Cameras in the Courtroom: A First Amendment Right of Access

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by RICHARD H. FRANK*

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It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which public duty is performed.

—Justice Oliver Wendell Holmes

Our courtroom is an open courtroom: the public and the press are there routinely, and since today television is part of the press, I have a hard time seeing why it shouldn’t be there too.

—Justice Potter Stewart

I

Introduction

In October 1984, Ted Turner’s Cable News Network (CNN) petitioned the U.S. District Court for the Southern District of New York to permit live television coverage of the trial of General William Westmoreland’s libel suit against CBS. The court denied the petition, citing a local rule of court prohibiting televised trial coverage from inside the courtroom. The Court of Appeals for the Second Circuit affirmed, rejecting CNN’s argument that the rule violated the first amendment to the

6. General Rule 7 provides:
   The taking of photographs and the use of recording devices in the courtroom or its environs, except by officials of the court in the conduct of the court’s business, or radio or television broadcasting from the courtroom or its environs, during the progress of or in connection with judicial proceedings, including proceedings before a United States Magistrate, whether or not the court is actually in session, is prohibited.
United States Constitution as applied to the Westmoreland case. In two recent criminal trials involving alleged misconduct of public officials, other federal courts of appeals have similarly upheld rules banning television cameras from the courtroom.

Despite the exclusion of television cameras in these three cases, the question of electronic access to judicial proceedings remains unresolved. In this context, the issue of the proper balance between rights of a free press and the right to a fair trial implicates the first, fifth, sixth, and fourteenth amendments to the United States Constitution. Yet while the issue has generated an abundance of commentary, it still re-

8. The first amendment states, in pertinent part, "Congress shall make no law ... abridging the freedom of speech or of the press." U.S. CONST. amend. I.

9. See infra notes 117-35 and accompanying text.

10. On trial in those cases were federal district court judge Alcee Hastings, charged with conspiracy and obstruction of justice, United States v. Hastings, 695 F.2d 1278 (11th Cir. 1983), discussed infra notes 93-104 and accompanying text, and Louisiana Governor Edwin Edwards, charged with fraud and racketeering, United States v. Edwards, 785 F.2d 1293 (5th Cir. 1986), discussed infra notes 136-40 and accompanying text.

11. The terms "electronic access," "access," "electronic coverage" or "coverage," when used without further qualification, will denote the use of television, radio, still or motion picture photography to record and/or transmit judicial proceedings from inside the courtroom.

12. The fifth amendment states, in pertinent part, "No person shall be ... deprived of life, liberty, or property, without due process of law ..." U.S. CONST. amend V.

13. The sixth amendment states, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a ... public trial." U.S. CONST. amend. VI. Whether a right of electronic access to the courtroom should be recognized under the sixth amendment is beyond the scope of this Note. The Supreme Court rejected an asserted sixth amendment right to broadcast trials in Estes v. Texas, 381 U.S. 532, 538-39 (1965); id. at 583-84 (Warren, C.J., concurring); id. at 588-89 (Harlan, J., concurring). See also United States v. Kerley, 753 F.2d 617, 620 (7th Cir. 1985); In re Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764, 774 (1979). But see Note, Cameras in the Criminal Courtroom: A Sixth Amendment Analysis, 85 COLUM. L. REV. 1546 (1985) [hereinafter Cameras in the Criminal Courtroom].

14. The fourteenth amendment states, in pertinent part, "No State shall ... deprive any person of life, liberty, or property, without due process of law ..." U.S. CONST. amend. XIV, § 1.

15. The question of televised coverage of trials has drawn considerable debate. In support of television coverage of judicial proceedings, see Davis, Television in Our Courts: The Proven Advantages, The Unproven Dangers, 64 JUDICATURE 85 (1980); Nevas, The Case For Cameras in the Courtroom, 20 JUDGES J. 22 (Winter 1981); Tornquist & Griffal, Television in the Courtroom, Devil or Saint?, 17 WILLAMETTE L. REV. 345 (1981); Weinstein & Zimmerman, Let The People Observe Their Courts, 61 JUDICATURE 156 (1977); Wilson, Justice in Living Color: The Case For Courtroom Television, 60 A.B.A.J. 294 (1974); Zimmerman, Overcoming Future Shock: Estes Revisited, or a
quires a thorough judicial evaluation in light of Supreme Court precedent and modern technological and societal conditions.

This Note first reviews the evolution of print and electronic coverage of courtroom proceedings. Next, it discusses the Supreme Court’s rejection of the claim that permitting television coverage of a criminal trial over the defendant’s objection violates his constitutional right to due process of law. Then, using the *Westmoreland* case as one example, this Note examines the current limitations on electronic access to the federal courts and concludes that inflexible rules which prohibit television coverage of trials are no longer legally defensible. Neither the Supreme Court decisions which have been interpreted to hold to the contrary, nor the “time, place or manner” doctrine, can continue to justify *per se* exclusion.

This Note also summarizes the relevant policy considerations asserted by advocates and opponents of electronic trial coverage and relied on by the courts. A survey of the effects of electronic access on state courts demonstrates that the fears of opponents are largely unfounded. Finally, drawing from a sample of successful experimental programs conducted by various states, this Note sets forth a proposal designed to test the contours of and promulgate guidelines for the broadcasting of trials from inside federal and state courtrooms.

II

Historical Overview of Trial Coverage by Print and Electronic Media

A. Pre-Television Coverage of Judicial Proceedings

The deleterious effects of media access to the courtroom were felt long before the introduction of television. For ex-

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16. See infra notes 193-228 and accompanying text.

17. The effects of pre-trial and trial publicity of events occurring outside the
ample, in 1917, the use of still photography to record judicial proceedings was a contributing factor in the reversal of a defendant's conspiracy conviction by the Illinois Supreme Court. Ten years later, a news reporter in New York was cited for contempt of court for violating a judicial order which prohibited the taking of photographs in the courtroom during a trial.

The controversy over press access to judicial proceedings increased when news photography blossomed with the growth of tabloid newspapers after World War I. By the mid-1920s, courtroom photographs had become a regular feature of such major papers as the New York Daily News. The development of radio broadcasting added another dimension to press coverage of judicial proceedings. For example, the great notoriety the Scopes "Monkey Trial" in 1925 received was due in part to the radio broadcasting of the trial.

In the wake of the abuse by the media—still and newsreel photographers—during the sensational 1935 trial of Bruno Hauptmann, the American Bar Association adopted Canon 35


18. People v. Munday, 280 Ill. 32, 67, 117 N.E. 286, 300 (1917). In reference to still photography in the courtroom, the court stated, "It is not in keeping with the dignity a court should maintain, or with the proper and orderly conduct of its business, to permit its sessions to be interrupted and suspended for such a purpose." Id.


For a discussion of the diversity of early judicial approaches toward still photography of judicial proceedings, see Kielbowicz, The Story Behind the Adoption of the Ban on Courtroom Cameras, 63 JUDICATURE 14, 16-17 (1979). Despite various rules prohibiting access, "[u]ntil the early 1930's, still photography and even radio broadcasting of court proceedings were fairly common in our courts." Tate, Cameras in the Courtroom: Here to Stay, 10 U. Tol. L. Rev. 925, 925 (1979).


21. John T. Scopes was convicted of teaching the Darwinian theory of evolution to public school children in Dayton, Tennessee in violation of a state statute. M. KRONENWETTER, FREE PRESS V. FAIR TRIAL 28 (1986). The trial featured the preeminent attorneys of the day—William Jennings Bryan (prosecution) and Clarence Darrow (defense). Id.

22. The radio coverage caused no problems at trial and enabled a nationwide audience to participate in a great national debate. Id. at 34.

of the Canons of Judicial Ethics. The Canon barred photography and broadcasting from judicial proceedings. A similar ban was enacted for criminal proceedings in federal courts in 1946.

B. Television Cameras in the Courtroom: The Initial Debate

In response to the emergence of the new medium of television, Canon 35 was amended in 1952 to include a ban on the televising of court proceedings. The Canon was quickly adopted by all of the states except Colorado, Oklahoma


24. Canon 35, as adopted in September, 1937, provided:

Proceedings in court should be conducted with fitting dignity and decorum.

The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.


25. Rule 53 of the Federal Rules of Criminal Procedure provides, “The taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court.” FED. R. CRIM. P. 53. There is no parallel federal rule prohibiting electronic access to civil trials.


28. In re Hearings Concerning Canon 35, 132 Colo. 591, 296 P.2d 465 (Sup. Ct. 1956). The Colorado Supreme Court adopted a different version of the rule, giving the trial judge discretion to exclude coverage depending upon whether it would “detract from the dignity of [courtroom proceedings], distract the witness in giving his testimony, degrade the court, or otherwise materially interfere with the achievement of a fair trial . . . .” Id. at 604, 296 P.2d at 472.

and Texas.

Television coverage of a trial was first challenged by a criminal defendant in People v. Stroble, a 1951 California murder case. The California Supreme Court upheld Stroble’s conviction, finding the broadcast coverage improper but not reversible error in the absence of proof of jury prejudice.

The first televised trial took place in 1953 in Oklahoma City. During the trial, the presiding judge had the power to instantly discontinue the filming by pushing a button installed at the bench. The first live television broadcast of courtroom proceedings involved the 1955 murder trial of Harry L. Washburn in Waco, Texas. Coverage of the trial was approved by the defendant and lauded by the media and county bar association.

C. From Estes to Chandler: A Due Process Analysis

The televised trial of Billy Sol Estes in 1962 provided the United States Supreme Court with the opportunity to determine the constitutionality of television coverage of a criminal trial over the defendant’s objection. Estes, a wealthy and politically well-connected financier, was convicted of swindling farmers by selling them non-existent farm equipment. Television and newsreel (film) coverage was highly disruptive during

not abuse its discretion in permitting television cameras and the taking of photographs in the courtroom. See also Estes, 381 U.S. at 580-81 n.38 (Warren, C.J., concurring) (electronic access in Oklahoma is within discretion of the trial judge) (citing Cody v. State, 361 P.2d 307 (Crim. App. Okla. 1961)).
31. 36 Cal. 2d 615, 226 P.2d 330 (1951), aff'd, 343 U.S. 181 (1952). Stroble, convicted of first degree murder for the brutal slaying of a young child, contended that newspaper accounts of his arrest and confession were so inflammatory as to make a fair trial impossible. Id. at 620-21.
32. Id. at 621, 226 P.2d at 334. The United States Supreme Court affirmed the California Supreme Court’s finding that the defendant failed to prove that jury prejudice resulted from the extensive media coverage. 343 U.S. at 191-95.
33. Geis, A Lively Public Issue: Canon 35 in the Light of Recent Events, 43 A.B.A.J. 419, 420 (1957) (case citation not provided).
34. Id.
35. Id.
36. The majority of calls received by local television stations voiced approval of the coverage, though a few complained that their favorite program had been preempted. Id. at 421. When defendant Washburn was asked whether he was bothered by the televising of his trial, he replied, “Naw, let it go all over the world. I don’t care.” Id. at 420.
38. M. Kronenwetter, supra note 21, at 49.
pre-trial hearings. The disruption was largely eliminated during the trial as a result of press compliance with a series of restrictive orders issued by the presiding judge. Nevertheless, a sharply divided Supreme Court reversed the conviction, holding that the television coverage over Estes' objection constituted a denial of due process under the fourteenth amendment.

Both Justice Clark, writing for the Court, and Chief Justice Warren, in his concurring opinion, found the televising of the trial over Estes' objection a per se violation of his due process rights. These opinions, together with Justice Harlan's concurrence, state that the inherent probability of prejudice resulting from television coverage was sufficient to render unnecessary an actual showing of the harmful effects of such coverage.

39. Justice Clark described the circus-like atmosphere created by coverage of the pre-trial hearings:
The videotapes of these hearings clearly illustrate that the picture presented was not one of that judicial serenity and calm to which petitioner was entitled . . . . Indeed, at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table.

381 U.S. at 536 (citations omitted). One commentator has stated that the cameramen behaved so poorly that "it was as if their main purpose was to convince the judiciary never to allow them into a courtroom again." M. KRONENWITTER, supra note 21, at 49-50.

40. For example, pursuant to the trial judge's orders, a booth was constructed at the back of the courtroom to house the cameras and photographers. See 381 U.S. at 537; id. at 606-09 (Stewart, J., dissenting). See also id. at 586 app. (Warren, C.J., concurring) (photographs of courtroom during pre-trial hearings and trial).

41. The opinion of the Court was delivered by Justice Clark. Chief Justice Warren delivered a concurring opinion which was joined by Justices Douglas and Goldberg. Id. at 552. Justice Harlan wrote a second concurring opinion which was the majority's crucial fifth vote. Id. at 587. Justice Stewart issued a dissenting opinion, joined by Justices Black, Brennan and White. Id. at 601. Justices White and Brennan each wrote separate dissenting opinions. Id. at 615, 617.

42. 381 U.S. at 534-35.

43. Id. at 535, 538, 550; id. at 552 (Warren, C.J., concurring).

44. Id. at 542-44; id. at 578 (Warren, C.J., concurring); id. at 593 (Harlan, J., concurring). In rejecting a requirement that a defendant demonstrate actual prejudice, see People v. Stroble, 36 Cal. 2d 615, 621, 226 P.2d 330, 334 (1951), discussed supra notes 31-32, the Estes Court followed more recent cases involving circumstances which were found to be "inherently prejudicial." 381 U.S. at 543-44 (citing Turner v. Louisiana, 379 U.S. 466 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); White v. Maryland, 373 U.S. 59 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); In re Murchison, 349 U.S. 133, 136 (1955) ("our system of law has always endeavored to prevent even the probability of unfairness") (emphasis in original)).

An additional rationale was the expressed difficulty in making a showing of actual
A lingering source of controversy is the extent to which Justice Harlan’s swing vote limited the absolutist position adopted by Justice Clark and the Chief Justice. Justice Harlan’s opinion has been variously interpreted as: 1) erecting a per se ban on television coverage of trial proceedings in accord with the opinions of Clark and Warren; 2) limiting the application of the Court’s prohibition to notorious trials; and 3) limiting the application of the Court’s prohibition to the facts of the Estes case. The narrower views are supported by Justice Harlan’s prejudice, 381 U.S. at 544, which “may be so subtle that it escapes the ordinary methods of proof, but it would gradually erode our fundamental conception of a trial.” Id. at 578 (Warren, C.J., concurring). Accord Chandler v. Florida, 449 U.S. 560, 577 (1981). See also infra notes 237-39 and accompanying text.


47. See, e.g., Zaehringer v. Brewer, 635 F.2d 734, 738 (8th Cir. 1980); Telecasting, supra note 45, at 144. Cf. Marcus, supra note 45, at 281 n.266 (“[e]normous problems would be created, however, if trial judges actually had to determine which cases were sufficiently ‘notorious’”). Justice Harlan’s concurring opinion in Estes stated:

At least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment.

381 U.S. at 587 (emphasis added).

48. This view has been widely adopted and has emerged as the Supreme Court’s position. See, e.g., Chandler v. Florida, 449 U.S. 560, 573 (1981); Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 552 (1976); Murphy v. Florida, 421 U.S. 794, 799 (1975); accord Hale v. United States, 435 F.2d 737, 746-47 (5th Cir. 1970), cert. denied, 402 U.S. 976 (1971).
statement: "At the present juncture I can only conclude that televised trials, at least in cases like this one, possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned." 49

In their separate opinions, Justices Clark, Warren and Harlan identified the potential problems created by the televising of trials: the psychological impact of television coverage on trial participants, 50 other harmful effects on the trial judge, 51 jurors, 52 criminal defendants, 53 witnesses 54 and attorneys; 55 the impact of electronic coverage on the integrity and decorum of judicial proceedings; 56 and the effect of such coverage on the general public. 57 Additionally, Chief Justice Warren and Justice Harlan cited the widespread implementation of Canon 35 by the states, 58 Rule 53 of the Federal Rules of Criminal Procedure 59 and a 1962 resolution of the Judicial Conference of the United States 60 to support their view that cameras should be

49. 381 U.S. at 596 (Harlan, J., concurring) (emphasis added). Justice Harlan also framed the issue in the case: "[W]e are concerned here only with a criminal trial of great notoriety, and not with criminal proceedings of a more or less routine nature." Id. at 587 (Harlan, J., concurring).

50. Id. at 544-50, 565; id. at 568-70 n.24 (Warren, C.J., concurring); id. at 591-93 (Harlan, J., concurring). See also infra notes 241-43 and accompanying text.

51. "Our judges are high-minded men and women. But it is 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." 381 U.S. at 548; id. at 565 (Warren, C.J., concurring). See also infra notes 244-50 and accompanying text.

52. 381 U.S. at 545-47. See also infra notes 251-55 and accompanying text.

53. 381 U.S. at 549; id. at 565 (Warren, C.J., concurring).

54. Id. at 547-48. See also infra notes 256-66 and accompanying text.

55. Id. at 591 (Harlan, J., concurring). See also infra notes 267-69 and accompanying text.

56. 381 U.S. at 560-64 (Warren, C.J., concurring); id. at 587 (Harlan, J., concurring); id. at 601 (Stewart, J., dissenting). See also infra notes 275-83 and accompanying text.

57. 381 U.S. at 574-76 (Warren, C.J., concurring).

58. Id. at 580-81 (Warren, C.J., concurring); id. at 594 (Harlan, J. concurring). See supra notes 26-30 and accompanying text.

59. 381 U.S. at 581-82 n.40 (Warren, C.J., concurring); id. at 594 (Harlan, J., concurring). See supra note 25.

