Cameras are in the Courts, Now What? Ethical Issues for Lawyers

The Case for Cameras in the Courtroom:

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The Case for Cameras in the Courtroom

By Kelli L. Sager, Karen N. Frederiksen, and Barbara Wartelle Wall

In the wake of the O.J. Simpson trial, there has been a renewed debate on the question of whether television cameras should be allowed to record and broadcast court proceedings. Unfortunately, some judges, lawyers and commentators have responded to criticisms of the Simpson proceedings and to complaints about the media's coverage of those proceedings, by pointing to the courtroom camera as the cause of every evil — a classic case of blaming the messenger. In contrast, the collective experience with televised trials throughout the United States over the past fifteen years and the enormous public benefits that result from enhanced coverage of judicial proceedings strongly support continuing — and increasing — electronic coverage of civil and criminal trials.

— Historical Background —

Thirty years ago, the presence of television cameras or recording devices in the courtroom was considered a novel concept. Critics viewed cameras to be largely inconsistent with the fundamental rights of parties to effective and impartial administration of justice. When the United States Supreme Court first considered the constitutional ramifications of televised proceedings in Estes v. Texas, 381 U.S. 532 (1965), television coverage of important national events was still in a stage of relative infancy. The first televised presidential debates, which were credited by many for the election victory of John F. Kennedy, and the substantial impact of early television coverage of the Vietnam War increased concern about television's influence.

Only two states allowed cameras in their courtrooms. The American Bar Association took a firm stand against electronic coverage. The technology available for such coverage was primitive by today's standards. The combination of these circumstances — along with a disruptive atmosphere in the courtroom itself — led the Supreme Court to rule that the presence of cameras in the Estes case had deprived the criminal defendant of his constitutional rights.

By 1981, however, when the United States Supreme Court next considered the issue, the atmosphere both inside and outside the courtroom had changed dramatically. Technological advances had reduced or eliminated many of the negative factors from electronic coverage, including cumbersome equipment, blinding lights, and multiple camera technicians. Preliminary reports concerning the impact of televised coverage were positive, in contrast to the speculative fears expressed by the Court in 1965. And six states allowed televised coverage of trials, with ten more states in the experimental stages. Under these new circumstances, the United States Supreme Court held in Chandler v. Florida, 449 U.S. 560 (1981), that electronic coverage did not inherently interfere with a defendant's right to a fair

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trial and that the states were free to adopt rules permitting such coverage. *Id.* at 578-79, 582.

Forty-seven states now allow electronic coverage of at least some portion of judicial proceedings. *See News Media Coverage of Judicial Proceedings With Cameras and Microphones: A Survey of the States, Radio-Television News Directors Association* (January 1994) at i-iii. Although the federal courts do not currently permit such coverage — and, in fact, voted in 1994 to end their experimentation with electronic coverage, notwithstanding the positive results of a three-year study by the federal Judicial Conference — the conference has re-opened the door to further consideration of this issue in 1996.

— Cameras In California Courts —

In California, Rule of Court 980 permits a judge to allow "film and electronic media coverage" of virtually any court proceedings, subject to certain physical restrictions, unless there is a finding that the interests of the parties, the dignity of the court, or the orderly conduct of the proceedings would be adversely affected by such coverage. This Rule was not adopted lightly; it represents a culmination of consideration, experimentation, and study that lasted almost twenty years.

The first in-depth analysis of this issue occurred as early as 1965, when California Assemblyman George Wilson held legislative hearings on the advisability of allowing cameras in the courtroom. Following these hearings, at which testimony was taken from individuals representing legal, educational, and media interests, the Assembly Interim Committee on Judiciary, Subcommittee on Free Press-Fair Trial concluded that the then-existing prohibition on televised courtroom proceedings was unjustified. As the Subcommittee’s Final Report noted:

"...the public can observe...the demeanor, tone, contentiousness...competency and veracity of the...participants."

Notwithstanding this unequivocal endorsement in favor of further experimentation and modification of the camera ban in California, cautious legislators engaged in an
additional thirteen years of study and experimentation before a comprehensive study was commissioned in California concerning the effect of cameras in the courtroom. This independent study, conducted by Ernest Short & Associates, reported overwhelmingly positive results from both surveys and observational studies involving electronic coverage of trials. See Evaluation of California's Experiment With Extended Media Coverage of Courts, Ernest H. Short & Associates, Inc., September 1981 (submitted to Administrative Office For the Courts and California Judicial Council). The result of this favorable study, coupled with the growing trend in favor of permitting camera coverage, led to the adoption of Rule 980 in its present form in 1984.

In the eleven years since its adoption, Rule 980 has rarely been the subject of any appellate review. In one of the few reported decisions concerning its application, KFMB-TV Channel 8 v. Municipal Court, 221 Cal. App. 3d 1362 (1990), the Fourth Appellate District Court of Appeal held that once a trial court had granted permission to record a well-publicized murder trial, it could not subsequently impose blanket restrictions on the broadcast of recorded portions of the proceedings. 221 Cal. App. 3d at 1367. In making its decision, the appellate court was clear that while Rule 980 gives the trial judge considerable discretion to evaluate whether electronic coverage should be permitted, that discretion is not unlimited; rather, the trial court "must consider the rule's criteria": "Rule 980 recognizes that media access should be granted except where to do so will interfere with the rights of the parties, diminish the dignity of the court, or impede the orderly conduct of the proceedings." Id. at 1369. Thus, the Fourth Appellate District appeared to be suggesting that Rule 980 creates a presumption in favor of electronic coverage — a suggestion that is entirely consistent not only with the comments of the early legislative hearings on Rule 980, but also with the laborious process culminating in its adoption.

Since the adoption of Rule 980, members of the electronic media have reported on dozens and dozens of civil and criminal proceedings in California. Courtroom Television Network ("Court TV") alone has broadcast gavel-to-gavel coverage of more than 40 trials in California since its formation in 1981, without complaint. Yet despite this positive history, in the wake of the post-Simpson criticism of the judicial process, opportunistic politicians have jumped on the media-bashing bandwagon to call for the repeal or drastic revision of Rule 980. This not only ignores California's prior experience with televised trials, but disregards the collective positive experience of the 46 other states which have allowed some or all of their judicial proceedings to be broadcast. It also ignores a host of empirical studies in both state and federal courts that have favorably reviewed electronic coverage of judicial proceedings.

Arguments Supporting Tevised Trials

One of the strongest arguments in favor of permitting electronic coverage of civil and criminal proceedings is centered in the well-established principle of American jurisprudence that the public has a right of access to court proceedings. This constitutionally-based right of access, so fundamental to the American concept of justice and the notion of an informed democracy, is considered vital not only to protect the rights of the parties, but also to increase public confidence by ensuring that the proceedings are being conducted fairly. As the United States Supreme Court recognized in Richmond Newspapers v. Virginia, 448 U.S. 555, 571 (1980), "[t]o
work effectively, it is important that society’s criminal process ‘satisfy the appearance of fairness,’...and the appearance of justice can best be provided by allowing people to observe it.”

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also...enhances the ability
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proceedings [with] video...”

In modern society, the media has taken on the role of surrogates for the public in observing and reporting what occurs. Electronic coverage furthers this interest by providing the public with a means of obtaining accurate, first-hand information about judicial proceedings when it is neither practical nor even possible for all those interested to personally attend. Through electronic coverage, members of the public can observe for themselves the demeanor, tone, contentiousness — and perhaps even competency and veracity — of the trial participants. That function was never more apparent than in the Simpson case, where limited courtroom space made it impossible for more than a handful of public spectators to attend the trial in person, yet where, by televised coverage, huge segments of the population were able to observe the proceedings. Thus, anyone who cared to do so was able to judge the credibility of the police witnesses, evaluate the scientific testimony on DNA testing, and view the ill-fated prosecution demonstration in which O.J. Simpson attempted to put on the bloody gloves.

Electronic coverage also clearly enhances the ability of the press to accurately and completely report on proceedings by giving them access to video footage of the actual proceedings. It was telling that the arguments in favor of televised coverage were made not only on behalf of the electronic media, but also strongly favored by the print because access to video footage gave all reporters the ability to evaluate first-hand what had happened during the day’s proceedings, check the accuracy of quotations, and replay confusing testimony so that it could be better understood.

The educational value of increased public access to the Simpson proceedings did not go unnoticed. As one commentator recognized years before, “[t]here is no field of governmental activity about which the people are so poorly informed as the judicial branch.” See Frank, Richard H., Cameras in the Courtroom: A First Amendment Right of Access, 9 Hast. J. Comm. & Ent. L. 749, 795-96 & n.289 (1987). Consequently, he concluded, television access to trials is essential to “educate a public largely ignorant about the conduct of state and federal trials.” Id. Educators at all levels, from secondary schools to law schools, took advantage of this educational opportunity by using portions of the Simpson trial coverage in their classrooms. Even outside a structured curriculum, individual citizens remarked that their observations of the Simpson trial had taught them a great deal about the legal system as well as about the particular issues involved in that case.

Nor was this unique to the Simpson trial. An independent survey of educators across the country in 1994 reported an overwhelmingly positive response to Court TV, which
provides gavel-to-gavel coverage of a wide variety of civil and criminal proceedings. Among other findings, the teachers surveyed indicated that such electronic coverage provides students an opportunity to see the judicial system in action and to understand key aspects of the law, and also provides a focus on resolving social disputes in a civilized and fair manner, as compared to many television programs which show violence being used to resolve disputes. See Facts and Opinions About Cameras in Courtrooms, Court TV, July 1995, at 23-24.

Unfortunately, this value to the public of televised court proceedings has been ignored in much of the popular media-bashing following the Simpson trial. Some criminal lawyers have bemoaned the fact that the coverage made the system "look bad," and that it made lawyers "look bad." Yet, as one commentator pointed out, television cameras are, in this context, akin to x-rays: they do not cause the disease, they simply show you that it exists. Whatever negative impressions of the criminal justice system in general, or lawyers in particular, came out of the Simpson case, they were not caused by the presence of a television camera in the courtroom. It would be a disservice to the public to suggest that they should be kept ignorant of whatever flaws do exist.

Moreover, the popular myth that the behavior of the players in a case — including Simpson — are dramatically affected by the presence of a courtroom camera is simply untrue. Research conducted not only in California, but in other states and by the federal Judicial Conference, has consistently concluded that the impact of electronic coverage on judges, juries, witnesses, and lawyers is virtually nil. See studies reported in Electronic Coverage of Courtroom Proceedings: Effects On Witnesses and Jurors, Supplemental Report of the Federal Judicial Center to The Judicial Con-

ference Committee on Court Administration and Case Management (1994). These results are consistent with common sense: if players in a courtroom drama are affected by the realization that a particular case is receiving public attention — as opposed to acting in their clients' best interests — any such behavioral change will occur regardless of whether the trial is televised.

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"C.J.C. has appointed a task force to conduct hearings and recommend... changes in California Rule of Court 980."

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In response to a request by Governor Pete Wilson, the California Judicial Council has appointed a task force to conduct hearings and recommend possible changes in California Rule of Court 980. Hearings are expected to be held in 1996, and any proposed changes are to be circulated to the public for comment. The federal Judicial Conference is also expected to re-evaluate its camera ban in the Spring of 1996. One can only hope that if continued electronic coverage is to be put on trial, the state and federal judges will make their respective decisions based on the evidence, which we believe supports the conclusion that televised judicial proceedings should continue.
Cameras in the Courts: Virtual Shadow Juries

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SHADOW JURY

Today’s panel discussion gives a view of what to expect when cameras are in the courtroom and ethical issues in the use of modern technology. While the Federal Courts pilot program for cameras in the courts is in its second year, it does not use webstreaming. This paper addresses how “Virtual Shadow Juries” through the use of webstreaming compares to the low-tech version of “Shadow Juries”. Shadow juries are akin to a focus group continuing throughout trial. Mock jurors sitting in the courtroom is an observation method that has its advantages and limitations for trial feedback.

History. Shadow jury describes a group of mock jurors observing the trial and debriefed by a trial consultant at the end of each day. The trial consultant gives strategic feedback to the trial team. There is an art to getting and giving feedback and there are pros and cons to using Shadow Juries. While Litigation Sciences commercialized the business of trial consulting and coined the term “Shadow Jury” in the mid 1970s, the concept of modern jury
research began with Hans Zeisel’s work in the 1950s. The National Jury Project made a
difference in political trials in the early 1970s for the Native Americans at Wounded Knee,
the uprising in Attica prison, and the Harrisburg Seven trials.

Shadow juries are a jury research method classified under the art of communication, rather
than scientific research. Trial consultants come from different fields such as psychology,
sociology, communication, and theater. Some trial consultants are social scientists
employing scientific methods and conducting hypothesis testing for case themes, jury
selection, and potential damages in pretrial research. Some trial consultants organize focus
groups, mock trials, and shadow juries. As there are many benefits to feedback from mock
jurors throughout the trial, as well as pretrial, many trial teams use shadow juries.

Benefits. Trial lawyers entrenched in case facts, law, and strategy, need objective eyes and
ears to assess how the trial is perceived in the jury box. Lawyers who use office staff or
family members for courtroom observation can get feedback, but inherent bias exists. Lay
people who approximate jurors are better suited to be objective. Given the shadow jury is
objective, the known benefits include:

1) Identifying jury comprehension of opening statements and witnesses’ salient points.
   Clarifying concepts can be incorporated into subsequent trial testimony or closing
   arguments.
2) Strategy shifts can evolve from jurors’ feedback. Once hearing presentations from
   opening statements and testimony, mock jurors’ feedback can inspire a corrective
   shift in strategy. Plaintiffs or defendants can apply this method in short or long trials.
3) Settlement decisions and better approach to damage issues. Mock jurors’ feedback
   helps determine whether liability is perceived and strategy approach to damages or
   settlement.
4) Witness assessment and preparation. The number one area where trial teams
   benefit is view of witnesses at trial.
5) Closing arguments are refined by incorporating feedback.

Headlines from Trials Using Shadow Juries. Every trial has unique dynamics and every
shadow jury has a unique story. Often trial lawyers tell their story to reporters. Here are a
dozen headlines describing lessons from shadow juries. The proof is in the pudding; some
trial lawyers love the method and others are skeptical.

1) In the courts: Firm dismayed as jury rejects phone patent lawsuit. Brits and Motorola
   surprised by jury verdict say, “Even the shadow jury favored the British company.” It
   is unclear whether the Brits employed the shadow jury or were told its views after the
   verdict. They were aghast that they lost and surprised that the real jury had a
different view than the shadow jury. The Brits say that even Motorola thought they
   would lose so possibly Motorola conveyed the shadow jury’s inclinations after trial.

2) Me and My Shadows. When the shadow jurors didn’t understand the plaintiff’s
   opening statement in a securities case, the defense lawyer withdrew the multi-million
   dollar settlement offer on the table. The trial concluded with a defense verdict by the
   real jury and the trial lawyer attributes his confidence to rescind the settlement offer
to the shadow jury’s feedback.
3) **A Lawyer’s Late Arrival Gives Him an Edge** A trial lawyer hired three weeks before the trial found that the shadow jury was able to give him the edge he needed and not over try the case. The plaintiff lawyer won a $454 million verdict from a Dallas jury on a franchise agreement.

4) **Billion-Dollar Blockbuster Against Oil Industry** What makes jurors angry? Missteps by the defense and the plaintiffs’ shadow jury’s feedback shifted the strategy to make this case into a punitive case against the oil industry.

5) **Durst lawyers relied on ‘shadow jury’ for guidance** In the famous murder case often noted as the epicenter of the CSI Effect, defense lawyers claim that they used pre-trial focus groups and a shadow jury to guide them throughout the trial.

6) **Small Firms Win Big. The firms behind some of the largest verdicts in early 2005.** A plaintiff lawyer with a wealthy widow in Texas credits his demographically similar shadow jury for refining his strategy during trial, especially with questions that they thought they had answered.

7) **August 8, 2005, WSJ on Vioxx.** In the first Texas Vioxx trial, Mark Lanier used a shadow jury to give feedback on effectiveness of his arguments. Lanier also used other resources, an expert observer and gives credit to his PowerPoint expert as well so it is hard to credit the shadow jury as the critical determinant. Relating to the jurors’ interests learned from juror questionnaires, Lanier connected on the emotional level. “He sprinkled the speech with biblical references, at one point using the tale of Esther to urge the jurors to do the right thing even if they were fearful. And he hammered home the point that they would be sending a message that would be heard widely. ‘I can’t promise Oprah,’ he said, but ‘there are going to be a lot of people who’ll want to know how you had the courage to do it.’”

8) **Shadow of a doubt: Despite popularity of paid courtroom observers, some experts question their effectiveness.** Oklahoma City attorneys give their views of shadow juries. Basically they favor focus groups, but one says don’t bother wasting time with mock juries, do shadow jury instead. One contrasting lawyer states the other side had the shadow jury and they did not get it right – we won the trial.

9) **Ernst & Young Sued for Allegedly Covering Up Bad Audits** In this case, the trial consultant did a great job matching demographics of the shadow jury to the real jury. The judge wondered how the rest of the trial would proceed when he discovered that a real juror and a shadow juror were friends. [In asking his friend why are you here, the friend said, “Oh, I’m on a shadow jury.”] The juror told the court, “I said ‘Oh cool, I’m on a regular jury.’”] The trial proceeded, but the judge dismissed the real juror after he Googled “shadow jury” over a break and told a fellow juror.

10) **Premium Standard Farms’ Expensive litigation fails to score the stinky pork producer a courtroom victory.** This case deals with odor from a pig farm and its effect on neighboring farmers. The real jury and the shadow jury had opposite verdicts. The real jury went on a site tour and the shadow jury stayed home. Another lesson from this case, at least one juror had her mind made up for the plaintiffs, but wouldn’t state it. There is innuendo that she knew the defense was paying and didn’t want to lose her paycheck.
The shadow jury\textsuperscript{xi} In reporting on a Baltimore case over carbon monoxide poisoning of 23 plaintiffs at a hotel, the reporter discusses the topic of shadow juries as polarizing for both trial lawyers and trial consultants.

Man upset with firing starts protest in front of the federal courthouse.\textsuperscript{xii} This was no ordinary employment case – this is a trial lawyer and trial consultant’s nightmare as a shadow juror was let go and protested outside the federal courthouse.

Cautions and Limitations. Many trial consultants and trial teams shy away from using traditional Shadow Juries in the courtroom. The anecdotal incidences that occur when employing a focus group or a shadow jury are rarely the nightmare as mentioned in the last article. Two incidents noted that alarm any trial lawyer (shadow jurors familiarity with the real jurors\textsuperscript{xiii} and protesting in front of the courthouse\textsuperscript{xiv}) are factors that can be eliminated when shadow juries are not in the courtroom. Cautions and limitations regarding traditional shadow juries in the courtroom include:

1) Visibility. Having a shadow jury in the court is noticeable to the jury, especially if seating is limited as most often is the norm.

2) Inappropriate Behavior. To avoid the shadow jury’s inappropriate behavior, training the shadow jurors as to appropriate behavior in the courthouse is imperative. Simple training regarding not talking in the courthouse restrooms can make a difference as well as leaving the courtroom promptly and not chatting with other observers.

