JUSTICE, TAKE TWO: THE CONTINUING DEBATE OVER CAMERAS IN THE COURTROOM

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"A trial in Yankee Stadium, even if the crowd sat in stony silence, would be a substantially different affair from a trial in a traditional courtroom under traditional conditions, and the difference would not, I think, be that the witnesses, lawyers, judges, and jurors in the stadium would be more truthful, diligent, and capable of reliably finding facts and determining guilt or innocence."[1]

A ruling by New York State Supreme Court Justice Joseph Teresi[2] has breathed new life into a controversy that has existed for over 80 years: film and television coverage of state court proceedings.[3] Teresi recently served as presiding judge in the trial of four white New York City Police officers accused of second-degree murder and other charges in the February, 1999 fatal shooting of Amadou Diallo, a 22-year-old West African Immigrant.[4] In his January 25th ruling on a motion filed by Court TV,[5] Judge Teresi declared a 48-year-old New

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[1] Estes v. Texas, 381 U.S. 532, 595 (1965) (Harlan, J., concurring).

[2] *See* People v. Boss, No. 2000-20053, slip op. at 2 (N.Y. Sup. Ct. Jan. 25, 2000).

[3] This article focuses on photographic media coverage of criminal trials in state courts. Rule 53 of the Federal Rules of Criminal Procedure has barred camera access to federal courtrooms in most circumstances since 1944. *See* FED. R. CRIM. P. 53 (1999).

[4] Amadou Diallo, a street vendor from Guinea, was shot 19 times in the vestibule of his Bronx, New York home by four members of the New York City Police Department's street crimes unit. *See* Mark McGuire, *Chronology of the Case,* TIMES UNION (ALB.), Jan. 31, 2000 at BB2. The officers, who claim that they believed Diallo was reaching for a gun, fired 41 shots. *See id.* The shooting touched off weeks of racially-charged anti-police protests in New York City, prompting defense attorneys for the officers to successfully argue to have the trial moved 145 miles north to Albany, New York's state capital. *See id.*

[5] Launched in 1990 by attorney Stephen Brill, the Courtroom Television Network (Court TV) provides twenty-four-hour, seven-day-a-week coverage of the legal and judicial system in

York statute banning cameras from the state's courtrooms unconstitutional.[6]

One of only three states that prohibit all television coverage of court proceedings at the trial level,[7] New York has not held a televised trial since the expiration of an experimental program that lifted the ban from 1987 to 1997.[8] Judge Teresi's decision, although not binding on other courts in the state,[9] has sent shock waves through New York's legal community[10] and has resurrected an all but abandoned effort to pass legislation lifting the blanket prohibition of the photographic press from New York courtrooms.[11] Echoing the traditional con-

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the United States and abroad. *See* RONALD L. GOLDFARB, TV OR NOT TV: TELEVISION, JUSTICE AND THE COURTS 24-25 (1998).

[6] *See* People v. Boss, No. 2000-20053, slip op. at 3 (N.Y. Sup. Ct. Jan. 25, 2000). New York's Civil Rights Law §52 states, in relevant part,

> [n]o person, firm, association, or corporation shall televise, broadcast, take motion pictures. . . within this state of proceedings, in which the testimony of witnesses by subpoena or other compulsory process is or may be taken, conducted by a court, commission, committee, administrative agency or other tribunal in this state. . . .

N.Y. CIV. RTS. LAW §52 (McKinney 1999).

[7] The two other states are South Dakota and Mississippi. *See* Cameras in Court Judge Lets the Light Shine in, SYRACUSE HERALD-JOURNAL, Jan. 27, 2000, at A10. New York has allowed broadcasting of state appellate proceedings since 1981. *See* GOLDFARB, supra note 5, at 74.

[8] *See* People v. Boss, No. 2000-20053, slip op. at 2 (N.Y. Sup. Ct. Jan. 25, 2000). The experimental period expired in June, 1997 when the legislature refused to extend the program, despite recommendations by various committees to extend the program based on generally positive survey results. *See* GOLDFARB, supra note 5, at 74-76.

[9] *See* Mark McGuire, *A 2nd Judge Lets Cameras in the Courtroom*, TIMES UNION (ALB.), Jan. 27, 2000 at A1. Although Judge Teresi's order is not binding precedent, some commentators predict that it will serve as a "springboard" for other New York judges to allow television cameras back into state courtrooms. *See id.* The day following Teresi's order, another Albany Judge, Acting Supreme Court Justice Dan Lamont approved the use of cameras in the trial of Melissa Strawbridge, a 24-year-old accused of suffocating her baby in a toilet bowl. *See Verdict for Cameras in a Welcome Move, Two Judges Reopen the Door for Courtroom Coverage*, THE POST-STANDARD, Jan. 31, 2000 at A6.

[10] *See* McGuire, *supra* note 9, at A1.

[11] In the wake of Teresi's decision, Governor George Pataki, State Senate Majority Leader Joseph Bruno, and State Assembly Speaker Sheldon Silver (previously a staunch opponent to a change in the law), all say they will seek a law overturning New York's camera

cerns of camera proponents, Judge Teresi wrote that allowing the trial to be televised will "further the interests of justice, enhance public understanding of the judicial system and maintain a high level of public confidence in the judiciary."[12] Supporters hailed the decision as "courageous" and "momentous."[13] Detractors called the ruling "beyond arrogant" and "bad policy."[14] Arguments on both sides reflect a debate as old as motion picture cameras themselves.

Sensational trials have always sparked strong public interest and have proved rich sources for media coverage.[15] From the trial of Aaron Burr for treason in 1807,[16] to the John Scopes "monkey trial" in 1925,[17] from Dr. Sam Sheppard's trial for the murder of his pregnant wife in 1966,[18] to the O.J. Simpson "circus" in 1994,[19] courtroom dramas have transfixed the attention of the nation and cre-

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ban. *See* Harry Rosenfeld, Judge's Courage Puts Cameras in Court, TIMES UNION (ALB.), Jan. 30, 2000 at B5.

[12] People v. Boss, No. 2000-20053, slip op. at 4 (N.Y. Sup. Jan. 25, 2000).

[13] *See* Fred LeBrun, *TV Ruling Was Right,* TIMES UNION (ALB.), Jan. 27, 2000 at B1.

[14] *See* Editorial, *A Judge Overreaches. . .* , NEW YORK POST, Jan. 26, 2000 at 38.

[15] *See* GOLDFARB, *supra* note 5, at 3.

[16] Burr v. U.S., 25 Fed. Cas. 49 (1807). Aaron Burr, Vice President to Thomas Jefferson from 1801 to 1805, fatally shot long-time political rival Alexander Hamilton in a duel at Weehawken, New Jersey on July 11, 1804. *See* DOUGLAS S. CAMPBELL, FREE PRESS V. FAIR TRIAL: SUPREME COURT DECISIONS SINCE 1807 11 (1994).

[17] *See* PAUL THALER, THE WATCHFUL EYE: AMERICAN JUSTICE IN THE AGE OF THE TELEVISION TRIAL 20-21 (1994). John Scopes, a Tennessee schoolteacher was prosecuted for teaching Darwin's theory of evolution. *See id.*

[18] Dr. Samuel H. Sheppard, a Cleveland osteopathic neurosurgeon, was convicted of fatally wounding his wife by striking her thirty-five times with a blunt instrument. *See* CAMPBELL, *supra* note 16, at 126-28. The Supreme Court reversed on due process grounds, holding that "Sheppard was deprived of a fair trial. . . because of the trial judge's failure to protect [him] from the massive, pervasive, and prejudicial publicity that attended his prosecution." Sheppard v. Maxwell, 384 U.S. 333, 335 (1966).

[19] National Football League Hall of Fame running back Orenthal James Simpson was tried and acquitted in connection with the brutal murder of his ex-wife Nicole Brown and her friend, Ron Goldman. GOLDFARB, *supra* note 5, at 11-15. The year-long trial, covered live by Court TV, became a "national obsession," culminating in a verdict viewed by approximately 150 million people. *See id.* ABC's Jeff Greenfield called the unprecedented excess of the media "the Chernobyl of American journalism." *Id.*

ated an insatiable thirst for information.[20]

This fascination with notorious trials has always engendered tension between the public's desire to know about, the press' right to report on, and the judiciary's duty to preserve the fairness of, court proceedings.[21] Some scholars argue that intense media coverage in the courtroom can jeopardize the fairness of a trial. Press advocates argue that the media act as a surrogate for the public, enhancing public understanding and fostering confidence in the legal system.[22] Therefore, the debate over media coverage of trials places two constitutional guarantees in seemingly direct competition:[23] the Sixth Amendment right to a fair trial[24] and the First Amendment right to freedom of the press.[25]

The advent of motion picture and television cameras added a whole new dimension to this age-old controversy.[26] While many of the deleterious effects of press coverage transcend all media formats, be it television, print, radio, or still

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[20] *See generally* GOLDFARB, *supra* note 5, at 3-11.

