inclined to favor fellow government officers.”).

259. *Id.* at 238.

260. COHN & DOW, *supra* note 28, at 41.

261. *See generally supra* notes 107-13 and accompanying text.

262. COHN & DOW, *supra* note 28, at 39.

court room is public property."<sup>263</sup> As the nation grew both numerically and geographically, it became difficult to provide these types of accommodations. The printed press often acted as the public's surrogate, albeit with limitations.<sup>264</sup> The next great step came with the advent of radio and television recording, and moves were made to employ these new forms of media within the courtroom.<sup>265</sup>

One commentator aptly describes the relatively diminutive introduction of television within the courts, noting that though there "is no reliable record of the first appearance of a news camera in an American courtroom . . . . By the 1920s, still photographs of court proceedings were relatively common in the nation's newspapers, especially in tabloids."<sup>266</sup> The use of media continued to grow,<sup>267</sup> and public interest grew alongside it.<sup>268</sup> The first documented radio broadcast occurred in 1925,<sup>269</sup> and by the time of the *Hauptmann* trial in 1935,<sup>270</sup> cameras were being used in the courtroom with some regularity.<sup>271</sup> After the resulting debacle, camera use was quickly curbed, fueled primarily by the American Bar Association's adoption of Canon 35.<sup>272</sup> Cameras stayed, ironically, out of the spotlight, and reemerged only after substantial technology changes allowed for their relatively undisturbed use.<sup>273</sup> Their reemergence in trial and appellate courts across the country in the past two decades has reignited debate over the appropriateness of their use.<sup>274</sup> The discussion that follows presents both sides of this debate, as applied to first trial courts, and then appellate. We begin with trial courts, as arguments from both fields tend to center around trials.

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

264. See generally COHN & DOW, *supra* note 28, at 40-41 (discussing the importance of the press at trials where there are seating limitations).

265. See generally ABA Letter, *supra* note 128.

266. COHN & DOW, *supra* note 28, at 14.

267. GOLDFARB, *supra* note 61, at 23 ("During the first decades of the twentieth century, radio and cameras captured the highlights of notorious trials . . . .").

268. See *supra* notes 107-13 and accompanying text.

269. GOLDFARB, *supra* note 61, at 7.

270. See *supra* notes 107-13 and accompanying text.

271. CARTER, *supra* note 107, at 2-4.

272. See generally *id.*

273. See *supra* notes 124-28 and accompanying text.

274. See *infra* notes 275-441 and accompanying text.

## 2. Proponents

### a. Constitutional Considerations

As discussed above, the First Amendment and Sixth Amendment guarantee two corollary rights with respect to trials: the First provides the public with the right of access to attend proceedings,<sup>275</sup> and the Sixth provides a defendant with a fair and public trial.<sup>276</sup> The application of these rights has resulted in conflict at times, both between the two amendments and within the Sixth Amendment itself.<sup>277</sup> Many proponents readily acknowledge the conflict within the language of the Sixth Amendment, noting that the words “fair” and “public” do not always go hand in hand.<sup>278</sup> There is also the additional tension between the guarantees of the Sixth Amendment and those secured by the First.<sup>279</sup> The weighty task of accommodating both of these constitutional rights was acknowledged by Justice Hugo Black when he wrote that “free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them.”<sup>280</sup> In fact, some even go as far to admit that the media exacerbates the natural tension between the First and Sixth Amendments, stating that “[a]s the media become more pervasive and more influential, the potential for conflict between the press’s right to present crime news and the defendant’s right to a fair and open trial increases.”<sup>281</sup>

Others, however, argue that this conflict between the rights of the press espoused in the First Amendment and the rights of the defendant championed in the Sixth is merely “illusory,” and that these rights can be concurrently recognized and honored.<sup>282</sup> The allies falling within this

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275. See U.S. CONST. amend. I; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577 (1980).

276. U.S. CONST. amend. VI.

277. Indeed, the Sixth Amendment requires trials to be both “fair” and “public.” U.S. CONST. amend. VI.

278. GOLDFARB, *supra* note 61, at 1 (“The constitutional rights of people charged with crimes to both a ‘public’ and a ‘fair’ trial may present an inherent conflict.”).

279. COHN & DOW, *supra* note 28, at 11 (“Ultimately the debate over cameras in the courtroom boils down to a constitutional balancing act that tantalizes and torments legal scholars – the right of public access, on one side, and a defendant’s right to a fair trial, on the other.”); Sentelle, *supra* note 31, at 25 (“All judges recognize the tension between this duty [providing the fairest possible trial to a defendant] and the rights owed to the public in general, and news media in particular, to disseminate information concerning such trials. In the United States, this tension is enhanced by the primacy of the constitutional protection of freedom of the press under our First Amendment.”).

280. *Bridges v. California*, 314 U.S. 252, 260 (1941).

281. GOLDFARB, *supra* note 61, at 1. See generally Charles H. Whitebread & Darrell W. Contreras, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System: Free Press v. Fair Trial: Protecting the Criminal Defendant’s Rights in a Highly Publicized Trial by Applying the Sheppard-Mu’Min Remedy*, 69 S. CAL. L. REV. 1587 (1996).

282. GOLDFARB, *supra* note 61, at 1-2 (referencing a discussion between the author and respected

particular camp tend to be scholars;<sup>283</sup> however, practicing attorneys<sup>284</sup> and other prominent proponents<sup>285</sup> have noted this as well. These supporters suggest that though the interplay between the First and Sixth Amendment is generally referred to as one of tension, the two amendments can actually be considered to be "mutually reinforcing."<sup>286</sup>

This idea of the "mutually reinforcing" amendments is often supported by history. As Professor Akhil Reed Amar has noted, the jury has historically protected the First Amendment rights of the public, just as the First Amendment has provided protection to the defendant through public accountability.<sup>287</sup> This mutual exchange – indeed, mutual reinforcement – makes sense; the rights guaranteed by both the First and Sixth Amendments at the time of the Founding were still relatively fragile. These rights were strengthened as citizens exercised them in tandem. Citizen attendance in open courts under Article III and the First Amendment provided an extra-judicial "check" on wayward judges<sup>288</sup> and prejudicial or biased participants,<sup>289</sup> thereby honoring a defendant's Sixth Amendment right to a fair and public trial.<sup>290</sup> Likewise, juries vindicated the public's First Amendment right to free speech in finding that individuals did nothing wrong by criticizing the government.<sup>291</sup> The result was a more accountable judiciary and more vibrant and unrestricted public discussion.

Though these rights work well together when placed in this historical context, each of these constitutional guarantees can be read on their own as providing a fully open judicial branch. For example, take the Sixth Amendment. Even though this amendment seems to be directed at the accused on its face, it mentions the public as well, and arguably guarantees

law professor Erwin Chemerinsky).

283. See generally AMAR, *supra* note 130; LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 964 (2d ed. 1988); Chris Fitzgerald, *Court TV: Are we being fed a steady diet of tabloid television*, A.B.A. J., May 1994, at 46.

284. See generally GOLDFARB, *supra* note 61.

285. See Strossen, *supra* note 30, at 648.

286. *Id.*

287. See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

288. *Id.* at 112 ("The ability of the public to judge the judge would tend to protect innocent defendants from judicial corruption or oppression . . .").

289. *Id.* at 112-13 ("So, too, the public right to monitor witnesses at trial was designed to help the truth come out, and truth would as a rule help innocent defendants more than guilty ones.").

290. U.S. CONST. amend. VI.

291. AMAR, *supra* note 287, at 23 ("It becomes even more clear that popular speech was the paradigm of our First Amendment when we recall its historic connection to jury trial: popular bodies outside regular government would protect popular speech criticizing government.").

rights that are to be shared by both defendants and the general public.<sup>292</sup> Likewise with the First Amendment, where the explicit prohibition against congressional interference of First Amendment rights can be implicitly read to provide those same rights against the other branches of government.<sup>293</sup> And finally, consider the text of Article III, which explicitly reminds the reader that courts in the United States are to be “open,” presumably to the public.<sup>294</sup>

In sum, these constitutional provisions provide a strong argument for open court proceedings, particularly when read together.<sup>295</sup> In fact, the Court has used the First Amendment to state that trial courts are presumptively open, absent some overriding interest.<sup>296</sup> However, even though the Court has guaranteed the public and the press a “right of access” to courts through the First Amendment, the right of access can be limited by factors beyond the judge’s control.<sup>297</sup> As a result, proponents contend, to various degrees, that the “right of access” will never be fully vested in the people until all people are allowed access to any given proceeding.<sup>298</sup> This,

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292. AMAR, *supra* note 130, at 328 (“Nor did the Sixth Amendment’s express statement of the rights of ‘the accused’ to enjoy a public trial negate the idea that the public also had a right to attend the trial even if the accused proved willing to waive his own entitlement. The people’s independent right to attend was strongly implicit in the Constitution’s general structure of governmental transparency, and in the wording of Article III, which spoke presumptively of open ‘courts’ as distinct from closed ‘chambers.’”).

293. *Id.* at 327-28 (“For instance, the mere fact that the First Amendment enumerated free-speech and free-exercise rights against Congress did not mean that Americans lacked similar rights against the president and federal courts, if those rights could indeed be properly inferred from the Constitution as a whole or from the spirit of the First Amendment itself.”).

294. *Id.* at 243 (“The explicit reminder that the court would be ‘open’ to the public, in keeping with a long American tradition of open judicial proceedings, complemented Article I’s transparency guarantee – its requirement of published legislative journals – and anticipated the Sixth Amendment promise of public trials in all federal criminal cases.”); U.S. CONST. art. III.

295. See *supra* notes 282-91 and accompanying text.

296. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 567, 580-81 (1980).

