LIGHTS, CAMERA, TRIAL: PURSUIT OF JUSTICE OR THE EMMY?

The argument in favor of permitting the broadcast media[1] access to the courtroom is based upon the idea that the right of the public to attend courtroom trials,[2] a right implicitly granted by the First Amendment,[3] extends to the admittance of the "thirteenth juror"[4]—the camera. While the proponents of this argument correctly contend that the First Amendment protects the public's "right to know"[5] by allowing public access to both criminal and civil[6] trials, this constitutional right does not require that the broadcast media be given access to the courtroom.[7] Although the

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[1] At all times within this Comment the "broadcast media," unless otherwise specified, refers to the segment of the media that provides live television coverage.

[2] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (holding that the right of the public to attend criminal trials is guaranteed by the First Amendment).

[3] See U.S. CONST. amend. I, which 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." *Id.*

[4] *See* Kathleen M. Krygier, Comment, *The Thirteenth Juror: Electronic Media's Struggle to Enter State and Federal Courtrooms*, 3 COMM. LAW CONSPECTUS 71, 83 (1995) (arguing that a camera present in a courtroom becomes a "thirteenth juror," and thus ensures the administration of justice); *see also* Roger Cossack, *What You See Is Not Always What You Get: Thoughts on the O.J. Trial and the Camera*, 14 J. MARSHALL J. COMPUTER & INFO. L. 555, 559 (1996) (proffering that the camera in the O.J. Simpson murder trial allowed home viewers to each become a "thirteenth juror").

[5] *See Richmond*, 448 U.S. at 580. The basis for the public's right to know argument is that the First Amendment assures that public discussion of governmental affairs is informed and free of unnecessary restraints on access to information held by the government. *See id.* at 575-76. If freedom of speech is to be meaningful, the government may not control or restrict the flow of information to the public unnecessarily. *See id.* Although the right of access to criminal trials is not explicitly mentioned in the First Amendment, *see id.* at 579, it is deemed to be implicitly granted so that the public is able to exercise fully other fundamental rights, such as freedom of speech and of the press, which are explicitly enumerated in the Constitution. *See id.* at 576-77.

[6] *See* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984) (holding that the public has a First Amendment right of access to civil proceedings); Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 23 (2d Cir. 1984) (agreeing with *Publicker* that there is a right of access to civil proceedings under the First Amendment); *see also Richmond*, 448 U.S. at 580 n.17 (noting that civil trials historically have been presumptively open to the public).

[7] *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 610 (1978) (concluding that "the guarantee of a public trial . . . confers no special benefit on the

United States Supreme Court recognized that individual states may allow camera access to its courtrooms under certain conditions, the Court did not endorse camera access.[8] Rather, the Supreme Court found no constitutional basis for an absolute ban on camera access to the courtroom.[9]

Today, a great discrepancy exists between camera access at the state level and camera access at the federal level.[10] Presently, forty-seven states permit camera access of some kind.[11] Conversely, the federal

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press") (citation omitted). Moreover, it is clear that the right to attend a trial does not necessarily mean that there is a right to watch it on television. *See id.* (finding that "there is no constitutional right" of the public to have any part of a trial broadcast live); *Westmoreland*, 752 F.2d at 23 (proffering that the Cable News Network (CNN) had no right to televise a trial even where both the plaintiff and the defendant had consented to the broadcast because Supreme Court precedent "articulate[s] a right to *attend* trials, not a right to view them on a television screen"); United States v. Hastings, 695 F.2d 1278, 1280 (11th Cir. 1983) (rejecting the media's "tortured reading" of Supreme Court access cases and contending that "just because television coverage is not constitutionally prohibited does not mean that television coverage is constitutionally mandated").

[8] *See* Chandler v. Florida, 449 U.S. 560, 582 (1981). In permitting the states to allow cameras in their courtrooms, the *Chandler* Court relied heavily on the fact that the Florida system at issue had in place "safeguards" protecting a defendant from prejudice and allowing a defendant the opportunity to object to the broadcast. *See id.* at 576-77. Moreover, the Court noted that the guidelines promulgated by the Florida Supreme Court specified the type of equipment that could be used at the trial as well as the manner in which it could be used. *See id.* at 566. The Florida guidelines specified that: (1) only one camera and one camera operator are allowed in the courtroom; (2) the media is required to share coverage when more than one organization seeks trial coverage; (3) artificial lighting is not allowed; (4) the media equipment must remain in a fixed location and not be moved during the trial; (5) videotaping equipment must be stationed away from the tribunal; (6) the changing of film, videotape, and lenses is prohibited while court is in session; (7) the conferences between lawyers, lawyers and clients, and lawyers and the judge are not allowed to be recorded; (8) the judge has the sole discretion to exclude media coverage of certain witnesses; and (9) filming the jury is prohibited. *See id.* In addition, the Florida rules provided that a judge may forbid camera coverage if convinced such coverage will injure a defendant's right to a fair trial. *See id.*

[9] *See id.* at 582. The Court so held because no definitive proof could be found that the defendant's right to a fair trial had been compromised. *See id.* Hence, the Court found that it could not interfere with the state's decision to allow camera access absent a showing of prejudice to a defendant. *See id.* at 582-83; *see also Westmoreland*, 752 F.2d at 21 (finding that although the *Chandler* Court did not hold that states are precluded from experimenting with televised proceedings, the Court "nevertheless did not endow the media with substantive rights qua media").

[10] *See* Krygier, *supra* note 4, at 81-82 (discussing the discrepancy between state and federal court access rules and arguing for greater access in federal trial courts). This disparity is narrowing as a result of the March 1996 decision of the United States Judicial Conference to allow cameras in the federal courts at the appellate level. See *infra* note 12 for discussion of the Judicial Conference's decision.

[11] *See* Todd Piccus, Comment, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 TEX. L. REV. 1053, 1064 (1993). Today, three states, Indiana, Mississippi, and South Dakota, in addition to the District of Columbia, do not allow broadcast media access to their courtrooms. *See id.* n.63; *see also* Saundra Torry, *In Some Courtrooms, Check Those Cameras at the Door*, WASH. POST,

courts have held steadfast and have resisted the admittance of the camera, at least at the trial level.[12] The notorious trials of Orenthal James (O.J.) Simpson,[13] Susan Smith,[14] Richard Allen Davis,[15] Timothy McVeigh,[16]

Oct. 23, 1995, (Wash. Bus.), at 7 (listing states that do not allow camera access). After the Supreme Court's decision in *Chandler*, Connecticut, Hawaii, Illinois, Kansas, Kentucky, Maine, Michigan, Nebraska, North Carolina, Texas, Vermont, and Wyoming permitted the broadcast media access to their courtrooms on a permanent basis. *See* Piccus, *supra*, at 1063 & n.58. Other states authorized the use of the camera in their courtrooms on an experimental basis after *Chandler*. *See id.* at 1063 & n.59.

[12] *See* Joan Biskupic, *A New Eye on Federal Courts: Committee Votes to Permit Cameras in Appeals Hearings*, WASH. POST, March 13, 1996, at A12. The Judicial Conference, headed by United States Supreme Court Chief Justice Rehnquist, voted 14 to 12 to allow cameras in the federal courts at the appellate level. *See id.* The members of the Conference voiced their opposition to camera access at the trial level. *See id.* Hence, the federal court system continues to ban cameras from the courtroom at the trial level. *See id.*

Recently, however, certain circuits have accepted the invitation from the Judicial Conference and now allow the broadcast media access to appellate proceedings. *See* Joe Gyan Jr., *N.O. Court Bans All Cameras, Tape Recorders in Courtrooms*, SUN. ADVOC. (Baton Rouge) Oct. 27, 1996, at 3B. Following the decision by the Judicial Conference the Second Circuit and the Ninth Circuit instituted experimental pilot programs, while most other federal appeal courts, such as the Fifth Circuit, have chosen to continue a closed-door policy. *See id.* The decision by the Judicial Conference to allow cameras at the federal appellate level is recognized as a "small but significant step" towards allowing camera access generally to the federal courts. *See* Biskupic, *supra*, at A12; *see also* Linda Greenhouse, *Reversing Course, Judicial Panel Allows Television in Appeals Courts*, N.Y. TIMES, Mar. 13, 1996, at A13.

[13] *See* Christine Spolar, *Judge Keeps Camera For Simpson Trial: Ito Says He Will Decide on Coverage of Pretrial Hearings on a Case-by-Case Basis*, WASH. POST, Nov. 8, 1994, at A14 (reporting Judge Lance Ito's belief that the one stationary camera would not jeopardize O.J. Simpson's right to a fair trial); Torry, *supra* note 11, at 7 (contending that the O.J. trial "stoked the debate" on the constitutionality of cameras in the courtroom). Interestingly, Judge Ito made the decision to permit camera access even though he had received 12,500 letters from citizens who "wanted the plug pulled" verses 800 letters from citizens who favored camera coverage. *See* Spolar, *supra*, at A14.

For purposes of this Comment, *People v. Orenthal James Simpson*, the criminal trial of O.J. Simpson, will hereinafter be referred to as the "O.J. trial," and should not be confused with the subsequent civil trial that was not televised.

[14] *See TV Barred in Drowning Case*, WASH. POST, July 1, 1995, at A2 (relaying Judge William Howard's contention that any broadcast of the trial of Susan Smith for the murder of her two sons would interfere with due process and pose a risk to the trial proceedings in general).

[15] *See* Jill Smolowe, *TV Cameras on Trial: The Unseemly Simpson Spectacle Provokes a Backlash Against Televised Court Proceedings*, TIME, July 24, 1995, at 38 (reporting Superior Court Judge Lawrence Antolini's vow that "[n]othing like the O.J. Simpson case is going to happen in my courtroom" during the trial of Davis for the alleged abduction and murder of Polly Klaas).

[16] *See Victims Can Watch Okla. Trial on TV*, STAR LEDGER, July 16, 1996, at 4. United States District Court Judge Richard Matsch decided to permit closed-circuit television coverage of the trial of Nichols and McVeigh for the bombing of Oklahoma City, Oklahoma in 1996, defending this access by noting that it was the only way in which victims and friends could view the trial. *See id.* The trial was televised from Judge

Jesse Timmendequas,[17] and Theodore Kaczynski[18] have sparked serious debate among scholars, lawyers, judges, and the broadcast media on the issue of access and the discrepancy between the federal and state courts.

Part I of this Comment sets forth the history of camera access to the courtroom and outlines the current state of such access at the state and federal levels. Part II highlights the possible repercussions and impacts of the camera on various courtroom participants. Part III addresses the argument that camera access is an issue of First Amendment concern and posits that the public's right to know is adequately protected by current day media coverage without the intrusion of the camera. Finally, Part IV concludes that the faults of the present day system allow litigants to suffer potential undue injury because of the imposition of the camera.

I. THE STATUS OF CAMERA ACCESS TO STATE AND FEDERAL COURTS TODAY

There are only three states that do not allow some form of camera access to the courtroom.[19] The majority of the states that allow camera

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Matsch's courtroom in Denver, Colorado and shown in a courtroom in Oklahoma City. *See id.*

The judge's decision came as a response to an anti-terrorism bill enacted in April 1996. *See id.* The law mandates closed-circuit coverage of trials in federal courts that have been moved in excess of 350 miles so that victims and survivors may follow the proceedings. *See id.* This law was passed by Congress after Judge Matsch had the venue changed for the trial from Oklahoma City to Denver, a considerable distance for interested parties to have to travel in order to view the proceedings. *See id.* Defense attorneys opposed the admission of the camera, contending that the law passed by Congress was unconstitutional because it violated the separation of powers doctrine by instructing the judiciary on camera coverage. *See id.* The judge rejected this constitutional argument, but acknowledged counsel's assertion that the camera might be disruptive. *See id.* As such, only one camera, unattended by a cameraman, was permitted at the trial. *See id.* The camera was mounted in a single place with the judge maintaining the ability to turn it off by a control mechanism within his reach. *See id.; see also Limited TV for Bombing Trial*, WASH. POST, July 16, 1996, at A2.

[17] *See* Tom Hester, *Judge Limits TV at Trial in Megan Murder*, STAR LEDGER, Mar. 8, 1997, at 1. Superior Court Judge Andrew B. Hamilton, after "intense consideration," decided to ban gavel to gavel coverage of the trial of Jesse Timmendequas, and allow Court TV to film only the opening and closing statements by the attorneys and the reading of the verdict. *See id.* Timmendequas was charged with the murder of Megan Kanka, whose death spurred the passage of a sex offender notification law commonly known as "Megan's Law." *See id.*

[18] *See Unabom Trial Won't Be Made for TV*, STAR LEDGER, July 5, 1996, at 3 (reporting that the trial of Kaczynski, the alleged "Unabomber," will not be televised, because United States District Judge Garland E. Burrell is expected to keep a tight hold on the case, thus confirming commentators' opinions that federal judges are known to refuse to allow their courtrooms to be run by cameras).

[19] *See supra* note 11 and accompanying text. Only three states ban the camera from their courtrooms:

(1) Indiana

A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

IND. CODE OF JUDICIAL CONDUCT, Canon 3(B)(13) (West 1996).

(2) Mississippi

A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

MISS. CODE OF JUDICIAL CONDUCT, Canon 3(A)(7) (West 1996).

(3) South Dakota

A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

access do, however, impose specific limitations on such access.[20] As a perceived "backlash" to the O.J. trial,[21] many of these states reconsid-

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;
(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:
(i) the means of recording will not distract participants or impair the dignity of the proceedings;
(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;
(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and
(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

S.D. CODE OF JUDICIAL CONDUCT, Canon 3(B)(12) (Michie 1995).