3) Changing Strategy. Many trial lawyers shy away from shadow juries because they don’t want to upset the strategy. That is a personal choice of the trial lawyer. If feedback during trial shakes trial lawyer’s confidence in the case, then pretrial jury research is a better option. Waiting until trial is a late game change if strategy has not been tested earlier.

4) Confidentiality. Signing confidentiality agreements is a general practice for trial consultants who gather mock jurors. Make sure that shadow jurors understand their role and confidentiality.

5) Matching Demographics, Experiences, and Attitudes. Matching can be done demographically, but exact matches occur only with twin studies. Even when the mock jurors approximate the real jurors on demographics, differing experiences and attitudes exist. If the central case issues are about race or gender issues (e.g., harassment cases, civil rights), then matching demographics is critical.

6) Reporting to the Trial Consultant. When the trial consultant also sits through the case, the shadow jurors should not observe the relationship between the trial consultant and the trial team. Granted it may be obvious to the shadow jurors once their recommendations are implemented in trial, extreme care needs to be taken to maintain the objectivity.
7) **Multiple Interviewers.** Gathering the information from shadow jurors in a timely fashion is important. When multiple interviewers are employed, recognize if there is varying ability to synthesize the feedback.

8) **Deliberations.** It is risky to rely on a small sample of shadow jurors. Any deliberations are for information purposes rather than predicting the verdict. The shadow jurors are used as a window into comprehension of the testimony, rather than matching the verdict. One cannot replicate the dynamics of the real jury, so debriefing with a consultant may be more productive than deliberations.

9) **Funding Party.** Knowing which side is funding the daily rates can influence shadow jurors’ views. Keeping silent on who is funding is instrumental in eliminating bias, although mock jurors often guess the party funding.

10) **Limited Funds.** If the funds for trial (and jury research) are limited, then the funds may be more beneficial applied toward pretrial jury research instead.

11) **Stealth Jurors.** Shadow jurors could have an agenda and not reveal it to the interviewers. Extensive screening of shadow jurors before the trial begins is important because nobody wants a Runaway Shadow Jury.

12) **Losing Focus of Real Jury.** Trial lawyers must keep connection with the real jury. Losing focus on your real jury and trying the case to the shadow jury is a scenario to avoid. The real jury is the decision maker.

**VIRTUAL SHADOW JURIES**

Shadow juries have gone virtual. Technology using web streaming from the courtroom gives trial teams an alternative to visible Shadow Juries in the courtroom. Courtroom View Network (CVN) makes viewing court proceedings available to parties via subscription service. CVN provides videostreaming and on-demand court trials to subscribers. This service is valuable for trial teams where there are multiple plaintiffs, multiple defendants, or multi-district litigation. Obvious benefits of CVN are video feed to other attorneys or staff in the war room. Corporate counsel can monitor the case from anywhere they access the Internet. Additional consultants can contribute specific feedback as well.

**Benefits.** Trial consultants can observe and get feedback from virtual shadow juries anywhere the technology exists. Virtual Shadow Juries are not visible to the real jury. The same benefits that traditional Shadow Juries have exist for Virtual Shadow Juries. Virtual Shadow Juries can be larger than traditional Shadow Juries. The advantages of shadow jurors being off site outweigh the lack of courtroom aura.

**Costs.** Budgets include daily fees for the CVN subscription, mock jurors incentives, facilities, parking, food, and trial consultant services. As with traditional Shadow Juries, it is important to debrief independently from the lawyers. The Virtual Shadow Jurors watch the trial somewhere other than in the lawyer’s office to avoid contact or knowing the funding source. Facilities range from a library room to a room with a one-way mirror. Using a facility with a one-way mirror speeds up debriefing and reporting. Consultant debriefing fees range depending upon their skill level. The ROI for Virtual Shadow Juries is intellectual and emotional capital for better jury comprehension and case perceptions.
**Listening to the Testimony.** Virtual Shadow Jurors listen and watch the web-streaming together in the same room or at separate stations. It is important to keep the shadow jurors from premature deliberations and bonding over a position taken. The on-demand subscription service can be used if a juror misses a portion of the testimony. A Virtual Shadow Jury can be brought in to get feedback on specific witnesses and not the entire trial.

**Strategizing with the Trial Team.** Consultants adept at eliciting feedback can verbally collect information from the shadow jurors or by written questionnaires. Consultants give feedback to the trial team. Whether they cut relaying extraneous feedback depends on the level of detail desired. Synthesizing the feedback into strategy depends on the consultant’s skill level. The consultant may have experience with the case from prior research or may be separated from existing trial strategy.

**Cautions and Limitations.** One limitation of the Virtual Shadow Jury is that mock jurors don’t see interactions of lawyers with one another, parties, and witnesses off the stand. The real jury pays attention to every nonverbal cue in the courtroom. The same warnings that occur with a regular shadow jury are inherent in small numbers for a virtual shadow jury. We warn in pretrial research, as well as in a traditional shadow jury, that one never replicates the dynamics of the real jury. Larger numbers of Virtual Shadow Jurors can be used to better approximate the community attitudes. One could have a larger shadow jury if virtual because the courtroom size limitation and visibility factors are removed.

**Virtual Shadow Experts.** Another method that works for trial teams and parties is having a trial consultant view the trial (without the shadow jury) and provide feedback. This consultant is not managing the shadow jury and can spend time directly benefiting the trial team with witness preparation, outlines for cross examinations, and writing closing argument suggestions.

**DEMONSTRATION CASE**

At the ABA Section of Litigation, Products Liability Committee, Women in Products Liability Regional Meeting in New York, we selected the retrial of *McCarrell v. Roche* (Accutane) from CVN’s video library, for our Virtual Shadow Jury demonstration. We chose the expert David Sachar, M.D. for mock jurors’ observations, reactions and strategy discussions. Professionally recruited mock jurors participated in observation of an expert witness and were debriefed at the conference. Our panel included a judge, in-house counsel, a trial consultant, and a trial lawyer. This live demonstration illustrated use of CVN on demand.

*Description of the case from CVN’s files:* Andrew McCarrell sued Hoffman-LaRoche and Roche Laboratories, which manufactured and distributed the prescription drug Accutane. McCarrell alleged that as a result of taking Accutane for an acne condition, he developed inflammatory bowel disease (IBD), which led to the surgical removal of his colon. The first jury returned a $2.6 million verdict. The Superior Court's appellate division ruled that the defendants in the McCarrell trial should have been allowed to present the background statistics showing that there were five million Accutane users. Openings in the retrial were January 13, 2010. On February 16, 2010, the jury returned a $25 million verdict in favor of the plaintiff.
CONCLUSION

As the Federal Courts cameras in the courts pilot project is underway and CVN webstreams trials, the technology has many benefits. Virtual Shadow Juries are the wave of the future in high stakes and bellwether trials. Looking at headlines and cautions with traditional Shadow Juries, Virtual Shadow Juries are safer and more flexible in gathering feedback on perceptions and comprehension. There is no fear of visibility or disruption in the courtroom. Virtual Shadow Juries are more productive than Shadow Juries, since debriefing off site is easier during recesses or sidebars. Mock jurors’ deliberations give insight, but do not predict verdicts in the real jury. Facilitating Virtual Shadow Jurors through debriefing or discussions, rather than deliberating to verdict, brings intellectual and emotional capital to a higher level of trial strategy. Trial lawyers who agree to have cameras in the courts must comply with ethical issues regarding the use of mock jurors as discussed by today’s panel.

iv January 7, 2002 by Diana Diggs, Lawyers Weekly USA.
vii August 22, 2005 by The Health Care Blog.
viii March 1, 2007 by Marie Price, The Journal Record, Oklahoma City.
x April 8, 2010 by Nadia Pflaum, The Pitch, News.
xı July 18, 2010 by Brendan Kearney, Dolan Media News wires.
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In Defense of Public Trials:

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In Defense of Public Trials

by Kelli Sager and Matthew Leish

After months of relentless media coverage about a brutal double murder and its aftermath, the attorney for the man charged with the crime declared that the widespread publicity had convinced him that his client “cannot get a fair trial.” Among other things, the media had reported about prosecution evidence that would not be admitted at trial, and a book published during jury selection had portrayed his client as a stalker and drug abuser. These reports made it impossible, the attorney declared, for the jury to decide the case impartially.

The attorney was Robert Shapiro, and his client was none other than O.J. Simpson. Linda Deutsch, “Simpson Trial Stalled by Kiss-and-Tell Book,” Fort Worth Star Telegram, Oct. 19, 1994. Needless to say, despite media coverage that reached arguably the highest level of any criminal trial in American history, Shapiro’s concerns eventually would turn out to be unjustified.

Attorneys involved in high-profile criminal and civil cases frequently complain about prejudicial pretrial publicity. Even in less well-known cases, attorneys often argue that the specter of publicity justifies the closing of pretrial proceedings, the sealing of documents, and other measures aimed at avoiding supposed jury prejudice. In a small but significant number of cases, trial judges have accepted this claim, have ordered closure or sealing, and more often have imposed gag orders on parties, attorneys, and witnesses. This has the effect of limiting access by the press—and, therefore, by the public—to information about trials of undeniable public interest and importance.

But is this fear of pretrial publicity warranted? The notion that potential jurors must be protected from pretrial publicity at all costs—and the notion that all pretrial publicity is necessarily “prejudicial”—is inconsistent with the history and structure of jury trials, as well as with practical experience. Not surprisingly, the theory that a “fair” trial is inconsistent with media coverage of pretrial proceedings also is flatly inconsistent with a host of decisions by the Supreme Court and lower appellate courts, which have found that undue prejudice is extremely rare, even in very high-profile cases involving intense media scrutiny.

In the rare instances where intense pretrial publicity actually may pose a danger to the rights of a defendant or a party in a civil case, the problem almost always can be effectively managed through careful voir dire, continuance, or change of venue. With these and other options available to parties and trial courts, the use of measures that directly intrude on the First Amendment—by limiting access to proceedings and documents, or by restricting the speech of attorneys or other participants in court proceedings—are virtually never justified.

In analyzing the validity of complaints about pretrial publicity, the first step is to consider the historical background of jury trials and public court proceedings. Modern lawyers and much of the general public start with the assumption that a jury should consist of 12 blank slates who know nothing about the parties or the matters at issue. Jury selection inevitably begins with the exclusion of anyone who has a prior history with the parties, lawyers, witnesses, or judge, as well as anyone whose background conceivably could provide them with personal knowledge that might differ from what they are spoon-fed during the trial. But the perceived need to find 12 jurors with no prior exposure to the facts or the parties has prompted criticism for centuries. Mark Twain is quoted, perhaps apocryphally, as remarking, “We have a jury system that is superior to any in the world, and its efficiency is only marred by the difficulty of finding 12 men every day who don’t know anything and can’t read.” A. Alschuler et al., “A Brief History of the Criminal Jury in the United States,” 61 U. Chi. L. Rev. 867, 882 (1994). More recently, as the court in the O.J. Simpson criminal trial struggled to empanel a jury that had not been exposed to pervasive news reports about the double murder, a joke began making the rounds: “Knock, knock.” “Who’s there?” “O.J.” “O.J. who?” “Congratulations.

Contrary to popular perception, however, the Constitution “does not guarantee trial by jurors totally oblivious to events unfolding from day to day in the community in which they live.” Martin v. Warden, Huntingdon State Correctional Institution, 653 F.2d 799, 806 (3d Cir. 1981). The Supreme Court repeatedly has pointed out that there is no requirement that jurors be “totally ignorant of the facts and issues involved … [i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.” Irwin v. Dowd, 366 U.S. 717, 722-3 (1961).

This distinction between ignorance and impartiality has been recognized for hundreds of years. As John Marshall, the fourth Chief Justice of the Supreme Court, wrote in an 1807 opinion involving one of the earliest trials marked by claims of prejudicial publicity, “light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror” United States v. Burr, 25 F. Cas. 49, 51 (Cir. Ct., D. Va. 1807).

In some respects, even the notion that a juror must be able to lay aside his or her impressions based on outside knowledge represents a drastic change from the historical roots of the jury trial. Far from a panel of “12 total virgins of fact,” the English jury originally was “a body of neighbors, chosen not because they were unbiased and knew nothing about the case, but for almost the opposite reason.” Friedman. “Some Notes on the Civil Jury in Historical Perspective.” 48 DePaul L. Rev. 201, 213 (1998). The jury system developed almost 1,000 years ago as a method for gathering knowledgeable individuals from the community to provide information affecting the king’s property rights and gradually expanded into a system for individual claimants to “submit their case to a jury of at least arguably knowledgeable local citizens rather than engage in trial by combat.” Landsman. “The Civil Jury in America,” 44 Hastings L.J. 579, 584 (1993). Thus, early jurors were chosen precisely because of their knowledge of the parties and the facts. This system persisted for hundreds of years, with one English statute even requiring that the parties be provided with the jurors' names at least six days before trial so the parties could “inform” the jury of the relevant facts. id. at 585.

Over time the jury of knowledgeable neighbors gradually evolved into the modern “impartial” jury that is supposed to reach its verdict based solely on the evidence presented in court. The requirement of an impartial jury in criminal cases is enshrined in the Sixth Amendment to the Constitution, in case law, and in procedural rules such as Federal Rule of Criminal Procedure 21(a), which provides for a change of venue where prejudice prevents the defendant from obtaining a “fair and impartial trial” in the district where the prosecution is pending. Although the Constitution does not explicitly require that juries in civil cases be impartial, the Supreme Court has held that the right to an impartial jury applies to civil cases as well. McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554 (1984).

But despite the constitutional requirement of an impartial jury, the Supreme Court has stated emphatically that jurors need not be totally ignorant of the facts and the parties in a particular case. In fact, apart from a string of exceptional cases in the 1960s, the Supreme Court consistently has rejected claims that prejudicial pretrial publicity mandates reversal of a verdict, finding time and time again that prejudice was not shown. Indeed, as early as 1887, the Court upheld an Illinois statute specifying that jurors could not be challenged when they admitted having already formed an opinion about the case based on rumor or newspaper reports, so long as they swore that they believed they could render a fair and impartial verdict in accordance with the evidence. Ex parte Spies, 123 U.S. 131 (1887).

Given this history, it is not surprising that the Supreme Court keeps reminding the lower courts that “pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial.” Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 565 (1976). As the Court noted in a decision addressing the rights of attorneys to talk about pending cases, “Only the occasional case presents a danger of prejudice from pretrial publicity. Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict on the evidence presented in court.” Gentile v. State Bar of Nevada, 501 U.S. 1030, 1053 (1991).

Practical experience suggests that the Supreme Court is correct in its view that jurors are capable of putting aside at least a certain amount of negative pretrial publicity and reaching a verdict based on the evidence. Judge Abner Mikva, who spent months working on the groundbreaking jury study conducted in the 1960s by Harry Kalven Jr. and Hans Zeisel, remarked:

If you are looking for a tabula rasa, you are not apt to find it … jurors always know something about these cases … I think that a juror can come into a case knowing what he has read in the newspapers. A good judge, with a good charge to the jury and an appropriately conducted trial,
can get a jury that is dispassionate and impartial and that will do justice."


Indeed, there is something troubling—even elitist—in the assumption that juries are somehow incapable of distinguishing between evidence presented at trial and information learned through the media or other sources, especially because no such assumption is made about the ability of judges to make such distinctions. As one commentator noted:

We assume that judges are somehow able to ignore what they see in the press, that they somehow know how to discount the media, but that juries are not so able ... it is not clear [...] that there is anything special about the way judges are selected or trained that gives them a special ability to ignore publicity.

“Empirical Research,” supra, at 552-23. Kalven and Zeisel’s study revealed that, in a number of cases where the defendant was acquitted by the jury, trial judges who were aware of negative information about the defendant that was not presented to the jury admitted that they would have convicted the defendant if it had been a bench trial. Kalven and Zeisel, supra, at 115. Although subject to different interpretations, this data may suggest that pretrial publicity may have the same impact on judges and juries—yet no one would suggest that a judge’s exposure to negative information that ultimately is not allowed into evidence somehow prevents the judge from conducting the proceedings in a fair and impartial manner. To the contrary, many critics of the modern exclusionary rules argue that this kind of data suggests that too much information is being withheld from consideration, including information that would have been available to jurors in earlier times through their own personal knowledge of the parties and circumstances.

Practical experience also supports the view that juries are perfectly capable of following instructions to reach a verdict based on the facts presented at trial, rather than succumbing to the influence of pretrial publicity. In case after case, American juries have shown a remarkable willingness to acquit defendants in high-profile cases, notwithstanding extensive pretrial publicity including arguably prejudicial information—even though the defendants in many of these cases complained before the verdict that prejudicial pretrial publicity made a fair trial impossible.

For example, almost 200 years ago, what would be described today as a “media circus” surrounded the treason trial of Aaron Burr. Numerous commentators and public figures—including, most notably, President Thomas Jefferson—publicly declared Burr to be guilty even before the trial commenced. The trial was scheduled to take place in the Hall of Delegates because all of the courtrooms were too small to accommodate everyone who wanted to attend. Burr, not surprisingly, complained that “the public mind had been so filled with prejudice against him that there was some difficulty in finding impartial jurors.” 25 F. Cas. at 49. Yet despite the supposedly overwhelming prejudicial publicity, Burr was acquitted.

More recent cases provide similar anecdotal support for the thesis that juries are able to set aside pretrial publicity in reaching their verdicts. The most obvious example is the acquittal by the jury in O.J. Simpson’s criminal trial despite the most pervasive and lurid media coverage conceivable. In the first Rodney King trial, juries empaneled after a change of venue acquitted the defendant LAPD officers, even though polls showed that 81 percent of Los Angeles area residents thought the officers were guilty. A jury also acquitted the defendant NYPD officers in the Amadou Diallo shooting after a change of venue, despite similar strong sentiments expressed throughout the community. Accused rapist William Kennedy Smith was acquitted even though his trial was the subject of what some described as “frenzied” publicity. And a Los Angeles jury acquitted John DeLorean of conspiracy to import cocaine even though a government videotape of DeLorean allegedly caught in the act was shown on national television before the trial. Former Attorney General John Mitchell similarly was acquitted of Watergate-related charges despite his earlier complaints that adverse publicity had irreparably prejudiced his defense—complaints that were supported by polls showing that 84 percent of respondents in the District of Columbia, where the case was tried, believed that he was guilty. Steven Helle, “Publicity Does Not Equal Prejudice,” 85 Ill. L.J. 16, 18 (Jan. 1997). And although Sirhan Sirhan was convicted of the murder of Bobby Kennedy, the California Supreme Court flatly rejected his claim that the widespread publicity surrounding his trial impacted the jury’s ability to decide the case fairly, particularly in light of the irrefutable evidence presented to the jury about Sirhan’s guilt. People v. Sirhan, 7 Cal. 3d 710, 729-32, 102 Cal. Rptr. 385 (1972), cert. denied, 410 U.S. 947 (1973).