297. See COHN & DOW, *supra* note 28, at 40 (quoting Kelli Sager, media advocate in the O.J. Simpson trial, as stating “[t]he fundamental precept of access is that everyone should be able to have access to court proceedings, should be able to observe what is going on . . . . It is physically impossible to have everyone in the courtroom . . .”). The fact that courtrooms are only able to hold a limited number of people bolsters proponents’ other arguments. *Id.*

298. Consider, for example, the right of access as applied to the O.J. Simpson trial. As one author notes:

There were just eight seats available to the public in the small courtroom where O.J. Simpson was tried for murder. The rest were set aside for family and friends of the participants, members of the legal teams and representatives of the news media. “Public” seats were at such a premium that the superior court conducted a daily lottery, with as many as 400 persons casting lots with Deputy William Dinwiddie. He ran the drawing with a vigilant eye for scalpers who commanded up to \$200 for a courtroom seat. A public trial? Hardly, by the historical standard of Justice Marshall. Yet the Simpson trial was available to a public audience that dwarfed the excited crowd at the Virginia House of Delegates [during the trial of Aaron Burr], a throng of hundreds-of-millions—everyone within sight and hearing of a television set.

*Id.* at 39.

the argument goes, cannot occur without the ability to broadcast.<sup>299</sup> Thus, though the constitutional arguments explicitly deal only with a general right of access,<sup>300</sup> proponents extend these arguments to imply a right of access through media.<sup>301</sup> However, this extension may usher in a new set of unforeseen issues.<sup>302</sup> For the time being though, we move to arguments that carry more force among modern proponents.

*b. Practical Considerations*

Beyond the constitutional arguments are the practical benefits of camera coverage of courtroom proceedings. The practical argument is twofold: first, the public, through their surrogate of the media, can act as an accountability check on the judicial branch;<sup>303</sup> second, the expanded opportunity to view judicial workings through media coverage provides a valuable educational opportunity to all American citizens.<sup>304</sup> The first argument was probably strongest in the first century following the enactment of the Constitution, as skepticism of closed government and fear of oppression still was paramount in citizen's minds.<sup>305</sup> Though this argument has since lost some of its initial force, it still provides a valuable function even in today's society.<sup>306</sup> This can be contrasted with the argument involving educational value, which, though valued at the time of the Founding, likely was considered to be a secondary benefit of open trials. However, as the accountability function has waned, the educational benefit has dramatically increased, particularly in today's fast-paced, media-centric world.<sup>307</sup> Because of the historical underpinnings, the discussion begins

299. See, e.g., Strossen, *supra* note 30, at 654 ("Ultimately, all of us who are committed to the Bill of Rights have an important stake in television access to all judicial proceedings. For our freedoms can't survive without popular support. And they would not have popular support without public understanding. Televised judicial proceedings have made an enormous, invaluable contribution to that public understanding."); Marci A. Hamilton & Clemens G. Kohnen, *The Jurisprudence of Information Flow: How the Constitution Constructs The Pathways of Information*, 25 CARDOZO L. REV. 267, 296 (2003) ("In contrast to the general populace's expectation of a guarantee of public access to the gallery of a United States courtroom, the Supreme Court has settled on a reading of the Constitution as offering no more than *some* right of access to *some* judicial proceedings, as opposed to a guarantee of public access to the audiences' benches in a courtroom.").

300. See generally *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

301. See, e.g., 151 CONG. REC. 121, S10426-S10430 (2005) (statements of Sen. Arlen Specter) [hereinafter "Statement of Specter"]; see also *supra* note 299 and accompanying text.

302. See *infra* notes 336-75 and accompanying text.

303. See *supra* notes 254-61 and accompanying text.

304. See *infra* notes 316-20 and accompanying text.

305. See *supra* notes 254-61 and accompanying text.

306. See *infra* notes 309-11 and accompanying text.

307. See *infra* notes 316-18 and accompanying text.

with the first argument: accountability.

The press has been seen as an “extralegal check” since as early as the beginning of the eighteenth century.<sup>308</sup> This function of the press has persisted into the modern age; in fact, some defense attorneys suggest that continued restraint and control is needed over a select few judges even today.<sup>309</sup> These proponents argue that cameras help provide and enhance that “check” on judicial misbehavior, stating that cameras in a courtroom put:

[R]estraints on the judge in a way that is beneficial to the defendant. The judge is not going to be as arbitrary (as many judges are) in front of the camera, where he is going to have to justify his behavior to a larger audience. A lot of these judges get away with so much because no one pays any attention to them.<sup>310</sup>

Though these sweeping generalizations may not be entirely true, the defense attorneys making these statements have first-hand knowledge of the workings of a trial,<sup>311</sup> and some weight should be given to these comments, as they support the continued need for public scrutiny of the judicial system.

Accountability applies not only to judges. Indeed, the public’s role in the judicial system reaches far beyond accountability: the public also plays a crucial part in the fair and complete administration of justice. On the historical front, our scholarly friends remind us that one of the influential figures in the seventeenth century, Alexis de Tocqueville, asserted “that the core interest underlying the jury trial is that of the jurors rather than the parties. And the citizenry’s interest in a jury trial transcends that of the twelve jurors. The public benefits from having ordinary citizens monitor judges, the police, and prosecutors.”<sup>312</sup> This argument has born true in the modern age, as some suggest that the O.J. Simpson trial resulted not only in a benefit to the public, but a benefit to the defendant and to the search for

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308. GOLDFARB, *supra* note 61, at 21.

309. COHN & DOW, *supra* note 28, at 30 (referencing Rikki J. Klieman, Court TV anchor and former Boston criminal defense attorney, who stated that “I blessed the camera when certain judges were kept honest rather than being arbitrary or capricious”). Rikki J. Klieman, “*But a Camera in the Courtroom Should Not Take the Blame*,” CHICAGO TRIBUNE, Oct. 10, 1995, at 15.

310. COHN & DOW, *supra* note 28, at 30 (quoting National Jury Project trial consultant Karen Jo Koonan).

311. Though Ms. Klieman may have a larger-than-life personality, she certainly has merit to brag about. In 1983, just eight years out of law school, she was named one of the five most outstanding trial attorneys in the country by Time magazine. She is of counsel to Klieman, Lyons, Schindler & Gross while serving as a legal analyst for *The Today Show* and *Court TV*. Court TV, Biographies: Rikki Klieman, [http://www.courtTV.com/anchors/rikki\\_klieman.html](http://www.courtTV.com/anchors/rikki_klieman.html) (last visited Aug. 30, 2006).

312. AMAR & HIRSCH, *supra* note 13, at 115. The authors later note that “[t]he ultimate right of the public to change policy and policymakers creates a strong presumption that government action in all three branches will be open to public scrutiny. Thus a public trial, like a trial by the People (jurors), helps preserve popular sovereignty.” *Id.* at 117.

truth itself.<sup>313</sup> Even critics note that though televising the trial resulted in some unique problems, it also brought forth new witnesses who were able to question other witnesses and authenticate evidence.<sup>314</sup> This holds not only judges accountable, but also our entire justice system, keeping trials as fair and fully informed as possible.

The second prong of the modern argument is that broadcasting court proceedings provides a valuable educational opportunity to the public at large.<sup>315</sup> Modern minds are more apt to emphasize this benefit, noting that, as a practical matter, "[m]uch of what adults learn about government – its institutions and members, their activities, decisions, defects, strengths, capabilities—stems from the mass media."<sup>316</sup> One scholar notes that the benefit from observing televised court proceedings would be particularly applicable in the legal education setting, stating that "students, educators, and lawyers would additionally benefit by being able to observe 'firsthand,' via the broadcast and videotape, the trial and its participants."<sup>317</sup> This argument is further supported by the public's current perception and understanding of the judicial branch: "[s]urveys of public perception of the judicial process . . . have revealed low levels of public understanding of the role of courts and of judicial processes, and correspondingly low levels of confidence in the judiciary."<sup>318</sup>

313. See COHN & DOW, *supra* note 28, at 27.

314. *Id.*

315. Christo Lassiter, *TV or Not TV – That is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928, 959 (1996).

316. DAVID L. PALETZ & ROBERT M. ENTMAN, *MEDIA POWER POLITICS* 5 (1981). See also COHN & DOW, *supra* note 28, at 11 ("Surveys repeatedly indicate that more than half of all Americans receive virtually all of their news from television.")

317. Lassiter, *supra* note 315, at 962. See also COHN & DOW, *supra* note 28, at 55 ("[E]ven legal scholars with a jaundiced view of television's public educational value rave about its effectiveness in educating future lawyers. Professor Uelmen quickly incorporated taped segments of the Simpson trial into the syllabi of his law school courses, as did UCLA's Peter Arenella, who decries the televising of high profile trials while admitting it educates far more people than televising ordinary cases. In fact, the O. J. Simpson case is a law professor's dream. With transcripts and tapes of the trial now well-established teaching tools in courses such as criminal procedure and evidence, the courtroom has become a classroom.")