60. 381 U.S. at 582-83 n.41. The resolution provides: Resolved, That the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceedings, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court.

Although not directly at issue before the Court, the Estes majority explicitly rejected the claim of a right of access under the first amendment. Justice Clark asserted that "while maximum freedom must be allowed the press in carrying on this important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process." Chief Justice Warren concurred with Clark's balancing approach:

[T]elevision is one of the great inventions of all time and can perform a large and useful role in society. But the television camera, like other technological innovations, is not entitled to pervade the lives of everyone in disregard of constitutionally protected rights. . . . On entering that hallowed sanctuary [an American courtroom], where the lives, liberty and property of people are in jeopardy, television representatives have only the rights of the general public, namely, to be present, to observe the proceedings, and thereafter, if they choose, to report them.

The majority and concurring opinions set out a balancing approach toward the conflict between first amendment and due process rights. The opinions appear to conclude both that due process rights should be accorded greater protection than first amendment rights in this context and that the mere presumption of a due process violation provides a sufficient foundation for the exclusion of television cameras.

The United States Supreme Court did not clarify or reevaluate Estes until 1981. In Chandler v. Florida, the Court re-

61. 381 U.S. at 539.
62. Id. In dissent, Justice Stewart expressed the view that first amendment considerations may be sufficient to invalidate an inflexible prohibition on electronic access:

[I]t is important to remember that we move in an area touching the realm of free communication, and for that reason, if for no other, I would be wary of imposing any per se rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights.

Id. at 604 (Stewart, J., dissenting).
63. Id. at 585-86 (Warren, C.J., concurring) (footnote omitted). Accord id. at 589 (Harlan, J., concurring) ("the line is drawn at the courthouse door, and within, a reporter's constitutional rights are no greater than those of any other member of the public").
64. 449 U.S. 560 (1981). The case involved the televising of the trial of two Miami Beach police officers charged with the burglary of a restaurant. The coverage, over the defendants' objections, was authorized by Florida's Canon 3 A(7) and limited to voir dire, a portion of the state's case-in-chief, and the closing arguments of both sides.
jected the Estes plurality's view that the televising of courtroom proceedings was inherently prejudicial to a criminal defendant. The Court stated that electronic coverage is not per se unconstitutional; instead, a showing of actual prejudice is required to constitute a denial of due process. In finding that Estes did not announce a per se ban, the Court construed Justice Harlan's concurring opinion narrowly—consistent with Supreme Court decisions—and limited the holding of Estes to its facts, and those cases "utterly corrupted by press coverage." Accordingly, the Chandler majority chose to distinguish rather than overrule Estes.

The issue in Chandler was a narrow one: whether a state court rule allowing electronic access to criminal trials over the defendant's objection comports with the requirements of due process. In support of its refusal to erect a categorical bar to television coverage, the Court, per Chief Justice Burger, relied on principles of federalism, stating:

Ultimately, the only material broadcast was two minutes and 55 seconds of the prosecution's case. Id. at 567-68.


66. 449 U.S. at 582; id. at 588 (White, J., concurring). No showing of actual prejudice was offered by the defendants or found by the Court. Id. at 581-82. The Court's rejection of a per se prohibition was due in part to the technological advances in broadcast equipment since Estes, which enable coverage without disruption. Chandler, 449 U.S. at 576. Justice Stewart, concurring in the result, cautioned that despite technological advances, "[i]t does not follow, however, that the 'subtle capacities for serious mischief' are today diminished, or that the 'imponderables of the trial arena' are now less elusive." Id. at 585 (Stewart, J., concurring in result).

67. See supra note 48.

68. 449 U.S. at 573 n.8 (quoting Murphy v. Florida, 421 U.S. 794, 798 (1975)).

69. 449 U.S. at 573 n.8. The Court stated: "As noted ... Justice Harlan pointedly limited his conclusion to cases like the one then before the Court;" thus there was "no need to 'overrule' a 'holding' never made by the Court." Id. Justices Stewart and White, in their separate concurring opinions, did not accept the narrow interpretation of Estes. They concluded instead that, despite the limiting language of Justice Harlan's concurring opinion, Estes announced a per se ban on the televising of courtroom proceedings. Therefore, Estes would have to be effectively overruled in order to affirm the conviction in Chandler. 449 U.S. at 583 (Stewart, J., concurring in result); id. at 587-88 (White, J., concurring in judgment).

70. 449 U.S. 562, 582-83.
Unless we were to conclude that television coverage under all circumstances is prohibited by the Constitution, the states must be free to experiment. We are not empowered by the Constitution to oversee or harness state procedural experimentation; only when the state action infringes fundamental guarantees are we authorized to intervene.\textsuperscript{71}

Moreover, the Court found that the potential dangers created by the broadcasting of trials had not been proven with sufficient certainty to justify an absolute ban.\textsuperscript{72} The Court also found it significant that more than half the states then allowed television coverage to some degree,\textsuperscript{73} in contrast to the widespread prohibition of electronic access at the time Estes was decided.\textsuperscript{74} An additional basis for the Chandler decision was the Court's deference to the breadth and judicial supervision of Florida's experimental program which preceded the state's allowance of electronic access on a permanent basis.\textsuperscript{75}

D. First Amendment Rights of Press and Public Access to the Courtroom

Less than one year prior to the Chandler decision, the Supreme Court thoroughly explored the interrelationship between the first amendment and the constitutional rights of a criminal defendant. The issue before the Court in Richmond Newspapers, Inc. v. Virginia\textsuperscript{76} was whether the exclusion of the press and public from the courtroom during a trial was constitutional. In invalidating the trial judge's closure orders, seven justices\textsuperscript{77} recognized that the first amendment—of itself

\textsuperscript{71} Id. at 582.
\textsuperscript{72} 449 U.S. at 578-79.
\textsuperscript{73} Id. at 565 n.6. The Court noted that as of October 1980, 28 states permitted electronic coverage of judicial proceedings. In addition, the possibility of allowing access was being studied by 12 other states. Id. The Court also noted the changing attitude of state judicial systems in favor of allowing television coverage of trials. Id. at 564. The Court cited the Conference of State Chief Justices' passage of a resolution in 1978, by a vote of 44 to 1 (with one abstaining), "to allow the highest court of each state to promulgate standards and guidelines regulating radio, television and other photographic coverage of courtroom proceedings." Id. (citing Resolution I, Television, Radio, Photographic Coverage of Judicial Proceedings, adopted at the Thirtieth Annual Meeting of the Conference of Chief Justices, Burlington, Vt., Aug. 2, 1978).
\textsuperscript{74} See supra note 58 and accompanying text.
\textsuperscript{76} 448 U.S. 555 (1980).
\textsuperscript{77} Chief Justice Burger wrote the plurality opinion, joined by Justices White and Stevens. Justice Brennan wrote a concurring opinion, joined by Justice Marshall. Id.
and as applied to the states through the fourteenth amendment—protects the right of both the press and the public to attend criminal trials.\textsuperscript{78}

In his plurality opinion, Chief Justice Burger stressed the importance of public confidence in the judiciary which, he asserted, is furthered by the publicizing of trial proceedings.\textsuperscript{79} The Chief Justice also advanced the theory that press coverage performs therapeutic and cathartic functions for the public.\textsuperscript{80} Essentially, the plurality opinion was anchored on two premises: 1) the history and presumption of public access to American courtrooms\textsuperscript{81} and 2) the assumption that publicity serves “to enhance the integrity and quality of what takes place [in the courtroom].”\textsuperscript{82} Similarly, Justice Brennan, concurring, emphasized “the beneficial effects of public scrutiny upon the administration of justice.”\textsuperscript{83}

In addition to prohibiting the closure of criminal trials to the public and press generally, \textit{Richmond Newspapers} articulated the principle that, although first amendment rights of access are not absolute,\textsuperscript{84} their abridgment cannot be arbitrary.\textsuperscript{85} The
Court found dispositive both the trial judge's failure to make any specific findings to support his closure order and his failure to employ safeguards less restrictive than closure to assure the defendant a fair trial.86

In *Globe Newspaper Co. v. Superior Court*, the Court reaffirmed and clarified its holding in *Richmond Newspapers* that a trial judge must make specific findings to justify closure of a criminal trial.87 The Court invalidated a Massachusetts statute which required closure of all rape or sexual assault trials during the testimony of minors. The Court held that a state's denial of access in order to inhibit the disclosure of sensitive information is subject to strict scrutiny and, therefore, valid only if the denial is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."88 The Court recognized the state's substantial interest in protecting the well-being of minor victims of sexual assault, but read *Richmond Newspapers* to proscribe any mandatory closure rules. Instead, a case-by-case evaluation of whether closure is necessary to protect the threatened interest is required.89

86. E.g., *Chandler*, 449 U.S. at 580-81. Chief Justice Burger indicated that the trial judge should have either excluded witnesses from the courtroom or sequestered them during the trial. *Id.* at 581. The Court referred to other safeguards for ensuring a fair trial in light of dangers posed by the press in covering trials discussed in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563-65 (1976), and *Sheppard v. Maxwell*, 384 U.S. 333, 357-62 (1966). 448 U.S. at 581.


88. The Court synthesized the various opinions in *Richmond Newspapers* as emphasizing two features of the criminal justice system that justify a first amendment right of access: the historical openness of criminal trials, 457 U.S. at 607, and the role of access in the judicial process, *id.* at 606. Within the latter rationale, the Court noted that public scrutiny can enhance the factfinding function of trials, *id.*, and that openness heightens public respect for the judicial process by fostering an appearance of fairness, *id.*

89. *Id.* at 607. In a footnote, the Court stressed the narrow scope of its holding, but restated that "a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional." *Id.* at 611 n.27.

90. *Id.* at 608. "Indeed, the plurality opinion in *Richmond Newspapers* suggested that individualized determinations are always required before the right of access may be denied." *Id.* at 608 n.20 (citing *Richmond Newspapers*, 448 U.S. at 581). The Court has since extended the press' right of access under *Richmond Newspapers* and *Globe* to voir dire proceedings, *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501 (1984), and certain pre-trial hearings, *Press-Enterprise Co. v. Superior Ct.*, 106 S.Ct. 2735 (1986).
The Exclusion of Cameras from the Federal Courts

As stated, Chandler v. Florida answered the question of whether electronic access could, consistent with due process, be permitted over a criminal defendant's objection. The converse—whether such access can, consistent with the first amendment, be absolutely denied—has been considered by federal courts of appeals in three significant cases, all of which involved charges of misconduct by prominent government officials.

A. United States v. Hastings

In United States v. Hastings, the Eleventh Circuit Court of Appeals considered the constitutional validity of Federal Rule of Criminal Procedure 53 and a local rule of court prohibiting electronic access to federal courtrooms in the Southern District of Florida. The Hastings trial involved criminal charges that United States District Court Judge Alcee Hastings ac-

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91. See supra notes 64-75 and accompanying text.
92. United States v. Edwards, 785 F.2d 1293 (5th Cir. 1986); Westmoreland v. Columbia Broadcasting Sys., Inc., 752 F.2d 16 (2d Cir. 1984); United States v. Hastings, 695 F.2d 1278 (11th Cir. 1983). In a fourth case, request was made by the defendant—on trial for allegedly failing to register for the draft—to photograph, record and broadcast his trial. United States v. Kerley, 753 F.2d 617 (7th Cir. 1985). As the court's opinion relies heavily on the reasoning of Hastings, discussed infra notes 93-104 and accompanying text, extensive discussion of the case is unnecessary.
93. 695 F.2d 1278, reh'g en banc denied per curiam, 704 F.2d 559 (11th Cir.), cert. denied, 459 U.S. 1203 (1983).
94. See supra note 25.
95. Local Rule 20 of the General Rules of the United States District Court for the Southern District of Florida prohibits "all forms of equipment or means of photographing, tape-recording, broadcasting or televising within the environs of any place of holding court in the District." See Hastings, 695 F.2d at 1279 n.4. For other cases considering the constitutionality of local rules restricting press access to federal courts, see Combined Communications Corp. v. Finesilver, 672 F.2d 818 (10th Cir. 1982) (upholding rule excluding the press from negotiations undertaken in a federal courtroom); Mazzetti v. United States, 518 F.2d 781 (10th Cir. 1975) (upholding rule prohibiting the taking of photographs from a courthouse parking lot); Dorfman v. Meisner, 430 F.2d 558 (7th Cir. 1970) (rule prohibiting photographing and broadcasting inside courtrooms and various floors of federal building held unconstitutionally overbroad where areas included in the ban did not involve judicial administration); Seymour v. United States, 373 F.2d 629 (5th Cir. 1967) (upholding prohibition on the taking of photographs from the hallway outside a courtroom); United States v. Yonkers, 587 F. Supp. 51 (S.D.N.Y. 1984) (newspaper reporter prohibited from using tape recorder in court under General Rule 7, the same local rule at issue in Westmoreland).
accepted a bribe from an undercover agent posing as a criminal defendant. The court upheld the two rules using a two-step analysis. It first noted that the Richmond Newspapers and Globe decisions do not support the proposition that the first amendment mandates electronic access. In this part of its analysis, the court gave controlling weight to Nixon v. Warner Communications, Inc. The Supreme Court there held that the press had no first amendment right of access to the Watergate tapes, which had been admitted into evidence in the trial of President Nixon's former advisors. The Hastings court determined that the issue of televised trial coverage was more akin to the first amendment claim rejected in Warner Communications than the access right recognized in Globe and Richmond Newspapers.

96. 695 F.2d at 1279 n.6. Judge Hastings moved the trial court to allow electronic coverage of the trial. Subsequently, local news organizations intervened in support of the motion. Id. at 1279-80.

97. Id. at 1280. The court correctly found that none of the holdings of these cases recognized a constitutional right to televised trials. However, the court's statement that "[n]one of those decisions intimate that the Supreme Court would find First Amendment rights abridged by the exclusion of television cameras ... from the courtroom," id. at 1280 (emphasis added), ignores the import of the cases when read together.


99. Id. at 609. Primarily, the Hastings court cited Warner Communications for the maxim that the press' right to gather information about trials is no greater than that of the general public. 695 F.2d at 1281 (citing Warner Communications, 435 U.S. at 609). This language was based in part on Justice Harlan's concurring opinion in Estes, 381 U.S. at 589 ("[t]he 'public trial' guarantee...certainly does not require that television be admitted to the courtroom"). The Hastings court's reliance on this aspect of Warner Communications is erroneous in light of Chandler's limitation of Estes subsequent to the Warner Communications decision. See infra notes 178-83 and accompanying text.

100. 695 F.2d at 1281. This finding is dubious. The right of access to the courtroom by electronic means more closely resembles the right to access by non-electronic means—recognized in Richmond Newspapers and Globe—than the right to take physical possession of trial evidence, rejected in Warner Communications. Thus, the Hastings court's reliance on Warner Communications is misplaced.

The court does distinguish on two grounds Warner Communications and a similar case from the Fifth Circuit, Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981), from the claim at issue in Hastings, finding neither ground sufficient to render those cases inapposite. The distinctions are: 1) that the local rule in Hastings was a per se prohibition, in conflict with the requirement set forth in Warner Communications and Belo Broadcasting that the trial judge make case-by-case determinations as to media access, and 2) that unlike the defendants in Warner Communications and Belo Broadcasting, defendant Hastings did not oppose the requested form of access. 695 F.2d at 1281. In dismissing the first distinction, the Hastings court stated that the complete restriction on access in Globe was not a factor in Hastings as the press and public were not barred from the courtroom entirely during the trial. Id. As for con-
Second, the Hastings court did look to Globe and Richmond Newspapers for the proper standard of review for evaluating the per se exclusion of cameras. After concluding that exclusion was not subject to strict scrutiny under Globe because the exclusionary rules only restricted the manner of access, the court read Globe and Richmond Newspapers to permit analysis of the rules as “time, place or manner” regulations. The court upheld the rules by determining that the competing policy considerations justified exclusion.


In Westmoreland v. Columbia Broadcasting System, Inc., the Second Circuit Court of Appeals agreed that a per se rule excluding electronic access does not violate the first amendment. Cable News Network petitioned the district court for permission to broadcast the Westmoreland libel trial. CNN asked the court for a waiver of General Rule 7. The court noted that it was but one factor to consider, and did not outweigh more important policy considerations. Id. at 1282-83.

101. See supra note 89 and accompanying text.

102. 695 F.2d at 1282-83. The court's reasoning is inconsistent. First it stated that Warner Communications is more relevant than Globe and Richmond Newspapers. Id. at 1281. Then the court analyzed the prohibitory rules under dicta from Globe, concluding that Warner Communications was controlling authority. Id. at 1284. For criticism of the majority's analysis, see United States v. Hastings, 704 F.2d 559, 560-62 (11th Cir. 1983) (Hatchett, J., statement in favor of rehearing en banc); Julin, The Inevitability of Electronic Media Access to Federal Courts, 1983 DET. C. L. REV. 1303, 1303-04.

103. 695 F.2d at 1282-84. Under the time, place or manner doctrine, expressive activity which is otherwise protected under the first amendment may be regulated as to the time, place or manner of its exercise. See infra notes 196-228 and accompanying text.

104. 695 F.2d at 1282-84. The court pinpointed two primary concerns—the interest in preserving order and decorum in the courtroom and the “institutional interest in procedures designed to increase the accuracy of the essential truth-seeking function of the trial.” Id. at 1283. The court found those interests more compelling than the potential for advancement of first amendment interests recognized in Globe, Richmond Newspapers, and Gannett Co. v. DePasquale, 443 U.S. 368, 382 (1979) (upholding exclusion of the press from a pre-trial suppression hearing). In light of Estes' built-in obsolescence, see Estes, 381 U.S. at 595-96 (Harlan, J., concurring), and Warner Communications' lack of relevance, supra note 100 and infra notes 178-83 and accompanying text, the balance struck by the court is tenuous. Judge Hatchett, dissenting from the Eleventh Circuit's decision not to hear the case en banc, concluded that the relevant policy considerations weighed in favor of electronic access. United States v. Hastings, 704 F.2d at 560-62 (Hatchett, J., dissenting from denial of rehearing en banc).