These results support the conclusion that jurors are more able to distinguish between evidence and what they see on the 10:00 o’clock news than attorneys may believe. An alternative explanation was provided by the District of Columbia Circuit Court of Appeal, which wryly noted in explaining its rejection of a prejudicial publicity claim in one of the post-Watergate trials, “This may come as a surprise to lawyers and judges, but it is simply a fact of life that matters which interest them may be less fascinating to the public generally.” United States v. Haldeman, 559 F.2d 31, 62-3 n.37 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977). The trial judge in one highly publicized case in the late 1980s was similarly educated by one prospective juror, a young woman who repeatedly said that she had not read or seen anything about the case. When the judge expressed his skepticism, she responded by asking him whether he had known anything about a certain rap group. Surprised, he admitted he did not—and the young woman responded, “See, you pay attention to what you want, and I pay attention to what I want.”

Undue concern about pretrial publicity also obscures the fact that jurors are more likely to be influenced by facts and prejudices related to their own personal experiences than by
media reports. Kalven and Zeisel’s The American Jury found abundant evidence that jurors bring a great deal of non-evidentiary knowledge to their deliberations. This extraneous information “tends to be some item of personal experience not part of the trial, or some generalization about human nature, such as ‘people drink a good deal at Polish weddings.’” Kalven and Zeisel’s, supra at 131-32. Ironically, that kind of life experience was viewed as one of the strengths of the jury system in its infancy: whether it is viewed positively or negatively, however, it is an inherent characteristic of juries that cannot be eliminated by the closing of pretrial hearings, the sealing of evidence, or other methods used in an attempt to prevent supposedly prejudicial media coverage.

Sketchy Evidence

Not surprisingly, scientific evidence of the prejudicial effect of pretrial publicity is sketchy. Although a number of studies have attempted to gauge the extent to which pretrial publicity actually affects the ability of jurors to remain unbiased and impartial, they tend to be based on small samples or have other serious limitations.

For example, a 1991 study using mock jurors concluded that continuances could remove the biasing effect of “factual” pretrial publicity (such as prior convictions and incriminating evidence) but might not eliminate the biasing effect of “emotional” pretrial publicity (such as information implicating a defendant in an unrelated hit-and-run in which a small child was killed). Norbert L. Kerr, et al., “The Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity,” 40 Am. U. L. Rev. 655 (1991). The author conceded, however, that evidence on the impact of pretrial publicity, while suggestive, is “fairly fragmentary and not very conclusive.” Id. at 551.

Similarly, a 1997 article surveyed existing research and concluded, “Prejudicial pretrial publicity has been found to influence evaluations of the defendant’s likeability, sympathy for the defendant, perceptions of the defendant as a typical criminal, pretrial judgments of the defendant’s guilt, and final verdicts.” Christina A. Studebaker, et al., “Pretrial Publicity,” 3 Psych. Pub. Pol. and L. 428, 433 (June/Sept. 1997). But a more recent commentary noted that empirical research had “produced little in the way of conclusive answers” and that although results of mock jury experiments “do not inspire strong confidence in the effectiveness of all the various remedial techniques . . . they [also] do not establish these techniques to be uniformly futile.” Chesterman, “O.J. and the Dingo,” at 109, 140.

In particular, the existing studies often assume that jurors have been exposed to prejudicial information rather than measure the extent to which actual jurors have been exposed to and have absorbed pretrial publicity. The studies also do not address “the difference between uncontrollable prejudicial publicity and publicity that may be prevented by denial of courtroom access . . . [if] the potentially prejudicial information is already public, little can be accomplished by closing the hearing.” Jones, “The Latest Empirical Studies on Pretrial Publicity, Jury Bias, and Judicial Remedies,” 40 Am. U. L. Rev. 841, 846 (Winter 1991). In other words, closing a pretrial hearing or sealing evidence as a remedy for pretrial publicity may be “akin to slamming the barn door behind the escaping horse.” Walton, “From O.J. to Tim McVeigh and Beyond,” 75 Denver U. L. Rev. 549, 574-5 (1998). Consequently, it cannot be seriously argued that the sparse research conducted to date provides any basis for ignoring the historical underpinnings of the jury system or for rejecting the Supreme Court’s stated view that jurors are capable of disregarding prejudicial publicity. Gentile, 501 U.S. at 1053.

With due consideration to all of these factors—history, practical experience, and the limited research that is available—the Supreme Court repeatedly has found that pretrial publicity, even if pervasive and concentrated, is not inherently prejudicial. Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 565. Consistent with this view, the Court has declined, except in rare cases, to find that pretrial publicity was so prejudicial that a party’s right to a fair trial was violated. Moreover, even in cases where the Court has thrown out a verdict based on prejudicial pretrial publicity, it typically has made clear that only an exceptionally high level of potentially prejudicial publicity, combined with the trial court’s failure to take advantage of available measures to redress the effect of this publicity, can warrant a reversal.

In Irwin v. Dowd, 366 U.S. 717 (1961), for example, the Court set aside a murder conviction where the defendant’s motions for change of venue were denied despite “clear and convincing” evidence that the jury, and the venue as a whole, actually were prejudiced by the massive pretrial publicity. The media had reported extensively about the defendant’s prior convictions, his identification in a police lineup, his refusal to take a lie-detector test, his confession to the six murders at issue, and his offer to plead guilty. Voir dire had revealed that, of the initial panel of 430 potential jurors, 370 “entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty.” Most significantly, eight of the 12 eventual jurors revealed during voir dire that they believed the defendant was guilty. Although this overwhelming evidence was sufficient for the Court to find that the trial had not been fair, the Court emphasized, “To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror’s impartiality would be to establish an impossible standard.” Nonetheless, the Court concluded that, under the unusual circumstances, “it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.”

Similarly, in Rideau v. State of Louisiana, 373 U.S. 723 (1963), the Court held that the denial of the defendant’s request for change of venue amounted to a due process violation where a local television station repeatedly had shown the defendant’s videotaped “confession” prior to trial. The Court reached its decision without reviewing any particularized evidence of bias on the part of any actual juror, in effect presuming the existence of bias based on the overwhelmingly prejudicial nature of the confession. Yet, even under these circumstances, the Court’s primary criticism was the lower court’s failure to take remedial measures—in this case, to change venue.

In the notorious murder trial of Sam Sheppard, which served as the inspiration for the television series and feature film The Fugitive, the Supreme Court reversed Sheppard’s murder conviction where, in addition to the massive amount of negative publicity before and during the trial, the trial itself degenerated into a “carnival” in which “bedlam reigned at the courthouse” as “newsmen took over practically the entire
courtroom, hounding most of the participants in the trial, especially Sheppard.” Sheppard v. Maxwell, 384 U.S. 333 (1966). In this case, the circumstances were so extreme that the Court held that a reversal was warranted without the need for a showing of actual prejudice. The Court’s decision makes clear, however, that the mere fact of publicity was not the biggest problem: it was the virtual bedlam in the courtroom, and the fact that the trial court did not take advantage of any of the innumerable measures that were available to reduce the danger of prejudice. These included restricting the number and location of reporters present in the courtroom; insulating witnesses from the press; placing restrictions on comments by counsel, witnesses, and the police; continuing the case until the publicity abated or transferring it to another venue; and sequestering the jury.

These cases all featured an unusual degree of prejudicial pretrial publicity, and the outcomes thus are the exception rather than the rule. In more recent cases, the Court has shown a marked reluctance to overturn convictions based on prejudicial pretrial publicity. Just 10 years after its decision in Sheppard, for example, the Supreme Court rejected an attempt to restrain press coverage of pretrial proceedings in a widely publicized murder case in a small community. Nebraska Press, at 539. Although this case involved an attempted prior restraint and, therefore, required the highest level of scrutiny, the Court’s decision also made clear that it rejected the supposed that “publicity” was, by necessity, “prejudicial” to a criminal defendant.

Similarly, in 1991, the Court refused to reverse a murder conviction involving a prison inmate who escaped from his work crew, murdered and robbed a local shop owner, then returned to the work crew. Mu'Min v. Virginia, 500 U.S. 415 (1992). Pretrial press coverage discussed details of the investigation, the defendant’s prior record, and the prior murder for which the defendant was in prison and indicated that he had confessed to murdering the shop owner. Even though 16 of 26 prospective jurors, and eight of the 12 actual jurors, admitted reading or hearing pretrial press coverage of the case, the Court found no reversible error in the trial court’s refusal to ask prospective jurors about the specific content of this material. It has been suggested that, after the Mu’Min decision, “presumed bias” without a showing of actual prejudice is no longer enough to warrant a reversal. Walton, From O.J. to Tim McVeigh and Beyond, at 587. Whether as an effect of this decision or not, the Supreme Court has not found presumed prejudice since the Sheppard decision more than 35 years ago.

No Abscam Restrictions

Following the Supreme Court’s lead, lower courts have applied a similarly strict analysis to claims that publicity somehow automatically prejudices a defendant’s fair trial rights. In the widely covered Abscam trial in 1980, the Second Circuit refused to restrict television networks’ access to videotapes that had been used at the first trial, even though other defendants were still awaiting trial. Although the appellate court acknowledged that making the tapes available to the networks would “greatly increase the number of people with knowledge of their content,” it rejected the notion that increased awareness of the tapes “poses the kind of risk to fair trials for Abscam defendants that justifies curtailing the public’s right of access to courtroom evidence.” In re National Broadcasting Co., 635 F.2d 945, 953 (2d Cir. 1980). Applying the same analysis, a California court of appeal reversed an order sealing portions of a grand jury transcript in a high-profile murder case, finding that even assuming prospective jurors might read newspaper accounts and develop “a preconception” concerning the criminal defendant’s guilt or innocence, the court could not conclude that “release of this material would make it difficult to find 12 jurors capable of acting impartially.” Press-Enterprise v. Superior Court, 22 Cal. App. 4th 498, 503 (1994).

These cases reflect in part a recognition that the trial courts’ responsibility to ensure a fair and impartial jury can be satisfied by traditional methods that do not intrude on First Amendment rights. In Sheppard, for example, the Supreme Court suggested that the danger of prejudice could have been avoided by continuing the case until the publicity subsided, transferring the case to another venue, or even sequestering the jury. 384 U.S. at 358-63. Careful voir dire also can help weed out those individual prospective jurors who may have formed an opinion based on pretrial publicity. As the Supreme Court noted, voir dire can play “an important role in reminding jurors to set aside out-of-court information, and to decide the case upon the evidence presented at trial.” Gentile, 501 U.S. at 1053. Similarly, in reviewing the convictions of Charles Manson and three other “Manson Family” members, the California court of appeal found that extensive voir dire, careful instructions to the jury, and sequestration of the jury were sufficient to ensure that the defendants’ fair trial rights were not prejudiced despite extensive publicity before and during the trial. People v. Manson, 61 Cal. App. 3d 102, 191 (1976).

Unfortunately, trial courts sometimes try to solve the perceived problem of prejudice by curtailing the ability of the media to obtain access to evidence or pretrial proceedings. There is no longer any question that direct, prior restraints on the press prohibiting the reporting of lawfully obtained information are unlikely ever to be permitted, e.g., Nebraska Press, 427 U.S. at 539, and rarely are attempted. However, trial courts have closed pretrial hearings, sealed evidence, and imposed gag orders on attorneys and other participants in the trial. Such orders raise serious First Amendment concerns.

The public and the press have a well-established constitutional right of access to both criminal and civil proceedings. Criminal and civil proceedings have been open to the public for centuries; as the Supreme Court has long recognized, “a trial is a public event. What transpires in the courtroom is public property.” Craig v. Harney, 331 U.S. 377, 374 (1947). Accordingly, the Court repeatedly has held that there is a “presumption of openness” in criminal trials. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980). This presumption of openness also applies in civil proceedings because “[t]he community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases” and because “secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption.” Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1159, 1179 (6th Cir. 1983); see also NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 980 P.2d 337 (Cal. 1999) (recognizing First Amendment right of access to civil trials and proceedings). The presumption of openness “may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values.” Press-Enterprise v. Superior Court (Press-Enterprise I), 464 U.S. 501, 510 (1984). Preliminary hearings and other pretrial proceedings also
are presumptively open to the public and press based on "the same considerations that led the Court to apply the First Amendment right of access to criminal trials." *Press-Enterprise Co. v. Superior Court* (Press-Enterprise II), 478 U.S. 1, 9, 10 (1986). Closure of pretrial proceedings can be justified only by "specific, on the record findings" demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 13-14. Even voir dire proceedings are presumptively open to the public and may be closed only on a showing of an "overriding interest" based on specific findings that closure is essential and narrowly tailored. *Press-Enterprise II*, 478 U.S. at 510.

In particular, the Supreme Court has held that a criminal pretrial hearing may be closed based on a claim that openness would generate prejudicial publicity and endanger the defendant's right to a fair trial "only if specific findings are made demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Press-Enterprise II*, 478 U.S. at 14.

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**There is little evidence that gag orders are effective in reducing the effect of prejudicial publicity.**

This is an extremely difficult standard to satisfy, especially given that, for the reasons discussed previously, pretrial publicity rarely rises to the level of true prejudice and "reasonable alternatives" to closure almost always exist.

The same concerns apply to the sealing of evidence and court records. Courts long have recognized a common-law right to "inspect and copy public records and documents, including judicial records of court proceedings." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). Although the Supreme Court never has addressed directly whether the First Amendment guarantees access to such records, state and federal appellate courts in recent years also have repeatedly held that there is a First Amendment right of access to both criminal and civil court records. The California courts, for example, have found that the First Amendment right of access to records in civil proceedings can be overcome only in "exceptional" circumstances involving a "compelling" justification for closing portions of the record in a "narrowly tailored" manner. *Estate of Hearst*, 76 Cal.App.3d 777, 785 (Cal. Ct. App. 1977); *NBC Subsidiary*, 980 F.2d at 337. The Fourth Circuit has held that criminal court records may not be sealed unless the court presents specific findings justifying sealing and explains why alternatives to sealing are inadequate. *In re Time, Inc.*, 182 F.3d 270 (4th Cir. 1999).

Perhaps recognizing the difficulty in justifying closure and sealing of evidence, some judges have turned to the use of gag orders prohibiting attorneys, parties, witnesses, and other trial participants from commenting publicly on the case. In the criminal trial of Oklahoma City bomber Timothy McVeigh, for example, the district court responded to concerns about the massive press coverage of the crime, the investigation, and subsequent court proceedings by placing severe restrictions on comments by attorneys and court personnel—restrictions that were later expanded, during jury selection, into a "blanket bar on out of court comments." *United States of America v. McVeigh*, 931 F. Supp. 756 (D.C. 1996) and 964 F. Supp. 313 (D.C. 1997).

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**Presumptively Void**

Even apart from the ineffective nature of such restrictions, however, gag orders also raise serious constitutional questions. Gag orders directly intrude on the First Amendment rights of the public and press, as well as those who are prevented from speaking. Accordingly, courts routinely hold that gag orders may not be imposed without a clear showing that the order is necessary to protect a party's fair trial rights. As one appellate court held in reviewing a gag order in a trial involving the widely publicized Kent State shootings, gag orders are "presumptively void" and "may be upheld only on the basis of a clear showing that an exercise of First Amendment rights will interfere with the rights of the parties to a fair trial." *CBS, Inc. v. Young*, 522 F.2d 234, 241 (6th Cir. 1975).

And even if a court somehow decides that the danger of prejudicial pretrial publicity outweighs the First Amendment interests at stake, the court still cannot impose a gag order unless it finds that no other available remedies would be effective at mitigating the effects of the prejudicial publicity. *In re New York Times*, 878 F.2d 67, 68 (2d Cir. 1989). Thus, although the Supreme Court suggested in *Sheppard* that imposing restrictions on public comments by attorneys and other trial participants was one way in which trial courts might reduce the danger of prejudicial publicity, it since has held that speech about ongoing court proceedings is protected under the First Amendment and may be restricted only in exceptional circumstances. *Gentile*, 501 U.S. 1030.

Just as important, there is little evidence that gag orders are effective in reducing the effect of prejudicial publicity. Especially in sensational cases where extensive pretrial publicity has surpassed the crime or dispute from the beginning, any argument that further comments by attorneys or trial participants would increase the level of prejudice is pure speculation. Courts routinely have held that such speculation is not enough to justify the imposition of gag orders. For example, in the related context of a request for a protective order excluding the press from a deposition, the District Court for the District of Columbia concluded, "In light of the enormous publicity already generated . . . any potential prejudice from further press coverage generated by [the] deposition is too speculative to alone constitute good cause." *Avirgan v. Hull*, 118 F.R.D. 252, 254 (D.D.C. 1987).

The tension between the rights of the parties to fair and impartial jurors and the rights of the public and press to access information about ongoing trial proceedings is unlikely to abate. In any case that generates media attention, one side or the other inevitably will claim that publicity has or will interfere with its ability to get a fair trial. But in evaluating these claims, courts must keep in mind the original conception of jury trials, which did not confuse ignorance with impartiality. The spectrum of options available to a trial judge are more than enough to solve any potential problems without resorting to draconian restrictions on competing constitutional rights.
Cameras are in the Courts, Now What? Ethical Issues for Lawyers

Televising the Judicial Branch: In Furtherance of The Public’s First Amendment Rights

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TELEVISING THE JUDICIAL BRANCH: 
IN FURTHERANCE OF THE PUBLIC’S 
FIRST AMENDMENT RIGHTS

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I. INTRODUCTION

The recent double murder trial of sports celebrity O.J. Simpson resulted in a cacophony of voices raised in criticism of virtually everyone and everything associated with the proceedings, including the trial judge, the lawyers for the respective parties, various witnesses, and the jurors. The harshest criticism, however, has been reserved for the media’s coverage of those proceedings, and in particular, for the courtroom camera, which has been singled out as the purported cause of every imaginable evil associated with the trial. Opportunistic politicians were quick to jump on the media-bashing bandwagon, calling for a reevaluation of the wisdom of allowing television cameras to record and broadcast court proceedings.2

When this movement is viewed in light of the history of the American court system and the entirety of empirical experience with

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2. For example, California Governor Pete Wilson requested that the California Judicial Council revise California Rule of Court 980, which presently provides a mechanism through which judges can permit electronic coverage of judicial proceedings. Under Governor Wilson’s proposal, the Rule would have been amended to forbid any electronic coverage of criminal court proceedings. Maura Oslan, Key State Panel to Consider Major Changes for Trials, L.A. TIMES, Oct. 31, 1995, at A1. This proposal was ultimately rejected by the Judicial Council. Mike Lewis, Camera Ban Rejected by Council, 13-6, L.A. DAILY J., May 20, 1996, at 3.
electronic coverage of the courts, it is apparent that while a reevaluation of such coverage is appropriate, it should proceed from a different perspective than that suggested by the chorus of Simpson critics. In this modern age, when most Americans rely on the broadcast media as their primary source of information, and where advances in technology have eliminated any unique problems associated with electronic coverage, the real issue to be addressed is whether there remains any principled basis upon which broadcasters can be barred from covering the nation’s courts. Moreover, when one considers this country’s historical commitment to public access to judicial proceedings, the United States Supreme Court’s substantial expansion of the constitutional right of access over the last two decades, and constitutional restrictions on government’s ability to arbitrarily discriminate between different members of the media, a serious question arises as to whether excluding broadcasters from court proceedings is consistent with the First Amendment.

