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IF COURTS ARE OPEN, MUST CAMERAS FOLLOW?

*Dolores K. Sloviter**

It has become a fact of the video age that every high-profile criminal trial is accompanied by a demand for live television coverage of the proceedings. The spirited debate on the advisability of permitting live television coverage of criminal trials has been fueled by the different atmospheres that prevailed at the trials of O.J. Simpson, where live coverage was permitted, and Timothy McVeigh, where it was not. It has even been suggested that the pervasiveness of television during Simpson's highly publicized trial had a direct connection to his ultimate acquittal for the murder of his former wife and her companion.¹

Inasmuch as no trial can be replicated in laboratory conditions, scientific experimentation is not possible, and we thus have no empirical data on the effect of television on a criminal trial from which to make policy decisions. Not surprisingly, the absence of evidence has not left us with a dearth of commentary and arguments on all sides of the dialogue.

* Circuit Judge, United States Court of Appeals for the Third Circuit. These comments are based on some portions of the 12th Annual Howard Kaplan Memorial Lecture given by Judge Sloviter at Hofstra University School of Law on November 5, 1997. The Author wishes to thank her law clerk, Michael B. DeSanctis, for his assistance in the preparation of this Article.

1. See S.L. Alexander, *The Impact of California v. Simpson on Cameras in the Courtroom*, 79 JUDICATURE 169, 172 (1996) ("The Simpson case has fueled a flurry of renewed attention to the controversy over courtroom cameras . . ."); Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COLO. L. REV. 989, 1011 (1996) (discussing Judge Ito's conduct in the courtroom); Peter Arenella, *Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1254-55 (1996) (discussing the effect of the O.J. Simpson trial on arguments for cameras in the courtroom); Christo Lassiter, *TV or Not TV—That Is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928, 981 (1996) (noting that the O.J. Simpson trial was "a trial which eclipses both surveys and speculation to demonstrate the disastrous reality of cameras in the courtroom"); Kelli L. Sager & Karen N. Frederiksen, *Televising the Judicial Branch: In Furtherance of the Public's First Amendment Rights*, 69 S. CAL. L. REV. 1519, 1519 (1996) (criticizing cameras in the courtroom in the O.J. Simpson trial); Gerald F. Uelman, *The Trial as a Circus: Inherit the Wind*, 30 U.S.F. L. REV. 1221, 1222 (1996) (noting the current movement to ban television cameras from the courtrooms in the wake of the O.J. Simpson trial).

From my view, one of the most provocative arguments made by those who champion live media coverage has been that it is merely an extension of the public trial right. Steven Brill, the founder of the Courtroom Television Network and, as could be expected, one of the most ardent supporters of televising trials, has even gone so far as to label those who have views different than his as being in favor of secret trials.²

I have always viewed myself as a staunch supporter of the public's right to know about the court system and what transpires in pending cases,³ and thus I was troubled that I did not instinctively find the connection between the right of public trial and televising trial proceedings as compelling as Mr. Brill does.⁴ It seemed that I needed to re-examine the genesis and rationale of the right of public access to trials before considering whether I agreed that the right to televise trial proceedings follows inexorably.

I. ACCESS TO COURT PROCEEDINGS

We begin with the notable absence in the Constitution of any provision that mentions a right of the *public* to access to court proceedings. The Sixth Amendment, the sole provision to refer to a public trial, lists it among the rights of the criminal defendant.⁵

2. See Steven Brill, *Courtroom Cameras*, 72 NOTRE DAME L. REV. 1181, 1181 (1997).

3. See, e.g., *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 164 (3d Cir. 1993) (finding a presumptive right to public access to materials filed in connection with nondiscovery pretrial motions); *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 662 (3d Cir. 1991) (finding a common law presumptive right of public access to material filed in connection with a summary judgment motion); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 343 (3d Cir. 1986) (holding that there is a presumption of access to the settlement agreement filed with the court); *United States v. Criden (In re National Broadcasting Co.)*, 648 F.2d 814, 823 (3d Cir. 1981) (holding that the media has a right to copy videotapes introduced in the Abscam trial, and declaring that "there is a strong presumption that material introduced into evidence at trial should be made reasonably accessible in a manner suitable for copying and broader dissemination").

4. Other commentators argue, without case law authority, that the First Amendment requires giving access at trials to electronic and television media. See, e.g., Susan E. Harding, Note, *Cameras and the Need for Unrestricted Electronic Media Access to Federal Courtrooms*, 69 S. CAL. L. REV. 827 (1996); Kathleen M. Krygier, Comment, *The Thirteenth Juror: Electronic Media's Struggle to Enter State and Federal Courtrooms*, 3 COMM. LAW CONSPECTUS 71 (1995). But cf. Elizabeth M. Hodgkins, Note, *Throwing Open a Window on the Nation's Courts by Lifting the Ban on Federal Courtroom Television*, 4 KAN. J. L. & PUB. POL'Y. 89, 92 (1995) ("[C]ourtroom television presently floats uneasily in First Amendment limbo.").

