THE THIRTEENTH JUROR: ELECTRONIC MEDIA'S STRUGGLE TO ENTER STATE AND FEDERAL COURTROOMS

Kathleen M. Krygier

The day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. Justice Harlan wrote these words in his concurring opinion in the landmark case of *Estes v. Texas*, in which the Supreme Court found that the obtrusive presence of the media in a courtroom jeopardized the defendant's right to a fair trial. In light of the public's increasing reliance on the electronic media as its primary source of information, the day has arrived for the Supreme Court to re-examine the constitutionality of cameras in the courtroom and to contemplate unlocking its doors to the electronic media. Technological advancements have eliminated many of the potential dangers to the truth-finding function and sanctity of courtroom proceedings that existed at the time the ban was instituted. However, state and federal courts disagree about their policies concerning the presence of the electronic media. While many dangers to the judicial process have been eliminated, the appetite of the media to pursue sensational cases with an overwhelming momentum has not diminished.

This Comment examines the struggle of courts to resolve the underlying tensions and competing interests of the press' First Amendment right to access, and the defendant's Sixth Amendment right to a fair trial. Part I traces the development and expansion of the right to access through the Supreme Court's interpretations of the First Amendment. Part II examines recent state court decisions granting the press access to trial proceedings in the absence of a substantial harm. Part III evaluates the United States Judicial Conference's recent decision to uphold the absolute ban in the federal court system. Part IV discusses the disparity between the court systems' views regarding cameras in the courtroom. Further, Part IV examines the value and growing popularity of Court TV. This Comment concludes that the divergence in the state and federal court systems' policies on access is unwarranted, and, therefore, the mandatory closure of federal courtrooms violates the First Amendment right of the press to have access to, and broadcast, courtroom proceedings.

2 *Id.; see text, infra part I.B.
4 *See Harris, supra note 3, at 804; see also Chandler v. Florida, 449 U.S. 560, 573-74 (1981)(acknowledging the continuing advancements in technology since the implementation of the ban on cameras in federal courtrooms).
5 The First Amendment provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech, or of the press*; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I (emphasis added).
6 The Sixth Amendment provides that:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.
I. PRIOR HISTORY: RECOGNIZING THE RIGHT TO ACCESS AND DEFINING ITS SCOPE

The ban on cameras in the courtroom can be traced back to the sensational Lindbergh baby kidnapping case of 1935. The media relentlessly pursued the story, causing the case to gain worldwide notoriety. The media's constant and disruptive presence in the courtroom threatened the defendant's constitutional right to receive a fair trial. Bruno Hauptmann, the defendant charged with the murder of the baby, was tried before a judge in a court of law, as well as before the public in a circus-like arena created by the press. Hence, the media frenzy surrounding this case sparked the debate on the constitutional right of the press to have access to trials.

A. Canon 3A(7): A Judicial Response

The detrimental impact upon the defendant's right to a fair trial compelled the American Bar Association which noted that the "Special Committee on Cooperation Harlan cites the amicus curiae brief of the American Bar Association which noted that the "Special Committee on Cooperation..."
pressly bans the electronic media coverage from all criminal proceedings in the federal court system.16 Since its inception, the absolute ban on electronic media coverage has endured constant attacks on its validity and constitutionality. The courts have consistently refused to unstrap the protective cloak from federal courtrooms, and have continued to deny the press access to both civil and criminal trials.19

B. Estes v. Texas: Recognizing A Right to Access

The increasing intensity of the struggle between the competing interests of the press and of the accused reached a culmination in 1965 in Estes v. Texas. In this case of first impression, the Supreme Court addressed the issues as to whether the First Amendment's right to access encompassed the right to televise courtroom proceedings, and whether the media coverage threatened the defendant's right to a fair trial.20 In determining the constitutionality of the exclusion of cameras, the Supreme Court found that the Sixth Amendment right to a fair trial outweighed the media's right to access,21 and further held that there was no constitutional right to televise judicial proceedings.22

While recognizing the disparity between state and federal courts, the Court prohibited the use of cameras in federal courtrooms to guarantee the fundamental fairness of the trial. The Court declared that "to ascertain the truth is the primary objective of the trial process, and is a goal which must be maintained at all costs."23 While the press should be given freedom to perform its valuable function of providing information to the public, the court indicated that "its exercise must necessarily be subject to the maintenance of absolute fairness of the judicial process."24

The Court premised the ban on the inherent prejudice and the potential detriment created by the presence of the cameras upon jurors, witnesses, judges, defendants, and the courtroom decorum.25 The primary concern was that the jury would be distracted by cameras and this would directly effect the jury's ultimate decision of guilt or innocence.26 The issue of whether Estes interprets the Constitution as imposing an absolute ban on cameras has caused much confusion.27 Many courts have relied upon Justice Harlan's concurrence to determine the scope of the opinion.28 In concurring that there is no constitutional right to televise trial proceedings, Justice Harlan stressed that the right to a public trial is "not one belonging to the public, but one to the accused, and inhering in the constitutional process by which justice is administered."29 However, the language of the opinion suggests that the ban is not absolute because the issue may be "subject to re-examination" upon the evolution of the electronic media and the elimination of the risks its current presence poses to the judicial system.30

---

16 FED. R. CRIM. P. 53. Rule 53 provides that: "the taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court."

19 See, e.g., Westmoreland v. Columbia Broadcasting System, 752 F.2d 16 (2d Cir. 1984)(holding that the prohibition on televising the trial is constitutional, even where both parties consented to televising the trial); Legi-Tech v. Keifer, 601 F Supp. 371 (N.Y. Dist. 1984)(holding that a constitutional challenge to Rule 53 cannot be upheld on the basis of a Sixth Amendment violation); United States v. Hastings, 695 F.2d 1278 (11th Cir. 1983)(finding a general consensus among the courts to uphold a standard to exclude cameras from federal courtrooms).