As discussed in the following sections, the expansive constitutional right of public access to court proceedings, coupled with more than two decades of experimentation and experience with electronic coverage of judicial proceedings, mandates a presumption in favor of allowing such coverage. Furthermore, in an era where the Supreme Court has recognized that disparate treatment of different media is highly suspect, restricting the rights of the electronic media to report on judicial proceedings cannot be justified absent a compelling showing that such coverage would inherently have a unique, adverse effect on the pursuit of justice. Not surprisingly, the overwhelming weight of experience and evidence is to the contrary. Thus, the time has come

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3. As of 1985, television was the principal source of news for 64 percent of the American public and the sole source of news for nearly half of this country’s population. See Note, Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media, 71 Tex. L. Rev. 1053, 1083 & nn.169-70 (1993) [hereinafter, Demystifying the Court] (citing a 1985 Roper study related to public attitudes toward television).

4. The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech or of the press . . . .” U.S. Const. amend. I. In addition to the right to speak, the First Amendment includes the right to “receive information and ideas.” Stanley v. Georgia, 394 U.S. 557, 564 (1969) (citations omitted); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972) (citations omitted). Thus, as the Supreme Court has stated:

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . . It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged. . . .

for the courts to recognize a presumptive right of the electronic media to have access to judicial proceedings.

II. HISTORICAL OVERVIEW OF ELECTRONIC COVERAGE OF THE COURTS

As the law exists today in most states, electronic coverage of court proceedings is permitted. The United States Supreme Court made clear in 1981 that the Federal Constitution does not inherently prohibit such coverage,⁵ and forty-seven states currently permit television coverage of at least some court proceedings.⁶ For many years, however, courts were highly skeptical about—or even hostile to—the notion of televised judicial proceedings, in large part for reasons that are either irrelevant today or have nothing to do with the intrinsic nature of the broadcast medium. Indeed, over the years, many on the bench, including several Supreme Court justices, have anticipated that their aversion to television cameras in courtrooms will change as technological advances are made and the public’s reliance on that medium becomes more commonplace.

The first suggested prohibition on the use of cameras in the courtroom came about before television was even invented, as a reaction to the frenzied media coverage of the 1935 trial of Bruno Richard Hauptmann. Hauptmann was charged with kidnapping national hero Charles Lindbergh’s child. As a consequence of the media circus that ensued at his trial,⁷ the American Bar Association began evaluating the propriety of allowing cameras in the courtroom, eventually adopting a rule that recommended prohibiting their use.⁸

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⁷. See State v. Hauptmann, 180 A. 809 (N.J.), cert. denied, 296 U.S. 649 (1935). The Hauptmann trial was covered by approximately 700 news reporters, including 120 camera persons. Among other disruptions, the unruly photographers resorted to climbing over counsel tables and using blinding flash bulbs. See R.A. Strickland, Cameras in State Courts: A Historical Perspective, 78 Judicature 128, 129 (1994). Notwithstanding this atmosphere, however, the appellate court rejected Hauptmann’s claim that he was denied a fair trial because of the chaos in the courtroom and the massive publicity the murder trial received. Hauptmann, 180 A. at 827-29.
⁸. Adopted in 1937, Canon 35 of the A.B.A. Canons of Judicial Ethics recommended a prohibition on the use of cameras in the courtroom. 62 A.B.A. Rep. 1123, 1134-35 (1937). In 1952, this Canon was amended to forbid television coverage of federal courts, as well as to bar photographic and broadcast coverage of state court trials. 77 A.B.A. Rep. 610, 611 (1952). In 1972, the Canons of Judicial Ethics were replaced with the Model Code of Judicial Conduct, and
Thirty years later, when the United States Supreme Court was first called upon to evaluate the effect of televised proceedings on a criminal defendant's right to a fair trial, the presence of television cameras in the courtroom was still considered a novel concept that many viewed as inconsistent with the parties' fundamental rights to effective and impartial justice, and dignified and solemn proceedings. All but two states prohibited electronic media coverage of their trials, and the American Bar Association still maintained its position that no cameras should be permitted in courts. Many simply assumed—albeit without any empirical data or other evidence—that the presence of television cameras in the courts was intrinsically harmful. This negative assumption was undoubtedly furthered by the fact that, at that point in time, television coverage of important national events was still in a stage of relative infancy, and its significant influence upon the public was becoming the subject of extensive discussion and concern.9

It was against this backdrop that the United States Supreme Court considered the claim of criminal defendant Billie Sol Estes, an associate of President Lyndon Johnson, that the televising of pretrial and trial proceedings in 1962 had interfered with his ability to get a fair trial on swindling charges.10 The majority of the Justices in Estes refused to adopt a per se rule that camera coverage is inherently unconstitutional as an interference with a defendant's Sixth Amendment rights.11 However, based upon the particularly chaotic circumstances of this case, the Court held in a 5-4 decision that Estes' fair trial rights had been violated, and his conviction was reversed.

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9. For example, the televised presidential debates between John F. Kennedy and Richard M. Nixon were believed by many to have meant the difference between victory and defeat for Kennedy. The unforgettable visual images of Kennedy's subsequent assassination, and the early coverage of the Vietnam War, combined to make television the topic of many commentators' analyses.

10. Estes v. Texas, 381 U.S. 532 (1965). Over Estes' objection, the trial judge had exercised his discretion to allow coverage under a Texas rule that permitted television coverage of pretrial and trial proceedings.

11. There were six separate opinions written by the Justices in Estes. Justice Clark, writing for the Court, and Chief Justice Warren, Justice Douglas and Justice Goldberg, who joined the majority opinion, believed that televising the Estes criminal trial was a per se violation of the defendant's due process rights. Justice Harlan, however, who provided the fifth vote in support of the judgment, did not join in the findings of per se unconstitutionality. See Chandler v. Florida, 449 U.S. 560, 570-71 (1981) (analyzing the separate opinions in Estes).
Of primary importance to the majority of the Justices was the highly disruptive atmosphere during pretrial hearings. Justice Clark, writing for the Court, described the courtroom during those hearings as follows:

[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 desk 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.\(^\text{12}\)

Although the presence of cameras at the actual Estes trial was more confined in compliance with new orders by the trial judge,\(^\text{13}\) the Supreme Court concluded that the highly disruptive atmosphere at the important and widely followed pretrial hearings (some of which were conducted in the jury’s presence) was amply sufficient to interfere with the defendant’s due process rights.\(^\text{14}\)

The Court clearly felt misgivings regarding the use of this relatively new medium in the novel setting of a courtroom. Justice Clark’s opinion for the Court repeatedly emphasized his concern that the mere presence of television cameras would signal to a jury that a case is “notorious.”\(^\text{15}\) In today’s society, however, where security cameras are noticeable in every public building, most courtrooms and even convenience stores, the “presence” of a camera is hardly meaningful at all. Justice Harlan—who cast the swing vote in favor of defendant Estes—presciently cautioned that the decision was not the definitive answer on electronic coverage, explaining that

the day may come when television will have become so commonplace in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. \textit{If and when that day arrives the constitutional

\(^{12}\) Estes, 381 U.S. at 536 (citations omitted). Chief Justice Warren’s concurring opinion provided further description, noting that two of the cameras were set up inside the bar, that “photographers [were] roaming at will throughout the courtroom,” and at one point a “cameraman wandered behind the judge’s bench and snapped his picture.” \textit{Id.} at 553 (Warren, C.J., concurring).

\(^{13}\) For example, for the trial, a booth painted the color of the interior of the courtroom was installed in the back of the room to house the photographers and their equipment. \textit{Id.} at 537; \textit{see also} \textit{Id.} at 606-09 (Stewart, J., dissenting). Even then, as Chief Justice Warren noted, there were four television cameras and several still photographers present, all of whom were “clearly visible to all in the courtroom.” \textit{Id.} at 556 (Warren, C.J., concurring).

\(^{14}\) \textit{Id.} at 551.

\(^{15}\) \textit{Id.} at 545.
judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause. At the present juncture . . . televising trials, at least in cases like this one, possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned.  

Even Justice Clark recognized the temporal nature of the majority’s ruling, noting that “at this time those safeguards [necessary to ensure solemn court proceedings] do not permit the televising and photographing of a criminal trial.”17 However, “when the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case.”18 Yet, based upon the disruptive scene in the courtroom, and the fact that television was a relatively new medium, a majority of justices in Estes were willing to assume that cameras were inherently harmful to the pursuit of justice.19 Having made this assumption, the Estes majority also stated, in dicta, that there was no First Amendment right of electronic media access to court proceedings because such a right would interfere with “the maintenance of absolute fairness in the judicial process.”20

16. Id. at 595-96 (Harlan, J., concurring) (emphasis added). Justice Harlan further limited his concurrence in Estes, stating that his holding was based in large part on the unusual facts presented by that case, including the fact that it was a “criminal trial of great notoriety.” Id. at 587. Subsequent decisions by the Supreme Court have recognized the extremely limited nature of Justice Harlan’s opinion. See, e.g., Chandler v. Florida, 449 U.S. 560, 573 (1981); Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 552 (1976).

17. Estes, 381 U.S. at 540 (emphasis added).

18. Id. (emphasis added). Similarly, a dissenting Justice Stewart—writing for four members of the Court—had the foresight to state that he was “wary” of imposing a “per se rule” against televising court proceedings that may “serve to stifle or abridge true First Amendment rights . . . in the light of future technology.” Id. at 604 (Stewart, J., dissenting); cf. id. at 615-16 (White, J., dissenting) (commenting that because of the “very limited amount of experience in this country with television coverage of trials,” the materials available to evaluate this coverage are too sparse to make a pronouncement about a constitutional rule).

19. Indeed, many of the concerns expressed by members of the Court in Estes—including worries about the possible impact upon witness testimony, the burden placed on the trial judge and the possible harassment of the defendant—were not supported by any empirical evidence, and have since been debunked by the states’ extensive experience with courtroom cameras and the numerous empirical studies of those experiences. See infra notes 78-88.

20. Estes, 381 U.S. at 539; id. at 585 (Warren, C.J., concurring); id. at 587-88 (Harlan, J., concurring). Justice Stewart, writing for four dissenting justices in Estes, not only pointed out that this conclusion is purely dicta, but also took strong exception to its

While no First Amendment claim is made in this case, there are intimations in this opinion filed by my Brethren in the majority which strike me as disturbingly alien to the First and Fourteenth Amendments’ guarantees against federal or state interference with the free communication of information and ideas. The suggestion that there are
In 1966, one year after deciding *Estes*, the Court reversed another murder conviction on grounds of prejudicial media coverage, holding that adverse pretrial publicity and media dominance during the trial had denied Sam Sheppard his right to a fair trial.\textsuperscript{21} As in the *Estes* case, the problems in *Sheppard* clearly were not the result of a single, unobtrusive courtroom camera—indeed, the actual proceedings were not broadcast at all—but rather with the overwhelming amount of media coverage and the complete paucity of any measures that could have safeguarded Sheppard's rights.\textsuperscript{22}

For more than a decade, these two cases were the foundation of many opponents' arguments against electronic coverage of judicial proceedings, even though both cases involved unique circumstances unrelated to the presence of a single video camera—or even a video camera at all, in the *Sheppard* case—recording the proceedings in the courtroom. By the time the United States Supreme Court again considered the impact of televised coverage of judicial proceedings,\textsuperscript{23} fifteen years after *Estes* and *Sheppard*, the circumstances both inside and outside the courtroom had changed dramatically.

\textsuperscript{21} Id. at 614-15 (Stewart, J., concurring) (citations omitted). Five years after *Estes* one circuit court took a somewhat more liberal view of cameras in the courtroom than the majority of Justices in *Estes*, but still held that such access is within the trial judge's discretion. Dorfman v. Meiszner, 430 F.2d 558, 562 (7th Cir. 1970) (holding that a trial court properly acted within its discretion in prohibiting photographs and broadcasting inside, and adjacent to, the courtrooms).

\textsuperscript{22} Id. at 562.

\textsuperscript{23} In addition to the prejudicial manner in which the Coroner's inquest was conducted, the Supreme Court pointed to the prejudicial and disruptive atmosphere at the trial itself, including the crowds of reporters and photographers in the courtroom whose movements in and out of the courtroom made it “difficult for witnesses and counsel to be heard”; the inability of counsel to confer privately with the defendant or the judge; the identification and photographing of jurors (who were not sequestered) during the trial, “all” of whom received calls about the case; and the refusal of the trial judge to take any ameliorative steps, such as moving or continuing the trial, sequestering the jury, or subjecting them to voir dire about their exposure to publicity and other outside influences. Id. at 340-45.

\textsuperscript{23} The access rights of the electronic media were raised in a different context in Nixon v. Warner Communications, 435 U.S. 589 (1978). As discussed below, although this case has frequently been relied upon by lower courts in holding that there is no First Amendment right of access for broadcasters, the unique circumstances of that case make it questionable authority, at best.
In 1981, when the Court decided Chandler v. Florida, twenty-eight states had adopted rules permitting televised coverage of at least some court proceedings, and twelve more states were experimenting with such coverage. The ABA Committee on Fair Trial-Free Press had recommended relaxing its prohibition on electronic coverage, and the Conference of State Chief Justices had almost unanimously approved a resolution in 1978 to promulgate standards permitting electronic coverage in state courts. Preliminary empirical data concerning the potential impact of televised coverage upon trial participants was positive, in contrast to the speculative fears expressed by several Justices in Estes when television "was in its relative infancy." Furthermore, technological advances had substantially reduced or eliminated many of the negative factors that had contributed to the distracting atmosphere in Estes, such as cumbersome equipment, blinding lights and multiple camera technicians.

The combination of all of these circumstances led a unanimous Court in Chandler to hold that televised criminal proceedings do not inherently interfere with a criminal defendant's constitutional right to a fair trial, and that there was no empirical evidence to support such a claim. Thus, according to the Court, the Constitution does not prohibit electronic coverage of criminal trials, absent a showing of actual

25. Id. at 566 n.6.
26. Id. at 562-65 & n.6.
27. Id. at 574.
28. Id. at 576. A year before Chandler was decided, the Florida Supreme Court had extensively examined the impact of televised court proceedings and reached a conclusion contrary to Estes about the constitutionality of electronic coverage. That court was "persuaded that on balance there is more to be gained than lost" by permitting such coverage. In re Petition of Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 780 (Fla. 1979). Noting that Florida's new camera access rule was a reflection of the state's commitment to open government, the Florida Supreme Court stated:

   The court system is no less an institution of democratic government in our society. Because of the court's dispute resolution and decision-making role, its judgments and decrees have an equally significant effect on the day-to-day lives of the citizenry as the other branches of government. It is essential that the populace have confidence in the process, for public acceptance of judicial judgments and decisions is manifestly necessary to their observance.

   Id. (citations omitted).
29. Chandler, 449 U.S. at 570-74. Unlike the Estes trial, in Chandler the portions of the trial that were broadcast were captured by a single camera. The Court noted that the specific issue of whether there is a First Amendment right to televise court proceedings was not before the court in Chandler. Id. at 569-70.
rejudice. In addition, the Chandler Court limited the Estes holding to its facts, and to those cases "utterly corrupted by press coverage."

Following the green light provided by the Court in Chandler, today forty-seven states permit electronic coverage of at least some portion of judicial proceedings, and courts across the country have found that permitting such coverage does not violate a criminal defendant's Sixth Amendment rights. Nonetheless, in the absence of an express directive from the United States Supreme Court, a number of lower courts have held that there is no First Amendment right to electronically broadcast court proceedings. These decisions improperly rely on the Supreme Court's decision in Estes—which, as explained above, should no longer be considered authoritative law in light of Chandler—and on the Court's decision in Nixon v. Warner Communications, which involved entirely different circumstances.

30. Id. at 578-79, 582; id. at 588 (White, J., concurring). In Chandler, the defendants failed to offer any evidence that they were injured by the electronic coverage.

31. Id. at 573 n.8. The majority decision appeared to go to great pains to avoid the need to overrule Estes, finding that Estes did not establish a per se constitutional violation for electronic coverage. Justices Stewart and White, however, wrote concurring opinions in which they set forth their respective beliefs that Estes should be expressly overruled. Id. at 583-86 (Stewart, J., concurring); id. at 586-89 (White, J., concurring). Even without expressly overruling Estes, however, the Court's decision in Chandler makes clear that Estes provides no support for a broad on electronic coverage of judicial proceedings.


33. See infra part IV.

34. See, e.g., Westmoreland v. Columbia Broadcasting Sys., Inc., 752 F.2d 16, 21-24 (2d Cir. 1984) (rejecting Cable News Network's ("CNN") First Amendment arguments, the Second Circuit affirmed a New York district court order prohibiting live television coverage of the trial of then-United States Supreme Court judge Alex Kozinski, who was charged with conspiracy and obstruction of justice, that there was no First Amendment right to televise the trial), cert. denied, 461 U.S. 931 (1983); United States v. Edwards, 783 F.2d 193 (5th Cir. 1986) (holding that there was no right to televise the trial of Louisiana governor Edwin Edwards, who was charged with fraud and racketeering); Conway v. United States, 852 F.2d 187 (6th Cir.), cert. denied, 488 U.S. 943 (1988) (no First Amendment right to televise judicial proceedings); United States v. Kerley, 753 F.2d 617, 620-22 (7th Cir. 1985) (criminal defendant had no constitutional right to insist that his trial be videotaped); see also United States v. Onion Bd. of Educ., 747 F.2d 111, 113-14 (2d Cir. 1984); Combined Communications Corp. v. Neiswender, 672 F.2d 875, 883 (9th Cir. 1982) (addressing district court ruling prohibiting televising settlement negotiations in a federal courthouse, the Tenth Circuit stated that "[t]he First Amendment does not guarantee the media a constitutional right to televise inside a courtroom"); Associated Press v. Bost, 655 So. 2d 113, 117 (Miss. 1995).

Several commentators have written that the First Amendment analysis in these opinions is flawed in light of recent Supreme Court precedent in the area of access to court proceedings, and advances in broadcasting technology. See, e.g., R.H. Frank, Cameras in the Courtroom: A First Amendment Right of Access, 9 Hastings Comm. & Ent. L.J. 748, 765-72 (1987).

In *Nixon*, the Supreme Court was faced with a request by several news organizations for permission to copy and sell audiotapes made by former President Richard Nixon. The audiotapes had been introduced into evidence in a criminal trial involving the Watergate conspirators. The Court did not squarely address the question of whether electronic coverage of court proceedings is permitted or required by the First Amendment; the sole issue was whether third party news organizations had the right to copy items that had been subpoenaed from the former President and introduced into evidence. As Justice Powell wrote for the majority:

[T]he issue presented in this case is not whether the press must be permitted access to public information to which the public generally is guaranteed access, but whether these copies of the White House tapes—to which the public has never had *physical* access—must be made available for copying.36

In a split decision, the Court held that under these circumstances, there is no constitutional right to have physical access to the tapes for broadcast.

The application of *Nixon* to the current electronic coverage debate is questionable, at best. First, the majority's reference to the right to record and broadcast court proceedings relied on *Estes,*37 which is hardly authoritative in light of the Court's later decision in *Chandler.* Second, and more importantly, the Court made clear that its decision was strongly influenced by the "additional, unique element" of the *Nixon* case; namely, that the records in question fell within the recently enacted Presidential Recordings Act, which sets forth specific limitations and procedures for public access to presidential documents.38 Finally, none of the arguments advanced in support of a constitutional right of access for electronic media were considered by the Court in *Nixon.* Consequently, the reliance by some lower courts on *Nixon* as somehow resolving the First Amendment issues surrounding a right to televise judicial proceedings is misplaced.