5. The text of the Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

The inclusion by the framers of our Constitution of the right of an open trial among the panoply of rights secured to a criminal defendant followed naturally as it was one of the features of basic criminal procedure that came to the colonies from England.⁶ In fact, the Supreme Court has noted that from the time even before the Norman conquest, the one constant from early times was the public character of the criminal trial—a trial “open to all who cared to observe.”⁷ At the time our organic laws were adopted, it was “an indispensable attribute of an Anglo-American trial.”⁸

The “Anglo-American distrust for secret trials has been variously ascribed to the notorious use of [secret trials] by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy’s abuse of the *lettre de cachet*.”⁹ Whatever its origin, the right to a public trial was sufficiently ingrained at the time of the framing of our Constitution that its inclusion was apparently taken as unexceptional, as we have no record of it being the subject of much dispute.¹⁰

The language of the Sixth Amendment, specifically, “[i]n all criminal prosecutions, *the accused* shall enjoy the right to a speedy and public trial,”¹¹ has led the Supreme Court to treat the right to a public trial “as [a right] created for the benefit of the defendant.”¹² While the Court upheld a defendant’s right under the Sixth Amendment to protest the secrecy of his trial,¹³ it held in *Gannett Co. v. DePasquale* that there

against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

6. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980).

7. *Id.* at 564. For a thorough discussion of the public nature of criminal trials, see *id.* at 564-69.

8. *Id.* at 569.

9. *In re Oliver*, 333 U.S. 257, 268-69 (1948) (citations omitted).

10. There is some irony in recalling that the framers themselves met behind closed doors and deliberated in secret. Before the Convention that drafted the Constitution was finally adjourned, the Journals and other papers of the Convention were deposited in the hands of the President, George Washington, and covered by a seal of secrecy until 1819 when John Quincy Adams, the Secretary of State, had them printed at the request of President Monroe. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, xi-xiii (Max Farrand ed., rev. ed. 1966).

11. U.S. CONST. amend. VI (emphasis added).

12. *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979). The issue in *Gannett* involved the right of a newspaper publisher to insist on access to a pretrial suppression hearing. See *id.* at 370-71. In addition to holding that the Sixth Amendment does not require public access in the situation where parties agree to closure, see *id.* at 384, the Court held that there was no public right to attend pretrial proceedings under English common law, see *id.* at 389, and that even if the First and Fourteenth Amendments do guarantee a public right, the defendant’s right to a fair trial thereafter outweighed any right of the public. See *id.* at 392-93.

13. See, e.g., *Oliver*, 333 U.S. at 272-73.

was no "correlative right in members of the public to insist upon a public trial."¹⁴ That holding rejected the argument of a newspaper publisher that "members of the public have an enforceable right to a public trial that can be asserted independently of the parties in the litigation."¹⁵

To be sure, the Court acknowledged that there was a "strong societal interest in public trials."¹⁶ However, by a bare five-Justice majority, the Court declined to catapult that societal interest into an enforceable right, saying, "[r]ecognition of an independent public interest in the enforcement of Sixth Amendment guarantees is a far cry . . . from the creation of a constitutional right on the part of the public."¹⁷

Yet, a year later, in *Richmond Newspapers, Inc. v. Virginia*,¹⁸ the Court, with only one dissent, was to find precisely such a constitutional right, albeit not in the Sixth Amendment.¹⁹ The issue arose when a defendant accused of murder decided he would prefer to forego his right to a public trial accorded by the Sixth Amendment.²⁰ His decision may have had something to do with the fact that he was facing his fourth trial for murder in the Circuit Court of Hanover County, Virginia.²¹ The prosecutor did not object to the waiver, and the trial judge granted defendant's motion to exclude the press and the public from the courtroom.²² But a local newspaper, whose reporters had been excluded, moved to vacate the closure order and was initially unsuccessful, both in the trial court and the Virginia Supreme Court.²³

By the time the newspaper's appeal reached the United States Supreme Court, the defendant had been found not guilty by the trial court.²⁴ The Supreme Court nonetheless chose to consider "whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required

14. *Gannett*, 443 U.S. at 381.

15. *Id.* at 383.

16. *Id.*

17. *Id.* Justice Powell, who was a member of the five-Justice majority, believed that the press and the public do have a First Amendment right of access, *see id.* at 397-98, but he concurred on the ground that the trial court adequately protected that right by hearing the representatives of the press and concluding that in the circumstances of that case closure was appropriate. *See id.* at 402-03.

18. 448 U.S. 555 (1980).

19. *See id.* at 580.

20. *See id.* at 559-60.

