Television Coverage of Trials: Constitutional Protection against Absolute Denial of Access in the Absence of a Compelling Interest

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Note

TELEVISION COVERAGE OF TRIALS: CONSTITUTIONAL PROTECTION AGAINST ABSOLUTE DENIAL OF ACCESS IN THE ABSENCE OF A COMPELLING INTEREST

I. Introduction

In 1934, Bruno Hauptmann was prosecuted for the kidnapping and murder of Charles Lindbergh, Jr., the son of the first pilot to successfully make a transatlantic flight. Because of the notoriety of the crime and the popularity of Charles Lindbergh, Sr., there was intense public interest in the Hauptmann trial. As a consequence of this interest, over 150 reporters and photographers packed the courtroom throughout the trial. The publicity was adverse to Hauptmann, who was convicted and sentenced to death. In response to the intense publicity generated by the trial, various canons and rules were developed to prevent a recurrence of the atmosphere that prevailed at the Hauptmann trial. The American Bar Association (ABA) House of Delegates adopted Judicial Canon 35, which recommended the banning of all photographic and broadcast coverage of courtroom proceedings. To reflect technologi-

1. See M. Franklin, Mass Media Law: Cases and Materials 597 (2d ed. 1982). When the Lindbergh child was kidnapped in 1932, and his body found in a shallow grave near the Lindbergh house, the story was front-page news for weeks. H. Nelson & D. Teeter, Law of Mass Communications 265 (3d ed. 1978).

2. H. Nelson & D. Teeter, supra note 1, at 265. When Hauptmann was tried for the crime in 1934, 150 reporters packed the courtroom and at times over 700 reporters were in Flemington, New Jersey, the site of the trial. Id. (citing J. Lofton, Justice and the Press 103-04 (1966)).

3. Id. A special American Bar Association (ABA) committee set up after the Hauptmann trial noted that the trial was "the most spectacular and depressing example of improper publicity and professional misconduct ever presented to the people of the United States in a criminal trial." Report of Special Committee on Cooperation Between Press, Radio and Bar, 62 ABA Rep. 851, 861 (1937).

In addition, the newsreel cameramen at the Hauptmann trial persuaded the trial judge to allow a camera in the balcony, which overlooked the jury and witness stand, after they had promised the judge that they would only film the trial during recesses. Films of the proceedings, however, later showed up in newsreel theatres. J. Gerald, News of Crime: Courts and Press in Conflict 152 (1983).

4. H. Nelson & D. Teeter, supra note 1, at 265. In proscribing photographic coverage of courtroom proceedings, Canon 35, which was adopted in 1937, stated:

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

(1267)
cal changes in the broadcast medium, Canon 35 was later amended to also proscribe television coverage of trials. Currently, the federal courts do not permit the photographing of courtroom proceedings and state courts permit it only at their discretion.

Despite this total prohibition against cameras in federal courtrooms, the Supreme Court has never directly addressed the issue of whether a per se rule against cameras in the courtroom is constitutional. The first amendment provides that Congress shall make no law abridging freedom of speech or the press. The fifth amendment and sixth amendment guarantee a defendant the right to a fair trial. These two 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. AMERICAN BAR ASSOCIATION, CANONS OF JUDICIAL ETHICS, Canon 35 (1937). Canon 35 was later amended to also proscribe television coverage. For a discussion of the current ABA judicial canon proscribing television coverage of court proceedings, see infra note 111 and accompanying text.

Although Canon 35 and similar ABA standards are not binding on courts, the canon did direct the ABA's opposition to cameras in the courtroom. Justice Harlan, in an appendix to his concurring opinion in Estes v. Texas, traced the development of Canon 35. See Estes v. Texas, 381 U.S. 532, 596-601 app. (1965) (Harlan, J., concurring). In addition, prior to the adoption of Canon 35, the impropriety of broadcasting court proceedings was recognized by the ABA's Committee on Professional Ethics and Grievances in its Opinion No. 67, in 1932. Id. at 597 n.3 app. (Harlan, J., concurring) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 67 (1932)).


6. See supra notes 29-31 & 101-105 and accompanying text.

7. U.S. Const. amend. I. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Id. The first amendment has also been held to apply to the states through the fourteenth amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

8. U.S. Const. amend. V. The fifth amendment reads:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id. See In Re Murchison, 399 U.S. 133, 136 (1954) (fair trial in fair tribunal is basic requirement of due process). These rights have also been held to apply to the states through the fourteenth amendment. See Irvin v. Dowd, 336 U.S. 717 (1961); Adamson v. California, 332 U.S. 46 (1947).

9. U.S. Const. amend. VI. The sixth amendment reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have
interests have come into conflict when the press has sought to cover certain judicial proceedings with photographic and television equipment. This inherent constitutional conflict raises questions of whether, in the first instance, access for cameras to the courtroom can be absolutely prohibited under the first amendment, and whether, in the absence of an absolute ban, first amendment considerations are outweighed by the fifth and sixth amendment guarantees of a fair trial in the circumstances of the particular case.

This Note will examine the parameters of the rights and guarantees embodied in the first, fifth, and sixth amendments. In addition, this Note will analyze the reasoning that courts have used to uphold an absolute ban under constitutional attack. Finally, methods will be proposed for satisfying both the press' right of camera access to trials and the defendant's right to a fair trial.

II. CONSTITUTIONAL CONSIDERATIONS

A. Due Process Limitations

Despite the passage of Canon 35 in 1937, and over the objection of defendants, Colorado allowed cameras in its state courtrooms. Texas similarly continued to permit cameras in its courtrooms, subject to the discretion of the trial judge. In Estes v. Texas, the United States Supreme Court for the first time addressed the due process problems raised by the presence of cameras in the courtroom. In Estes, the defendant was prosecuted for allegedly masterminding a large-scale swin—

been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence. Id. Rights under the sixth amendment, such as the right of confrontation, have been held to be essential to a fair trial. Pointer v. Texas, 380 U.S. 400, 405 (1965).

10. J. Gerald, supra note 3, at 155. Prior to the 1960's, broadcasters were successful in gaining access to trial and appellate proceedings in Colorado. Judges maintained control and guidance over the use of television cameras in Colorado courtrooms. One reason Colorado allowed the use of cameras in its courtrooms was the courts' sensitivity to political conditions and their previous experience with cameras in the courtroom. Id. When the Supreme Court's decision in Estes v. Texas erected a barrier to cameras in the courtroom, Colorado stopped allowing their use. For a discussion of Estes, see infra notes 12-16 and accompanying text. But Colorado was also the first state to return to cameras in the courtroom after the Estes decision. J. Gerald, supra note 3, at 157.

11. J. Gerald, supra note 3, at 155. In Texas, like Colorado, judges were sensitive to political conditions and had considerable experience with cameras in the courtroom since photographers in courtrooms were commonplace until the Estes decision in 1965. Id. The Texas State Bar favored allowing cameras in the courtroom and the use of the cameras was left to the discretion of the trial judge. Id.

dle.\textsuperscript{13} Despite the defendant's pretrial motion to exclude all cameras, the state trial judge allowed the televising of a pretrial hearing and the televising of the trial on a restricted basis.\textsuperscript{14} On appeal the Supreme Court, in a five to four decision with the majority split three ways,\textsuperscript{15} re-

13. \textit{Id.} at 534 n.1. The evidence presented at the trial indicated that Estes made fraudulent representations to local farmers that convinced the farmers to buy fertilizer tanks that did not exist. \textit{Id.} at 534. Estes was subsequently convicted in a Texas court on charges of swindling. \textit{Id.} at 534.

14. \textit{Id.} at 535-36. Even before the proceedings began, the Estes case attracted national attention and eleven volumes of press clippings concerning Estes were on file with the court clerk. \textit{Id.} at 535. The defense moved to prevent the broadcast of the trial and for a continuance. The pretrial hearing on these motions was carried live by radio and television. \textit{Id.} at 535-36. The Supreme Court noted that there were at least twelve cameramen in the courtroom during the hearing providing television, motion picture, and photographic coverage. In addition, cables were run across the courtroom's floor and microphones were placed throughout the courtroom. \textit{Id.} at 536. These activities led to considerable disruption of the judicial proceedings. \textit{Id.}

15. \textit{Id.} at 534, 552, 587. Justice Clark delivered the opinion of the Court. \textit{Id.} at 534. Justice Clark began his analysis with the proposition that the sixth amendment guarantees the accused a public trial to ensure that the accused is treated fairly. \textit{Id.} at 538. While the press serves an important role and the press must be accorded maximum freedom, Justice Clark stated that the press, in the exercise of its function in a democratic society, must be subject to restrictions for the preservation of absolute fairness in the judicial process. \textit{Id.} at 539. Further, Justice Clark concluded that it was not discriminatory to exclude cameramen from the courtroom while allowing access to newspaper reporters. Justice Clark noted that all members of the press, as well as members of the public, were allowed access to the courtroom. \textit{Id.} at 540. The newspaper reporter, however, is not allowed to bring his typewriter into the courtroom, just as the television reporter may not bring a camera into the courtroom. \textit{Id.} When the presence of cameras in the courtroom would not create hazards to the process of a fair trial, Justice Clark commented that a different case would then be presented to the Court. \textit{Id.} In addition, television coverage does not contribute to ascertaining the truth at trial, Justice Clark wrote; rather, it injects an irrelevant factor into the proceedings. \textit{Id.} at 544. For a discussion of the portion of Justice Clark's opinion relating to the hazards of television coverage, see infra note 16 and accompanying text.

Chief Justice Warren, who was joined by Justices Douglas and Goldberg, concurred and wrote separately. 381 U.S. at 552. (Warren, C.J., concurring). While Chief Justice Warren joined the opinion of the Court, he wrote to further argue that the televising of criminal trials is inherently a violation of a defendant's due process rights. \textit{Id.} Chief Justice Warren argued that the Estes trial provided an illustration of the inherent prejudice involved in televising a criminal trial. \textit{Id.} He stated that the sixth amendment not only defines the defendant's rights, but also guarantees that these rights are to be specifically enjoyed at the trial. \textit{Id.}

The Chief Justice argued that televising a criminal trial violated the sixth and fourteenth amendments. \textit{Id.} at 565 (Warren, C.J., concurring). He based his conclusion on three grounds. First, the televising of a trial diverts the trial from its proper purpose and inevitably impacts upon all the trial participants. Second, televising trials presents the public with the wrong impression of the purpose of trials, which in turn detracts from the dignity and reliability of trials. Third, such coverage of trials singles out certain defendants and subjects these defendants to prejudicial conditions not experienced by others. \textit{Id.} Moreover, in Chief Justice Warren's view, the Constitution, experience in applying the pro-
versed the defendant’s conviction, finding that the television coverage violated the defendant’s due process right to a fundamentally fair trial. Justice Harlan, in casting the crucial fifth vote for the Estes majority, lim-

visions of the Constitution, and the nation’s common law heritage committed the Court to the position that the purpose of the criminal trial is to provide a fair and reliable determination of guilt. Id.

Chief Justice Warren also expressed concern about how the media would present the trial and about the likely intrusions in the trial process that would be caused by the media. The public, the Chief Justice argued, would equate the trial process with other forms of entertainment regularly seen on television. Id. at 571 (Warren, C.J., concurring). Chief Justice Warren further expressed a fear that the television industry, believing that a trial was not sufficiently dramatic, would provide expert commentary on the trial and anticipate potential legal strategies. Id. at 572 (Warren, C.J., concurring).

Furthermore, the more accepted television became in the courtroom, Chief Justice Warren reasoned, the more sacrifices would have to be made to accommodate the media. Id. For example, this could include physical alterations in the layout of the courtroom. Id. The Chief Justice also feared that judges would become partners of the media, thereby causing a threat to the integrity of the trial process. This could conceivably lead, he argued, to the television industry influencing the time and date trials were scheduled. Id. at 573 (Warren, C.J., concurring). In essence, Chief Justice Warren argued that television coverage of trials would lead to the commercialization of the trial process. Id. at 574 (Warren, C.J., concurring).