As the following section of this Article demonstrates, there are two separate strands of cases which strongly support a constitutional right for electronic coverage under the First Amendment. The first strand of cases involves the well-established rights of the public and

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36. *Id.* at 609. The audiotapes had been played in open court, and copies of transcripts were made available to the public and press. *Id.*
37. *Id.* at 610.
38. *Id.* at 603.
press to have access to judicial proceedings, and the need for electronic coverage if those rights are to be meaningful in today's society. The second strand of cases involves the constitutional limitations on the government's ability to arbitrarily discriminate between different mediums of communication, particularly where, as here, there is no compelling justification for such differential treatment. Arguably, either or both of these lines of precedent establish a constitutional right of access to the courts for electronic media. At a minimum, it is clear from these cases that electronic coverage substantially furthers the public's interests under the First Amendment, and for this reason alone is entitled to a presumption favoring such access absent a compelling justification to the contrary.

III. ELECTRONIC COVERAGE OF JUDICIAL PROCEEDINGS FURThERS, AND IS ARGUALLY REQUIRED BY, THE PUBLIC'S RIGHTS UNDER THE FIRST AMENDMENT.

A presumption in favor of allowing electronic coverage of judicial proceedings is not only consistent with, but is arguably required by, two important constitutional doctrines: the public's well-established constitutional right of access to the courts and the prohibition against discriminatory treatment of different members of the media.

A. THE HISTORY OF OPEN JUDICIAL PROCEEDINGS IN THIS COUNTRY FAVORS PERMITTING ELECTRONIC COVERAGE OF THE COURTS

The origins of proceedings that evolved into the modern criminal and civil trials date back to the days before the Norman Conquest, when disputes were brought before local courts called "moots." Attendance at the "moots" was required of all freemen, who were "called upon to render judgment." Although the requirement of attendance was relaxed as the jury system evolved, the concept that all members of a community should observe the proceedings was not lost. As explained by one general court decision in 1313 and recited more than 600 years later by the United States Supreme Court:

[T]he King's will was that all evil doers should be punished after their deserts, and that justice should be ministered indifferently to

39. This historical evolution is traced in detail in the United States Supreme Court's decision in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-65 (1980).
40. Id. at 565.
rich as to poor, and for the better accomplishing of this, he prayed the community of the county by their attendance there to lend him their aid in the establishing of a happy and certain peace that should be both for the honour of the realm and for their own welfare.\textsuperscript{41}

This tradition of attendance did not change over the course of time, as the Supreme Court recognized in its historical analysis. Quoting from a treatise by Sir Thomas Smith published in 1565, the Court noted the “constant” public nature of criminal proceedings:

All the rest [after the written indictment] is done openlie in the presence of the Judges, the Justices, the enquest, the prisoner, and so many as will or can come so neare as to heare it, and all depositions and witnesses given aloude, that all men may heare from the mouth of the deponents and witnesses what is said.\textsuperscript{42}

This tradition was carried over into the American colonies, where trials were held “in open Court, before as many of the people as chuse to attend.”\textsuperscript{43}

The Supreme Court relied on this clear tradition in reaching its decision in \textit{Richmond Newspapers} that the right of a “public” trial belongs not only to the accused, but to the public and press as well. After reviewing the historical analogs to the modern open trial, the Court concluded:

\begin{quote}
[T]he historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial. Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.\textsuperscript{44}
\end{quote}

Recognizing that modern society prevents most people from physically attending trials, the Court went on to specifically address the need for access by members of the media:

Instead of acquiring information about trials by first hand observation or by word of mouth from those who attended, people now

\textsuperscript{41} \textit{id.} at 566 (quoting 2 W. Holdsworth, A History of English Law 268 (1927)).

\textsuperscript{42} \textit{id.} (quoting Thomas Smith, De Republica Anglorum 101 (Aiston ed., 1972)).

\textsuperscript{43} \textit{id.} at 568-69 (quoting 1 Journals of the Continental Congress, 1774-1789, at 107 (1904)).

\textsuperscript{44} \textit{id.} at 569 (citations omitted).
acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This "contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system. . . ." 45

The Court also recognized the intrinsic value of having court proceedings be as open as possible to public scrutiny:

When a shocking crime occurs, a community reaction of outrage and public protest often follows. . . . Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers. . . . It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," and the appearance of justice can best be provided by allowing people to observe it. 46

In keeping with the recognition of the importance of public access to and observation of court proceedings, the United States Supreme Court has repeatedly emphasized and expanded this constitutional right since Richmond Newspapers. Two years after Richmond Newspapers, in Globe Newspaper Co. v. Superior Court, 47 the Court struck down a state law closing courtrooms during the testimony of minors who were victims of sex crimes. Furthermore, the Court strengthened its holding in Richmond Newspapers by requiring that a trial judge make specific findings on the record to justify the closure of

45. Id. at 572-73 (emphasis added) (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976)). Courts have frequently found that the media is entitled to greater First Amendment protection than individuals when the media fulfills its role as a surrogate for the public. See, e.g., Houchins v. KQED, Inc., 438 U.S. 1, 16-17 (1978) (Stewart, J., concurring).
46. Richmond Newspapers, 448 U.S. at 571-72 (emphasis added) (citations omitted).
47. 457 U.S. 596 (1982).
a criminal trial. The Court also held that closure of judicial proceedings is subject to strict scrutiny: Closure is permissible only in the limited circumstances where denial of such access is justified by a "compelling governmental interest" and such closure order is "narrowly tailored to serve that interest."  

The Supreme Court subsequently extended this constitutional right of access to judicial proceedings to several contexts beyond actual trial. For example, in *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise I*") the Court upheld the First Amendment right of access to jury voir dire. Shortly thereafter, the Court held in *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise II*") that the First Amendment right of access applies to preliminary hearings. In these cases, as in the earlier decisions, the Supreme Court emphasized the importance of indirect public scrutiny of the judicial process based upon the direct observations of interested individuals and organizations:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.  

The Court further noted that "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."  

In recognizing the importance of public scrutiny, the Court rejected the notion that a post-trial review of transcripts is sufficient to satisfy this important interest. As Justices Marshall and Brennan observed in *Richmond Newspapers*:

48. *Id.* at 606-07.
49. *464 U.S. 501* (1984). Echoing the Court's earlier holding in *Richmond Newspapers* and *Globe*, the *Press-Enterprise I* Court stated:

"[T]he presumption . . . [of access] may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."

*Id.* at 510.
51. *Id.* at 13 (quoting *Press-Enterprise I*, *464 U.S.* at 508).
52. *Id.* (quoting *Richmond Newspapers*, *448 U.S.* at 572).
In advancing these purposes [of open judicial proceedings], the availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the “cold” record is a very imperfect reproduction of events that transpire in the courtroom. Indeed, to the extent that publicity serves as a check upon trial officials, “[r]ecord... would be found to operate rather as cloa[k] than chec[k]; as cloa[k] in reality, as chec[k] only in appearance.”

The reason is clear: Critical components of any trial include the demeanor, tone, credibility and contentiousness—and perhaps even the competency and veracity—of trial participants. Even a complete transcript, which is rarely available to the public, cannot provide such critical, nonverbal information.

Thus, the history of this country’s jurisprudence demonstrates that maximum public access is the accepted ideal, and the United States Supreme Court has repeatedly reaffirmed this principle in the past fifteen years. Moreover, although the Court has not directly addressed this need for maximum public access in terms of allowing electronic coverage, it cannot be seriously disputed that, in today’s society, only electronic coverage can provide realistic access for most segments of the public to most judicial proceedings.

In part, this is a function of the importance television now plays in individuals’ daily lives. Television has become a primary source of information for the public worldwide. In the United States, for example, “[t]elevision is our... most common and constant learning environment, the mainstream of our culture. In a typical American home, the set is on for more than 7 hours each day, engaging its audience in a

53. Richmond Newspapers, 448 U.S. at 597 n.22 (Brennan, J., and Marshall, J., concurring) (alteration in original) (quoting In re Oliver, 333 U.S. 257, 271 (1978)). In Kleindienst v. Mandel, 408 U.S. 753 (1972), the Court rejected the government’s proposition that access to a lecturer’s ideas through books and speeches—and through “technological developments,” such as tapes or telephone hook-ups”—satisfied the First Amendment rights of professors who wished to hear the lecturer in person. “This argument [by the government] overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning.” Id. at 765. In Cable News Network, Inc. v. American Broadcasting Cos., 518 F. Supp. 1238 (N.D. Ga. 1981), while discussing the differences between television and other forms of media, the district court commented that “visual impressions can and sometimes do add a material dimension to one’s impression of particular news events. Television film coverage of the news provides a comprehensive visual element and an immediacy, or simultaneous aspect, not found in print media.” Id. at 1245.
ritual most people perform with great regularity."54 In large part because of the pervasiveness of television, electronic coverage of the government—the legislative branch, as well as the courts—has become commonplace.

Furthermore, as the Supreme Court has long recognized, the physical space limitations of a particular courtroom and geographic and other limitations on the public’s ability to personally attend judicial proceedings validate the media’s claim that it acts as a "surrogate" for the public in providing access to those proceedings.55 While Chief Justice Burger has specifically referred to both the print and electronic media as fulfilling that important surrogate role, only television has the ability to provide the public with a close visual and aural approximation of actually witnessing a trial without physical attendance. Thus, in today’s society, a ban on television coverage of a given court proceeding means that only a handful of individuals can have meaningful access to that proceeding. As Chief Justice Burger noted in Richmond Newspapers, such a limited view of the First Amendment’s right to attend court proceedings is unacceptable:

[I]n the context of trials . . . the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors . . . “For the First Amendment does not speak equivocally. . . . It must be taken as a command of the

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54. See Demystifying the Court, supra note 3, at 1083 & n.172 (citation omitted); see also Cable News Network, 518 F. Supp. at 1245 (“[I]t cannot be denied that television news coverage plays an increasingly prominent part in informing the public at large of the workings of government. Many citizens likely rely on television as their sole source of news.”) Frank, supra note 34, at 774-75; Thomas R. Julin, The Inevitability of Electronic Media Access to Federal Courts, 1983 Det. C. L. Rev. 1303, 1310 (1983) (“Television provides the most accurate and effective tool to report that has ever been devised and the public today relies on the medium more than any other for complete, honest, and objective information about virtually all news events.”); E.E. Stolnick, Television News and the Supreme Court: A Case Study, 77 Judicature 21, 22 (1993) (stating that most of the public reports that its main or only source of news is television); Diane L. Zimmerman, Overcoming Future Shock: Estes Revisited, or a Modest Proposal for the Constitutional Protection of the News-Gathering Process, 1980 Duke L.J. 641, 659 (1980) (“When the first amendment was adopted, the mass communicators were the publishers of eighteenth century broadsheets and pamphlets; now they are the national television and radio networks. The Supreme Court firmly recognizes that speech can occur in a variety of forms, many of which were unknown or arguably unpalatable to the framers.”) (footnotes omitted).

55. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980). A good example of this is the O.J. Simpson criminal trial where there were only approximately 6 to 10 seats assigned to the “public,” and approximately 27 seats available for the dozens of national and international media representatives. See, e.g., Life Imitates Art, But This is Los Angeles, Boston Herald, Jan. 25, 1995, at 20; Steven Brill, Cameras in the Court and Original Intent, Conn. L. Trib., Jan. 29, 1996, at 43.
broadest scope that explicit language, read in the context of a liberty-loving society, will allow.\textsuperscript{56}

Thus, true public "access," consistent with the Federal Constitution and this nation's history, requires courts to permit televised coverage of their proceedings.

B. FORBIDDING ELECTRONIC COVERAGE ABSENT A COMPELLING JUSTIFICATION ALSO CONSTITUTES IMPERMISSIBLE DISCRIMINATION IN CONTRAVENITION OF IMPORTANT FIRST AMENDMENT PRINCIPLES.

Following Chandler v. Florida, a second line of cases developed in support of a presumption favoring electronic coverage. This second line of cases involves restrictions on the government's ability to arbitrarily discriminate among different media. In recent years, the Supreme Court and lower courts have repeatedly held that differential treatment of different media is impermissible under the First Amendment,\textsuperscript{57} absent an overriding governmental interest.\textsuperscript{58} For example, the Court has invalidated discriminatory tax schemes only imposed upon certain types of media.\textsuperscript{59} As the Court explained, "[t]his is [unconstitutional] because selective taxation of the press—either singling

\textsuperscript{56} Richmond Newspapers, 448 U.S. at 576 (emphasis added) (quoting Bridges v. California, 314 U.S. 252, 263 (1941)).

\textsuperscript{57} It was established long ago that the First Amendment applies to all media. See, e.g., Superior Films, Inc. v. Department of Educ., 346 U.S. 587, 589 (1954) (Douglas, J., concurring) (stating that although motion pictures are different than "public speech, the radio, the stage, the novel, or the magazine," the First Amendment draws no distinction between the various methods of communicating ideas"); United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948) ("[M]oving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.").

\textsuperscript{58} The charge that the denial of television coverage of trials violates the equal protection clause of the Fourteenth Amendment was rejected by the fragmented Supreme Court in Estes; however, for the reasons set forth in Part II, supra, that decision should no longer be viewed as reliable precedent. See generally Estes v. Texas, 381 U.S. 532, 540 (1965) ("[C]ourts [cannot] be said to discriminate where they permit the newspaper reporter access to the courtroom. . . . The television and radio reporter has the same privilege. . . . The news reporter is not permitted to bring his typewriter or printing press."); id. at 589-90 (Harlan, J., concurring). Indeed, Estes' dated approach has been roundly criticized by commentators. See, e.g., Zimmerman, supra note 54, at 653 (recasting the equal protection argument by arguing that if print reporters are permitted to bring writing instruments and papers into a courtroom, the broadcast media should be permitted to bring the tools relevant to them: "If this kind of evenhanded treatment is denied, reporters are not treated in a functionally equal way: none but the traditional print journalists may exploit the full potential of their medium of communication."); Charles E. Ares, Chandler v. Florida: Television, Criminal Trials, And Due Process, 1981 Sup. Cr. Rev. 157, 177 (arguing that electronic broadcasters cannot constitutionally be treated differently from print media, and thus the broadcast media should be given access to the courtroom).

\textsuperscript{59} See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 590 (1983) (holding that a special use tax assessed against a publication for the use of ink and
out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State.”

In addition to limits imposed by the First Amendment against discrimination against particular members of the media, the Supreme Court has held that the Fifth Amendment’s Equal Protection and Due Process Clauses also bar such discrimination. As the Court noted in Police Department v. Mosley:

"[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard."

Thus, discrimination in the area of First Amendment rights cannot be content-based, and any differential treatment must be tailored to serve a substantial government interest. Since eliminating television coverage significantly impacts upon the content of the information conveyed about a particular trial, this scrutiny is required in any analysis of whether precluding the electronic media from court proceedings while permitting access to others violates the Equal Protection Clause and the First Amendment.

In cases that deal more directly with access-related issues, lower courts have held that the Federal Constitution does not permit government officials to discriminate between members of the media. For example, in Cable News Network, Inc. v. American Broadcasting paper violated the First Amendment both by singling out newspapers for the special tax, and by only targeting a small group of newspapers through the use of an exception for the first $100,000 in costs for any calendar year; the effect was to eliminate all but a handful of newspapers from being subject to the tax); Arkansas Writers’ Project, Inc. v. Ragland, 481 U.S. 221, 232-33 (1987) (holding that a tax imposed upon magazines and newspapers was discriminatory and violated the First Amendment, where some specialty magazines were exempt under the statutory scheme; because Arkansas’ selection application was discriminatory in that it treated different magazines differently, the Court expressly declined to address the argument that the tax was also unconstitutional to the extent newspapers and magazines were treated differently).

60. Ragland, 481 U.S. at 228.
61. 408 U.S. 92, 96 (1972).
62. Id. at 96 (citation omitted).
Cos., a Georgia court held that discriminatory treatment of television media in coverage of the White House is unconstitutional. Specifically, the court recognized the First Amendment right of the electronic media to be included in a White House media pool that was open to other types of media. In reaching this conclusion, the court noted that only television coverage "provides a comprehensive visual element and an immediacy, or simultaneous aspect, not found in print media."

Reaching a similar conclusion, the First Circuit in *Anderson v. Cryovac, Inc.* reviewed a protective order entered by the trial court that prohibited the parties from divulging information obtained during discovery, but exempted disclosures to one public media organization that was preparing a documentary film about the case. A newspaper challenged the order as discriminatory. Although the First Circuit acknowledged that an order barring all disclosure of discovery materials would have been within the trial court's discretion, it held that the disparate treatment of different types of the media rendered the protective order unconstitutional:

A court may not selectively exclude news media from access to information otherwise made available for public dissemination. . . . The danger in granting favored treatment to certain members of the media is obvious: it allows the government to influence the type of substantive media coverage that public events will receive. Such a practice is unquestionably at odds with the first amendment. Neither the courts nor any other branch of the government can be allowed to affect the content or tenor of the news by choreographing which news organizations have access to relevant information.

The Second Circuit engaged in a similar analysis in *American Broadcasting Cos. v. Cuomo,* where the court held that there would be irreparable harm to the public and ABC television if the network was not given immediate access to the campaign headquarters of the two New York City mayoral candidates, Mario Cuomo and Edward

64. Id. at 1245 ("[T]he Court finds that the total exclusion of television representatives from White House pool coverage denies the public and the press their limited right of access, guaranteed by the First Amendment.").
65. 805 F.2d 1 (1st Cir. 1986).
66. Id. at 9. The First Circuit also objected to granting only one "privileged" member of the media access to the discovery materials, reasoning that the chosen outlet would then "shape the form and content of the initial presentation of the material to the public." Id.
67. 570 F.2d 1080 (2d Cir. 1977).
Koch. The Second Circuit rejected the candidates’ contentions that they could selectively exclude some members of the media through providing access by invitation only:

[O]nce the press is invited, including the media operating by means of instantaneous picture broadcast, there is a dedication of those premises to public communications use. . . . The issue is not whether the public is or is not generally excluded, but whether the members of the broadcast media are generally excluded.

. . . [O]nce there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable.

Thus, in the fifteen years since Chandler was decided, courts have consistently held that public officials cannot arbitrarily discriminate

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68. ABC television crews were on strike and management personnel were operating the network’s cameras. The candidates had threatened to have any nonunion ABC crews arrested for trespassing. No other television news organizations were similarly threatened because none of them had striking employees. Id. at 1062.