The highest courts of the states resisting the admittance of the camera have consistently upheld the ban as being constitutionally sound, even in the face of media pressure. *See* Brown v. State, 546 N.E.2d 839, 842 (Ind. 1989) (denying defendant's request for broadcast coverage of his trial because Indiana's Canon 3(A)(7) of the Code of Judicial Conduct prohibits a judge from allowing recording, television, or photography in the courtroom); Associated Press v. Bost, 656 So. 2d 113, 114, 117 (Miss. 1995) (holding that there is "no constitutional right to have testimony recorded and broadcast" and contending that the camera will continue to be banned until the "benefits and ramifications" of its presence have been extensively researched). To date, the media has not challenged the rule of South Dakota severely limiting camera access.

[20] *See* Torry, *supra* note 11, at 7. Although forty-seven states permit access, only twenty-three of those states do not have specific limitations and allow "routine" coverage. *See id.* Conversely, most states impose certain restrictions. *See id.* For example, Maryland allows cameras in civil and appellate proceedings but not in criminal proceedings. *See id.*; MD. CODE ANN., Crimes and Punishments § 467B (1996) (prohibiting extended camera coverage of criminal proceedings in the trial courts).

Moreover, Virginia allows the camera to view both civil and criminal proceedings, but takes care to bar the medium from all proceedings involving sex offenses or issues of a sensitive nature. *See* Torry, *supra* note 11, at 7; see also VA. CODE ANN. § 19.2-266 (Michie 1995), which provides that

A court may solely in its discretion permit the taking of photographs in the courtroom during the process of judicial proceedings and the broadcasting of judicial proceedings by radio or television and the use of electronic or photographic means for the perpetuation of the record of parts thereof in criminal and in civil cases, but only in accordance with the rules set forth hereunder.
1. The presiding judge shall at all times have authority to prohibit, interrupt or terminate electronic media and still photography coverage of public judicial proceedings. The presiding judge shall advise the parties of such coverage in advance of the proceedings and shall allow the parties to object thereto. For good cause shown, the presiding judge may prohibit coverage in any case and may restrict coverage as he deems appropriate to meet the ends of justice.
2. Coverage of the following types of judicial proceedings shall be prohibited: adoption proceedings, juvenile proceedings, child custody proceedings, divorce proceedings, temporary and permanent spousal support pro-

ered the issue and called for either a ban on the camera or, at a minimum, stricter regulation.[22] Other states seemingly question whether the O.J. trial had any impact on the issue of camera access at all.[23]

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ceedings, proceedings concerning sexual offenses, proceedings for the hearing of motions to suppress evidence, proceedings involving trade secrets, and in camera proceedings.

3. Coverage of the following categories of witnesses shall be prohibited: police informants, minors, undercover agents and victims and families of victims of sexual offenses.

4. Coverage of jurors shall be prohibited expressly at any stage of a judicial proceeding, including that portion of a proceeding during which a jury is selected. The judge shall inform all potential jurors at the beginning of the jury selection process of this prohibition.

5. To protect the attorney-client privilege and the right to counsel, there shall be no recording or broadcast of sound from such conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, between adverse counsel, or between counsel and the presiding judge held at the bench or in chambers.

VA. CODE ANN. § 19.2-266 (Michie 1995).

[21] *See* Smolowe, *supra* note 15, at 38 (noting that the "backlash" against cameras in the courtroom has less to do with constitutional concerns and more to do with the real consequences of the Simpson case, including "the media stalking of witnesses, the glut of pop books, [and] the glamorization of commentators"); Torry, *supra* note 11, at 7 (discussing that as a "backlash" to the O.J. trial other judges have closed their courtroom doors to notable proceedings). *But see* Ted Gest, *Revolution? We're Still Waiting*, U.S. NEWS & WORLD REP., Sept. 23, 1996, at 78 (arguing that any "revolution" has yet to arrive, but noting that certain minor changes in the law have been observed since the beginning of the O.J. trial, namely: (1) the new California law allowing the admission of certain hearsay evidence, such as the diaries of Nicole Brown Simpson, which would, in the past, have been excluded; (2) the ABA's implementation of a "mentor team" for those participants involved in high visibility trials; and (3) the new caution exercised by judges involved in televised trials); James C. Goodale, *Cameras, the Courts and the Missing 'Simpson' Backlash*, N.Y. L.J., Aug. 2, 1996, at 3 (arguing that the O.J. trial did not result in a "backlash" to the system because the case would have been a media circus regardless of the presence of the camera); Marla Hart, CHI. TRI., *You, the Jury: Court TV Brings the Courtroom Home*, Aug. 4, 1996, at 5 (relaying assertion of Steven Brill, founder of Court TV, that the expected "backlash" of the O.J. trial only lasted a few weeks and courtroom cameras are here to stay).

[22] *See, e.g.*, Maura Dolan, *State Panel Puts Partial Ban on Court Cameras*, L.A. TIMES, May 18, 1996, at 1. Although the judicial council for the State of California rejected a broad ban on the camera, it approved a new rule forbidding the camera to broadcast jury selection, courtroom spectators, sidebar conferences, or discussion by attorneys and clients at counsel tables. *See id.* The new rule also requires a judge to consider a number of factors when deciding whether to permit television broadcast of a trial, including "the security and dignity of the court, the importance of promoting public access to the judicial system, the privacy rights of participants and the potential impact on the jury." *Id.* The council's decision to restrict the camera quashed an earlier measure endorsed in April 1996 by the governing board of the State Bar of California granting judges the discretion to permit cameras in their courtrooms, citing as a defense a belief that the public has a right to know the business of the courts. *See* Ken Hoover, *Klass Case Puts Focus on Camera Ban*, S.F. CHRON., Apr. 22, 1996, at A17. The new rule would seemingly have changed the way the O.J. trial was broadcast, because the televised reactions of the relatives of Nicole Brown Simpson and Ronald Goldman to various

The federal courts, conversely, have consistently contended that the right to attend a trial and report its contents is distinguishable from the right of the press to broadcast the actual proceedings.[24] Therefore, the federal courts have not prompted Congress to amend the federal rule that prohibits photography during court proceedings.[25] The authority for the federal courts' position is readily traceable to Supreme Court decisions that have interpreted the constitutional right of access somewhat nar-

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pieces of evidence and the whispered discussions between O.J. and his attorneys would today be prohibited. *See id.*; Shelley Emling, *Bill Will Let Judges Bar Cameras*, ATLANTA J. & CONST., Mar. 16, 1996, at C5. The Georgia Senate unanimously passed legislation in March 1996 that allows a judge to ban cameras from his or her courtroom. *See id.* The new bill requires a judge to consider certain factors before allowing the broadcast media access, including the impact on due process, the integrity of the court, and any objections voiced by lawyers and witnesses on either side. *See id.* Following the rule of many other states, cameras had previously been allowed in Georgia state courts unless there was a "compelling" reason to ban them. *See id.; see also* Stephen A. Metz, Comment, *Justice Through the Eye of a Camera: Cameras in the Courtrooms in the United States, Canada, England and Scotland*, 14 DICK. J. INT'L L. 673, 695 (1996) (noting that as a direct result of the O.J. trial the California Supreme Court enacted a new rule of professional conduct, which imposes substantial penalties upon any lawyer who makes a public statement about a proceeding in which the attorney is participating or has participated when the lawyer knows or reasonably should know that there is a substantial likelihood of the statement materially prejudicing the proceeding).

[23] *See* S.L. Alexander, *The Impact of* California v. Simpson *on Cameras in the Courtroom*, 79 JUDICATURE 169 (1996). Two days after the reading of the *Simpson* verdict surveys were sent out to individuals in all states, Washington, D.C., and Guam who the Society of Professional Journalists listed as voluntary local experts on media access. *See id.* at 169-70. The surveyed group included lawyers, reporters, and editors. *See id.* at 169. The survey contained the following three questions designed to determine the impact of the O.J. trial:

> 1) As of this date, do you know of any change in the status of courtroom camera usage in your state since November 1994?
> 2) As of this date, do you know of any activity (i.e., bills introduced in legislature, statements by members of bar or judiciary) suggesting there may soon be a change in status of courtroom camera usage in your state?
> 3) Do you feel camera coverage of *California v. Simpson* has had any effect on the status of courtroom camera usage in your state?

Id. at 170.

New Jersey, New York, and Pennsylvania, states that were considering extending allowable camera coverage, all reported that there was no substantial impact from the case. *See id.* at 171; Gest, *supra* note 21, at 78 (highlighting states that have sustained no impact from the O.J. trial).

[24] *See* Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 23 (2d Cir. 1984) (contending that it is a "long leap . . . between a public right under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised"); United States v. Hastings, 695 F.2d 1278, 1280 (11th Cir. 1983) (promulgating that the press "misconceives" the right of access when it argues that this right extends to televising trials).

[25] *See* FED. R. CRIM. P. 53 (providing that "the taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court").

rowly, holding that there is no guaranteed right of the media to televise trials.[26] The Court's posture rests on the theory that the prohibition of the camera neither inhibits the press from reporting events nor prevents the public from receiving information because the dissemination of the news is readily accomplished through alternative media efforts.[27]

Despite the Supreme Court findings on the matter, the demand for camera access to federal judicial proceedings has nonetheless continued. In March 1996, the Judicial Conference of the United States[28] (the Judicial Conference) relented somewhat to the pressures of the media in deciding that a federal appellate judge may allow camera access to the federal courtroom at his or her discretion.[29] This decision reversed a long-standing rule unequivocally barring the camera from the federal courtroom.[30] The access, however, is severely limited; only federal appellate

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[26] *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 610 (1978) (finding that the right to a public trial is satisfied by the ability of the press and public to attend and report trial observations without resort to live broadcast); Estes v. Texas, 381 U.S. 532, 589 (1965) (Harlan, J., concurring) (acknowledging the educational value of television but contending that the argument lacks constitutional dimension because the "rights to print and speak . . . do not embody an independent right to bring the mechanical facilities of the broadcasting . . . into the courtroom").

[27] *See* Richmond Newspapers, Inc. v. Virginia , 448 U.S. 555, 572-73 (1980) (holding that the media, in its role as "surrogate" for the public, adequately protects the public's right of access).

[28] *See* Anton R. Valukas et al., *Cameras in the Courtroom: An Overview*, 13 COMM. LAW. 1, 19 & n.15 (1995). The Judicial Conference of the United States is the rulemaking body for the federal court system, less the Supreme Court. *See id.* The Judicial Conference is headed by Supreme Court Chief Justice William Rehnquist and comprised of 26 appellate and district court judges. *See id.*

[29] *See* Biskupic, *supra* note 12, at A12; Greenhouse, *supra* note 12, at A13; *see also* Gail Diane Cox, *Lights! Camera! Justice? TV Changed Politics and Football. What Will It Do to Our System of Justice?*, NAT'L L.J., Jan. 29, 1996, at A1 (discussing the decided turn of the federal courts from the absolute ban on the camera and predicting possible repercussions to a society in which all trials may be televised). The author predicts that networks may use trials as a form of cheap programming with many opportunities for commercial breaks. *See id.* at A21. Additionally, the author opines that there may be a "dumbing down" or "popularization" of legal jargon as newscasters subconsciously conform their speech to that of their viewers. *See id.*

[30] *See* Henry J. Reske, *No More Cameras in Federal Courts*, A.B.A. J., Nov. 1994, at 28. In September 1994 the Judicial Conference voted two to one to reinstate the prohibition of the broadcast media from all civil cases in federal court and voted unanimously to continue to ban the media from all criminal cases in federal court. *See id.* The decision came after the Judicial Conference had addressed the number of challenges made by the media to the closed-door policy of the federal courts by instituting an experimental pilot program allowing cameras in federal courts during civil trials. *See id.* A three-year experiment was conducted, and a survey was subsequently taken in an attempt to determine what affect, if any, the camera had on the participants in the courtroom. *See id.* The results of the study seemed to indicate that the presence of the camera had little or no effect upon the trial participants. *See id.* The Judicial Conference, however, voted to uphold the ban on the camera. *See id.* In support of its decision, the Judicial Conference

judges, and not federal trial judges, have the discretion to admit the camera.[31] The reaction of the federal courts to the Judicial Conference's decision to allow appellate courts to permit broadcast media access has varied, with some circuits choosing not to exercise the option and others welcoming the change.[32] The United States Court of Appeals for the Second Circuit has gone to the extreme and permitted the televising of trials in the federal civil courts in New York.[33] This defied the call from the Judicial Conference for federal appellate courts to annul any local state rules permitting camera coverage at the federal trial level.[34] The United States Court of Appeals for the Third Circuit, the appellate trib-

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highlighted potential negative effects that the camera may have upon jurors and witnesses. *See id.* Indeed, the survey results indicated that 37% of judges questioned believed that witnesses were made nervous by the camera to some extent. *See id.* Hence, the Judicial Conference was concerned that even if only a minimum number of participants were affected, a defendant's right to a fair trial could be compromised. *See id.* Therefore, the Judicial Conference did not approve an amendment to Rule 53 of the Federal Rules of Criminal Procedure, which would have allowed for camera access in the courtroom under guidelines to be promulgated by the Judicial Conference. *See id.*

[31] See *supra* note 12 for a discussion of camera access at the federal appellate level.

[32] *See* Gyan, *supra* note 12, at 3B. The United States Court of Appeals for the Fifth Circuit formally initiated a total ban on television cameras, as well as still photography and tape recorders. *See id.* The First, Seventh, Tenth, and Eleventh Circuits have also declined the invitation by the Judicial Conference to allow the media access in this fashion. *See id.* The Second and Ninth Circuits, which were the only appellate courts to take part in the pilot program conducted by the Judicial Conference, have approved a rule permitting cameras in certain cases. *See id.*

[33] *See infra* note 34.