Justice Harlan cast the necessary fifth vote. While he also joined the Court’s opinion, he did so subject to the limitations expressed in his concurrence. For a discussion of Justice Harlan’s concurrence in Estes, see infra note 17 and accompanying text.

16. 381 U.S. at 536-52. The proceedings in Estes were televised over the objection of the defendant and there was widespread public interest in the trial activities. The Supreme Court articulated several concerns about the television coverage and how it could cause unfairness during the proceedings. Id. at 544-50. The Court considered the following factors in its analysis. First, the televising of proceedings could prejudice jurors and subject them to pressure from friends and neighbors when the media created intense public feeling against the defendant. Id. at 545. Second, the quality of testimony could be impaired. Witnesses would know their testimony was being viewed, which would make some witnesses frightened, others cocky and others embarrassed. In general, the testi-

monies of witnesses would be influenced by the presence of cameras in the courtroom. Id. at 547. Third, televising a trial would place additional responsibilities on the trial judge. Id. at 548. A trial judge must ensure that a defendant receives a fair trial; therefore, when a trial is being televised, the judge must also supervise the coverage. In addition, the media could pressure judges, both in the decision whether to allow broadcast coverage and in supervising the coverage itself. Id. at 548-49. Fourth, cameras could have an adverse impact on the defendant. There would be close-ups of the defendant, his movements would be closely monitored and his ability to concentrate on the trial would be adversely affected. Id. at 549.

In considering the impact of television coverage on criminal trials, the Court stated:

The television camera is a powerful weapon. Intentionally or inadvertently it can destroy an accused and his case in the eyes of the public. . . . The necessity for sponsorship weighs heavily in favor of the televising of only notorious cases, such as this one, and invariably focuses the lens upon the unpopular or infamous. . . . We have already examined the ways in which public sentiment can affect the trial partici-

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ited the prohibition of cameras from the courtroom to cases where there was great public interest.\textsuperscript{17}

Several justices have construed the \textit{Estes} decision as setting a per se rule against television coverage of trials, at least when the defendant objected.\textsuperscript{18} This interpretation, however, has been refuted by a majority

pants. To the extent that television shapes that sentiment, it can strip the accused of a fair trial.

\textit{Id.} at 549-50.

\textsuperscript{17} \textit{Id.} at 587-96 (Harlan, J., concurring). While Justice Harlan concurred in the opinion of the Court, he did so only to the extent indicated in his opinion. \textit{Id.} at 587 (Harlan, J., concurring). Although Justice Harlan noted that cameras at their worst could be quite intrusive, television coverage of trials had to be judged as it was at the \textit{Estes} trial—relatively unobtrusive, with cameras in a booth in the back of the courtroom. \textit{Id.} at 588 (Harlan, J., concurring).

The sixth amendment provision for a public trial, Justice Harlan wrote, embodies a right for the accused and not the public. \textit{Id.} (Harlan, J., concurring). The impact of televisions in the courtroom would vary according to the particular case involved since the effect on the accused's constitutional rights would vary from case to case. \textit{Id.} While Justice Harlan did not suggest that a distinction should necessarily be drawn on the basis of the particular case involved, he did suggest that the Court proceed slowly in determining whether television coverage would violate a defendant's constitutional rights. \textit{Id.} at 590-91 (Harlan, J., concurring). Justice Harlan noted that the sensationalism involved in the television coverage of trials, especially those trials with high public interest, had the potential to disrupt the integrity of the trial process. \textit{Id.} at 592 (Harlan, J., concurring). Justice Harlan found that the circumstances of the coverage of the \textit{Estes} trial violated the defendant's right to a fair trial, but stated that, although the decision was demanded by this case, the circumstance of television coverage would not necessarily require such a decision. \textit{Id.} at 595 (Harlan, J., concurring). He wrote:

Finally, we should not be deterred from making the constitutional judgment which this case demands by the prospect that 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. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause. 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.

\textit{Id.} at 595-96 (Harlan, J., concurring).

\textsuperscript{18} \textit{See} Chandler v. Florida, 449 U.S. 560, 584 (1981) (Stewart, J., concurring). In his concurrence in \textit{Chandler}, Justice Stewart stated that \textit{Estes} announced a per se rule that the fourteenth amendment prohibited cameras from a state courtroom when a criminal trial was in progress. \textit{Id.} (Stewart, J., concurring) (citing \textit{Estes}, 381 U.S. at 614). On this basis, Justice Stewart was unable to join the Court's opinion in \textit{Chandler}. Justice White expressed a similar position in his concurrence in \textit{Chandler}. \textit{Id.} at 587 (White, J., concurring). Justice White wrote that \textit{Estes} is fairly read as establishing a per se constitutional rule against the televising of any criminal trial if the defendant objects. \textit{Id.} (White, J., concurring). Thus, Justice White concluded that \textit{Estes} had to be overturned to allow the television coverage permitted in the \textit{Chandler} case. \textit{Id.} (White, J., concurring). For a review of the \textit{Chandler} Court's discussion of \textit{Estes}, see infra note 19 and accompanying text.
of the Supreme Court.\textsuperscript{19} Nevertheless, in a series of cases in the 1960s, the Supreme Court demonstrated its willingness to overturn convictions when a trial was subject to pervasive adverse publicity.\textsuperscript{20}

Despite the possibility that television coverage of a trial could result in the reversal of a conviction if a criminal defendant’s due process rights were violated, some states continued to allow cameras in their courtrooms.\textsuperscript{21} In 1980, Florida’s experimental program for allowing television coverage of courtroom proceedings was challenged in Chandler v. Florida\textsuperscript{22} by defendants who charged that the coverage denied

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19. See Chandler v. Florida, 449 U.S. 560, 570-74 (1981). For a discussion of the circumstances of the Chandler case, see infra notes 22-28 and accompanying text. The Chandler Court stated that the Court’s opinion in Estes was only a plurality, and Justice Harlan’s concurrence provided the necessary fifth vote for the judgment. Id. at 570-71. The Chandler Court interpreted Justice Harlan’s opinion as limiting the Estes decision to the particular circumstances of the case. Id. at 573 (citing Estes, 381 U.S. at 587 (Harlan, J., concurring)). Therefore, the Court concluded that Estes did not stand for a constitutional bar against television coverage in all cases. Id.

20. See Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 551-53 (1976). In Nebraska Press, the Supreme Court discussed a number of the cases in which the defendant’s due process rights had been violated because of pervasive press coverage. Id. at 551-52 (citing Irvin v. Dowd, 366 U.S. 717 (1961) (overturning defendant’s conviction for murder on ground that defendant was denied fair trial because press had prompted wave of public passion against defendant); Rideau v. Louisiana, 373 U.S. 723 (1963) (defendant’s conviction for murder, kidnapping, and robbery was reversed because his confession had been filmed and broadcast while he was awaiting trial); Sheppard v. Maxwell, 384 U.S. 333 (1966) (defendant’s conviction was overturned because of impact of pretrial publicity; Court also noted that trial court had duty to protect defendant’s constitutional right to fair trial)).

21. J. Gerald, supra note 3, at 157. In 1970, Colorado was the first state to allow cameras in the courtroom after the Estes decision. Id. Colorado’s earlier experience with cameras reduced opposition to their return to the courtroom. Id. Seven years later, the Supreme Court of Washington issued guidelines that permitted the use of cameras in that state’s courtrooms. Id. The state of Florida also allowed cameras in its courtrooms in 1976. Id. For a discussion of Florida’s program, see infra note 22 and accompanying text.

22. 449 U.S. at 560 (1981). In 1976, Florida’s Supreme Court announced an experimental program that initially allowed the televising of one civil trial and one criminal trial under specific guidelines. Id. at 564. Under the original guidelines, the consent of all the parties was required. Id. It became clear, however, that it was difficult to gain the consent of all the parties. The Florida Supreme Court consequently revised its order for a one-year test period to allow the televising of all judicial proceedings without requiring the consent of the participants. Id. at 564-65. Under this revised order, detailed guidelines governed the type of electronic equipment allowed and the manner which it could be used during judicial proceedings. In re Petition of Post-Newsweek Stations, 347 So. 2d 402, 408 (Fla. 1977). Following the expiration of this one-year program, the court promulgated a revised judicial canon which permitted cameras in Florida courtrooms. 449 U.S. at 566. In promulgating this canon, the Florida Supreme Court rejected any constitutional right of access for cameras. Id. at 569. The Florida Supreme Court’s implementing guidelines specified that no more than one camera and one camera technician were allowed in a courtroom. Pool coverage was required if more than one news organization wanted to
them a fair and impartial trial. In *Chandler*, the Supreme Court ruled that television coverage of a criminal trial did not inherently violate the Constitution.\(^{23}\) The Court further concluded that such coverage was permissible even over a defendant's objection.\(^{24}\) While the *Chandler* Court indicated that broadcast coverage of a trial could affect a defendant's right to a fair trial in some cases, this risk did not justify an absolute constitutional ban against broadcast coverage.\(^{25}\) Chief Justice Burger, writing for the majority, stated that there were potential difficulties, such as the media singling out sensational cases, which could raise due process concerns.\(^{26}\) The Chief Justice also noted, however, that no available empirical evidence demonstrated that the presence of cameras in the courtroom would necessarily have an adverse effect on a defendant's right to a fair trial.\(^{27}\) The Chief Justice noted that since Estes was de-

broadcast a trial. *Id.* at 566. Additionally, artificial lighting was not allowed and the equipment had to be located in a fixed position. The guidelines further specified that a judge, at his discretion, could exempt the testimony of a witness from television coverage, and the media was prohibited from filming the jury. *Id.*  

23. 449 U.S. at 582-83. The Court held that the presence of cameras did not violate the Constitution under all circumstances; therefore, the states must be free to experiment. *Id.* at 582-83. The Court stated:  

It is not necessary either to ignore or discount the potential danger to the fairness of a trial in a particular case in order to conclude that Florida may permit the electronic media to cover trials in its state courts. Dangers lurk in this, as in most experiments, but unless we were to conclude that television coverage under all conditions is prohibited by the Constitution, the states must be free to experiment. *Id.* at 582.  

24. *Id.* at 577. While a trial could be televised over the objection of the defendant, the Supreme Court noted that Florida still required the objections of the accused to be heard and considered on the record by the trial court. *Id.* The *Chandler* Court stated that such a provision preserves the defendant's right of appeal and ensures review to determine if his right to a fair trial was violated by the television coverage.  

25. *Id.* at 574-75. The Court concluded:  

An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage. . . . [T]he appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly. *Id.*  

26. *Id.* at 580. Chief Justice Burger noted that it is within the media's discretion to decide what trials would be televised. *Id.* Thus, factors that would affect the public interest, such as the nature of the crime or the status or position of the defendant, would govern the media's decision. *Id.*  

27. *Id.* at 578-79. Chief Justice Burger observed that "at present no one
ceded, there had been major technological advances which had reduced the intrusiveness of broadcast equipment. 28

Notwithstanding the Chandler decision, which clearly rejected an absolute constitutional barrier to televising trial and courtroom proceedings, the use of cameras remains totally banned from federal courtrooms. 29 The barriers to the use of cameras in the federal courts are found in local federal court rules 30 and the Federal Rules of Criminal Procedure. 31 Additionally, Chief Justice Burger has expressed hostility to permitting cameras in federal courtrooms. 32

B. Right of Access

In Chandler, the Supreme Court was faced with the question of whether the presence of cameras in a courtroom during a criminal trial constituted a per se violation of the Constitution in the context of a defendant seeking to determine the scope of his sixth amendment rights. 33

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.” Id.

28. Id. at 576. Empirical data was introduced revealing that many of the problems that the Court focused on in Estes, such as cumbersome equipment, cables, lighting and the like, were no longer substantial factors because of technological advances.  Id. Florida conducted a survey of program participants and the results, though somewhat limited, indicated that the media had the ability to minimize the disruptive effects of cameras in the courtroom. Id. at 576 n.11.