[21] *See* Jonathan M. Remshak, Note, *Truth, Justice, and the Media: An analysis of the Public Criminal Trial*, 6 SETON HALL CONST. L.J. 1083, 1083 (1996).

[22] *See* GOLDFARB, *supra* note 5, at 61-62.

[23] *See* MARJORIE COHN & DAVID DOW, CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE 11 (1998). The authors conclude that "[u]ltimately the debate over cameras in the courtroom boils down to a constitutional balancing act that tantalizes and torments legal scholars – the right of public access, on one side, and a defendant's right to a fair trial, on the other." *Id.*

[24] The full text of the Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

[25] The full text of the First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of Grievances." U.S. CONST. amend. I.

[26] *See* THALER, *supra* note 17, at 25.

photography, many argue that certain dangers attach only to, or are unfairly exacerbated by, the presence of television cameras in the courtroom.[27]

All forms of media potentially obscure public perception of the judicial system, dissuade prospective witnesses and victims from coming forward, poison a prospective jury pool, or destroy any hope of fairness at a re-trial.[28] Nonetheless, camera advocates are quick to point out that these extraneous influences can be effectively subverted through procedural safeguards such as rigorous *voir dire*, continuances, changes of venue, gag orders, sequestration, and exclusion of the media from pre-trial hearings.[29] This argument, however, ignores the real issue. The focus of this article is not the ability or inability of the courts to keep information which is available outside the courtroom from reaching the trial participants. Rather, this comment will examine how the very presence in the courtroom of an unnecessary variable, the photographic media, may serve to affect the performance of all participants in manners that render a fair trial impossible.

Technological advances have made the physical presence of bulky cameras,

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[27] *See* Taffiny L. Smith, *The Distortion of Criminal Trials Through Televised Proceedings*, 21 LAW & PSYCHOL. REV. 257, 260-62 (1997).

[28] *See* Estes v. Texas, 381 U.S. 532, 548 (1965). Writing for the majority, Justice Clark noted that "while some of the dangers [addressed by the Court] are present as well in newspaper coverage of any important trial, the circumstances and extraneous influences intruding upon the solemn decorum of court procedure in the televised trial are far more serious than in cases involving only newspaper coverage." *Id.*

[29] *See* GOLDFARB, *supra* note 5, at 25-35. *Voir dire* is a process which entitles counsel on both sides, either directly or through the judge, to question prospective jurors in an attempt to ascertain partiality. *See id.* Lawyers have a limited ability to "challenge," and thus exclude, certain potential jurors from serving based on their answers to these questions. *See id.* If, for example, it can be shown that a potential juror has been so influenced by pre-trial publicity that he has formed an "unalterable opinion" concerning the case, that juror can be challenged "for cause." *See id.* Continuances and changes in venue are generally attempts to quell some of the effects of media coverage on potential jurors by holding the trial removed in time or space, respectively, from the underlying events. *See id.* Thus the trial may be delayed until things "cool off," or may be moved to a location where the "presumed influence of the press and public feeling would be less likely." *Id.*

Gag orders, as they are primarily used today, involve an instruction from the judge directing lawyers, litigants, and court officers not to speak publicly concerning issues that could taint the prospective jury pool. *See* COHN & DOW, *supra* note 23, at 143-44. This technique is severely limited by First Amendment concerns and ordinarily cannot be utilized to inhibit members of the press from discussing court proceedings. *See id.* Sequestration involves isolating jurors, and thus controlling their exposure to publicity once the trial has begun. *See id.* Viewed as a "drastic remedy," sequestration is ordinarily used only in extremely high-profile cases where "saturation" of news coverage "cannot be avoided." *Id.* at 139.

snaked wires, and spotlights a non-issue.[30] However, as the Supreme Court recognized as early as 1965, the true danger lies not in the physical presence of the camera, but in the awareness of being televised and all that it represents.[31] Aside from the natural human tendency to be self-conscious in front of a camera, there exists the possibility that "neither the judge, prosecutor, defense counsel, jurors or witnesses would be able to go through trial without considering the effect of their conduct on the viewing public."[32] Remove the audience, and this consideration is not present.[33] Surely, the thought that "the whole world is watching me" has a different impact than the thought "the whole world will hear about this."

In a series of cases, discussed *infra*, involving both camera access and the access of the media in general, the Supreme Court has examined the relationship between the Sixth Amendment right to a "fair" and "public" trial and the First Amendment right of the public, and therefore the press, to attend criminal trials.[34] Although the Court has consistently identified the media's First Amendment right of access as an implicit, qualified right which must yield to the defendant's explicit, fundamental guarantee of a fair trial,[35] the burden has been

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[30] *See* THALER, *supra* note 17, at 115 (noting that "[a]dvances in television technology have made in-court cameras virtually inconspicuous").

[31] *See generally* Estes v. Texas, 381 U.S. 532 (1965).

[32] Estes, 381 U.S. at 566-67 (Warren, J., concurring).

[33] *See* Julie Gannon Shoop & Christo Lassiter, *Cameras in the Courtroom? A Fair Trial is at Stake,* TRIAL, Mar. 1, 1995. These commentators noted that "[t]he purpose of the court is not education or. . . spectacle or public entertainment, but justice. And, as every student of communication knows, when you change the audience, you change the proceeding. It's very difficult for participants in a courtroom who are speaking to a global audience of tens or maybe hundreds of millions of people not to be affected by that." *Id.* (quoting a National Public Radio interview with George Gerbner, University of Pennsylvania's Annenberg School for Communication, July 12, 1994).

[34] *See generally* GOLDFARB, *supra* note 5, at 47-55.

[35] *See Estes*, 381 U.S. at 539. Justice Clark wrote:

> [t]he free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings. While maximum freedom must be allowed the press in carrying out this function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process.

placed upon the accused to show that his rights will be violated if media access is granted.[36]

The Court's rule is problematic on two fronts. First, as between a fundamental constitutional guarantee and a limited, implicit right, the presumption should be in favor of the former. The defendant, who stands to lose the most, should be given a choice whether or not cameras will be allowed. Second, the very nature of the subtle effects potentially caused by the presence of cameras renders them unpredictable, undetectable, and immeasurable.[37] A defendant may never be able to demonstrate that unfairness will or has occurred. Thus the hurdle placed before a criminal defendant requires him to decisively measure the immeasurable before he can demonstrate unfairness.

Beyond the First Amendment arguments, camera proponents also highlight the educational benefits, the promotion of the public's confidence in the judicial system, and the positive effect of public scrutiny of government conduct.[38] However, even if television coverage in fact serves these broad societal goals, a matter which is itself the source of much debate,[39] it is of small comfort to a

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Id.

[36] *See* Chandler v. Florida, 449 U.S. 560, 575 (1981).

[37] *See Estes*, 381 U.S. at 544-45. Justice Clark wrote: "experience teaches us that there are numerous situations where [the use of television] might cause actual unfairness – some so subtle as to defy detection by the accused or control by the judge." *Id. See* also, Melissa A. Corbett, Note, Lights, Camera, Trial: Pursuit of Justice or the Emmy?, 26 SETON HALL L. REV. 1542, 1565-68 (1997) (noting that "[i]t is questionable. . .whether any of the studies conducted to test the influence of the camera are scientifically valid. The conclusions pronounced are speculative at best because the studies begin with the assumption that jurors can objectively determine whether they have been influenced by the camera.").

[38] *See* COHN & DOW, *supra* note 23, at 6-7.