[34] *See* Deborah Pines, *Circuit Council Leaves Camera Rule Intact*, N.Y. L.J., June 14, 1996, at 1. Two federal judges sitting in New York construed a local rule to allow cameras in their courtrooms at the trial level. *See id.* The Second Circuit, however, took no steps to disturb or amend the local New York rule that allowed for such construction. *See id.* That rule, local Rule 7, had been interpreted by Judge Robert Ward of the United States District Court for the Southern District as allowing camera access into his courtroom. *See id.* at 4; Marisol A. v. Giuliani, 929 F. Supp. 660, 662 (S.D.N.Y. 1996) (permitting televising of oral arguments under New York local Rule 7). Judge Robert W. Sweet, also of the Southern District, followed the lead of Judge Ward, and construed local Rule 7 to permit camera coverage of arguments in a proposed class-action suit against Victoria's Secret Catalogue. *See* Katzman v. Victoria's Secret Catalog, 923 F. Supp. 580, 584 (S.D.N.Y. 1996); Deborah Pines, *TV Cameras Allowed in U.S. Court*, N.Y. L.J., May 1, 1996, at 1 (reporting Judge Sweet's contention that "[t]welve years after the *Westmoreland* decision and twenty-two years after the *Estes* holding" advances in technology preclude a continued bar to the "presumptive First Amendment right" to view televised trials). Other New York judges have followed suit, yet the United States Court of Appeals for the Second Circuit has remained silent on the issue. *See* Hamilton v. Accu-Tek, 942 F. Supp. 136, 137 (E.D.N.Y. 1996) (recognizing the Judicial Conference's resolution but nonetheless agreeing with the holdings of *Marisol* and *Katzman* that the Conference's authority is only persuasive and New York local Rule 7 controls); Sigmon v. Parker Chapin Flattau & Klimpl, 937 F. Supp. 335, 336 (S.D.N.Y. 1996) (same).

une that hears appeals from the United States District Court for the District of New Jersey, is still considering the matter.[35]

A. Constitutional History

Two seminal cases, *Estes v. Texas*[36] and *Chandler v. Florida*,[37] outline the controversy surrounding, and the basis for permitting, camera access to the courtroom. In *Estes*, the Supreme Court held that televising the trial deprived the defendant of his constitutional right to due process.[38] Sixteen years later, however, the *Chandler* Court decided that its decision in *Estes* did not mandate an absolute ban on camera access.[39] Because concrete evidence of prejudice to the defendant attributable to the presence of the camera was lacking, the *Chandler* Court held that the state's camera access program passed constitutional muster.[40] Accordingly, since the decision in *Chandler*, many states have instituted various programs allowing some form of camera access to their courtrooms.[41]

1. Estes v. Texas

The *Estes* Court balanced a defendant's right to a fair trial by an impartial jury under the Sixth Amendment[42] against the public's right to

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[35] *See* Rocco Cammarere, *Cameras in Courtrooms? No, by Narrow Margin*, 5 N.J. LAW. 831 (1996). A survey taken of 116 New Jersey trial attorneys revealed that 53.5% voted against the presence of the camera in the courtroom. *See id.* Further, as a result of the "furor" of the O.J. trial, New Jersey state courts are taking a second look at allowing cameras into their courtrooms, even though cameras have been permitted since 1986. *See id.* The United States Court of Appeals for the Third Circuit, which hears appeals from the United States District Court for the District of New Jersey, is undecided on the question of access. *See id.*

[36] 381 U.S. 532 (1965). The defendant in *Estes* was indicted by a grand jury on charges of "swindling" as a result of his fraudulent attempt to induce several farmers to purchase fictitious property. *See id.* at 534 & n.1. During the two day pre-trial hearing on the defendant's motion to close the courtroom to the press, "massive publicity" occurred, amounting to more than 10 volumes of newspaper articles. *See id.* at 535. The hearing was carried by live television and radio coverage, involving 12 cameramen and causing "considerable disruption." *See id.* at 536. During the defendant's actual trial, however, the camera was confined to a booth located in the back of the courtroom. *See id.* at 537.

[37] 449 U.S. 560 (1981).

[38] *See Estes*, 381 U.S. at 535.

[39] *See Chandler*, 449 U.S. at 574.

[40] *See id.* at 582-83.

[41] *See* Piccus, *supra* note 11, at 1063 & n.58 (listing states that have enacted rules allowing camera access at some level since the *Chandler* decision).

[42] See U.S. CONST. amend. VI, which provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State. . . ." *Id.*

know under the First Amendment.[43] The Court found that a defendant's right to a trial unprejudiced by a camera outweighed the competing interest of the public in viewing a broadcast courtroom proceeding.[44] Writing for the majority, Justice Clark determined that the press, through its role as representative of the public, fully protected the public's right to know guaranteed by the First Amendment.[45] Although the Court conceded that the press had been a great "catalyst" in motivating public interest in governmental affairs and exposing corruption, the majority held that freedom of the press was not absolute.[46] Thus, the Court opined that the extent of freedom afforded the press must be subject to overriding considerations of fairness in judicial procedure.[47]

2. Chandler v. Florida

After *Estes*, the issue of camera access to the courtroom remained relatively dormant until 1981 when the Supreme Court revisited the issue in *Chandler v. Florida*.[48] Because the *Chandler* decision is hailed by many camera advocates as endorsing the presence of the camera,[49] it is important to note that although the Supreme Court confirmed that the public holds a constitutional right of access to trials, the Court noted that the right does not mandate the admittance of the camera.[50]

In addressing the question of whether cameras should be banned, the *Chandler* Court noted that the "task would be simple" if the camera conclusively affected the conduct of the parties so as to injure a defendant's right to a fair trial.[51] Highlighting that the only empirical evidence analyzing the impact was "limited" and "nonscientific,"[52] the Court found

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[43] See U.S. CONST. amend. I, which 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." *Id. See also Estes*, 381 U.S. at 539.

[44] *See id.* at 544-45. The Court focused on the fact that the guarantee of a public trial under the Sixth Amendment was a guarantee for the benefit of the defendant, not the public. *See id.* at 538. Additionally, the Court found that there was no right under the United States Constitution that required that courtroom proceedings to be televised. *See id.* at 540.

[45] *See id.* at 541-42.

[46] *See id.* at 539.

[47] *See id.*

[48] 449 U.S. 560 (1981).

[49] *See* Piccus, *supra* note 11, at 1063.

[50] *See Chandler*, 449 U.S. at 574; *see also* Nixon v. Warner Communications, Inc., 435 U.S. 589, 610 (1978) (dismissing the argument that there is a constitutional right to view televised court proceedings).

[51] *See Chandler*, 449 U.S. at 575.

[52] *See id.* at 576 n.11.

that the "general issue of the psychological impact of broadcast coverage upon the participants in a trial . . . is still a subject of sharp debate."[53] The Court noted, however, the absence of any unimpeachable empirical data supporting the argument that the camera adversely impacts a defendant's right to a fair trial.[54] Conversely, the Court acknowledged that Florida, the state in which Chandler was tried, had established certain safeguards and guidelines to protect a defendant from possible prejudice.[55] Therefore, the Court concluded that the Florida program did not offend the Constitution because none of the evils and dangers feared by the *Estes* Court existed.[56]

3. Significance of Estes and Chandler today

The Supreme Court found the camera acceptable in the *Chandler* case because the publicity surrounding the trial did not rise to the level of what the Court termed a "Yankee Stadium" atmosphere.[57] Camera pro-

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[53] *Id.* at 578.

[54] *See id.* at 576 n.11.

[55] *See id.* at 566, 576-77; *supra* note 8 (listing the guidelines implemented at that time by the Florida courts).

[56] *See Chandler*, 449 U.S. at 582-83. The Court noted the *Estes* Court's concern that the presence of the camera would create a "Yankee Stadium" atmosphere in the courtroom as well as expose the jury to "sensational" coverage but found no such atmosphere in the case at bar. *See id.* at 582.

[57] *See id.* Conversely, the Court found that the notoriety suffered by the defendant in *Estes* because of the broadcast media was a violation of the defendant's constitutional rights. *See Estes*, 381 U.S. at 534-35.

Notably, before this time, camera and radio access had been banned entirely as a result of the trial of Bruno Hauptmann in 1935 for the kidnapping of the Lindbergh baby. *See* State v. Hauptmann, 180 A. 809 (N.J. 1935). Hauptmann was convicted of first degree murder. *See id.* at 813. The trial, however, through the use of radio, was broadcast and therefore gained "spectacular publicity." *See id.* at 828. Consequently, after the trial the A.B.A. evaluated the presence of the camera and its impact in the courtroom, and accordingly drafted Canon 35, later to be amended to Canon 3A(7), which banned both photographing and broadcasting in the courtroom. *See* Valukas, *supra* note 28, at 18. *See generally* Ruth Ann Strickland & Richter H. Moore, Jr., *Cameras in State Courts: A Historical Perspective*, 78 JUDICATURE 128, 130 (1994) (discussing the evolution of Canon 35). The bar association of each state enacted its own version of the A.B.A.'s model Canon 3A(7). *See* David Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 799 n.110 (1993); *infra* note 62 (quoting entire text of Canon 3A(7)). The Florida rule at issue in *Chandler*, set forth below, reflected a liberal interpretation of Canon 3A(7):

> Subject at all times to the authority of the presiding judge to (I) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in

ponents, however, seemingly view the *Chandler* decision as giving a "green light" to cameras at the state court level, provided there are certain safeguards to protect a defendant's rights.[58] Ironically, the *Chandler* opinion is instead more helpful to an argument opposing admittance of the camera in certain circumstances today.[59] In the opinion, the Court specifically noted that whether television coverage of future trials would result in a "barbaric perversion of decent justice" was a question that was yet to be determined.[60] As such, the Court concluded that, keeping in mind the evolutionary nature of state experimentation, a risk of prejudice to any defendant always exists and should be ascertained on a case-by-case basis.[61] Today, the varying access rules among state courts, exacerbated by the media's prerogative to televise proceedings selectively, ignore the *Chandler* Court's concern regarding appropriate court decorum, and thus pose a significant risk of prejudice to any defendant in court.

B. State Access Rules

Most states have adopted or incorporated into their court rules Canon 3 of the ABA Code of Judicial Conduct,[62] which allows a judge in

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> accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

In re Petition of Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 781 (Fla. 1979). Notably, the present version of A.B.A. Code of Judicial Conduct Canon 3 omits any discussion of the camera in the court. *See infra* note 62 for further discussion of the latest version of Canon 3.

[58] *See* Piccus, *supra* note 11, at 1063 & nn.58 & 59 (listing number of states that implemented either permanent or experimental programs permitting camera access after the *Chandler* decision).

[59] *See Chandler*, 449 U.S. at 582 (finding camera access constitutional as it did not instigate the type of "circus" environment feared by the *Estes* Court); Paul Gewirtz, *Victims & Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 886 (1995) (contending that the O.J. trial exhibited the essence of a "circus," or gaudy, public entertainment); Charles Musser, *Film Truth, Documentary and the Law: Justice at the Margins*, 30 U.S.F. L. REV. 963, 984 (1996) (arguing that the O.J. trial was transformed by the media into a "circus"); Gerald F. Uelman, *The Trial as a Circus: Inherit the Wind*, 30 U.S.F. L. REV. 1221, 1222 (1996) (discussing the camera's capacity to tempt trial participants to play to it and consequently turn the trial into a "circus"); Michael Gartner, *O.J. Circus? Blame TV*, USA TODAY, Oct. 3, 1995, at 11A; Steven Keeva, *Circus-Like Trial Colors Expectation*, A.B.A. J., Nov. 1995, at 48C.

[60] *See Chandler*, 449 U.S. at 580-81.

[61] *See id.* at 582

[62] See *supra* note 57 for a brief history of Canon 3. Canon 3A(7) of the 1972 version of the ABA Code prohibited the presence of the camera, and was amended in 1982 to permit camera access as follows:

> A judge should prohibit broadcasting, televising, recording or photographing in courtrooms and areas immediately adjacent thereto during sessions of court, or recesses between sessions, except that under rules prescribed by a supervising appellate court or other appropriate authority, a

his or her discretion to permit the broadcast of a courtroom proceeding.[63] The amount of discretion permitted by a presiding judge varies for each state, as do the restrictions that each state court employs.[64] Some state courts allow a participant to object to the presence of the camera at the proceeding, but reserve the ultimate decision regarding access to the judge's discretion.[65] A minority of state courts find that any objection to the camera by the defendant is sufficient cause for its exclusion.[66] Other state courts, conversely, impose a high evidentiary burden on a defendant, requiring a demonstration of actual harm before barring the broad-

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> judge may authorize broadcasting, televising, recording or photographing of judicial proceedings in courtrooms and areas immediately adjacent thereto consistent with the right of the parties to a fair trial and subject to express conditions, limitations, and guidelines which allow such coverage in a manner that will be unobtrusive, will not distract the trial participants, and will not otherwise interfere with the administration of justice.

See ABA CODE OF JUDICIAL CONDUCT Canon 3A(7) (1982); Strickland & Moore, *supra* note 57, at 133. This section of the Code has been highly influential, and most states incorporated verbatim Canon 3A(7) into their own codes of judicial conduct to allow a judge in his or her discretion to permit camera access. *See id.*

Notably, in 1990 the ABA amended Canon 3 considerably, entirely deleting the section relating to cameras in the courts. *See* ABA CODE OF JUDICIAL CONDUCT Canon 3 (1990). The change was instigated by a belief that the question of camera access is not closely related to judicial ethics and is more properly addressed by the administrative rules adopted by each state. *See* ABA Standing Comm. on Ethics and Professional Responsibility, Report to the House of Delegates, Aug. 1990.

[63] *See* ABA CODE OF JUDICIAL CONDUCT Canon 3A(7) (1982).

[64] See *supra* note 20 for a discussion of variations in state rules. See generally Christo Lassiter, *TV or Not TV — Statutory Appendix*, 86 J. CRIM. L. & CRIMINOLOGY 1002 (1996), for a comprehensive list of the rules and statutory guidelines employed by different states.