21. Stevenson, the defendant, had been convicted of second-degree murder, but that conviction was overturned for improper admission of evidence; both his second and third trials ended in mistrials, the third partly as a result of some newspaper publicity. *See id.* at 559.

22. *See id.* at 560.

23. *See id.* at 560-62.

24. *See id.* at 562-63.

to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure."²⁵ In other words, do the public and the press have a right grounded in the Constitution to attend a criminal trial independent of the defendant's Sixth Amendment right to a public trial?

Chief Justice Burger, writing for the plurality, found that there is such a right of public access to criminal trials, and that it emanates from the penumbra of the specific protections enumerated in the First Amendment.²⁶ His opinion distinguished *Gannett* rather summarily on the ground that it dealt with access to hearings on pretrial motions, rather than on a right of access to trials, and that the Court there did not decide whether the First and Fourteenth Amendments guarantee a right of the public to attend trials.²⁷ He then declared that in guaranteeing free speech, along with the correlative right to receive information, a free press, and the right of the people to assemble in public places, "the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning [and effect] to those explicit guarantees."²⁸ The Justices' different views generated a total of six additional opinions: two concurring opinions, three separate opinions concurring in the judgment, and one dissent.

It is primarily to *Richmond Newspapers*, the foundation on which the public right to access to court proceedings rests, that one must look to analyze whether the rationale that the Court enunciated for a right to public access applies equally to television in the courtroom.

In his opinion, Chief Justice Burger spoke of the therapeutic, cathartic value that public access to criminal trials has for the community, making it easier for the public to accept particular verdicts and engendering public respect for and confidence in the judicial system.²⁹ He referred to the "educative effect of public attendance,"³⁰ which affords the public "a form of legal education."³¹ He commented on the "concern and importance to the people [of] the manner in which criminal trials are conducted."³² He also placed great emphasis on the role played by open access to judicial proceedings in "enhanc[ing] the in-

25. *Id.* at 564.

26. *See id.* at 580.

27. *See id.* at 564, 580-81.

28. *Id.* at 575.

29. *See id.* at 570-72.

30. *Id.* at 572 (quoting 6 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1834, at 438 (James H. Chadbourne ed., rev. ed. 1976)).

31. *Id.* (quoting *State v. Schmit*, 139 N.W.2d 800, 807 (Minn. 1966)).

32. *Id.* at 575.

tegrity and quality of what takes place [in the courtroom].”³³

In his concurring opinion, Justice Brennan echoed many of these policy considerations. For him, the First Amendment “has a *structural* role to play in securing and fostering our republican system of self-government.”³⁴ Encouraging receipt of information through public access to trials fosters informed debate and meaningful discussion of government affairs, thereby enabling the people to “resolve their own destiny.”³⁵ He has also viewed access as allowing the public to act as a check on the judiciary,³⁶ and as discouraging perjury by witnesses and corrupt decision making by judges.³⁷

Cases in which the Supreme Court extended the public right of access to trials followed quickly after *Richmond Newspapers*. Two years later, the Court held that a Massachusetts statute requiring that trials for specified sexual offenses against minors must be closed during the victim’s testimony violated the First Amendment right of access to criminal trials.³⁸ Justice Brennan, writing for the Court, recognized that the reasons given for the statute, i.e., the protection of minor victims of sex crimes from further trauma and embarrassment and encouragement of such victims to come forward and testify, could be compelling reasons for closure, but stated that the decision to close *vel non* had to be made on a case-by-case basis.³⁹

The next line of cases focused on which proceedings other than the trial were covered by the right of access. In *Press-Enterprise Co. v. Superior Court* (“*Press-Enterprise I*”),⁴⁰ the Court, in an opinion by Chief Justice Burger, held that it was unconstitutional for the trial court to order the closing of the *voir dire* of prospective jurors in a capital criminal trial of a defendant charged with rape and murder of a teenage girl.⁴¹ Jury selection had traditionally been open in England⁴² and “was the common practice in America when the Constitution was adopted.”⁴³ The right to attend the *voir dire*, a right held by everyone in the community,

33. *Id.* at 578.

34. *Id.* at 587 (Brennan, J., concurring).

35. *Id.* at 587 n.3 (quoting *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting)). For a brief discussion of the necessity of informed debate to self-government, see *id.* at 587-88.

36. See *Gannett*, 448 U.S. at 592, 596.

37. See *id.* at 596-97.

38. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610-11 (1982).

39. See *id.* at 607-10.

40. 464 U.S. 501 (1984).