[39] Advocates of televised trials argue that a camera essentially acts as a window into the courtroom, providing viewers with an "unfiltered" picture of the trial process that most closely replicates actual attendance. *See* COHN & DOW, *supra* note 23, at 10. *But see* Peter L. Arenella, *Televising High Profile Trials: Are We Better Off Pulling the Plug?*, 37 SANTA CLARA L. REV. 879, 893-901 (1997) (arguing that courtroom cameras do not accurately depict courtroom reality and in fact transform that reality in several respects); Corbett, *supra* note 37, at 1565-68 (arguing that the educational value of televised trials is undermined by the fact that only atypical, sensational cases are televised); Angelique M. Paul, Note, *Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About the Real Law?*, 58 OHIO ST. L.J. 655 (1997) (though Court TV has potential educational value, the network's current focus on sensational trials is misleading); Smith, *supra* note 27, at 260-62 ("[w]hat is produced on the screen is the end result of a series of technological modifications that are within the scope of the discretion of editors and the cameraman. . . . Space, camera angles, lighting juxtaposition, and editing are tools used by cameramen to affect how images appear on the television screen. In essence, the public's perception is manipulated prior to the coverage of a trial.");

criminal defendant whose trial has been prejudiced that society as a whole might have benefited from the exhibition. An individual's freedom is too great a price to pay for any educational gains that society might derive. Further, given a choice, not all criminal defendants and defense attorneys would exclude cameras from their trials.[40] Thus, by allowing criminal defendants to choose whether or not to allow cameras, many of the asserted benefits of coverage can be served while preserving the rights of those who choose not to permit broadcasting.

ACT I: THE CAST

It does not take a behavioral scientist to recognize that people change their behavior when placed in front of a camera.[41] Anyone who has ever viewed a home movie can attest to this. The fact that court proceedings may be broadcast to hundreds of millions of people can only heighten this effect.[42]

Many commentators have expressed concerns about the unique effects the presence of cameras in the courtroom might have on the various participants.[43]

Audrey Winograde, *Cameras in the Courtroom: Whose Right is it Anyway?*, 4 SW. J.L. & TRADE AM. 23, 31-33 (1997) (arguing that that trials are selected for broadcasting based on their entertainment, rather than educational, value).

[40] Many notorious criminal defendants have been either indifferent to television coverage or have actively sought it. In fact, Harry L. Washburn, who was the defendant in what is generally agreed to be the first televised trial, was apathetic to the idea. THALER, *supra* note 17, at xviii. When questioned whether he minded the coverage, Washburn replied, "Naw, let it go all over the world." *Id.* Other notable examples include Sante and Kenneth Kimes, the alleged mother and son "grifter" team accused of killing Manhattan socialite Irene Silverman. *See* Leonard Levitt, *No Cameras in Trial of Mother-Son Team,* NEWSDAY, Jan. 30, 2000 at A38 (attorneys for the defense filed a motion to have the trial opened to cameras, which was denied). O.J. Simpson's attorneys also requested camera access. *See* COHN & DOW, *supra* note 23, at 4 (defense attorney Robert Shapiro stated before trial that cameras would serve to ensure that "when Mr. Simpson, if he is acquitted, returns to society. . . the public [will have] a true perspective on what the real state of the evidence was in this case"). *Id.* (citing Transcript, 980 Hearing, *People v. Simpson,* No. BAO97211 (Cal. Super. Ct., Nov. 7, 1994)). Joel Steinberg, a New York attorney convicted in 1988 of murdering his six-year-old daughter, Lisa, in a high-profile domestic abuse case, also agreed to the presence of cameras. *See* THALER, *supra* note 17, at 130.

[41] *See* GOLDFARB, *supra* note 5, at 62. (defense attorneys have argued that "human nature and common sense make it clear that people act differently, posture differently, pose differently when they know they're on TV"). (citations and internal quotation marks omitted).

[42] *See* Shoop & Lassiter, *supra* note 33.

[43] *See, e.g.,* Arenella, *supra* note 39, at 901-05; Smith, *supra* note 27, at 260-63; Winograde, *supra* note 39, at 33-40.

Conversely, camera advocates argue that new technology has rendered broadcasting equipment so small and unobtrusive so as to minimize any disruptive experienced in the past.[44] However, as Supreme Court Chief Justice Warren pointed out in 1965, the very awareness that one is being televised gives rise to nervousness, tension, and an increased concern with appearances.[45] It is this human tendency to be self-conscious in front of cameras that may jeopardize a criminal defendant's right to a fair trial.[46]

As stated above, many of the arguments set forth in support of banning courtroom cameras would apply equally to all media. The sections below focus only on the particular unfairness inherent in the use of cameras and their likely effect on the various trial participants, including jurors, witnesses, judges, and counsel.[47]

A. JURORS:

In *Estes v. Texas*, discussed in detail *infra*, Justice Clark warned that juror distractions "are not caused solely by the physical presence of the camera and its telltale red lights. It is the awareness of the fact of telecasting that is felt by the juror throughout the trial."[48]

Only notorious cases will be televised.[49] Once a judge announces that cam-

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[44] *See* Winograde, *supra* note 39, at 36.

[45] *See* Estes v. Texas, 381 U.S. 532, 569-70 (1965) (Warren, J., concurring). Justice Warren stated that "[w]hether they do so consciously or subconsciously, all trial participants act differently in the presence of television cameras. And, even if all participants make a conscientious and studied effort to be unaffected by the presence of television, this effort in itself prevents them from giving their full attention to their proper functions at trial." *Id. See also* THALER, *supra* note 17, at 89. Thaler points out the danger that "as courtroom participants lose their anonymity in the face of the camera, they will perceive themselves differently and alter their behavior, knowing that their actions and testimony will extend far beyond the confines of the courtroom itself into the public realm and a broader historical record." *Id.*

[46] *See Estes*, 381 U.S. at 569-70 (Warren, J., concurring).

[47] *See* Gerald F. Uelmen, *The Trial as a Circus: Inherit the Wind*, 30 U.S.F. L. REV. 1221, 1222 ("the current movement to ban television cameras from courtrooms in the wake of the O.J. Simpson trial is based on the premise that the cameras are like Sirens of old, seducing the lawyers, witnesses and even the judge to play to the television audience, thus turning the trial into a 'circus.' Television cameras can have that effect. Witnesses may testify as if they're performing a gig. Lawyers may trade cheap shots to provide sound bites for the evening news. The judge may delay his most dramatic rulings until prime time.").

[48] *Estes*, 381 U.S. at 546.

[49] *See id.* at 545; *see also* Paul, *supra* note 39, at 668 (noting that Court TV, as a com-

eras will be permitted, the case becomes a "*cause celebre*" that captures the interest of the whole community.[50] This knowledge may so pervade jurors' minds so as to impair their ability to evaluate the evidence before them.[51] As jurors become preoccupied with the presence of the camera, their attention may be directed away from the testimony, thereby inhibiting their function in the trial process.[52]

In addition to juror distraction, a feeling of accountability may taint the deliberation process.[53] Particularly in jurisdictions that allow the jury itself to be filmed, jurors may be fearful of returning to their families and communities having rendered an unpopular verdict.[54]

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mercial venture, has a "partiality for televising sensational trials that will attract audiences, increase ratings, and generate advertising dollars"); Stephen P. Easton, *Whose Life is it Anyway?: A Proposal to Redistribute Some of the Economic Benefits of Cameras in the Courtroom From Broadcasters to Crime Victims*, 49 S.C. L. REV. 1, 19-27 (1997). Mr. Easton remarked that trials are evidently selected for broadcast based more on their entertainment value than any "idealistic or altruistic desire to educate television audiences." *Id.*

[50] *Estes*, 381 U.S. at 545.

[51] *See id.* at 546.

[52] *See* GOLDFARB, *supra* note 5, at 198 App. A, Table A-5. Indeed, while many states prohibit the filming of jurors in criminal trials, according to a 1996 survey the Radio and Television News Directors Association, 17 states provide only limited coverage, while the rules of 6 states have no such limitation. *Id.*

[53] *See Estes*, 381 U.S. at 545. The *Estes* majority observed that

> [w]here pretrial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them. If the community be hostile to an accused a televised juror, realizing that he must return to neighbors who saw the trial themselves, may be led not to hold the balance nice, clear and true between the State and the accused.

Id. (citations and internal quotation marks omitted).

[54] *See* COHN & DOW, *supra* note 23, at 37. In a 1994 memo to the House of Delegates, the Criminal Justice Section of the New York State Bar Association argued that "[c]ameras in the courtroom signal to the jury that the case is especially notorious, that its verdict will be highly publicized and that the jurors' decision will likely be scrutinized by their neighbors and friends. This not-so-subtle message influences jurors to accept general public perceptions of guilt – and thus vote to convict – and is far *less* likely to bolster jurors who harbor reasonable doubt." *Id.*; *see also* Winograde, *supra* note 39, at 35 (arguing that "jurors in televised cases cannot help but feel the pressure of knowing that their friends and neighbors are watching them, and they in turn may be judged if the community is hostile to an accused in a televised

B. WITNESSES:

Justice Clark described the potential impact on witnesses as "incalculable."[55] Although the media frenzy surrounding any highly publicized trial can deter potential witnesses from coming forward,[56] the problem may be exacerbated when the trial is to be televised.[57] Conversely, the presence of cameras may attract witnesses who are willing to "color or slant their testimony" for dramatic effect in the spotlight of national exposure.[58]

In addition, even the most subtle changes in a witness' mannerisms, inflections and body language can send confusing signals to the jury.[59] As the ultimate finders of fact, the jury determines the credibility of witnesses, and is entrusted with this grave responsibility, despite the lack of special knowledge or ability beyond their personal life experience. The accuracy of this potentially life-and-death determination may be skewed if a witness' delivery of testimony is altered in any way by the presence of the camera.