20 Estes, 381 U.S. at 535-40. Because of the extensive publicity surrounding his indictment for swindling, Estes made a motion to exclude the media from his trial. The Court denied Estes' original motion. However, the Court was compelled by the defendant's continual objections and the intrusive presence of the media to proscribe restrictions to limit the actions of the press, thereby prohibiting the broadcasting of large portions of the trial. The Court held that the intrusive presence of the electronic media infringed upon the defendant's Sixth Amendment right to a fair trial and warranted a reversal of his conviction. Id. at 538-52.

21 Id. at 538-52.

22 Id. at 535. The Court described the courtroom as having massive amounts of cables and wires all over the courtroom floor and microphones on the judge's bench, the jury box, and counsel table. The activities of the media created considerable disruptions to the hearing. Id. at 536.

23 Id. at 540.

24 Id. at 539.

25 Id. at 545. The Court was concerned that the quality of the testimony would be impaired and its accuracy undermined and that an additional burden would be placed upon the presiding judge. The impact on the witness was deemed incalculable, potentially causing them to over-dramatize or re-shape their testimony. Id. at 544. The presence of the media was disruptive to such an extreme degree as to warrant an objection by defense when one photographer attempted to photograph the page of the paper which Estes was reading from at the counsel table. Id. at 538.

26 Id. at 544-50. The Court noted that "practical experience tells us that a televised juror feels the pressures of being looked at throughout the course of the proceedings. The juror's eye is fixed upon the camera and its mind is preoccupied with the telecasting rather than the testimony." Id. at 546.

27 See Chandler v. Florida, 449 U.S. 560 (1981), see also discussion, infra part I.D.

28 Estes, 381 U.S. at 587-91.

29 Id. at 595.

30 Id. at 532.
C. Richmond Newspapers Inc. v. Virginia: The Tradition of Accessibility

The Supreme Court first acknowledged the constitutional right of the public and the press to attend trials in Richmond Newspapers Inc. v. Virginia. The Court held that the First Amendment implicitly guarantees the right to access. The Court examined the public character of the trial process, tracing it back to its origins in the English justice system before the days of the Norman Conquest. The media was seen as a "surrogate" for the public by informing them of the legal system, thereby bolstering public confidence and enhancing the "integrity and quality of the proceedings." The opportunity afforded to the public to better comprehend and to scrutinize the operations of the legal system ensures the fair administration of justice and indicates the significance of the presumption of openness to a democratic government.

The Court determined that the First Amendment rights are subject to limitations imposed by judicial discretion in the interest of the fair administration of justice. To deter arbitrary closures, the Court concluded that if the party opposing access fails to articulate an overriding interest, then the presumption of openness is not rebutted and the trial must be open to the public. The Court did not address the issue as to whether the right to access extends to civil proceedings.

D. Chandler v. Florida: Acknowledging the States' Authority to Consent

The proposals of the ABA Committee on Fair Trial-Free Press to revise Canon 3A(7) propelled the use of cameras in the courtroom to the forefront of legal issues in 1978. As a result, state courts became empowered to authorize the promulgation of standards and guidelines to permit limited access and media coverage of courtroom proceedings. Demystifying the cloud of vagueness that had hovered over the right to access since Estes, the Supreme Court in Chandler v. Florida, held that the Constitution neither imposes an absolute ban on cameras from courtrooms and nor bars state experimentation with electronic media coverage.

The basic principles of federalism limit the scope of the Supreme Court's supervisory jurisdiction over state courts and restrict its authority to intervene only in situations where state action violated the Constitution. Where one party shows that the electronic media coverage of a trial constitutes a denial
of Due Process and impedes to the fair administration of justice, Supreme Court intervention may be warranted. The Supreme Court recognized the right of states to consent to electronic media coverage of judicial proceedings, but neither endorsed nor invalidated the presence of the electronic media. The circumscribed regulations safeguard the fundamental fairness of the defendant’s Sixth Amendment right by authorizing the presiding judge to limit, deny, or terminate all broadcast coverage or photography in courtrooms. In light of recent advancements in technology that have substantially decreased potential dangers to the fair administration of justice, the mere presence of the broadcasting media has not been found to be inherently adverse to the judicial process and, alone, is insufficient to warrant an absolute ban.

E. Globe Newspaper Co. v. Superior Court: Qualifying the Right To Access

In Globe Newspaper v. Superior Court, the Supreme Court held that the right to access, although implicitly guaranteed by the First Amendment, is not absolute. To justify the closure, a party must show “that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.” Exclusion of the electronic media is determined by the circumstances of each case. Therefore, the Court concluded that a compelling interest, in and of itself, does not justify a mandatory closure rule. However, the Court warned that its invalidation of a statute mandating closure did not establish an absolute ban against exclusion.

The Court broadly interpreted the First Amendment in light of the First Amendment’s underlying purpose to protect the free discussion of governmental affairs. The Court indicated that the media’s role as a watchdog against judicial impropriety was essential to the proper functioning of the justice system, promoting public confidence and ensuring participation in the government and informed discussions of governmental affairs.