318. Daniel Stepniak, *Technology and Public Access to Audio-Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions*, 12 WM. & MARY BILL RTS. J. 791, 806 (2004). See also James Podgers, *Message Bearers Wanted*, A.B.A. J., April 1999, at 89 (noting that a 1998 survey conducted by the ABA found that only 30 % "of the respondents were 'extremely or very confident' in the U.S. justice system, while 27 [%] were no more than 'slightly confident' in the system"). However, this indication of ignorance does not necessarily correlate with a public interest or even desire to have trials broadcasted over the television network. In fact, in a poll taken in 2002 after the arrest of possible 9-11 participant Zacarias Moussau, only 42 % of the public believed that the trial should be broadcast live, while the majority felt that the trial should not be televised. Jennifer J. Miller, *Cameras in Courtrooms: The Lens of the Public Eye on our System of*



In fact, such sentiments have been around for more than fifty years. Arguments from the bench have sounded since as early as 1956, when Justice Otto Moore of the Colorado Supreme Court emphatically posed these rhetorical questions:

What harm could result from portraying by photo, film, radio and screen to the business, professional and rural leadership of a community, as well as to the average citizen regularly employed, the true picture of the administration of justice? Has anyone been heard to complain that the employment of photographs, radio and television upon the solemn occasion of the last Presidential Inauguration or the Coronation of Elizabeth II was to satisfy an "idle curiosity"? Do we hear complaints that the employment of these modern devices of thought transmission in the pulpits of our great churches destroys the dignity of the service; that they degrade the pulpit or create misconceptions in the mind of the public? The answers are obvious. That which is carried out with dignity will not become undignified because more people may be permitted to see and hear.<sup>319</sup>

Indeed, the educational value provided from televised court proceedings works to correct public misperception about the criminal justice system as a whole.<sup>320</sup>

Proponents are also eager to respond to criticisms voiced on the other side of the debate. One of the main arguments advanced by critics is that of potential prejudice affecting the jury, the witnesses, and possibly even the judge.<sup>321</sup> A ready response is to be found; proponents suggest that the protective procedures in place minimize, and in some cases eliminate, the possibility of a prejudicial outcome.<sup>322</sup> The opportunities for continuance and change of venue, the tool of voir dire, the judicial limiting instruction, and the curative ability to declare a mistrial or reverse on appeal all safeguard the defendant's rights while preserving those of the public and the press.<sup>323</sup>

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*Justice*, S.C. LAW., Mar.-Apr. 2002, at 25.

319. CARTER, *supra* note 107, at 8 (citing *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 296 P.2d 465, 469 (Colo. 1956) (en banc)).

320. COHN & DOW, *supra* note 28, at 55 ("In terms of educating the public, televising actual court proceedings can correct inaccuracies and distortions portrayed in the fictional events of television entertainment programs.").

321. *See infra* notes 346-66 and accompanying text.

322. *See generally* GOLDFARB, *supra* note 61, at 25-40 (outlining the protective procedures in place "designed to block out . . . prejudicial effects").

323. *Id.*

This response is additionally supported by studies that evaluate the impact of media on trial participants.<sup>324</sup> Even critics readily admit that these studies give credence to proponents' arguments.<sup>325</sup> Proponents argue that these studies, coupled with anecdotal accounts of cameras in courtrooms, refute the critique that media have an adverse psychological impact on trial participants.<sup>326</sup> However, as seen below, the studies cited are not foolproof. In fact, they are far from it. As noted by both critics and proponents, documenting the effect of cameras on court proceedings is a difficult, if not impossible, undertaking.<sup>327</sup> Indeed, even with favorable results supporting proponents, equally persuasive contentions are heard from their counterparts, the critics.

### 3. Critics

For critics, the fact that trials have been routinely broadcasted for several decades is a double-edged sword. On the one hand, it presents a longstanding accepted practice that may be difficult or impossible to overturn. On the other, it has provided a wealth of real-life examples demonstrating all of the risks and pitfalls of media coverage. The critics are not few in number, and include judges,<sup>328</sup> scholars,<sup>329</sup> and politicians.<sup>330</sup> In fact, several prominent voices in the government, including former President Bill Clinton, joined the ranks of critics after the O.J. Simpson trial, quipping that television coverage of the trial created a "circus atmosphere."<sup>331</sup>

324. See Blake D. Morant, *Resolving the Dilemma of the Televised Fair Trial: Social Facilitation and the Intuitive Effects of Television*, 8 VA. J. SOC. POL'Y & L. 329, 370-72 (2001).

325. *Id.*

326. See CARTER, *supra* note 107, at 18 ("Proponents of camera coverage have argued strongly that these psychological effects are merely a matter of speculation for which no substantial basis exists in the trial records."); see also GOLDFARB, *supra* note 61, at 96.

327. See, e.g., GOLDFARB, *supra* note 61, at 96 ("Few studies have tested the hypothesis that courtroom cameras change behavior; such a hypothesis is difficult to prove or disprove.")

328. See, e.g., O'Scannlain statement, *supra* note 227; *Cameras in the Courtroom Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (testimony of Hon. Jan E. DuBois) [hereinafter Judge DuBois Testimony].

329. See, e.g., Lassiter, *supra* note 315.

330. See generally John Broder, *Clinton Says Televising Simpson Trial Led to 'Circus Atmosphere'*, L.A. TIMES, Sept. 22, 1995, at A28 (discussing President Clinton's criticism of allowing media in the courtroom during the O.J. Simpson Trial).

331. *Id.*

a. *Constitutional Considerations*

Case history works in the favor of critics on this point, as the Sixth Amendment guarantee of a fair and *public* trial has been interpreted to be the defendant's right alone, not to be shared by the public.<sup>332</sup> The critics find support even on First Amendment grounds, as the right of public access declared in *Richmond Newspapers* has not been extended to the television media.<sup>333</sup> The only direct ruling by the Court on issues of media access was in *Chandler*, where the Court merely held that the use of cameras was not per se unconstitutional.<sup>334</sup> Commentators emphasize that the Court in *Chandler* made no move to require media coverage; rather, they simply held that media coverage is constitutionally allowed.<sup>335</sup> Thus, critics rarely need to set forth constitutional arguments, because the Constitution has been interpreted in their favor thus far.

b. *Practical Considerations*

The crux of the critic's practical argument is that adding a camera to a trial "significantly alters the judicial process in ways which pad and pen never did."<sup>336</sup> Many of the critics maintain that the past decade of widespread camera usage lends support to their argument, providing ample examples of what can – and does – go wrong.<sup>337</sup> Furthermore, many critics argue that the use of cameras infuses courtrooms with politics, making "trials more political and less judicial."<sup>338</sup> Finally, critics readily note that the potential adverse effects of cameras extend beyond the courtroom, infringing upon trial participants' privacy and safety, wrongfully

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332. See *Patton v. United States*, 281 U.S. 276, 296-97 (1930).

333. See COHN & DOW, *supra* note 28, at 43 (noting that the Constitution doesn't necessarily require cameras in the courtroom).

334. See *Chandler v. Florida*, 449 U.S. 560, 573 (1981).

335. See, e.g., COHN & DOW, *supra* note 28, at 43 ("[T]he Constitution doesn't necessarily prohibit cameras in courtrooms, but it does not require they be allowed in either.").

336. Lassiter, *supra* note 315, at 933 ("The lens cap should be put back on cameras in the courtroom."). See also COHN & DOW, *supra* note 28, at 12 (quoting Gerald Uelmen, former Santa Clara Law School Dean and defense attorney, who stated in one presentation: "The unprecedented public scrutiny of [the O.J. Simpson] case has intruded to alter the roles and behavior of all the participants in many ways, some subtle, some not so subtle").

337. See Lassiter, *supra* note 315, at 933 ("The wisdom of hindsight presages reconsideration of current practices permitting cameras in the courtroom."); see also COHN & DOW, *supra* note 28, at 13 (quoting Gerald Uelmen, referencing the O.J. Simpson trial and suggesting that "[t]o find out what's really happening in the next trial of the century, . . . the American public may have to start reading newspapers again").

338. Lassiter, *supra* note 315, at 933.

encouraging civil litigants to settle, and causing a general public misperception of the court system and a given trial.<sup>339</sup>

Critics do not deny that cameras provide an educational experience to the general public; rather, they suggest that such benefits are outweighed by the risks presented by media coverage.<sup>340</sup> In fact, some critics even state that judges should never be forced to balance the defendant's right to a fair and impartial trial with the positive effects of media coverage, as a judge's first priority is to fairly administer justice.<sup>341</sup> This, critics contend, quickly dispenses of proponents' "educational value" argument, as the mere possibility of a judge having to compromise a defendant's constitutional right for the incidental educational benefit to the public is too great of a burden to place on the judicial system.<sup>342</sup>

Furthermore, even if judges were forced to value the educational effect of broadcasted proceedings, they should do so with caution, as the education provided from a televised proceeding is an incomplete and imperfect one.<sup>343</sup> Critics note that the trials that which are likely to be broadcast are atypical high-profile cases, and even those are often edited or summarized with two-minute "wrap-ups" at the end of the day.<sup>344</sup> This provides the public with a distorted view of both trials in general and of the specific trial under the spotlight.<sup>345</sup>

Of even greater importance in the critics' argument is the potential adverse effect media coverage of a trial can have on trial participants. As mentioned above, proponents contend that the judicial procedures in place provide adequate safeguards against prejudice to the defendant.<sup>346</sup> However, critics claim that such safeguards merely act as "legal Band-Aids," minimizing prejudicial decision-making to some extent, but failing to "ameliorate media's potential disruptive influences on the trial itself."<sup>347</sup>

339. See generally *O'Scannlain statement*, *supra* note 227, at 42-44 (outlining the adverse effects of allowing cameras in the courtroom).

340. See *id.* ("[E]ven if [the benefit to society from media coverage] is true, increased public education cannot be allowed to interfere with the judiciary's primary mission, which is to administer fair and impartial justice to individual litigants in individual cases.").

341. *Id.* at 48.

342. *Id.*

343. COHN & DOW, *supra* note 28, at 56.

344. *Id.*; Melissa A. Corbett, comment, *Lights, Camera, Trial: Pursuit of Justice or the Emmy?*, 27 SETON HALL L. REV. 1542, 1563-64 (1997).