Critics emphasize that the camera may have a greater effect on lay witnesses than on experts, who are more likely to have more courtroom experience in front

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trial"). *Id.*

[55] *Estes,* 381 U.S. at 547. Justice Clark continued: "[s]ome may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for truth, as may a natural tendency toward overdramatization." *Id.* at 548.

[56] *See* Arenella, *supra* note 39, at 902-3. Professor Arenella points out that potential witnesses in high profile cases must consider that their testimony will be "scrutinized by talk show guests, legal pundits, and ordinary citizens glued to their sets." *Id.* at 903.

[57] *See* COHN & DOW, *supra* note 23, at 34 (noting that famed defense attorney and O.J. Simpson defense "dream team" member Barry Scheck recalls losing potential witnesses due to television coverage).

[58] COHN & DOW, *supra* note 23, at 34; *see also* Arenella, *supra* note 39, at 903 (arguing that "the courtroom camera increases the stakes exponentially for those [witnesses] who crave recognition. . . [who frequently will] delude themselves into thinking they have relevant information"); Smith, *supra* note 27, at 261 (noting that "[t]here is a risk that a witness will alter his story in order to appeal to the television audience instead of fulfilling his evidentiary role. His testimony becomes more important for its entertainment value which may cause embellishment of certain aspects of his testimony. . . for many witness, this may be their only opportunity to shine in the limelight").

[59] Winograde, *supra* note 39, at 37.

of cameras.[60] If this distinction distorts the jury's perception of credibility, such distortion could weigh in favor of the prosecution, who is more likely than a criminal defendant to use experts at trial.[61]

C. JUDGES:

Judges may be affected by the presence of cameras in several ways. The broadcasting of court proceedings to a vast television audience may affect a judge's demeanor, deliberations, and rulings.[62] Some scholars fear that judges, particularly those elected to the bench, might be inclined to use the televised trial as a "political weapon,"[63] offering "campaign speeches under the guise of legal rulings."[64] In a worst case scenario, a judge may be more concerned with his public image than with the conduct of a particular case. Less cynical is the argument that, because trial judges are given the sole discretion to supervise television coverage, this added responsibility may serve as a distraction, thereby diverting their attention from their primary function: seeing that the accused receives a fair trial.[65]

D. COUNSEL:

Television coverage may impair a defendant's Sixth Amendment right to effective assistance of counsel.[66] The concern is that lawyers may be more concerned with posturing and playing to the cameras than focusing on effective representation.[67] Defense lawyers may view coverage as an opportunity to advertise

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[60] *See* COHN & DOW, *supra* note 23, at 69.

[61] *See id.*

[62] *See* Winograde, *supra* note 39, at 39 (citing Christo Lassiter, *The Appearance of Justice: TV or Not TV – That is The Question*, 86 J. CRIM. L. & CRIMINOLOGY 928, 972 (1996)).

[63] Estes v. Texas, 381 U.S. 532, 548 (1965).

[64] Arenella, *supra* note 39, at 897.

[65] *See* Estes, 381 U.S. at 548.

[66] *See* COHN & DOW, *supra* note 23, at 35. The Sixth Amendment guarantees all criminal defendants the right "to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

[67] *See* Shoop & Lassiter, *supra* note 33. Professor Gerald F. Uelmen relates the following admonition of an unidentified commentator: "[t]he most dangerous place in a courtroom is to stand between [well-known defense attorney] Alan Dershowitz and a television camera."

their services;[68] prosecutors may see the trial as a forum to garner votes for political office.[69] Both sides might attempt to sway public opinion, thus infecting the jury pool in case of a retrial.[70] Attorneys could have more to gain by fueling the sensationalism of a trial than by effectively litigating it.[71] Moreover, the lure of instant celebrity may impact the decision whether the case will go to trial at all.[72]

ACT II: THE BIRTH OF A DEBATE

As early as 1917, the Illinois Supreme Court recommended an outright ban on still and newsreel photography in the state's courts.[73] Over the next several years, cameras enjoyed a mixed reception in courtrooms around the country.[74] The early rumblings of the debate exploded in 1935 as a result of the highly publicized trial of suspected Lindbergh baby kidnapper-murderer, Richard Bruno Hauptmann.[75] The utter chaos resulting from the intense media coverage both within and without the courtroom prompted observers to describe the scene as a "circus"[76] and a "Roman Holiday."[77]

Uelmen, *supra* note 47, at 1222.

[68] *See* Smith, *supra* note 27, at 262.

[69] *See* Arenella, *supra* note 39, at 903-04.

[70] *See id.*

[71] The exposure of a high-profile televised trial can be lucrative for attorneys. As Professor H. Patrick Furman points out, half of the lawyers in O.J. Simpson's trial got their own television shows after the trial. *See* H. Patrick Furman, *Publicity in High Profile Criminal Cases,* 10 ST. THOMAS L. REV. 507, 507 (1998).

[72] *See* COHN & DOW, *supra* note 23, at 35. The possibility exists that prosecutors will be less likely to negotiate a plea bargain in the face of the national exposure of a prospective televised trial. *Id.*

[73] *See* SUSANNA R. BARBER, NEWS CAMERAS IN THE COURTROOM: A FREE PRESS – FAIR TRIAL DEBATE 1 (1987) (citing *People v. Munday*, 117 N.E. 286, 300 (Ill. 1917)).

[74] *See* BARBER, *supra* note 73, at 1-2.

[75] *See* THALER, *supra* note 17, at 22. The child of aviator and national hero Charles Lindbergh and his wife Anne Morrow Lindbergh was kidnapped from their home in Hopewell, New Jersey. *See* GOLDFARB, *supra* note 5, at 8.

[76] *See* GOLDFARB, *supra* note 5, at 9.

The Flemington, New Jersey courtroom, designed to hold 260 persons, was jammed with "275 spectators and witnesses; 135 reporters, trial participants, and court personnel; and for a part of the proceedings a panel of 150 prospective jury members."[78] Photographers "clambered on the counsel's table and shoved their flashbulbs into the faces of witnesses,"[79] and a hidden newsreel camera captured events for movie audiences nationwide.[80] Outside the courthouse, an estimated 20,000 spectators and media personnel gathered, some "perching on window-sills, craning over balcony rails, and standing on tables to get a glimpse of the proceedings."[81] One commentator called the proceedings "perhaps the most spectacular and depressing example of improper publicity and professional misconduct ever presented to the people of the United States in a criminal trial."[82] When the melee had ended, Hauptmann was convicted and executed, but the debate over cameras in the courtroom was thrust to the forefront of American jurisprudence.

The fallout from the Hauptmann trial inspired swift action from the American Bar Association. Although many considered the entire media equally responsible for the disruption of the trial, the backlash was directed squarely at the photographic press.[83] In 1937, the House of Delegates adopted Judicial Canon 35, prohibiting the use of motion picture and still cameras in the courtroom.[84] A majority of state legislatures codified Canon 35 or similar provisions into law, and, with a few exceptions, cameras remained out of state courtrooms for over two decades.[85]

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[77] *See* THALER, *supra* note 17, at 22.

[78] *Id.* at 23.

[79] *Id.* at 22.

[80] *See id.* at 22.

[81] *Id.* at 23.

[82] *Id.*

[83] *See* COHN & DOW, *supra* note 23, at 17.

[84] As adopted on September 30, 1937, Judicial Canon 35 read: "Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted." *Id.*

[85] *See* THALER, *supra* note 17, at 25-26.