105. 752 F.2d 16 (2d Cir. 1984).

106. The subject of the libel suit was The Uncounted Enemy: A Vietnam Deception
which prohibits the use of television cameras in the district courts for the Southern and Eastern Districts of New York. Similar to the claim of access asserted in Hastings, CNN alleged that Rule 7's per se prohibition violated the free press clause of the first amendment. 108 CNN also argued that waiver of the rule was proper because the issues involved were of great public importance 109 and all parties to the litigation consented to the proposed coverage. 110

In his opinion and order, United States District Judge Leval denied the petition, citing his lack of authority to set aside the inflexible prohibition of Rule 7. 111 However, Leval expressed his view that such coverage should be allowed, citing the Chandler decision, 112 the large number of states allowing coverage, 113 and various policy considerations. 114 He suggested that a per se prohibition of broadcast coverage of trials was in conflict with


107. See supra note 6.
108. 752 F.2d at 17.
109. Id.
110. Id. The court of appeals went so far as to assume arguendo that Westmoreland presented a paradigm case for televising a federal trial. Id.
112. Id. at 1168 (citing Chandler, 449 U.S. 560).
113. 596 F. Supp. at 1168. When CNN petitioned to broadcast the Westmoreland trial in August of 1984, 41 states allowed cameras in their courtrooms on permanent or experimental bases. Id. For a current summary of electronic access to state courtrooms, see infra notes 326-44 and accompanying text. See also Note, An Assessment of the Use of Cameras in State and Federal Courtrooms, 18 GA. L. REV. 389, 402-12 (1984) [hereinafter Cameras in State and Federal Courtrooms]; Annotation, Validity, Propriety, and Effect of Allowing or Prohibiting Media's Broadcasting, Recording, or Photographing Court Proceedings, 14 A.L.R. 4th 121 (1982).

Eighty-one of ninety-two U.S. district courts have rules prohibiting electronic access. Those federal courts permitting access include district courts in Alaska, Indiana (N.D.), Tennessee (E.D. & W.D.), Texas (E.D. & W.D.) and Vermont. FEDERAL LOCAL COURT RULES, (Callaghan) (1986). See also infra note 128 and accompanying text.

114. Judge Leval stated that in a case involving strong public interest, electronic coverage could ensure that witnesses tell the truth and that the court does not improperly influence the jury. 596 F. Supp. at 1168. In addition, Judge Leval pointed out the importance of public opportunity to learn how the courts function; personal time constraints and the length of many trials are such that television coverage could serve as the only opportunity for many to view judicial proceedings. Id. at 1169. Fl-
the spirit of Chandler as well as subsequent Supreme Court cases, and restated the many benefits offered by trial publicity mentioned in those decisions.

At issue on appeal to the Second Circuit was CNN's claim that the Rule 7 prohibition of electronic access abridged first amendment rights and therefore was in violation of the Rules Enabling Act. In refusing to recognize a first amendment right of access to broadcast courtroom proceedings, the court, per Judge Oakes, relied on the Supreme Court's prior failure to do so in Estes and Chandler. The court declined to undertake a modern constitutional analysis, and relegated the "carefully reasoned" arguments of Judge Leval to a footnote.

The court analyzed the asserted first amendment claim to broadcast trials by dividing it into two discrete rights: 1) the press' right to broadcast trials; and 2) the public's right to view televised judicial proceedings. The court based its rejection of the press' first amendment right to broadcast trials on Estes and, in particular, on Justice Harlan's statement in Estes that "there is no constitutional requirement that television be

nally, Judge Leval noted that electronic coverage is necessary to increase public confidence and respect for federal judges. Id.

The Rules Enabling Act states in pertinent part:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions. . . . Such rules shall not abridge, enlarge or modify any substantive right. . . .


CNN also asserted that first amendment rights were implicated by virtue of the trial being a "public forum." This argument was dismissed by the court, which viewed such a right as exclusively a "speaker's interest," separate from the access right asserted by the media. 752 F.2d at 21-22.

The court's reliance on Estes as a substitute for an independent, contemporary first amendment analysis ignores Justice Harlan's parting caveat to his 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." 381 U.S. at 595 (Harlan, J., concurring). The court also failed to consider the evolutionary nature of constitutional interpretation, e.g., id. at 603-04 (Stewart, J., dissenting) (the issue of cameras in the courtroom is "subject to continuous and unforeseeable change").
allowed in the courtroom."121 In also rejecting a potential first amendment right of the public to view televised judicial proceedings, Judge Oakes disagreed only with CNN's conclusion while accepting many of its substantive premises. These arguments were: 1) that "the public... has First Amendment interests that are independent of the First Amendment interests of speakers;"122 2) that vital to the concern of the free speech guarantee "is the corollary that there be full opportunity for everyone to receive the message;"123 3) that "the public's right to receive information may not be vitiated by appeals to the availability of alternative means for receipt of the information;"124 and 4) that seven justices in Richmond Newspapers recognized the press and public's qualified first amendment right to attend criminal trials,125 a right subsequently extended to civil trials.126

Nevertheless, the court classified the purported first amendment right of electronic access as a "long leap [from Richmond Newspapers and its progeny] ... that is not supported by history ... [and one] we are not yet prepared to take."127 The court supported this conclusion by citing the opposition of federal judges to electronic access as evidenced by a recently-issued report by the Ad Hoc Committee of the Judicial Conference of the United States on Cameras in the Courtroom.128 Judge

121. 752 F.2d at 21 (citing Estes v. Texas, 381 U.S. 532, 581 (1965) (Harlan, J., concurring)).
123. 752 F.2d at 22 (emphasis added) (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 76 (1976)).
124. 752 F.2d at 22 (citing Kleindienst v. Mandel, 408 U.S. 753, 765 (1972)).
125. 752 F.2d at 22. See also supra notes 76-86 and accompanying text.
127. 752 F.2d at 23.
128. Id. at 23 (referring to REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON CAMERAS IN THE COURTROOM, Submitted to the Judicial Conference of the United States, Sept. 19-20, 1984 [hereinafter AD HOC COMMITTEE REPORT]. The report recommended the denial of a petition submitted by 28 television, radio, newspaper and related organizations (including CNN) which advocated that Canon 3 A(7) of the Code of Judicial Conduct for United States Judges, supra note 26 and infra notes 133 & 325, and Rule 53 of the Federal Rules of Criminal Procedure, supra note 25, be amended to allow electronic entry to federal courtrooms. The report did not consider "legal issues," such as whether existing per se rules were constitutional. AD HOC COMMITTEE REPORT at 2.
Oakes stated that until the competing policy considerations were found to favor the broadcasting of trials, coverage on an experimental basis would be allowed providing it is approved "by a district court, as opposed to an individual judge." The opinion concludes with a summary of its controlling argument:

[O]ur point is that until the First Amendment expands to include television access to the courtroom as a protected interest, television coverage of federal trials is a right created by consent of the judiciary, which has always had control over the courtrooms, a consent which the federal courts, including the Southern District of New York, have not given.

In his concurring opinion, Judge Winter recognized that the first amendment "is implicated in a request to televise" judicial proceedings. Winter justified exclusion of television cameras based upon a "time, place or manner" theory. In support of his view, he relied on the "cumulative years of experience" represented by the recommended bans on electronic trial coverage by the Judicial Conference and Canon 3 A(7) of the Canons of Judicial Conduct for the federal courts. Judge Winter recognized that "television may not be harmful in each and every case." But he argued that the pressures upon the trial judge to allow access and on the parties to consent to television cover-

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129. 752 F.2d at 23-24. Following the denial of CNN's petition and subsequent motion for reconsideration, the network petitioned the Board of Judges of the Southern District of New York. The Board also refused to grant a waiver of Rule 7. Id. at 19.
130. Id. at 24 (emphasis added) (footnotes omitted). This argument is somewhat circular considering the fact that judges determine the scope of constitutional rights.
131. Id. (Winter, J., concurring).
132. Id. at 25 (Winter, J., concurring). See infra notes 193-228 and accompanying text.
133. 752 F.2d at 25 (Winter, J., concurring).

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, or for the perpetuation of a record; and

b. The broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.

CODE OF JUDICIAL CONDUCT FOR UNITED STATES COURTS Canon 3 A(7) (1975). Judge Winter's reliance on experience gained by excluding cameras from federal court rooms is a strange barometer of the propriety of access. The federal courts' position excluding cameras is also contradicted by the weight of experience gained from access to state courtrooms. See infra notes 345-404 and accompanying text.
134. 752 F.2d at 25 (Winter, J., concurring). See also Westmoreland v. CBS, Inc., 596 F. Supp. at 1168 (noting the fact that Chandler recognizes the harm from television coverage in some cases is not grounds for barring access in all cases).
age would result in a *de facto* right of electronic entry in disregard of the dangers inherent in specific cases.\(^\text{135}\)

C. *United States v. Edwards*

In *United States v. Edwards*,\(^\text{136}\) the Fifth Circuit Court of Appeals upheld a district court’s rejection of a journalist’s request to televise the fraud and racketeering trial of Louisiana Governor Edwin Edwards. The court of appeals held that the *per se* prohibitions of Federal Rule 53\(^\text{137}\) and a local rule of court\(^\text{138}\) were not inconsistent with the first amendment. The court’s cursory rejection of a constitutional right of electronic access was similar to the first part of the *Hastings* analysis: no Supreme Court case has recognized a first amendment right to broadcast trials,\(^\text{139}\) and *Estes v. Texas*, as reaffirmed in *Nixon v. Warner Communications, Inc.*,\(^\text{140}\) expressly rejected such a right.

Thus, the *per se* prohibition of electronic access from the federal courts has withstood constitutional challenge by courts using two lines of reasoning. In *Westmoreland* and *Edwards* the courts rejected a first amendment right to broadcast trials largely on the questionable precedential value of *Estes v. Texas* and *Nixon v. Warner Communications, Inc.* In *Hastings*, the Eleventh Circuit adopted a similar argument, but also added an alternative rationale: the exclusionary rule could be justified as a valid regulation of the time, place or manner of speech otherwise protected by the first amendment.

\(^{135}\) 752 F.2d at 25-26 (Winter, J., concurring).

\(^{136}\) 785 F.2d 1293 (5th Cir. 1986).

\(^{137}\) See supra note 25.

\(^{138}\) Local Rule 13.11 of the U.S. District Court for the Eastern District of Louisiana prohibits "[t]he taking of photographs in the courtroom or its environs or radio or television broadcasting from the courtroom or its environs during the progress of or in connection with judicial proceedings."


\(^{140}\) 785 F.2d at 1295 (citing Nixon v. Warner Communications, Inc., 435 U.S. 589, 610-11 (1978)). This reasoning is criticized *infra* notes 164-83 and accompanying text.
IV
A Modern Constitutional Analysis of Per Se Exclusion

A. Richmond Newspapers and the Scope of First Amendment Access

In Richmond Newspapers, Inc. v. Virginia, the Supreme Court recognized that there is a “presumption of openness” which underlies the press and public’s first amendment right to attend judicial proceedings. This presumption is an essential starting point in an analysis of the breadth of first amendment access. The threshold question is whether the right of public “attendance” at judicial proceedings under Richmond Newspapers is limited to an individual’s physical presence, or whether it includes members of the public whose observation occurs through viewing television coverage of the proceedings. The guarantee that members of the public be allowed to attend in person, the recognized function that the press serves as a surrogate for the public, and the inherent characteristics and pervasive role of electronic media militate in favor of an expansive interpretation of the right to attend trials.

The scope of the access afforded by Richmond Newspapers can be interpreted broadly to include electronic access in light of the Supreme Court’s expressed understanding of contemporary media. Chief Justice Burger stated in his Richmond

141. 448 U.S. 555 (1980).
142. Id. at 573 (plurality opinion).
143. 448 U.S. 555 (1980).
146. See, e.g., Choper, Kamisar & Tribe, Panel Discussion, 3 SUP. CT: TRENDS & DEVS. 249, 263-65 (1982); Zimmerman, supra note 15, at 655; Television and Newspaper Trial Coverage, supra note 65, at 528-29; Note, Richmond Newspapers, Inc. v. Virginia: A Demarcation of Access, 34 U. MIAMI L. REV. 937, 953-54 (1980); Note, Television Coverage of Trials: Constitutional Protection Against Absolute Denial of
Newspapers opinion that "[i]nstead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public." Electronic access is further contemplated by Chief Justice Burger's description of the public aspect of press freedom to cover courtroom proceedings in Richmond Newspapers:

In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." 

B. Electronic Media and the First Amendment

In examining the balance between the rights of free press and fair trial, the ability of the electronic press to advance the interests articulated in Richmond Newspapers and its progeny is paramount. It is now clear beyond peradventure that television can provide greater public access than print media.

The role of the electronic press in our modern first amendment regime is qualitatively and quantitatively greater than that of the print media. Television exerts a pervasive influ-

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147. 448 U.S. 555, 572-73 (1980) (plurality opinion). Accord id. at 588 n.2 (Brennan, J., concurring). See also id. at 577 n.12 (plurality opinion). Those interested in observing trials may be prevented from doing so by their work schedules, the limited seating capacities in most courtrooms, and the high demand to attend most trials which generate a substantial amount of public interest. For example, at the trial of Judge Hastings, "[l]ines formed early each morning outside the courtroom and only the earliest arrivals were allowed into the trial. The line remained outside the courtroom for the duration of the trial. If any observer left during the trial, the next person in line was allowed in." Julin, supra note 102, at 1303 n.2.


149. See infra notes 150-51 and accompanying text.

150. Roper surveys since 1963 have found television to be the number one news source in America. See Ares, supra note 65, at 174 n.74 (citing Roper Organization, Public Perception of Television and Other Mass Media: A Twenty Year Re-
ence in our society by reason of both its broad reach and its ability to stimulate our eyes and ears simultaneously. Moreover, electronic media can transmit events as they occur, providing an unbroken path from the message source to the viewer.

Where television coverage of trials is limited to brief summaries by news announcers spoken over sketches of trial participants, the medium’s potential is not achieved. Viewers receive information through the television medium, yet they are deprived of the medium’s ability to capture and disseminate information in a manner which maximizes accuracy and captures spontaneity.

In Westmoreland, the denial of electronic access prevented members of the public, other than the few actually present in the courtroom during the trial, from scrutinizing through audio-visual observation the testimony of current and former prominent government officials, military officers and broadcasters. Similarly, in the Hastings and Edwards trials, the public was unable to directly observe the quality of justice afforded the federal judge and state governor, respectively, except by attending the trials in person. Instead, public observation was limited to mere restatements and reprints of trial testimony filtered through news persons and key witnesses. Where a trial—a public event for which press access is guaranteed under Richmond Newspapers—elicits a significant degree of public interest, fundamental first amendment principles dictate that coverage of the event be reported in the most accurate fashion.

See also Cable News Network v. American Broadcasting Co., 518 F. Supp. 1238 (N.D. Ga. 1981), where the court held that electronic media had a right to be included in the press pool for “limited coverage” White House events. The court stated, “[I]t cannot be denied that television news coverage plays an increasingly prominent part in informing the public at large of the workings of government. Many citizens likely rely on television as their sole source of news.” Id. at 1245. Accord Estes, 381 U.S. 582, 589 (1965) (Harlan, J., concurring).

151. See FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (broadcasting’s “uniquely pervasive presence”); Cable News Network, Inc. v. American Broadcasting Co., 518 F. Supp. 1238, 1246 (N.D. Ga. 1981) (television conveys immediacy lacking in still photographs); Estes, 381 U.S. at 589 (Harlan, J., concurring) (“televising [trials] might well provide the most accurate and comprehensive means of conveying their content to the public”). See also Ares, supra note 65, at 173-74; Davis, supra note 15, at 86 (television coverage conveys the “reality” of the courtroom more accurately than other media); Wilson, supra note 15, at 296. It has also been suggested that the increased attention given to courtroom proceedings by television coverage has spurred greater accuracy in trial coverage by print media. National L.J., Jan 30, 1984, at 8, col. 2.
technologically possible.\textsuperscript{152}

Additionally, the potential gavel to gavel broadcasting of trials offered by cable television outlets such as CNN can provide live, extended coverage\textsuperscript{153} generally not available on the over-the-air broadcast networks. Coverage by such cable outlets would decrease the degree of editorial mitigation of the original message which is endemic to nightly news broadcasts.