[65] *See* Lassiter, *supra* note 64, at 1007 n.24 (listing the states—Arizona, Colorado, Connecticut, Hawaii, Iowa, Missouri, Nebraska, New Jersey, New York, Rhode Island, Vermont, West Virginia, Wisconsin, and Wyoming—that permit a defendant to object to the presence of the camera but allow the presiding judge to make the final decision regarding broadcast coverage).

[66] *See id.* n.23 (highlighting the states—Alabama, Arkansas, Indiana, Maryland, Minnesota, Mississippi, Oklahoma, Pennsylvania, Tennessee, Texas, and Utah—that do not allow camera access in absence of a defendant's consent). For a discussion advocating that rules of professional conduct, rather than rules of camera access, should protect the rights of a defendant, see Metz, *supra* note 22, at 695-96. Metz contends that "it is important to realize that whether to allow cameras in the courtroom should be based more on what laws and policies are in place to protect the rights of the accused versus the general public opinion." *Id.* at 700. Metz argues that instead of instituting an absolute ban on camera coverage, the better approach would be for states to enact additional rules preventing lawyers from behaving "in a manner that they know or should know will materially prejudice the proceedings." *Id.* In this connection, Metz cites as an example the new California rule regarding attorney professional conduct that was enacted as a direct result of the O.J. trial. *See id.* at 695-96 & n.180; *supra* note 22 (delineating the rule). As long as there are rules that protect the rights of the defendant, like the new California rule, and are strictly enforced, Metz contends that a camera may be present during court proceedings. *See* Metz, *supra* note 22, at 696, 701.

cast media from the proceeding.[67] Demonstration of actual harm by a defendant is rarely successful, however, because of the typical absence of tangible evidence of prejudice or bias.[68]

II. IMPACTS OF THE CAMERA ON COURTROOM PARTICIPANTS

A. Judicial Discretion

Most state court systems that admit cameras also provide for judicial discretion in making the final decision regarding access.[69] Consequently, it is often the decision of one judge that determines whether a defendant's face will be broadcast to the nation via television.[70] Leaving this impor-

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[67] *See* People v. Jackson, 920 P.2d 1254, 1292 (Cal. 1996) (finding that a defendant must demonstrate "specific prejudice" caused by the camera's presence); People v. Wieghard, 727 P.2d 383, 386 (Colo. Ct. App. 1986) (finding that the mere presence of the camera did not by itself deny the defendant his due process rights); King v. State, 390 So. 2d 315, 318 (Fla. 1980) (holding that the defendant failed to show a denial of due process caused by the presence of the camera); Clark v. State, 379 So. 2d 97, 103 (Fla. 1980) (same); Commonwealth v. Cordeiro, 519 N.E.2d 1328, 1332 (Mass. 1988) (upholding burden on defendant to prove "specific prejudice" standard); Commonwealth v. Cross, 605 N.E.2d 298, 300 n.3 (Mass. App. Ct. 1992) (proffering that a defendant could meet the burden of showing "specific prejudice" if a judge were to instruct jurors to inform the court if camera access would affect the jurors' impartiality); Stewart v. Commonwealth, 427 S.E.2d 394, 402 (Va. 1993) (holding admissible the presence of video cameras over defendant's objections because defendant had failed to point to any "specific prejudice"); State v. Jessup, 641 P.2d 1185, 1194 (Wash. Ct. App. 1982) (holding that defendant must set forth specific evidence that the camera negatively affected the trial).

[68] *See* Estes v. Texas, 381 U.S. 532, 544 (1965) (noting that even though television may cause prejudice, "one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced"); *id.* at 578 (Warren, C.J., concurring) (discussing the almost impossible task of defendant proving harm); *id.* at 592 (Harlan, J. concurring) (noting that the possibility for distortion of the integrity of the judicial process may carry no telltale signs, but the effects may be considerably more deleterious and persuasive than actual physical disruptions); Valukas, *supra* note 28, at 21 (arguing that camera effects are so subtle that they are "impossible to rectify when they do occur"). See the following cases, which exemplify the difficulty of proving injury because of the camera: People v. Spring, 200 Cal. Rptr. 849, 854 (Ct. App. 1984) (finding no prejudice to defendant due to presence of camera during trial); Williard v. State, 400 N.E.2d 151, 158 (Ind. 1980) (holding no prejudice to defendant even though the judge violated Indiana's Canon 3(A)(7), which bars cameras in the courtroom); Kansas City v. McCoy, 525 S.W.2d 336, 339 (Mo. 1975) (en banc) (holding that although a microphone present at counsel table of defendant picked up conversation between defendant and his attorney, no prejudice was incurred); State v. Smart, 622 A.2d 1197, 1206-07 (N.H. 1993) (finding that televised coverage of defendant's notorious murder trial did not affect defendant's Sixth Amendment rights).

[69] *See supra* notes 62-65 and accompanying text.

[70] *See Estes*, 381 U.S. at 548. The Supreme Court could not overlook the potential impact the camera may have on a defendant, noting that its mere presence could constitute a form of harassment. *See id.* at 549. To this end, the Court stated that a defendant

tant, and sometimes binding, decision in the hands of one individual allows for arbitrary results.[71] This is readily apparent considering that Judge Ito condoned the broadcast of the O.J. trial, while Judges Howard and Weisberg, presiding over the trials of Susan Smith and the retrial of the Menendez brothers respectfully, decided against camera access.[72] Allowing a judge to decide whether a particular case is appropriate for television viewing necessarily "singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others."[73] Indeed, it is arguably the "luck of the draw" that determines whether a defendant will be exposed to the nation.[74]

Exacerbating this concern is the fact that although all judges presumably act with the best intentions, the members of the judiciary are nonetheless vulnerable to the frailties common to most individuals.[75] As

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must be given his or her day in court and the opportunity to concentrate on the proceeding, undistracted by the camera. *See id.*

[71] *See infra* notes 72-74 and accompanying text.

[72] *Compare* Christine Spolar, *Judge Keeps Camera for Simpson Trial: Ito Says He Will Decide on Coverage of Pretrial Hearings on a Case-by-Case Basis*, WASH. POST, Nov. 8, 1994, at A14 (reporting Judge Lance Ito's belief that one stationary camera would not jeopardize O.J. Simpson's right to a fair trial) *with TV Barred in Drowning Case*, WASH. POST, July 1, 1995, at A2 (relaying Circuit Judge William Howard's contention that any broadcast of the trial of Susan Smith for the murder of her two sons would interfere with due process and pose a risk to the trial proceedings in general); Ann W. O'Neill & J. Michael Kennedy, *Judge Bars Television Cameras from Courtroom for Menendez Retrial*, L.A. TIMES, Oct. 7, 1995, at B1. Superior Court Judge Stanley Weisberg's decision to ban the camera was heralded by Deputy Public Defender Charles Gessler, who represented Lyle Menendez. *See id.* at B3 Gessler had argued that the camera would jeopardize his client's right to a fair trial by providing viewers with "free entertainment" and reminding jurors of the pressure to convict the brothers of murder. *See id.* In defense of his position not to permit broadcast coverage of the retrial of the Menendez brothers, Judge Weisberg opined that television coverage would substantially increase the risk that jurors would be exposed, even inadvertently, to commentary about the brothers outside the courtroom. *See id.* at B1. The judge believed that potential exposure of this kind would prejudice the rights of the defendants as well as necessitate hearings to investigate the impact of any exposure of the jury. *See id.*

[73] *Estes*, 381 U.S. at 565 (Warren, C.J., concurring).

[74] *See* Harvey J. Sepler, *Where Do We Stand on Cameras in the Courtroom?*, FLA. B.J., June 1996, at 113 & n.5 (discussing a letter that Pete Wilson, Governor of California, wrote to Malcolm Lucas, then-Chief Justice of the Supreme Court of California, wherein Wilson commented that "where television and radio broadcasting can turn counsel, witnesses, and jurists into instant celebrities, it may simply not be appropriate to leave this decision [whether or not to prohibit coverage in a particular case] in the hands of the attorneys and the court who will benefit, no matter how well intentioned and conscientious they are.") (alteration in original) (footnote omitted); Torry, *supra* note 11, at 7 (relaying assertion of defense attorney that a judge other than the presiding judge should be the one to decide the question of camera access).

[75] *See Estes*, 381 U.S. at 548. As noted by Justice Harlan in a concurring opinion, "who can say that . . . even a conscientious judge will not stray, albeit unconsciously, from doing what 'comes naturally' into pluming themselves for a satisfactory television 'performance.'" *Id.* at 591 (Harlan, J., concurring).

such, the Supreme Court has recognized that certain judges may, even subconsciously, base their decision whether to allow camera access on personal desires for fame and notoriety.[76] Other judges may feel pressure to succumb to media and public pleas to view the trial on television[77] and allow camera access although they are aware of the complications the camera may add to an already notorious trial.[78] Even more realistic is the possibility that once certain judges, particularly state court judges who are concerned with reelection,[79] allow the camera into the courtroom, their resulting decisions will be tailored to invoke favorable public opinion.[80] Finally, some judges may permit camera access to prove to the

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[76] *See id.* at 548 (recognizing that because judges are "subject to the same psychological reactions as laymen," they also may be influenced by a desire for personal fame or admiration); Wendy Kaminer, *Cameras in the Courtroom: Should Judges Permit High-Profile Trials to Be Televised - No: Tabloid Television Does Not Belong at Trial*, A.B.A. J., Sept. 1995, at 37 (arguing that the presence of the camera may cause a judge to play to the viewing audience).

[77] *See, e.g.*, Hoover, *supra* note 22, at A17 (relaying assertions of one Los Angeles superior court judge that colleagues describe their courtrooms as "under siege" by the broadcast media).

[78] *See Estes*, 449 U.S. at 548-49 (highlighting that the camera would add significantly to the burden of a judge who already has the difficult task of maintaining control in a courtroom where the proceeding involves a well-known individual).

[79] *See* Cossack, *supra* note 4, at 558-59 (contending that federal judges, because they are not concerned with impressing the public, maintain better control of their courtrooms than do state court judges, who are easier targets for public scrutiny).

[80] *See id.* at 558 (highlighting the possibility that Judge Ito allowed the defense considerable leeway in the O.J. trial to counter any possible perceptions that the judge favors the prosecution); Mary Wisniewski Holden, *Opinions on Cameras in the Courts Keep Changing Channels*, CHI. LAW., Nov. 1996, at 16 (discussing various opinions on the camera given at the Defense Research Institute's first annual meeting and highlighting Los Angeles County Deputy District Attorney Christopher Darden's opinion that the camera affected Judge Ito who felt the need to "ben[d] over backwards to be fair"); J. Stratton Shartel, *Cameras in the Courts: Early Returns Show Few Side Effects*, 7 INSIDE LITIG. 1, 23 (1993) (contending that judges are concerned with how the public views their rulings and this concern is exacerbated by camera access resulting in rulings that "may be more popular than correct"); Betsy Streisand, *And Justice for All*, U.S. NEWS & WORLD REP., Oct. 9, 1995, at 50, 51 (recognizing that Judge Ito may ultimately be remembered for his willingness to let the O.J. trial get out of control); Torry, *supra* note 11, at 7 (relaying defense attorney Abbe Lowell's opinion that the camera caused Judge Ito to transform from "a tight-fisted judge" who maintained control of his courtroom to "someone who cared about the public perception of fairness" above anything else); *see also* Laurie L. Levenson, *What Is the Real Reason the Simpson Defense Team Wants Cameras in the Courtroom*, O.J. Simpson Case Commentaries, Nov. 10, 1994, *available in* 1994 WL 620920. Levenson contends that O.J. Simpson's defense team embraced the admittance of the camera at their client's trial not for public interest or educational reasons but for tactical ones; i.e., the defense team believed that the camera would place additional pressure on the key players in the trial, namely the judge, to demonstrate to the public at home that the defendant is being treated fairly. *See id.* at *1.

public that a trial can be conducted with dignity and decorum in certain courtrooms.[81]

B. *Juror Prejudice*

Relying substantially on various studies wherein jurors indicated that the presence of the camera did not influence their decision making,[82]

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[81] *See* Streisand, *supra* note 80, at 51 (reporting that since the beginning of the O.J. trial, judges have surprisingly granted 47 out of 49 requests by Court TV to televise proceedings; seemingly, the judges are eager to prove to the public that their courtrooms can facilitate justice); Torry, *supra* note 11, at 7 (relaying President of Court TV Steven Brill's experience that some judges recently have "jumped at the chance" to have their courtroom proceedings televised to prove to the public that a courtroom can be run properly and the O.J. trial was nothing but "an aberration").

[82] *See* Valukas, *supra* note 28, at 19-21. One survey conducted by Court TV in 1992 consisted of an informal questionnaire sent to judges who had experience with cameras in their courtrooms. *See id.* at 20. Court TV conducted the experiment after the station had televised 100 criminal and civil trials in 28 states as well as certain civil cases in federal courts which had allowed for experimental access pilot programs. *See id.* All 70 judges who responded to the survey declared that the presence of the camera had not hampered the judicial process. *See id.* Moreover, 60% of the survey respondents believed that the camera "helped convey the events of the trial in a way that contributed to public understanding of the legal system." *Id.*

The Federal Judicial Center conducted a similar study. *See id.* The Center's study involved pilot programs adopted by the Judicial Conference of the United States in 1990. *See id.* The programs were implemented from July 1, 1991 to June 30, 1993 in six district courts and two circuit courts of appeal. *See id.* In order to evaluate its findings the Center relied on a number of sources, including telephone interviews with judges whose courtrooms had contained cameras, questionnaires sent to judges and attorneys, discussions with media representatives, and reviews of studies analyzing the effects of the media coverage on witnesses and jurors. *See id.* The findings were reported as follows: (1) judges looked more favorably at media coverage after experience with the program; (2) judges and attorneys found that the presence of the camera caused little or no effect on the participants in the courtroom; (3) members of the media cooperated and obeyed the rules set forth by the court regarding the camera; and (4) most participants believed that the camera had little or no effect on witnesses and jurors. *See id.* In light of these results, the Center recommended to the Judicial Conference that federal courts nationwide allow camera access to civil proceedings, subject to certain guidelines to be promulgated by the Judicial Conference. *See id.* For a brief summary of other studies regarding camera access, see Valukas, *supra* note 28, at 19-21.