In 1944, Congress entered the fray by enacting Rule 53 of the Federal Rules of Criminal Procedure,[86] banning the taking of photographs or radio broadcasting in all criminal trials in federal courts, a proscription that remains in place today. In 1952, the A.B.A. amended Judicial Canon 35 to expressly include television cameras.[87] Federal Rule 53 was similarly updated in 1962.[88] During these years, most states continued to maintain a *per se* ban on broadcast coverage. However, despite this onslaught of anti-camera legislation, courts in several states began once again to experiment with television cameras in their courtrooms.[89]

ACT III. ENTER SUPREME COURT, STAGE LEFT

In 1965, the United States Supreme Court crystallized the debate between advocates and opponents of courtroom television coverage in *Estes v. Texas*.[90] Billy Sol Estes, a well-connected political figure,[91] was convicted of swindling an estimated $32 million in a scheme involving the sale of non-existent fertilizer tanks.[92] The trial, held in the Seventh Judicial District of Texas at Tyler, drew frenzied media attention reminiscent of the Hauptmann trial. After a change in venue, a two-day pretrial hearing was held in response to a defense motion to prevent radio and television broadcasting at trial.[93] The hearing was broadcast

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[86] Rule 53, entitled "Regulation of Conduct in the Court Room," provides: "[t]he taking if photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not permitted by the court." FED. R. CRIM. P. 53 (1999).

[87] *See* COHN & DOW, *supra* note 23, at 17-18.

[88] *See* BARBER, *supra* note 73, at 9.

[89] *See* COHN & DOW, *supra* note 23, at 18. Oklahoma, Kansas, Texas and Colorado began to allow limited coverage. *See id.* The 1953 Oklahoma City trial of Billy Eugene Manley is believed to be the first recorded by a television camera, while the first live television broadcast of a trial is generally agreed to have occurred in Waco, Texas in 1955. *See* BARBER, *supra* note 73, at 10-11.

[90] 381 U.S. 532 (1965).

[91] Estes was an acquaintance of then President Lyndon B. Johnson. *See* COHN & DOW, *supra* note 23, at 19.

[92] *See* THALER, *supra* note 17, at 27.

[93] *See Estes*, 381 U.S. at 535. The law in Texas, at the time one of the few states allowing limited television coverage of trials, left the broadcasting decision to the discretion of the trial judge. *See* COHN & DOW, *supra* note 23, at 19.

live on television and radio, and still photography was permitted.[94]

The result was a chaotic free-for-all leading to "considerable disruption" of the proceedings.[95] All seats in the courtroom were full and 30 observers stood in the aisles.[96] Photographers "roam[ed] at will through the courtroom,"[97] and no less than twelve cameramen operated amidst a "forest of equipment."[98] As Chief Justice Earl Warren later noted, even as defendant's counsel made his objection, one of the many photographers "wandered behind the judge's bench and snapped his picture."[99]

At the trial itself, the atmosphere was markedly more subdued. In an attempt to conceal the television and film cameras, a booth had been constructed at the rear of the courtroom, with only a small opening for the camera lenses.[100] Due to various restrictions imposed at the behest of defense counsel, only portions of the trial were broadcast.[101] Estes was ultimately convicted of swindling.[102]

The United States Supreme Court granted *certiorari* on the question of whether Estes had been denied due process by the televising of his trial.[103] In an opinion written by Justice Clark, the majority first dismissed claims that the

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[94] *See Estes*, 381 U.S. at 536.

[95] *See id.* Justice Clark described the scene: "at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. . . . The petitioner was subjected to characterization and minute electronic scrutiny to such an extent that at one point the photographers were found attempting to picture the page of the paper from which he was reading while sitting at the counsel table." *Id.* at 536-38.

[96] *See id.* at 535.

[97] *Id.* at 553 (Warren, C. J. concurring).

[98] *Id.* at 554 (Warren, C. J. concurring).

[99] *Id.* at 553 (Warren, C. J. concurring).

[100] *See Estes*, 381 U.S. at 537.

[101] *See id.* Only the prosecution's opening and closing arguments, and the reading of the verdict were covered live with sound. *See id.*

[102] *See id.* at 535.

[103] *See id.* at 534-35.

Sixth Amendment requirement of a "public trial"[104] confers a right upon the press to attend criminal trials. Noting that the purpose of the public trial is to "guarantee that the accused would be fairly dealt with and not unjustly condemned," the Court held that the right to a public trial belonged to the defendant alone.[105]

Turning to the First Amendment, the Court rejected the assertion that freedom of the press confers upon the media an unlimited right of access to criminal trials.[106] While recognizing that "maximum freedom" must be afforded to the press to fulfill its "important function in a democratic society," the court held that this right "must necessarily be subject to the maintenance of absolute fairness in the judicial process."[107] The majority reasoned that since "[c]ourt proceedings are held for the solemn purpose of endeavoring to ascertain truth which is the *sine qua non* of a fair trial,"[108] the "primary concern of all must be the proper administration of justice. . . ."[109] To subrogate the accused's right to a fair trial to the unrestricted freedom of the press, the majority concluded, would be to deny him due process: "the life or liberty of any individual in this land should not be put in jeopardy because of actions of any news media."[110]

The Court was not dissuaded by the State's assertions that the public's "right to know what goes on in the courts" compelled the admission of television cameras.[111] While recognizing the importance of this right, the Court held that it was

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[104] *See supra* note 24 and accompanying text (quoting the full language of the Sixth Amendment).

[105] *Estes*, 381 U.S. at 538-39. Justice Clark cited Justice Black's declaration in In re Oliver, that "[w]hatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." *Id.* at 539 (citing In re Oliver, 333 U.S. 257, 270 (1948)).

[106] *See id.* at 539.

[107] *Id.* Justice Clark described the free press as a "mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings." *Id.*

[108] *Id.* at 540.

[109] *Id.* (citations and internal quotation marks omitted).

[110] *Id.* (citations and internal quotation marks omitted).

[111] *Estes*, 381 U.S. at 541. The State cited Craig v. Harney, 331 U.S. 367, 374 (1947), arguing that the court has no power to "suppress, edit, or censor events, which transpire in the

satisfied by the fact that the courts are open to all journalists, including television reporters, who are "plainly free to report whatever occurs in open court through their respective media."[112] The majority reasoned that television reporters enjoy the same right to attend a trial as newspaper reporters or any other members of the public.[113] However, just as "[t]he news reporter is not permitted to bring his typewriter or printing press," the television reporter is prohibited from bringing the instruments of his trade.[114]

Having established the constitutional framework, the majority then considered the prejudicial impact of television cameras on the administration of a fair trial.[115] Significantly, despite the above-described chaos that pervaded the pretrial hearings, the Court focused not on the physically disruptive nature of the cameras and equipment, but rather on their potentially subconscious effects.[116]

Notwithstanding the State's contention that "psychological considerations are for psychologists, not courts,"[117] Justice Clark examined the potential effects on jurors, witnesses, judges, counsel, and the defendant. Referring to the use of television cameras as "the injection of an irrelevant factor into court proceedings," Justice Clark warned that "actual unfairness" could result, some "so subtle as to defy detection by the accused or control by the judge."[118] Justice Clark concluded that, because of the very nature of the inchoate and often subconscious prejudices that might occur as the result of the presence of the television cameras, a defendant asserting a due process violation need not demonstrate that

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proceedings before it." *Estes,* 381 U.S. at 541.

[112] *Id.* at 542.

[113] *See id.* at 541-42. In his concurrence, Chief Justice Warren commented: "[o]n entering [the] hallowed sanctuary [of an American courtroom], where the lives, liberty, and property of people are in jeopardy, television representatives have only the rights of the public, namely, to be present, to observe the proceedings, and thereafter, if they choose, to report them." *Id.* at 585-86 (Warren. C. J., concurring).

[114] *Id.* at 540.

[115] *See id.* at 542.

[116] *See id.* at 570 (Warren, C. J., concurring). The Chief Justice wrote: "the evil of televised trials. . . lies not in the noise and appearance of the cameras, but in the trial participants' awareness that they are being televised. To the extent that television has such an inevitable impact it undercuts the reliability of the trial process. *Id.*

[117] *Estes,* 381 U.S. at 541.

[118] *Id.* at 544-45.

actual prejudice had occurred.[119] While stating that "in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused," the Court pointed to past decisions which held that certain "procedure[s] employed by the State involve[] such a probability that prejudice will result that. . . [they] are deemed inherently lacking in due process." [120] Finding that the use of television cameras was one such procedure, the Court reversed Estes' conviction.[121]

Anticipating the re-emergence of the debate, Justice Clark predicted that the future was likely to bring both technological advances in broadcasting equipment as well as a society accustomed to the presence of television cameras.[122] These factors, Justice Clark speculated, could "bring about a change in the effect of telecasting upon the fairness of criminal trials."[123] The Justice further noted that "[w]hen the advances in these arts permit reporting by. . . television without [its] present hazards to a fair trial we will have another case."[124]

ACT IV. EXIT SUPREME COURT, STAGE RIGHT

The case anticipated by Justice Clark would come sixteen years later in the

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[119] *See id.* at 542-43.