41. See *id.* at 510-13.

42. See *id.* at 505-08.

43. *Id.* at 508.

was said to promote fairness.⁴⁴ Significant to our purposes is the Chief Justice's further statement that "[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed"⁴⁵

Two years later, in *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise II*"),⁴⁶ the issue arose again when a California trial court ruling on motion of the defendant, a nurse charged with murdering twelve patients by administering massive doses of the heart drug lidocaine, both closed the lengthy evidentiary preliminary hearings and prevented the release of the transcript to the public.⁴⁷ The California Supreme Court held that the right of public access to criminal proceedings extended only to the actual criminal trial itself.⁴⁸ In reversing, the United States Supreme Court disagreed, holding that the First Amendment right of access also attaches to preliminary hearings and noting that in criminal cases the preliminary hearings often are "the final and most important step" in the proceedings.⁴⁹

Continuing the series of cases expanding the public right to access, the Court in *Waller v. Georgia*⁵⁰ also applied the open access presumption to a suppression hearing.⁵¹ That decision was of particular significance because, as noted above, the Court held in *Gannett Co. v. DePasquale*,⁵² only five years earlier, that the press could be excluded from a suppression hearing.⁵³ Of course, in *Gannett* the defendant had agreed to the closure,⁵⁴ whereas in *Waller* the defendant objected.⁵⁵ Thus, the holding of *Waller*, that the accused's Sixth Amendment right to a public trial extends to a suppression hearing conducted prior to the presentation of evidence to the jury,⁵⁶ was not exceptional. What was of particular interest was the Court's absorption of the intervening First Amend-

44. *See id.*

45. *Id.*

46. 478 U.S. 1 (1986).

47. *See id.* at 3-6.

48. *See id.* at 5.

49. *Id.* at 12. Although the California Superior Court already released the transcript by the time the case reached the United States Supreme Court, the Court held that the case was not moot because "this [type of] controversy is 'capable of repetition, yet evading review.'" *Id.* at 6 (quoting *Globe Newspaper Co. v. Superior Court*, 464 U.S. 596, 603 (1982), and *Gannett Co. v. DePasquale*, 443 U.S. 368, 377-78 (1979)).

50. 467 U.S. 39 (1984).

51. *See id.* at 47.

52. 443 U.S. 368 (1979).

53. *See id.* at 394.

54. *See id.* at 368. In fact, the defendant requested the closure. *See id.*

55. *See Waller*, 467 U.S. at 42.

56. *See id.* at 47.

ment precedent into the Sixth Amendment analysis. The Court stated flatly, “[t]he explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public.”⁵⁷ It concluded that “under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press-Enterprise* [I] and its predecessors.”⁵⁸

The steady expansion of the scope of the public’s right of access to court proceedings could be viewed as the prelude to a holding that televising those proceedings, which provides the opportunity for exposure to a broader audience, necessarily is encompassed within the public right of access. However, the Court itself has consistently cautioned that there may be instances in which access would be inappropriate, and that competing policy or prudential concerns may come into play.⁵⁹ More important, the Court’s two decisions that raised the permissibility of televised proceedings do not analyze the issue in terms of any public right of access.

II. SUPREME COURT CASES ON CAMERAS IN THE COURTROOM

The Supreme Court had its first opportunity to examine the constitutional implications of the presence of cameras in the courtroom in *Estes v. Texas*,⁶⁰ fifteen years before it enunciated the public right of access in *Richmond Newspapers*. The occasion was the trial of Billie Sol Estes, a political mover and shaker from Texas in the era of Lyndon Johnson, who was charged in a Texas court with fraud and obtaining property from local farmers through false pretenses and fraudulent representations.⁶¹ The media, particularly television, showed intense interest in the proceedings.⁶²

Although the pretrial proceedings concerned issues that were hardly dramatic, the accounts given by the Justices portray the courtroom as a media zoo. At least twelve camera operators were present, cables and wires covered the courtroom floor, three microphones were placed on the judge’s bench,⁶³ close-ups were taken of documents as

57. *Id.* at 46.

58. *Id.* at 47.

59. *See, e.g., id.* at 45; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81 (1980).

60. 381 U.S. 532 (1965).

61. *See id.* at 534-35.

62. *See id.* at 535-38.

63. *See id.* at 536.

they were being read by the defendant and his counsel at counsel's table,⁶⁴ at least thirty people were standing in the aisles, photographers were "roaming at will" about the courtroom and behind the bench,⁶⁵ and the jurors themselves were filmed.⁶⁶ It was conceded that the cameras had caused a "considerable disruption."⁶⁷ Incredibly, four of the jurors who were later empaneled had seen or heard all or part of the broadcast of these pretrial proceedings.⁶⁸ At the trial, the only live television broadcast was of the prosecution's closing argument and the return of the jury verdict, in addition to short clips of the rest of the trial used simply as a backdrop for a reporter's coverage.⁶⁹