Notably, however, the Federal Judicial Center admitted the limitations inherent within its study. *See id.* at 20. For example, the following factors indicate the questionable validity of the study:

> (1) the evaluation only included a measure of perceived (rather than actual) effects on courtroom participants;
> (2) the pilot program limited coverage to civil proceedings;
> (3) the pilot courts were chosen from among courts that volunteered to participate; and
> (4) most of the analyses in the study focused on judges who actually had experience with electronic media coverage and who may have reacted more favorably than a randomly selected sample of judges.

Id.

proponents of televised proceedings argue that camera access does not impede a defendant's right to a fair trial.[83] Indeed, one such study found that of the forty-eight states that conducted some form of investigation regarding the influence of the camera, all but one state concluded that the camera had little, if any, influence in the courtroom.[84]

It is questionable, however, whether any of the studies conducted to test the influence of the camera are scientifically valid.[85] 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.[86] As acknowledged by the Supreme Court, "practical experience tells us" that jurors involved in a televised trial are "preoccupied with the telecasting rather than the testimony."[87] Even if

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Hence, in light of these factors, the study could be deemed to include only judges who were already proponents of cameras in the courtroom. *See id.*

[83] *See* Krygier, *supra* note 4, at 83 (arguing that studies show no major negative effect on jurors and witnesses); Shartel, *supra* note 80, at 24-26 (outlining "reputable" studies that purport to show that cameras do not adversely affect trial participants).

[84] *See* Christo Lassiter, *Put the Lens Cap Back on Cameras in the Courtroom: A Fair Trial Is at Stake*, N.Y. ST. B.J., Jan. 1995, at 6 (conceding that studies conclude that the camera had little or no influence on jurors' decisions, but questioning the validity of those studies, especially those conducted prior to the reading of the O.J. verdict).

[85] *See* Metz, *supra* note 22, at 697 (questioning the validity of studies because the research does not take into account the fact that every trial situation is unique); Francis Murphy, *A Case Against Cameras in Courtrooms*, N.Y. L.J., June 30, 1994, at 2 (reporting that the "alarming truth" is that the effect of the camera has never been comprehensively assessed and noting that studies conducted have been criticized for their "statistical invalidity"); Shartel, *supra* note 80, at 24 (relaying the argument that few of the numerous studies conducted are scientifically valid because the studies either are partisan or lack neutrality); Valukas, *supra* note 28, at 19-21. Valukas provides a brief synopsis of some notable studies and concludes that the studies lack scientific validity. *See id.* The author explains that variables possibly affecting a defendant's right to a fair trial are unquantifiable, thus causing the studies to be invalid. *See id.* at 21. Valukas further concludes that his observations are largely intuitive, but contends that scientifically valid evidence never would be available because the impact of camera access depends not on the camera itself but on the actual proceedings and their participants. *See id.*

[86] *See* Chandler v. Florida, 449 U.S. 560, 580-81 (1981) (noting that the impact of televised trials remained to be seen); Associated Press v. Bost, 656 So. 2d 113, 114 (Miss. 1995) (contending that the camera will continue to be banned until the "benefits and ramifications" of its presence have been extensively researched); Metz, *supra* note 22, at 696 (noting the difficulty inherent in evaluating camera impact because human behavior is unpredictable).

[87] *See Chandler*, 449 U.S. at 581 (noting that the camera may have a significant impact on a juror, because the moment that a judge announces that a proceeding is to be televised the proceeding is given new status and significance); Estes v. Texas, 381 U.S. 532, 546 (1965) (proffering that "distractions are not caused solely by the physical presence of the camera"; rather, "[i]t is the awareness of the fact of telecasting that is felt by the juror throughout the trial"). The *Estes* Court stated that this alone was enough to increase the chance of prejudice against a defendant, as "realistically it is only the notorious trial which will be broadcast" and the jury, knowing that the proceeding will be viewed by the community, will feel added pressure to perform. *See* 381 U.S. at 545.

jurors are not distracted by the camera itself, the selection of a particular trial for broadcast may influence the jurors' ability to arrive at an unbiased decision.[88] Thus, it is conceivable that jurors may become engrossed with their opportunity for fame as a result of sitting on a notorious televised trial and accordingly fail to scrutinize the evidence before them.[89] In addition, there is evidence that jurors may misperceive a trial witness's reaction to the camera[90] or vary their own behavior in response to the medium.[91] Finally, the camera may also impact jurors indirectly, by affecting the duration of a trial,[92] the length of which directly affects

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[88] *See* Lassiter, *supra* note 84, at 8 (noting that trial notoriety can by itself influence a juror because the camera lets the juror know that the trial is a celebrated one, and consequently places undue pressure on the juror, whose decision may become "politicized" rather than unbiased).

[89] *See Estes*, 381 U.S. at 591 (Harlan, J., concurring) (asserting "who can say that the juror who is gratified by having been chosen for a front-line case . . . will not stray, albeit unconsciously, from doing what 'comes naturally' into pluming themselves for a satisfactory television 'performance'"); *see also* Christopher Parkes, *Trials of OJ May Never End*, FIN. TIMES, Feb. 6, 1997, at 4 (highlighting O.J. jurors who have authored books, contracted to appear in movies, and demanded large fees to appear on television shows); *Simpson Trial Participants Still Cashing In on Notoriety*, OTTAWA CITIZEN, Sept. 14, 1996, at A14 (discussing Playboy spread obtained by one O.J. juror and outlining other incidents of trial participants securing lucrative business deals because of their participation in the O.J. proceeding).

[90] *See* Shartel, *supra* note 80, at 23 (conveying the experience of a criminal trial attorney whose jurors "couldn't tell whether particular witnesses were nervous because of the cameras or because they were lying").

[91] *See id.* (relaying belief of Roy E. Black, William Kennedy Smith's attorney in *Florida v. Smith*, that the camera affects a juror's ability to be honest, highlighting an experience with a juror who "blurted out" the truth of his feelings during voir dire only after the camera was turned off).

[92] *See* Streisand, *supra* note 80, at 50 (reporting that the sequestration of the O.J. jury for nine months was a California record); Cossack, *supra* note 4, at 557. Cossack contends that the verdict was influenced by the fact that the jury was sequestered for almost one year, an unprecedented length of time. *See id.* The author contends that because the forced separation of the jurors from their family and friends may have impacted the verdict, a compelling argument could be made that the camera should be excluded in a long trial. *See id.* This conclusion is mandated, Cossack contends, because jurors need to come to a verdict solely on the evidence heard, and not as a reaction to their frustration. *See id.; see also* Joseph D. Steinfield & Robert A. Bertsche, *Recent Developments in the Law of Access*, *in* COMM. LAW 1996, at 7, 39 (PLI Patents, Copyrights, Trademarks, & Literary Property Course Handbook Series No. G4-3980, 1996) (discussing Judge Hiroshi Fujisaka's decision to deny camera access to O.J.'s civil trial, naming as one of his reasons the risk a televised trial would place on the unsequestered jury). Judge Fujisaka stated that the "overwhelming pervasiveness" of the "intense coverage" of the O.J. criminal trial led him to believe that he had a duty to prevent the probable exposure of the unsequestered jury in the civil case. *See* Steinfield & Bertsche, *supra*, at 40. Seemingly, allowing a trial to be televised may also necessitate the sequestration of a jury, which itself is obviously problematic. *See* Cossack, *supra* note 4, at 557.

jurors' attitude, or motivate attorney "grandstanding,"[93] behavior that may influence jurors as well.

C. *Witness Prejudice*

Witnesses are similarly vulnerable to the possible influences of the camera.[94] As evinced by the testimony of Kato Kaelin at the O.J. trial, there is certainly some credence to the Supreme Court's prediction that a proceeding could be prejudiced by a "'cocky' witness having a thirst for the limelight" who becomes even "more 'cocky' under the influence of television."[95] Equally, if not more, troubling are witnesses who have either sold their stories before testifying at trial[96] or witnesses who present testimony that is arguably skewed in order to invite further media attention.[97]

Conversely, the camera may have the effect of unnerving certain witnesses who may become apprehensive[98] on the stand and who conse-

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[93] *See* Lassiter, *supra* note 84, at 8 (discussing the inevitable battle between opposing counsel to tell their side of the story to the public when the camera is involved, rather than give their full attention to the jury). *But see* Floyd Abrams, *Cameras in the Courtroom: Should Judges Permit High-Profile Trials To Be Televised?—Yes: Cameras Reflect the Process, for Better or Worse*, A.B.A. J., Sept. 1995, at 36 (arguing that the camera is not to blame for attorney grandstanding because such behavior is typical during notorious trials); Hoover, *supra* note 22, at A17 (highlighting the arguments of camera proponents that attorney showboating occurs regardless of the presence of the camera); Metz, *supra* note 22, at 700 (contending that attorney grandstanding, which occurs even in the absence of the media, is more to blame for the prejudices inflicted upon a defendant than the camera).

[94] *See infra* notes 95-101 and accompanying text.

[95] Estes v. Texas, 381 U.S. 532, 591 (1965) (Harlan, J., concurring).

[96] *See, e.g.*, *Sexy Willie's Social Whirl*, N.Y. NEWSDAY, Jan. 31, 1992, at 4 (reporting that in the trial of William Kennedy Smith for date rape, the defense attorney impeached the account given by a friend of the victim by revealing that the friend sold the story to a local television show prior to testifying).

[97] *See, e.g.*, Streisand, *supra* note 80, at 50 (stating that several potential witnesses for the O.J. trial did not take the stand because their "fever" for book deals and media attention injured the reliability of their testimony); Lassiter, *supra* note 84, at 7. Lassiter relays the situation of the shopkeeper who sold his story to the media before testifying at a preliminary hearing about the sale of a knife to O.J. *See id.* The witness later spoke with great conviction at trial, and subsequently landed a $12,000 appearance on a tabloid talk show. *See id.* Lassiter remarks that television talk shows only pay guests for the truth if the truth is "sensational" enough to warrant broadcast, and infers that if the witness had been less than convincing, the offer from the tabloid talk show would not have been made. *See id.* Hence, Lassiter points out that the camera may cause witnesses to manipulate or exaggerate their stories in such a manner so as to ensure themselves of a few minutes of fame. *See id.*

[98] *See* Murphy, *supra* note 85, at 2 (discussing the impression of jurors, impaneled for the criminal trial of Joel Steinberg for the murder of his daughter, that the witnesses were unnerved by the camera); Shartel, *supra* note 80, at 23 (relaying the account of a

quently appear to be less than credible.[99] To the extreme, witnesses may even express hesitance towards testifying at all, knowing that they will be exposed to the nation via the camera.[100] At a minimum, it must be acknowledged that the impact of the camera is "incalculable," potentially causing witnesses to over-dramatize or re-shape their testimony.[101]

D. Media Variable

Today, the Courtroom Television Network (Court TV) is the medium most readily identified with televised court proceedings.[102] The station is widely known and complimented for providing the first "gavel-to-gavel" coverage of both criminal and civil trials conducted across the nation.[103] Court TV began broadcasting in July 1991 and is most noted for its broadcast of the O.J. trial.[104]

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criminal trial attorney whose witnesses appeared noticeably nervous on the stand in reaction to the camera).

[99] *See* Shartel, *supra* note 80, at 23 (relaying a criminal trial attorney's experience with one juror who told the attorney that he had not believed a witness because the witness appeared to be more concerned with how he looked in front of the camera than with his actual testimony).

[100] *See, e.g.*, Smolowe, *supra* note 15, at 38. Smolowe reports that a witness in the O.J. trial, Pablo Fenjves, has been the target of death threats and has been chased by tourists because of the live coverage of the trial. *See id.* As a result, Fenjves does not know if he would have testified if he had known the consequences. *See id.*; *see also Estes*, 381 U.S. at 547 (noting the possible reluctance of witnesses to testify because of the "mere fact" that the trial would be broadcast); Murphy, *supra* note 85, at 2 (highlighting account of two witnesses in the Joel Steinberg trial who expressed fear for their safety because of the sensationalism of the trial).

[101] *See Estes*, 381 U.S. at 547. The Court found that the potential for the impairment of testimony from witnesses was strong. *See id.* The Court contended that in situations where an individual is speaking publicly, there is a "natural tendency towards over-dramatization," and therefore the accuracy of any given testimony by a witness who is aware that he or she is on camera may be severely impaired. *See id.*; *see also* Valukas, *supra* note 28, at 7 (arguing that the camera impacts the truth-finding process, because "[a]s human beings, we all know that people act differently in front of a camera").

[102] *See* Kristine Garcia, *Court TV Hits Five-Year Mark*, ELEC. MEDIA, July 1, 1996, at 28, *available in* 1996 WL 7535184 (reporting that Court TV is profitable after five years running, with 23.6 million subscribers and expansion onto the Internet).