30. See Federal Local Court Rules (Pike & Fisher ed. 1984). The wording of these rules varies from jurisdiction to jurisdiction. The rule for the eastern district of Pennsylvania reads in part:

(a) No judicial proceedings may be broadcast by radio or television, or filmed by still or motion-picture camera, except that investive, naturalization or other ceremonial proceedings may be broadcast, or filmed, subject to the supervision of the Clerk . . . .

E.D. PA. R. CIV. P. 10(a).

31. See 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.” Id. Congress authorized the Supreme Court to promulgate the Federal Rules of Criminal Procedure. 18 U.S.C. § 3771 (1982).

32. Philadelphia Inquirer, Nov. 13, 1984, at 8, col. 1. Recently, Chief Justice Burger made what is believed to be his first public statement reflecting his hostility toward cameras in the courtroom. He stated that no cameras would be allowed in the Supreme Court while he sat on the Court. Id.

33. 449 U.S. at 567-69. For a discussion of Chandler, see supra notes 22-28 and accompanying text.

Supreme Court cases to this point focused on the issue of cameras in the courtroom in light of a defendant’s rights, rather than from the perspective of first amendment rights. The Court, nonetheless, did discuss the media’s right of access to a limited extent in both Chandler and Estes. In Chandler, the Court noted that the Florida Supreme Court, in promulgating the rule that allowed cameras in the courtroom, rejected any state or federal constitutional right of access on
Any restriction on the media's access to courtrooms, however, also necessarily involves a consideration of first amendment rights. The Supreme Court addressed the interaction of these constitutional rights in a series of cases beginning with *Nebraska Press Association v. Stewart.*

In *Nebraska Press,* the Supreme Court affirmed the press' right to publish information concerning judicial proceedings. The state trial judge in *Nebraska Press* issued a restraining order prohibiting the press from publishing certain information about the trial. While indicating that prior restraints on the press come before the Court with a heavy presumption against their constitutionality, the Court did not forethe part of the media to televise or electronically record trial proceedings. 449 U.S. at 569. The Florida court relied on the holding in *Nixon v. Warner Communications,* Inc., 435 U.S. 589 (1978). This, however, constituted the Supreme Court's entire discussion of first amendment rights in *Chandler.* For a discussion of *Warner,* see infra notes 44-47 and accompanying text.

In *Estes,* it was argued that the first amendment extended the media a right to televise from the courtroom, and that to prohibit such coverage discriminated between newspapers and television. 381 U.S. at 539. The Court stated, however, that this argument misconceived the rights of the press. While the press is to be granted maximum freedom, the press must exercise its function subject to restrictions designed to maintain fairness in the judicial process. *Id.* Furthermore, prohibiting cameras from courtrooms was not discriminatory since all the media were allowed access subject to restrictions. Newspaper reporters were not allowed to bring typewriters into a courtroom; therefore, the Court concluded that not permitting television reporters to bring cameras into the courtroom was not discriminatory. *Id.* at 540. Thus, in both *Chandler* and *Estes,* the Court's discussion of the first amendment was peripheral to the discussion of the fair trial issues.

43. 427 U.S. 539 (1976). See also *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980); *Gannett Co. v. DePasquale,* 443 U.S. 368 (1979); *Nixon v. Warner Communications,* Inc., 435 U.S. 589 (1978). In examining these cases, the Supreme Court found that although the trial itself was over, the first amendment considerations were not moot because the controversy was one that was "capable of repetition yet evading review." *See Gannett,* 443 U.S. at 377 (quoting *Southern Pac. Terminal Co. v. ICC,* 219 U.S. 498, 515 (1911)).

35. 427 U.S. at 543-44. The case arose after a Nebraska trial judge entered an order restraining the press' publication of information concerning the trial of a defendant charged with six counts of murder. *Id.* at 541. The trial judge's order, which was to be effective until the jury was impaneled, prohibited the press from reporting, *inter alia,* on the following subjects: the existence and contents of the defendant's confession, the nature of the defendant's statements to other persons, and the contents of a note written by the defendant on the night of the crime. *Id.* at 543-44. The order also prohibited the press from reporting on the exact nature of the restraining order. *Id.* The Nebraska Supreme Court later modified and limited the trial judge's order. *Id.* at 545. Some of the information the press was prevented from reporting, however, had already been introduced in open court proceedings. *Id.* at 543.

36. *Id.* at 558 (citing *Carroll v. Princess Anne,* 393 U.S. 175, 181 (1968)). In *Carroll,* the petitioners, members of a white supremecy political party, held a rally, prompting local officials to obtain a restraining order to prevent the petitioners from holding further rallies for ten days. The restraining order was set aside because it was obtained ex parte and the petitioners had no opportunity to participate in the proceedings. 393 U.S. at 180. Further, the Supreme Court
close the possibility that a court could impose prior restraints in certain instances.\textsuperscript{37} In determining whether prior restraints were permissible to protect the trial process, the Court developed a test that focused on the nature and extent of the news coverage, the possible alternatives to restraining the press, and the effectiveness of the restraining order in protecting a defendant's right to a fair trial.\textsuperscript{38} The Nebraska Press Court also recognized that while, in some instances, the publicity surrounding a trial has led to violations of a defendant's due process rights, such publicity does not invariably lead to an unfair trial.\textsuperscript{39} Consequently, the Court concluded that trial judges were responsible for mitigating the effects of adverse pretrial publicity.\textsuperscript{40}

In spite of the Supreme Court's decision in Nebraska Press, the ABA in 1978 drafted a fair trial-free press standard that would prohibit a judge from restraining the press from publishing information about a criminal case.\textsuperscript{41} This standard, in fact, was promulgated specifically in

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  \item \textsuperscript{37} 427 U.S. at 569. The Court did not rule out the possibility that prior restraint could be used to protect against a threat to a defendant's right to a fair trial. \textit{Id.} The Court, however, did not hypothesize as to the type of circumstances under which such prior restraint would be permissible. \textit{Id.} at 569-70.

  \item \textsuperscript{38} \textit{Id.} at 562. The Nebraska Press Court stated that the trial court, when deciding whether to impose a prior restraint on publication, must examine: "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important." \textit{Id.}

  \item \textsuperscript{39} \textit{Id.} at 554. The Court stated that "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." \textit{Id.}

  \item \textsuperscript{40} \textit{Id.} at 555. The Court stated that the trial judge has a major responsibility to protect the defendant's right to a fair trial. \textit{Id.} This includes what the judge himself says about a trial and what attorneys and police say to encourage news coverage. \textit{Id.} In addition, the measures a judge takes, or does not take, to mitigate the effects of publicity may be determinative of whether the defendant receives a fair trial. \textit{Id.}

  \item \textsuperscript{41} ABA \textsc{standards for criminal justice} \textsection 8-3.1 (1978) [hereinafter cited as ABA \textsc{standards}]. This fair trial-free press standard provides that "[n]o rule of court or judicial order shall be promulgated that prohibits representatives of
response to the *Nebraska Press* decision. The drafters of this fair trial-free press standard indicated that such a categorical prohibition against restraining orders was necessary to protect the media's rights.

Following *Nebraska Press*, the Supreme Court discussed the press' right of access to judicial records in *Nixon v. Warner Communications, Inc.* In *Warner Communications*, the defendant sought to copy, broadcast, and sell the Watergate tapes that were admitted into evidence at the trial of President Richard Nixon's former advisors. The Supreme Court rejected Warner Communication's claim that there was a first amendment right to copy and publish the tapes. The Court held that the press had no greater right of access to the tapes under the first amendment than the public, and that the public has never had such a right of physical access.

The news media from broadcasting or publishing any information in their possession relating to a criminal case." *Id.*

The Senate's Subcommittee on Constitutional Rights also went on the record as opposing prior restraints being placed on the media in the free press-fair trial context. STAFF OF SENATE SUBCOMM. ON CONSTITUTIONAL RIGHTS, 94TH CONG., 2D SESS., FREE PRESS-FAIR TRIAL (Comm. Print 1976) [hereinafter cited as FREE PRESS-FAIR TRIAL]. The subcommittee noted the advantages of free press coverage of a trial and stated that self-policing by the media is a judicious course. *Id.* at 8.

42. ABA STANDARDS, supra note 40, at § 8-3.1 historical note.

43. *Id.* § 8-3.1 comment. This comment recognized that ultimate vindication through the judicial system means little when the cost of litigation is high and long delays in publication result. *Id.* A categorical prohibition against restraining orders does not preclude sanctions, however. For example, if information is obtained by theft or fraud, the first amendment does not bar appropriate punishment. Such punishment, however, is to be aimed at the method used to obtain the information and not at the publication of the information. *Id.*


45. *Id.* at 594. The *Warner Communications* case involved the Watergate tapes that had been admitted into evidence in the trial of Nixon's former advisers. *Id.* at 591-94. During the trial, those who attended the trial were able to listen to the tapes. *Id.* at 594. Transcripts of the tapes were also made and released to the press. *Id.* Warner Communications requested permission to copy, broadcast, and sell the tapes that were admitted in evidence. *Id.*

46. *Id.* at 608-09. The Court perceived this case as a question of physical access to the tapes. The Court stated:

[T]he issue presented in this case is not whether the press must be permitted access to public information to which the public is generally guaranteed access, but whether these copies of the White House tapes—to which the public has never had physical access—must be made available for copying.

*Id.* at 609 (emphasis in original).

The Court noted that reporters were given transcripts of the tapes, which they were free to publish. Thus, the press was able to publish and utilize the exhibits that were in evidence as it saw fit. *Id.*

47. *Id.* at 609. The Court did not consider the issue in *Warner Communications* to be whether the press had a right of access to public information as to which public access is generally guaranteed. *See id.* Rather, the question was whether the press had a greater right of physical access than the public, such that the Watergate tapes presented as evidence at trial could be copied. *Id.*
Following Nebraska Press and Warner Communications, the Supreme Court in Gannett Co. v. DePasquale\(^{48}\) held that the public had no independent right of access to a pretrial judicial proceeding.\(^{49}\) In Gannett, the defendants were on trial for murder, and the judge excluded the public and press from a pretrial suppression hearing and prevented them from receiving an immediate transcript of the hearing.\(^{50}\) In finding no independent right of access to the trial, the Court stated that sixth amendment rights to a speedy and public trial were personal to the accused, and that the sixth amendment did not guarantee any right of access for the public.\(^{51}\) While the Court acknowledged the public's interest in open proceedings, it stated that this interest was adequately

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49. Id. at 370-71, 394. When the defense requested that the hearing be closed, the press, the prosecution, and the trial judge failed to object. Id. at 375. It was not until the following day that a right of access to the transcript was asserted by the press. Id. The Supreme Court framed the issue as follows:

   The question presented in this case is whether members of the public have an independent constitutional right to inspect upon access to a pretrial judicial proceeding, even though the accused, the prosecutor, and the trial judge all have agreed to the closure of that proceeding in order to assure a fair trial.

   Id. at 370-71.

50. Id. at 375. In Gannett, the defendants were charged with murder, robbery, and grand larceny. Gannett's two area newspapers had published reports that the two defendants had accompanied the murder victim to his boat, where evidence indicated the victim had been killed. Id. at 371-72. The newspapers carried several stories covering the apprehension of the defendants by the police and reports on the suspected motive for the crime. Id. at 372-73. The newspapers also carried the details of the arraignment of the defendants.

Following their arraignment, the defendants moved for the suppression of statements made to the police and for the suppression of physical evidence. Upon the request of defense counsel, who argued that the build-up of adverse publicity jeopardized the defendants' right to a fair trial, the court granted a motion to exclude the press and public from the suppression hearing. Id. at 376. When a reporter objected the next day to the closure of the suppression hearing, the trial judge responded that the hearing was concluded and that the decision on the immediate release of the hearing transcript had been reserved. Id. Gannett challenged the closure order, which eventually resulted in the appeal reaching the Supreme Court. Id. at 376-78.