69. Id. at 1083; see also Times-Picayune Publishing Corp. v. Lee, 15 MEDIA L. REP. (BNA) 1713, 1719 (E.D. La. 1988) (holding that a sheriff violated the First Amendment by directing his staff not to respond to questions of reporters from plaintiff newspaper unless they were submitted in writing); United States v. Peters, 754 F.2d 753, 763 (7th Cir. 1985) (holding that a court order barring one reporter’s access to trial exhibits, while permitting other reporters to have access, is unconstitutional; “Arbitrary exclusion jeopardizes the first amendment’s ‘core purpose’ of insuring informed debate of issues crucial to our democratic government.”); Cable News Network, Inc. v. American Broadcasting Cos., 518 F. Supp. 1238 (N.D. Ga. 1981) (temporary restraining order was granted to a television network which claimed its First and Fifth Amendment rights were violated by defendants, who unreasonably interfered with the rights of the press to cover the White House and who treated the television media in a different manner than other forms of news media); Southwestern Newspapers Corp. v. Curtis, 584 S.W.2d 362, 364-54 (Tex. Civ. App. 1979) (finding a First Amendment violation when the district attorney required reporters of a disfavored newspaper to obtain advance appointments not required of other reporters); Sherrill v. Knight, 569 F.2d 124, 129 (D.C. Cir. 1977) (holding that access to White House press conferences via press passes could not be denied to one reporter “arbitrarily or for less than compelling reasons”); Borrega v. Fasi, 369 F. Supp. 906, 909-10 (D. Haw. 1974) (holding that a mayor could not bar a newspaper reporter from access to his press conferences without violating the First Amendment and Equal Protection Clause, even though he believed the reporter was biased against him; the court rejected the mayor’s argument that there was no constitutional violation because the newspaper could send another reporter to cover the conferences and the reporter in question could have access to news releases and other written material); Quad-City Community News Serv., Inc. v. Jebens, 334 F. Supp. 8, 15 (S.D. Iowa 1971) (finding a violation of the First Amendment and Equal Protection Clauses where city officials denied reporters for an underground newspaper access to police files available to other reporters: “Any classification which serves to penalize or restrain the exercise of a First Amendment right, unless shown to be necessary to promote a compelling governmental interest is unconstitutional.”); McCoy v. Providence Journal Co., 190 F.2d 760, 764-66 (1st Cir.), cert. denied, 342 U.S. 894 (1951) (finding that a city’s refusal to permit a newspaper to inspect municipal tax resolutions, while providing competing newspaper access to that material, violated the Fifth Amendment).
regarding access to official proceedings and records without running afoul of the Fifth and Fourteenth Amendments. During the same period, the Supreme Court has broadly interpreted the public’s right of access to the courts. Thus, although lower courts have so far refused to extend constitutional rights of access to cameras, it is impossible to reconcile these two lines of cases with the view that courts can arbitrarily restrict the public’s access to judicial proceedings and discriminate against the electronic media absent a compelling justification for doing so.  

C. Electronic Coverage Is Also Consistent with the Well-Recognized Purposes of the First Amendment, Namely, to Make Information Available to the Public.

As the Supreme Court has recognized, one of the primary purposes of the First Amendment is to “preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged.” It is here that the value of allowing electronic coverage of court proceedings is most obvious: Such coverage not only provides the public with information that is vital to the public’s role in a functioning democracy, but also helps

70. See generally Zimmerman, supra note 54, at 647 (discussing the differing treatment of the various media and arguing that “all news-gathering techniques should enjoy a first amendment right of access to any governmental function otherwise open to the public”; thus, bans on the use of the different media’s technology—including television cameras—violate the Equal Protection Clause of the Fourteenth Amendment). See also Associated Press v. Bost, 655 So. 2d 113, 119 (Miss. 1995) (Hawkins, C.J., specially concurring) (“I cannot, however, [concur with] the argument that a television reporter denied the right to bring his camera in the courtroom is not being discriminated against because the newspaper reporter cannot bring his typewriter into the courtroom, either. That is about like saying to the newspaper reporter that he cannot bring a pad and pencil into the courtroom. Or, if the reporter could take shorthand or stenotype, he could not do that, either. . . .”). But see id. at 115-18 (majority holding that state law providing trial judges with discretion as to whether to permit trials to be televised does not discriminate against photojournalists or broadcasters; court held that equal protection’s strict scrutiny standard does not apply because there is no recognized First Amendment right to televise court proceedings; rational basis scrutiny is satisfied by the state’s “interest in preserving order and decorum, preserving the truth-seeking function of a trial, and the protection of a defendant’s rights”). See generally Timothy B. Dyk, Newsgathering, Press Access, and the First Amendment, 44 STAN. L. REv. 927, 944-47 (1992) (“[T]he courts have invalidated discriminatory bans on camera access as between different television news organizations, but have been less sympathetic to claims of discrimination between print press organizations and television news organizations.”) (footnote omitted).

ensure that the information disseminated is more complete and accurate.

As to the first point, it is axiomatic that only an informed public can monitor and, when necessary, change the laws and procedures that provide the structure of democracy. Only an informed public can work to ensure that those laws and procedures are fairly and lawfully implemented by government officials, including judges, law enforcement officers, prosecutors, and others. Justice Frankfurter longed for the day when “the news media would cover the Supreme Court as thoroughly as it did the World Series,” believing 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.” Writing for the plurality in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572-73 (1980) (quoting State v. Schmit, 139 N.W.2d 800, 807 (Minn. 1966)). See generally Demystifying the Court, supra note 3, at 1085 & n.117 (“The reaction of the people to judicially declared law has been an especially important factor in the development of the country; for while the Judges’ decision makes the law, it is often the people’s view of the decision which makes history.”) (citation omitted); Nancy T. Gardner, Cameras In the Courtrroom: Guidelines For State Criminal Trials, 84 Mich. L. Rev. 475, 492-93 (1985) (noting that not only do televised court proceedings promote the public’s education about the judicial process, they also advance the press’ “fourth estate” function of serving as a watchdog over the other three branches and facilitate a “community therapeutic value” by providing an outlet for community hostility over a particular crime or trial) (citation omitted); David R. Fine, Lex, Lies, and Audiocassette, 96 W. Va. L. Rev. 449, 468 (1993) (arguing that court proceedings should be televised because “the justice system in this country—police, lawyers, judges—has become too far removed from the everyday lives of Americans”).

72. Demystifying the Court, supra note 3, at 1087 & nn.186-87 (citations omitted).
73. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572-73 (1980) (quoting State v. Schmit, 139 N.W.2d 800, 807 (Minn. 1966)). See generally Demystifying the Court, supra note 3, at 1085 & n.117 (“The reaction of the people to judicially declared law has been an especially important factor in the development of the country; for while the Judges’ decision makes the law, it is often the people’s view of the decision which makes history.”) (citation omitted); Nancy T. Gardner, Cameras In the Courtrroom: Guidelines For State Criminal Trials, 84 Mich. L. Rev. 475, 492-93 (1985) (noting that not only do televised court proceedings promote the public’s education about the judicial process, they also advance the press’ “fourth estate” function of serving as a watchdog over the other three branches and facilitate a “community therapeutic value” by providing an outlet for community hostility over a particular crime or trial) (citation omitted); David R. Fine, Lex, Lies, and Audiocassette, 96 W. Va. L. Rev. 449, 468 (1993) (arguing that court proceedings should be televised because “the justice system in this country—police, lawyers, judges—has become too far removed from the everyday lives of Americans”).
74. Frank, supra note 34, at 796 & n.289 (1987).
and its participants. Indeed, as early as 1965, in his concurring opinion in *Estes*, Justice Harlan recognized that “television is capable of performing an educational function by acquainting the public with the judicial process in action.” The plurality opinion in *Richmond Newspapers* later elaborated on this idea:

> When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case:

> “The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.”

Because of the public scrutiny and media attention given to pretrial and trial proceedings, televised coverage frequently provides a highly unique, and perhaps unprecedented, opportunity to educate a huge domestic and international audience about how our courts administer justice and the essential roles of the judge, jury, prosecutors and defense counsel. In addition, television coverage of court proceedings provides an essential source of information to the public about important social issues of the day. As the Georgia district court explained in *Cable News Network*:

> “It cannot be denied that television news coverage plays an increasingly prominent part in informing the public at large of the workings of government. Many citizens likely rely on television as their sole source of news. Further, visual impressions can and sometimes do add a material dimension to one’s impression of particular news events. Television film coverage of the news provides a comprehensive visual element and an immediacy, or simultaneous aspect, not found in print media.”

In addition to directly benefiting the public, simultaneous television coverage of a trial also improves the media’s overall ability to accurately report on the proceedings. Limited space availability in most courtrooms has meant that only a few can be physically present in court. Television, however, expands this potential audience so that

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all reporters can have instantaneous access to virtually all of the proceedings. Thus, for reporters who are not able to be present in court, electronic media coverage—at least to the extent that it is broadcast simultaneously with the proceedings—provides the most accurate possible information about the proceedings—an audio and video record of the proceedings themselves. Articles and analyses can be prepared as the proceedings unfold, and reporters need not face the inherent time pressure of waiting to receive information from the “pool” reporters. Furthermore, in-court events, including quotations, can be verified simply by playing back a videotape of the day’s proceedings. Visually oriented information that is critical to a complete and accurate portrayal of the proceedings, including the atmosphere of the courtroom and the demeanor, gestures, and emotions of the trial participants, is readily available to all.

Thus, because electronic coverage of judicial proceedings furthers not only the constitutional justifications set forth previously, but also the central purpose of the First Amendment (informing citizens), there should be a presumption in favor of allowing such coverage in the absence of a compelling justification for preventing it. As discussed below, no such justification exists as a general matter; consequently, absent unique, compelling circumstances, electronic coverage should be permitted.

IV. NO JUSTIFICATION, LET ALONE A COMPELLING ONE, EXISTS FOR BARRING ELECTRONIC COVERAGE OF JUDICIAL PROCEEDINGS.

The concerns raised most often about television coverage of courtroom proceedings regard the potential harm to the integrity of the court or the negative effects upon the trial participants. These concerns have been refuted by extensive studies and broad-based state experiences with courtroom cameras. As the Supreme Court noted in Chandler, the remarkable technological breakthroughs that have taken place in the last few decades—and, indeed, even in the last fifteen years—have eliminated many of the problems with electronic coverage that existed during the Estes era. Today, court proceedings are televised by the use of one small, noiseless, generally stationary camera located inconspicuously in a court-approved location. Indeed, these cameras are no more intrusive or distracting than the standard security camera with which we have all become highly familiar.
Furthermore, pooling arrangements, which are typically required, allow use of only one video operator and camera in the courtroom, and arrangements can be made to have a fixed camera, operated by remote control, mounted on the wall so that it is even less visible to trial participants. No special lighting is necessary, and existing microphone systems can typically be utilized so that the wires, cables, and lights that filled the courtroom in Estes are completely absent in the modern courtroom. Indeed, some have observed that the use of a single, "pooled" television camera in a courtroom and the concomitant availability of a video feed to interested journalists can—and has—reduced congestion and disruption that otherwise might be caused by the physical presence of many reporters in the courtroom.

The speculative concerns raised in Estes about the potential impact on trial participants also have been repeatedly refuted by empirical studies and experiences across the nation. Researchers in various states including California, as well as the federal courts, have reached virtually identical conclusions concerning the impact—or lack of impact—on trial participants from the presence of cameras.

For example, several states—including Arizona, California, Florida, Hawaii, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New York, Ohio, Virginia and Washington—have studied the impact of electronic media coverage on courtroom proceedings, particularly focusing on the effect cameras have upon courtroom decorum and upon witnesses, jurors, attorneys, and judges. In all of these states, electronic media coverage was permitted in both civil and criminal proceedings, although the majority of coverage was in criminal cases.

The results from the state studies were unanimous: The impact of electronic media coverage of courtroom proceedings—whether civil or criminal—is virtually nil. For example, the state studies revealed that fears about witness distraction, nervousness, distortion, fear of harm and reluctance or unwillingness to testify were unfounded.  

A typical example of study findings relates to the states' inquiry into witness nervousness. The 1991 New York study, for example, revealed that when jurors were asked whether credibility of the witness was affected by their "relative insecurity or tension" due to camera coverage, most responded "not at all." Similarly, more than ninety percent of the respondents in the Florida study on electronic media coverage of the courtroom said the presence of electronic media had "no effect" whatsoever on their ability to judge the truthfulness of witnesses.

Similarly, when these states evaluated the impact of cameras in the courtroom upon jurors—including potential juror distraction, effect on deliberations or case outcome, making a case or witness importance and reluctance to serve with electronic media present—almost no such effects were noted. Indeed, during the evaluation of the recent federal experiment regarding electronic media coverage of court proceedings, the Federal Judicial Center specifically found that

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79. See generally the state studies described in the previous footnote, and Supplemental Report, supra note 78, at 1-25, which provides a comprehensive overview of several states' evaluations of camera presence in civil and criminal trial proceedings.


81. Id.

82. See, e.g., Supplemental Report, supra note 78, at 1-25. Indeed, the impact upon jurors is now minimized by rules in most states requiring exclusion of jurors from coverage. Jurors are frequently ordered to avoid all press coverage about the case with which they are involved, and in some cases courts have sequestered juries to prevent their exposure to extensive pretrial and trial publicity. At least to the extent that televised judicial proceedings reveal only what takes place while a jury is present, sequestration may be unnecessary; certainly there can be little prejudice to a defendant if a juror disobeys a judge's order and watches on the television court events that the juror already has seen personally. Moreover, the Supreme Court has long held that a juror need not be ignorant of the facts surrounding a case prior to trial; the relevant inquiry is whether the juror can put aside that information, and his or her own personal biases, and follow the court's instructions in rendering an impartial verdict. See, e.g., Murphy v. Florida, 421 U.S. 794, 799 (1975) (holding that a jury's exposure to information about the plaintiff or the defendant prior to trial does not necessarily deprive the plaintiff of due process); Mu'Min v. Virginia, 500 U.S. 415 (1991) (holding that defendant could obtain a fair trial because jurors were asked whether they could remain impartial, despite the pretrial publicity to which they were exposed).
"[r]esults from state court evaluations of the effects of electronic media on jurors and witnesses indicate that most participants believe electronic media presence has minimal or no detrimental effects on jurors or witnesses."  

California also conducted its own study on the effect of electronic coverage, resulting in a report that is probably the most comprehensive of the state evaluations that have been completed. In addition to surveying the impact of cameras on jurors and witnesses, as many other states have done, the researchers involved in the California evaluation also observed the jurors' behavior. The California study also included observations and comparisons of proceedings that were covered by the electronic media versus proceedings that were not.

Not only did California's survey results mirror those of other states and the federal courts—namely, finding that there was virtually no impact upon jurors, witnesses, judges, counsel or courtroom decorum when cameras were present during judicial proceedings—but the "observational" evaluations completed in California further buttressed these results. For example, after systematically observing proceedings where cameras were and were not present, the consultants who conducted California's study concluded that witnesses were equally effective at communicating in both sets of circumstances. Furthermore, the behavioral observations in California also reinforced survey results from California and other state and federal courts, which found that jurors in proceedings where electronic media were present were equally attentive to testimony as jurors in proceedings without such coverage. Not surprisingly, the California study

83. *Federal Evaluation, supra note 80, at 7, 38-42; see also Supplemental Report, supra note 78, at 2 (noting that several state studies and the federal study found that "[m]ost participants believe electronic media presence has no or minimal detrimental effects on jurors or witnesses"). Although the federal study only examined judges and attorneys in its evaluations, the Federal Judicial Center also reviewed and considered the many state surveys in which witnesses and jurors were questioned along with judges and attorneys. The results were the same regardless of whom was being polled: The majority who experienced such coverage did not report any negative consequences or concerns. See, e.g., Supplemental Report, supra note 78, at 4.

84. See generally California Study, supra note 78, at 20, 55-67, 82-98.

85. Id. at 220-27, 243-45.

86. Id. at 103-04.

87. Id. at 86-87, 106-07, 111. In fact, several studies and commentators have noted that televising court proceedings is likely to enhance the performance of trial participants: judges may be more attentive, attorneys better-prepared, some witnesses able to remember more details and others alerted to the need to come forward and testify. See generally Frank, supra note 34.
also revealed that there was no, or only minimal, impact upon courtroom decorum from the presence of cameras.\textsuperscript{88}

The overwhelmingly positive results from the California study cannot be distinguished on the ground that the case at hand is a "high-profile" case. To the contrary, as noted in the California study, it is precisely the "sensational heinous crime case type" that constitutes a large portion of the proceedings that are covered by electronic media, and such cases were included in the State's study.\textsuperscript{89}

Finally, in September 1990, the Judicial Conference of the United States implemented a three-year pilot program that permitted electronic media coverage in civil proceedings in six federal district courts and two circuit courts.\textsuperscript{90} Not surprisingly, in light of the uniformly positive results from similar state court evaluations of electronic media coverage of trials, the Federal evaluation revealed, among other things, that federal judges who experimented with allowing electronic coverage developed a favorable view of it:

- 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 reported observing small or no effects of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice;
- Overall, judges and court staff report[ed] that members of the media were very cooperative and complied with the program guidelines and any other restrictions imposed.\textsuperscript{91}

Indeed, the Federal Judicial Center's "Summary of Findings" concluded that little or no negative impact resulted from having cameras in the courtroom.\textsuperscript{92}

Notwithstanding these positive results, the U.S. Judicial Conference—made up almost entirely of judges who did not participate in the experiment—voted to ignore its own study's findings, and rejected a permanent program allowing electronic media coverage of federal court proceedings. This decision was reconsidered by the Judicial

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\begin{itemize}
\item \textsuperscript{88} \textit{California Study}, \textit{supra} note 78, at 78-79.
\item \textsuperscript{89} \textit{Id.} at 67-69.
\item \textsuperscript{90} The results of that pilot program from July 1, 1991 to June 30, 1993 were monitored and evaluated by the Federal Judicial Center via judge and attorney evaluations and are reported in \textit{Federal Evaluation, supra, note} 80.
\item \textsuperscript{91} \textit{Id.} at 7; \textit{see also id.} at 12-18.
\item \textsuperscript{92} \textit{Id.} at 7.
\end{itemize}
\end{footnotesize}
Conference earlier this year; the conference voted to allow each of the eleven circuit courts to set its own rules regarding cameras.93

In sum, the extensive empirical evidence that has been collected on the impact of electronic coverage has established that such coverage is not detrimental to the parties, jurors, counsel, or courtroom decorum. Consequently, it is not surprising that, despite the frequently raised objection that electronic coverage will somehow interfere with a criminal defendant's right to a fair trial, courts evaluating such claims—even in high-profile cases—have repeatedly found that television coverage did not negatively impact upon the defendant's Sixth Amendment rights.94

Fears regarding possible undermining of fair trial rights in televised cases are, at best, misplaced, as is demonstrated by recent experiences in California with cameras in the courtroom. Even in instances where a defendant opposed such coverage, it has been proven over and over that television coverage of criminal trials does not negatively impact the defendant's fair trial rights,95 or the jury's ability to render a verdict based upon the evidence, and participants are not hindered from successfully performing their trial responsibilities by the presence of a camera in the courtroom.96 Moreover, problems of prejudicial publicity from all media can be effectively dealt with through careful voir dire, admonition, and sequestration.

93. See Philip Carriozza, 9th Circuit to Allow Cameras Back into Courtroom for Oral Arguments, L.A. DAILY J., Mar. 25, 1996, at 3. Responding to the Judicial Conference's new position, the Ninth Circuit Court of Appeals announced that it would allow camera coverage during oral argument. Id.