F. Press-Enterprise Co. v. Superior Court of California: The Logic-Experience Test

In Press-Enterprise Co. v. Superior Court of California, the Supreme Court formulated a standard to assist courts in determining when the qualified right of access attaches to a proceeding, and what circumstances demand closure. Before the First Amendment right attaches, the particular proceeding

---

45 Id. at 569, 583.  
46 Id. at 582.  
47 Id. at 566. The guidelines set forth by the Florida Supreme Court specify the kind of equipment to be used and the manner in which it is to be operated. The guidelines state that: (1) no more than one television camera and only one television operator are allowed; (2) pooling arrangements must be arranged when more than one media organization seeks coverage; (3) artificial lighting is prohibited; (4) equipment must be in a fixed location and may not be moved during the trial; (5) videotaping equipment must be remote from the courtroom; (6) film, videotape, and lenses may not be changed while the court is in session; (7) no audio recordings of conferences between lawyers, parties and counsel, or at the bench are permitted; (8) the judge has sole and plenary discretion to exclude coverage of certain witnesses; and (9) the jury may not be filmed. Id.  
48 Id. at 573, 574.  
49 Id. at 604-6. The state statute granted to judges presiding over sexual offense cases the power to clear the courtroom during the testimony of victims who are 18 years of age or younger. Massachusetts Gen. Laws Ann., ch 278, §16 A (West 1981). In Globe, the Supreme Court held that the Massachusetts statute violated the First Amendment as applied to the states through the Fourteenth Amendment. Prior to the commencement of the rape trial, Globe Newspapers made a motion to the court to revoke its order of closure and grant them access to the hearing. Even though the victims waived “whatever rights [they might] have [had]to exclude the press,” the Supreme Judicial Court of Massachusetts reaffirmed the closure, justifying it upon the furtherance of “genuine State interests.” Globe Newspaper, 457 U.S. at 596, 598-602.  
50 Id. at 607.  
51 Id. at 609. "The need for closure is determined on a case by case basis. In order for this approach to be effective, ‘representatives of the press and general public must be given the opportunity to be heard on the question of their exclusion.’" Id. at 609 n.23 (quoting Gannet Co., 443 U.S. at 401).  
52 Id. at 606-11.  
53 Id. at 611 n.27.  
54 Id. at 604.  
55 Id. at 604-11. The Court states that openness “enhances the quality an safeguards the integrity of the fact finding process.” Id. at 606.  
56 478 U.S. 1 (1986).  
57 Id. at 3-7. This case intended the First Amendment right of access to trial proceedings to apply to preliminary hearing. Robert Diaz, a nurse charged with murdering twelve of his patients, motioned for closure of his trial because of the risk of prejudice of pretrial publicity. Due to the extensive and overwhelming publicity surrounding the case, the Magistrate ordered closure to preserve the constitutional right to a fair and impartial trial. Petitioners motioned the Superior Court of California to release the preliminary hearing transcript of the closed proceeding. The Court held that a "conclusory assertion" of potential prejudicial publicity could not overcome the First Amendment right of access. Id. at 3-7, 15.
must have a tradition of public access and a significant positive role in the functioning of justice system, otherwise known as the logic and experience test. 67 If the “logic and experience” test is satisfied, the access cannot be denied unless there is a specific showing that “closure is essential to preserve higher values and is narrowly tailored to serve that interest.”68

When balancing the respective constitutional rights, the Court indicated that the public right to attend trials is not necessarily inconsistent with the defendant’s right to a fair trial. 69 Both parties view it as a means for achieving the common objective of the assurance of a fair trial. 70 If the Sixth Amendment right of the accused is the interest asserted, the moving party must specifically demonstrate that there is a substantial probability that the defendant’s fair trial rights “will be prejudiced by publicity that closure would prevent” and that the right to a fair trial could not be adequately protected by reasonable alternatives to closure. 71 The Court held that the risk of prejudicial publicity did not mandate closure of the trial proceeding. 72

II. RECENT DEVELOPMENTS

A. The Growing Presence Of Cameras In State Courtrooms

Since Chandler v. Florida, the electronic media has consistently battled to gain access to courtroom proceedings. 73 Today, forty-seven states have unlocked the doors to their courtrooms, allowing the broadcast media to enter. 74 However, as previously stated, the right of access is not absolute. Most states have adopted Canon 3A(7) of the Judicial Code of Conduct or have incorporated Canon 3A(7)'s substantive contents in its provisions, conditioning access upon statutory limitations and judicial discretion. In exercising their authority, judges may regulate, terminate, and deny access in order to ensure the fair administration of justice. 75

Courts have struggled to define the scope of accessibility and to balance the defendant’s Sixth Amendment right to a fair and impartial trial with the press’ First Amendment right of access to judicial proceedings. Although many state courts have consented to the presence of electronic media, the narrowness of the restrictions vary among them. Some states prohibit the recording of courtroom proceedings unless the court consents in writing. 76 In contrast, other states allow access unless the moving party satisfies a heavy burden of showing a demonstrable and actual harm. 77 Still other states bar access upon a timely objection made by or on behalf of a participant to the proceeding, in accordance with judicial discretion. 78

1. Substantial Showing of Harm or Prejudice

At one extreme, states have instituted statutes granting trial judges great discretion in conditioning access and establishing a higher standard to be met to justify closure. In these jurisdictions, state courts require that an actual showing of prejudice or harm result from the electronic media coverage to render a trial unfair. In Commonwealth v. Cross, 69 the Mas-
sachusetts Court of Appeals affirmed the press’ right to broadcast a courtroom proceeding on the basis of the accused’s failure to show that the presence of the media adversely impacted or created a substantial harm to the party’s court proceedings. The objecting party has the burden of demonstrating that a “substantial likelihood of harm to any person or any harmful consequence would result from the presence of television cameras in the courtroom.” A mere objection of jury distraction and of interference with the orderly presentation of evidence does not warrant closure. Courts have held that, although an inherent risk of juror prejudice exists “in any publication of trial, . . . something more than juror awareness that the trial is such as to attract the attention of broadcasters” must be demonstrated. If the moving party does not satisfy this burden, the judge will not deny the electronic media’s access to the courtroom.

The Cross court, in dictum, suggests the use of additional safeguards to reduce potential jury distraction. For example, a court may specifically instruct the jury, prior to the commencement of the trial, to inform the court if the presence of television cameras hinders the jury’s ability to render a fair and impartial verdict.