51. Id. at 379-80. The Court stated that the right to a public trial, like other sixth amendment guarantees, is personal to the accused. Id. The Supreme Court stated that prior cases have uniformly recognized the tenet that the sixth amendment guarantee of a public trial is for the benefit of the defendant. Id. at 380-81 (citing In re Oliver, 333 U.S. 257 (1948); Estes v. Texas, 381 U.S. 532 (1965)).
protected by the trial participants in the adversarial system.\textsuperscript{52} The majority of the Justices deciding \textit{Gannett}, however, specifically pointed out that the Court was not addressing any first amendment issues.\textsuperscript{53}

In 1980, the Supreme Court held in \textit{Richmond Newspapers, Inc. v. Virginia}\textsuperscript{54} that the first amendment implicitly provided protection against

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\textsuperscript{52} \textit{Id.} at 383. The Court recognized that the public has an independent interest in the enforcement of sixth amendment guarantees, but concluded that the existence of such an interest does not create a constitutional right for the public. \textit{Id.} The Court observed that openness in judicial proceedings arguably improves the quality of testimony, causes trial participants to perform their duties more conscientiously, and gives the public an opportunity to observe the legal system. \textit{Id.} Nevertheless, the Court found that the public's interest in the administration of justice was protected by the participants in the litigation. \textit{Id.}

The four dissenters in \textit{Gannett}, on the other hand, argued that the sixth and fourteenth amendments prevented the state from conducting a pretrial suppression hearing in private without first giving full and fair consideration to the public's constitutionally protected interest. \textit{Id.} at 436 (Blackmun, J., concurring in part and dissenting in part).

\textsuperscript{53} \textit{Id.} at 392. The \textit{Gannett} majority noted that the Court need not reach any first amendment issues in the abstract. \textit{Id.} Thus, the Court did not decide whether the press and public had a first amendment right of access in this case. \textit{Id.} The Court decided the case on sixth amendment grounds but stated that even if a first amendment right was involved, the state court showed all necessary deference to any first amendment right. \textit{Id.} No spectator, nor the one reporter at the hearing, objected when the defendant made the motion for closure. \textit{Id.} Still, the reporter was given the opportunity to object to the closure at a later proceeding. \textit{Id.} At that time, the trial judge found that the probability of prejudice outweighed any right of access. \textit{Id.} at 392-93. Further, the Court noted that the denial of access was temporary and that a transcript of the hearing was made available when the danger of prejudicial publicity had passed. \textit{Id.} at 399. The press and public then had the opportunity to scrutinize the judicial proceedings. \textit{Id.} The Court also concluded that the ban on access was not absolute since the press had the opportunity to inform the public of the details of the pretrial hearing accurately and completely. \textit{Id.} \textit{Gannett}, however, was decided before the Court recognized a first amendment right of access in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion). For a discussion of \textit{Richmond Newspapers}, see infra notes 54-61 and accompanying text.

The later \textit{Richmond Newspapers} decision was criticized for not reconciling its holding with the holding in \textit{Gannett}. See BeVier, Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers, 10 Hofstra L. Rev. 311, 321 (1982). BeVier argues that the plurality opinion in \textit{Richmond Newspapers} failed to adequately explain why \textit{Gannett} was decided on sixth amendment grounds and \textit{Richmond Newspapers} on first amendment grounds. \textit{Id.} In the plurality opinion in \textit{Richmond Newspapers}, however, Chief Justice Burger distinguished \textit{Gannett} because it involved access to a pretrial suppression hearing and not a trial. 448 U.S. at 564 (plurality opinion).

On the other hand, the \textit{Gannett} dissenters argued that the sixth amendment provided protection for the public's right of access; therefore, they did not discuss the first amendment issue. \textit{Gannett}, 443 U.S. at 447 (Blackmun, J., concurring in part and dissenting in part). Only Justice Powell, in his concurring opinion, stated that the press had a first and fourteenth amendment right to be present at the pretrial hearing. \textit{Id.} at 397 (Powell, J., concurring).

\textsuperscript{54} 448 U.S. 555, 580 (1980) (plurality opinion). In \textit{Richmond Newspapers} the defendant, who was charged with murder, moved for the courtroom to be closed to the public. The prosecutor did not object, and the judge subsequently
the exclusion of the press from criminal trials. This right of access, closed the trial. Id. at 559-60. The plaintiff, Richmond Newspapers, then sought to have the trial opened. Id. at 560. The trial court denied the newspaper's motion to vacate the order closing the trial. Id. at 561. The Virginia Supreme Court denied the newspaper's petition for appeal, but the Supreme Court granted a petition for writ of certiorari to hear the case. Id. at 562-63.

While the Court did hold there was a first amendment right of access, there was no majority opinion. Chief Justice Burger wrote the plurality opinion and was joined by Justices White and Stevens. Id. at 558 (plurality opinion). The Chief Justice first reviewed the relevant history which showed that criminal trials have been presumptively open. Id. at 564-69 (plurality opinion). The plurality then focused on how an open trial system enhances the fairness and integrity of the judicial system. Id. at 569-73 (plurality opinion). For a further discussion of the plurality opinion, see infra notes 55-60 and accompanying text.

Justice Brennan, joined by Justice Marshall, filed a concurring opinion. In his concurrence, Justice Brennan focused on the structural role of the first amendment in finding a right of access to criminal trials. Id. at 587 (Brennan, J., concurring). For a further discussion of Justice Brennan's concurrence, see infra note 61 and accompanying text.

Justices Stewart and Blackmun also filed concurring opinions. In his concurrence, Justice Stewart recognized a constitutional right of access to trials, both criminal and civil, but stated that such access was not absolute. Id. at 599-600 (Stewart, J., concurring). Thus, Justice Stewart stated that reasonable limitations could be placed on unrestricted access to courtrooms. Id. at 600 (Stewart, J., concurring). Justice Blackmun concurred on the basis of his dissenting opinion in Gannett. For a discussion of Justice Blackmun's dissent in Gannett, see supra note 55 and accompanying text.

In a lone dissent, Justice Rehnquist argued that neither the first nor sixth amendment requires review by the Supreme Court when the defendant and prosecutor consent to a closure order by a judge. Id. at 605 (Rehnquist, J., dissenting). Justice Rehnquist argued that the issue was not one of first amendment versus sixth amendment rights, but rather that the question was whether the Constitution could be read to prevent a state trial judge from ordering closure of a trial. Id. at 606 (Rehnquist, J., dissenting).

While it can be said that the Supreme Court in Richmond Newspapers held there was a first amendment right to attend criminal trials, commentators have noted that the absence of a majority opinion and the number of divergent opinions makes it difficult to say much more about the decision with any certainty. G. Ferner & J. Koley, Access to Judicial Proceedings: To Richmond Newspapers and Beyond, 16 HARV. C.R.-C.L. L. REV. 415, 420-21 (1981). Although the judgment was by a margin of seven to one, the greatest number of Justices joining one opinion was three. Id. at 421 n.30. Moreover, as a result of the number of opinions, the decision in Richmond Newspapers lacked a unifying rationale. Bev-ier, supra note 53, at 313. Furthermore, the number of opinions implies intransigence and an absence of consensus among members of the Court concerning the access question. Id.

55. 448 U.S. at 580 (plurality opinion). The plurality stated that "the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated."

In a concurring opinion joined by Justice Marshall, Justice Brennan wrote that "[t]he instant case raises the question whether the First Amendment, of its own force and as applied to the States through the Fourteenth Amendment, secures the public an independent right of access to trial proceedings. . . . [t]he First Amendment secures such a public right of access. . . ." Id. at 584-85 (Brennan, J., concurring). Justice Stewart likewise found such a right exists: "[T]he
however, was not deemed to be absolute; the Court concluded that reasonable limitations could be imposed on the media's right of access.\textsuperscript{56} In its plurality opinion, the Court first focused on the fact that criminal trials were historically open.\textsuperscript{57} The plurality then found an implicit right

First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal." \textit{Id.} at 599 (Stewart, J., concurring) (footnote omitted).

While Justice Blackmun focused much of his concurring opinion on a sixth amendment analysis, he stated that "with the Sixth Amendment set to one side in this case, I am driven to conclude, as a secondary position, that the First Amendment must provide some measure of protection for public access to the trial." \textit{Id.} at 604 (Blackmun, J., concurring).

While the \textit{Richmond Newspapers} Court recognized a right of access to criminal trials, the Supreme Court has also discussed right of access questions in other contexts. Arguably, the Supreme Court has decided two lines of access cases. \textit{See Note, Public Trials and a First Amendment Right of Access: A Presumption of Openness,} 60 Neb. L. Rev. 169, 172-73 (1981). One line of cases consists of those decisions that involve a conflict between the sixth and first amendments, in other words, the fair trial-free press conflict. \textit{Id.} at 172. The other line discusses the public right of access to governmental institutions such as prisons, and to information. \textit{Id.} at 173. \textit{Richmond Newspapers} and \textit{Gannett} posed a question of access to governmental information within the fair trial-free press conflict. \textit{Id.} at 183-86. \textit{See also Comment, Is the Right of Access to Trials an Instance of a First Amendment Right to Know?} Richmond Newspapers v. Virginia, 42 Ohio St. L.J. 831 (1981) (framing question of access in terms of whether there is a constitutional guarantee that government information be available to public).

56. 448 U.S. at 581 n.18 (plurality opinion). Although the plurality noted that its holding did not mean that the first amendment rights were absolute, the Court did not define the circumstances under which a trial could be closed to the public. \textit{Id.} The plurality stated that while a judge may impose reasonable limitations on access to a trial, he may not exert control to deny or unwarrantedly abridge opportunities for the communication of thought. \textit{Id.} (citing Cox v. New Hampshire, 312 U.S. 569, 574 (1941)). For example, seating at trials is limited and not all those who would like to attend have the opportunity to attend the trial. In this type of situation, a court can impose reasonable restrictions on access. \textit{Id.}

57. \textit{Id.} at 563-75 (plurality opinion). In the plurality opinion, Chief Justice Burger traced the history of criminal trials to their early roots and found that the public character of criminal trials remained constant. Nothing in the review of the history of criminal trials, Chief Justice Burger wrote, suggested that the presumptive openness of the trial was not also an attribute of the judicial systems in colonial America. \textit{Id.} at 567 (plurality opinion). Justice Burger stated that "the historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial." \textit{Id.} at 569 (plurality opinion).

Furthermore, Chief Justice Burger argued that the history of open trials reflects the idea that public trials serve a significant therapeutic value. \textit{Id.} at 570 (plurality opinion). For example, when a shocking crime occurs, an open trial provides an outlet for community concern, hostility, and emotion. \textit{Id.} at 571 (plurality opinion). For the justice system to work effectively, Chief Justice Burger argued, the system must satisfy the appearance of justice, which is best provided by allowing people to observe the judicial process. \textit{Id.} at 571-72 (plurality opinion) (citations omitted). Finally, Chief Justice Burger concluded that this
of access in the first amendment guarantees of free press, free speech, and the right of assembly.\(^{58}\) The right to publish what takes place at a trial, the plurality concluded, would lose meaning if the press was denied access to a trial.\(^{59}\) While the Court in Richmond Newspapers specifically granted access to attend only criminal trials, the plurality noted that civil trials, as well as criminal trials, are presumptively open to the public and press.\(^{60}\) In a concurring opinion, Justice Brennan also found uncontradicted history implied that a presumption of openness inheres in the very nature of a criminal trial. \textit{Id.} at 573 (plurality opinion).