Estes was convicted and appealed on the ground that he was deprived of due process by the televising and broadcasting of his trial.⁷⁰ The Supreme Court agreed. Justice Clark, writing an opinion for the Court, which was joined by Chief Justice Warren and Justices Douglas and Goldberg,⁷¹ was of the opinion that in all criminal cases cameras deprived defendants of a fair trial, and their presence in the courtroom was *per se* unconstitutional.⁷² The crucial fifth vote came from Justice Harlan, who expressly limited his concurrence in the opinion (and, therefore, the holding of the majority) to high-profile or notorious criminal cases.⁷³

In considering the manner and extent to which cameras affect the fairness of the trial, the Court emphasized that court proceedings are held, as it said, "for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial."⁷⁴

The Court examined the effects of television cameras on the principal trial participants, i.e., jurors, witnesses, judges, and the defendant and defense counsel.⁷⁵ The Court believed that jurors would be subjected not only to the physical distraction caused by the cameras, but the men-

64. *See id.* at 538.

65. *Id.* at 553 (Warren, C.J., concurring).

66. *See id.* at 609 (Stewart, J., dissenting). Photographs of what the courtroom looked like with all the cameras are in an appendix to Chief Justice Warren's concurrence. *See id.* at 586.

67. *Id.* at 536.

68. *See id.* at 538.

69. *See id.* at 537.

70. *See id.* at 534-35.

71. Chief Justice Warren wrote a concurring opinion, with which Justices Douglas and Goldberg joined, joining Justice Clark's opinion to express additional views on why the televising of criminal trials is inherently a denial of due process. *See id.* at 552.

72. *See id.* at 542-44, 550-52.

73. *See id.* at 587 (Harlan, J., concurring).

74. *Id.* at 540.

75. *See id.* at 545-50.

tal distraction caused from the broadcasting of a notorious trial that converts it into a *cause celebre*, thereby rendering jurors far more likely to deliver a verdict influenced by societal pressures that have no business in the courtroom.⁷⁶

Although the “impact” on the witnesses was “incalculable,” the Court thought “[s]ome may be demoralized and frightened, some cocky and given to overstatement,” some embarrassed and others “reluctant to appear.”⁷⁷

Judges also are “subject to the same psychological reactions as laymen.”⁷⁸ The Court noted that especially where judges are elected, “telecasting of a trial becomes a political weapon.”⁷⁹ Though it characterized judges as “high-minded men and women,” the Court believed that judges could find it “difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly and through the shaping of public opinion.”⁸⁰

The Court was particularly concerned about the impact on the defendant who “is entitled to his day in court, not in a stadium, or a city or nationwide arena,” stating:⁸¹

The inevitable close-ups of [the defendant’s] gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before him—sometimes the difference between life and death—dispassionately, freely and without the distraction of wide public surveillance.⁸²

Finally, the Court worried that telecasting may deprive the defendant of effective counsel and anticipated that “the temptation offered by television to play to the public audience might . . . have a direct effect not only upon the lawyers, but [on the other principal participants].”⁸³

Justice Harlan, the key fifth vote, in traditional fashion went no further than he had to; he made his view clear that “[n]o constitutional

76. *See id.* at 545-46; *see also id.* at 577 (Warren, C.J., concurring) (“This Court would no longer be able to point to the dignity and calmness of the courtroom as a protection from outside influences. For the television camera penetrates this protection and brings into the courtroom tangible evidence of the widespread interest in a case . . .”).

77. *Id.* at 547.

78. *Id.* at 548.

79. *Id.*

80. *Id.* at 548-49.

81. *Id.* at 549.

82. *Id.*

83. *Id.*

provision guarantees a right to televise trials.”⁸⁴ Moreover, he stated that “the Court should proceed only step by step in this unplowed field.”⁸⁵ He limited his joinder in the opinion of the majority to a case that was heavily publicized and highly sensational, such as the *Estes* case, and concluded that in such a case, the considerations against allowing televising far outweigh countervailing factors.⁸⁶ Justice Harlan concurred while acknowledging that the televising of the proceedings at *Estes*’s trial was “relatively unobtrusive,” as the cameras were contained in a booth at the back of the courtroom.⁸⁷

In dissent, Justice Stewart, joined by Justices Black, Brennan, and White, thought it was unwise policy, at least then, to introduce television into a courtroom.⁸⁸ However, he noted that there was only limited live telecasting during the *Estes* trial itself, that there was no claim based on any First Amendment right, and that he himself was wary of a *per se* rule which, in light of future technology, might limit true First Amendment rights.⁸⁹

The Justices made clear that this was not the last word on this issue, and that it would have to be revisited in the future if there were technological advances made with television.⁹⁰

The future, and with it another opportunity to consider cameras in the courtroom, came sixteen years later in *Chandler v. Florida*.⁹¹ That case was one of local public interest, as the defendants were policemen charged with robberies and the trial had been televised over the defendants’ objection.⁹² Chandler and a co-defendant appealed after they were convicted, basing their due process challenge on *Estes*.⁹³

The Court rejected Chandler’s challenge and upheld the broadcasting without overruling *Estes*.⁹⁴ It stated:

Estes is not to be read as announcing a constitutional rule barring still photographic, radio, and television coverage in all cases and under all circumstances. It does not stand as an absolute ban on state experimentation with an evolving technology, which, in terms of modes of mass

84. *Id.* at 588 (Harlan, J., concurring).