94. In addition, any purported Sixth Amendment concerns raised by cameras in trial courtrooms are irrelevant to the question of whether the public and press have a First Amendment right to have state and federal appellate proceedings televised live. See generally, J. Clark Kelso, A Report on the California Appellate System, 45 HASTINGS L.J. 433, 486-87 (1994) (advocating televised appellate proceedings, which often raise questions of interest to the entire community).

95. Indeed, many of the notable "high-profile" trials televised during the last fifteen years resulted in acquittals for the criminal defendant, including not only O.J. Simpson, but also District of Columbia Mayor Marion Barry and William Kennedy Smith.

96. Thus, in the high-profile case of People v. Keating, 19 Cal. Rptr. 2d 899 (Ct. App. 1993), portions of the trial were televised with no apparent negative effect. In fact, the Court of Appeal denied Keating's claim that he was denied a fair trial because television coverage had been permitted. See also People v. Spring, 200 Cal. Rptr. 849 (Ct. App. 1984) (holding that the presence of a television camera during trial did not violate criminal defendant's Sixth Amendment right to a fair trial); State v. Smart, 622 A.2d 1197 (N.H. 1993) (holding that televised coverage of high-profile murder trial did not prejudice defendant); Stewart v. Commonwealth, 427 S.E.2d 394 (Va. 1993) (holding that the presence of video cameras during a criminal trial did not violate defendant's due process rights); Florida v. Garcia, 12 MEDIA L. REP. (BNA) 1750 (Fla. Cir. Ct. 1986) (holding that criminal defendants did not have right to bar broadcast coverage of criminal proceedings).
Indeed, television coverage of what actually took place in the courtroom should actually improve a defendant’s opportunity to receive a fair trial, particularly in a high-profile situation. The best antidote to lawyers’ “spin control,” legal commentators’ opinions or any type of biased, subjective publicity is to let the public view via their television sets what actually occurs in the courtroom.

In any event, the First Amendment right of access is not absolute in other instances, and would not be absolute in the case of electronic coverage. Where a compelling justification exists for restricting electronic coverage—and certainly scenarios can be hypothesized where there would be justification for shutting down some or all electronic coverage during a particular proceeding—courts may do so, just as they may close the courtroom or seal files where a “compelling” justification for doing so exists. However, the concern that electronic coverage of court proceedings might in some circumstances subject trial participants, possibly including the judge, to public scrutiny and even criticism does not justify keeping cameras out. To the contrary, the need for such scrutiny is one of the very reasons that such access must be established as a matter of First Amendment right.97

V. CONCLUSION

It has been fifteen years since the United States Supreme Court held that electronic coverage of trials is not prohibited by the Federal Constitution.98 During that time hundreds—if not thousands—of judicial proceedings across the country have been covered by the electronic media. Yet, it appears that there has not been a single case since 1981 where the presence of a courtroom camera has resulted in a verdict being overturned, or where a camera was found to have had any effect whatsoever on the ultimate result. This fact alone should

97. See Demystifying the Courts, supra note 3, at 647; see also Craig v. Harney, 331 U.S. 367, 376 (1947) (“[A] judge may not hold in contempt one ‘who ventures to publish anything that tends to make him unpopular or to belittle him’ . . . . The law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.”) (citations omitted).

give pause to those who would “pull the plug” on electronic coverage of the courts. At the same time, those fortunate enough to live in—or receive broadcast footage from—states where electronic coverage is permitted have been able to “see for themselves” what transpires in their courts, in keeping with the historical requirement that trials be open to all who choose to attend. As one commentator summarizes: “Advocates of electronic media coverage of judicial proceedings argue that courts belong to the people, that the people have a right to know exactly what goes on in their courts, and that the public should be able to get that information through whatever medium they wish.”

Thus, absent a showing in a given case that televised coverage will demonstrably prejudice the parties or interfere with the conduct of justice, televised coverage should be permitted as a matter of constitutional right. Moreover, even when it is demonstrated that a compelling interest exists for restricting electronic coverage, any restriction should be narrowly tailored to address only that specific interest. Any other standard would severely and needlessly limit the public’s First Amendment right of court access to only a chosen few.

100. S. Shepard Tate, Cameras In The Courtroom: Here To Stay, 10 U. Tol. L. Rev. 925, 926 (1979).
Courtroom Connect’s Webstreaming Of Court Proceedings In Re Disney Shareholders:

Hon. Amy St. Eve
United States District Court, Northern District of Illinois, Eastern Division
Chicago, IL

Kelly Sager
Davis, Wright, Tremalne
Los Angeles, CA

Michael Breyer
Courtroom Connect
Atlanta, GA

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Executive Summary

Last fall, the Court of Chancery in Georgetown, Delaware, was the venue for a high-profile suit by Disney shareholders, challenging the $140-million dollar severance award to Disney’s president of 15 months, Michael Ovitz. Due to the small size of the courtroom, Courtroom Connect, a company that provides a variety of courtroom technological solutions, delivered an Internet webcast of the trial that combined audio and video with a copy of the trial transcript and exhibits. This white paper evaluates the effectiveness of the webcast from several perspectives: courtroom personnel, attorneys representing the parties, the media, and the provider company. This paper also presents a potential academic use for the technology. Overall, this paper concludes that the use of the technology was a success while providing some issues for the participants to consider in planning webcasts of future trials.
Courtroom Connect’s Webstreaming of In Re Disney Shareholders

Technology Overview

Last fall, the Court of Chancery in Georgetown, Delaware, found itself in the spotlight. The courthouse was the venue for a high-profile suit by Disney shareholders, challenging the $140-million dollar severance award to Disney’s president of 15 months, Michael Ovitz. Due to the small size of the courtroom (with seating for only 55 people) and the great interest in the story, both from shareholders with a vested interest in the outcome, and a curious public eager to see celebrity witnesses testify, the court needed to find an alternative option for public access to the trial.

Taking the next technological step beyond showing the trial on Court TV, the presiding judge, Chancellor William B. Chandler, coordinated with Courtroom Connect, a company that provides a variety of courtroom technological solutions, to transmit the trial over the Internet. Because the recently constructed courtroom already contained a wireless network and four ceiling-mounted cameras, Courtroom Connect was able to use this infrastructure as a basis for the Internet transmission. Although this was the first trial to provide public access to the technology, a limited-access version of the service had been used by attorneys in other cases.

The transmission used webstreaming technology, the same concept used to provide Internet users with on-line news and music videos. The audio and video feed was augmented with a scrolling text transcript, and images of evidence as it was shown to witnesses. Two different versions of the technology were available: a live feed showing the trial as events unfolded, and an on-demand file, posted twice daily and comprising a half-day session of the trial. While the live feed was an up-to-the-minute broadcast of trial events, it did not contain options for the viewer to pause, rewind, or fast forward; these options were only available in the on-demand version.

As with other services Courtroom Connect has provided to courtrooms, costs were allocated to the users of the technology so there was no charge to the court itself. Additionally, the Chancellor requested that access to the trial be provided for free to Delaware residents. The live feed was priced at $200/day and $600/week, and approximately 75 users accessed this service. In addition to the on-demand file being free to Delaware residents, it was also free to the first 50 users to access it at a given time. Users over this limit were charged $10/day.
Now that the evidentiary portion of the trial is complete, it is time to evaluate the technology. What worked? What didn’t? What possibilities are there for improvement for the next trial? These answers can vary based on the role of the participant: court personnel, trial attorneys, media, and the company. This paper will examine each of these perspectives for the pros and cons of how the technology worked in this case. Additionally, a potential educational role for the technology will be discussed. The overwhelming response, however, from all these perspectives has been that the webstreaming of the Disney trial was a success. The few drawbacks to using the technology relate more to courthouse acquisition rules than to any shortfalls in the system.

Court Perspective

From the court’s perspective, there were three advantages to using the technology: cost, control, and camera location. Although this court’s personnel did not experience any disadvantages with the technology, there are two issues, procurement rules and camera usage, other courts should consider before attempting a similar trial.

As previously stated, Courtroom Connect provided the technology at no charge to the court; the costs were allocated to users who accessed the feed. For courts that don’t have an existing wireless network, Courtroom Connect can also provide this support at no charge to the court, again by allocating the costs to the users of the network.

Another advantage is control of the transmission and the transcript. During the course of the trial, there were times when the judge needed to prevent information from being broadcast to outside viewers. Michelle Beaudry, Courtroom Connect’s Director of Marketing and Communications, explained that the webstreaming system included the capability for court personnel to shut off the audio upon the judge’s request. Joshua Margolin, one of the judge’s clerks, confirmed that this feature made transitioning between audio on and off very easy. Additionally, the court retained control over the dissemination of the transcript. During the live feed, only participants in the trial had the draft transcript included in their feed. At the conclusion of each day, these participants were provided an official, final copy of the transcript. Any third-party requests for transcripts still were processed by the court to ensure the requester received a copy of the official transcript. The court
also had an agreement with Courtroom Connect, that any user who requested a copy of the feed with the transcript included would also have to request an official transcript from the court. The reasoning behind these procedures was to prevent dissemination of unofficial copies of the transcript; courts could also avoid this problem by using a scopist to review and correct the transcript before it is transmitted, as has been done for many years by Courtroom 21, to have a truly real-time record.

The third advantage for the court was camera location. The courtroom hosting the trial contained four ceiling-installed cameras. These were used for capturing the video of the trial. Andrew Farthing, another of the judge’s clerks, stated that because there was no tripod in the middle of the courtroom, it was easy to forget the trial was even being broadcast. One of the attorneys trying the case shared this opinion. Other courtrooms looking to use this technology may not be as well equipped and may need to place cameras throughout the courtroom to obtain a similar result.

While there were several advantages from the court’s perspective, another court planning to use this type of technology should consider two potentially negative issues. One is the rules associated with the procurement process. Governments use a bidding process to ensure new equipment and infrastructure are acquired at the best price possible. Because Courtroom Connect’s equipment is provided at no charge to courtrooms, courts may not consider their jurisdiction’s procurement rules to be applicable to agreements for Internet connectivity and trial webcasting. In Baltimore, Maryland, one such agreement was challenged for this reason, but the courts were able to keep the infrastructure. In New Jersey, however, the state’s Administrative Office of the Courts directed removal of a wireless network from one court because it had not used the bidding process. A court considering a permanent installation of this type of technology should coordinate with its procurement office to determine whether the bidding rules apply when equipment is provided free to the court, but users are charged a service fee.

Another issue for courts to consider is the jurisdiction’s rules for cameras within the courtroom. Although some jurisdictions may give individual judges discretion over this type of decision, others have more restrictive policies for camera use. For federal courts, Judicial Conference policy and Federal Rule of Criminal Procedure 53 prohibit public broadcasts of trials. As a result, the public access option for the Disney trial would not
be possible for an equally high-interest federal case; however, this restriction could change in the future, as lawmakers continue to present “Sunshine in the Courtroom” bills to provide judges the authority to allow cameras in their courtrooms. Although state rules tend to be more lenient on allowing cameras in the courtroom, a courtroom looking to publicly transmit a trial for the first time should check if there are any state rules limiting public transmissions specifically, or camera use in general.

From the court perspective, the technology provides a small footprint for a courtroom equipped with at least the required cameras. There is no charge to the court and restricted portions of the trial can easily be omitted from the broadcast. The court also retains control over the official transcript. This court was so pleased with the technology that they have already used it again for an oral argument. The main issues for courts wishing to duplicate this type of transmission to consider are procurement procedures and camera usage limitations.

**Attorney Perspective**

Trial teams on both sides of the case used the live feed and were pleased with the results. Jennifer Hirsh, one of the shareholders’ attorneys from Milberg, Weiss, Bershad & Schulman LLP, stated that her firm rented houses in Georgetown and Rehoboth Beach for trial support; the live feed was broadcast to both of these locations, plus the firm’s New York and Wilmington offices. Bart Williams, whose firm, Munger, Tolles & Olson LLP, represented Mr. Ovitz, said that the defense team also rented a house in Georgetown for trial support, and accessed the feed there and at the firm’s Los Angeles office. Anne Foster, whose firm Richards, Layton & Finder, represented Sidney Poitier, indicated that in addition to the feed at the house shared by the defense team, her team was able to watch the feed at their hotel, and members of her firm accessed it on their office desktops. Both sides provided several advantages to using the technology, all relating to the interactions between the in-court team and the remote viewers. They also provided some observations on ways the technology could fall short of expectations in the areas of malfunction, evidence, and testimony.

As stated above, both sides provided the live feed to more than one alternate location. Mr. Williams explained that his team used the courtroom’s wireless network to exchange emails with the trial-support team. The support team was able to send comments and questions to the in-court team based on what they saw on the live feed. Corey Tunney, a member of Milberg
Weiss’ litigation support team, stated his firm relied more on Blackberries for email support, but the live feed gave his firm’s support teams the same options to send timely comments and questions.51

Both sides also used the feed to enable expert witnesses to remotely watch relevant portions of the trial.52 This also gave an opportunity for timely expert feedback. Ms. Foster stated that another advantage relating to witnesses was that the support team could judge when the next witness would be needed, saving attorneys in the courtroom from having to step out of the courtroom to call and request witnesses.53

Several of the attorneys also commented on the ability to scroll back within the transcript.54 This gave the remote viewers the opportunity to skim any testimony they were unable to watch real-time.55 Ms. Foster indicated this feature also helped follow testimony when a witness moved too far away from the microphone.56 For similar reasons, Christian Wright, another one of Mr. Ovitz’s attorneys, from Young, Conaway, Stargatt & Taylor, LLP, found this feature also helped with note taking.57 Both sides agreed this capability was very useful.58

While both sides were pleased with the various options available for their remote teams to use the technology, they also identified some potential concerns.59 One issue is the natural consequence of using any technology, some malfunction of the system. In this trial, Mr. Williams stated that there was one period where the audio stopped working due to some cause within the courtroom.60 Ms. Foster also commented that the wiring in the Georgetown house, installed just for the trial, occasionally affected the transmission.61 Whereas there did not appear to be a significant impact in this instance, the more complex the technology, the more potential there is for problems to occur. Using the technology to the fullest, a problem can occur with the audio, the video, the transcript system, the system displaying the evidence, the courtroom’s network, the firm’s network, the Internet connection, or the firm’s email service. As when using any type of technology, firms relying on the feed for remote support should address these potential problems with a backup plan to enable them to continue working until such problems can be fixed.

Another potential concern from this trial was evidence presentation. Ms. Hirsh explained that her team displayed their evidence using the courtroom’s presentation system.62 Because the presentation system was linked to the transmission feed,
remote viewers were then able to see what was being shown to a witness. 63 Ms. Hirsh explained that the defense in this case did not use these capabilities, and instead passed around paper copies of evidence. 64 While it did not seem like the limited transmission of evidence affected this trial, 65 this could be a drawback for some remote viewers in other trials. Depending on the role of the viewers, they might not be able to obtain the evidence in advance, or might be unable to see what portions of the evidence are pointed out to the witness during questioning.

The last potential issue was quality of testimony. Mr. Williams commented that although not a major factor in this trial, witnesses who know they are on camera might act differently because of the additional audience. 66 This issue would not matter for trials with the feed limited to the participating firms, but would be a consideration by firms agreeing to a similar publicly transmitted trial.

As with the court perspective, there are issues firms should consider in deciding whether to use this technology, but overall the advantages for a large firm with support teams at the office or in other locations outside the courtroom, greatly outweigh the potential disadvantages.

**Media Perspective**

Although several articles on the trial mentioned the on-line viewing options, 67 many writers also went to the courthouse to watch the trial in person. 68 While there, they were still able to see the feed because it was aired on a plasma screen in the waiting area. 69 This setup was similar to a “media room” concept used in New South Wales, Australia, to enable reporters to watch trials over closed circuit television and talk and make telephone calls without disrupting the proceedings. 70 Mr. Farthing and Ms. Foster both commented that the press seemed pleased with this option. 71 Only one of the writers contacted for comments on the technology was willing to give her perspective. 72 Ms. Beaudry also shared an additional advantage this courtroom’s setup had for media viewers. 73

Despite the minimal feedback from reporters, it was still possible to determine two advantages and one disadvantage from this perspective. One local writer, Ms. Jennifer Batchelor, covered the trial for Delaware Law Weekly in person, but also accessed the live feed. 74 She was pleased with the quality of this video. 75 It appears that other news outlets shared this opinion. The Wall Street Journal, New York Times, and Seattle Times all included
As previously stated, the courtroom was equipped with four cameras. Ms. Beaudry commented that this enabled transmission from different perspectives. In particular, it was possible to change cameras to show who was speaking at a given time. Mr. Williams and Mr. Wright also commented on how this feature made the trial easier to follow. Using a multi-frame feature, the feed could also be configured to permanently broadcast several perspectives of the courtroom simultaneously, such as the judge, witness, and the examining attorney.

The one disadvantage Ms. Batchelor saw was that the transmission did not include speakers’ names; viewers who accessed the feed in the middle of a witness’s testimony might not know who was testifying or who was doing the questioning. This information can be added to the on-demand file, but cannot be added during the live feed.

**Company Perspective**

For Courtroom Connect, the transmission of this trial was an unqualified success. Ms. Beaudry felt the most important reason for this was adequate planning time before the trial. As required for using any type of technology, Ms. Beaudry found being able to prepare and test the system before the trial contributed to how well it functioned during the trial. The one potential problem for the company was that the trial lasted much longer than the 4-6 weeks originally anticipated. Ms. Beaudry addressed this issue as well, and concluded that because of the adequate preparation time, the company was able to continue the service during the additional time.

**Academic Perspective**

Even though this particular trial did not have an academic perspective, one person interviewed for this article, Richard Herrmann, a partner at Morris, James, Hitchens & Williams LLP, adjunct faculty member at both the College of William and Mary and Widener University Law Schools, and Senior Legal Technology Advisor to the Courtroom 21 Project, provided insight on a potential academic use. Mr. Herrmann is currently working with the Delaware Court of Chancery, Courtroom Connect, and Widener to capture appellate oral arguments for posting on the Widener web site. Mr. Herrmann indicated
these videos could be added to student assignments, along with the corresponding cases’ briefs and opinions, to give students a different perspective on the case than from just reading the opinion.

The drawbacks to this use are similar to those of other perspectives: rules on camera usage and costs. While the Delaware Court of Chancery does allow public broadcasts, if the project was successful enough for potential expansion, rules on camera usage could affect which courts could participate in the program.

Another issue is how the technology would be funded. As with the sentencing issue discussed above, costs would fall on the sole user, the university. Mr. Herrmann believes there would be enough other users interested in accessing this material to satisfy this cost issue.

Conclusion

Most people interviewed considered the best use of this technology to be for a large trial team with members who need to do other work or cannot travel to the courtroom, but who also need to keep an eye on the trial. As long as the support team has the ability to communicate with the in-court team through email or instant messaging, this is an effective tool for drawing on a larger support base of attorneys and experts. Additionally, the ability to scroll within the transcript makes it easier for the support team to not only follow the trial, but also to review and send comments on prior testimony while the attorneys at trial focus on the current witness.

Mr. Herrmann’s academic support concept also appears to be an effective use of the technology. Besides learning the rules of law, students can improve their own oral argument skills by assessing the ones viewed on line.