One commentator has argued that Chief Justice Burger derived the right of access from a presumption of openness that was inferred from historical practice. BeVier, \textit{supra} note 53, at 325. Professor BeVier criticized Chief Justice Burger's opinion because the opinion merely invoked history and did not provide any reason why historical practice was an appropriate source of a constitutional right. \textit{Id.} The opinion, she argued, delineated the relationship between a presumption of openness and a constitutional command of openness. \textit{Id.} Furthermore, the historical analysis in the opinion affirmed the virtues of openness rather than affirming the relevance of the history itself. \textit{Id.}

58. 448 U.S. at 577 (plurality opinion). The plurality noted that the right of access was guaranteed by an amalgam of the first amendment rights of speech and press. \textit{Id.} Additionally, the Court found the right of assembly relevant because it served as a catalyst to augment the free exercise of other first amendment guarantees, in addition to being regarded as an independent right. \textit{Id.} The plurality further stated that the first amendment, taken in conjunction with the fourteenth amendment, was written to prevent the abridging of the rights of free press, free speech, and free assembly. \textit{Id.} at 575 (plurality opinion). These freedoms, when taken together, ensured the free communication of information concerning governmental functions. The plurality found that the manner in which criminal trials were conducted was an aspect of government that was of great concern and importance to the people. \textit{Id.}

59. \textit{Id.} at 576-77 (plurality opinion). The plurality noted that the right to attend trials was a right exercised by the public less frequently today, because much of the information concerning trials reaches the public through the media. \textit{Id.} at 577 n.12 (plurality opinion). The plurality stated, however, that this did not alter the right. \textit{Id.}

60. \textit{Id.} at 577 & n.12 (plurality opinion). The issue of whether there was a right of access to civil trials was not raised in Richmond Newspapers. The plurality noted, however, that historically civil trials, as well as criminal trials, were presumptively open to the public. \textit{Id.} at 578 (plurality opinion). In addition, Justice Stewart stated in his concurrence that "the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal." \textit{Id.} at 599 (Stewart, J., concurring) (footnote omitted).

The Third Circuit recently held that there is also a constitutional right of access to civil trials. Publicker Indus. v. Cohen, 733 F.2d 1059 (3d Cir. 1984), \textit{noted in} the Third Circuit Review, 30 \textit{Vill. L. Rev.} 980 (1985). In Publicker, which involved a proxy fight, a motion was made to close the courtroom because of the sensitive nature of the information involved. In essence, the issue in the case was whether certain information should be released. 733 F.2d at 1063. The Third Circuit reviewed the Supreme Court's decisions in Richmond Newspapers and \textit{Globe Newspaper} and noted that two factors were important in a finding of a right of access to criminal trials: a historical presumption of openness and the role of access in guarding the integrity and fairness of the judicial process. \textit{Id.} at 1067-74 (citations omitted). The court concluded that these features of the criminal justice system also characterize the civil justice system. \textit{Id.} at 1070. The court stated that civil proceedings have been historically open and that both the
a right of access, but based the finding on the structural role the first amendment plays in maintaining America's republican form of govern-

tment and the judicial system benefit from the openness of civil trials. *Id.* at 1068-70. The court stated, however, that the right of access was not absolute, but rather the burden would be on the moving party to justify the closure. *Id.* at 1070-71.

Commentators have also argued that the constitutional right of access to trials applies to civil trials as well as criminal trials. See Ferner & Koley, *supra* note 54, at 430-32. Ferner and Koley argue that the *Richmond Newspapers* decision supports the conclusion that the right of access applies to civil trials. *Id.* at 430. As Ferner and Koley noted, the three-Justice plurality noted that civil trials have also been presumptively open and Justice Stewart, in his concurrence, specifically stated that there was a constitutional right of access to trials, both civil and criminal. *Id.* Furthermore, the authors argued that Justice Brennan's structural approach to the resolution of fair trial-free press questions supported the extension of the right of access to civil trials. *Id.* at 430. For a discussion of Justice Brennan's structural approach, see *infra* note 61 and accompanying text. Justice Powell's approach regarding constitutional protection for access to information about governmental affairs would also provide some measure of protection for access to civil proceedings. *Id.* at 430-31 (citing *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850-75 (1974) (Powell, J., dissenting)).

Another commentator has argued that there were two basic reasons why the Supreme Court found a right of access to criminal trials—the historical presumption of openness and the role access plays in the proper functioning of the judicial process, which would extend a right of access to civil trials as well. See *Note, The First Amendment Right of Access to Civil Trials After Globe Newspaper Co. v. Superior Court*, 51 U. Chi. L. Rev. 286, 290 (1984). The reasoning applied in finding a right of access to criminal trials would also lead to the conclusion that there was a right of access to civil trials. Historically, civil trials have also been open to the public. See *id.* at 294-96. Until the tenth century there was no distinction between civil and criminal matters. *Id.* at 294. When a distinction was made between criminal and civil procedure, public attendance at trial did not seem to be one of the distinctions. *Id.* at 295. Early commentators, therefore, expressly or implicitly recognized that civil trials were open to the public. *Id.* Today, the Federal Rules of Civil Procedure provide that civil trials take place in open court and that the testimony of witnesses be taken in open court. *Id.* at 296 (citing Fed. R. Civ. P. 77(b), 43(a)).

In addition to civil trials being historically open, this commentator argued that there are important public interests to be served by public attendance at civil trials. *Id.* at 297-98. Arguably, open civil trials protect the goals of informed public discussion and self-government, goals enunciated in *Globe Newspaper*. *Id.* at 297 (citing *Globe Newspaper*, 457 U.S. at 604-06). Many civil suits concern the vindication of constitutional and statutory policies, and civil suits often involve issues such as school desegregation, prison reform, environmental pollution, and corporate misconduct. *Id.* (citations omitted). Furthermore, civil suits concern the functioning of the government and because over half the federal and state courts' caseload is civil, to deprive access to civil trials would deprive the public of the opportunity to scrutinize much of the judicial process. *Id.* at 298.

Although there is a strong argument that a constitutional right of access to civil trials exists, some states that allow cameras in their courthrooms distinguish access to trials on the basis of whether the trial is civil or criminal. *See generally* Dennison, *Cameras in the Courtroom 1982*, QUILL, March 1982, at 24-25. Still, coverage of civil trials, which often are of less interest to the media, is allowed only slightly more often than coverage of criminal trials. *Id.* at 22.
Due to the divergence of the theories relied upon by the plurality and Justice Brennan, the scope of the right of access recognized in *Richmond Newspapers* was unclear. The Court, however, later recognized that the guarantee of open proceedings included access to voir dire examination of potential jurors in a criminal case.

61. 448 U.S. at 587 (Brennan, J., concurring). Justice Brennan began with the proposition that previous Supreme Court decisions must be read to hold that any privilege of access to governmental information is subject to restraint to the degree dictated by the nature of the information and the countervailing interests in security and confidentiality. *Id.* at 586 (Brennan, J., concurring) (citations omitted). Thus, Justice Brennan argued that these cases simply reflected the special nature of a claim of a first amendment right to gather information. *Id.* In addressing the structural role that the first amendment plays, Justice Brennan wrote:

[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government. . . . Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open," New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.

*Id.* at 587-88 (Brennan, J., concurring) (emphasis in original) (citation and footnotes omitted). Because this reasoning could extend protection of public access to unworkable extremes, Justice Brennan wrote that the structural analysis must be invoked with discrimination and temperance. *Id.* at 588 (Brennan, J., concurring). Justice Brennan articulated two guiding principles: First, the case for access has special force when it is drawn from an enduring and vital tradition of public entry to particular proceedings or information. Second, the value of access must be measured in specifics; in other words, the analysis should focus on whether access to particular government process is important in terms of that process. *Id.* at 589 (Brennan, J., concurring).

Justice Brennan then stated that history and previous Supreme Court decisions indicated the public character of the trial process. *Id.* at 590-99 (Brennan, J., concurring). He noted that open trials play a fundamental role in furthering the efforts of the judicial system to assure criminal defendants a fair trial. *Id.* at 593 (Brennan, J., concurring). By playing a pivotal role in the judicial process, access, by extension, plays a pivotal role in the form of government. *Id.* at 595 (Brennan, J., concurring). On the basis of these factors, Justice Brennan concluded that the balance was tipped strongly in favor of the rule that trials be open. *Id.* at 598 (Brennan, J., concurring).

62. For a discussion of the limited nature of the *Richmond Newspapers* holding, see supra note 54.

63. Press-Enterprise & Co. v. Superior Court of Cal., 464 U.S. 501 (1984). In this case, Press-Enterprise moved that the voir dire examination of jurors in the trial of a man charged with raping and murdering a teenage girl be open to the public. *Id.* at 503. While the voir dire lasted six weeks, only three days of the proceedings were open to the public. *Id.* The Court first recognized the importance of the jury selection process to the criminal justice system. *Id.* at 505. Next, the Court traced the development of the jury selection process and found that historically it had been presumptively open. *Id.* at 505-08. In addition, the
The Supreme Court, however, further defined its Richmond Newspapers decision in Globe Newspaper Co. v. Superior Court. In Globe Newspaper, the Court reviewed a Massachusetts law that prohibited access to trials during the testimony of a minor who was the victim of a sexual offense. The Court held that this mandatory closure rule violated the first amendment. Justice Brennan, who wrote the majority opinion, cited two basic reasons why the right of public access to criminal trials is protected by the first amendment. First, criminal trials historically have been open to the public and, over time, this presumption of openness has remained secure. Second, public access to criminal trials plays an important role in the proper functioning of the judicial and governmental processes.

The Globe Newspaper Court reiterated that while the right of access is constitutionally guaranteed, it is not an absolute right. Still, to successfully exclude the public and press from a trial, the Court held that the state must show a compelling governmental interest. In addition, an order preventing access must be narrowly drawn to serve this com-

Court recognized the important role open trials play in assuring fairness in the criminal justice system. Id. at 508. While closed proceedings are not absolutely precluded, the Court found that closed proceedings must be rare and occur only when the cause shown outweighs the value of openness. Id. at 509. The trial court must consider alternatives to closure; otherwise the voir dire proceeding may not be constitutionally closed. Id. at 511.

64. 457 U.S. 596 (1982).
65. Id. at 598. The Massachusetts law required trial judges to exclude the press and public from the courtroom during the testimony of a minor victim of certain sexual offenses. Id.
66. Id. at 610-11 & 611 n.27. The Globe Newspaper Court limited its holding to the confines of the case, holding that “a rule of mandatory closure respecting the testimony of minor sex victims is constitutionally infirm.” Id. at 611 n.27. Still, the Court noted that such closure may be appropriate in individual cases. Id.
67. Id. at 602. The Court stated: “This uniform rule of openness has been viewed as significant in constitutional terms not only ‘because the Constitution carries the gloss of history,’ but also because ‘a tradition of accessibility implies the favorable judgment of experience.’” Id. at 605 (quoting Richmond Newspapers, 448 U.S. at 589 (Brennan, J., concurring)). Further, the Court noted that it was unable to find any United States case in which criminal proceedings were held in camera. Id. For a discussion of why the Massachusetts statute was found unconstitutional, see infra note 72 and accompanying text.
68. 457 U.S. at 605. The Court recognized that access to trials allows for public scrutiny of the judicial process, which in turn enhances the integrity of the fact-finding process. Thus, access benefits both the defendant and the public. Id. In addition, the Court concluded that open trials result in an appearance of fairness that increases the public’s respect for the judicial process. Id.
69. Id. at 606 (citing Richmond Newspapers, 448 U.S. at 581 n.18 (plurality opinion)). For a discussion of this portion of the Richmond Newspapers opinion, see supra note 55.
70. 457 U.S. at 606-07. One commentator has suggested several interests that arguably are compelling. Note, supra note 55, at 299-310. These interests would include the protection of national security interests, protection of trade secrets, protection of juveniles, and protection of personal privacy. Id.
pelling governmental interest.⁷¹ Although the Court found that the state's interest in protecting minors was a compelling one, the Court held that the mandatory closure rule did not constitutionally deny access because the statute was not narrowly tailored to meet the state's interest.⁷²

In the Richmond Newspapers and Globe Newspaper decisions, the Supreme Court recognized that restrictions on access which resemble time, place, and manner restrictions would not be subject to the same strict scrutiny as would restrictions that completely banned access.⁷³ On

⁷¹ 457 U.S. at 606-07. The Court stated: [T]he circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.

Id. (citations omitted).

Chief Justice Burger in a dissenting opinion joined by Justice Rehnquist argued that the Court's decision grossly invaded Massachusetts' state authority. Id. at 612-13 (Burger, C.J., dissenting). In addition, the dissenters argued that the media was not denied access to the information about what took place at the trial, rather the media was only prevented from witnessing the testimony. Id. at 615 (Burger, C.J., dissenting).