345. COHN & DOW, *supra* note 28, at 56. Critics note that this potential harm could be obviated by a court-based C-SPAN, providing unbiased, "gavel-to-gavel coverage of ordinary [proceedings]." *Id.*

346. See *supra* note 323 and accompanying text.

347. See Morant, *supra* note 324, at 333.

Consider how media coverage affects the star of the show, the defendant. Many critics suggest that media coverage portrays the defendant in an inaccurate, unflattering, and incriminating light, which follows the defendant into his personal life even after an acquittal is handed down.<sup>348</sup> Furthermore, regardless of whether the defendant is ultimately found innocent or guilty, the camera's incriminating eye affects the public, which in turn affects jurors, as many do not want to return an unfavorable verdict and then face criticism from their community.<sup>349</sup> As a result, impartial decision-making in the trial jury box is further burdened, and the likelihood of the defendant receiving a fair sentence is placed in jeopardy.<sup>350</sup>

The concerns as applied to witnesses are similarly substantial, but on different grounds. Whereas the defendant is often an involuntary trial participant, witnesses are regularly voluntary, and participation is fueled by a need to see justice done.<sup>351</sup> However, some argue that witnesses are less inclined to participate in trial proceedings when cameras are present, either because they do not wish to be thrust into the public eye or because they are simply intimidated by the presence of cameras in the courtroom.<sup>352</sup> This could potentially harm a defendant's case.<sup>353</sup> Even those witnesses who voluntarily participate may give altered testimony, either because they have listened to other testimony on television against a judge's orders,<sup>354</sup> or merely because the idea of their words being broadcast to an audience of thousands is frightening and unnerving.<sup>355</sup> Broadcasted witness testimony even follows the witness after the trial has ended – Pablo Fenjves of the notorious O.J. Simpson murder trial noted that he had strangers approach him in the supermarket and he had even received death threats.<sup>356</sup> This raises another substantial concern: the safety and privacy of trial participants.<sup>357</sup> Though most trial participants realize that some level of

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348. COHN & DOW, *supra* note 28, at 333 (“Although the Simpson defense favored televising the trial so that people would see justice had been done and that Simpson could lead a normal life after he was acquitted, he faced ridicule and scorn following his acquittal. Dean Uelmen calls it the ‘Rodney King Syndrome,’ in which the public feels ‘we saw it with our own eyes and we’re in just as good a position as the jury to evaluate it.’”).

349. *Id.* at 32-34, 37.

350. *Id.* at 32-34.

351. *Id.* at 34.

352. *Id.*

353. *Id.* at 35.

354. *Id.* See also Corbett, *supra* note 344, at 1563-64.

355. COHN & DOW, *supra* note 28, at 68-69.

356. Jill Smolowe, *TV Cameras On Trial: The Unseemly Simpson Spectacle Provokes a Backlash Against Televised Court Proceedings*, TIME, July 24, 1995, at 38.

357. Miller, *supra* note 318, at 26 (noting that not only did Judge Brinkema, the district judge presiding over the Moussaoui trial, express concerns about declaring unconstitutional a rule of the federal court system, but also for the safety of the jurors). Judge Brinkema further stated that “[a] permanent photographic image of . . . jurors [and] witnesses . . . [is] out there forever in the public domain.” *Id.* See also *O’Scannlain Statement*, *supra* note 227, at 41.

privacy is readily sacrificed when one is involved in a public trial, this sacrifice becomes exponentially greater when cameras provide exposure to the national, rather than just local, community.<sup>358</sup>

These arguments are further supported by studies evaluating the effect of cameras in the courtroom. Even though some critics admit that the available studies are generally in the proponent's favor,<sup>359</sup> others have found differently.<sup>360</sup> For example, consider once again the Federal Pilot Program of the early 1990s.<sup>361</sup> While many proponents have cited the evaluation favorably,<sup>362</sup> others have focused on the specific results, noting the following "disturbing" statistics: 64 % of the participating judges stated that cameras made witnesses more anxious, 46 % thought "cameras made witnesses less willing to appear in court," and 41 % found that cameras distracted witnesses.<sup>363</sup> These statistics were supplemented by serious concerns from trial attorneys, who stressed that cameras may prevent witnesses and parties from testifying on sensitive matters, and that damaging accusations made at trial might persist after the trial, even if the defendant were vindicated.<sup>364</sup> At least one defense attorney stated that "the threat of a televised trial would [encourage] the defendant to consider settlement regardless of the [strength] of the case [on the merits]."<sup>365</sup> Critics citing these results understandably conclude that the "disadvantages of cameras in the courtroom far outweigh the advantages."<sup>366</sup>

Other critics take a different approach: instead of looking at the study results, they question the reliability of the limited and potentially biased evaluations.<sup>367</sup> One critic suggests that potential sources of bias include both participants and researchers, as voluntary reporting creates skewed results and sponsorship or a researcher's personal views will color data interpretation and analysis.<sup>368</sup> Another notes that there have been no "double blind" studies conducted on the effect of cameras.<sup>369</sup> These criticisms are not unsubstantiated; even the Judicial Center Report

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358. Corbett, *supra* note 344, at 1572.

359. Judge DuBois Testimony, *supra* note 328.

360. *See infra* notes 363-71 and accompanying text.

361. *See* JOHNSON & KRAFKA, *supra* note 220 (summarizing the pilot program in federal courts).

362. *See supra* notes 324-26 and accompanying text.

363. Judge DuBois Testimony, *supra* note 328.

364. *Id.*

365. *Id.*

366. *Id.*

367. *See* Morant, *supra* note 324, at 373; COHN & DOW, *supra* note 28, at 62.

368. Morant, *supra* note 324, at 374.

369. *See* COHN & DOW, *supra* note 28, at 12.

acknowledges the limitations of the Federal Pilot Program, noting that the program only evaluated perceived, not actual, effects and that it culled opinions only from judges and attorneys, not trial participants themselves.<sup>370</sup> Furthermore, the evaluation itself recognized the potential for bias within the program, as the pilot courts were chosen from willing volunteers, which naturally disposed the participating judges to have more favorable views towards electronic media coverage.<sup>371</sup>

Finally, many critics argue that televised reporting will necessarily be biased, as networks will rarely be able to cover a trial in its entirety.<sup>372</sup> Even with a network solely committed to uninterrupted coverage (much like C-SPAN for the national legislature),<sup>373</sup> it would be difficult to cover all trials in full, and even if the possibility existed, snippets of proceedings would likely be borrowed by other multi-purpose networks.<sup>374</sup> Such selective cuts could misconstrue statements of the participants, possibly resulting in prejudice during trial or a distorted view of the attorneys, witnesses, or judges that would persist even after the trial ended.<sup>375</sup> These arguments present no easy task for proponents; they set forth serious concerns that should be heeded by the judicial community. Such admonitions carry over on appeal, as seen below.

## B. Appellate Courts

### 1. Historical Background

The background of appellate court proceedings in colonial times pales in comparison to the rich history behind public trials and trial by jury.<sup>376</sup> Ironically, this is reflected in the sparse text of Article III of the Constitution, which establishes the entire appellate practice at the federal level for the United States in three concise phrases.<sup>377</sup> The paucity of language here is no

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370. JOHNSON & KRAFKA, *supra* note 220, at 8.

371. *Id.*

372. CARTER, *supra* note 107, at 19-20.

373. See generally Marilyn Duff, *C-Span Helps Viewers Bypass Liberal Spin of Major Media*, HUMAN EVENTS, Feb. 17, 1995, at 12 (describing C-SPAN as a fair and impartial technological blessing to the national legislature, and explaining how C-SPAN helped provide the public with a more reasoned view of Supreme Court nominees Robert Bork and Clarence Thomas).

374. See, e.g., Miller, *supra* note 318, at 26 (placing Justice David Souter's famous comment that "the day you see a camera come into our courtroom, it's going to roll over my dead body" in context, where he further explained that "camera coverage had restricted his questions from the bench in New Hampshire because he worried about being taken out of context with a sound bite on the evening news").

375. See generally COHN & DOW, *supra* note 28, at 32-34.

376. See *supra* notes 243-64 and accompanying text.

377. "The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III.

coincidence; the Framers of the Constitution indicated that the judicial branch was considered to be the least of the three branches of the new government.<sup>378</sup> In fact, one Framers said as much in writing the Federalist Papers, stating that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."<sup>379</sup>

Though this may seem odd in comparison to the customary view today of the Supreme Court as the "ultimate interpreter of the Constitution,"<sup>380</sup> this relegation (or should we say, delegation) to the third tier of government power was actually a step up for appellate tribunals at the time of the Founding.<sup>381</sup> And, though history on appellate proceedings during *colonial times* is relatively sparse, the "court of review" brought a more ancient history with it when it was textually set in Article III.<sup>382</sup> In fact, the appellate tradition – that of a "second opinion" – dates back over 4000 years and is evidenced in, of all places, the Bible.<sup>383</sup> The ancestor of our three-tiered federal system we have today arose around 300 B.C.,<sup>384</sup> and was refined into a more centralized system when it finally reached colonial hands.<sup>385</sup> Because the system was, by the 1780s, "tried and true" in many ways, it may help to explain why Article III was passed in the Constitutional Convention with little debate.<sup>386</sup> This passage ushered in the "weakest of the three departments of power."<sup>387</sup>

Even though the judicial branch was considered to be the least of the three government arms at the time of the Founding,<sup>388</sup> it did not preclude public interest in the functioning of the new federal court. Public interest was present even at the first official meeting of the then-incipient Supreme Court, and though documented public comments relate to the attire worn at

378. AMAR, *supra* note 130, at 207 ("Modern civics textbooks portray America's Supreme Court as the ultimate interpreter of America's supreme law . . . [t]he Constitution itself presents a more balanced picture, listing the judicial branch third, pronouncing the justices 'supreme' over other judges but not over other branches, and installing juries alongside judges.").

379. HAMILTON ET AL., *supra* note 244 ("[T]he judiciary is beyond comparison the weakest of the three departments of power.").

380. Justice Brennan was the first to coin this phrase in reference to the Supreme Court, and it seems to have stuck nicely. See AMAR, *supra* note 130, at 215.

381. *Id.* at 207-08 (noting that the "Constitution proposed by the drafters gave federal judges more power and independence than their state counterparts commonly enjoyed").

382. See generally U.S. CONST. art. III; FRANK M. COFFIN, *THE WAYS OF A JUDGE* 17 (1980).

383. COFFIN, *supra* note 382, at 16-17.

384. *Id.* at 19.