[103] *See* Kavanau v. Courtroom Television Network, No. 91Civ.7959, 1992 WL 197430, at *1938 (S.D.N.Y. Aug. 3, 1992). In 1992, Ted Kavanau, a 30-year veteran of the cable and television industry, alleged that he originally thought of the idea for a twenty-four hour cable station with a mainstay of live courtroom broadcasts throughout the United States. *See id.* at *1939. He brought an action for damages against Court TV and claimed relief against Court TV for theft of creation, unfair competition and misappropriation, unlawful and tortious interference with prospective economic retaliations and advantage, and denial of business opportunity. *See id.* The court granted summary judgment for Court TV upon the finding that Kavanau's idea was not a novel one. *See id.* at *1944; *see also* Hart, *supra* note 21, at 5 (reporting that Steven Brill founded Court TV in July 1991 after he was asked to develop a legal magazine and realized that televised trial proceedings would be more "exciting" to the public); Scott Minerbrook, *It's Court*

Once a judge decides to permit camera access in a particular matter,[105] Court TV ultimately determines whether the proceeding warrants exposure on television.[106] Indeed, when courts have expressed hesitation in allowing televised coverage, the station has, in some cases, appeared as an interested party on a motion to compel the court to allow access.[107] Because of the commercial nature of Court TV, the station broadcasts proceedings that are entertaining,[108] so as to peak the public's interest and curiosity, and thus generate profit.[109] Consequently, the public is not ex-

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Time, U.S. NEWS & WORLD REP., July 15, 1991, at 16 (relaying how Steven Brill's idea for Court TV came to him while riding in a taxi).

[104] *See* Patricia Edmonds, *The Moment*, USA TODAY, Oct. 4, 1995, at A7 (reporting that a record-breaking 8 out of 10 people watched television or listened to the radio to learn the verdict); Anthony Scaduto, *Flash! The Latest Entertainment News & More*, NEWSDAY, Feb. 7, 1997, at A10 (reporting that the O.J. trial is credited with giving Court TV its fame). Court TV was not able to reap the same ratings for the civil trial of O.J. Simpson, however, as all media was barred from the courtroom. *See* Linda Deutsch, *Judge Bans All Media from Simpson's Civil Trial*, STAR LEDGER, Aug. 24, 1996, at A5; *Judge Bans Cameras, Video from Simpson Courtroom*, WASH. POST, Aug. 24, 1996, at A24 (reporting that Superior Court Judge Hiroshi Fujisaka decided that the media, in every form from broadcast to still life sketch artists, would be denied access to the proceedings).

[105] *See supra* note 62 and accompanying text (discussing Canon 3A(7), implemented by most states, which allows for judicial discretion in deciding camera access).

[106] *See* David Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 805 (1993). To aid in deciding which proceedings to televise, Court TV employs five criteria: (1) the public interest in the case; (2) the notoriety and newsworthiness of the case and the participants; (3) the caliber of the story; (4) the educational benefit of the case; and (5) the probable duration of the case. *See id.*

[107] See *supra* note 34 listing recent New York court proceedings wherein Court TV made a motion to intervene to persuade the respective courts to allow the station to televise the proceeding.

[108] *See* Massimo Calabresi, TIME, Jan. 10, 1994, at 56. Steven Brill, founder of Court TV, has rejected criticism that the station televises only spectacular cases. *See id.* Court TV, however, is "hardly shying away from the big cases," as it has televised the trials of such notables as Lorena Bobbitt, Jeffrey Dahmer, William Kennedy Smith, and Lyle and Erik Menendez. *See id.*; Frazier Moore, *Court TV Presents Dirt with Dignity: Daily Show Wraps It Up*, RECORD, May 5, 1996, (TV & Cable) at 4 (quoting Gregg Jarrett, co-anchor of Court TV, as contending that "[e]ntertainment is what a trial is all about"); *see also* Jim McConville, *Court TV Remakes Prime Time: Looks to Strengthen Brand Identity with Viewers*, BROADCASTING & CABLE, May 20, 1996, at 60, *available in* 1996 WL 8290281 (discussing Court TV's attempt to produce a "faster format" in order to make its programs "more watchable" and employing a "multimillion-dollar advertising campaign" to promote its new schedule).

[109] *See* Harris, *supra* note 106, at 801 (noting that while Court TV may in fact educate, its aim is to sell the products of its advertisers, and thus this goal will necessarily determine in large part what the station chooses to televise); *id.* at 825 & n.295 (discussing Alan Dershowitz's suggestion that televised trials be run by non-profits organizations uninfluenced by profit motivation so there is no need to pick "flashy" cases). *But see* Harris, *supra* note 106, at 801 n.129 (remarking that there is nothing inherently

posed to the reality of every day courtroom procedure[110] but, rather, is primarily permitted to view only those proceedings deemed dramatic in nature.[111]

The necessity of trials televised by Court TV and other stations is questionable; a brief review of Supreme Court precedent supports the conclusion that the public's right of access would not be undermined if the camera were barred from certain judicial proceedings.[112] Camera proponents nevertheless argue that the medium should be permitted because of its value to society as an educational tool.[113] The Supreme Court

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wrong with the commercial nature of Court TV, but arguing that it is important to recognize that the station is "a profit-motivated, market-oriented organization").

[110] *See* Estes v. Texas, 381 U.S. 532, 548 (1965) (acknowledging that telecasters' decisions regarding what to televise will be dictated somewhat by the necessity of sponsorship, necessarily resulting in the televising of only the most notorious cases involving unpopular or famous individuals); Westmoreland v. Columbia Broad. Sys. Inc., 752 F.2d 16, 23 n.10 (2d Cir. 1984) (relaying finding of the Ad Hoc Committee of the Judicial Conference in response to media requests to televise trials that the "asserted public benefits of understanding and education" are "illusory since coverage is necessarily selective and 'sensational'"); *see also* Harris, *supra* note 106, at 805 (discussing the fact that while one of Court TV's criteria in selecting which trials to televise focuses on the importance of the issue at bar, the case with the "better 'story,'" especially one involving celebrities, will be the one chosen for the airways); Hart, *supra* note 21, at 5 (reporting that Court TV concedes that trials are admittedly selected for broadcast based on their notoriety or controversy); Murphy, *supra* note 85, at 2 (asserting that Court TV primarily televises only those cases that are especially lurid or involve a celebrity as a party).

[111] *See* Calabresi, *supra* note 108, at 56 (relaying assertion of Harvard Law Professor Alan Dershowitz that virtually all Court TV covers is "sex, gore and pornography"); Murphy, *supra* note 85, at 2 (noting Court TV's open admittance that it finances its televised trials by selling them as "a cross between C-Span and soap opera"); Moore, *supra* note 108, at 4 (reporting the station's admittance that its shows are a form of entertainment, as exhibited by Court TV's pre-show commentary designed to intrigue potential viewers—"Will the tears of her spouse help convict her accused killer?").

[112] See Part III *infra* discussing the public's right of access grounded in the First Amendment.

[113] *See* Harris, *supra* note 106, at 787 (pointing out that Court TV broadcasts essentially unedited versions of trials, and thus permits the public to observe the judicial process); Minerbrook, *supra* note 103, at 16 (stating contention of Steven Brill, founder of Court TV, that the station is equally as educational as it is commercial, because it provides information to the public about the least understood and most hidden branch of the government—the court system); Patrick A. Tuite, *"No Cameras" Leaves Negative Impression*, CHI. LAW., July 1996, at 3 (contending that the public is entitled to information about the judicial branch and noting that this lack of knowledge may be the motivating factor behind jokes about lawyers). *But see Estes*, 381 U.S. at 589 (Harlan, J., concurring) (acknowledging the educational value of television, which may "well provide the most accurate and comprehensive means of conveying" information to the public, but contending that an argument of this kind lacks constitutional dimension, because the "rights to print and speak . . . do not embody an independent right to bring the mechanical facilities of the broadcasting . . . into the courtroom").

has admittedly recognized this argument as valid, noting the ability of education to strengthen public confidence in the system.[114]

The educational value of televised proceedings is undermined, however, because public perception is formed by watching courtroom drama that is arguably atypical.[115] And even if the broadcast is truly indicative

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[114] *See* Chandler v. Florida, 449 U.S. 560, 565-66 (1981) (noting the Florida Supreme Court's conclusion that allowing the public to view trials on television would "contribute to wider public acceptance and understanding of decisions"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980) (opining that an open trial assists the public in "understanding the system in general and its workings in a particular case" and thereby increases confidence in the justice system). *But see Estes*, 381 U.S. at 544 (contending that the "chief function of our judicial machinery is to ascertain the truth" and "television . . . cannot be said to contribute materially to this objective" because it amounts to "the injection of an irrelevant factor into court proceedings.").

Instead of boosting confidence in the system as the judiciary had anticipated that it would, the presence of the camera has produced the opposite effect, now leaving the public's opinion of the system in low regard. *See, e.g.*, Don J. DeBenedictis, *The National Verdict*, A.B.A. J., Oct. 1994, at 52. The American Bar Association conducted polls in 1994 and 1995 that revealed that the public's opinion of lawyers and of the judicial system in general has plummeted to a record low. *See id.*; Steven Keeva, *Storm Warnings*, A.B.A. J., June 1995, at 77. The polls reported that by April 1995 nearly half of the individuals questioned had lost confidence in the justice system. *See* Keeva, *supra*, at 77. Hence, the argument that the television broadcast of trials "enhances, not hinders, the administration of justice by fostering public confidence in the judicial process," Krygier, *supra* note 4, at 81, is unpersuasive. Indeed, since the advent of Court TV, many individuals have instead expressed their dismay regarding the flaws of the system and the behavior of lawyers in particular. *See* Keeva, *supra*, at 77.

[115] *See* Harris, *supra* note 106, at 786, 821 (arguing that although Court TV promotes a better understanding of the justice system the station also provides information that is "often misleading and frequently wrong"). The ability of citizens to correctly assess the policies underlying judicial decisions and the institutions implementing those policies depends on the dissemination of accurate information. *See id.* at 786. Therefore, erroneous information directly affects an individual's view of the justice system, as well as his or her ability to accurately critique that system. *See id.* Court TV injures the ability of society to informatively decide the behavior of the judicial system because its broadcasts reflect "good entertainment" but do not honor the reality of the justice system. *See id.* at 827. Harris contends that this "flawed" picture of the judicial system is presented by Court TV in certain respects. *See id.* at 788. First, Court TV's programming is based almost exclusively on trials, which are themselves atypical of the legal system, because the system resolves most conflicts without the necessity of a trial. *See id.* Second, because the station focuses on trials only, it presents an incomplete picture of the judicial system, as the trial is only one small part of the system as a whole. *See id.* The public in this manner remains ignorant to the true workings of the legal process. *See id.* Third, because Court TV is the selector of the trials and is motivated by profit, the proceedings televised "contain a larger than normal dose of weighty, topical issues, involve celebrities, lascivious detail, or grotesque or macabre trivia." *Id.* Hence, what is broadcast to the public cannot be called a "true" and complete picture of the judicial system. *See id.; see also* Calabresi, *supra* note 108, at 56 (reporting Alan Dershowitz's contention that the "way Court TV does it is a bad idea" and the better approach would involve a nonprofit channel that would provide the public with a broad range of issues); Tuite, *supra* note

of conventional courtroom proceedings, commentary by the newscasters[116] coupled with questionable camera focus may actually skew the accuracy of the broadcast.[117] Although it is true that Court TV has positively contributed to society by stimulating vigorous dialog on issues of public concern,[118] the crucial question still remains: Is the overriding purpose of the justice system to educate the public or to conduct fair proceedings?[119]

113, at 8 (proffering that there would be no harm either to the public or to the court if judicial proceedings were televised on C-Span without sound bites or commentary).

Some argue that giving the public an inaccurate picture of the system may consequently result in a backlash to that system, as the public becomes disenchanted with the present state of the law. *See* Cox, *supra* note 29, at A21. Cox predicts that increased public cynicism is likely to lead to pressures to change the system in order to increase the chance of more acceptable verdicts, focusing on court rules that do not allow for certain publicized evidence to be presented to the jury. *See id.* Other possible consequences of public dismay with the system are potential involvement of non-lawyers and opportunistic politicians as would-be reformers, using the camera as a way of intensifying the "let's hang-em" attitude. *See id.*; *see also* Streisand, *supra* note 80, at 47 (relaying the dismay that the public will now "view the justice system through the prism of the O.J. Simpson case" and noting to this end the results of a poll that revealed that one out of four members of the public now believe that there is no justice in America).

[116] *See* Murphy, *supra* note 85, at 2. For example, Court TV once had to apologize for remarks its broadcasters made after a defendant's testimony. *See id.* Murphy contends, however, that the damage sustained was irreparable, because the public was likely to believe the commentators' remarks implying the defendant was a liar. *See id.* Indeed, commentary during trials arguably analogizes court proceedings to sporting events, where this type of play-by-play commentary is appropriate. *See id.* As aptly stated by Justice Harlan in his concurring opinion in *Estes*:

> [A]t its worst, television is capable of distorting the trial process so as to deprive it of fundamental fairness. . . . interviews with the principal participants, commentary on their performances, "commercials" at frequent intervals . . . certainly such things would not conduce to the sound administration of justice by any acceptable standard.

Estes v. Texas, 381 U.S. 532, 588 (1965) (Harlan, J., concurring).

[117] *See* Murphy, *supra* note 85, at 2 (relaying the surprise of one juror sitting on the Joel Steinberg case who found that the Steinberg on television was significantly different than the Steinberg sitting in the courtroom, because the televised version of the case focused on what appeared to be a constantly fidgeting defendant, who in fact was "calm" and "dignified" throughout the proceeding, and thus portrayed the defendant in a "very false" light).

[118] *See* Marisol A. v. Giuliani, 929 F. Supp. 660, 661 (S.D.N.Y. 1996) (permitting camera access because of Judge Robert Ward's belief that television coverage was appropriate as it raised "profound social, political, and legal issues"); Harris, *supra* note 106, at 787 nn.22-23 (noting important social issues such as acquaintance rape, domestic violence, and the insanity defense that Court TV helped bring to the public conscience). *But see* Murphy, *supra* note 85, at 2 (stating that as a result of the televised William Kennedy Smith trial, the number of reported rapes dropped dramatically because the real possibility of publicity frightened women who would otherwise have gone to the police).