⁷² Id. at 610-11. The state asserted that it had interests both in protecting minor victims of sex crimes from further trauma and in encouraging such victims to come forward and testify in a truthful and credible manner. Id. at 607. While the Court found the interest in safeguarding the physical and psychological well-being of a minor to be a compelling one, it also found that a mandatory closure rule was not justified. Id. at 607-08. A decision on closure should be made on a case by case basis, the Court concluded, since the significance of the interest may vary in particular cases. Id. at 608. As to the state's second stated interest, encouraging victims to testify truthfully, the Court found that the state had provided no empirical evidence that a mandatory closure rule would encourage minor victims to come forward to testify. Id. at 609. The Court further reasoned that the interest in encouraging victims to come forward could not be limited to minor victims of sex crimes. Thus, the Court concluded that Massachusetts' argument based on this interest was overbroad, running contrary to the presumption of openness in criminal trials. Id. at 610.

⁷³ See Globe Newspaper, 457 U.S. at 607 n.17 (limitations on right of access that resemble time, place, and manner restrictions are not subject to same strict scrutiny as when access is completely denied); Richmond Newspapers, 448 U.S. at 581 n.18 (plurality opinion) (just as government may impose reasonable time, place, and manner restrictions on use of streets for free flow of traffic, trial judges, in the fair administration of justice, may impose reasonable limitations on access to trial; this would include limitations on seating); id. at 600 (Stewart, J., concurring) (just as legislature may impose reasonable time, place, and manner restrictions upon exercise of first amendment freedoms, trial judges may impose reasonable limitations upon unrestricted occupation of courtroom).

Ferner and Koley have also recognized the necessity of reasonable controls unrelated to the content of the proceeding. Ferner & Koley, supra note 54, at 444. They suggest that such restrictions would allow preferential access to judicial proceedings for the media, screening of spectators for weapons, and reasonable restrictions on access to exhibits if unrelated to the content or substance of
previous occasions, the Court stated that reasonable regulation of the
time, place, or manner of protected speech was permitted under the first
amendment when the regulations were necessary to further significant
governmental interests.\textsuperscript{74} Such time, place, and manner restrictions,
however, may not be based on the subject matter or content of the
speech\textsuperscript{75} and must leave ample alternative channels for
communication.\textsuperscript{76}

the exhibit. \textit{Id.} at 444-46. The authors point out, however, that while such de-
nial of access might be justified, such a restriction is not the same as being able
to prevent the publication of information once it is known. \textit{Id.} at 446.

For a discussion of the application of a time, place, and manner analysis to a
case involving the access of cameras to a courtroom, see \textit{infra} notes 86-88 and
accompanying text.

\textsuperscript{74} Young v. American Mini Theatres, Inc., 426 U.S. 50, 64 n.18 (1976)
(citing Kovacs v. Cooper, 336 U.S. 77 (1949) (limitation on use of sound trucks),
Cox v. Louisiana, 379 U.S. 559 (1965) (ban on demonstrations in or near court-
house with intent to obstruct justice), Grayned v. City of Rockford, 408 U.S. 104
(1972) (ban on willful noisemaking near school that disturbs order of school
session)).

In \textit{Young}, the city of Detroit had adopted a zoning ordinance that differenti-
ated between picture theaters that showed sexually explicit films and
theaters that did not show such movies. 426 U.S. at 53. In effect, the zoning
ordinance required that the adult theaters be dispersed. \textit{Id.} In finding the zon-
ing ordinance valid, the Court held that the regulation of location of adult film
theaters did not offend the first amendment. \textit{Id.} at 64.

\textsuperscript{75} See Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065

\textsuperscript{76} \textit{Id.} at 3069. In \textit{Clark}, the Supreme Court considered whether a National
Park Service regulation, which prohibited camping in certain parks, violated the
first amendment when it was used to prohibit demonstrators from camping over-
night at a Washington, D.C., park. \textit{Id.} at 3067. This demonstration was in-
tended to call attention to the plight of the homeless. \textit{Id.} at 3068. The Park
Service gave permission for a demonstration in the park, but had denied permis-
sion for the demonstrators to camp overnight in the park. \textit{Id.}

The Court stated that restrictions of the type at issue in \textit{Clark} are valid when
they (1) are made without reference to the content of the regulated speech,
(2) are narrowly tailored to serve a significant governmental interest, and
(3) leave open alternative channels for communication of the information. \textit{Id.} at
3069 (citing City Council v. Taxpayers for Vincent, 104 S. Ct. 2118 (1984);
Educators' Ass'n, 460 U.S. 37 (1983); Heffron v. International Soc'y for Krishna
Consciousness, 452 U.S. 640 (1981); Virginia Pharmacy Bd. v. Virginia Citizens
Consumer Council, 425 U.S. 748 (1976); Consolidated Edison Co. v. Public Ser-
vice Comm'n, 447 U.S. 530 (1980)).

The Court concluded that the Park Service regulation was a time, place,
and manner regulation. 104 S. Ct. at 3069. Because the Park Service allowed the
demonstration, but did not permit the demonstrators to camp, the regulation
was directed only at the manner of the demonstration. \textit{Id.} The Court also con-
cluded that the regulation was content neutral, because there was no argument
that the prohibition against camping was directed at the content of the demon-
strators' speech. \textit{Id.} at 3070. Furthermore, the regulation narrowly focused on
the Government's substantial interest in maintaining national parks. \textit{Id.} While
the Court assumed that actually camping at the park would involve an element
of expression, its major function with respect to the planned demonstration
would be facilitative; i.e., those who were actually homeless would be en-
III. THE CONTINUING BAN OF CAMERAS FROM FEDERAL COURTROOMS

The Supreme Court's analysis of the media's first amendment right of access to criminal trials raises the question of whether a total ban of cameras from federal courtrooms violates the Constitution.\textsuperscript{77} The Eleventh Circuit in Hastings v. United States\textsuperscript{78} recently discussed the absolute ban of cameras from federal courtrooms.\textsuperscript{79} In Hastings, a news organization was encouraged to come to the park to sleep. \textit{Id.} The Court also rejected the argument that there was a less restrictive alternative because of the threat of damage to the park by allowing people to camp overnight on park land. \textit{Id.} at 5072.

Similarly, in Consolidated Edison, the issue was whether the first amendment was violated by an order of the Public Service Commission of New York (Commission) that prohibited Consolidated Edison from including inserts, which discussed controversial issues, in monthly electric bills. 447 U.S. at 533. Consolidated Edison had placed bill inserts that expressed its view on the benefits of nuclear power. \textit{Id.} In the opinion of the Court, Justice Powell stated that one determination the Court had to make was whether the prohibition was a reasonable time, place, or manner restriction. \textit{Id.} at 536. In reviewing this question, the Court presented an overview of cases that have fleshed out the time, place, and manner analysis.

The Court first recognized that reasonable time, place, or manner restrictions are valid if they serve a significant government interest and leave ample alternative channels for communication. \textit{Id.} (citing Linmark Assocs. v. Willingboro, 431 U.S. 85 (1977); Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Kovacs v. Cooper, 336 U.S. 77 (1949)). The Court also noted that a restriction that regulates only time, place, or manner may be imposed if it is reasonable, but if the regulation is based on the content of the speech the governmental action must be scrutinized more carefully. \textit{Id.} at 537. Because governmental action that regulates content is not neutral, a permissible time, place, and manner regulation may not be based on the content or subject matter of the speech. \textit{Id.} (citations omitted). In Consolidated Edison, the Commission admitted that its actions were related to the content of the inserts. Thus, the prohibition could not be upheld as a valid time, place, and manner restriction. \textit{Id.} at 538.

77. For a discussion of the media's first amendment right of access, see supra notes 54-61 and accompanying text.

78. 695 F.2d 1278 (11th Cir.), cert. denied, 103 S. Ct. 2094 (1983). The defendant Hastings, a federal judge, was indicted for conspiracy and obstruction of justice. 695 F.2d at 1279 n.6. This indictment accused Hastings of accepting a bribe from an undercover agent posing as a criminal defendant. \textit{Id.} Hastings favored televising the trial, arguing that it would serve to restore his reputation. \textit{Id.}

79. In addition to Hastings, two other circuit courts have faced similar questions. See United States v. Kerley, 753 F.2d 617 (7th Cir. 1984); United States v. Yonkers Bd. of Educ., 747 F.2d 111 (2d Cir. 1984). For a discussion of Kerley, see infra notes 89-94 and accompanying text.

In Yonkers Board, a newspaper reporter sought to bring a tape recorder into a federal courtroom. 747 F.2d at 112. Under a local federal court rule, cassette recorders were not allowed in the courtroom. \textit{Id.} In its opinion, the appellate court argued that Supreme Court decisions limited the right of access to trials to physical presence. \textit{Id.} at 113. Because the local rule did not prevent the reporter's right of access and did not prohibit him from communicating what he observed to his readers, the rule was a time, place, and manner restriction that was to be upheld if it was reasonable. \textit{Id.} at 114. The Second Circuit found that the rule was reasonable because witnesses could be distracted by the presence of a tape recorder and tape recorders would also detract from the dignity of the
tion sought to televise a trial in federal court, and the criminal defendant also requested that the court permit coverage of the trial. In refusing to open the trial to television cameras, the Eleventh Circuit rejected the television station's first amendment challenge to the federal court system's total ban on cameras in the courtroom. While indicating that television coverage of courtroom proceedings was not constitutionally prohibited, the Hastings court stated that this did not necessarily lead to the conclusion that television coverage was constitutionally mandated. Because the television station asserted a first amendment right to record and broadcast the trial, the court found the television station's request to televise the trial more analogous to the request for the Watergate tapes in Warner Communications than to the media's request for access in Richmond Newspapers and Globe Newspaper.

courtroom. Id. In addition, allowing indiscriminate recording of trials could undermine the official reporting system. Id. Thus, the rule was found to be constitutional. Id.

80. 695 F.2d at 1279. In Hastings, the defendant moved to allow the trial to be televised. Id. Post-Newsweek Stations, which represented the interests of several news organizations, filed a motion to intervene. Id. at 1280. The district court denied both of these motions. Post-Newsweek then filed a motion with the circuit court for an expedited appeal, and the court granted the motion. Id. The defendant did not join the appeal but did file an amicus brief. Id.

81. Id. at 1284. The Hastings court reasoned that the use of cameras in federal courtrooms should not be fixed in "constitutional concrete," but should instead be addressed through rulemaking authority. Id. The court concluded that first amendment concerns would be advanced only minimally by allowing media access. On the other hand, the institutional interests in protecting the trial process would be served by regulating cameras in the courtroom through the courts' rulemaking authority. Id.

82. Id. at 1280. The court interpreted recent Supreme Court decisions as holding that television coverage of a criminal trial is not inherently unconstitutional because a defendant's right to due process is not necessarily violated by the presence of cameras in the courtroom. Id. (citing Chandler, 449 U.S. at 574-81). The court stated that although Supreme Court rulings stand for the proposition that the press has a right of access to observe criminal trials, such rulings are not dispositive of the issue of whether cameras must be permitted in federal courts. Id. (citing Globe Newspaper, 457 U.S. at 606-11; Richmond Newspapers, 448 U.S. at 579-81).

83. Id. at 1281. In Warner Communications, the request had been to copy and publish tape recordings that had been admitted into evidence. In Richmond Newspapers and Globe Newspaper, the press sought the right to attend judicial proceedings that had been closed to both the press and the public. The Hastings court concluded that a request to televise a trial more closely approximated the request in Warner Communications. Id. For a discussion distinguishing the request in Hastings from the request in Globe Newspaper, see infra note 129 and accompanying text.