[120] *Id.* at 542-543. The Court cited Rideau v. State of Louisiana, 373 U.S. 723 (1963) (holding that the televised broadcast of the defendant's confession inherently violated due process, without any showing of prejudice by the defendant) and Turner v. State of Louisiana, 379 U.S. 466 (1965) (holding that defendant had been denied the right to a fair trial by an impartial jury, despite any showing of actual prejudice, where two sheriff's deputies who were key witnesses for the prosecution fraternized with sequestered jurors outside the courtroom).

[121] *See Estes*, 381 U.S. at 544. Justice Clark wrote: "[t]elevision in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced." *Id.* Justice Harlan agreed: "[t]o be sure. . . distortions [created by the presence of television cameras] may produce no telltale signs, but in a highly publicized trial the danger of their presence is substantial, and their effects may be far more pervasive and deleterious than the physical disruptions which all concede would vitiate a conviction." *Id.* at 592 (Harlan, J., concurring).

[122] *See id.* at 551-52. In his concurring opinion, Justice Harlan predicted: "the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process." *Id.* at 595 (Harlan, J., concurring).

[123] *Id.* at 552.

[124] *Id.* at 540.

form of *Chandler v. Florida.*[125] In the years following *Estes*, there was some confusion as to whether the Court had indeed espoused a *per se* constitutional ban on the use of cameras in the courtroom.[126] This uncertainty resulted in a "chilling effect" on television coverage.[127] Moreover, the American Bar Association maintained its anti-camera stance when adopting the Code of Judicial Conduct in 1972 to replace the Canons of Judicial Ethics. Canon 35's proscriptions were embodied in Canon 3A(7)[128] of the new code with limited exceptions.[129]

In 1977, undeterred by the A.B.A.'s continued opposition, the Florida Supreme Court authorized an experimental one-year program that allowed television coverage of state court proceedings without the consent of the participants.[130] In 1978, other states followed when the Conference of State Chief Justices approved a resolution advocating state experimentation with television and radio coverage.[131] By the time *Chandler* reached the United States Supreme Court in 1981, twenty-nine states had adopted rules permitting some form of television camera access.[132]

The facts of *Chandler* had all the makings of a high-profile case, if not a made-for-TV movie. Two police officers stood accused of burglarizing a popular Miami Beach restaurant.[133] During the robbery, the officers communicated on their police-issued walkie-talkies.[134] The state's chief witness was an amateur

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[125] 449 U.S. 560 (1981).

[126] *See* THALER, *supra* note 17, at 29. For several years after the *Estes* decision, only Colorado allowed any electronic media in its courtrooms. *Id.* at 64.

[127] *See Id.* at 29.

[128] As adopted, Cannon 3(A)7 provided in part: "[a] judge should prohibit broadcasting, televising, recording or photographing in courtrooms and areas immediately adjacent thereto during sessions of the court. . . ." MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1972).

[129] *See* THALER, *supra* note 17, at 29. Canon 3A(7) allowed cameras only for "specific non-news purposes, such as making a court record, presenting evidence or producing educational materials for students." COHN & DOW, *supra* note 23, at 22.

[130] *See* COHN & DOW, *supra* note 23, at 22.

[131] *See* GOLDFARB, *supra* note 5, at 24.

[132] *See* THALER, *supra* note 17, at 31.

[133] *See* Chandler v. Florida, 449 U.S. 560, 567 (1981).

[134] *See id.*

radio operator who had inadvertently overheard and recorded their conversation.[135] Despite the defense's objection, a television camera was present for the chief witness' testimony and the state's closing argument.[136]

In contrast to the chaotic, circus-like environment of the *Estes* trial, the media coverage at issue in *Chandler* was much more reserved.[137] Only one television camera and one technician were allowed, and no artificial lighting, videotaping equipment, or lens changing was permitted at any time during the proceedings.[138] The defendants were convicted on all counts.[139] Reading *Estes* as announcing a *per se* constitutional ban on television coverage, the defendants/appellants argued that they had been denied due process.[140]

The U.S. Supreme Court granted *certiorari* on the broad question of "whether, consistent with constitutional guarantees, a state may provide for radio, television, and still photographic coverage of a criminal trial for public broadcast, notwithstanding the objection of the accused."[141] Writing for the unanimous court, Chief Justice Burger set out to dispel any remaining confusion as to whether *Estes* established a blanket prohibition on courtroom cameras. Analyzing the case's several opinions, the Chief Justice concluded that *Estes* did not stand for such a preclusion.[142]

Justice Clark announced the judgment in *Estes*. Chief Justice Warren, who was joined by Justice Douglas, and Justice Goldberg, wrote a concurring opinion. Justice Harlan, in a separate concurrence, provided the fifth vote supporting the judgment. The two dissenting opinions,[143] argued against an absolute ban. While expressing strong objections to the use of cameras, at one point calling it an "extremely unwise policy," the dissenters were nevertheless unwilling to "es-

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[135] *See id.*

[136] *See id.* at 568.

[137] *See id.*

[138] *See id.* at 566.

[139] *See Chandler*, 449 U.S. at 568.

[140] *See id.* at 570.

[141] *Id.* at 562.

[142] *Id.* at 574.

[143] Justice Stewart authored a dissent and was joined by Justices Black, Brennan, and White. The other, authored by Justice White, was joined by Justice Brennan.

calate this personal view into a *per se* constitutional rule."[144]

It is thus Justice Harlan's concurrence, noted Chief Justice Burger, that is "fundamental to an understanding of the ultimate holding in *Estes*."[145] While the opinions of Justice Clark (implicitly),[146] and of Chief Justice Warren (explicitly),[147] support a *per se* rule, Justice Harlan was more reticent. The Justice began his opinion with this caveat: "I concur in the opinion of the Court, subject, however, to the reservations and only to the extent indicated in this opinion."[148]

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[144] Estes v. Texas, 381 U.S. at 532, 601-02 (Stewart, J., dissenting).

[145] *Chandler*, 449 U.S. at 571.

[146] *See Estes*, 381 U.S. at 540. Justice Clark, after affirming that the ultimate purpose of court proceedings lies in the ascertainment of truth, explained:

> [o]ver the centuries Anglo-American courts have devised careful safeguards by rule and otherwise to protect and facilitate the performance of this high function. As a result, at this time those safeguards do not permit the televising and photographing of a criminal trial, save in two States and there only under restriction. The federal courts prohibit it by specific rule. *This is weighty evidence that our concepts of a fair trial do not tolerate such an indulgence.*

Id. (emphasis added).

[147] *See id.* at 552, 565. (Warren, C. J., concurring). Chief Justice Warren, "agree[ing]" with the Court that "the televising of criminal trials is inherently a denial of due process," wrote that "[t]he record in this case presents a vivid illustration of the inherent prejudice of televised criminal trials and supports our conclusion that this is the appropriate time to make a definite appraisal of television in the courtroom. . . . I believe that it violates the Sixth Amendment for federal courts and the Fourteenth Amendment for state courts to allow criminal trials to be televised to the public at large." *Id.* (Warren, C. J., concurring).

[148] *Id.* at 587 (Harlan, J., concurring). Justice Harlan concluded that

> there is no constitutional requirement that television be allowed in the courtroom, and, *at least as to a notorious criminal trial such as this one*, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment.

Id. (emphasis added). Justice Harlan saw the issue before the Court as limited to the constitutional implications of televising "heavily publicized and highly sensational" trials:

Justice Harlan elaborated by limiting his conclusion to the facts of the *Estes* trial and trials of comparable widespread notoriety.[149]

The importance of Justice Harlan's reservations was underscored by the brief postscript offered by Justice Brennan, who noted that "only four of the five Justices voting to reverse rest on the proposition that televised criminal trials are constitutionally infirm, whatever the circumstances. . . my Brother Harlan subscribes to a significantly less sweeping proposition."[150] Thus, Justice Brennan concluded, "today's decision is not a blanket constitutional prohibition against the televising of state criminal trials."[151]

Having concluded that *Estes* did not in fact create a *per se* ban on the use of television cameras in courtrooms, the *Chandler* Court then addressed the advisability of promulgating such a rule.[152] The Court declined to do so, holding that a state may, "consistent with constitutional guarantees. . . provide for radio, television, and still photographic coverage of a criminal trial for public broadcast, notwithstanding the objection of the accused."[153]

While acknowledging the potential for unfairness resulting from the use of cameras, the Court reasoned that "the risk of such prejudice does not warrant a constitutional ban on all broadcast coverage."[154] The Court departed further from *Estes* in holding that, in order to support a due process claim, a defendant would now be required to demonstrate actual prejudice resulting from the television coverage.[155]

In its analysis, the Court first noted that the technological advances in televi-

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> [w]hen the issue of television in a non-notorious trial is presented it may appear that no workable distinction can be drawn based on the type of case involved, or that the possibilities for prejudice, though less severe, are nonetheless of constitutional proportions. The resolution of those further questions should await an appropriate case. . . ."