C. Precedential Support for the Invalidity of Arbitrary Restrictions on Access

Under \textit{Richmond Newspapers} and \textit{Globe}, arbitrary and absolute bans on press access to the courtroom are unconstitutional.\textsuperscript{154} Rather, a case-by-case discretionary determination as to whether the interests of the parties outweigh the interests of the press and public is required. Although those decisions did not expressly deal with electronic access, it is difficult to reconcile with this principle the inflexible prohibition of such access as mandated by Rule 53 and the local rules implicated in \textit{Hastings}, \textit{Westmoreland} and \textit{Edwards}.\textsuperscript{155}

\textit{Richmond Newspapers} and its progeny contemplate a broad definition of "attendance" at trials.\textsuperscript{156} Further, \textit{Richmond Newspapers} articulated certain fundamental first amendment policies and effects\textsuperscript{157} in the trial context which can best be ad-

\begin{thebibliography}{99}
\bibitem{152} See Ares, \textit{supra} note 65, at 173-74. In Kleindienst v. Mandel, 408 U.S. 753, 765 (1972), the Court rejected the argument that the availability of an author's speeches and books extinguishes the public's right to see and hear him speak in person. See also Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 n.18 (1969) (citing J. \textit{MILL, ON LIBERTY} 32 (R. McCallum ed. 1947)); Fell v. Procunier, 417 U.S. 817, 838 (1974) (Douglas, J., dissenting); \textit{Richmond Newspapers}, 448 U.S. at 597 n.22 (Brennan, J., concurring) ("the availability of a trial transcript is no substitute for a public presence at the trial itself"). It should be noted, however, that under the time, place or manner doctrine, discussed \textit{infra} notes 193-228 and accompanying text, the presence of "adequate" alternative avenues of dissemination is a factor in validating regulation of speech. \textit{See infra} note 216.
\bibitem{153} See Turner \& Ornstein, \textit{The Supreme Court's Television Debut}, \textit{CALIF. LAW.}, Nov. 1986, at 22, 58: "A 'law channel' seems no more far-fetched than do fine-arts, stock-market and weather channels."
\bibitem{154} See supra notes 76-90 and accompanying text. \textit{See also Constitutional Protection Against Absolute Denial of Access, supra} note 146, at 1296-1303.
\bibitem{155} \textit{See, e.g.,} Julin, \textit{supra} note 102, at 1309. \textit{See also supra} note 100 and accompanying text (discussing \textit{Hastings}).
\bibitem{156} \textit{See supra} note 146 and accompanying text.
\bibitem{157} The Court has emphasized that press access to and coverage of trials may serve cathartic and therapeutic functions for the public, enhance public acceptability of trial results, enhance public scrutiny of judicial proceedings and function as a sur-
\end{thebibliography}
vanced by electronic media. Finally, in *Richmond Newspapers*, Chief Justice Burger recognized that significant restrictions on the public's right to receive information and ideas carry "a heavy burden of justification":

[In the context of trials ... the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors. For the First Amendment does not speak equivocally. ... It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.]

In *Globe*, the Court held that a case-by-case evaluation must be made as to whether press exclusion is necessary to protect the asserted interest. In *Hastings* and *Edwards*, neither trial court determined whether electronic coverage would be prejudicial to the defendants. In *Westmoreland*, the trial judge concluded that the particular facts of the case did justify granting CNN's petition to broadcast the trial. Thus, the rulings in *Hastings*, *Westmoreland* and *Edwards* upholding absolute rules prohibiting electronic access in the absence of specific findings violate the case-by-case evaluation requirement set forth in *Globe* and the policy considerations enumerated in *Richmond Newspapers*.163

In addition, these decisions ignore the ability of electronic media to advance fundamental first amendment interests. Where journalistic freedom to cover an institution as public in nature as the judiciary is curtailed in an arbitrary manner, the restriction cannot withstand constitutional scrutiny. As a legitimate, dominant news source, television cameras cannot be summarily barred from a courtroom without violating the first amendment.

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158. See supra notes 150-51 and accompanying text.
159. 448 U.S. at 576 (plurality opinion) (quoting in part, *Bridges v. California*, 314 U.S. 252, 263 (1941)) (footnote omitted). See also *Estes v. Texas*, 381 U.S. 532, 615 (1965) (Stewart, J., dissenting) ("The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms") (emphasis added).
161. Judge Hastings' consent to coverage rendered such an analysis unnecessary. See supra note 96.
163. See supra notes 79-83 and accompanying text.
Defects in Federal Court Analyses Upholding Exclusionary Rules

A. *Estes, Warner Communications and Chandler*: How Persuasive?

In excluding cameras from federal courtrooms in *Hastings, Westmoreland, Edwards* and other cases, the courts have relied on inapposite authority. Primarily, the decisions have cited *Estes v. Texas* for the proposition that there is no constitutional right of electronic access to the courtroom. In addition, the courts have relied on *Nixon v. Warner Communications, Inc.* and *Chandler v. Florida* to support denial of electronic access. The first amendment discussions set forth in *Warner Communications* and *Chandler* were essentially restatements of the *Estes* court's treatment of the issue. Therefore, if *Estes* no longer justifies denial of a qualified first amendment right to broadcast trials, *Warner Communications* and *Chandler* cannot justify per se exclusion.

The analysis of the current status of *Estes* begins with *Chandler*. Chandler's focus on due process issues appears to leave the first amendment jurisprudence in *Estes* undisturbed. Even so, *Estes* rejection of a constitutional right of access is no longer tenable. First, developments in television technology and the increased role of television in our society since *Estes* was decided in 1965 require reconsideration of the constitutional arguments for per se prohibition on electronic access to the courtroom. Justice Harlan presciently recognized this in the caveat to his concurring opinion in *Estes*: "The day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage

164. See supra notes 93-140 and accompanying text.
165. 381 U.S. 532 (1965).
166. *Edwards*, 785 F.2d at 1295 (citing *Estes*, 381 U.S. at 589 (Harlan, J., concurring)); *Westmoreland*, 752 F.2d at 21 (citing *Estes*, 381 U.S. at 585-86 (Warren, C.J., concurring)); id. at 587 (Harlan, J., concurring)); *Hastings*, 695 F.2d at 1281 (citing *Warner Communications*, 435 U.S. at 609 (quoting *Estes*, 381 U.S. at 589 (Harlan, J., concurring))).
169. See supra notes 61-63 and accompanying text.
170. See infra notes 282-83 and accompanying text.
171. See supra notes 150-51 and accompanying text.
the judicial process.\textsuperscript{172}

Second, the Estes majority did in fact acknowledge the existence of first amendment interests in the broadcasting of trials.\textsuperscript{173} The Court merely subordinated these rights of the press and public to the due process rights of criminal defendants.\textsuperscript{174} The combination of subsequent advances in technology, Chandler's recognition that the broadcasting of trials is not inherently prejudicial to a criminal defendant,\textsuperscript{175} Richmond Newspapers' recognition of a first amendment right of press and public access to criminal trials,\textsuperscript{176} and Globe's disapproval of \textit{per se} rules of exclusion\textsuperscript{177} compels the conclusion that the result reached in Estes can no longer be supported. Reconsideration is therefore required.

The \textit{Nixon v. Warner Communications, Inc.}\textsuperscript{178} decision cannot continue to justify exclusion of television cameras from courtrooms for several reasons. Foremost is its lack of relevance. The issue before the Court was the media's asserted right to physical possession of audio tapes entered as evidence—tapes gained by court order.\textsuperscript{179} Thus, the case is clearly distinguishable from those involving the broadcasting of trial proceedings, especially where the parties to the litigation consent to broadcast coverage.\textsuperscript{180} Establishing a right to obtain physical possession of evidence is clearly more difficult than establishing a right to communicate the events of a proceeding already open to the general public.\textsuperscript{181} Additionally, the Court in \textit{Warner Communications} declined to fully evaluate first

\begin{itemize}
\item \textsuperscript{172} 381 U.S. at 595 (Harlan, J., concurring). \textit{See also} id., at 564 (Warren, C.J., concurring). In his dissenting opinion in Estes, Justice Stewart agreed that the issue of cameras in the courtroom was "subject to continuous and unforeseeable change." Id. at 603-04 (Stewart, J., dissenting).
\item \textsuperscript{173} \textit{See supra} notes 61-63 and accompanying text.
\item \textsuperscript{174} Id.
\item \textsuperscript{175} 449 U.S. 560, 574 (1981).
\item \textsuperscript{176} 448 U.S. 555, 580 (1980).
\item \textsuperscript{177} 457 U.S. 596, 608 (1982).
\item \textsuperscript{178} 435 U.S. 589 (1978).
\item \textsuperscript{180} The trial court in Westmoreland noted the importance of the parties' consent to the broadcasting of their trial, 596 F. Supp. at 1168. In Hastings, 695 F.2d at 1281, the court of appeals noted that Judge Hastings consented to the requested access, contrasting \textit{Warner Communications.} Nevertheless, the Hastings court concluded that the distinction did not undermine the precedential value of \textit{Warner Communications,} \textit{id.} at 1284. \textit{See supra} note 100.
\item \textsuperscript{181} \textit{See, e.g.,} Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (orders re-
amendment interests in the context of the television medium.\textsuperscript{182} Instead, the Court recited in dicta the rule set forth in \textit{Estes}—that only the right to publish what is gathered from the courtroom by non-electronic means enjoys constitutional protection.\textsuperscript{183} As \textit{Estes}’ first amendment jurisprudence decays, so does the precedential value of \textit{Warner Communications}.

Nor is \textit{Chandler v. Florida}\textsuperscript{184} persuasive support for the validity of \textit{per se} rules which bar cameras from the courtroom. Chief Justice Burger’s majority opinion did not directly reject a first amendment right of electronic access. Rather, it noted that allowance of electronic coverage of trials in Florida was not premised upon the first amendment.\textsuperscript{185} Moreover, the issue in \textit{Chandler} was the validity of access, not the validity of exclusion.

In summary, \textit{Estes v. Texas} and its progeny can no longer be interpreted as foreclosing a first amendment right to broadcast trials, in light of societal and technological changes as well as the right of access recognized in \textit{Richmond Newspapers}. Thus, the federal courts of appeals in \textit{Hastings}, \textit{Westmoreland} and \textit{Edwards} erred in relying on \textit{Estes, Warner Communications} and \textit{Chandler} to uphold local rules of court prohibiting electronic access.

\textbf{B. The Flawed Application of the “Time, Place or Manner” Doctrine}

In \textit{Globe Newspaper Co. v. Superior Court},\textsuperscript{186} the Supreme
Court held that denial of press access to judicial proceedings is valid only if it is "necessitated by a compelling governmental interest and is narrowly tailored to serve that interest." In Press-Enterprise Co. v. Superior Court, the Court further stated:

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

Under this standard, the per se rules barring electronic access to the courtroom upheld in Edwards, Westmoreland and Hastings cannot be sustained. The standard mandates that the trial court make specific findings as to the manner in which press access threatens protected interests in the case at bar. In upholding the inflexible prohibition on electronic access in Edwards, Westmoreland and Hastings, the courts of appeals considered only whether interests perceived to be common to all televised trials, such as preservation of order and decorum in the courtroom, justified the blanket ban on access. The respective courts did not pass on whether the interests enumerated were threatened in the specific cases before the trial courts. As per se rules preclude trial judges from undertaking to exercise their discretion, they violate the requirement that the trial judge make specific findings that closure is necessitated by the need to preserve other governmental interests. For the same reasons, per se rules violate the requirement that closure orders be narrowly tailored.

A lesser standard of review than the strict scrutiny required by Globe and Press-Enterprise was applied by the majority

187. Id. at 606-07.
189. Id. at 510.
190. See Julin, supra note 102, at 1307 n.13; Constitutional Protection Against Absolute Denial of Access, supra note 146, at 1299.
191. See, e.g., Hastings, 695 F.2d at 1283. The court also noted "the institutional interest in procedures designed to increase the accuracy of the essential truth-seeking function of the trial," id. (footnote omitted), another concern not evaluated with reference to the case at bar.
opinions in Hastings, United States v. Kerley, and in Judge Winter's concurring opinion in Westmoreland. These opinions concluded that a per se prohibition of electronic access to the courtroom could be sustained as a reasonable regulation of the manner in which protected speech is exercised. A careful look at Hastings, Kerley, and the Richmond Newspapers line of cases illustrates the confusion among courts and commentators as to the proper standard of review in applying a time, place or manner analysis to electronic access. While the proper test for excluding electronic access to the courtroom under the time, place or manner doctrine remains an open question, application of either of the two possible standards demonstrates the invalidity of mandatory exclusion.

First, a time, place or manner regulation is only valid if it is "content-neutral." Thus, the doctrine—applying a lesser standard of scrutiny—may be properly invoked only if prohibition of televised trial coverage is aimed at protecting interests unrelated to the suppression of ideas. Of the various interests asserted to justify exclusion, some are primarily related to the suppression of speech while others clearly are not.

Commentators have urged that prohibitions on electronic access are not content-neutral because the electronic media conveys messages in an entirely unique manner which cannot be duplicated in traditional "oral or written descriptions." Ac-
Accordingly, regulation of live television’s unique message is content-based. Regulations prohibiting electronic access are content-based if their purpose is to preserve the dignity of judicial proceedings by avoiding the possibility that trials, once televised, would be perceived by the public as entertainment programming.\textsuperscript{203} The fear that televised trial proceedings will turn public sentiment against a particular party in a case—other than where such prejudice would impair the court’s ability to impanel an impartial jury—is similarly a content-based rationale for exclusion.\textsuperscript{204} In addition, the exclusion of cameras because of the desire of trial participants—including judges—to avoid public scrutiny\textsuperscript{205} is not content-neutral unless such desire is related to privacy interests.\textsuperscript{206}

Alternatively, the primary rationale for excluding cameras from the courtroom can be viewed as unrelated to suppression of content; that is, to ensure the fair administration of justice. Specifically, several interests sought to be protected are directly tied to ensuring the parties’ rights to a fair trial.\textsuperscript{207} Such interests include preserving order in the courtroom,\textsuperscript{208} eliminating distraction caused by noise and movement\textsuperscript{209} and preventing certain behavioral effects caused by the presence of television cameras among trial participants.\textsuperscript{210}

Despite the arguments that regulations prohibiting electronic access are content-based,\textsuperscript{211} it appears that the primary purpose for excluding cameras from the courtroom is to protect litigants’ fair trial rights,\textsuperscript{212} an interest unrelated to the sup-

\textsuperscript{203} See infra notes 275-77 & 401 and accompanying text.

\textsuperscript{204} However, the restriction is content-neutral to the extent it is aimed at the court’s ability to empanel an impartial jury for retrials following a televised trial, a due process interest unrelated to content. For a discussion of the retrial of Klaus Von Bulow following the national coverage via cable television of his first trial, see M. KRONENWETTER, supra note 21, at 71-75 (1986).

\textsuperscript{205} See infra note 289.

\textsuperscript{206} But see infra note 271 and accompanying text.

In addition to the theories stated supra notes 201-05, access restrictions may be content-based to the degree that electronic access to trials is prohibited, but allowed for other courtroom proceedings. See, e.g., Recommendation D of the Judicial Conference, 87 F.R.D. 519, 536 (1980) (permitting electronic access to ceremonial and naturalization proceedings occurring in the courtroom).

\textsuperscript{207} See, e.g., Chandler v. Florida, 449 U.S. at 575-77; Estes, 381 U.S. at 540.

\textsuperscript{208} “Decorum” interests include maintaining quiet and order in the courtroom. See infra notes 275-83 and accompanying text.

\textsuperscript{209} See infra notes 281-83 and accompanying text.

\textsuperscript{210} See infra notes 240-74 and accompanying text.

\textsuperscript{211} See supra notes 201-06 and accompanying text.

\textsuperscript{212} See, e.g., Chandler, 449 U.S. at 574-75, 577, 581-82; Hastings, 695 F.2d at 1283.
pression of speech. Therefore, a lower level of scrutiny may be applied under the time, place or manner doctrine. However, it is unclear whether the applicable standard of review is the prevailing time, place or manner standard, or a more narrow approach for regulating access discerned from the Richmond Newspapers line of cases.

The Supreme Court has stated that time, place or manner regulations are valid provided they are justified without reference to the content of the regulated speech, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of information. Under this prevailing standard, even assuming content-neutrality, per se rules which prohibit electronic access fail

Richmond Newspapers also identified a content-neutral interest—the fair administration of justice—as a basis for imposing limitations on press access to trials. See infra text accompanying note 222.

213. This is especially true considering that per se regulations may not be content-based by definition. Cf. City of Renton v. Playtime Theatres, Inc., 106 S. Ct. 925 (1986) (content neutrality refers to a speaker’s viewpoint, not an entire class of speech).

214. Specifically, cameras may be barred from the courtroom as a regulation of the manner of access otherwise guaranteed by Richmond Newspapers and its progeny.


The Hastings court adopted a similar test, holding that a restriction on access to the courtroom is constitutional if it is reasonable, promotes significant governmental interests and does not “unwarrantly abridge . . . the opportunities for the communication of thought.” 695 U.S. at 1282 (quoting Richmond Newspapers, 448 U.S. at 581 n.18). There is some internal tension in this standard: “reasonableness” implies application of minimal scrutiny while an intermediate level of scrutiny is seemingly required by the subsequent two prongs of the test. The Hastings court cited Justice Stewart’s concurring opinion in Richmond Newspapers as authority for the reasonableness requirement, 695 F.2d at 1282 n.9 (citing Richmond Newspapers, 448 U.S. at 600 (Stewart, J., concurring) (“[j]ust as a legislature may impose reasonable time, place, and manner restrictions upon the exercise of First Amendment freedoms, so may a trial judge impose reasonable limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public”) (emphasis added by the Hastings court)), and seemed to apply minimal scrutiny. As discussed infra notes 222-26 and accompanying text, it is unclear whether Richmond Newspapers and its progeny endorse a traditional time, place or manner limitation on courtroom access, or an analogous, more limited approach. With regard to the prevailing time, place or manner standard, the reasonableness requirement seems superfluous, subsumed in the actual test to be applied. See, e.g., Clark, 468 U.S. at 295. Alternatively, if a narrower approach is compelled by Richmond Newspapers, infra notes 225-26 and accompanying text, a lower, reasonableness standard may be proper. See United States v. Kerley, 753 F.2d 617, 620-21 (7th Cir. 1985). The approach taken by the Hastings court evidences confusion as to the meaning of Richmond Newspapers—Hastings’ primary authority for application of a time, place or manner analysis—as to whether the proper level of scrutiny is minimal under a reasonableness test, or intermediate under the prevailing time, place or manner standard.
on at least two grounds.\textsuperscript{216} As stated above, a \textit{per se} prohibition by definition is not narrowly tailored.\textsuperscript{217} Second, an examination of the relevant policy considerations\textsuperscript{218} and the success of state court experimentation with electronic trial coverage\textsuperscript{219} indicates that the purportedly significant governmental interests furthered by exclusion are illusory. In fact, it appears that significant governmental, as well as societal, interests are advanced by access.\textsuperscript{220}

The \textit{Hastings} court cited dicta from \textit{Globe} and \textit{Richmond Newspapers} as grounds for applying a time, place or manner analysis.\textsuperscript{221} However, the court overlooked important language in these cases and, consequently, failed to apply key principles articulated by the Court.