385. *Id.* at 33.

386. *Id.* at 34.

387. HAMILTON ET AL., *supra* note 244, at 412-13.

388. *Id.*



the meeting rather than the substance discussed, it was a public showing nonetheless.<sup>389</sup> However, it is likely that interest waned after this first meeting, as the department was given no official seat in the new capitol and did not decide a case until nearly three years after the first meeting.<sup>390</sup>

Regardless, the absence of a lengthy historical background does not preclude one from considering history in furthering an argument on either side. Indeed, many of the principles espoused with regards to trial courts are easily applied to appellate courts as well, and some of the unique concerns presented by trials are lacking.<sup>391</sup> This is shown through the arguments of both proponents and critics, who are not loath to delve into historical accounts in search of support.<sup>392</sup>

## 2. Proponents

The general principles of accountability<sup>393</sup> and education<sup>394</sup> remain strong at the appellate level. These principles provide the foundation for proponents of appellate court broadcasts, and as with those advocating for media access at the trial level, appellate proponents buttress these two general principles with constitutional language<sup>395</sup> and practical considerations.<sup>396</sup> We begin with practical arguments, starting with proponents' most powerful argument: educational value.

The strongest argument for media coverage at trial court proceedings continues to reign supreme at the appellate level: there is incredible educational value in broadcasting the third branch of our government,<sup>397</sup> as it

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389. BERNARD SCHWARTZ, A BASIC HISTORY OF THE SUPREME COURT 12 (1968) ("On February 2, 1790, the Supreme Court met in its first public session in the Royal Exchange, at the foot of Broad Street, in New York City. The justices were elegantly attired in black and red robes, 'the elegance, gravity and neatness of which were the subject of remark and approbation with every spectator,' though they had discarded what Jefferson termed 'the monstrous wig which makes the English judges look like rats peeping through bunches of oakum!'" ).

390. *Id.* at 13.

391. As mentioned previously, one of the "problems" found with media coverage at the trial level, the presence and intimidation of jurors and witnesses, is not present at the appellate level. *See supra* note 353-58 and accompanying text.

392. *See generally supra* notes 254-61.

393. *See supra* notes 254-61, 308-11 and accompanying text.

394. *See supra* notes 316-20 and accompanying text.

395. Because the Constitutional arguments made and applied to trial court proceedings presumptively apply to appellate proceedings as well, they only garner a brief mention in the discussion that follows. This does, of course, assume that the Supreme Court precedents, which were appropriately decided on fact-based inquiries into *trials*, apply equally to appellate proceedings. For a full discussion of the constitutional arguments on both the pro and con sides of the debate, see *supra* notes 275-302, 332-35 and accompanying text.

396. *See infra* notes 397-428 and accompanying text.

397. Of note is the fact that the other two branches have been covered by the media with some regularity for over a decade. In fact, the House of Congress opened up their doors to full coverage in 1979, and the Senate followed in 1986. *See* Statement of Specter, *supra* note 301.

both increases awareness and teaches laypersons about the functioning of the judiciary.<sup>398</sup> The argument gains strength at the appellate level, as the cases being decided are more likely to cover major issues of law that have possible implications on the lives of everyday citizens.<sup>399</sup>

Proponents supplement this argument by looking to history, and consider the Framers' overall intentions in constructing the Constitution. In the early years of this nation, access to public meetings and counsels, not only trial proceedings, was a highly protected right, and the right to free speech and information was paramount in the Framers' minds, particularly when it came to the citizenry being informed about their government leaders.<sup>400</sup> This argument from proponents is further bolstered by the fact that not only was the citizenry to have full knowledge about the character and conduct of their leaders, but government itself, in all its branches, was to be subservient to the public.<sup>401</sup> Proponents then pose the rhetorical question: given that speech (or access) is one of our immutable natural rights, and that government's purpose is to "enlarge the exercise" of this right, to what lengths should the government, including the court system, go to ensure and indeed enlarge this right?<sup>402</sup> Their ready answer comes in the form of modern technology – this right can only be guaranteed for all citizens when courts are opened through the public's surrogate, the media.<sup>403</sup>

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398. See, e.g., Lassiter, *supra* note 315, at 934; Statement of Specter, *supra* note 301; Statement of Chabot, *supra* note 12; Statement of Feingold, *supra* note 11.

399. Lassiter, *supra* note 315, at 934 ("Television coverage of a trial would be worthwhile where major issues of law having societal significance were under discussion. And therein lies an argument for using the television as communicator and educator."). Interestingly, Lassiter's article generally advocates for a restriction on cameras in the courtroom – however, his focus is almost exclusively on trial courts, suggesting that he may feel differently about cameras in appellate courtrooms. *Id.* See also Statement of Specter, *supra* note 301 ("The current Court, like its predecessors, hands down decisions which vitally affect the lives of all Americans.").

400. JOHN ADAMS, A DISSERTATION ON CANON AND FEUDAL LAW (1765) ("[L]iberty cannot be preserved without a general knowledge among the people, who have a right, from the frame of their nature, to knowledge, . . . an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean, of the characters and conduct of their rulers.").

401. [G]overnment [Q]uotes, <http://www.gmu.edu/departments/economics/wew/quotes/govt.html> (last visited Sept. 26, 2006) (quoting James Wilson from his 1791 work *Lectures on Law* where he stated: "Government, in my humble opinion, should be formed to secure and to enlarge the exercise of the natural rights of its members; and every government, which as not this in view, as its principal object, is not a government of the legitimate kind").

402. See, e.g., Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 679 (1996) ("This ultimate right of the public to change policy and policymakers creates a strong presumption that governmental action in all three branches will be open to public scrutiny.").

403. See Gregory K. McCall, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 COLUM. L. REV. 1546, 1559 (1985) (suggesting that particularly in cases where physical access to the courtroom is limited, the public's right of access becomes truly viable only through the surrogate media). See also Lassiter, *supra* note 315, at 961 ("[T]he importance of the public's 'attendance' at

Proponents also employ modern information and data in arguing that appellate proceedings should be open to the public through their modern surrogate, television media.<sup>404</sup> The facts used to argue for coverage of trial proceedings are echoed here: we live in a media-centered world, and the public will remain ignorant in the absence of media coverage of court proceedings.<sup>405</sup> Again, statistics are indicative: not only do the media-related statistics apply here,<sup>406</sup> but there is the additional depressing fact that only 43% of Americans can name just one Justice of the Supreme Court.<sup>407</sup> Though there is no concrete data suggesting that media coverage would cure this abysmal state of public awareness, it is argued that broadcasted proceedings could at least move us towards the goal of a fully-informed citizenry.<sup>408</sup>

The accountability argument follows along the same lines as the argument set forth for broadcasted trial proceedings.<sup>409</sup> As with trial courts, this argument carries less force in modern times, and possibly is further dampened at the appellate level (where one expects to find more experienced, unelected judges), but nonetheless still carries some weight.<sup>410</sup> Even in an established, modern court system there are a few “bad apples,” and public and press attendance and action help to prevent those wayward judges from misapplying the law.<sup>411</sup> Furthermore, access continues to help courts in their pursuit for truth, even at the appellate level.<sup>412</sup> In fact, the Court in recent years has suggested that presumptive openness allows the public and the press to provide an accountability “check” on the judicial branch.<sup>413</sup>

Proponents not only set forth arguments for media coverage of appellate proceedings; they also respond to criticisms raised by their esteemed counterparts. For example, some critics contend that legislation such as that

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courtroom proceedings is best served by the availability of contemporaneous, complete audio and video accounts of the trial, which can only occur if cameras are present in the courtroom.”).

404. See, e.g., COHN & DOW, *supra* note 28, at 40-41.

405. See generally PALETZ & ENTMAN, *supra* note 315; COHN & DOW, *supra* note 28, at 41.

406. See COHN & DOW, *supra* note 28, at 41.

407. Findlaw, *FindLaw's US Supreme Court Awareness Survey*, <http://public.findlaw.com/ussc/122005survey.html> (last visited Sept. 11, 2006).

408. See Statement of Specter, *supra* note 301; Statement of Chabot, *supra* note 12; Statement of Feingold, *supra* note 11.

409. See generally *supra* notes 303-10 and accompanying text.

410. See Statement of Specter, *supra* note 301; Statement of Chabot, *supra* note 12; Statement of Feingold, *supra* note 11.

411. See generally Statement of Specter, *supra* note 301; Statement of Chabot, *supra* note 12; Statement of Feingold, *supra* note 11.

412. Statement of Specter, *supra* note 301; Statement of Chabot, *supra* note 12; Statement of Feingold, *supra* note 11.

413. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (“With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.”).

before the respective House and Senate committees excessively interferes with functions that are uniquely within the court's province and control.<sup>414</sup> A radical yet persuasive response suggests that at least as to federal appellate proceedings, the Constitution grants the legislature almost complete control over the federal appellate courts.<sup>415</sup> We need not search far for their basis of support: Article III vests power to only one court, a supreme court, and then "in such inferior Courts as the Congress may from time to time ordain and establish."<sup>416</sup> Congressional control at the Supreme Court level is certainly not lacking; Article III, Section 2 reminds us that Congress has discretion to regulate the Supreme Court's appellate jurisdiction.<sup>417</sup>

Though this argument certainly has substance, it also has serious negative political ramifications. For some, it brings to mind separation of powers concerns; for others, outright conflict seems imminent.<sup>418</sup> For example, Stephen Wermiel of American University hypothesized that if the legislature forcibly imposed such regulations on the courts, "it would be a sign of streaming the relations between the two branches to a new level of stress."<sup>419</sup>

Of course, there are those that we may term "limited proponents," advocating for coverage of appellate proceedings but imposing more stringent conditions on trial coverage. Among these is prominent scholar Alan Dershowitz, who has been a longtime proponent of media coverage, but has become recently disillusioned by the approach of Court TV, suggesting that "with its emphasis on sensational, audience-grabbing cases [Court TV] seems to have destroyed any realistic likelihood that our judicial branch will be televised with dignity."<sup>420</sup> Dershowitz raises a strong point:

414. See, e.g., Ann Althouse, *Can Congress Force Television Cameras on the Supreme Court?*, Nov. 10, 2005, <http://althouse.blogspot.com/2005/11/can-congress-force-television-cameras.html> ("I would very much like to see the oral arguments [of the Supreme Court] on television, but I don't think Congress ought to be imposing it on the Court . . . I should think there is a decent argument that this would be unconstitutional, violating separation of powers.").