85. *Id.* at 590-91.

86. *See id.* at 587.

87. *Id.* at 588.

88. *See id.* at 601.

89. *See id.* at 602-04.

90. *See id.* at 540, 595-96 (Harlan, J., concurring); *id.* at 604 (Stewart, J., dissenting).

91. 449 U.S. 560 (1981).

92. *See id.* at 567-68.

93. *See id.* at 568, 570.

94. *See id.* at 582-83.

communication, was in its relative infancy in 1964, and is, even now, in a state of continuing change.⁹⁵

Thus, retreating somewhat from the opinion of the Court in *Estes*, the *Chandler* Court held that on a due process challenge it was the defendant's burden to show actual prejudice resulting from the broadcast—a burden that had not been met by the defendants in that case.⁹⁶

In light of the difference in result between *Estes* and *Chandler*, one might find it significant that only three Justices who sat on the Court in 1965, Brennan, Stewart, and White, were still on the bench in 1981—and that all three had dissented in *Estes*.⁹⁷

More important was the markedly different use of cameras at the two trials. Florida, unlike Texas, had imposed a restrictive court rule aimed at limiting the influence of cameras on the trial.⁹⁸ Only one camera was allowed. The equipment was to be placed in a fixed location and not moved. Lenses and film cartridges could not be changed during the proceedings. The jurors would not be filmed. No audio recordings of attorney conferences or side bar discussions were permitted, and furthermore, the judge had discretion to prohibit coverage of certain witness.⁹⁹ There can be little doubt that such safeguards were instrumental in convincing the *Chandler* Court not to pretermitt experimentation by states with televising their court proceedings.

In both *Estes* and *Chandler*, the focus was on the effect televising the trial had on whether the defendant received a fair trial. If cameras in the courtroom are to be rationalized in terms of the public's right of access to court proceedings stemming from the First Amendment, it would have been only natural for the Supreme Court to have made that connection. The *Chandler* case was decided within a year of *Richmond Newspapers*, but the Court did not rely on any First Amendment right of the public or the press in upholding the Florida rule permitting cameras. To the contrary, it suggested otherwise by expressly noting that in authorizing cameras "the Florida Supreme Court pointedly rejected any state or federal constitutional right of access on the part of photogra-

95. *Id.* at 573-74 (footnote omitted). Justice Stewart and Justice White each concurred separately, stating that *Estes* should be overruled. *See id.* at 583 (Stewart, J., concurring); *id.* at 587 (White, J., concurring).

96. *See id.* at 581.

97. *See Estes v. Texas*, 381 U.S. 532, 601 (1965) (Stewart, J., dissenting). Justice Brennan joined Chief Justice Burger's majority opinion in *Chandler*. *See Chandler*, 449 U.S. at 561. Both Justice Stewart and Justice White wrote opinions concurring in the judgment in *Chandler*. *See id.* at 583, 586.

98. *See Chandler*, 449 U.S. at 565-66.

99. *See id.* at 566.

phers or the broadcast media to televise or electronically record and thereafter disseminate court proceedings.”¹⁰⁰

The *Chandler* Court continued its obvious concurrence with the Florida court’s conclusion by characterizing its holding as “carefully framed” and then quoting that court’s holding verbatim:

While we have concluded that the due process clause does not prohibit electronic media coverage of judicial proceedings per se, by the same token we reject the argument of the [Post-Newsweek stations] that the first and sixth amendments to the United States Constitution mandate entry of the electronic media into judicial proceedings.¹⁰¹

The Florida Supreme Court in turn relied on the Supreme Court’s decision in *Nixon v. Warner Communications, Inc.*,¹⁰² denying the television networks the right to copy tapes made by President Nixon that were introduced in the criminal trials against the President’s advisors in the Watergate cases.¹⁰³ The Court in *Chandler* quoted from language in *Nixon* when it said, “[i]n the first place, . . . there is no constitutional right to have [live witness] testimony recorded and broadcast. Second, . . . the guarantee of a public trial . . . confers no special benefit on the press.”¹⁰⁴

The decisions of those federal courts of appeals that have directly addressed the issue of cameras in the courtroom have also rejected the suggestion that the media has any constitutional right to televise proceedings. The Seventh and Eleventh Circuits upheld blanket bans on cameras in federal criminal proceedings, concluding that the right of access enunciated in *Richmond Newspapers* and *Globe Newspapers Co.* was a right simply to attend, not to televise or record.¹⁰⁵ In a similar holding for the Second Circuit,¹⁰⁶ Judge Oakes wrote:

100. *Id.* at 569 (referring to *In re* Petition of Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, 774 (Fla. 1979)).