Id. at 590 (Harlan, J., concurring).

[149] *See id.*

[150] *Id.* at 617 (Brennan, J., dissenting).

[151] *Id.* (Brennan, J., dissenting).

[152] *See* Chandler v. Florida, 449 U.S. 560, 574 (1981).

[153] *Id.* at 562.

[154] *Id.* at 575.

[155] *See id.*

sion equipment predicted in *Estes* had been realized, thus greatly alleviating the physical disruptions typical of earlier trial broadcasts. The Court then turned to the concern expressed in *Estes* that "the very presence of media cameras and recording devices at a trial inescapably gives rise to an adverse psychological impact on the participants in the trial."[156] While conceding that the issue is one in "sharp debate," the Court pointed out that "at present no one has been able to present empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect on [the judicial] process."[157] Absent such a showing, the Court held, a constitutional ban could not be justified.[158]

Though the lack of empirical data compelled the Court to reject a *per se* ban, the majority denied "ignor[ing] or discount[ing] the potential danger to the fairness of a trial in a particular case."[159] Rather, the Court asserted that the rights of an accused could be adequately safeguarded by the "range of curative devices [developed] to prevent publicity about a trial from infecting jury deliberations."[160] These devices included the appellate process and state guidelines governing television coverage. The Court concluded that "the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case – be it printed or broadcast – compromised the ability of the particular jury that heard the case to adjudicate fairly."[161] Alternatively, the Court provided that a defendant "might show that broadcast coverage of his particular case had an adverse impact on the trial participants sufficient to constitute

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[156] *Id.*

[157] *Id.* at 578-79. Indeed, the Court did concede that "[f]urther developments and more data are required before this issue can be finally resolved." *Id.* at 579 n.12.

[158] *See Chandler*, 449 U.S. at 575. The majority explained:

> [i]f it could be demonstrated that the mere presence of photographic and recording equipment and the knowledge that the event would be broadcast invariably and uniformly affected the conduct of participants so as to impair fundamental fairness, our task would be simple; prohibition of broadcast coverage of trials would be required.

Id.

[159] *Id.* at 582. The Court noted that although "dangers lurk in [Florida's program], as in most experiments, [ ]unless we were to conclude that television coverage under all conditions is prohibited by the Constitution, the states must be free to experiment." *Id.*

[160] *Id.* at 574.

[161] *Id.* at 575.

a denial of due process."[162] The Court further noted that Florida's experimental camera access program, in particular, included special rules concerning certain witnesses, placed affirmative obligations on the trial judge to maintain fairness, and provided for consideration of the defendant's objections to television coverage.[163]

Turning to the facts before it, the Court held that the defendants had failed to meet their burden of demonstrating that television coverage had in any way denied them their rights to a fair trial.[164] Accordingly, their convictions were upheld.[165]

One year later, no longer able to stem the tide of media and technology, the ABA again revised Canon 3A(7).[166] While not endorsing the practice, the new rule provided for the use of courtroom television cameras subject to the discretion and supervision of the state's highest appellate court.[167] With the ABA no longer a barrier, a total of 43 states had adopted some form of program allowing broadcasting of their trial or appellate courts by July 1, 1984. Therefore, television had gained a permanent foothold in state courtrooms.

ACT V. THE FREE PRESS – FAIR TRIAL DEBATE

While *Estes* and *Chandler* specifically addressed the issue of cameras in the courtroom, another line of cases served to fuel both sides of the free press – fair trial debate. Prompted by media organizations, the Court undertook to decide whether the Sixth or First Amendments implicitly grant the press a right of access to criminal trials.

Echoing Justice Clark's assertion in *Estes*, the Court in *Gannett Co. v. DePasquale*[168] affirmed that the Sixth Amendment right to a "public trial" belongs to the criminal defendant alone.[169] Writing for the majority, Justice Stewart rec-

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[162] *Id.* at 581.

[163] *See id.* at 577.

[164] *See Chandler*, 449 U.S. at 581.

[165] *See id.* at 583.

[166] *See* THALER, *supra* note 17, at 31.

[167] *See* BARBER, *supra* note 73, at 19.

[168] 443 U.S. 368 (1979).

[169] *See id.* at 379-81.

ognized that the public has a strong interest in the enforcement of the Sixth Amendment.[170] Nevertheless, the Court held that this "strong societal interest in public trials" does not create a constitutional right on the part of the public (and therefore the press) to attend criminal trials.[171] The Court, however, did not address whether the First Amendment creates such a right.[172]

The following year, the Court had an opportunity to address the First Amendment issue in *Richmond Newspapers, Inc. v. Virginia*.[173] Citing English and American historical precedent, the majority recognized a presumptive openness of criminal trials, despite the lack of an explicit guarantee in the text of the Constitution.[174] Chief Justice Burger explained that the "explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could. . . be foreclosed arbitrarily."[175] The Court held that the right to attend criminal trials is "implicit. . . in the First Amendment," and, "[a]bsent an overriding interest articulated in the findings, the trial of a criminal case must be open to the public."[176] The Court thus established a limited, conditional right of access for the press and the public to criminal trials.

Two years later, in *Globe Newspaper Co. v. Superior Court*,[177] the Court defined the scope of the rule set forth in *Richmond Newspapers*. Striking down a

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[170] *See id.* at 383.

[171] *See id.* at 391. Although the facts of *Gannett* involved a pre-trial hearing, the Court squarely held that "members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal *trials*." *Id.* (emphasis added).

[172] *See id.* at 392. The First Amendment issue was not before the Court: "[w]e need not decide in the abstract [ ] whether there is [a First and Fourteenth Amendment right to attend criminal trials]. For even assuming, *arguendo*, that the First and Fourteenth Amendments may guarantee such access in some situations, a question we do not decide, this putative right was given all appropriate deference by the state *nisi prius* court in the present case." *Id.*

[173] 448 U.S. 555 (1980) (invalidating trial court's closure of criminal trial to the press and public). The "narrow question" before the Court, as articulated by Chief Justice Burger, was "whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution." *Id.* at 558.

[174] *See id.* at 569.

[175] *Id.* at 576-77.

[176] *Id.* at 580-81.

[177] 457 U.S. 596 (1982).

Massachusetts statute barring public access to criminal trials involving minor victims of sexual crimes, the Court found that such *per se* closures violate the First Amendment.[178] Writing for the majority, Justice Brennan held that the denial of public access to a criminal trial must be "necessitated by a compelling governmental interest" and "narrowly tailored to serve that interest."[179] This case-by-case analysis, Justice Brennan asserted, "ensures that the constitutional right of press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest."[180]

Finally, in *Press-Enterprise Co. v. Superior Court*,[181] the Court articulated the burden that must be met by defendants before a proceeding could be closed to the public and therefore the press. In order to justify such closure, the majority concluded that the defendant must demonstrate first the existence of a "substantial probability that [his] right to a fair trial [would] be prejudiced by publicity that closure would prevent,"[182] and second, that "reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."[183] Thus, any such closure must be "narrowly tailored to serve" the defendant's interest in a fair trial.[184]

Read together with *Estes* and *Chandler*, this line of cases is generally regarded as establishing the constitutional bases for permitting courtroom television coverage over the objection of the defense.[185] Although the First Amendment confers only an "implicit" and "qualified" right of access on the press, courts are presumptively open to the media. Accordingly, it appears the First Amendment has "edged out" the Sixth Amendment.[186] Absent a specifically articulated showing by the defendant of a substantial probability that the presence

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[178] *See id.* at 602.

[179] *Id.* at 607.

[180] *Id.* at 609.

[181] 478 U.S. 1 (1986) (invalidating trial court's denials of press access to defendant's preliminary hearing and transcripts thereof).

[182] *Id.* at 14.

[183] *Id.*

[184] *Id.* at 15.