It is important, however, to recognize two aspects of the Supreme Court's decision in Warner Communications. First, it was decided in 1978, before the Richmond Newspapers decision. 435 U.S. at 589. Second, the Court viewed Warner Communications as involving access to judicial records, rather than access to the proceedings themselves. Id. at 591-609. For a discussion of Warner Communications, see supra notes 43-46 and accompanying text. For a discussion of Richmond Newspapers, see supra notes 54-61 and accompanying text.
The Hastings court also sought to distinguish the Supreme Court's decision in Globe Newspaper, which held that a per se exclusion of the public violates the first amendment.\textsuperscript{84} While the local court rules for all federal district and circuit courts prohibit access of cameras to the courtroom,\textsuperscript{85} the Hastings court concluded that this exclusion does not foreclose public scrutiny of the trial in any way, unlike a rule that completely closes a trial during a victim's testimony, as did the rule in Globe Newspaper.\textsuperscript{86} In addition, the Eleventh Circuit held that the federal courts' per se exclusion of cameras is a reasonable time, place, and manner restriction.\textsuperscript{87} The court reasoned that the per se exclusion is a reasonable restriction because the additional benefit of allowing cameras in the courtroom would advance first amendment concerns only minimally, while judicial economy and efficiency are served significantly by the per se exclusion.\textsuperscript{88}

\textsuperscript{84} For a discussion of Globe Newspaper, see supra notes 64-72 and accompanying text.

\textsuperscript{85} For a discussion of the local federal court rules, see supra note 30 and accompanying text.

\textsuperscript{86} 695 F.2d at 1281. The Eleventh Circuit stated that the rules which ban cameras from federal courthouses are significantly different than the state statute that was challenged in Globe Newspaper. \textit{Id.} In Globe Newspaper, the Massachusetts statute permitted the courtroom to be closed during a minor victim's testimony at a sex offender's trial. 457 U.S. at 598. At the trial of a sex offender, the victim's testimony is likely to be the most critical evidence presented at the trial, and under the Massachusetts statute, it would be obscured from public view. Hastings, 695 F.2d at 1281. The Hastings court reasoned, however, that with the ban against cameras in the courtroom, public scrutiny of the trial, or any portion of the trial, would not be foreclosed. \textit{Id.}

The Eleventh Circuit did not take note that, under the circumstances in Globe Newspaper, the press could have gained access to the record, although they could not be present during the testimony. \textit{See} 457 U.S. at 615 (Burger, C.J., dissenting).

\textsuperscript{87} 695 F.2d at 1282. The Hastings court found that the federal rules banning cameras in federal courthouses were merely a restriction on the manner of the media's news gathering activities, since the press was able to attend the trial and report on what occurred. \textit{Id.} Thus, the Hastings court concluded that a strict scrutiny standard was not applicable. \textit{Id.} Rather, the court stated that the proper standard for determining the reasonableness of such a restriction was whether the restriction promoted a significant governmental interest without unwarrantedly abridging communication of thought. \textit{Id.}

\textsuperscript{88} \textit{Id.} After determining the applicable standard of review, the court discussed the competing interests to be weighed. \textit{Id.} at 1282. In this particular case there was no fear of harming the defendant's right to a fair trial since the defendant expressly waived any such objections. \textit{Id.} at 1283. The defendant Hastings had requested that the court permit the trial to be televised. \textit{Id.} at 1279.

The court noted that there are two institutional considerations that support the ban of cameras from federal courthouses. First, there is an institutional interest in preserving order and decorum in the court. Second, there is an interest in procedures designed to ensure a fair trial and increase the truth-seeking function of a trial. \textit{Id.} at 1283.

The court also listed the factors favoring media coverage of trials. \textit{Id.} First, the right of access fosters public confidence in the fairness of the criminal justice
The Seventh Circuit reached a result similar to that of the *Hastings* court in *United States v. Kerley.* In *Kerley,* the defendant sought to photograph and broadcast his court proceedings. After finding that such coverage was prohibited by the Federal Rules of Criminal Procedure, the *Kerley* court turned to the first and sixth amendment questions presented in the case. The court found that the sixth amendment right to a public trial did not guarantee the defendant the right to broadcast his trial. Additionally, in discussing the first amendment considerations, the court found that the ban of cameras from federal courtrooms was a time, place, and manner regulation. The court found that the restriction on the access of cameras represented a limitation on access rather than a denial of access. Because the interests in denying access outweighed the marginal gains of allowing access, the rule against cameras in the courtroom was not unreasonable.

89. 753 F.2d 617 (7th Cir. 1984).

90. *Id.* at 617. In *Kerley,* the defendant was indicted for failing to register for the draft. The defendant filed a pretrial motion requesting permission to photograph, record, and broadcast the court proceedings. *Id.* The motion was denied pursuant to rule 55 of the Federal Rules of Criminal Procedure, which bans cameras from federal courtrooms. *Id.* at 618.

91. *Id.* at 620. The court stated that the Supreme Court has expressly rejected such an extension of sixth amendment rights. *Id.* (citing *Warner Communications,* 435 U.S. at 610). For a discussion of *Warner Communications,* see supra notes 44-47 and accompanying text.

92. 753 F.2d at 620. In its analysis of first amendment rights, the court cited the rationale of the *Hastings* court. The court stated that because the restrictions at issue regulated only the time, place, and manner of newsgathering activities, they would be upheld if they were neutral and reasonable. *Id.* Thus, the court focused its inquiry on whether rule 55 unwarrantedly abridged the opportunities for communication of thought. *Id.* (citations omitted).

93. *Id.* at 620-21. Consequently, the limitation on access was not subject to the same strict scrutiny as a denial of access. *Id.* at 620.

94. *Id.* at 621-22. While there were benefits in broad access to trials, the court stated that the marginal gains resulting from allowing cameras into an already public trial did not outweigh the risks and uncertainties associated with allowing cameras in the courtroom. *Id.* at 621. There are also potential distractions and interests in judicial decorum threatened by cameras in the courtroom. *Id.* at 622. Thus, the nondiscretionary prohibition of cameras was not unreasonable. *Id.*
The Second Circuit also wrestled with the issue of cameras in federal courtrooms in *Westmoreland v. CBS*.\(^{95}\) In *Westmoreland*, the Cable News Network sought to televise the courtroom proceedings\(^{96}\) of the libel suit General William Westmoreland brought against CBS for charges made on the news show *Sixty Minutes*.\(^{97}\) In discussing the first amendment issues implicated in the request to televise the trial, the court recognized the first amendment right of access to trials.\(^{98}\) The court stated, however, that it was unprepared to take the leap from the constitutional right of access to a finding that a right to televise trials exists under the first amendment.\(^{99}\) Although the court found that a

95. 752 F.2d 16 (2d Cir. 1984), *cert. denied*, 53 U.S.L.W. 3882 (U.S. June 17, 1985) (No. 84-1377).

96. 752 F.2d at 17. The court framed the issue presented by Cable News Network by stating:

This case presents the novel question whether a cable news network has a right to televise a federal trial and the public a right to view that trial—where the court is adjudicating a civil action, where both parties have consented to the presence of television cameras in the courtroom under the close supervision of a willing court, but where a facially applicable court rule prohibits the presence of such cameras.

*Id.*

The Cable News Network argued that because of the extraordinary nature of the Westmoreland trial, the application of a rule prohibiting television coverage was beyond the powers of the court and a violation of both the network’s and the public’s first amendment rights. *Id.* The news organization further asserted that the issues of the trial were of particular importance because the substantive issues in *Westmoreland* implicitly mirror the institutional tensions raised before this court—in *Westmoreland*, one party seeks redress of injury flowing from statements asserting that the Government withheld information from the public in order to insulate the Government from public scrutiny; while the other party, seeking to defend the integrity of those statements, implicitly defends the integrity of the medium through which those statements were made.

*Id.*

97. See *Westmoreland v. CBS*, 596 F. Supp. 1166, 1169 (S.D.N.Y.). One allegation at issue was whether officers high in the United States military command had willfully distorted intelligence data to substantiate optimistic reports about the progress of the Vietnam war. *Id.*

98. 752 F.2d at 22. The Second Circuit noted that this right of access under the first amendment is based on the understanding that “a major purpose of that Amendment was to protect the free discussion of governmental affairs.” *Id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). The court further recognized that public access to civil trials is secured by the first amendment since such access “enhances the quality and safeguards the integrity of the factfinding process.” *Id.* at 23 (quoting *Globe Newspaper*, 457 U.S. at 606). However, the court rejected the argument that the right to access includes the right to televised trials. *Id.* The Second Circuit noted that “no case . . . has [ever] held that the public has a right to televised trials.” *Id.* at 22.

99. *Id.* at 23. The court stated:

There is a long leap, however, between a public right under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised. It is a leap that is not supported by history. It is a leap that we are not yet prepared to take.

*Id.* In support of its conclusion, the court cited a finding of an ad hoc committee
right to televise trials does not currently exist, it stated that when judicial concerns with the difficulties of televising a trial are diminished, the presumption may shift in favor of allowing television coverage. 100

While the federal courts maintain a total ban against cameras in the courtroom, a majority of the state judicial systems allow cameras in their courtrooms, although not under a constitutional mandate. Approximately forty states allow television coverage, but the types of coverage allowed varies from state to state. 101

of the Judicial Conference . . . that the risks to the administration of justice outweighed the benefits of changing the rules currently governing media coverage of federal proceedings. Id. at 23 n.10 (citing REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON CAMERAS IN THE COURTROOM 5 (Sept. 6, 1984)). The court admitted, however, that at some point in the future the presumption might be in favor of allowing cameras in the courtrooms. Id. at 23. For a further discussion of this issue, see infra note 100 and accompanying text.

Although the majority touched upon the first amendment implications of its decision, these implications were more fully discussed in the concurrence by Judge Winter. Judge Winter concurred in the result in Westmoreland, but disagreed with the rationale of the majority opinion. 752 F.2d at 24 (Winter, J., concurring). Judge Winter found that the first amendment is implicated in a request to televise a trial, but that the rule prohibiting cameras in federal court was a valid time, place, and manner restriction. Id. at 24-25 (Winter, J., concurring). Judge Winter rejected the Cable News Network's contention that a per se rule banning cameras in the courtroom was unconstitutional because of his concern that workable standards could not be created to allow for a case-by-case determination. Id. at 25 (Winter, J., concurring). Furthermore, he stated that a per se rule is a justifiable time, place, and manner restriction notwithstanding uncertainty that a case-by-case approach would be unworkable; it is enough that there is a reasonable belief that the potentially undesirable effects of television cannot be detected on a case-by-case basis. Id. at 26 (Winter, J., concurring).

100. 752 F.2d at 23. The court stated that after experimentation with cameras in courtrooms, a time may come when concerns with the expenditure of judicial time on administration, with the potentially adverse effects on jurors and witness, and with retaining courtroom dignity are secondary or irrelevant. Id. If such a time comes, the court stated that the presumption may be that all trials should be televised. Id. The court thus found that until the first amendment expands to include television access to courtrooms, the right to televise federal trials is created by the consent of the judiciary. Id. at 24.

It is submitted that the Westmoreland court premised its first amendment analysis on the finding that television coverage is disruptive to courtroom proceedings. For a discussion of the court's findings in this regard, see supra note 99 and accompanying text. The Second Circuit thereby avoided a discussion of whether television access itself is constitutionally protected, and merely concluded that for the present time judicial concerns override the interests served by allowing television coverage of trials.

101. See Westmoreland v. CBS, 596 F. Supp. 1166, 1168 (S.D.N.Y. 1984). In Westmoreland, the district court cited a statistic, provided by Cable News Network, which indicated that 41 states allow television coverage of courtroom proceedings in some form. Id. See also Denniston, supra note 60, at 22-25. Denniston provided a comprehensive survey, conducted about two years prior to the Westmoreland decision, of the type of television coverage allowed in those states that permit television coverage of judicial proceedings. In 1982, 35 states allowed television coverage in some form. Id. at 22. Many of these states have only allowed television coverage since 1979. Id. For a discussion of the types of coverage states allow, see infra notes 102-105 and accompanying text.
experiment with cameras in the courtroom, it will only allow coverage of appellate proceedings on the theory that the risk of distraction is lessened when there are no jurors, witnesses, or presentations of evidence. The states may then extend the coverage to allow television broadcast of trials. When such coverage is allowed, a number of states have enacted veto provisions which permit a trial participant to withhold consent to the coverage. This veto power may be total or partial and can be in the hands of the judge, defendant, prosecutor, witness, juror, or any combination of the participants. These veto provisions continue to exist even though the Supreme Court, in Chandler, held that a veto provision was not constitutionally required.