415. See generally AMAR, *supra* note 130, at 214; Statement of Specter, *supra* note 301.

416. U.S. CONST. art. III, § 1.

417. U.S. CONST. art. III, § 2 ("[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

418. See, e.g., Althouse, *supra* note 414; Tony Mauro, *Congress Moves Closer to Allowing Cameras in Federal Courts*, Nov. 11, 2005, <http://www.firstamendmentcenter.org/analysis.aspx?id=16052> ("[T]he climate has changed to the point where it is possible to imagine, sometime in the next few years, Supreme Court oral arguments on the air, [or] on cable . . .").

419. Melissa Drosjack, *Pols Consider Cameras at Supreme Court*, Fox News, Nov. 10, 2005, <http://www.foxnews.com/story/0,2933,175239,00.html>. Constitutional arguments aside, Wermiel suggests that practicalities and present judicial views on the issue should play a role in congressional action. *Id.*

420. Fitzgerald, *supra* note 283, at 46 (quoting Alan Dershowitz, who responded to a question

though the general public may think of Court TV when they think of televised judicial proceedings, the real hope of proponents is that broadcasts would follow more along the lines of C-SPAN,<sup>421</sup> covering judicial proceedings around the clock without editorializing and bothersome commercial breaks.<sup>422</sup>

Dershowitz is not the only “limited-proponent” – many others at least acknowledge the differences between trial and appellate proceedings, and generally suggest that if cameras belong anywhere, it is at the appellate level rather than at the trial level.<sup>423</sup> Many of the unique concerns that permeate trial court proceedings are conspicuously absent at the appellate level.<sup>424</sup> Consider, for example, the intimidation of witnesses. Appellate proceedings are based wholly on an unemotional record and two (generally highly-qualified) lawyers arguing in front of a judge or panel of judges.<sup>425</sup> Witnesses play no part in these proceedings.<sup>426</sup> Thus, the argument goes, the suggestion that cameras will intimidate witnesses just does not hold water at the appellate level.<sup>427</sup> This argument is equally applied to concerns over juror intimidation and prejudice, as the judge replaces the jury as the ultimate decision maker at the appellate level.<sup>428</sup> This difference had been noted by Justice Stephen Breyer, who indicated in a recent talk that many of the concerns over broadcasted proceedings at the trial level disappear when the conversation changes to coverage of appellate proceedings.<sup>429</sup>

Of final note is the absence of constitutional arguments seen in the discussion. Generally speaking, the arguments at the appellate level fall along the same lines as those seen at the trial level.<sup>430</sup> Therefore, it can be said, as with trial proceedings, there are strong constitutional arguments to be made at the appellate level as well.<sup>431</sup> However, dicta from the Supreme

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posed by Fitzgerald by stating that the ideal court coverage “would be a noncommercial operation, not driven by ratings, available as a public service to the citizens interested in seeing how an important branch of our government functions”).

421. See generally Duff, *supra* note 373.

422. *Id.*

423. One of Dershowitz’s allies deserves mention: Justice Stephen Breyer has generally been receptive to the idea of broadcasted court proceedings, but has stated that, particularly in considering the O.J. Simpson trial, “I think I’m not certain I would vote in favor of having them in every criminal trial in the country.” Drosjack, *supra* note 419.

424. *Id.*

425. *Cameras in the Courtroom Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement Court TV Chairman and CEO Henry Schleiff) [hereinafter Schleiff Testimony].

426. *Id.* (“I would submit, that where no witnesses or other parties are involved, just lawyers arguing to other lawyers – albeit lawyers dressed in robes . . .”).

427. Al Tompkins, *A Case for Cameras in the Courtroom*, TV/RADIO, Nov. 28, 2000, available at [http://www.poynter.org/content/content\\_view.asp?id=5132&sid=8](http://www.poynter.org/content/content_view.asp?id=5132&sid=8).

428. See generally Drosjack, *supra* note 419; Schleiff Testimony, *supra* note 425.

429. Gina Holland, *Supreme Court Justices Conflicted On Benefits of Courtroom Cameras*, ASSOCIATED PRESS, Nov. 10, 2005.

430. See *supra* note 395 and accompanying text.

431. See *supra* notes 303-10 and accompanying text (many proponents naturally extend these

Court might indicate otherwise,<sup>432</sup> the precedent on the books of the Supreme Court generally favors the critics. With that said, it seems only appropriate to continue with our equally formidable contenders – the critics.

### 3. Critics

Though it may seem difficult to respond to contentions that cameras in the courtroom at the appellate level are perfectly appropriate, critics of the practice enter the ring with a litany of arguments in support of keeping television away from the revered bench. These arguments ultimately refute the suggestion that the judicial branch remains a “mystery” to the general public and endorse traditional methods of learning about government service and operation – in person attendance.<sup>433</sup>

Though appellate proceedings do not present many of the unique concerns seen with cameras at the trial level, critics contend that camera coverage of appellate and Supreme Court oral arguments would nonetheless alter the dynamics of oral argument.<sup>434</sup> Indeed, the late Chief Justice Rehnquist and others have argued that the invasive presence of cameras would create a “chilling effect” on both the judges and the attorneys, as attorneys will be restricted from arguing passionately for their client and judges will feel restrained from asking pointed questions for fear of public misperception of their stance on a particular issue.<sup>435</sup> However, the potential

arguments to appellate proceedings).

432. See, e.g., *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) (stating that the First Amendment “has a structural role to play in securing and fostering our republican system of self-government. Implicit in this structural role is not only ‘the principle that debate on public issues should be uninhibited, robust, and wide-open,’ but also that the antecedent assumption that valuable public debate – as well as other civic behavior – must be informed”) (citations omitted); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (“[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (stating that the First Amendment proclaims the right to “receive information and ideas”); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-63 (Powell, J., dissenting) (“[P]ublic debate must not only be unfettered; it must also be informed.”); *Craig v. Harney*, 331 U.S. 367, 374 (1947) (stating that “[a] trial is a public event. What transpires in the courtroom is public property . . . . Those who see and hear what transpired can report it with impunity”); *Bridges v. California*, 314 U.S. 252, 263 (1941) (“[T]he First Amendment does not speak equivocally . . . [i]t must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.”).

433. References to the “mysterious” judicial branch can be found in many proponents’ sources. See, e.g., *Tompkins*, *supra* note 427; *Drosjack*, *supra* note 419.

434. See *Charlie Rose Interview with Chief Justice William Rehnquist* (PBS television broadcast Feb. 16, 2001).

435. *Id.* See also *Stepniak*, *supra* note 318, at 808-09 (“It is difficult to appreciate why an avenue, which would permit the public to observe the submissions and oral arguments in their highest court,

for public misperception runs deeper than just individual views of the justices. Justice Stephen Breyer has suggested that televised broadcasts of Supreme Court proceedings “would give the public a distorted picture of how the [ ] Court functions” because the oral proceedings comprise a very small percentage of the decision-making process.<sup>436</sup> Though proponents argue that this misperception is equally present when spectators attend proceedings in person and alternative media could be used to supplement the oral record,<sup>437</sup> the fact remains that television poses a serious potential in misconstruing the operations of the Court.

Another substantial critic argument promulgated at the appellate level is that cameras would infringe upon the traditional role of the judge as an anonymous, unbiased arbiter.<sup>438</sup> Former Chief Justice Rehnquist appeared to espouse this view when he expressed concern over the potential loss of “mystique and moral authority” that the Court currently holds.<sup>439</sup> The former Chief indicated that camera exposure might jeopardize this favorable aura within and around the Court.<sup>440</sup> While some dismiss these concerns as mere “personal preferences,”<sup>441</sup> they arguably reach beyond the quirky choice of an individual and implicate the Founder’s views of what the Court should be. The potential for irreparable damage to the courts deserves strong consideration in this discussion, and who better to look to than the current judiciary in weighing this factor?

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should remain closed because it is feared that the public may not appreciate that questions asked by judges may not actually reflect their own views, or that it may cause judges to be more careful in the questions that they do ask.”); Miller, *supra* note 318, at 26 (placing Justice David Souter’s famous comment (“the day you see a camera come into our courtroom, it’s going to roll over my dead body”) in context, where he further explained that “camera coverage had restricted his questions from the bench in New Hampshire because he worried about being taken out of context with a sound bite on the evening news”).

436. Michal C. Dorf, *A TV Appearance by Two Supreme Court Justices Indicates How Much the Court Continues to Value Image Control*, July 9, 2003, available at <http://writ.lp.findlaw.com/dorf/20030709.html>.

437. Stepniak, *supra* note 318, at 809-10 (noting that O’Connor’s argument “implicitly concedes that members of the public observing proceedings from the public gallery are equally misled” and suggesting that this situation “should be seen as an opportunity for technology to remedy the lack of openness. Audio-visual transmission of oral argument supplemented by electronic access to written submissions . . . would arguably permit members of the public to acquire an understanding of cases”).

438. See Stepniak, *supra* note 318, at 805 (“U.S. federal judges, and especially Supreme Court Justices, appear to base their objections to camera coverage of appeal cases on the grounds that such coverage would . . . take away their independence and anonymity, and turn their deliberations into subjects for street talk.”).

439. *Id.* (internal quotation marks omitted).