Chief Justice Burger's plurality opinion in \textit{Richmond Newspapers} concluded with a footnote stating:

[O]ur holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as free flow of traffic . . . so may a trial judge in the interest of the fair administration of justice, im-

\begin{itemize}
\item \textsuperscript{216} The first prong, content-neutrality, is discussed \textit{supra} notes 198-213 and accompanying text. Because television coverage of trials is qualitatively superior to coverage by print media or by television reporting, \textit{supra} notes 150-51 and accompanying text, one can argue that such existing "channels" are not "adequate" alternatives. However, the Supreme Court has been quick to find the existence of adequate alternative avenues of communication in recent cases. \textit{See}, \textit{e.g.}, \textit{Renton}, 106 S. Ct. at 932; \textit{Taxpayers for Vincent}, 466 U.S. at 812; \textit{id.} at 2136-37 (Brennan, J., dissenting); \textit{FCC v. Pacifica Found.}, 438 U.S. 726, 746 (1978). Courts have traditionally found print media and analogous broadcast coverage to be "adequate." \textit{See}, \textit{e.g.}, \textit{Estes}, 381 U.S. at 539-40 (1965). \textit{But see generally Television and Newspaper Trial Coverage, supra note 65.}
\item \textsuperscript{217} \textit{See supra} note 192 and accompanying text.
\item \textsuperscript{218} \textit{See infra} notes 229-310 and accompanying text.
\item \textsuperscript{219} \textit{See infra} notes 345-404 and accompanying text.
\item \textsuperscript{220} \textit{See infra} notes 288-306 and accompanying text. The \textit{Hastings} court, which reached the contrary conclusion, relied heavily on the obsolete \textit{Estes} decision in this regard. 695 F.2d at 1283-84 (citing \textit{Estes}, 381 U.S. at 544-50 (truth-seeking function of trials may be adversely affected by television coverage), \textit{id.} at 545 (impact of television coverage on trial participants may be too subtle to be detected)). The \textit{Hastings} court also cited \textit{Chandler} in support of its conclusion. However, the court cited to portions of the \textit{Chandler} opinion which either merely summarized the \textit{Estes} doctrine, 695 F.2d at 1283 (citing \textit{Chandler}, 449 U.S. at 575-78 (summarizing \textit{Estes}, 381 U.S. at 544-50)), or expressed uncertainty as to the effects of televised trial coverage, 695 F.2d at 1283 (citing \textit{Chandler}, 449 U.S. at 578).
\item \textsuperscript{221} 695 F.2d at 1282 (citing \textit{Globe}, 457 U.S. at 607 n.17; \textit{Richmond Newspapers}, 448 U.S. at 600 (Stewart, J., concurring)).
\end{itemize}
pose reasonable limitations on access to a trial.\textsuperscript{222}

The meaning of the dictum, repeated in Justice Stewart's concurring opinion and cited in \textit{Globe}, is unclear. Construed broadly, as was done by the \textit{Hastings} court, the language endorses application of a traditional time, place or manner analysis to electronic access to the courtroom.\textsuperscript{223} Yet, as discussed above, characterizing inflexible rules prohibiting electronic access to the courtroom as mere manner restrictions cannot justify exclusion under the prevailing standard of review.\textsuperscript{224}

Alternatively, the Court in \textit{Richmond Newspapers} and \textit{Globe} may have stated a narrower caveat to the right of access right it established. The relevant and consistent language in these opinions intimates that restrictions of press access are merely \textit{analogous} to time, place or manner restrictions, and extend only to prevent courtroom noise and overcrowding.\textsuperscript{225} Under this view, \textit{per se} exclusion of television cameras is invalid unless such access is shown to disturb the proceedings. The state experiments with eletronic trial coverage have widely refuted

\textsuperscript{222} 448 U.S. at 581 n.18 (emphasis added).

\textsuperscript{223} \textit{See supra} note 215. The third prong of the test adopted by the \textit{Hastings} court—that a restriction on access not unwarrantly abridge opportunities for communication of thought—is language from \textit{Cox v. New Hampshire}, 312 U.S. 569, 574 (1941), cited by Chief Justice Burger in the concluding footnote to the plurality opinion in \textit{Richmond Newspapers}, 448 U.S. 581-82 n.18. Arguably, the language is inapposite to the context of televised trials. The complete sentence in \textit{Cox}, quoted by the Chief Justice, reads in pertinent part, "... the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." \textit{Richmond Newspapers}, 448 U.S. at 581-82 n.18 (quoting \textit{Cox}, 312 U.S. at 574) (emphasis added). This statement, in its entirety, refers to the regulation of speech in a public forum, \textit{e.g.}, United States v. Grace, 461 U.S. 171 (1983), which a courtroom is not. \textit{See Westmoreland}, 752 F.2d at 21-22 (public forum interest in courtroom speech may be a speaker's right, but does not extend to the press as representatives of the public). Thus, insofar as the Chief Justice appears to apply doctrine applicable to public fora, which courtrooms are not, the \textit{Hastings} court erred in relying upon the non-sequitur in formulating its time, place or manner standard of review.

\textsuperscript{224} \textit{See supra} notes 215-20 and accompanying text.

\textsuperscript{225} \textit{Richmond Newspapers}, 448 U.S. at 581 n.18 (plurality opinion) (language quoted \textit{supra} text accompanying note 222); \textit{id.} at 600 (Stewart, J., concurring). \textit{Accord Globe}, 457 U.S. at 607 n.17 ("limitations on the right of access that resemble 'time, place, and manner' restrictions ... would not be subjected to strict scrutiny") (emphasis added). \textit{See also Fenner & Koley, \textit{Access to Judicial Proceedings: To Richmond Newspapers and Beyond}, 16 HARV. C.R.-C.L. L. REV. 415, 444-46 (1981). This language may also be construed more broadly to include activities in the courtroom which have adverse psychological effects on trial participants. Note, \textit{Globe Newspaper: Sounding the Death Knell for Closure in Courtroom Proceedings?}, 3 PACE L. REV. 395, 412 (1983).
the idea that television cameras are prohibitively disruptive.\footnote{226}

Also important is the admonition of four justices in \textit{Richmond Newspapers} that the trial judge, not the reviewing court, must determine whether restrictions on access are reasonable.\footnote{227} Thus restrictions on access should be within the sound discretion of the trial judge. The \textit{per se} prohibition of electronic access is thus \textit{per se} invalid because it prevents the trial judge from exercising his discretion by determining whether the restriction on access is reasonable.\footnote{228}

In summary, \textit{per se} rules prohibiting electronic access to the courtroom violate the compelling governmental interest standard articulated in \textit{Globe}. A \textit{per se} prohibition of cameras from the courtroom is also invalid as a time, place or manner, or analogous restriction. Under the prevailing time, place or manner test, a \textit{per se} regulation is invalid because it neither advances significant governmental interests nor is narrowly tailored to further the purported governmental interests. A narrower test under \textit{Richmond Newspapers} and its progeny would permit a trial judge to bar cameras in order to prevent excessive noise and overcrowding in the courtroom. The \textit{Hastings} and \textit{Kerley} courts and Judge Winter's concurring opinion in \textit{Westmoreland} erred by failing to correctly apply any of these possible standards.

\section*{VI}

\textbf{Policy Considerations: The Unproven Dangers of Cameras in the Courtroom}

Courts and commentators have focused on various policy considerations in examining the constitutionality of permitting cameras in the courtroom.\footnote{229} In \textit{Estes v. Texas},\footnote{230} the Supreme Court held that various dangers\footnote{231} purportedly occasioned by

\begin{footnotesize}
\footnotetext[226]{See infra notes 393-94 and accompanying text.}
\footnotetext[227]{448 U.S. 581 n.18 (plurality opinion); id. at 600 (Stewart, J., concurring).}
\footnotetext[228]{In \textit{Westmoreland}, for example, the trial judge found that exclusion of cameras from the courtroom was not justified. 596 F. Supp. 1166, 1167-70 (S.D.N.Y. 1984).}
\footnotetext[230]{381 U.S. 532 (1965).}
\footnotetext[231]{The policy issues set forth in \textit{Estes} include the psychological impact of cameras in the courtroom upon trial participants; other adverse effects upon the trial judge, jurors, criminal defendants, witnesses and attorneys; the impact of electronic coverage upon the dignity and decorum of judicial proceedings; the effect of television}
\end{footnotesize}
electronic trial coverage violated the defendant's right to due process. Fourteen years later, the Florida Supreme Court in *In re Petition of Post-Newsweek Stations, Florida, Inc.*, held to the contrary. The Florida Supreme Court concluded that, on balance, a modern policy analysis illustrates that electronic coverage is not only constitutionally permissible but also desirable. Finally, in *Chandler v. Florida*, the United States Supreme Court held that the harm caused by electronic access to the courtroom *may* be sufficient in specific instances to prohibit such coverage, but only if affirmatively proven. The Court stated, "Whatever may be the 'mischievous potentialities [of broadcast coverage]...' no one has been able to present empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect on that process." The empirical data referred to by the *Chandler* court may, as a practical matter, be impossible to gather. The purpose of judicial proceedings—to adjudicate legal rights—precludes methodologically correct experimentation. Further, it is questionable whether the potentially deleterious effects of broadcast coverage of trials can be isolated from other forms of jury prejudice.

A. Potential Dangers

1. Impact On Trial Participants

One supposed threat posed by electronic access to trials is the
possibility that the mere knowledge that proceedings are being televised will alter the behavior of the participants.240 Feared reactions range from intimidation and inhibition of witnesses to showboating and grandstanding by attorneys.241 Such behavior may alter the course of the trial and impede the basic fact-finding goal of the proceeding. These concerns appear to be unwarranted. The greater weight of authority indicates that during the course of courtroom proceedings most participants are not overly conscious of or influenced by the presence of television cameras.243

Opponents of cameras in the courtroom argue that electronic access will distract the judge, increase the judicial workload and provide a forum for judges to pursue political goals.244 Opponents urge that when the decision of whether or

240. The Chandler court noted, "If it could be demonstrated that the mere presence of photographic and recording equipment and the knowledge that the event would be broadcast invariably and uniformly affected the conduct of participants so as to impair fundamental fairness, our task would be simple . . . ." 449 U.S. at 575.

241. See, e.g., Kamisar, supra note 74, at 163.

242. See, e.g., Estes, 381 U.S. at 566 (Warren, C.J., concurring); id. at 591 (Harlan, J., concurring); Douglas, The Public Trial and the Free Press, 33 ROCKY MTN. L. REV. 1, 8 (1960).


Judge Stanley C. Soderland presided over a mock trial in the state of Washington and observed, "I found that I completely forgot the presence of the news media as soon as I was called upon to take some action. Participants in a trial get so absorbed in what they are doing that the presence of a camera is going to fade into the background." D'Alemberte, Cameras In The Courtroom, 9 LITIGATION 20, 21 (Fall 1982). Cf. Fretz, "No, or at Least a Cautious 'Only If';" Cameras in the Courtroom: A Dialogue, 64 A.B.A.J. 549, 550 (1978).

244. Estes, 381 U.S. at 548; Fatzer, supra note 15, at 239.

245. Estes, 381 U.S. at 548. This point was a primary concern of the Court in Estes: "[The trial judge's] job is to make certain that the accused receives a fair trial. This most difficult task requires his undivided attention. Still when television comes into the courtroom he must also supervise it." Id.


[No] judge fit to be one is likely to be influenced consciously except by what he sees and hears in the court and by what is judicially appropriate for his deliberations. However, judges are also human, and we know . . . how powerful is the pull of the unconscious and how treacherous the rational process.
not to allow electronic coverage rests with the trial judge, media pressure will unduly influence his discretion.\textsuperscript{247} Beyond this, opponents fear that once cameras gain access to the courtroom, media considerations will abridge a degree of the presiding judge's control over the conduct of the trial.\textsuperscript{248}

These dangers have proven to be unfounded. Judges who are monitored by a viewing audience may actually perform their duties more effectively, as they feel compelled to be more alert and attentive.\textsuperscript{249} Many judges are actually "educated" by their experience with cameras in their courtrooms; after presiding over a televised trial, those who initially voiced apprehension or opposition expressed approval of access.\textsuperscript{250}

The issue of the potential impact of coverage on the function of jurors has also elicited a divergence of opinion. Opponents of access argue that prejudice may arise when an unsequestered jury views rebroadcasts of trial proceedings.\textsuperscript{251} Jurors may feel pressured to render a verdict in accord with public sentiment, especially in notorious trials.\textsuperscript{252} Jurors may even fear or actually experience physical threats to deliver such verdicts. In

\textsuperscript{247} In \textit{Estes}, Justice Clark framed this notion as the initial tap of a domino theory: Our judges are high-minded men and women. But it is 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. Moreover, where one judge in a district or even in a State permits telecasting, the requirement that the others do the same is almost mandatory. Especially is this true where the judge is selected at the ballot box.

\textsuperscript{248} This concern was expressed even by judges who were not opposed to television coverage of trials. In \textit{re Petition of Post-Newsweek Stations, Florida, Inc.}, 370 So. 2d 764, 770 (results of survey of Florida circuit judges). \textit{Cf.} Davis, \textit{supra} note 15, at 86 (cartoon of judge announcing from the bench, "We'd like to welcome a new station today—KCHTV in Fall Creek!").

\textsuperscript{250} Alabama Judge Robert Hodnette observed that the presence of cameras during a murder trial over which he presided "kept me and all the courtroom personnel on our toes." \textit{Time}, Feb. 9, 1981, at 5, as quoted in \textit{A Comprehensive Approach}, \textit{supra} note 65, at 128-29. \textit{See also infra} note 395.

\textsuperscript{251} \textit{Estes}, 381 U.S. at 546; \textit{Post-Newsweek}, 370 So.2d at 777.

\textsuperscript{252} \textit{Estes}, 381 U.S. at 545 ("Where pre-trial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them"). \textit{Accord id.} at 592-93 (Harlan, J., concurring). \textit{See also} Fatzer, \textit{supra} note 15, at 238 (studies indicate that increased public awareness of a
sensational trials, they may presume the guilt of the accused based solely on the fact that the trial is being televised.\textsuperscript{253} Obtaining an impartial jury for retrials may be more difficult after a televised trial.\textsuperscript{254}

Proponents counter these charges by pointing out that jurors can and should be excluded from coverage\textsuperscript{255} and sequestered to prevent viewing of rebroadcasts and accompanying commentary. It is doubtful that television coverage of trials will become so popular as to preclude the availability of an impartial jury.

Whether knowledge that a trial is being televised may deter the shy witness from coming forward to testify in such a case\textsuperscript{256} or intimidate such a witness once on the stand is, again, uncertain.\textsuperscript{257} Proponents of coverage contend that witnesses will actually receive better treatment when cameras are rolling\textsuperscript{258} and that coverage may bring the trial to the attention of key witnesses not previously discovered by the litigants.\textsuperscript{259} According

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\begin{itemize}
\item 253. See Estes, 381 U.S. at 545.
\item 254. Estes, 381 U.S. at 546-47; Fatzer, supra note 15, at 239; Tongue & Lintott, supra note 15, at 800. But see Post-Newsweek, 370 So.2d at 777 (noting that widespread publicity of the Watergate hearings was held not to have unduly prejudiced the jury pool for the subsequent trials of H.R. Haldeman, John Ehrlichman and John Mitchell).
\item 255. This is the current practice in some state courts. See, e.g., Post-Newsweek, 370 So.2d at 787-89 (Fla. 1979); State v. Newsome, 177 N.J. Super. 221, 426 A.2d 68 (N.J. Super. Ct. App. Div. 1980) (jurors may not be photographed without their consent). See also Hoyt, Prohibiting Courtroom Photography: It's Up to the Judge in Florida and Wisconsin, 63 JUDICATURE 290, 295 (1980) (Wisconsin and other states prohibit televising of jurors unless they "specifically and individually" consent); Comment, Constitutional Law: Television on Trial—Cameras in the Courtroom, 21 WASHBURN L.J. 419, 424 (1982). See also infra note 398 and text accompanying note 414.
\item 256. See Estes, 381 U.S. at 547; Tongue & Lintott, supra note 15, at 790-91 (describing a "chilling effect" of trial coverage on the availability of key witnesses):
\begin{itemize}
\item Even now one of the serious problems of law enforcement is that many persons who witness crimes do not want to "get involved," particularly if they live or work in the area so as to be subject to retaliation. This problem easily could be compounded by the realization of these persons that "to get involved" may result in the televising of their testimony.
\item 257. See infra note 397.
\item 258. Tornquist & Grifall, supra note 15, at 387.
\item 259. Kamisar, supra note 74, at 163. Trial publicity in general has been recognized as enabling key witnesses not otherwise called to testify to learn of testimony they know is false, and to enable them to come forward to rebut the perjured testimony. Richmond Newspapers, 448 U.S. at 570 n.8 (plurality opinion) (citing 6 J. WIGMORE,
to one study, television coverage may even enhance witnesses' ability to recall pertinent facts.\textsuperscript{260}

Rules promulgated by the various states which allow broadcast coverage of trials\textsuperscript{261} vary in regard to whether or not the consent of witnesses is required for their testimony to be televised,\textsuperscript{262} and the issue has been widely debated.\textsuperscript{263} However, most courts\textsuperscript{264} and commentators\textsuperscript{265} have agreed that certain types of witnesses—for example, minors, victims of sexual assault and those whose testimony could possibly endanger their lives, threaten national security or reveal trade secrets—should be excluded from electronic coverage.\textsuperscript{266}

Predictions that television coverage of trials will generate inappropriately self-indulgent conduct on the part of attorneys have not been borne out by experience.\textsuperscript{267} Attorneys with a propensity for theatrics do not need the presence of cameras to play to the courtroom theater.\textsuperscript{268} Moreover, attorneys may be

EVIDENCE § 1834, at 436 (Chadbourn rev. 1976)); id. at 596-97 (Brennan, J., concurring) (quoting In re Oliver, 333 U.S. 257, 270 n.24 (1948)); Douglas v. Wainwright, 714 F.2d 1532, 1541-42 (11th Cir. 1983). The substantial reach of television could further advance this function of trial publicity.