Most courts do not require that the injured or adverse party be the defendant.Closure has been ordered upon the prosecutorial showing of a detrimen-

tal impact upon a witness or a victim giving testimony before a court. Courts have constructed safeguards to shield certain types of witnesses, such as victims of sexual offenses, from “the glare of publicity and tensions of being on camera.”

2. Expansion: Broadening the Scope of the Right of Access

Although most states have opened their doors to allow electronic media coverage of judicial proceedings, the media has subtly tried to push the perimeters of its access and to relax the conditions upon which its entry is based. In Smith v. State, the Supreme Court of Arkansas approved the media coverage, even though the mere presence of the cameras constituted a “patent” error. The defendant objected to the presence of cameras, asserting that a sentencing hearing was encompassed in the definition of “courtroom proceeding” as expressly stated in the statute, thereby warranting exclusion. Although the court indicated that an error was caused, the defendant failed to make a sufficient record supporting an allegation of a resulting harm sufficient to warrant reversal.

Several courts have heightened the standard of proof required to show a substantial resulting harm. In State v. Douglas, the defendant claimed that the

believing that the child could be harmed by public access. Id. See also In re Katherine B., 189 N.E.2d. 443 (N.Y. App. Div. 1993)(basing the closure of a child protective proceeding upon the negative effects on the victim’s psychological and emotional well-being); In re VV Publishing Corp., 120 N.J. 508 (1990)(weighing the strong legislative interests in protecting the identities of minor victims of sexual offenses with the media’s interest in the case and holding that the media was entitled to receive only redacted trial transcripts). See also Jean Montoya, On Truth and Shielding in Child Abuse Trials. 43 HASTINGS L.J. 1259 (July 1992).

When the obtrusive presence of the media often causes much harm, defendants have asserted that its absence can also violate their Sixth Amendment right to a fair trial. In these cases, the burden of producing a demonstrable harm remained with the accused. However, courts have not found the presence of the media to be an essential component in the fundamental fairness of a trial. In Commonwealth v. Corderio, 519 N.E.2d 1328 (Mass. 1988), the defendant asserted that the exclusion of the press from his trial extraneously influenced the jury and adversely implicated the presumption of innocence on behalf of the victim’s testimony. The court found that the defendant failed to carry his burden to produce a consequential harm. Id.

Cross, 605 N.E.2d at 298-301.

Id.

See In re T.R., 556 N.E.2d 439 (Ohio 1990) This child custody proceeding generated a media frenzy. Due to the flood of publicity, the guardian ad litem for the minor child asserted that closure of the courtroom to the press and public would be in the best interest of the girl. In balancing the public’s interest in openness with the parties’ interests in confidentiality, the Supreme Court of Ohio concluded that, absent a statute, juvenile proceedings were neither presumptively open nor presumptively closed to the public and the press. The court may restrict access to trial proceedings when a reasonable and substantial basis exists for

See supra note 77.

Id.

American Bar Association Journal October 1995

Id. at 298-301.

Id. at 300.

Id. at 298-301.

While the obtrusive presence of the media often causes much harm, defendants have asserted that its absence can also violate their Sixth Amendment right to a fair trial. In these cases, the burden of producing a demonstrable harm remained with the accused. However, courts have not found the presence of the media to be an essential component in the fundamental fairness of a trial. In Commonwealth v. Corderio, 519 N.E.2d 1328 (Mass. 1988), the defendant asserted that the exclusion of the press from his trial extraneously influenced the jury and adversely implicated the presumption of innocence on behalf of the victim’s testimony. The court found that the defendant failed to carry his burden to produce a consequential harm. Id.

Cross, 605 N.E.2d at 298-301.

Id.

See In re T.R., 556 N.E.2d 439 (Ohio 1990) This child custody proceeding generated a media frenzy. Due to the flood of publicity, the guardian ad litem for the minor child asserted that closure of the courtroom to the press and public would be in the best interest of the girl. In balancing the public’s interest in openness with the parties’ interests in confidentiality, the Supreme Court of Ohio concluded that, absent a statute, juvenile proceedings were neither presumptively open nor presumptively closed to the public and the press. The court may restrict access to trial proceedings when a reasonable and substantial basis exists for

believing that the child could be harmed by public access. Id. See also In re Katherine B., 189 N.E.2d. 443 (N.Y. App. Div. 1993)(basing the closure of a child protective proceeding upon the negative effects on the victim’s psychological and emotional well-being); In re VV Publishing Corp., 120 N.J. 508 (1990)(weighing the strong legislative interests in protecting the identities of minor victims of sexual offenses with the media’s interest in the case and holding that the media was entitled to receive only redacted trial transcripts). See also Jean Montoya, On Truth and Shielding in Child Abuse Trials. 43 HASTINGS L.J. 1259 (July 1992).

When the obtrusive presence of the media often causes much harm, defendants have asserted that its absence can also violate their Sixth Amendment right to a fair trial. In these cases, the burden of producing a demonstrable harm remained with the accused. However, courts have not found the presence of the media to be an essential component in the fundamental fairness of a trial. In Commonwealth v. Corderio, 519 N.E.2d 1328 (Mass. 1988), the defendant asserted that the exclusion of the press from his trial extraneously influenced the jury and adversely implicated the presumption of innocence on behalf of the victim’s testimony. The court found that the defendant failed to carry his burden to produce a consequential harm. Id.

Cross, 605 N.E.2d at 298-301.

Id.

See supra note 77.

10 Katherine B., 189 A.D.2d at 443.

80 863 S.W.2d 568 (Ark. 1993).

Id. at 566-68.

11 Id. Although the majority did not specifically address the issue, the concurrence reasoned that the coverage could be qualified by clarifying the statutory language. The controlling statute, an adaptation of Canon 3A(7), bars the “broadcasting of courtroom proceedings upon the objections from witnesses and parties to the trial.” Id.