[119] *See* Hoover, *supra* note 22, at A18 ("The purpose of [a] trial is not to educate the public about anything"); Lassiter, *supra* note 84, at 11 (recognizing that the "purpose of the court is not education or not spectacle or public entertainment, but justice"); *see also*

E. Privacy of the Participants

One of the elementary rights of every individual is the right to privacy.[120] The public has an equally well-established right of access to trial, implicitly guaranteed by the First Amendment.[121] The press is also granted this access right and has an arguably greater interest in attending judicial proceedings because the goal of the press is to inform the public.[122] Accordingly, a judge may restrict the access of the press only in extreme circumstances and normally must permit the media to attend courtroom proceedings.[123] Added to this complex bundle of rights is the entitlement of a defendant to an open court proceeding pursuant to the Sixth Amendment.[124]

There is a resulting inherent conflict between the rights of trial participants and the public.[125] Augmenting this conflict is the fact that trial participants have varying degrees of privacy expectations. Certain individuals are expected to endure close scrutiny by the media because they are deemed "public officials."[126] Similarly, other participants must forgo

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Estes, 381 U.S. at 540 (stating that "[c]ourt proceedings are held for the solemn purpose of endeavoring to ascertain the truth"); *id.* at 588 (Harlan, J., concurring) (noting that under the Sixth Amendment a "fair trial is the objective, and 'public trial' is an institutional safeguard for attaining" that right granted to a defendant); Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 24 n.13 (2d Cir. 1984) (highlighting the fact that "courts . . . are at most only secondarily institutions to foster public debate . . . [and] exist primarily to adjudicate legal controversies").

[120] *See* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (right of privacy); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (same); *see also* Marijo A. Ford & Paul A. Nembach, Note, *The Victim's Right to Privacy: Imperfect Protection from the Criminal Justice System*, 8 ST. JOHN'S J. LEGAL COMMENT. 205, 208 n.10 (1992) (listing state statutes codifying the constitutionally found right to privacy).

[121] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).

[122] *See id.* at 572-73 (holding that the media, in its role as "surrogate" for the public, adequately protects the public's right of access).

[123] *See* Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 606 (1982) (noting that "the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one.").

[124] *See* Ford & Nembach, *supra* note 120, at 207 (noting the inevitable conflict of interest between the rights of a defendant and the rights of a victim).

[125] *See id.* at 209-10 & n.12 (highlighting difficulty of finding the level of privacy afforded to a victim in a criminal case, as neither the Supreme Court nor state courts have provided any meaningful guidelines).

[126] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 283 & n.23 (1964). The Court held that in a defamation action a public official may not recover damages for falsehoods made against him without proving by "convincing clarity" that the statement made by the media about him was made with "actual malice." *See id.* at 283, 285-86. In *New York Times*, L.B. Sullivan, the plaintiff alleging a cause of action for defamation, was an elected Commissioner of the City of Montgomery, Alabama. *See id.* at 256. Although the Court did not specify those persons who would be considered public officials, the Court considered Sullivan to be a "public official" because he was an elected official of a city. *See id.* at 283 n.23. Sullivan complained that he had been libeled in a newspa-

certain privacy rights as they are categorized as "public figures" due to their individual fame or notoriety.[127] Individuals who would not normally be termed public figures may temporarily suffer privacy invasions because of their voluntary joinder in a public controversy.[128] Most individuals, however, who are ordinary private citizens,[129] are not accus-

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per advertisement that was carried by the *New York Times* describing the civil rights movement and appealing for donations. *See id.* at 256. The advertisement referred to the police in a negative manner by implying that the police had tried to intimidate Dr. Martin Luther King. *See id.* at 257-58. Sullivan contended that the references made in the advertisement to "police" and "they" actually referred to him. *See id.* at 258.

[127] Two companion cases decided by the Supreme Court outline the "public figure" definition. The first, *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), involved the athletic director of the University of Georgia, Wally Butts, who had earned a national reputation as the previous head football coach of the university. *See id.* at 135-36. Butts had initiated an action against the press after it had printed an article that alleged Butts had conspired to fix a football game held between the University of Georgia and the University of Alabama. *See id.* at 136-37.

The second case, *Associated Press v. Walker*, 388 U.S. 130 (1967), involved a private citizen, Edwin Walker, who had gained national prominence as a result of a distinguished military career. *See id.* at 140. He had filed a complaint for defamation against the press after it had printed an article asserting that Walker had taken charge of a large crowd that had rioted on campus in opposition to school desegregation measures and encouraged the group to resort to violence. *See id.* at 140-41.

The Court found in *Butts* and *Walker* that "public figures" should be held to the same strict standard established for public officials in *New York Times*, because although public figures are not public officials, they nevertheless are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.* at 164 (Warren, J., concurring). Therefore, the Court reasoned that because public figures have access to the media they can address and/or counter any criticisms assailed against them. *See id.* at 155.

[128] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). The *Gertz* Court distinguished between a "public figure for all purposes"; i.e., when an individual has achieved pervasive fame or notoriety, and a "public figure for a limited range of issues;" i.e., when an individual has injected himself into a particular controversy. *See id.* In either case, however, both are held to the strict public official/*New York Times* standard because such individuals are deemed to "assume special prominence in the resolution of public questions." *Id.* Gertz was a Chicago attorney who was representing a family in a civil action whose minor son was killed by a police officer. *See id.* at 325. The American Opinion, a monthly paper that published the views of the John Birch Society, alleged that Gertz had communist affiliations as well as a criminal record. *See id.* at 325-26. The paper also alleged that Gertz was involved in a conspiracy in an attempt to frame a police officer. *See id.* at 326. Gertz was active in community affairs and well known as an attorney, but was still not deemed a "public figure" because he had achieved no real fame or notoriety. *See id.* at 351-52.

The camera, notably, might have changed the outcome in *Gertz*. Clearly, an attorney involved in a similar case today could become quite well known if portrayed over the television airways. He or she would thus achieve the fame Gertz had not, and therefore be deemed a "public figure."

[129] *See id.* at 344. The Court found that private individuals are distinguishable from public figures because they are more vulnerable to criticism and more susceptible to injury, and therefore compel greater protection by the state. *See id.* Conversely, the individual who decides to seek election to government office does so with the knowledge that

tomed to any media infringement on their personal lives and thus do not have a lesser expectation of privacy.[130]

These private citizens are of primary concern because their privacy rights are dictated by the variations apparent in different state court access rules. As discussed *supra* in Part I, certain state courts do not allow trials of a sensitive nature to be televised, going to great lengths to protect the privacy rights of individuals.[131] Other state courts seemingly find privacy rights less compelling, and limit the camera narrowly, merely forbidding focus on either witnesses[132] or jurors.[133] At the extreme are

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his life will thereafter be subject to public scrutiny. *See id.* Indeed, the Supreme Court has also found the public figure responsible for her privacy loss, because she has forced herself to the "forefront of particular public controversies" and therefore has "invit[ed] attention and comment." *Id.* at 345.

[130] *See* Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 54 (1974) ("In [public disclosure] cases the individual has been profaned by laying a private life open to public view. The intimacy and private space necessary to sustain individuality and human dignity has been impaired by turning a private life into a public spectacle. The innermost region of being . . . has been bruised by exposure to the world.") (footnote omitted).

[131] *See supra* note 20 and accompanying text; Lassiter, *supra* note 64, at 1011 & nn.37-38 (listing states—Alaska, Iowa, Kansas, Maryland, Missouri, New York, North Carolina, North Dakota, and Ohio—that allow a judge to ban the camera for that portion of the trial involving testimony by the victim).

[132] *See* Lassiter, *supra* note 64, at 1013 & nn.60-61 (listing states—Alabama, Arkansas, Indiana, Minnesota, Mississippi, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, and Utah— that prohibit the televising of witnesses or at a minimum lessen the invasion of privacy); *see also* Torry, *supra* note 11, at F7. Jon O. Newman, Chief Judge of the Second Circuit, is concerned that a witness should never be televised involuntarily; Judge Newman is quoted as stating that "[i]t's outrageous to give a witness the notoriety that comes from instant nationwide recognition." *Id.*

[133] *See* Elizabeth Gleick, *Did He or Didn't He?*, TIME, Feb. 6, 1995, at 56 (noting an incident during the O.J. trial where a Court TV cameraman mistakenly televised the face of an alternative juror); Harris, *supra* note 106, at 803 n.152 (pointing out that some states allow the jury to be televised, while others forbid the camera to focus on jurors, or only allow jurors to be televised in "background shots"); Hoover, *supra* note 22, at A18 (relaying Los Angeles Superior Court Judge Mary Ann Murphy's experience that the media has repeatedly disobeyed orders barring them from televising victims or defendants, and consequently has "alarmed jurors who want their privacy preserved"); Lassiter, *supra* note 64, at 1110-11 & nn.32-35 (listing various rules employed by states to minimize intrusions on juror privacy, noting that the current trend is to electronically blur juror faces to hide identify).

Juror privacy may become a volatile issue when the camera is present, as courtroom access is typically open to the public during jury questioning, and often exposes the jury to privacy invasions as a result of attorney inquiry into the jurors' personal lives. *See, e.g.*, Press-Enterprise Co. v. Superior Ct., 464 U.S. 501 (1984) (*Press-Enterprise I*). The issue in *Press-Enterprise I* involved the voir dire, or questioning of a jury, which necessarily revolves around personal issues relating to the jurors. *See id.* at 512. The lower court had ordered the doors to the courtroom closed in light of the potential for invasions of privacy. *See id.* at 513. The Supreme Court, however, reversed the order, finding that the lower court had not considered fully the alternatives to closure. *See id.* The Court conceded that the interrogatories to the potential jury may necessitate a discus-

those state courts that permit live telecasts even where the defendant[134] or victim[135] objects. Concededly, privacy invasion is an unfortunate but necessary result of the judicial system that is warranted due to the overriding concerns of a defendant's right to a fair trial. The addition of the camera into the courtroom, however, unnecessarily exacerbates this privacy intrusion by apathetically exposing the average citizen to the nation via television.[136]

III. BROADCAST MEDIA ACCESS—AN ISSUE OF FIRST AMENDMENT CONCERN?

The seminal case providing the basis for public access to trials is *Richmond Newspapers, Inc. v. Virginia.*[137] Prior to this case, the Supreme Court in *Gannett v. DePasquale* had decided that the public did not have a right of access to pre-trial motions.[138] Because the *Gannett*

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sion of personal matters, but found that the privacy rights of the individuals in question may have been preserved without absolutely prohibiting access to the proceeding. *See id.*

[134] *See supra* note 67 and accompanying text (listing cases in states that allow televised proceedings over the objection of the defendant).

[135] *See* Ford & Nembach, *supra* note 120, at 220 n.78 (listing cases wherein the victim requested that the courtroom be closed due to the sensitive aspects of the case but was denied closure due to the overriding concern of a defendant's right to a fair and open trial). Typically it is the victim in a given proceeding who is most concerned with privacy invasions, and who therefore requests that the courtroom be closed. The victim's privacy interest, however, only overrides the public's right of access and the defendant's right to an open trial if the victim demonstrates the existence of an "overriding interest that is likely to be prejudiced." Waller v. Georgia, 467 U.S. 39, 45 (1984). To date, no litigant has satisfied this burden. *See* Ford & Nembach, *supra* note 120, at 222.

[136] *See* Lassiter, *supra* note 84, at 11. In connection with a discussion of the privacy rights of the victim, and in particular the William Kennedy Smith rape trial, Lassiter contends that "[t]he humiliation of parading an alleged rape victim's undergarments in a courtroom . . . is a necessary part of the judicial process. Further humiliation by making such evidence the fare of national television may make for fair commercial television, but does it make for a fair trial?" *Id.*

[137] 448 U.S. 555 (1980).

[138] *See* Gannett Co. v. DePasquale, 443 U.S. 368 (1979). *Gannett* involved an appeal to the United States Supreme Court of an order that excluded the public as well as the press from a pre-trial motion to suppress alleged involuntary confessions by the defendants. *See id.* at 375-77. The trial court had determined that the publicity regarding the confessions might jeopardize the defendants' right to a fair and impartial trial. *See id.* at 392-93. The Supreme Court upheld the order, noting that although there was a strong societal interest in a public trial, the Sixth Amendment guarantee serves to protect an individual defendant from possible prejudicial factors that may injure his right to an unbiased verdict. *See id.* at 383. The Court held that the Sixth Amendment did not give the public or the press the right of access to a pre-trial hearing, and emphasized that "a hearing . . . is not a trial." *Id.* at 394 (Burger, C.J., concurring). But see notes 153-59 and accompanying text discussing *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*) where the Court relayed situations where the public may be permitted access to pre-trial hearings.

Court had not determined whether the public had a right of access to trial,[139] *Richmond* was considered a case of first impression.[140]

The defendant in *Richmond* was initially convicted of second-degree murder, a judgment later reversed due to an evidentiary error.[141] Two subsequent trials ended in mistrials.[142] At the onset of the fourth trial for the murder charge, the defendant requested that the proceedings be closed to the public.[143] The Supreme Court heard the case on a writ of certiorari, and prefaced the opinion by noting that both criminal and civil trials have historically been open to the public.[144] The Court first highlighted the notion that the open trial system is an integral part of American society.[145] Recognizing, however, that the right to trial access is not specifically granted in the Constitution,[146] the Court began its analysis by examining the basis for the claim.

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[139] *See id.* at 392 n.24.

[140] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 559 (1980).

[141] *See id.*

[142] *See id.*

[143] *See id.* at 559-60.