260. Hoyt, \textit{Courtroom Coverage: The Effects of Being Televised}, 21 J. BROADCASTING 487, 493 (1977). In Professor Hoyt's experiment, witnesses reported greater recall when testifying while television cameras were present than when cameras were absent. \textit{Id.}

261. \textit{See infra} notes 326-44 and accompanying text.


In Post-Newsweek, the Florida Supreme Court established a "qualitative difference" test:

The presiding judge may exclude electronic media coverage of a particular participant only on a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.

370 So. 2d at 779. The test is praised, although some decisions applying it are criticized in Cohen, \textit{Cameras in the Courtroom and Due Process: A Proposal for a Qualitative Difference Test}, 57 WASH. L. REV. 277, 288 (1982). The criticized decisions are State v. Palm Beach Newspapers, Inc., 395 So.2d 544 (Fla. 1981) (exclusion of cameras upheld when prison inmates claimed coverage of their testimony would subject them to reprisals); State v. Green, 395 So.2d 532 (Fla. 1981) (presence of cameras constitute a denial of due process by rendering the accused incompetent to stand trial).

263. \textit{See generally} authorities cited supra note 15.

264. \textit{E.g.}, Chandler, 449 U.S. at 577; Post-Newsweek, 370 So.2d at 779.

265. \textit{E.g.}, Hoyt, supra note 255, at 294-95; Tornquist & Grifall, supra note 15, at 361.

266. \textit{See infra} note 341-44 and accompanying text and text accompanying note 413.

267. \textit{See infra} note 396 and accompanying text.

268. Barber, supra note 239, at 255 (studies have not shown that cameras make attorneys more flamboyant); J. FRANK, \textit{COURTS ON TRIAL} 138 (1949). One commentator has asserted that if attorneys grandstand, the bar should respond by demanding
more conscientious and thorough in preparing their cases knowing that their work will receive broad exposure to the general public.269

Concern has also been expressed as to whether the televising of trials violates trial participants' rights of privacy.270 However, a challenge to electronic access on the basis of asserted privacy rights would be unconvincing under established constitutional doctrine,271 especially considering the inherently public nature of trials272 and the recommended exclusion from coverage of jurors273 and certain types of witnesses.274

2. The Threat to the Dignity and Decorum of Judicial Proceedings

One long-held fear is that the televising of trials will detract from the dignity and decorum of judicial proceedings.275 Some opponents, including jurists, have stated that the courts should not be subject of commercial exploitation.276 Another con-

that attorneys demonstrate a greater degree of professionalism in the courtroom, not by excluding cameras from the proceedings. M. KRONENWETTER, supra note 21, at 93. 269. Tornquist & Grifall, supra note 15, at 366.

270. See generally Ares, supra note 65, at 181 (compelling interest in prohibiting coverage of certain types of witnesses such as young rape victims); Power, supra note 15; Comment, Television and Newsreel Coverage of a Trial, 43 IOWA L. REV. 616, 624 (1958). See also United States v. Kleinman, 107 F. Supp. 407 (D.D.C. 1952) (discharging citation for contempt of Congress of witness who refused to testify before Senate committee investigating organized crime in televised hearings). Cf. H.R. RULE XI, c.3 (rules of the U.S. House of Representatives prohibit televising a witness over his or her objection).


275. See, e.g., Canon 35: Cameras, Courts and Confusion, supra note 26; Douglas, supra note 242, at 1, 3 & 6 (cited with approval in Estes, 381 U.S. at 541).

276. "There would be a real threat to the integrity of the trial process if the television industry and trial judges were allowed to become partners in the staging of criminal proceedings." Estes, 381 U.S. at 573-74 (Warren, C.J., concurring). See also Douglas, supra note 242, at 9; infra note 401 (Justice Stanley Mosk dissenting from
cern is that televised trials may be perceived as entertainment rather than news by a confused public. A related fear is that only the most sensational or newsworthy trials or portions thereof will garner sufficient public interest to be broadcast.

These concerns are misplaced. Newspaper coverage of trials consists primarily of excerpts, which often emphasize the sensational and rarely include a complete transcript. No different from print in this respect, electronic media, by necessity, selectively edit vast quantities of information for dissemination. This process is substantially free from government intervention or limitation.

Whether television coverage will adversely affect the dignity and decorum of courtroom proceedings is dependent upon whether electronic media personnel and equipment remain physically unobtrusive. But this is a matter well within the control of the jurisdiction—under rules promulgated to regulate electronic access—and the presiding judge. Courts and commentators share near unanimous opinion that, contrary to the disruptive capabilities evident at the trial of Billy Sol Estes, the danger of physical disruption has virtually disappeared. This is largely due to advances in television

the California Supreme Court’s decision to allow experimental coverage of oral argument before the state high court).


278. See Chandler, 449 U.S. at 580: "[s]election of which trials, or parts of trials, to broadcast will inevitably be made not by judges but by the media, and will be governed by . . . factors . . . [which will have] the effect . . . to titillate rather than to educate and inform." See also Estes, 381 U.S. at 594-95 (Harlan, J., concurring); Fatzar, supra note 15, at 235; Gerbner, supra note 15, at 420; A Comprehensive Approach, supra note 65, at 134; But see Davis, supra note 15, at 87; Wilson, supra note 15, at 295 ("this . . . is a concern more for judicial public relations than in [sic] communicating the truth").

It should be noted that many trials of broad public interest involve the rights or interests of a large number of people, involving the conduct of public officials or large corporations.

279. Davis, supra note 15, at 89; Tate, supra note 19, at 928.


281. See supra note 39 and accompanying text.

282. See, e.g., Chandler, 449 U.S. at 576-77; Westmoreland, 752 F.2d at 18; Post-Newsweek, 370 So.2d at 775. See also Graham, supra note 243, at 546 (cameras are even less distracting than “the exotic machines employed by stenographic reporters”); Fretz, supra note 243, at 550; Julin, supra note 102, at 1306; Note, Televised Trials: Constitutional Constraints, Practical Implications, and State Experimentation, 9 Loy. U. Chi. L.J. 910, 925 (1978). See also infra note 393.

Electronic media coverage of trials may actually reduce disruption by allowing “the
technology and broadcasters' willingness to pool coverage to eliminate large numbers of personnel and equipment from the courtroom.283

3. Administrative Considerations

The televising of trials raises further concerns in the area of the general administration of the judiciary. These concerns include the purported increase in litigation, necessitated by required judicial determinations of whether coverage should be allowed (including appeals) and the expense of sequestering juries.284

While these considerations are legitimate, their persuasive force on the larger issue of whether trials should be televised is insufficient to bar access in all cases. First, reviewable judicial rulings are required for a wide range of other issues during trial.285 In resolving these other issues, concern over judicial economy is not relevant and, similarly, should not be an important factor in justifying denial of electronic access. Second, jurors are commonly sequestered for non-televised trials of significant public interest.286 Finally, matters of administrative cost or judicial inconvenience, unless of constitutional dimensions, cannot in themselves outweigh the first amendment interests287 which mandate finding per se rules of exclusion constitutionally infirm.

B. Potential Benefits

1. Educational Value

The potential educational value of electronic access is frequently suggested as one of its primary benefits.288 Televised trials enable the public to receive more accurate accounts of
courtroom proceedings than those provided by print media and television news accounts, which do not include footage of the proceedings. Accordingly, such access can educate a public largely ignorant about the conduct of state and federal trials. Direct personal experience of courtroom proceedings among non-lawyers is minimal. Alternatively, fictional images of court proceedings proliferate on a spate of popular television programs and recent films.

Arguably, the purported educational benefits resulting from the televising of trials are incomplete, as asserted in Estes. Opponents of electronic access claim that brevity of coverage, coverage of primarily sensational trials and the lack of access to written documents such as pleadings and motions, or trial

289. Howell T. Heflin, United States Senator (D-Ala.) and former Chief Justice of the Supreme Court of Alabama, wrote:

There is no field of governmental activity about which the people are so poorly informed as the judicial branch. It is highly inconsistent to complain of the ignorance and apathy of the people concerning the judiciary, and then to close the windows of information through which they might observe and learn.

Heflin, *Fair Trial v. Free Press: Time for a Rehearing?*, 61 JUDICATURE 154, 155 (1977). U.S. District Judge Jack B. Weinstein of the Eastern District of New York laments "the cult of the robe," a sense of elite isolation sought by judges which in turn transforms modern court procedure into "a mysterious private rite." Weinstein & Zimmerman, *supra* note 15, at 156-57 (quoting in part, J. FRANK, supra note 268, at 254). Accord Kielbowicz, *supra* note 19, at 23. A 1978 survey conducted by Yankelovich, Skelly and White for the National Center for State Courts indicates that erroneous beliefs about the judiciary are widely held, including: 37% believed a person accused of committing a crime was guilty until proven innocent; 72% thought the United States Supreme Court can review and reverse any decision made by a state court; and 30% believed that the job of a district attorney is to defend an accused criminal who cannot afford an attorney. Tate, *supra* note 19, at 927. See also *Post-Newsweek*, 370 So.2d at 781.

290. E.g., *L.A. Law* (Twentieth Century Fox Television 1986), *Night Court* (Starry Night Prods. in association with Warner Bros. 1984) and *Matlock* (Viacom 1986) are prime time network programs which feature fictional characters and legal matters. *Peoples' Court* (Ralph Edwards Prods. 1981), *Divorce Court* (Blair Entertainment Co. 1984) and *Superior Court* (Ralph Edwards/Stu Billett Prods. 1986) are nationally syndicated programs which purport to present the adjudication of actual legal controversies.

291. Recent films containing substantial portrayals of courtroom proceedings include *The Verdict* (Twentieth Century Fox 1982), *Jagged Edge* (Columbia Pictures 1985) and *Legal Eagles* (Universal Studios 1986).

292. 381 U.S. at 575 (Warren, C.J., concurring); id. at 594-95 (Harlan, J., concurring).


CAMERAS IN THE COURTROOM

conferences, precludes complete understanding of trials. Opponents further contend that the function of trials is not to educate the public. Nevertheless, in the final analysis the judiciary is part of our system of government and, as such, should provide the people with an opportunity to see how it operates. If efficiency is a concern, it is hard to imagine a more efficient manner of illustrating the mechanics of the American system of justice than electronic access to the courtroom.

2. Increasing Public Confidence in the Judiciary

In Richmond Newspapers, Inc. v. Virginia, the Supreme Court stressed the importance of maintaining public confidence in the judiciary. In his plurality opinion, Chief Justice Burger observed, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." In his concurring opinion, Justice Brennan added:

For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably. That necessity . . . mandates a system of justice that demonstrates the fairness of the law to our citizens. One major function of the trial, hedged with procedural protections and conducted with conspicuous respect for the rule of law, is to make that demonstration.

Electronic media are uniquely capable of advancing the interests articulated in Richmond Newspapers. In opening the courtroom to the television camera, the public is able to gain a level of access exceeded only by personal observation. Even the mere opportunity to observe proceedings has a tendency to increase public confidence. Electronic access can quantitatively and qualitatively enhance the public's opportunity to

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295. In fact, viewers would be placed in roughly the same position as juries which, similarly, do not have access to pleadings, pre-trial motions or bench conferences.
296. Estes, 381 U.S. at 575 (Warren, C.J., concurring). Commentators have suggested that education about the legal system can be advanced more effectively by means other than the televising of trials. See, e.g., Fatzer, supra note 15, at 243.
298. Id. at 572 (plurality opinion); id. at 594-95 (Brennan, J., concurring). See also supra note 1 and accompanying text.
299. 448 U.S. at 572 (plurality opinion) (cited with approval in Press-Enterprise Co. v. Superior Ct., 464 U.S. 501, 509 (1984)).
300. 448 U.S. at 594-95 (Brennan, J., concurring).
301. See supra notes 79-83 and accompanying text.
302. See Richmond Newspapers, 448 U.S. at 570-72 (plurality opinion); id. at 595 (Brennan, J., concurring).
Consequently, public confidence can be maximized by allowing television into the courtroom. Once inside, confidence can be further heightened by the public's observation of portions of the trial itself, enabling "justice [to] satisfy the appearance of justice."304

3. Enhancing the Fact-Finding Function of Trials

As discussed above, the presence of television cameras in the courtroom can enhance the fact-finding function of trials.305 Judges may be more attentive, attorneys better-prepared, some witnesses able to remember more details and others alerted to the need to come forward to testify. Whether trial participants' performance is actually enhanced by the knowledge that the general public is monitoring their actions is not subject to proof to the degree required to satisfy either proponents or objectors.306 But it follows that if performance is enhanced, the ability of our judicial system to ascertain the truth will also be enhanced.

C. Summary

In accord with Chandler v. Florida,307 the potential dangers of electronic access remain speculative and cannot continue to justify the per se ban on access upheld in United States v. Hastings,308 Westmoreland v. Columbia Broadcasting System, Inc.309 and United States v. Edwards.310 Moreover, the effects of access may very well be salutary. Therefore, the reliance placed upon policy considerations in those decisions was erroneous.

VII

Electronic Trial Coverage of State Courts

The widespread ban on electronic access to federal court-
rooms stands in stark contrast to the permissive climate among the states. A survey of the history and status of television cameras in state courtrooms is useful for three reasons. First, the widespread acceptance and successful practice of electronic coverage in state courtrooms ably refutes federal court rulings that the unproven dangers of electronic trial coverage pose a sufficient threat to the fair administration of justice to support per se exclusion. Second, state experimentation has generated a body of data which evidences the substantial absence of specific harmful effects of electronic access preferred by the federal courts and opponents. Finally, state experimentation and implementation of rules providing for electronic access provide models which the federal courts and states which do not presently permit access can look to in structuring their own pilot programs.

A. Summary of Televised Trial Coverage

In the late seventies, and prior to the Supreme Court decision in Chandler v. Florida, many states began experimenting with electronic trial coverage. This experimentation oc-

311. See supra notes 92-140 and accompanying text.
312. See infra notes 318-44 and accompanying text. For an extensive discussion of state regulations permitting televised trial coverage, see Guidelines for State Criminal Trials, supra note 271.
313. E.g., United States v. Edwards, 785 F.2d 1293 (5th Cir. 1986); Westmoreland v. Columbia Broadcasting Sys., Inc., 752 F.2d 16 (2d Cir. 1984); United States v. Hastings, 695 F.2d 1278 (11th Cir. 1983).
314. See infra notes 318-44 and accompanying text.
315. See infra notes 389-404 and accompanying text. Recognition by the federal courts of the successful state experiments—and reforms based thereon—will give content to the Supreme Court's frequent admonition that the states are laboratories of criminal (and civil) justice, contributing to better procedures in the courts throughout the United States. See, e.g., Chandler v. Florida, 449 U.S. at 579 (citing New State Ice Co. v. Leibmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); Duncan v. Louisiana, 391 U.S. 145, 172 (1968) (Harlan, J., concurring).
316. See infra notes 326-44 and accompanying text.
317. See, e.g., infra notes 345-88 and accompanying text.
318. 449 U.S. 560 (1981) (television coverage of a criminal trial over the defendant's objection does not violate due process absent a showing of actual prejudice). See supra notes 64-75 and accompanying text.
curred despite the apparent prohibition by the Court in *Estes v. Texas* \(^{320}\) and the recommended ban by the American Bar Association.\(^{321}\) The success of such coverage and the blessing given to state experimentation in *Chandler* \(^{322}\) led to further experimentation and adoption of permanent rules permitting electronic access.\(^{323}\) Finally, in August of 1982, the ABA repudiated its longstanding recommended ban on cameras in the courtroom\(^{324}\) and amended Canon 3 A(7) to give trial judges authority to allow electronic access in specific cases under guidelines ensuring due process.\(^{325}\)

As of January 7, 1987, forty-three states permitted televised trial coverage on a permanent or experimental basis.\(^{326}\)

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\(^{320}\) 381 U.S. 532 (1965). See *supra* notes 37-63 and accompanying text.

\(^{321}\) See *supra* note 26 and accompanying text.

\(^{322}\) 449 U.S. at 582.