88 Id. Despite the statutory violation, the court concluded that the presence of the cameras did not have any effect upon the adjudication of guilt or innocence, and did not threaten any harm to the defendant’s guaranteed right to a fair and impartial trial. Id. at 453.

84 485 N.W.2d 619 (Iowa 1992).
media interfered with attorney-client consultations and violated his right to effective assistance of counsel by placing microphones at the defense table.\(^{88}\)

The court found that the defendant failed to show that he had been harmed by the presence of the media during his trial. Although the presence of the microphones was "clearly a nuisance" and created a "real potential for prejudicing a defendant's constitutional rights," the majority held that the defendant's Due Process rights were not violated.\(^{89}\) The court based its decision on the absence of a resulting prejudicial harm to the defendant and the defendant's failure to demonstrate that counsel was impeded from presenting an effective defense.\(^{90}\)

Although judges may exercise discretion when deciding whether the right to access attaches to a particular case, they are required to articulate the reasons underlying their decisions.\(^{91}\) A silent record provides the appellate courts with no basis for determining the correctness of the exclusion. The requirement discourages arbitrary decisions.\(^{92}\)

### III. MEDIA ACCESS TO FEDERAL COURTS

Although many state courts have authorized media access, the Supreme Court has repelled the broadcast media's attempts to penetrate the walls of federal courtrooms. In proscribing the parameters of accessibility, the Court distinguishes the right to attend a trial and to report its contents from the right of the press to broadcast the actual proceedings from the courtroom.\(^{93}\) The Supreme Court has refused to interpret the First Amendment as providing a constitutional guarantee to televise courtroom proceedings.\(^{94}\)

The prohibition of electronic media coverage does not impede the right of the press to disseminate information acquired at trial; the media still may report on the trial.\(^{95}\) Despite the Court's unwavering support of the ban, the press has continually struggled to redefine the right to access to encompass the televising of proceedings.

The favorable results of experiments with cameras have encouraged states to allow the electronic media to broadcast the proceedings.\(^{96}\) In contrast, the shield protecting federal courtrooms has remained impenetrable. The United States Judicial Conference quelled any expectations of removing the cloak by its recent decision to uphold the mandatory exclusion of the electronic media from federal courtrooms.\(^{97}\)

Upon the expiration of a three-year experiment with media coverage in the federal court system, the Judicial Conference voted to secure the ban on cameras from both civil and criminal federal trials.\(^{98}\)

#### A. Background of the United States Judicial Conference

The Judicial Conference of the United States is the rulemaking body for the federal court system, with the exception of the United States Supreme Court.\(^{99}\) Presided over by the Chief Justice of the United States, the Conference is composed of the

---

88 Id.
89 Id.
90 Id. The defense counsel asserted that the responsibility of turning the microphones on and off, so as to avoid the disclosure of confidential conversations while simultaneously trying to perform legal duties at trial, placed an undue burden on them. Id.
91 See United States v. Peters, 754 F.2d 753, 763 (7th Cir. 1985).
92 Id.
93 Id.
94 There has been a general consensus by federal courts that the ban on cameras from federal courtrooms is constitutional. This exclusion is based upon constitutional scrutiny as "reasonable and neutral, as with time, place, and manner restrictions." Globe Newspapers, 457 U.S. at 607 n.17. See also Richmond Newspapers, 448 U.S. at 581-82; Young v. American Mini Theatres, Inc. 427 U.S. 50, 63 n.18 (1976); United States v. Kerley, 753 F.2d 617, 621 (7th Cir. 1985); Westmoreland v. CBS, 752 F.2d 16, 22 (App 2d Cir. 1984)(holding the right to access does not constitute a right to view trials on a television screen).
95 See Estes, 381 U.S. at 558 (holding no constitutional right to televise judicial proceedings); Hastings, 695 F.2d at 1280 (holding television coverage is not constitutionally mandated just because it is not constitutionally prohibited); United States v. Edwards, 785 F.2d 1293, 1296 (1983)(holding there is a distinction between the right to access and the right to attend, listen, and report).
96 Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 569 (1976)(holding that the media is free to publish what transpired at a public hearing); Craig v. Harney, 331 U.S. 367, 374 (1947)(holding that the court cannot suppress, edit, or censor events which transpire in proceedings); Times Publ. Co. v. State, 632 So. 2d 1072, 1074-5 (4th Cir. 1994)(holding that if the media gains access to the courtroom, there is no constitutional authority to prevent the dissemination of the information acquired and what they film).
98 The decision was announced at a press conference at the Supreme Court on Sept. 21, 1994. David H. Sellars, spokesman for the Judicial Conference, informed the press that the Conference had convened on the prior day and had voted, roughly two to one, in favor of upholding the absolute ban. Although no public explanation was given for the vote, Sellars said that "the tenor of concern was the potential impact on witnesses and jurors." Joan Biskupic, Federal Ban Continued, WASH. POST, Sept. 21, 1994, at A3.
chief justices from each of the thirteen federal circuit courts, district judges from twelve geographic districts, and the chief judge from the Court of International Trade. The policymaking body prescribes, modifies, or abrogates any rule or practice to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." The Chief Justice abstains from voting, except to break a tie.

In exercising the statutory duties, the Chief Justice must submit an annual report to Congress that contains a record of the Conference's proceedings and its recommendations for legislation. In 1967, upon the recommendations of the Conference, Congress created the Federal Judicial Center to further develop the adoption of improved judicial administration. In 1988, the Judicial Conference addressed the increasing number of constitutional challenges to the ban on electronic media access to courtroom proceedings by appointing a second Ad Hoc Committee on Cameras in the Courtroom to review recommendations that would allow access in federal courtrooms.