440. See *id.* Other Justices of the Supreme Court have also expressed this concern. For example, in 1995 Justice Anthony Kennedy remarked that he was “delighted [to be] less famous than Judge Ito.” *Id.*

441. *Id.* (“Such rationales, though understandable as personal preferences, appear to dismiss the electronic media’s potential to enhance public access and understanding, and suggest a preference for limited publicity of judicial proceedings in forms that are unintelligible or inaccessible to the public at large.”).

## VII. CURRENT VIEWS AND THE LIKELIHOOD OF CHANGE

Indeed, arguments promulgated on both sides of the debate seem substantial, and it would indeed be a difficult task to choose between the two sides.<sup>442</sup> Thankfully, that is likely not our job. Rather, it is left to the able minds of state legislatures, judges, the federal judiciary, and ultimately, the Supreme Court. Because these are the people most likely to endorse and enact change, we consider their views first, and then follow with current viewpoints within the legislature and the academy.

*A. Views Among the States and Federal Judiciary*

The Judicial Conference is the most appropriate body to look to when searching for general views from the federal judiciary, as they are the federal courts' policy-making body.<sup>443</sup> The Conference has been active in this area since the inception of media in the courts.<sup>444</sup> Given the Conference's regular interest and participation in this subject,<sup>445</sup> one might expect a more tempered view than that espoused in the original Judicial Canon 35. Such an expectation, however, would be merely that: the Conference continues to stand in adamant opposition to even limited electronic media coverage in trial courts.<sup>446</sup> However, as noted earlier, the Conference has backed off on its stance at least as to appellate courts, noting that, "since 1994[,] the Judicial Conference has permitted 'the photographing, recording, or broadcasting of appellate arguments' in the Circuit Courts of Appeals."<sup>447</sup>

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442. See *Bridges v. California*, 314 U.S. 252, 260 (1941) ("Free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them.").

443. See generally *O'Scannlain statement*, *supra* note 227.

444. *Id.* (noting that the Judicial Conference has "examined the issue of whether cameras should be permitted in the federal courts for more than six decades").

445. *Id.*

446. *Id.* ("The Judicial Conference strongly opposes S. 829, a bill that would 'allow media coverage of court proceedings,' so far as it applies to the federal trial courts . . . . The Judicial Conference in its role as the policy-making body for the federal judiciary has consistently expressed the view that camera coverage can do irreparable harm to a citizen's right to a fair and impartial trial."). Judge O'Scannlain's concerns echoed those voiced in September 2000 by Chief Judge Edward E. Becker of the Third Circuit, where Judge Becker provided a statement on a bill similar to S. 829 on behalf of himself and the Judicial Conference. See generally *Judicial Conference Nixes Cameras in Courtrooms*, 67 DEF. COUNS. J. 429 (2000).

447. *Id.*



## B. Views of the Supreme Court

The traditionally vehement opposition to cameras within the Supreme Court has lessened in recent years, and has been seriously dampened by the events of this past term. Sitting chief justices have generally set forth the strongest opposition,<sup>448</sup> but the arrival of the new Chief has proponents hopeful.<sup>449</sup>

As previously noted, the late Chief Justice Rehnquist was a long-time opponent to broadcast proceedings.<sup>450</sup> Even the late Chief Justice Burger, author of the *Richmond Newspapers* opinion, was opposed to the use of electronic media to record court proceedings.<sup>451</sup> The Justice argued that television coverage would necessarily result in selective and distorted coverage because editorial treatment would pull “snippets” of proceedings, providing the general public with a “distorted conception” of the Court and the given case, which would “be ‘bad for the country, bad for the court and bad for the administration of justice.’”<sup>452</sup> Justice Powell also expressed similar concerns about selective coverage.<sup>453</sup>

Concerns have not been limited to editorializing. In the past, “[s]ome judges even dropped broad hints that such a law might be an unconstitutional violation of the separation of powers.”<sup>454</sup> More recently, Justices Kennedy and O’Connor expressed their concerns about televised proceedings, where Justice Kennedy stated that “[a] number of people would want to make us part of the national entertainment network,”<sup>455</sup> and O’Connor, in her usual cautious demeanor, opined that there is not “a total consensus as [of] yet on having cameras in all courts.”<sup>456</sup>

Beyond the articulated concerns exists just downright opposition. For example, in 1996, Justice Souter told a congressional panel that “[t]he day you see a camera come into our courtroom, it’s going to roll over my dead body.”<sup>457</sup> Justice Souter is joined in part by his colleague, Justice Antonin

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448. See *supra* notes 439-40 and accompanying text.

449. See, e.g., Mauro, *supra* note 418.

450. See *supra* notes 439-40 and accompanying text.

451. Eleanor Randolph & Al Kamen, *Chief Justice Considers Televising the Supreme Court; Burger Opposes Selective Coverage of Proceedings*, WASH. POST., Apr. 12, 1986, at A5.

452. *Id.*

453. See Jay Sharbutt, *Jurist Favors TV in Court for Law Schools*, L.A. TIMES, Jan. 3, 1989, § 6, at 8 (“Like retired chief Justice Warren Burger, [Justice Lewis Powell, Jr. is] against TV coverage of the Supreme Court for general broadcast.”).

454. Mauro, *supra* note 418.

455. Holland, *supra* note 429.

456. *Id.*

457. *Id.*

Scalia, who has flatly said that there is "not a chance" cameras would enter the halls of the Court.<sup>458</sup>

However, Justice Souter's staunch opposition is not shared by all of his colleagues. In fact, some Justices have not hesitated in endorsing the idea of broadcasted proceedings. At least three former Justices have openly endorsed the possibility of cameras in the courtroom. Justice Brennan, the author of the compelling concurrence in *Richmond Newspapers*, once commented: "I feel strongly that we should allow television and radio broadcasts of our proceedings."<sup>459</sup> He believed that this would "eliminat[e] the mystique surrounding the Court" and "creat[e] 'a better understanding of the court's functioning and the way the court operates.'"<sup>460</sup> Justice Felix Frankfurter has wholeheartedly endorsed the idea of cameras in the courtroom, stating that "he longed for the day when the news media would cover the Supreme Court as thoroughly as it did the World Series" because he believed that "the public confidence in the judiciary hinges on the public's perception of it, and that perception necessarily hinges on the media's portrayal of the legal system."<sup>461</sup> Justice Marshall, like his esteemed colleagues, has also gone on the record in support of broadcasted proceedings.<sup>462</sup>

Several current Court members side with Justices Brennan, Frankfurter, and Marshall. Justice Stevens, the most senior member on the Court, has stated that televised proceedings are at least "worth a try."<sup>463</sup> And even those Justices who have articulated some concerns have also noted that cameras could help lawyers who might argue someday before the Court, and that it is easier to make arguments for cameras than against them.<sup>464</sup> The changing composition of the Court suggests that Justice Stevens and Justice Kennedy will have some new allies in this area: Chief Justice Roberts has already indicated a willingness to at least consider the option of televised proceedings, and newbee Justice Alito encouraged the use of cameras in the Third Circuit Court of Appeals.<sup>465</sup> These Justices receive much support

458. Drosjack, *supra* note 419.

459. Piccus, *supra* note 24, at 1095 (internal quotation marks omitted).

460. *Id.*

461. Lassiter, *supra* note 315, at 963.

462. *Cameras in the Supreme Court: A dry-run for the justices*, BROADCASTING, Nov. 28, 1988, at 57, 58.

463. Henry Weinstein, *Televised High Court Hearings Backed: Public Understanding Would Be Enhanced, Stevens Believes*, L.A. TIMES, July 14, 1989, at 3.

464. Holland, *supra* note 429.

465. Roberts Hearings, *supra* note 3 (mentioning that the Framers "appreciated the benefits that would come from public awareness. This is a very important principle"); Alito Hearings, *supra* note 3 (responding to a question by Senator Arlen Specter, who asked why the Supreme Court shouldn't

from other federal and state judges. In fact, this latter bloc of the judiciary seems much more open to the idea, with many noting that we should expect to see cameras regularly in the courts “in our lifetime.”<sup>466</sup>

### C. *The Spoken Views of the National Legislature*

Proponents of televised court proceedings are even more readily found in the legislature and in academia, where members of Congress speak openly on behalf of their constituents and the public, and scholars advocate televised courts under constitutional theory.<sup>467</sup> The most vocal legislative voices sound from the authors of the current bills up for consideration, as bill sponsors regularly provide either oral or written testimony in support of the bill.<sup>468</sup> For example, take Senator Arlen Specter, who sponsors Senate bill 1768 along with Senators Leahy, Coryn, Allen, Grassley, Schumer, and Feingold.<sup>469</sup> Senator Specter is an unabashed proponent of televised appellate court proceedings, and has argued with particular force for live Supreme Court broadcasts over the years.<sup>470</sup> Senator Specter’s arguments for the current bill echo those of other proponents – Specter essentially argues that televised court proceedings will better educate the public on the workings of the Supreme Court<sup>471</sup> and will keep Supreme Court Justices

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be open to the public with television, Alito stated: “Well, I had the opportunity to deal with this issue, actually, in relation to my own court a number of years ago. All the courts of appeals were given the authority to allow their oral arguments to be televised if they wanted. And we had a debate within our court about whether we should allow television cameras in our courtroom. And I argued that we should do it. I thought that it would be useful.” (at this point, Judge Alito was interrupted by Senator Specter)). Though then – Judge Alito was not able to come out and say yea or nay on televised Supreme Court proceedings, he suggested that he would remain open to the idea. *Id.* (stating that “[t]he issue is a little bit different on the Supreme Court. And it would be presumptuous for me to talk about it right now, particularly since, I think, at least one of the justices has said that a television camera would make its way into the Supreme Court room over his dead body. So I wouldn’t want to comment on it . . . [regardless,] I will keep an open mind, despite the position I took on the 3rd Circuit”).