The future for potential public broadcast will probably be limited, because of court rules on public transmission and the fee for the live feed. It would likely take another trial involving celebrities to make a similar Internet feed worthwhile. Additionally, the lack of identifiers could make it difficult for the public to follow a real-time broadcast.

More applications may emerge as the infrastructure’s quality and speed improve. Mr. Wright, for one, hopes that a future version will allow the transmission to be split onto two monitors to allow for a full-screen view of the testifying witness.
2 Telephone Interview with Michelle Beaudry, Director of Marketing and Communications, Courtroom Connect (May 16, 2005) [hereinafter Beaudry Interview].
3 Id.
4 Id.
5 Id.
6 Id.
7 Beaudry Interview, supra note 2.
8 Id.
9 Id.
10 Id.
11 Id.
12 Beaudry Interview, supra note 2.
13 Telephone Interview with Bart Williams, Co-Managing Partner, Munger, Tolles & Olson, LLP (May 23, 2005) [hereinafter Williams]; Telephone Interview with Anne Foster, Director, Corporate Department, Richards, Layton & Finder (May 25, 2005) [hereinafter Foster]; Telephone Interview with Jennifer Hirsh, Associate, and Corey Tunney, Litigation Support, Milberg, Weiss, Bershad & Schulman LLP (May 23, 2005) [hereinafter Hirsh]; Telephone Interview with Christian Wright, Associate, Young, Conaway, Stargatt & Taylor, LLP (May 24, 2005) [hereinafter Wright]; Telephone Interview with Joshua Margolin, Clerk, Court of Chancery, Georgetown, Delaware (May 19, 2005) [hereinafter Margolin]; Telephone Interview with Andrew Farthing, Clerk, Court of Chancery, Georgetown, Delaware (May 25, 2005) [hereinafter Farthing]; Beaudry Interview, supra note 2.
14 Margolin, supra note 13; Farthing, supra note 13; Telephone Interview with William Dawson, Court Reporter, Court of Chancery, Georgetown, Delaware (May 25, 2005) [hereinafter Dawson].
15 Beaudry Interview, supra note 2.
17 Beaudry Interview, supra note 2; Margolin, supra note 13.
18 Beaudry Interview, supra note 2.
19 Margolin, supra note 13.
20 Dawson, supra note 14.
21 E-mail from Jonathan Kelly, Senior Product Manager, Courtroom Connect (May 25, 2005, 10:17 EDT) (on file with author) [hereinafter Kelly].
22 Margolin, supra note 13.
23 Dawson, supra note 14.
24 Id.
25 Id.
26 Interview with Fredric Lederer, Chancellor Professor of Law, and Director, Courtroom 21 Project, College of William and Mary Law School, in Williamsburg, Va. (June 8, 2005).
27 Beaudry Interview, supra note 2.
28 Id.
29 Farthing, supra note 13.
30 Foster, supra note 13.
31 Allison Klein, Courthouses Join Wireless Age; Net Subscription Service Seen as Boon to Attorneys; Lack of Bidding Criticized, THE BALTIMORE SUN, May 24, 2005, at 1B, LEXIS, News, Most Recent Two Years File; Henry Gottlieb et. al., Inadmissible, 178 N.J.L.J. 223 (2004), LEXIS, News, Most Recent Two Years File.
32 Klein, supra note 31; Gottlieb, supra note 31.
33 Klein, supra note 31.
34 Gottlieb, supra note 31.


Grassley, Shumer Promote Greater Public Access to Federal Courtrooms, supra note 35.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

1 Guide to Judiciary Policies and Procedures, supra note 35.

Id.

Beaudry Interview, supra note 2; Margolin, supra note 13.

Dawson, supra note 14.

Farthing, supra note 13.

Williams, supra note 13; Foster supra note 13; Hirsh supra note 13; Wright supra note 13.

Hirsh supra note 13.

Williams, supra note 13.

Foster, supra note 13.

Williams, supra note 13; Foster supra note 13; Hirsh supra note 13; Wright supra note 13.

Williams, supra note 13; Foster supra note 13; Hirsh supra note 13; Wright supra note 13.

Williams, supra note 13; Foster supra note 13; Hirsh supra note 13; Wright supra note 13.

Hirsh supra note 13.

Foster, supra note 13.

Williams, supra note 13; Foster supra note 13; Hirsh supra note 13; Wright supra note 13.

Williams, supra note 13; Foster supra note 13; Hirsh supra note 13; Wright supra note 13.

Foster, supra note 13.

Wright, supra note 13.

Williams, supra note 13; Foster supra note 13; Hirsh supra note 13; Wright supra note 13.

Williams, supra note 13; Foster supra note 13; Hirsh supra note 13; Wright supra note 13.

Foster, supra note 13.

Wright, supra note 13.

Williams, supra note 13; Foster supra note 13; Hirsh supra note 13; Wright supra note 13.

Williams, supra note 13; Foster supra note 13; Hirsh supra note 13; Wright supra note 13.

Foster, supra note 13.

Wright, supra note 13.

Hirsh, supra note 13.

Id.

Id.

Id.

Id.

Id.

Wright, supra note 13.


E.g., Foster supra note 13; Farthing supra note 13.

Foster supra note 13; Farthing supra note 13.

71 Foster supra note 13; Farthing supra note 13.
72 E-mail from Jennifer Batchelor, formerly a reporter for Delaware Law Weekly (May 20, 2005, 10:51 EDT) (on file with author) [hereinafter Batchelor E-mail].
73 Beaudry Interview, supra note 2.
74 Batchelor E-mail, supra note 72.
75 Id.
76 Marr supra note 71; Laura M. Holson and Rita K. Farrell, Eisner, on the Stand, Describes Courting of Ovitz, N.Y. TIMES, Nov. 16, 2004, at C1, LEXIS, News Most Recent Two Years File; Chad Bray, Eisner Downplays Friendship with Ovitz; Shareholder Suit - CEO Details Talks that Brought Top Agent to Disney, SEATTLE TIMES, Nov. 16, 2004, at C2, LEXIS, News Most Recent Two Years File.
77 Beaudry Interview, supra note 2.
78 Id.
79 Id.
80 Williams, supra note 13; Wright, supra note 13.
81 Community Law Reform Program, supra note 70.
82 Batchelor E-mail, supra note 72.
83 E-mail from Michelle Beaudry (May 23, 2005, 15:48 EDT) (on file with author).
84 Beaudry Interview, supra note 2.
85 Id.
86 E-mail from Michelle Beaudry (May 18, 2005, 14:48 EDT) (on file with author).
87 Id.
88 Id.
89 Telephone Interview with Richard Herrmann, Partner, Morris, James, Hitchens & Williams LLP (May 18, 2005) [hereinafter Herrmann Interview].
90 Id.
91 Id.
92 E-mail from Richard Herrmann (May 24, 2005, 09:53 EDT).
93 Williams, supra note 13; Foster supra note 13; Hirsh supra note 13; Wright supra note 13; Herrmann Interview, supra note 89.
94 Williams, supra note 13.
95 Williams, supra note 13; Hirsh supra note 13; Wright supra note 13.
96 Herrmann Interview, supra note 89.
97 Id.
99 Beaudry Interview, supra note 2.
100 Batchelor E-mail, supra note 72.
101 Wright, supra note 13.
Panel Discussion on Cameras in the Federal Courts: Judicial Conference Committee News and Guidelines

Michael Breyer
Courtroom Connect
San Francisco, CA

Manuel Medrano, Moderator
Medrano & Carlton
Los Angeles, CA

Kelli Sager
Davis Wright Tremaine LLP
Los Angeles, CA

Honorable Amy St. Eve
U.S. District Court, Northern District of Illinois
Chicago, IL

Cynthia R. Cohen, Ph.D., Program Chair
Verdict Success LLC
Manhattan Beach, CA
Included are the Judicial Conference Guidelines and news items from the United States Courts website.

**Rule 53. Courtroom Photographing and Broadcasting Prohibited**
Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom. (As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

**Courts Selected for Federal Cameras in Court Pilot Study**
June 2011 News Article from U.S. Courts website:

Fourteen federal trial courts have been selected to take part in the federal Judiciary’s digital video pilot, which will begin July 18, 2011, and will evaluate the effect of cameras in courtrooms. All 14 courts volunteered to participate in the three-year experiment.

The courts were selected by the Judicial Conference Committee on Court Administration and Case Management (CACM) in consultation with the Federal Judicial Center, the Judiciary’s research arm. The participating courts are:

- Middle District of Alabama
- Northern District of California
- Southern District of Florida
- District of Guam
- Northern District of Illinois
- Southern District of Iowa
- District of Kansas
- District of Massachusetts
- Eastern District of Missouri
- District of Nebraska
- Northern District of Ohio
- Southern District of Ohio
- Western District of Tennessee
- Western District of Washington

The pilot will provide for participation by more than 100 U.S. district judges, including judges who favor cameras in court and those who are skeptical of them. Districts volunteering for the pilot must follow guidelines adopted by CACM. The pilot is limited to civil proceedings in which the parties have consented to recording.

No proceedings may be recorded without the approval of the presiding judge, and parties must consent to the recording of each proceeding in a case. The recordings will be made publicly available on www.uscourts.gov and on local participating court websites at the court’s discretion.
The pilot recordings will not be simulcast, but will be made available as soon as possible. The presiding judge can choose to stop a recording if it is necessary, for example, to protect the rights of the parties and witnesses, preserve the dignity of the court, or choose not to post the video for public view. Coverage of the prospective jury during voir dire is prohibited, as is coverage of jurors or alternate jurors.

Electronic media coverage of criminal proceedings in federal courts has been expressly prohibited under Federal Rule of Criminal Procedure 53 since the criminal rules were adopted in 1946, and by the Judicial Conference since 1972. In 1996, the Conference rescinded its camera coverage prohibition for courts of appeals, and allowed each appellate court discretion to permit broadcasting of oral arguments. To date, two courts of appeals—the Second and the Ninth—allow such coverage. In the early 1990s, the Judicial Conference conducted a pilot program permitting electronic media coverage of civil proceeding in six district courts and two courts of appeals.

Cameras Pilot One Year Later
July 31, 2012 News Article from U.S. Courts website:
http://news.uscourts.gov/cameras-pilot-one-year-later

A year after the federal Judiciary began its cameras in the courtroom pilot program in 14 federal trial courts, 39 court proceedings are available online for public viewing on the Judiciary’s website. The video recordings and brief summaries of the cases are organized by court, subject matter, and procedural posture. The posted videos have been viewed over 28,000 times since the pilot began in July 2011.

The 14 courts volunteered for the pilot and were selected by the Judicial Conference Committee on Court Administration and Case Management (CACM) in consultation with the Federal Judicial Center, which is studying the 3-year pilot.

“From the start of this digital video pilot program, the CACM Committee has emphasized the importance of public access,” said Judge Julie A. Robinson (D. Kan.), CACM committee chair. “It is encouraging that so many civil proceedings are now available online for the public to see, as if they were in the courtroom themselves.”

Participating courts follow guidelines (pdf) endorsed by the Conference. The courts record the proceedings themselves; proceedings may not be recorded without the approval of the presiding judge and the parties in the case. The pilot includes only civil cases; photographing or broadcasting criminal proceedings in federal courts has been prohibited under Federal Rule of Criminal Procedure 53 since 1946.

The Judicial Conference has authorized each appellate court to decide whether to permit broadcasting of oral arguments. Two courts of appeal—the Second and the Ninth—allow such coverage.

Guidelines for Cameras in the Courts
Guidelines from U.S. Courts website:
Judicial Conference Committee on Court Administration and Case Management
Guidelines for the Cameras Pilot Project in the District Courts

In September 2010, the Judicial Conference authorized a three-year pilot project to evaluate the effect of cameras in district court courtrooms, video recordings of proceedings therein, and publication of such video recordings by making them available through www.uscourts.gov, as well as participating courts’ websites, if so desired. (JCUS-SEP 10, pp. 3-4). The pilot is national in scope, consisting of up to 150 individual judges from districts chosen to participate by the Federal Judicial Center (FJC), in consultation with the Court Administration and Case Management Committee (CACM).

At the Conference’s direction, the CACM Committee promulgated these guidelines under which the pilot program must proceed. The Conference also authorized this Committee to periodically amend the guidelines, as necessary, to assist the pilot participants.

The Conference also directed the CACM Committee to request that the FJC conduct a study of the pilot, and the FJC will prepare interim reports after the first and second years of the pilot.


a. Participating courts must abide by these guidelines as a condition for participating in this pilot program. These guidelines will remain in effect for the duration of the pilot, unless changed by the Conference or the CACM Committee acting on its behalf.

b. Only courts participating in the pilot program may record court proceedings for the purpose of public release.

c. The pilot is limited to civil proceedings in which the parties have consented to recording.

d. Courts participating in the pilot must amend their local rules (providing adequate public notice and opportunity to comment) to provide an exception to the Judicial Conference ban on recording for judges participating in the pilot consistent with the guidelines.

e. It is not intended that a grant or denial of a request to record a proceeding be subject to appellate review insofar as it pertains to and arises under these guidelines, except as otherwise provided by law.

f. Courts participating in the pilot will record or control the recording of proceedings. Recordings by other entities or persons, unless hired by or under the control of the court, are not allowed.

g. Courts participating in the pilot program will be expected to cooperate with the FJC and the CACM Committee in collecting study-specific data needed by the FJC to evaluate the pilot project on behalf of the CACM Committee.
2. Selection of Cases for Video Recording

a. The presiding judge will select cases for participation in the pilot, although parties to a case or the media may request video recording of proceedings. Participating judges should consider recording different types of proceedings (e.g., trial and non-trial proceedings; a variety of case types; proceedings of varying sizes such as hearings, large cases, and multidistrict litigation; and proceedings with varying levels of expressed public interest).

b. Under any circumstances, proceedings may not be recorded without the approval of the presiding judge.

c. Parties must provide consent to the recording of each proceeding in a case. Consent to the recording of one proceeding in a case will not be construed as consent to any other proceeding in a case.

d. The court may

   (1) establish a procedure for obtaining party consent to the recording of a proceeding selected for the pilot, including a time frame by which consent must be given; and

   (2) in its discretion, hold a hearing to address objections by parties, witnesses, or others to the recording or posting of a recording for public access. Such hearings should not be recorded.

e. Using forms provided by the FJC, courts should gather data on and report to the FJC on the consent process, including which parties did not provide consent and the reasons why they did not consent.

3. Cameras and Equipment

a. Judges participating in the pilot should use the following equipment configuration for recording proceedings:

   (1) Optimally, there should be at least three but no more than four cameras with microphones to record the proceedings in the courtroom. The cameras should be inconspicuous and fixed on the judge, the witness, the lawyers' podium, and/or counsel tables.

   (2) The security cameras in the courtroom should not be used to record the proceedings for the pilot.

   (3) There should also be a feed from the electronic evidence presentation system.

   (4) The recording equipment should transmit the camera inputs to a switcher that incorporates them onto one screen. The recording equipment also should include an encoder to record the file for posting.
b. The Administrative Office will develop technical guidelines for the digital video recording equipment and will provide those guidelines to the courts selected to participate in the pilot.

c. The Administrative Office is authorized to provide limited funding for equipment as well as technical support to courts participating in the pilot. Participating courts are discouraged from purchasing new equipment. A participating court is encouraged to use its existing recording equipment so long as the equipment meets the requirements of the pilot. The court should contact the Administrative Office’s Court Administration Policy Staff to request assistance and/or online/distance training for court personnel to use new or pre-existing equipment.

4. Managing the Recording

a. A presiding judge may refuse, limit, or terminate the recording of an entire case, portions thereof, or testimony of particular witnesses: in the interests of justice; to protect the rights of the parties, and witnesses, and the dignity of the court; to assure the orderly conduct of proceedings; or for any reason considered necessary or appropriate by the presiding judge.

b. The following must not be recorded:

(1) Privileged communications between the parties and their attorneys, non-public discussions between attorneys, and sidebar conversations between attorneys and the presiding judge, without the express permission of the judge.

(2) Jurors or alternate jurors while in the jury box, the courtroom, the jury deliberation room, or during recess, or while going to or from the deliberation room at any time. Coverage of the prospective jury during voir dire is also prohibited.

c. The court should remind all persons present in the courtroom that a recording is taking place, so as to limit noise, side conversation, and other disturbances.

d. Nothing in these guidelines will prevent a court from placing additional restrictions, or prohibiting recording or broadcasting in designated areas of the courthouse.

e. The court should help ensure that personal information covered by Fed. R. Civ. P. 5.2 and the Judicial Conference privacy policy not be uploaded for public view, including providing warnings to attorneys, parties, witnesses, and jurors about disclosing confidential and personal information.
f. If security concerns arise, the judge might consider consulting with the United States Marshals Service regarding the video recording of the judge.

5. Operating the Equipment

a. A court employee, such as a courtroom deputy, or a private contractor controlled by the court, must control the recording equipment. The Administrative Office will provide online/distance training to existing court personnel on operating the recording equipment and handling the digital files. Courts are also encouraged to seek the assistance of court personnel from other districts who have experience with the recording equipment.

b. In order to control the costs of the cameras pilot program, courts are discouraged from contracting with a private vendor for purchasing, installing, and operating the necessary equipment. If a court finds it necessary to contract with a private vendor, such a vendor must be under the authority and control of the court, including any recording activity, any files created, and the posting of recordings for public access. Moreover, the court should contact the Administrative Office’s Court Administration Policy Staff for assistance in locating and contracting with the vendor.

c. The media or its representatives will not be permitted to create recordings of courtroom proceedings.

6. Storage and Access to Recordings

a. It is preferable that recordings of proceedings should be broken down into one- to four-hour increments (shorter time-frames are preferable due to the size of these digital files), but only as resources and equipment permit. Unless the presiding judge deems otherwise, recordings of court proceedings should be made publicly available within a few hours. Recordings should be made according to the following procedures:

(1) Recordings of court proceedings will be stored on a national server (www.uscourts.gov) to prevent burdening the operations of local court automation systems and to provide data to the FJC for the required study. Courts may also maintain a link to their recordings on their public website. Regardless of how the link is accessed, all access will be tracked on the judiciary’s video hosting service.

(2) The judiciary’s video hosting service will provide a unique, stable URL for use on www.uscourts.gov and on a court’s own website.
b. The Administrative Office will prepare an educational instructional video to assist the courtroom deputy and court staff regarding publishing the file.

c. The court should be mindful of protecting sensitive and private information and of Judicial Conference requirements regarding transcripts in civil proceedings. The court may wish to consider creating a procedure by which the parties may request that the recording, or a portion thereof, not be made publicly accessible due to privacy concerns.

d. In the event that the presiding judge decides not to make the recording publicly available, the judge must document, using the forms provided by the FJC, the reasons for the decision and send that information to the FJC.

e. The decision to upload the recording is final, and the recording will automatically be made available to the public through a national server (www.uscourts.gov) and, at the court’s discretion, through a link on its public website.

f. The digital recordings emanating from the pilot (as well as any transcripts made from the recordings) are not the official record of the proceedings, and should not be used as exhibits or part of any court filing.

g. The court may wish to designate certain court personnel to coordinate media questions, and confer with the Administrative Office’s Office of Public Affairs in handling those requests.