B. The Experiment

In September of 1990, the Judicial Conference accepted the recommendations of the Ad Hoc Committee to authorize a pilot project to permit cameras during civil trials in federal courts. The blanket ban that had suffocated federal courtrooms was temporarily lifted by this judicial grant of consent. The Ad Hoc Committee approved the procedural guidelines for the experiment and selected participants from a pool of volunteers who were evaluated by their size, civil caseload, and location to a metropolitan area. The Judicial Conference Committee on Court Administration and Case Management assumed responsibility for the implementation and operation of the experiment after dismissal of the Ad Hoc Committee. The Federal Judicial Center monitored the progression of the project and created a research staff to study the feasibility and impact of the cameras on trial proceedings. Each pilot court appointed an administrative liaison to record the progression of the program, report relevant information, and supervise the daily administration of the pilot. The pilot commenced on July 1, 1991 and expired on December 31, 1994.

The study delved into the expectations, experiences, and overall attitudes about media coverage of the participating judges, attorneys, and media organizations. The Committee monitored the experiences by questionnaires and telephone interviews. Participating judges and attorneys were asked about their experiences in federal courtrooms, in the jury deliberation room, or during recesses; (3) allow only one television and one still camera in trial courts (except for Southern District of New York, which was permitted to allow two cameras in the courtroom) and two television cameras and one still camera in appellate courts; and (4) require the media to establish "pooling" arrangements when more than one media organization wants to cover a proceeding. The presiding judge is empowered with the discretion to grant, refuse, terminate, or restrict media coverage.


Id.

Id. (citing Report of Proceedings of the Judicial Conference of the United States). In 1983, 28 news organizations petitioned the Judicial Conference to permit the presence of cameras in federal courtrooms. Broadcasting, Oct. 3, 1988, at 23. In September of 1990, the Ad Hoc Committee received a letter from U.S. Representative Robert Kastenmeier (D-Wis.), then chairman of the House Judiciary's subcommittee overseeing the federal courts, which implied that legislative actions would be compelled if the absolute ban was not lifted. See Saundra Torry, Federal Courts to Experiment With Televized Civil Trials, Wash. Post, Sept. 13, 1990, at A2.


Id. at 5. The Judicial Conference formulated a set of mandatory guidelines. The guidelines:

(1) require reasonable advance notice of a request to cover a proceeding; (2) prohibit photographing of jurors in the courtroom, in the jury deliberation room, or during recesses; (3) allow only one television and one still camera in trial courts (except for Southern District of New York, which was permitted to allow two cameras in the courtroom) and two television cameras and one still camera in appellate courts; and (4) require the media to establish "pooling" arrangements when more than one media organization wants to cover a proceeding. The presiding judge is empowered with the discretion to grant, refuse, terminate, or restrict media coverage.

Id.

Id. at 50. The Center performs such services as developing and administering various education programs for nonjudicial court personnel, judges, career court attorneys, and federal defender office personnel. Id. See also 28 U.S.C. §§ 620-629.


Id. at 4 n.5.

Id. at 8. The experiences and attitudes of the participating jurors, witnesses, and parties were not evaluated in this study. The Federal Judicial Center based the exclusion on their minimal experiences with courtrooms and on their limited direct involvement with the electronic media. Id.

Id. at 11-5. Prior to the commencement of the trial, questionnaires were sent to all the participating judges asking them about their expectations. Judges were asked to rate the likelihood of the potential harmful effects of the electronic media coverage as opposed to conventional coverage. Id. at 11. Two follow-up questionnaires were sent to the pilot judges after the first
the potential positive and negative effects of the presence of cameras upon witnesses, jurors, judges, courtroom decorum, and the fair administration of justice. The Committee examined the prejudicial impact through an analysis of the content, use, and presentation of televised material of the pilot to the public through evening news broadcasts. The potential effects were evaluated and compared to similar studies in state courts.

C. The Results

Based upon its collection of data, the Federal Judicial Center found that "overall, the attitudes of judges toward electronic media coverage of civil proceedings were initially neutral and became more favorable after experience of the pilot." Judges and attorneys who participated in the pilot reported observing "small or no effects" of cameras upon the

and second years of the program. In addition to the same questions that were asked on the prior survey, the judges were asked to comment on whether they experienced any of these potential harmful effects. Id.

Judges were asked to rate the likely effect of cameras upon witnesses (including witnesses' motivation to be truthful, violation of privacy, willingness to appear in court, distraction, and nervousness about testifying); jurors (including attentiveness, sense of responsibility for the verdict, weight and importance they give to certain witness testimony, influence they feel is placed upon them by viewers); attorneys (including attorneys' preparation for court, their presentation, manners and level of courtesy); judges (including judges' attentiveness, tendency to avoid unpopular decisions, and courteousness); and the courtroom proceedings (including the disruption caused and educational benefit given to the public). Id. at 14-15. Questionnaires were mailed to the lead plaintiff and defense attorneys of 100 cases covered by electronic media. The 32 cases that received extended coverage were included in the sample. The remaining 68 were selected at random. The questionnaires focused on the following issues:

1. if the court adequately considered their views and those of their clients in deciding whether to approve coverage requests; (2) whether potential witnesses refused to testify because of the prospect of camera coverage; (3) what effects of electronic media coverage affected the fairness of the proceedings; (4) whether the electronic media coverage affected the fairness of the proceedings; (5) whether, overall, they favor electronic media coverage of civil proceedings; and (6) whether their views toward electronic media coverage have changed as a result of participation in the program.

Id. at 16-19.

Out of the attorneys who responded to the surveys, 66% expressed that they somewhat or greatly favored the electronic media in civil cases, 21% were somewhat or greatly opposed to it, and 13% said they had no opinion. Id. at 7. Ninety-seven out of the 109 attorneys said that cameras had no effect on the overall fairness of the proceeding. Id. at 19-22.