\(^{323}\) Thirty-three states promulgated experimental or permanent rules for electronic trial coverage following the *Chandler* decision. *Summary of Cameras, supra* note 319, at 3-4.

\(^{324}\) See *supra* note 26 and accompanying text.

\(^{325}\) The ABA House of Delegates adopted the new Canon 3 A(7) of the Canons of Judicial Conduct by a vote of 162 to 112. Canon 3 A(7) presently reads, in pertinent part:

> A judge should prohibit 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.

*News Media Coverage of Judicial Proceedings, supra* note 319, at 3. On February 7, 1986, the executive committee of the National Conference of State Trial Judges—part of the ABA's Judicial Administration Division—adopted a model rule permitting electronic access to state courtrooms. *Id.* at 4.

\(^{326}\) *Id.* at B-1. Thirty-three states have adopted permanent rules, while fourteen have experimental coverage rules. Alaska, Kansas, Minnesota and Utah have both experimental and permanent rules. States which continue to prohibit televised trial coverage are Indiana, Michigan, Mississippi, Missouri, South Carolina, South Dakota, Texas (audio recording permitted in appellate courts), Virginia and the District of Columbia (petition for access pending in the district's courts). *Id.* at B-2, B-4.
these, thirty allow coverage in both trial and appellate courts, while eleven permit cameras only in appellate courts. Almost all states which allow some type of electronic coverage have adopted rules or guidelines to govern access, addressing concerns such as the type and placement of media equipment and the number and movement of equipment operators. The judge is given discretion to control the coverage during the course of the proceedings in all jurisdictions permitting electronic access.

Of particular interest are the areas in which rules for electronic trial coverage vary from state to state. Variation lies primarily along two lines: 1) the consent of certain trial participants as a prerequisite to electronic access, and 2) the prohibition on electronic coverage for certain types of legal proceedings or witnesses.

1. Consent Requirements

In Chandler, the Supreme Court held that televised coverage of a criminal trial over a defendant's objection does not necessarily violate due process. Nevertheless, seven of the twenty-nine states which allow electronic coverage of criminal trials and appeals require the consent of the accused. Twenty-five states require consent of the court as an absolute precondition to access. Some states also require consent of the prosecutor, parties to a civil action or criminal appeal, or

327. Id. at B-1, B-3.
328. Id. at B-1, B-4. Pennsylvania permits electronic access only to its trial courts. Id. at B-3.
329. Summary of Cameras, supra note 319, at 2. See also Guidelines for State Criminal Trials, supra note 271, at 505-16 (advocating that the states implement a uniform set of regulations).
330. Id.
331. Id. at 510.
332. See supra notes 70-75 and accompanying text.
334. Id. at B-10. The states which require a criminal defendant's consent are Alabama, Alaska, Arkansas, Georgia, Minnesota, Oklahoma and Tennessee. Several states which initially required the defendant's consent during experimental periods revoked the requirement in order to allow coverage of more trials. See, e.g., infra notes 351 & 380 and accompanying text (Florida & California).
335. Id. at B-8 - B-9. Mere prior notice of media intent to televise a court proceeding is required in ten states. Id.
336. Five states require consent of the prosecutor: Alabama, Alaska, Arkansas, Georgia and Tennessee. Id. at B-11.
counsel as a prerequisite to electronic access. In addition, some states require a witness’ consent to have his or her testimony televised. Many states do not allow coverage of the jury in a manner by which any juror may be identified.

2. Exclusion in Special Circumstances

Television cameras are barred from many state courtrooms which otherwise allow access in special circumstances which reflect particular concern for the interests of trial participants. Electronic media are excluded due to the nature of the legal controversy, the identity of certain witnesses, or the type of judicial proceeding involved. In regard to the first category, many states prohibit coverage of legal matters relating to the family, such as adoption, divorce, child custody and juvenile proceedings. Cases involving sex crimes and trade secrets are exempted from television coverage in eight states. Witnesses exempted from coverage in many states include police informants, relocated witnesses, undercover agents, minors and witnesses in jeopardy of serious bodily harm. Judicial hearings other than trial or appellate proceedings are exempted from coverage by some states.

B. Experimental Programs

One of the most important observations gained from studies

337. Five states require consent of a party to a civil action or civil appeal: Alabama, Arkansas, Maryland, Minnesota and Tennessee. Id. at B-12.
338. Consent of counsel is required in three states: Alabama, Arkansas and Tennessee. Id. at B-14.
339. Id. at B-15 - B-16. Fourteen states require that witnesses consent to have their testimony televised; some states require consent only for victims of sexual offenses (Iowa) or other crimes (Maryland). Id. In New Mexico, the trial judge retains discretion to exclude coverage of certain witnesses, such as victims of sexual offenses and their families, police informants, undercover agents, relocated witnesses and juveniles. Id. at B-16 n.52. Consent of a sexual offense victim is required to have his or her testimony televised in Alaska. Id. at B-15. Florida’s “qualitative difference” standard for witness exclusion is discussed supra note 262.
340. Id. at B-17 - B-18 (12 states). See also Guidelines for State Criminal Trials, supra note 271, at 497-99.
341. Id. at B-19 - B-21.
342. Id. at B-23.
343. Id. at B-22 - B-25.
344. Id. at B-22, B-24 - B-25. The exempted proceedings include motions to suppress (seven states), in camera proceedings (four states), proceedings before magistrates (one state), probable cause hearings (two states), motions to dismiss (three states), voir dire hearings (nine states), motions in limine (two states) and hearings on admissibility of evidence (Minnesota).
of cameras in state courtrooms is the manner in which electronic media have gained access. Of the forty-three jurisdictions which permit electronic trial coverage, all but nine first instituted experimental programs which consisted of televised coverage of actual trials for a period of one year or longer. Most of the programs were conducted under the auspices of the state's highest court or judicial council, with those bodies promulgating temporary or permanent rules for electronic coverage. In many states, special committees were formed to implement guidelines for experimental coverage, oversee pilot programs and report their findings to the state body authorizing the program.

Finally, the adoption of permanent rules allowing electronic coverage in a majority of states, following successful experimental periods, indicates the ability of electronic media to cover trial proceedings without impeding the fair administration of justice. Three examples of states whose successful experimental programs led to the adoption of permanent rules permitting televised trial coverage—Florida, Massachusetts and California—are illustrative and instructive.

1. Florida

The experimental program conducted in Florida remains the most visible to date and has evoked much commentary. In April of 1979, after four years of consideration and experimentation with cameras in the state's courtrooms, the Supreme

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347. For example, see the discussions of experimental programs in Florida, Massachusetts and California, infra notes 349-88 and accompanying text.

348. Fifteen states have extended the experimental periods rather than adopting permanent rules. Summary of Cameras, supra note 319, at 4. Five of these states have extended their experimental programs indefinitely. Id.

349. Unlike virtually all other pilot studies, Florida's experimental program was summarized in a published opinion by the state's highest court, In re Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979). The state's coverage rules were upheld in Chandler v. Florida, 449 U.S. 560 (1981), discussed supra notes 64-75 and accompanying text.

350. E.g., Graham, supra note 243, at 545; Comment, From Estes to Chandler: Shifting the Constitutional Burden of Courtroom Cameras to the States, 9 FLA. ST. REV. 315 (1981); Whisenand, Florida's Experience with Cameras in the Courtroom, 64 A.B.A.J. 1860 (1978).

351. On January 24, 1975, Post-Newsweek Stations, Florida, Inc. petitioned the Florida Supreme Court to amend Florida's existing Canon 3 A(7) to permit electronic access to the state's courtrooms or, in the alternative, for the court to reexamine the
Court of Florida issued a lengthy opinion which concluded by amending Florida’s Canon 3 A(7) to permit electronic access to the state’s courtrooms on a permanent basis. Amendment of the Canon was premised not on “constitutional imperative,” but on the supreme court’s power over the state’s courts. The court grounded its decision on both an analysis of survey data gathered from trial participants during the course of the pilot study—which evidenced a lack of serious problems of disruption during trial proceedings—as well as the perceived ability and desirability of televised coverage of trials to inform the public about judicial proceedings.

The court first summarized the survey data received from

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Canon. *Post-Newsweek*, 370 So.2d at 765-66. The court authorized an on-site experimental program to consist of the televising of one criminal and one civil trial subject to specific guidelines, including the consent of all participants. Petition of Post-Newsweek Stations, Florida, Inc., 327 So.2d 1 (Fla. 1976). The experiment failed due to the inability to obtain party consent to coverage, *Post-Newsweek*, 370 So.2d at 766. Consequently, the court revoked the consent requirement and entered an interlocutory decision invoking a one-year pilot program to begin on July 1, 1977. Petition of Post-Newsweek Stations, Florida, Inc., 347 So.2d 402 (Fla. 1977).

352. *Post-Newsweek*, 370 So.2d at 781. Canon 3 A(7), as amended states:

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

353. 370 So.2d at 771.

354. The court stated:

The court first summarized the survey data received from

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356. *Id.* at 781.

356. *Id.* The court stated:

In reaching our conclusion we are not unmindful of the perceived risks articulated by the opponents of change. However, there are risks in any system of free and open government. A democratic system of government is not the safest form of government, it is just the best man has devised to date, and it works best when it citizens are informed about its workings.
trial participants and judges. Next, it analyzed constitutional considerations, concluding that due process concerns could not justify exclusion absent a demonstration of prejudice. The court also held that neither first nor sixth amendment considerations provided an affirmative right of access. Finally, it evaluated various policy considerations against and in favor of electronic trial coverage in light of the survey results. The court concluded that "on balance there is more to be gained than lost by permitting electronic media coverage of ju-

357. Id. at 768-69. The court listed sixteen findings from the survey of the trial participants, including: (1) the presence of electronic media had little effect upon survey respondents' perception of the judiciary or dignity of the trial proceedings; (2) electronic media coverage disrupted the proceedings slightly or not at all; (3) respondents' awareness of the presence of electronic media averaged between slight and moderate; (4) jurors' ability to judge the truthfulness of witnesses and concentrate on their testimony was perceived to be unaffected; ... (6) the presence of electronic media made jurors and witnesses feel slightly more responsible for their actions; ... (8) electronic media distracted jurors almost not at all, and distracted witnesses and attorneys slightly; ... (14) court personnel perceived that attorneys acted slightly more flamboyant than during trials not covered by electronic media; ... and (16) court personnel and attorneys felt witnesses were slightly inhibited by the presence of electronic media; jurors were perceived as slightly self-conscious, nervous and distracted but also slightly more attentive. Id. at 768-69 (citing A Sample Survey, supra note 354, at § II. A.1, questions 1-8, 10, 13, 15 and § II. A.2., questions 2, 7, 13-16). The court pointed out that the results were not scientific but only reflected the respondents' attitudes and perceptions of cameras in the courtroom. 370 So.2d at 768.

358. The position of the Florida Conference of Circuit Judges, submitted in a report filed with the court, opposed amendment of Canon 3 A(7) to permit electronic access. 370 So.2d at 770. However, the court noted that this stance was not supported by data collected from the member judges. "particularly from respondents who experienced electronic media coverage." Id. (emphasis added).

359. Id. at 774. The court's conclusions that Estes did not announce a per se ban and that actual prejudice was required to support a violation of due process, anticipated the same conclusions drawn by the United States Supreme Court in Chandler. See supra notes 64-75 and accompanying text.

360. 370 So. 2d at 774. The court relied upon Estes and, to a greater degree, Warner Communications, to summarily reject a constitutional right of access.

361. 370 So.2d at 774-79. The court found that: (i) physical disruption was minimal; (ii) concerns over the psychological impact of electronic coverage on trial participants were unsubstantiated; (iii) commercial exploitation of trial coverage by electronic media is not greater than exploitation of the courts by print media; (iv) problems of prejudicial publicity were not appreciably increased by televised coverage compared with print coverage; (v) the effect of electronic coverage of cases involving particular categories of witnesses justified concern but is insufficient to bar electronic access in all cases; and (vi) privacy rights of trial participants are minimal in the context of press coverage of judicial proceedings. Id.

362. Id. at 779-81. The court emphasized the traditional openness of trial proceedings, the important role televised trial coverage may serve in educating the public about the court system, and its ability to enhance public confidence in the state's judiciary.
dicial proceedings subject to standards for such coverage."

2. Massachusetts

In November 1982, following a two-year experimental program, the Supreme Judicial Court of Massachusetts adopted a new Canon 3 A(7) to permit the broadcasting of courtroom proceedings. The new canon was adopted by the court upon

363. Id. at 780. The court promulgated standards for equipment and conduct to govern electronic coverage of trial proceedings in an appendix to its opinion. Id. at 792-95. The standards include provisions for equipment and personnel, sound and lighting, location of equipment, personnel, movement during proceedings, restrictions on coverage of attorney-client conferences, impermissible use of media material and appellate review of orders excluding electronic access. Id.

364. The program was summarized in an untitled report submitted to the state high court by the Advisory Committee to Oversee the Experimental Use of Cameras and Recording Equipment in Courtrooms to the Supreme Judicial Court (available from the National Center for State Courts, Williamsburg, Va.) [hereinafter Advisory Committee Report].

365. The amended Canon 3 A(7) provides:

A judge shall permit broadcasting, televising, electronic recording, or taking photographs of proceedings open to the public in the courtroom by the news media for news gathering purposes and dissemination of information to the public, subject, however, to the following limitations:

(a) A judge may limit or temporarily suspend such news media coverage, if it appears that such coverage will create a substantial likelihood of harm to any person or other serious harmful consequence.

(b) A judge should not permit broadcasting, televising, electronic recording, or taking photographs of hearings of motions to suppress or to dismiss or of probable cause or voir dire hearings.

(c) During the conduct of a jury trial, a judge should not permit recording or close-up photographing or televising of bench conferences, conferences between counsel, or conferences between counsel and client. Frontal and close-up photography of the jury panel should not usually be permitted.

(d) A judge should require that all equipment is of a type and positioned and operated in a manner which does not detract from the dignity and decorum of the proceeding. Only one stationary, mechanically silent, video or motion picture camera, and, in addition, one silent still camera should be permitted in the courtroom at one time. The equipment and its operator usually should be in place and remain so as long as the court is in session, and movement should be kept to a minimum, particularly, in jury trials.

(e) A judge should require reasonable advance notice from the news media of their request to be present to broadcast, to televise, to record electronically, or to take photographs at a particular session. In the absence of such notice, the judge may refuse to admit them.

(f) A judge may permit, when authorized by rules of court the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, for other purposes of judicial administration, or for the preparation of materials for educational purposes.

MASSACHUSETTS CODE OF JUDICIAL CONDUCT Canon 3 A(7); Rules of Massachusetts Supreme Judicial Court Rule 3:09, MASSACHUSETTS RULES OF COURT, Desk Copy (West 1986).
consideration of the findings and recommendations submitted by the Advisory Committee appointed to oversee the experiment. 366

The experimental period commenced in April and June of 1980 for appellate and trial proceedings, respectively. 367 In an effort to educate the judiciary and the media as to the experimental rules, the Committee distributed the guidelines and additional information to prospective participants in the experiment prior to beginning the program. 368 During the course of the experiment the Committee gathered survey data from trial participants 369 and detailed reports from judges 370 and court clerks. 371

In its final report to the Supreme Judicial Court, the Advisory Committee stated four general conclusions. First, the Committee noted the lack of any serious adverse incidents while television cameras were present in courtrooms during the two-year experimental period. 372 Second, electronic coverage of trials enabled a "much broader public audience" to observe trial proceedings, giving the public "an enhanced

366. See Advisory Committee Report, supra note 364. The fifteen-member Committee was comprised of judges, attorneys and representatives from print and broadcast media. The Supreme Judicial Court also considered comments submitted by judges at different levels of the state judiciary, including those who presided over televised trials. Cameras in the Court (press release from the Office of Chief Justice Edward F. Hennessey, Supreme Judicial Court, Nov. 18, 1982) (available from the National Center for State Courts, Williamsburg, Va.).


368. Advisory Committee Report, supra note 364, at 2. The Committee also held a series of meetings with judges throughout the state to discuss the guidelines and situations which were anticipated to arise during the experiment. Id.

369. The report is unclear as to the number of cases in which questionnaires were distributed to trial participants. Survey data from one murder trial is discussed in detail. Id. at 2-3. A total of 69 cases were covered by television, still cameras or radio. Id. at 4. Fewer than ten trials had substantially full gavel to gavel coverage. Typical trial coverage consisted of a small amount of footage taken at the beginning of the trial and used each day during trial in conjunction with oral commentary. Additional electronic coverage often occurred during sentencing or announcing of the verdict. Id. at 6-7.

370. E.g., Advisory Committee Report, supra note 364, at 3 (citing report of Honorable Roger J. Donahue). The Committee also gathered information from observers of televised trials and through correspondence with participants of such proceedings. Id. at 4.

371. The court clerks reported on the frequency of television, still cameras and radio coverage of judicial proceedings and commented on any problems incident to the coverage. Id. at 3-4.

372. Id. at 1.
awareness" of the quality of justice administered by the state's courts. The report stated that problems which did occur were minor, could be remedied in the future and were not of sufficient gravity to justify excluding cameras from the state's courtrooms. Finally, the Committee recommended that a permanent advisory committee be established to help resolve problems which might arise due to technological and social changes affecting televised trial coverage. In more specific recommendations, the Committee recognized the necessity that the trial judge retain authority to suspend coverage when it appeared that a substantial likelihood of harm to any person or other serious adverse consequences would follow continued coverage.