[144] *See id.* at 580 n.17. To this end, the Court discussed the long-standing tradition of the public trial and its importance to the functioning of the judicial system in American history. *See id.* at 564-68; *see also* Craig v. Harney, 331 U.S. 367, 374 (1947) (holding that because a trial is considered to be a public event, the events that transpire there are public property).

[145] *See Richmond*, 448 U.S. at 568. The Court found that the opportunity of citizens to attend was deemed to be an "indispensable attribute" of the American system of justice. *See id.* To this end, Chief Justice Burger reasoned that the openness of a trial assures that the proceedings are conducted in a fair manner, discourages any misconduct or inclinations towards perjury, and, most importantly, facilitates decisions based not on partiality or bias but on facts and evidence. *See id.* at 569. Moreover, the Justice highlighted the "therapeutic value" the public trial provides and explained that when a community is exposed to a shocking crime, the open process of justice serves an "important prophylactic purpose, providing an outlet for community concern, hostility and emotion" as well as assisting the public in "understanding the system in general and its workings in a particular case." *Id.* at 570-71. The Court further expressed the idea that the effect of public attendance strengthens the confidence in judicial remedies and increases the respect for the law, an essential ingredient to a democratic society. *See id.* at 572.

[146] *See id.* at 579. The Court acknowledged that this right of access to trial is not explicitly stated in the First Amendment or anywhere else in the Constitution. *See id.* The Court noted, however, many other rights that have been deemed to be granted by the purpose and wording of the Constitution when taken as a whole, even though these rights are nowhere specifically mentioned in the text. *See id.* at 579-80 & 580 n.16 (citing Stanley v. Georgia, 394 U.S. 557 (1969) (right of privacy); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel between states); Griswold v. Connecticut, 381 U.S. 479 (1965) (right of privacy); NAACP v. Alabama, 357 U.S. 449 (1958) (right of association)). Moreover, the Court has viewed the Bill of Rights as having certain "penumbras"; i.e., rights that are not explicitly mentioned but that logically follow from the rights specifically enumerated in the Bill of Rights. *See Griswold*, 381 U.S. at 484.

Chief Justice Burger, writing for a plurality of the Court, found that the First Amendment must be broadly construed to give full meaning to enumerated rights.[147] To this end, the Court declared that an absolute "closed-door" policy banning public access to trial would be unconstitutional, as such a ban would eviscerate important rights encompassed by the freedoms of speech and press.[148]

Although the *Richmond* Court declared that the right of access is necessary for full expression of enumerated rights, the Court was explicit in stating that access is not absolute and may be restricted.[149] Pertinent to the majority's reasoning was its finding that the public's right of access is sufficiently protected by the press.[150] Because this role of the press is deemed to be of primary importance, the Chief Justice noted that the press should be given preferential access in situations where spectator interest exceeds seating capacity.[151]

The *Richmond* Court pronounced the rule barring mandatory closure to trial.[152] The Supreme Court has since expanded this rule in its most recent decision on access, *Press-Enterprise Co. v. Superior Court*.[153] In *Press-Enterprise*, Chief Justice Burger held that a qualified right of access under the First Amendment attaches to those judicial proceedings that satisfy two complementary considerations.[154] First, the proceeding must historically have been open to both the press and the public.[155] Second, the proceeding must be one that is positively enhanced by public involvement.[156] The majority noted, however, that access may be denied if

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[147] *See Richmond*, 448 U.S. at 580. In this vein, the Court noted that it had previously held that freedom of the press could not properly be exercised without the necessary corresponding access to issues of public importance. *See id.* at 576-77.

[148] *See* Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

[149] *See Richmond*, 448 U.S. at 581 n.18.

[150] *See id.* at 572-73.

[151] *See id.* at 573.

[152] *See id.* at 581; *see also* Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 606 (1982). The *Globe Newspaper* Court noted that under *Richmond* the right of access is not absolute, but held that the circumstances where the press and public can be barred are limited. *See id.* Accordingly,"[w]here . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest." *Id.* at 606-07 (citations omitted). In *Globe Newspaper*, the Court invalidated a Massachusetts law requiring the exclusion of the press and the public during proceedings involving sex crimes when the victim testifying is under eighteen. *See id.* at 602.

[153] 478 U.S. 1 (1986) (*Press-Enterprise II*).

[154] *See id.* at 8.

[155] *See id.*

[156] *See id.* at 9. *Press-Enterprise II* involved the right of access to the transcript of a preliminary hearing in a criminal case. *See id.* at 3. The California Supreme Court declared that the right of access to criminal trials did not extend to preliminary hearings. *See id.* at 5. The Supreme Court conversely found that preliminary hearings were his-

a court determines that publicity may injure the rights of the accused or negatively affect other court participants.[157] Denial of access is mandated, though, only when courtroom "closure is essential to preserve higher values and is narrowly tailored to serve that interest."[158] Because the lower tribunal did not record specific findings outlining the need for closure and did not consider alternatives to absolute closure, the Supreme Court found the denial of access unwarranted in *Press-Enterprise*.[159]

As exemplified by the Supreme Court decisions discussed herein, it is clear that the rationale for the right of access to court proceedings is to ensure that the public is adequately informed and to guarantee the fair administration of justice.[160] Indeed, this two-pronged interpretation complements the rationales for the First Amendment: to perpetuate the search for truth by inflating the "marketplace of ideas,"[161] to aid individuals in their own self-governance,[162] and to keep government power in check.[163] Hence, in accordance with Supreme Court precedent and estab-

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torically, and presumptively, open to the public. *See id.* at 10. Noting to this end its past decision in *Gannett* wherein the closure of a preliminary hearing was upheld, the Court declared that precedent dictated that a courtroom be closed only upon a showing of "good cause." *See id.* at 11. See *supra* note 138 for a discussion of *Gannett*. The Court recognized that preliminary hearings held in California were extensive in scope and quite similar to a trial, and thus found that public access to such hearings would ensure their proper functioning. *See Press-Enterprise II*, 478 U.S. at 12-13.

[157] *See Press-Enterprise II*, 478 U.S. at 9 & n.2.

[158] *Id.* at 9.

[159] *See id.* at 14.

[160] *See* Press-Enterprise Co. v. Superior Ct., 464 U.S. 501, 508 (1984).

> 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.

Id. (citation omitted).

[161] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting):

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

[162] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, 25-27 (1948) (contending that all members of society, who are essentially potential voters, must be made as informed as possible so they are better able to advocate public policy and decide issues in a competent manner).

[163] *See* Mills v. Alabama, 384 U.S. 214, 218-19 (1966) (stating that the "major purpose of [the First Amendment] was to protect the free discussion of governmental affairs"); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (asserting that the rationale behind the protection of free speech

lished First Amendment theories, courtrooms are only closed to the public in extreme circumstances.[164]

In this regard, when discussing the public's right to access for informational and self-governing purposes, it should be clear that "'[p]ublic interest,' taken to mean curiosity, must be distinguished from 'public interest,' taken to mean value to the public of receiving information of governing importance."[165] In other words, there simply is not a First Amendment right "to satisfy public curiosity and publish lurid gossip about private lives."[166] Conversely, a First Amendment right to be well-informed on issues of public concern is clear.[167]

Under the present system, the argument that camera access is an issue of First Amendment concern must fail. Because, by definition, the right of access encompasses *only* issues of public concern, the camera should not reach information of a more private nature.[168] Yet as a result of the commercial nature of televised judicial proceedings today, the camera focuses not on issues protected by the First Amendment but on trials that often transform the courtroom from a tribunal of justice to a talk show studio. Exemplifying this problem is the primary desire of the

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"is the value that free speech . . . can serve in checking the abuse of power by public officials").

[164] *See, e.g., Press-Enterprise II*, 478 U.S. at 15 (noting that a defendant must show more than the mere risk of prejudice from publicity to overcome the public's right of access, and even upon such a showing, any limitation on the public's right of access must be narrowly tailored); Globe Newspapers Co. v. Superior Ct., 457 U.S. 596, 606 (1982) (acknowledging that only in limited circumstances will courtroom access be denied to the press and the public).

[165] Bloustein, *supra* note 130, at 56-57 (footnotes omitted).

[166] *See id.* at 57; *see also* Melville B. Nimmer, *The Right to Speak from* Times *to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 962 (1968) (contending that "speech necessary for an effective and meaningful democratic dialogue by and large does not require references to the intimate activities of named individuals").

[167] See *supra* note 115 and accompanying text discussing the importance of an educated public.

[168] *See* Lassiter, *supra* note 84, at 10 (arguing that "[t]he public's right to know, so very persuasive with respect to the executive and legislative branches, has less sway when applied to the judicial branch"). Because trials seem to concentrate primarily on the personal lives of individuals rather than on government abuse, courts routinely require disclosure of very intimate details of a defendant's life. *See id.* In this respect, the camera invades an individual's privacy even further by graphically exposing matters of private concern not only to courtroom viewers but also to all who may watch the proceeding at home. *See id.* While the press often omits personal, intimate details that have no real bearing on the legal aspects of the case, the "unblinking camera has no discretion and no modesty." *Id.*

public not to be informed in areas of legitimate legal procedure, but rather to be entertained.[169]

Moreover, even if the information disseminated by the camera involved only issues of public concern, the need for cameras in the courtroom is still questionable. It is axiomatic that the right to information is useless unless there is a corresponding opportunity to receive and have access to that information.[170] The camera, however, is an unnecessary means of fulfilling this corollary right. Now, more than ever, the press provides the public with information in a manner so efficient that it dispels any need for live television coverage.[171] Indeed, recent advancements in the multimedia sector allow many trial enthusiasts to be connected "on-line" via the Internet, where they can immediately view the results of trial proceedings as disseminated by the reporters attending these events.[172] In light of the many information alternatives offered to the public, alternatives that are inherently less intrusive than the camera, the argument for live televised broadcasts accordingly fails.[173] Similarly,

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[169] *See, e.g.*, Ginia Bellafante, *Soap Operas: The Old and the Desperate*, TIME, May 29, 1995, at 73 (noting that since Court TV began broadcasting the O.J. trial, the ratings for the top three soap operas, The Young and the Restless, All My Children, and General Hospital, dropped by more than ten percent); Richard Corliss, *It's Already the TV Movie*, TIME, July 18, 1994, at 36 (highlighting the public's "strange taste in atrocities" and tendency to ignore important social issues while remaining fascinated by gossip); James McConville, *Down Is Up for Cable Networks, Broadcasting & Cable*, Oct. 30, 1995, at 51, *available in* 1995 WL 7940318 (reporting a significant drop in the ratings of Court TV, E!, and CNN's Geraldo Rivera Live since the reading of the O.J. verdict); Scaduto, *supra* note 104, at A10 (reporting that Court TV is "pulling the plug" on its syndicated program "Court TV: Inside America's Courts" because of low ratings).

[170] *See* Young v. American Mini Theaters, Inc., 427 U.S. 50, 76 (1976) (Powell, J., concurring) (asserting that the opportunity to receive information is vital to the guarantee of free speech); Branzburg v. Hayes, 408 U.S. 665, 681 (1972) ("without some protection for seeking out the news, freedom of the press could be eviscerated").

[171] *See* Lassiter, *supra* note 84, at 10-11 (arguing that the press adequately covers court proceedings even after omitting irrelevant information, while the camera lens does not "blink" and, therefore, broadcasts personal facts unnecessary to the education of the public); Valukas, *supra* note 28, at 21. Modern press coverage of judicial proceedings is so advanced that the considerations underlying open trials are sufficiently accommodated without live television coverage. *See id.* Today, the sophistication of the press is such that daily transcripts are routinely available and the media is granted access to most courtroom proceedings. *See id.* Arguably, then, "it is open to serious debate whether the public's 'right to know' and its ability to monitor judicial proceedings materially is affected by the absence of live television coverage." *Id.*

[172] *See* Jon Kerr, *Cyberspace Hums with Discussion of Communications Decency Act Case*, WEST'S LEGAL NEWS, Apr. 11, 1996, *available in* 1996 WL 259710 (discussing the fact that although there was no direct on-line access to the O.J. trial, enthusiasts followed the case via on-line reports by correspondents covering the proceedings).

[173] *See* Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 22 (2d Cir. 1984) The court noted that the right of access to information requires the corollary right to receive that information, but asserted that "[n]o case . . . has held that the public has a right

the absence of the camera cannot be said to hinder the assurance of justice because both the public and the media have sufficient access to most court proceedings.

IV. CONCLUSION

As Justice Harlan stated in his oft-cited concurring opinion in *Estes*:

> [T]he 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.[174]

Many argue that that day has come. The variations in state court access rules, however, are troublesome because the differences tread upon a fundamental right granted by the United States Constitution — the right to a fair trial. Because the Supreme Court in *Chandler* did not create a standard regarding camera access, state courts have been left to their own devices. As a result, some state tribunals broadly construe a defendant's Sixth Amendment right while others narrowly interpret the liberty. Augmenting this disturbing consequence is the absence of any concrete data evidencing that a defendant is unharmed by the presence of the camera.

Hence, the present system essentially allows some individuals to be open to potential punishment from the camera while others are shielded by chance of judicial discretion. Defendants who are not famous or newsworthy are arguably granted further protection, as the media will most likely not deem their trial broadcast-worthy. In this regard, the Supreme Court clearly voiced its concern that factors such as "the nature of the crime and the status and position of the accused—or of the victim" would dictate which proceedings are broadcast, resulting in television that may serve to "titillate rather than to educate and inform."[175] Until that concern is adequately vitiated, the "thirteenth juror" should remain outside the courtroom.

Melissa A. Corbett

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to televised trials." *Id.* The *Westmoreland* court dismissed the media's argument that the public's right to access was "wholly diluted" if not extended to broadcast coverage. *See id.* at 23. The court instead found that the right was adequately upheld through the public's ability to review trial proceedings through the newspaper and television news. *See id.*

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

[175] *See* Chandler v. Florida, 449 U.S. 560, 580 (1981).