The administrative liaisons estimated that between 1-25% of their time was spent on the administration of the program. Most found that the media cooperated and complied fully with the guidelines. Id. at 37. The media organizations set forth the following criteria in deciding which trials to provide coverage for (in descending order): (1) the "broad applicability" or "universal relevance" of the subject matter; (2) the newsworthiness of the trial; (3) the relevance of the story to local interests; and (4) the high profile of the litigants involved. Id.

The recommendations presented to the Conference were those of the research project staff and not of the Federal Judicial Center or its Board.

The staff recommended that a standard practice be adopted to inform counsel or a party appearing pro se that an application for media coverage has been received. The staff proposed a notice requirement to remedy the discontent of
tory to the participants, the Staff suggested that slight alterations concerning procedural matters and court house facilities be made in order to make the operation run more smoothly.\textsuperscript{120}

In September of 1994, the United States Judicial Conference voted, roughly two to one, to uphold the prohibition of the electronic media from all federal courtrooms. A spokesman for the Conference, David Sellars, announced at a press conference that the underlying rationale for the decision was the potentially negative effects upon jurors and witnesses.\textsuperscript{121} The Conference debated for only twenty minutes before it dismissed the recommendations of the research staff and discarded the results of the three-year pilot.

IV. BLOCKED ACCESS EQUALS FIRST AMENDMENT VIOLATION

The camera is the thirteenth juror, ensuring that justice is being served by encouraging public scrutiny. Broadcasting enhances, not hinders, the administration of justice by fostering public confidence in the judicial process. The televising of trial proceedings enables viewers to witness the operations and to receive a more accurate and comprehensive view of the justice system. Many misconceptions about the legal process are clarified by a heightened awareness of important legal issues and enriched public discussions. However, critics allege that defendants' Sixth Amendment right to a fair trial is jeopardized by the electronic media in courtrooms neither adversely affects participants to the proceedings nor disrupts the solemnity of the courtroom decorum nor interferes with the fair administration of justice. Despite these findings, a disparity still remains between the federal and state court systems concerning their policies of accessibility.

Upon the termination of the experiment with the electronic media in the federal court system, the United States Judicial Conference reaffirmed its exclusionary policy of barring the media from federal courtrooms.\textsuperscript{122} The Conference engaged in a twenty minute discussion before it rejected the recommendation of the researchers to permanently extend coverage to civil trials in federal courts.\textsuperscript{123} In light of the brief period of time in which the Conference contemplated the results of the commissioned study, the question arises as to why the Conference ever authorized the pilot. This may have been a ploy by the Justices to alleviate themselves of constant pressure from citizen groups and from subtle threats by legislators, and to discourage futile constitutional challenges from being waged in the courtroom.

Although the potential impact upon jurors is offered as the primary reason for the decision, the conclusion is inconsistent with the results of the study.\textsuperscript{124} Most of the participants were pleased with their experience and found "no or little effect" of the character of trials that has remained throughout history. He indicates that "[n]o aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate." \textit{Id.} at 588 n.3 (quoting Saxbe v. Washington Post Co., 417 U.S. 843, 862 (Powell, J., dissenting)).

\textsuperscript{120} For example, the staff proposes that media organizations be invited to submit proposals for constructing and regulate the use of permanent camera facilities in federal courtrooms. The results of the study suggest that permanent installation of cameras may be the "least intrusive" means of providing coverage. \textit{Id.} at 44-5 n.36.

\textsuperscript{121} See supra notes 94-100, and accompanying text.

\textsuperscript{122} See, e.g., Smith, 863 S.W. 2d at 566-68.

\textsuperscript{123} See Douglas, 485 N.W.2d at 619 (holding that the defendant failed to make a specific record to demonstrate the harm produced by the media's presence).

\textsuperscript{124} See Biskupic, supra note 94 at A3.
electronic media coverage upon jurors. Therefore, the question remains unanswered as to what principle the Conference is relying upon to support the bar and to justify the distinction between state and federal courts.

Critics reason that the disparity in treatment of the electronic media by the respective court systems lies with the duration of judicial appointments. State judges are elected officials, in comparison to federal judges who receive lifetime appointments. Therefore, it is argued that the media coverage serves as an additional check on elected officials to ensure the appropriate exercise of their judicial duties and to deter deviation from established legal standards. Allowing the constituency to peer through the lens of the camera and into the courtroom establishes a safeguard against corruption and judicial abuse of power. Exposure to unblinking eye of the camera enables the public to monitor the performance of the judges in their adjudicative duties and to make an informed vote.

This argument is valid, yet it fails to recognize the importance of providing a similar check on the federal court system. A lifetime appointment does not justify exclusion from the roving eye of the camera or the scrutinizing eye of the public. The additional safeguard may be necessitated by the greater risk of judicial misuse of power existing in the federal system. Federal judges have less incentive to abstain from improprieties because they cannot be voted out of office.

The goal of the trial system is the fair administration of justice. The significance of this objective is not dependent upon jurisdiction. The severity of an offense nor the public’s interest in seeing the fair administration of justice is not lessened in a state court system rather than a federal court system. By upholding a bright line of demarcation, the Court subtly suggests that there is a greater significance to the federal court system which warrants the mandatory closure. The trial processes of both state and federal governments share the common objective to ascertain the truth and to ensure that justice is served. A distinction made upon jurisdictional grounds is unfounded.