466. See Miller, *supra* note 318, at 27 (quoting South Carolina District Court Chief Judge Joseph Anderson, Jr., who stated “I think we will see televised federal proceedings in our lifetime. Federal judges should be given discretion to allow or disallow cameras in the courtroom for cases of local interest. However, I agree that the Moussaui trial is one case where it should definitely be disallowed”).

467. See, e.g., Kaitlin Thane, *Senator pushes for cameras in high court*, <http://www.rcfp.org/news/mag/29-4/bct-senatorp.html> (last visited Sept. 27, 2006) (noting that Senator Arlen Specter introduced a bill that, if passed, would permit U.S. Supreme Court proceedings to be televised).

468. See *id.*; *supra* note 301 and accompanying text.

469. See S. 1768, 109th Cong. (2005).

470. See Statements of Specter, *supra* note 301 (noting that, in arguing a similar bill in September 2000, he said “I do believe the day will come when the Supreme Court of the United States will be televised. That day will come, and it will be decisively in the public interest so the public will know the magnitude of what the Court is deciding and its role in our democratic process”).

471. *Id.* (“Televised court proceedings better enable the public to understand the role of the Supreme Court and its impact on the key decisions of the day.”).

accountable to the public and to their co-equal branches.<sup>472</sup> This is the same two-prong argument seen in the discussion above.<sup>473</sup> Not only does Senator Specter employ the double-punch approach of education and accountability, but he also supports his practical arguments with a constitutional basis for televised proceedings, noting that “[b]eyond this general policy preference for openness, however, there is a strong argument that the Constitution requires that television cameras be permitted in the Supreme Court.”<sup>474</sup> Finally, the Senator concludes by providing empirical data supporting his contention; indeed, the same data seen used by proponents.<sup>475</sup>

As seen by the numerous co-sponsors, it is clear Senator Specter is not alone.<sup>476</sup> In fact, Senator Grassley has authored similar bills in the past,<sup>477</sup> and Senator Feingold has lodged his support with similar proposals for several years running.<sup>478</sup> Like Senator Specter, Senator Feingold also contributed a statement on the pending Senate proposals, citing educational value<sup>479</sup> and accountability<sup>480</sup> as two reasons to support the proposal, and also making a general policy argument in support as well.<sup>481</sup> The Senator also noted that there are some complicated issues at the trial level involving media coverage, but suggests that there are safeguards available to make broadcasting viable there too.<sup>482</sup> Indeed, the states themselves employ many of these protectionary measures.<sup>483</sup> Trial proceedings aside, Senator

472. *Id.* (stating that the Supreme Court decision in the well-known case of *Bush v. Gore* “cried out for greater public scrutiny of the process by which the Justices heard arguments and all but decided the fate of the 2000 presidential race”).

473. *See supra* notes 393-94 and accompanying text; *see also* Statement of Specter, *supra* note 301 (casting his own argument into two prongs, Specter states that “televising the proceedings of the Supreme Court will allow sunlight to shine brightly on these proceedings and ensure greater public awareness and scrutiny”).

474. Statement of Specter, *supra* note 301 (referencing *Richmond Newspapers* and *Chandler*).

475. *Id.* (referencing the Federal Pilot Program Evaluation).

476. *Id.*

477. Statement of Chabot, *supra* note 12.

478. Statement of Feingold, *supra* note 11.

479. *Id.* (“Through televised court proceedings, the American people can learn so much more about the operation of our judicial system.”).

480. *Id.* (“Cameras in the courtroom will also increase transparency in government. When the workings of government are transparent, the governed can understand them more thoroughly and constructively, and more readily hold their elected leaders and other public officials accountable.”).

481. Senator Feingold makes the very practical argument that almost every major event in recent history has been available through television broadcasts. *Id.* Thus, he sees no reason why court proceedings, particularly those at the Supreme Court, should not be available as well. *Id.* (“For decades, Americans have been able to watch virtually every significant event of national importance on television, except for proceedings of the judicial branch.”).

482. *Id.*

483. *Id.*

Feingold concludes by stating that “[t]here is no good argument, in my view, for keeping cameras out of appellate proceedings.”<sup>484</sup>

The Senators have allies in the House of Representatives. Representative Steve Chabot authored the *Sunshine in the Courtroom Act*, which, instead of addressing only Supreme Court proceedings as seen in Senator Specter’s bill, applies to all federal trials and appeals.<sup>485</sup> The congressman uses similar arguments to make his point,<sup>486</sup> and like Senator Specter,<sup>487</sup> compares the judicial branch to the floor of the Senate and the House, noting that those branches have been open for a full decade.<sup>488</sup>

Though these proclamations may give the perception that members of Congress are all for opening the courts to media coverage, they tend to give a skewed view of the real stance of Congress. A more accurate outlook can be culled by looking at the voting record on past bills of a similar nature.<sup>489</sup> As may be gathered, none of these proposals were ever enacted, and few even made it to the full floor of either house.<sup>490</sup> This suggests that Congress remains split on the issue, and though broadcasted proceedings may have some vocal proponents,<sup>491</sup> there are likely a fair number of reluctant Congress members who think otherwise.

#### D. Current Views in Academia

It is not nearly as difficult to see the split among academics as it is within the national legislature. This may be merely because of the nature of the institution – professors do not have a throng of constituents to answer to, and they are more likely to be limited by their field of expertise than anything else. We have seen glimpses of this split in the discussion above,

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484. *Id.*

485. Statement of Chabot, *supra* note 12.

486. H.R. REP. NO. 109-271, at 112 (2005) (“It is good public policy for Congress to facilitate, through media access to the courtroom. The ability of people to exercise their right to freedom of speech, freedom of the press, and to petition the Government for redress of grievances”).

487. Statement of Specter, *supra* note 301.

488. H.R. REP. NO. 109-271, at 113 (2005) (“The chambers of Congress are open to all citizens through CSPAN . . . allowing the American people to stay apprised of the actions of the Legislative Branch of Government. Why should the Judicial Branch be any different?”).

489. See, e.g., A:\LEGIS.ASC, *Congress Focuses on Judicial Activism and Related Legislation*, <http://www.uscourts.gov/ttb/may97ttb/legis.htm> (last visited Sept. 26, 2006) (noting that H.R. 702, which was introduced in 1997, contained similar provisions to a bill introduced the year before in the 104th Congress, which passed the House but failed in the Senate); S. 3086, 104th Cong. (2000) (suggesting that the bill made some initial moves, but then languished in the Senate Judiciary Committee); H.R. 594, 104th Cong. (1995); Kevin Goldberg, *2003 FOI update: Congress*, Mar. 17, 2003, available at <http://www.firstamendmentcenter.org/analysis.aspx?id=6510> (noting that Congress “once again failed to move any of the numerous proposals related to cameras in the courtroom”).

490. See *supra* note 489 and accompanying text.

491. See *supra* notes 278-327 and accompanying text.

as law professors write – and fall – on both sides of the debate.<sup>492</sup> We see this even more so with the discussion on broadcasting trials, as some academics that would side with appellate proponents take a more cautious approach to media access at trial proceedings.<sup>493</sup> Even though it appears that there are a higher number of academics in favor of media access,<sup>494</sup> it is difficult to get a precise statistic, as there are likely many soft-spoken critics that would argue differently.

#### VIII. BRIEF THOUGHTS: A MODEST OPINION AND HYPOTHESIS

Justice Hugo Black's words of caution ring true;<sup>495</sup> weighing the two sides of the debate is indeed a weighty task, and one I am not fully equipped to manage. However, a few thoughts may be in order. It appears that there are several additional factors to consider when deciding that cameras should be allowed in a trial, rather than an appellate, proceeding. Because of this, it seems most appropriate to give a trial judge broad discretion in regulating broadcasts at the trial level. Additionally, to protect participants' privacy interests, it would be only right to require consent of the participants before filming is allowed. Employing these safeguards would resolve many of the concerns voiced by critics, and it would still allow for broadcasts in many situations, at least fulfilling the educational potential that court broadcasts demonstrate.

On the other hand, there are far fewer critiques of appellate proceedings, and the current Senate bill appears to have the most viable approach for this segment of court proceedings. Senate Bill S. 1768 would presumptively allow broadcasts of all Supreme Court proceedings (of course, this could be realistically and easily extended to all appellate proceedings).<sup>496</sup> Cameras would be excluded by a majority vote of the presiding judges,<sup>497</sup> thus taking into account cases or substantive material of a particularly sensitive nature. This would further promote the educational aspect of televising court proceedings, and it would more so employ the accountability check on

492. See generally Lassiter, *supra* note 315 (arguing that televised court proceedings would be beneficial in the legal education setting); Fitzgerald, *supra* note 283; AMAR & HIRSCH, *supra* note 13.

493. See, e.g., Lassiter, *supra* note 315.

494. This arguably could be seen in part through the well-known scholar names that appear on the proponent's side: Akhil Reed Amar, Alan Hirsch, Erwin Chemerinsky, and Alan Dershowitz, to name a few.

495. See *supra* note 280 and accompanying text.

496. S. 1768, 109th Cong. (2005).

497. *Id.*

presiding judges, as they would be given less discretion in deciding to bar cameras from the courtroom.

A final note of caution: though the constitutional arguments are powerful, the Court has shown no inclination in adopting them,<sup>498</sup> and imposing such regulations on the Court would likely cause unnecessary discord among the government branches. Thus, proponents will do best using practical arguments to further their cause.

## IX. CONCLUSION

Given the recent personnel changes on the Court and the resurgence of interest by the legislature, it is certainly reasonable to expect cameras to take a more prominent place in the court system as the next decade unfolds. This is predicted by some commentators and delighted in by proponents. For now, we can only wait and see if the bills in Congress stay active, and if the new justices are able to influence their colleagues in accepting technological access within the United States court system.

Audrey Maness

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498. *See supra* notes 332-35 and accompanying text.