3. California

California conducted an eighteen-month pilot study of electronic trial coverage in its courtrooms, similar to the experimental programs in Florida and Massachusetts. Following the study, and in consideration of a report submitted by a private research firm, the Judicial Council amended Rule 980 of the California Rules of Court to permit electronic coverage of judicial proceedings subject to the consent of the judge.

373. Id.
374. Id. Problems engendered by electronic trial coverage during the experimental period included objectionable frontal close-up photography of the jury in one case, id. at 4; feared prejudicial pre-trial publicity following electronic coverage of a probable cause hearing in a rape case, id. at 5; failure to follow the experimental guidelines requiring pooling of media coverage for one trial, id.; and inadequate lighting and electrical facilities in some courtrooms, id. at 5-6.
375. Id. at 10.
376. Id.
378. The report, Evaluation of California's Experiment, supra note 377, was prepared by Ernest H. Short and Assoc., a market research firm, and was submitted to both the Chief Justice's Special Committee on the Courts and the Media and the California Judicial Council.
379. CAL. RULES OF COURT § 980 (West 1987).
380. Consent of the accused in criminal proceedings was required during the first seven months of the experimental period. This requirement was later lifted to enable more trials to be covered. Evaluation of California's Experiment, supra note 377, at 219.
The California experiment included electronic or still photography coverage of over 200 cases,\textsuperscript{381} including various stages of cases—arraignments, motions and trials.\textsuperscript{382} The research focused on two key policy issues: 1) whether the physical presence of electronic media equipment and operators caused disruption or impaired the dignity and decorum of the courtroom, and 2) whether the trial participants' behavior was altered by electronic trial coverage to an extent which threatened the fair administration of justice.\textsuperscript{383}

Results of the survey data\textsuperscript{384} showed that "none of the postulated disturbance-distraction-decorum effects occurred."\textsuperscript{385} Major findings of the report included the "ordinariness" of electronic media presence in the courtroom and the lack of extreme behavioral impact.\textsuperscript{386} As in the experimental program

\textsuperscript{381} Id.
\textsuperscript{382} Id. at 220. As with the Massachusetts program, \textit{Advisory Committee Report, supra} note 364, pt. 2 at 2, criminal proceedings were also the primary subject of electronic coverage in California's experiment. \textit{Evaluation of California's Experiment, supra} note 377, at 220. Few requests were submitted for coverage of appellate or juvenile proceedings. \textit{Id.} The report noted that an (unidentified) libel suit between a celebrity and a newspaper received extensive electronic coverage. \textit{Id.}

\textsuperscript{383} \textit{Evaluation of California's Experiment, supra} note 377, at 218.
\textsuperscript{384} Data included in the report was gathered from participant interviews and direct observation by experiment "evaluators." \textit{Id.} at 223. The report analyzed two types of data: case-specific (trial participants' statements about personal experiences in specific cases) and attitudinal data (largely opinions as to whether television coverage of certain types of cases is desirable). The report noted that the attitudinal data was more skeptical than the case-specific data. \textit{Id.} at 224. Shifts in attitude following experiences with electronic trial coverage were almost always in a direction favorable to coverage. \textit{Id.} at 224. The study also observed a phenomenon termed "tranference of responsibility," in which one group of trial participants (jurors, for example) saw other groups (e.g., witnesses and attorneys) as more negatively affected by electronic trial coverage than their own group. \textit{Id.} at 225.

\textsuperscript{385} \textit{Id.} at 243. Eighty percent of the judges and attorneys interviewed during the experiment reported no apparent impact on the dignity or decorum of the proceedings. \textit{Id.} at 222. Only ten percent of trial participants found the presence of television cameras and their operators at all distracting. \textit{Id.} The report noted that the implementation of controlled experimental conditions gave little reason "in event after event" to have any fears about electronic trial coverage. \textit{Id.} at 243. The experiment was described as "highly structured, heavily monitored and tightly controlled." \textit{Id.} The report asserted that weakening of the rules would invalidate the applicability of the research results, and cautioned that the favorable conclusions of the study did not warrant carte blanche access by electronic media coverage or for the media to ignore the experimental guidelines set out in the rules. \textit{Id.} at 244.

\textsuperscript{386} \textit{Id.} at 243. \textit{See also} \textit{id.} at 221 (summaries of the perceived impact on trial participants). One-half of all judge respondents said electronic coverage had virtually no impact on trial proceedings; one-fifth concluded such coverage had a positive effect. Another one-fifth felt electronic coverage had both positive and negative effects, while eight percent found the overall effect to be negative. \textit{Id.} at 223. The study
conducted in Massachusetts, the California report emphasized the important role played by the trial judge to ensure that electronic coverage is conducted in a manner consistent with the parties' fair trial rights.

C. Experimental Data

The summaries of the programs in Florida, Massachusetts and California exemplify the favorable results states have obtained from carefully monitored and evaluated experimental programs permitting electronic trial coverage. As discussed above, "scientific data" cannot be gathered as to the impact of television coverage of judicial proceedings on the quality of justice rendered in such trials. This is true largely because trial participant behavior cannot be examined with and without the presence of television cameras for actual proceedings, which occur only once. Nevertheless, although not conclusive, the consistency of data gathered from state experimentation sharpens the otherwise fuzzy picture as to the potential positive and negative effects of electronic coverage of judicial proceedings. The data indicate that the advantages of electronic coverage outweigh potential, and largely unproven, dangers.

Of vast importance is the states’ monolithic conclusion that electronic trial coverage neither significantly detracts from the dignity and decorum nor causes physical disruption of court-

concluded: "There seemed little reason, in event after event, to have many fears about the presence of [electronic] equipment and personnel inside the courtroom, under the controlled experimental conditions." Id. at 243.

387. See supra note 376 and accompanying text.

388. Evaluation of California's Experiment, supra note 377, at 244. The report warned that "a mixing of subtle elements" could create problems resulting in injustice. Id.


390. See supra notes 237-39 and accompanying text.


392. E.g., id., at § II, pt. A1, § 1, at 2; Evaluation of California's Experiment, supra note 377, at 222, 228, 243; Raker, supra note 389, at 20-21; Van Sickle, supra note 389, at 2-3. Moreover, the Nevada and Florida studies included responses by many trial participants—including 28% of respondent judges in Nevada—that electronic trial
Accordingly, participant distraction traceable to television cameras and personnel was found to be minimal. Moreover, the experimental programs have concluded that the psychological impact of the presence of electronic media and corresponding changes in participant behavior are not of sufficient magnitude to prohibit electronic coverage. Fears that attorneys would play to the cameras and "grandstand" are largely unsubstantiated. Witnesses indicated some increased nervousness or self-consciousness about having their testimony televised, but little intimidation or reluctance to testify. Problems experienced by jurors as a result of electronic coverage were due primarily to frontal depiction of juries by electronic media, rendering individual coverage enhanced the dignity of the proceedings. A Sample Survey, supra note 354, at § II, pt. A1, § 1, at 2; Van Sickle, supra note 389, at 2-3.

It also bears noting that 40% of the respondent judges in the Arizona study said that the presence of electronic media during courtroom proceedings caused them to be more attentive. Raker, supra note 389, at 28. In the Florida program, 34% of respondent court personnel and 54% of respondent attorneys stated that judges were between slightly and extremely more attentive due to the presence of electronic media. A Sample Survey, supra note 354, at § II, pt. A1, § 1, at 3-7; Advisory Committee Report, supra note 364, at 3; Evaluation of California’s Experiment, supra note 377, at 221, 226, 228; Hawaii Bar Ass’n Report, supra note 389, at 20-21; Evaluation of California’s Experiment, supra note 377, at 221-22, 226, 243; Raker, supra note 389, at 20-21; Van Sickle, supra note 389, at 6.

panel members identifiable by the viewing public.\textsuperscript{398}

In contrast to the near absence of perceived negative effects,\textsuperscript{399} the experimental programs reported substantial benefits from electronic coverage.\textsuperscript{400} Most significantly, they have concluded that televised coverage of trials is a necessary tool to inform the public about the administration of justice\textsuperscript{401} and facilitate enhanced public scrutiny of the judicial process.\textsuperscript{402} It was observed that direct trial coverage by electronic media increases accuracy of news media portrayal of courts by communicating actual trial proceedings, rather than self-interested characterizations of the proceedings offered by trial participants in stand-up news conferences.\textsuperscript{403} In addition, some states observed that news coverage of judicial proceedings in general increased when television cameras were permitted to record and broadcast proceedings.\textsuperscript{404}

\textsuperscript{398} E.g., Advisory Committee Report, supra note 364, at 4; Evaluation of California's Experiment, supra note 377, at 231-32; Raker, supra note 389, at 44, 74, 75. This Note maintains that juror anonymity is a desirable practice. See infra text accompanying note 414.

\textsuperscript{399} See supra notes 392-98 and accompanying text.

\textsuperscript{400} See supra notes 363 & 373 and accompanying text, and infra notes 401-04 and accompanying text.

\textsuperscript{401} E.g., A Sample Survey, supra note 354, at § II, pt. A2, at 3-5; Advisory Committee Report, supra note 364, pt. 1, at 1; Hawaii Bar Ass'n Report, supra note 389, at 17; Raker, supra note 389, at 44. The California report indicated three types of reactions to the purported educational benefits of televised trial coverage. The largest group of respondents indicated that the value of televised trial proceedings may be slight where only small portions of a trial are broadcast, often dubbed over by a reporter's summary of the proceedings. Evaluation of California's Experiment, supra note 377, at 241. This group did feel that even the amount of coverage described was accurate and fair. Id. A substantial number of respondents "applauded" electronic coverage as contributing to public knowledge of the judicial system. Id. A small "vocal minority" expressed skepticism about the television medium's ability to cover the courts fairly and accurately due to its inherent commercial nature. Id. For example, California Supreme Court Justice Stanley Mosk voiced opposition to electronic coverage of the court's proceedings:

It's regrettable that a majority of the members of this court have yielded to the persistence of the entertainment medium. As a result, this temple of justice is being transformed into a theater, and lawyers and justices are to be the actors. One wonders if the work of this court is now to be evaluated on the basis of its Nielsen ratings. I hope that upon reflection, the members of this court will reconsider their ill-advised submission to the entertainment medium.

Turner & Ornstein, supra note 153, at 24.

\textsuperscript{402} E.g., Hawaii Bar Ass'n Report, supra note 389, at 17.

\textsuperscript{403} Id.

\textsuperscript{404} E.g., Advisory Committee Report, supra note 364, at 7; Raker, supra note 389, at 55 (television was the most active form of media covering judicial proceedings during Arizona's one-year experimental program).
The foregoing analysis indicates that the per se prohibition of electronic access to the courtroom is constitutionally untenable. As any access by the electronic media must accommodate due process and other protected interests, this Note proposes that the federal courts and those states currently not allowing coverage on experimental or permanent bases amend provisions proscribing the broadcasting of trials to authorize a two-year pilot study similar to those undertaken by various states. The ultimate goal of the proposed program should be to ascertain the appropriate balance between the competing interests.

A. Access Guidelines

Under the authority of Richmond Newspapers, Inc. v. Virginia, Globe Newspaper Co. v. Superior Court, and Press Enterprise Co. v. Superior Court, requests by the media to gain access may be evaluated by the trial judge on a case-by-case basis under the compelling governmental interest standard. Alternatively, a lesser standard of review—under a time, place or manner, or analogous analysis—may be applicable. In either case, to assure consistency and minimize judicial bias against electronic access, rulemaking authorities in the participating federal and state court systems should formulate workable guidelines for making such determinations. These guidelines should consider: a) the strength of the public interest involved in the case; b) whether the parties to the litigation consent to the coverage; c) potential dangers posed to the parties; and d) whether the court anticipates the admission of testimony of a sensitive nature. The scope of the proposed coverage should not be considered. Strict guidelines for equipment should be utilized.

405. See supra notes 345-88 and accompanying text.
409. See supra notes 88-90 and accompanying text.
410. See supra notes 215-28 and accompanying text.
1. The Public Interest

"Public interest" should be defined broadly to favor access in many different contexts: where there are issues concerning government activity or the conduct of elected officials; where issues are inherently public in nature, such as defamation trials involving public figures and media defendants; where the court's treatment of a party due to the party's unusually high or low socio-economic status should be publicly examined; and other cases where private action involved in the litigation impacts the rights of a large number of people, for example, class actions, insider trading cases, criminal trials involving corporations accused of defrauding the government or consumers, and espionage cases.

2. Consent of the Parties

Electronic access should be permitted in virtually all cases where consent of the parties to the suit is freely given. Yet, access should not be precluded in cases where consent by all parties is not given.

3. Dangers Posed to Trial Participants

Trial courts permitting electronic access are required to consider potential violations of a criminal defendant's due process rights. In addition, courts must look to the impact of such access on a defendant's physical and mental well-being. Due process rights of civil litigants must also be protected. The jury should not be covered in a manner which makes individual jurors identifiable to viewers.

4. Sensitive Testimony

Prohibition of coverage of certain trials or witnesses, upon specific findings of potential harm, will be justified where family matters, sexual assault, minors as parties or witnesses, infor-

412. See, e.g., Cameras in State and Federal Courtrooms, supra note 113, at 406-08; Nevas, supra note 15, at 49-50; Zimmerman, supra note 15, at 703. See also Post-Newsweek, 370 So.2d at 779 ("qualitative difference" test), discussed supra note 262.
413. Jurisdictions may seek to structure their pilot programs to give additional protection to ensure that the spectre of television coverage of civil trials will not unduly hinder access to the courts for media shy complainants.
414. See supra notes 255, 340 & 398 and accompanying text.
mants, undercover agents, trade secrets or classified information are involved. 415

5. Scope of Coverage

The extent of the proposed coverage—complete or partial, live or delayed—should not be a determinative factor. If it were, the court could easily usurp the press’ editorial functions. Access should not be limited to the trial level, as appellate proceedings are an equally vital aspect of any judicial system. 416

6. Technical Guidelines

Technical guidelines 417 to minimize dangers of physical disruption should be promulgated and strictly enforced. These guidelines would specify the types of broadcast equipment and the number and placement of operators allowed in the courtroom.

7. Burden of Proof

Under the suggested pilot program, the propriety of electronic access should be presumed. Exclusion will be justified only by a specific articulation of the governmental interests which would justify denial in a particular case. 418

B. Appellate Review

A trial judge’s decision to prohibit access should be immediately reviewable by an appellate court. Alleged harm to a criminal defendant resulting from coverage would be evaluated

415. See Cameras in State and Federal Courtrooms, supra note 113, at 422-23. For example, witnesses in the Westmoreland trial disclosing sensitive military or intelligence information would be excluded from coverage. See also supra notes 341-43 and accompanying text.
416. In addition, threats to due process rights posed by electronic coverage of appellate proceedings are minimal compared to dangers in trial courts. This is true in part because witnesses and juries are not involved in appellate proceedings. Also, only questions of law are pertinent and consideration of the parties’ briefs and cited authorities are considered in chambers prior to and after oral argument.
417. See, e.g., Post-Newsweek, 370 So.2d at 792-95.
418. See Cameras in State and Federal Courtrooms, supra note 113, at 418-24. The author argues that the presumption should be rebutted only when either strong state interests—such as privacy rights and the interest in protecting and rehabilitating minors—outweigh first amendment interests or when the televising of a trial would offer no “material advancement” of first amendment interests. The latter circumstance includes coverage of jurors and certain types of witnesses. See also Constitutional Protection Against Absolute Denial, supra note 146, at 1302-03.
according to the actual prejudice standard of Chandler v. Florida.419

C. Evaluation

Results of the proposed survey420 would then be compiled and evaluated with respect to its goals: to implement a qualified first amendment right of electronic access to judicial proceedings without sacrificing other constitutionally protected interests; to gather data to assist in shaping the boundaries of that right; and to provide a more experienced frame of reference for judges to evaluate the effects of television cameras in their courtrooms.

IX
Conclusion

In upholding rules excluding television cameras from federal courtrooms in United States v. Hastings,421 Westmoreland v. Columbia Broadcasting System, Inc.422 and United States v. Edwards,423 the respective courts of appeals relegated public observance of matters of broad public importance to second-hand accounts filtered through third-party reporting. The courts' reliance on Estes v. Texas424 and Nixon v. Warner Communications, Inc.425 to support the position that electronic access remains outside the parameters of the first amendment is no longer valid. The United States Supreme Court's more recent Chandler v. Florida426 decision leaves room for the invalidation of absolute and inflexible rules of exclusion, especially when read together with the Court's landmark decisions recognizing press access rights to judicial proceedings which began with Richmond Newspapers, Inc. v. Virginia.427

419. See supra note 66 and accompanying text.
420. The programs should be evaluated from surveys of both trial participants and non-interested trial observers who would evaluate coverage of a greater number of trials than the participant respondents. See, e.g., Advisory Committee Report, supra note 365; Evaluation of California's Experiment, supra note 377.
421. 695 F.2d 1278 (11th Cir. 1983).
422. 752 F.2d 16 (2d Cir. 1984).
423. 785 F.2d 1293 (7th Cir. 1986).
Cameras can no longer be excluded from the courtroom on the theory that they cause a variety of harmful effects. A contemporary analysis of the relevant policy considerations points toward access, not exclusion. The right to broadcast trials demands a thorough first amendment analysis which the respective courts in Chandler, Hastings, Westmoreland and Edwards declined to undertake. Such an analysis indicates that any per se ban on electronic access to the courtroom must be struck down. This invalidation is compelled by consideration of the modern role of the electronic press in society, advances in technology and the absence of harmful effects of electronic access as found by the many states permitting access. Finally, the implementation of a two-year pilot study would prove invaluable in exploring the extent of the first amendment right to broadcast judicial proceedings.

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