Judges serve as impartial officers of the court. They are vested with the responsibility to uphold the law and to ensure judicial integrity. It should not be presumed that their attention will divert from the trial at hand when presented with the opportunity to make a sound bite or a campaign pitch for re-election. We need to have more faith in our legal system than to assume that judges would arbitrarily jeopardize a defendant’s constitutional right for their personal whims and expectations. It is this lack of respect and confidence in the justice system that can be eradicated by granting access. Unlocking the doors the federal court system would not dictate mandatory openness. It would vest faith in the justice system and in its officers to ensure the fair administration of justice. It is not the public’s access to information that we should restrict, but the conduct of the press in its delivery to the public.

B. Court TV: An Educational Vehicle?

The image of the legal system has been distorted by a saturation of crime shows and “infotainment” in combination with the public’s inexperience with the law. This misconception was partially remedied in July of 1991, when the Courtroom Television Network, (“Court TV”), hit the airwaves, providing the viewing public with “gavel-to-gavel” coverage of criminal and civil trials from across the nation. Court TV is the first television station dedicated to covering legal news and issues. The network was immediately thrust into the spotlight when it provided live coverage of the William Ken-

Cable Yearbook, 158(1994).

Kavanau v. Courtroom Television Network, 23 U.S.P.Q.2d (BNA) 1938 (N.Y. Dist. Ct. 1992). In 1992, Ted Kavanau, a 30-year veteran of the cable and television industry, alleged that he originally thought of the idea for the channel and conceptualized a twenty-four hour cable station with a mainstay of live broadcasts throughout the United States. He brought an action for damages against the Courtroom Television Network et al., and claimed relief against the defendants for theft of creation, unfair competition and misappropriation, unlawful and tortious interference with prospective economic retirements and advantage, and for denial of business opportunity. The court granted summary judgment for the defendants upon the finding that Kavanau’s idea was not a novel one. Id. at 1938-44.
nedy Smith trial. Court TV has developed a strong and loyal following of viewers ever since.

Programmers must determine which trials have merit and are worthy of coverage. Court TV examines the trials according to five criteria: (1) public interest in the case; (2) notoriety and newsworthiness of the case and the participants; (3) quality of the story; (4) educational value of the case; and (5) duration of the case.

Viewers are given the opportunity to silently watch the entire trial, and to learn about fundamental principles and substantive issues of law. Court TV can be used as an educational tool that enhances the understanding of the courts and the Constitution, and their respective significance. This enrichment encourages public debate and introduces significant legal issues into the public forum.

Although its broadcasts provide viewers with a more accurate picture of the formalities and legalities of an actual courtroom trial, Court TV’s programming is not entirely representative of the justice system. It is not an absolute safeguard against public misconceptions. Critics assert that the cable network is misleading by “glamorizing litigation” in its creation of an image that the trial is the “center of the legal universe,” ignoring the reality that few trials are ultimately resolved in a court of law, but instead are settled out of court.

Opponents challenge the network’s ability to present an accurate view of the justice system and claim that the parties rights are sacrificed for viewing entertainment. Although the broadcasts of actual trials are unedited, programmers have editing power in deciding which trials to televise. The ignorance of the trial tracking process creates the misguided impression that most trials resolve around such serious and sensationalistic issues as murder and rape. In its quest for financial backing, Court TV has admitted to advertising its programming as a cross between C-Span and a soap opera. However, the network’s financial objectives do not diminish its value as an educational tool to the public.

V. CONCLUSION

A camera in a courtroom becomes a thirteenth juror, ensuring the fair administration of justice. It provides an opportunity for the public to peer through the windows into the trial process and to receive a more comprehensive understanding about the justice system. The camera is an educational device informing the public about procedural and substantive issues of law and encouraging enriched debate. Although the electronic media has successfully eroded many of the barriers to state courtrooms, it has failed to erase the line of demarcation that ostracizes it from the federal court system. The unblinking eye of the camera serves as an additional safeguard against judicial impropriety and increases public confidence. Judges, whether they serve in state or in federal courtrooms, are vested with the duty to preserve the fair administration of justice. Federal court judges should not be isolated from the roving eye of the camera merely because of their life time appointment to the bench. As officers of the court, judges are empowered to exercise their sound discretion to preserve the rights of the parties.

Studies have indicated that the presence of the electronic media has no major negative impacts upon witnesses and jurors. The justifications for the exclusionary policy that have been entrenched in the federal system no longer exist. The day has arrived for the disparity between state and federal court systems to be eliminated. The absolute ban that has cloaked

---

135 In 1991, the nation became mesmerized by the rape trial of William Kennedy Smith. The media blitz compelled the trial judge to prohibit all of the participants in the trial from making any public statement concerning the case. See State v. Smith, 91-5482-CF-A02 (Fla. Cir. Ct. 1991). However, this order did not impede the media’s attempts to feed the public’s voracious appetite for sensationalism by exploiting any persons who were somehow related to the case, such as old college roommates. While Smith was tried before a jury, the characters of both the alleged victim and the defendant were tried before the public. Robert S. Stephen, Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do To Ensure a Fair Trial in the Face of a Media Circus, 26 SUFFOLK U. L. REV. 1063, 1078-80 (1992).

136 Subscriber growth has skyrocketed from 4 million viewers in July of 1991 to 14.4 million viewers in 1993. Subscriber

137 See Harris, supra note 3, at 805.

138 Id. at 797, 818-20.

139 Id. at 805. Many important social issues, such as domestic violence, date rape, and child custody have emerged in the public forum by means of televised trials. For example, the William Kennedy Smith rape trial and the O.J. Simpson murder trial attracted immense public attention, especially when televised.

140 Id. at 823-24.

141 Id. at 805-15. See also Court Experts See Good Bad in TV Camera’s Eye, HOLLYWOOD REP., Aug. 16, 1994.

142 Harris, supra note 3, at 805-20.

143 Francis Murphy, A Case Against Cameras in Courtrooms, N.Y. L. J. June 30, 1994 at 2.
the federal court system for sixty years should be lifted allowing courts to open their doors to the electronic media.