101. *Id.* at 569 (alteration in original) (quoting *Post-Newsweek Stations*, 370 So. 2d at 774).

102. 435 U.S. 589 (1978). In *Nixon*, the Supreme Court decided that the Nixon papers should not be released under the common law right of access to judicial records because the Presidential Recordings Act already prescribed an avenue of public access. *See id.* at 604-08.

103. *See id.* at 591.

104. *Chandler*, 449 U.S. at 569 (alteration in original) (quoting *Nixon*, 435 U.S. at 610 (citations omitted)).

105. *See* *United States v. Kerley*, 753 F.2d 617, 620-22 (7th Cir. 1985); *United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir. 1983).

106. *See* *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16 (2d Cir. 1984). General Westmoreland had filed a civil defamation action against Columbia Broadcasting System (“CBS”) for its claim that he and the military command distorted intelligence data during the Vietnam War to make it appear more optimistic than it was. Both parties had consented to being filmed, but televising was barred because of a district court local rule banning cameras in civil cases. *See id.* at

There 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. It is a leap that is not supported by history. It is a leap that we are not yet prepared to take.¹⁰⁷

Under the case law to date, televised trials are neither constitutionally prohibited in all instances nor are they constitutionally mandated in any instance. The analysis now must shift to whether the reasons underlying the public right of access to trials apply equally to expanding that access via contemporaneous televising of the trials.

III. CONSIDERATION OF PUBLIC ACCESS RATIONALE

Review of the Supreme Court's cases in the last two decades shows that the rationale given for finding a right of the public and the press to attend court proceedings has been primarily that the open trial enhances the quality, and safeguards the integrity, of the fact-finding function, thereby serving as a check upon the judicial process. Such a check fosters an appearance of fairness that heightens public respect for, and confidence in, the judicial process, while having an educative effect.

I turn first to the important—perhaps central—purpose served by open trials, namely “discourag[ing] perjury, the misconduct of participants, and decisions based on secret bias or partiality.”¹⁰⁸ There seems no reason why the benefits of such observation of a trial would not flow just as effectively from the presence of neutral observers in the courtroom as it would under the eyes of scattered observers watching via television.

In *Nixon*, the Court stated, “[t]he requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.”¹⁰⁹ The same point was made by Chief Justice Warren in his separate concurring opinion in the *Estes* case, where he recognized that as long as a courtroom has facilities for a reasonable number of the public to observe the proceedings, “[t]hose who see and hear what transpired can report it with impunity.”¹¹⁰ Arguably, the value of openness in deterring witness

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107. *Id.* at 23.

108. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980); *see also* *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7 (1986) (*Press-Enterprise II*) (noting that a common goal of open trials is the assurance of fairness).

109. *Nixon*, 435 U.S. at 610.

110. *Estes v. Texas*, 381 U.S. 532, 585 (1980) (Warren, C.J., concurring) (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)).

perjury might be increased as more persons from various venues have the opportunity to observe from afar via television, but the reporting of testimony in trials of public interest is so widespread and instantaneous today that the increased exposure can be marginal at best. As Justice Harlan stated in his concurrence in *Estes*, “[i]t is impossible to believe that the reliability of a trial as a method of finding facts and determining guilt or innocence increases in relation to the size of the crowd which is watching it.”¹¹¹

The same analysis applies to the appearance of fairness rationale. As Chief Justice Burger wrote, “the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known.”¹¹² Similarly, Justice Black noted that the knowledge that the trial “is subject to contemporaneous review in the forum of public opinion is [itself] an effective restraint on possible abuse of judicial power.”¹¹³

The most frequently raised argument for allowing cameras in the federal courts is that it serves to educate the public about the operation of the judicial system. Although the public educative function has been included in the rationale for open access to the courts, both Chief Justice Warren and Justice Harlan emphasized in *Estes* that the purpose of a trial is not to educate.¹¹⁴ The educative function cannot be pursued if it is to be at the expense of the trial’s truth-seeking function. In any event, the educative effect is more a policy rationale than a constitutionally based reason to compel televising.¹¹⁵

Significantly, one of the few neutral studies conducted on cameras in the courtrooms questions how much education television provides. The 1994 evaluation of the pilot program in federal courts conducted by the Federal Judicial Center found that most courtroom footage was used merely to illustrate news reports rather than to tell the story through the words and actions of the participants, and although it provided basic information about the case, it provided little verbal information to viewers about the legal process.¹¹⁶

In light of the patent inability of courts to require that televising be uncut, fair, and comprehensive, there is no reason to assume that the

111. *Id.* at 595 (Harlan, J., concurring).

112. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (Press-Enterprise I).