[185] *See* Winograde, *supra* note 39, at 27.

[186] *Id.*

of a camera will prejudice his right to a fair trial, the Constitution will not bar the televising of state criminal trials.

CONCLUSION

Whether Justice Teresi's decision to allow television coverage of the Diallo case will ultimately lead to the permanent return of cameras to New York's courtrooms remains to be seen. The question is, should it?

Not only would such a change be detrimental to the fair administration of justice, but it is also not constitutionally required. Admittedly, there are benefits to using cameras in the courtroom. However, strict application of the *Chandler / Press-Enterprise* rule in the context of television coverage goes too far, essentially establishing a *per se* inclusion. Although the "authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other,"[187] when these rights are in direct conflict, one must prevail. The right of the media to attend criminal trials has long been recognized as a limited one, subject to the concerns of a fair trial.[188] In contrast, the right to a fair trial has been called "the most fundamental of all freedoms."[189] As between the fundamental rights of the accused and the qualified right of the press, the presumption should rest with the former.

Trials are not held to educate or entertain. As Justice Clark stated, "[c]ourt proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial."[190] It is no argument to say that the dangers of television coverage cannot be quantified. The very nature of their effect does not lend itself to objective or subjective detection, let alone quantification.[191] As Chief Justice Warren observed in *Estes*, "[t]he prejudice of television may be so subtle that it escapes the ordinary methods of proof, but it would

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[187] Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 561 (1976).

[188] *See* COHN & DOW, *supra* note 23, at 38. The authors explained that "[t]he public's right of access to the courtroom, guaranteed by the First Amendment, may be curbed only where there is a compelling interest at stake. When a fair trial is jeopardized, that is a compelling interest." *Id.*

[189] Estes v. Texas, 381 U.S. 532, 540 (1965).

[190] *Id.*

[191] For a discussion of the limitations of techniques that have been utilized to attempt such measurement, see GOLDFARB, *supra* note 5, at 96-123.

gradually erode our fundamental conception of trial."[192] The lack of empirical evidence does not decisively disprove the existence of prejudice. How likely is it that a witness or juror will, or even can, give truthful answers to a questionnaire asking "were you intimidated," or "was your decision-making affected," or "did the presence of a camera alter your mannerisms, inflections, and/or body language in any way?"[193]

Even the majority in *Chandler* recognized that "[i]nherent in electronic coverage of a trial is a risk that the very awareness by the accused of the coverage and the contemplated broadcast may adversely affect the conduct of the participants and the fairness of the trial, yet leave no evidence of how the conduct or the trial's fairness was affected."[194] Yet, in almost the same breath, the Court placed the onus on the aggrieved defendant to prove the effect of that nonexistent evidence "with specificity."[195] It is difficult to envision a circumstance where a criminal defendant will ever be ably to meet this burden. In the interests of fairness, a defendant should possess the ability to "veto" the broadcasting of his trial.

Finally, despite Justice Teresi's assertion, New York's ban on cameras in the courtroom is not unconstitutional. While *Chandler* stands for the proposition that television coverage is not constitutionally *prohibited*, the Supreme Court has never held that such coverage is constitutionally *mandated*.[196] Similarly, the Court's analyses in the *Press-Enterprise* line of cases should not be read to render anti-camera statutes such as New York's Rule 52 unconstitutional.[197] Rather, *Press-Enterprise* and its progeny merely stand for the proposition that an *outright closure* of court proceedings to the press and public will only be upheld if the justification advanced by the state meets a strict scrutiny analysis.[198]

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[192] *See Estes*, 381 U.S. at 578 (Warren J., concurring)

[193] Studies on the effects of courtroom cameras are based primarily on surveys and questionnaires of trial participants. *See generally* GOLDFARB, *supra* note 5, at 64-84.

[194] Chandler v. Florida, 449 U.S. 560, 577 (1981).

[195] *Id.* at 581.

[196] *See* U.S. v. Hastings, 695 F.2d 1278, 1280 (11th Cir. 1983), *cert. denied*, 461 U.S. 931 (1983).

[197] *See supra* note 6 and accompanying text (quoting the full language of New York's Civil Rights Law §52).

[198] *See Hastings*, 695 F.2d 1278 at 1282 (construing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) and Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)). Although *Hastings* was decided before *Press-Enterprise* itself, the decision in *Press-Enterprise* does not change the reasoning of *Hastings*. The Supreme Court's holding in *Press-*

In contrast to the closures addressed in the *Press-Enterprise* cases, Rule 52 "do[es] not absolutely bar the public and the press from any portion of a criminal trial; rather, [it] merely pos[es] a restriction on the *manner* of the media's news gathering activity."[199] Thus, the strict scrutiny analysis mandated by *Press-Enterprise* is not applicable to Rule 52 and similar proscriptions.[200]

It has long been recognized that a reasonable restriction on the "time, place, and manner" of conduct protected by the First Amendment is not subject to the same level of scrutiny as an absolute bar to such conduct.[201] Under Rule 52, the

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Enterprise, like those of *Richmond Newspapers* and *Globe Newspaper*, specifically addressed the "closure" of court proceedings to the public and press. *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 13-14 (1986) (holding that "[court] proceedings cannot be closed unless. . . closure is essential to preserve higher values and is narrowly tailored to serve that interest") (citations and internal quotation marks omitted).

[199] *Hastings*, 695 U.S. at 1282 (upholding Federal Rule 53's *per se* prohibition of electronic media coverage of federal criminal trials). *See supra* note 86 and accompanying text (quoting the full language of Rule 53 of the Federal Rules of Criminal Procedure).

[200] *See Hastings*, 695 U.S. at 1280. The *Hastings* court found the *Richmond Newspapers, Inc.* and *Globe Newspaper Co.* decisions "neither. . . dispositive or even genuinely at issue" in the case before it. *Id.*

[201] *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding a New Hampshire statute requiring procurement of a license to hold a parade or procession on public streets). In dicta, both *Globe Newspaper Co.* and *Richmond Newpapers, Inc.* specifically distinguished "time, place, and manner" restrictions on courtroom access from instances of outright closures. *See Globe Newspaper Co.*, 457 U.S. at 607 n.17 ("[o]f course, limitations on the right of access that resemble 'time, place, and manner' restrictions on protected speech. . . would not be subject to such strict scrutiny") (citations omitted). *See also Richmond Newspapers, Inc.*, 448 U.S. at 581 n.18. Chief Justice Burger explained:

> our holding today does not mean that the first amendment rights of the public and representatives of the press are absolute. Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets. . . so may a trial judge , in the interest of the fair administration of justice, impose reasonable limitations on access to a trial. The question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge. . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.

Id. (citations and internal question marks omitted).

In a concurring opinion, Justice Stewart agreed, in almost identical language, that

> [j]ust as a legislature may impose reasonable time, place, and manner restrictions upon

media are not barred from attending criminal trials. They are simply not allowed to bring with them certain instruments that may affect the fairness of the proceedings. Such "manner" restrictions are constitutional if they are "reasonable", they "promote[] significant governmental interests," and they do not "unwarrantedly abridge. . . the opportunities for the communication of thought."[202]

New York's ban on cameras in the courtroom withstands the appropriate scrutiny. First, the government certainly has a significant interest in preserving the fairness of criminal trials.[203] Second, in light of the potential deleterious effects on the fundamental rights of a criminal defendants, not permitting the televising of proceedings cannot be said to constitute an "unwarranted abridgement" of the media's opportunity to communicate thought. Members of the press are "free to attend the entire trial, and to report whatever they observe."[204] Thus, Rule 52's restriction on the manner of press coverage is reasonable and should not be repealed.

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the exercise of First Amendment freedoms, so may a trial judge impose reasonable limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public.

Id. at 600 (Stewart, J., concurring).

[202] *Hastings*, 695 U.S. at 1282 (citations and internal quotation marks omitted).

[203] *See id.* at 1283. Indeed, "time, place, and manner" restrictions on access to public places have been upheld based on far less compelling governmental objectives, such as the "free flow of traffic." *See Richmond Newspapers, Inc.*, 448 U.S. at 580-81 n.18 (citing *Cox*,, 312 U.S. at 569). Comparing the interest asserted in *Cox* to that which would justify a limitation on courtroom access, the Court correctly asserted that it is "far more important that trial be conducted in a quiet and orderly setting than it is to preserve that atmosphere on city streets." *Id.*

[204] *Hastings*, 695 F.2d 1278 at 1282 (construing Federal Rule 53's *per se* prohibition of electronic media coverage of federal criminal trials).