113. *In re Oliver*, 333 U.S. 257, 270 (1948).

114. *See Estes*, 381 U.S. at 575, 589.

115. *See id.* at 589 (Harlan, J., concurring).

116. *See* FEDERAL JUDICIAL CTR., ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS 7 (1994).

televised proceedings will not be primarily of the sensational, notorious, or shocking portions of a trial that may fail to give the public the well-balanced look into litigation that is really necessary to understand how the judicial system operates.¹¹⁷

It follows that the considerations that led the Supreme Court to find a presumptive right of public access to court proceedings in the First Amendment do not compel finding a constitutional basis for televising court proceedings. The issue then is a policy one, not a constitutional one.

Before *Chandler* was argued in 1980, there were approximately nineteen states allowing electronic coverage.¹¹⁸ By 1996, as many as forty-seven states allowed some degree of televising live court proceedings.¹¹⁹ In contrast, federal courts are bound by both the Criminal Procedure Rule that prohibits electronic media coverage of criminal proceedings¹²⁰ and the decision of the Judicial Conference of the United States to reject its own committee's recommendation to permit the photographing, recording, and broadcasting of civil proceedings.¹²¹ More recently, the Judicial Conference authorized the courts of appeals to decide on an individual basis whether cameras will be allowed at appellate arguments.¹²²

The most telling distinction between the public right of access to trials and the media's right to televise trials is the likelihood that televising trials may introduce an additional factor into the trial itself. In his concurrence in *Estes*, Chief Justice Warren said that "the evil of televised trials . . . lies not in the noise and appearance of the cameras, but

117. See *Estes*, 381 U.S. at 594-95 (Harlan, J., concurring).

118. See *Chandler v. Florida*, 449 U.S. 560, 565 n.6 (1981).

119. See *Lassiter*, *supra* note 1, at 929 n.8; RADIO-TELEVISION NEWS DIRECTORS ASS'N, SUMMARY, STATE CAMERA COVERAGE RULES 1 (1994).

120. See FED. R. CRIM. P. 53.

121. See Marcia Coyle, *Federal Judges OK Cameras for Appeals*, NAT'L L.J., Mar. 25, 1996, at A14; Matthew Goldstein, *U.S. Judicial Conference Votes to Allow Cameras into Appellate Courts*, N.Y. L.J., Mar. 13, 1996, at 1; Deborah Pines, *Federal Judges to Weigh Cameras*, N.Y. L.J., Mar. 5, 1996, at 1.

122. See Coyle, *supra* note 121, at A14; Goldstein, *supra* note 121, at 1. Fourteen months after the Judicial Conference rejected a plan to expand the pilot project that was ongoing in some federal courts, the Judicial Conference narrowly passed a proposal by then Chief Judge Jon O. Newman of the Second Circuit Court of Appeals to allow the individual courts of appeals to determine whether to prohibit cameras in the courtroom or not. See Coyle, *supra* note 121, at A14. At this time, only the Second and the Ninth Circuit Courts of Appeals, participants in the Judicial Conference's pilot program, see FEDERAL JUDICIAL CTR., *supra* note 116, at 4, have decided to allow cameras in the courtrooms for civil cases pursuant to the guidelines proscribed by the Court. See 2d CIR. R. app. part F; 9TH CIR. GUIDELINES FOR PHOTOGRAPHING, RECORDING, AND BROADCASTING IN THE COURTROOM (1996).

in the trial participants' awareness that they are being televised."¹²³ Even in *Chandler*, which upheld the televising of court proceedings, the Court expressed concern about "the psychological impact of broadcast coverage upon the participants in a trial, and particularly upon the defendant."¹²⁴

While the *Estes* Court did not have either scientific or empirical data to support its lengthy panoply of harmful effects caused by televising trials, neither have the proponents of televised court proceedings produced substantial and reliable evidence that such effects do not ensue.¹²⁵ Until they do, they will not be able to convince even those who find attractive the concept of broad public exposure to the judicial system that the media's preoccupation with certain trials, and the posturing of counsel and witnesses that accompanies televising trials, will not lead to an unacceptable distortion of the judicial process itself. It is difficult to disagree with Chief Justice Warren's conclusion that "[t]he right of the communications media to comment on court proceedings does not bring with it the right to inject themselves into the fabric of the trial process to alter the purpose of that process."¹²⁶

123. *Estes v. Texas*, 381 U.S. 532, 570 (Warren, C.J., concurring).

124. *Chandler v. Florida*, 449 U.S. 560, 578 (1981).

125. Compare the approach of Chief Justice Warren in *Estes*, 381 U.S. at 569-70 (Warren, C.J., concurring), with that in the majority opinion in *Chandler*, 449 U.S. at 578-79.

126. *Estes*, 381 U.S. at 585 (Warren, C.J., concurring).