In the meantime, efforts have been made to provide guidelines for the use of television cameras in the courtroom. In 1968, the ABA drafted standards for balancing the interests of a fair trial and a free press. These standards were met with criticism from the media because a primary goal of the ABA's report was to prevent judges and attorneys from revealing certain types of information to the press. As

102. Denniston, supra note 60, at 24. Denniston commented: [A]ppeals hearings are usually short on drama and long on technical legal argument. Indeed, they are not often considered to be very newsworthy events by news directors normally eager to have the courts covered by TV and radio. An appeals-only rule thus tends to mean that the cameras won't be around much of the time.

103. Id. When trials are made accessible to cameras, the news potential increases dramatically and news organizations become more interested in broadcasting the trial. Id.

104. Id. If the veto is total, then cameras are not allowed any access to the proceedings when a participant objects. If the veto is partial, the cameras can cover the trial, but the camera may have to be turned off at certain times or not be directed at the objecting individuals. Id. A majority of states that allow cameras in their courtrooms retain at least a partial veto, even though a veto provision is not constitutionally mandated. See Chandler, 449 U.S. at 577. In 1982, 24 states allowed cameras to cover criminal trials and 13 had veto provisions. But of the 26 states that allowed coverage of civil trials only eight provided for a veto by the parties or lawyers. Denniston, supra note 60, at 24. For a listing of the various veto provisions implemented by the states, see id. at 22-23.

105. Denniston, supra note 60, at 22. Experience shows that judges are not quick to use their veto power, while other trial participants use their veto power much more frequently. Id. Defense attorneys almost always invoke their veto, as demonstrated by the experience in the Florida program which allowed cameras in its courtrooms. Id.

106. Chandler, 449 U.S. at 569-83. For the Chandler Court's discussion of the veto provision, see supra note 24 and accompanying text.

107. H. Nelson & D. Teeter, supra note 1, at 283. These standards were drafted by a committee headed by Massachusetts Supreme Court Justice Paul Reardon, thus the committee's report became known as the Reardon Report. Id. For a discussion of the current ABA standards on fair trial-free press, see infra notes 110-111 and accompanying text.

108. H. Nelson & D. Teeter, supra note 1, at 283. The 1968 ABA report focused on matters attorneys and judges should not discuss during the course of a trial in order to protect the defendant's rights. Id. This restriction on the flow
a result, the press and ABA worked jointly in a number of states to draft guidelines for the coverage of criminal trials.\textsuperscript{109}

Additionally, the ABA recently adopted standards that would not prohibit television coverage of trials.\textsuperscript{110} In its fair trial-free press standards and its code of judicial conduct, the ABA provided for the televising of judicial proceedings if the coverage was consistent with the right to a fair trial.\textsuperscript{111} The new fair trial-free press standard allows cameras in the courtroom; previous to its adoption, the standards were silent on the right of access of cameras to the courtroom. This standard, adopted in 1982, was prompted by the Supreme Court’s decision in \textit{Chandler}.\textsuperscript{112}

\section*{IV. \textbf{Analysis: An Absolute Ban of Cameras from Courtrooms Violates the First Amendment}}

The question of a constitutionally based right of access for cameras to the courtroom necessarily raises questions of first, fifth, and sixth amendment rights. The task of simultaneously protecting all these interests is made more difficult because the Bill of Rights does not provide a guideline for balancing fundamental rights. While a defendant must

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of information concerned the media. \textit{Id.} The media were especially concerned with suggestions in the report that members of the media could be charged with contempt if they published a prejudicial statement about a trial. \textit{Id.} The current ABA standards show a greater respect for the first amendment rights of the media. For a discussion of the ABA standards, see supra notes 41-43 and accompanying text and infra notes 111-112 and accompanying text.
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\textsuperscript{109} H. Nelson & D. Teeter, \textit{supra} note 1, at 284.

\textsuperscript{110} ABA \textit{Code of Judicial Conduct}, Canon 3(A)7 (1983).

\textsuperscript{111} \textit{Id.} Canon 3(A)7 would allow broadcast coverage of trials. This provision was the successor to Canon 35, which prohibited such coverage. \textit{Id.} For a discussion of Canon 35, see \textit{supra} note 4 and accompanying text.

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Canon 3(A)7 provides:
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\begin{quote}
A judge should prohibit broadcasting, televising, recording or photographing in courtrooms and areas immediately adjacent thereto during sessions of court, or recesses between sessions, except that under rules prescribed by a supervising appellate court or other appropriate authority, a judge may authorize broadcasting, televising, recording and 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.
\end{quote}

\textsuperscript{112} ABA \textit{Code of Judicial Conduct}, Canon 3(A)7 (1983).

The ABA adopted the identical standard in its fair-trial-free press standards. Prior to the adoption of this standard in 1982, these fair trial-free press standards were silent on the issue of broadcasting courtroom proceedings. ABA \textit{Standards}, \textit{supra} note 41, at Standard 8-3. (standard has not yet been numbered).

\textsuperscript{112} ABA \textit{Standards}, \textit{supra} note 41, at Standard 8-3. (standard has not yet been numbered). As the history of the standard indicates, the ABA House of Delegates adopted the standard, prompted in large part by \textit{Chandler}. \textit{Id.} For discussion of \textit{Chandler}, see \textit{supra} notes 22-28 and accompanying text.
be protected from adverse pretrial and trial publicity, the public and press have a right of access that also deserves protection. In addition, there are potentially negative consequences for the judicial system when the public and press are excluded from judicial proceedings. Open trials are essential to preventing excesses within the judicial system and encouraging effectiveness in the judicial process. In the past, the media’s right to cover trials and a defendant’s right to a fair trial have seemingly been in conflict, as evidenced by Supreme Court decisions overturning convictions because of prejudicial publicity. It is submitted that one right need not be chosen over the other since courts possess adequate tools both to allow access and to protect a defendant’s rights.

In Richmond Newspapers, the Supreme Court ruled that both the press and public have a constitutional right of access to criminal trials. Furthermore, in Chandler, the Court ruled that it was not inherent

113. For a discussion of the potential prejudicial effects of pretrial and trial publicity, see supra note 20 and accompanying text.
114. For a discussion of the Richmond Newspapers decision, which granted this right of access, see supra notes 54-61 and accompanying text.
115. It is submitted that if courts are correct in finding that open trials serve a useful purpose, then closing trials risks the danger that the public will lose confidence in the proceedings and that there will be a lessened check on the judicial process. For a discussion of some of the purposes served by an open trial, see supra notes 57, 67 & 110.
116. Gannett, 443 U.S. at 421 (Blackmun, J., dissenting). In his dissent, Justice Blackmun traced the history of the open trial. Id. He noted that early advocates of open trials spoke of the role open trials played in maintaining the effectiveness of the trial process. Id. Justice Blackmun also noted that commentators have recognized that open trials provide a check against judicial abuse. Id.
117. See Nebraska Press, 427 U.S. at 551-53. For a discussion of the Nebraska Press Court’s survey of these cases, see supra note 20.
118. Nebraska Press, 427 U.S. at 611-12 (Brennan, J., concurring). Justice Brennan stated that he “would reject the notion that a choice [between the first and sixth amendments] is necessary, that there is an inherent conflict that cannot be resolved without essentially abrogating one right or the other.” Id. at 612 (Brennan, J., concurring).
119. Richmond Newspapers, 448 U.S. at 580 (plurality opinion). For a discussion of Richmond Newspapers, see supra notes 54-61 and accompanying text.
ently unconstitutional to televise courtroom proceedings. The Court has not directly addressed the issue of whether an absolute ban of cameras from a courtroom violates the first amendment. There are indications, however, that the Court would not be receptive to the idea of a constitutionally based right of access for cameras in courtrooms. Chief Justice Burger has expressed his commitment to keeping cameras out of the federal courts. Additionally, the Supreme Court has promulgated rules that prohibit cameras from criminal trials in federal courtrooms. Finally, some cases implicitly reject the existence of an absolute constitutional right of access.

While there are serious constitutional questions raised by an absolute ban on the access of cameras to federal courtrooms, it is not difficult to suggest that an absolute ban on the right of access of cameras is permissible. The guarantees enumerated in the first amendment are not absolute. There are restrictions on these rights; for example, speech that is slanderous or libelous is subject to punishment. More importantly in the context of the present debate, first amendment rights are subject to reasonable time, place, and manner restrictions.

Both the Kerley court and the Hastings court found that an absolute denial of access for cameras to federal courtrooms was a time, place, and manner restriction. Nonetheless, the Supreme Court has never directly addressed the issue of access of cameras to court proceedings in the context of the existence of a first amendment right of access to trials. Despite Kerley and Hastings, it is submitted that a complete denial of access for cameras to courtrooms is not a time, place, and manner restriction, as the Supreme Court has defined these types of restrictions. Instead, the decision to ban absolutely cameras from a

120. Chandler, 449 U.S. at 582-83. For a discussion of Chandler, see supra notes 22-28 and accompanying text.
121. For a discussion of Chief Justice Burger’s hostility to cameras in the courtroom, see supra note 32 and accompanying text.
122. See Fed. R. Crim. P. 53. For a discussion of this rule, see supra note 30.
123. For a discussion of two such cases, see supra notes 56 & 69 and accompanying text.
124. For text of the first amendment, see supra note 8.
125. See L. Tribe, AMERICAN CONSTITUTIONAL LAW 606 (1978). Professor Tribe noted that statements intended to inflict injury are outside the purview of the first amendment. Id. See also New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (court recognized defamation action against public official, but held constitutional guarantees limit when a public official may recover).
126. For a discussion of time, place, and manner restrictions, see supra notes 73-76 and accompanying text.
127. See Kerley, 753 F.2d at 620.
128. See Hastings, 695 F.2d at 1282.
129. The Supreme Court has discussed this issue in the context of a defendant’s rights. See supra notes 22-28 and accompanying text.
130. See Richmond Newspapers, 448 U.S. at 581-82 n.18 (plurality opinion) ("[T]he question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication
courtroom should be governed by a stricter standard, such as the *Globe Newspaper* standard. Such a conclusion is inevitable if the right of access is to be meaningful. The right of trial access ceases to be meaningful when cameras are absolutely banned from courtrooms, since restrictions on media access affect the media’s ability to effectively cover a trial. For example, if members of the press were allowed access to a trial but were not allowed to take notes, this would severely affect their ability to accurately report on the proceedings. In other words, the type of access permitted is directly related to the media’s ability and effectiveness in covering the trial.

Television is a unique medium, and its unique qualities must be considered when applying first amendment principles. Unlike the print medium, television has the capability to cover a trial in its entirety—every word, every sentence, and every gesture. Television is also arguably a more direct medium, in that it can convey the moods and nuances of a trial, and provide the public with first-hand information about a trial or testimony rather than second-hand information through someone else’s words. Because the television medium is qualitatively different, it has the capability to provide qualitatively different coverage of trials, and this should be reflected in the first amendment right of access to trials. This is especially true when a ban of cameras from courtrooms denies the public television coverage of issues of national importance.

of thought and the discussion of public questions immemorially associated with resort to public places.” *Id.* (quoting *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941)). For a discussion of the time, place, and manner standard, see *supra* notes 74-76 and accompanying text.

131. *See Globe Newspaper*, 457 U.S. at 606-07. Because there was a mandatory closure of the trial in *Globe Newspaper*, the Court required that the state show a compelling governmental interest. *Id.* It is submitted that a rule that completely prohibits the use of cameras in courtrooms is more akin to the mandatory closure rule in *Globe Newspaper* than it is to the time, place, and manner regulation of the location of adult movie theaters in *Young*. *See Young v. American Mini Theatres*, 427 U.S. 50 (1976). For a discussion of *Young*, see *supra* note 74. For a discussion of the standard applied in *Globe Newspaper*, see *supra* notes 66-72 and accompanying text.

132. *See Richmond Newspapers*, 448 U.S. at 576-77. The *Richmond Newspapers* Court stated: “The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.” *Id.* (footnote omitted). Analogously, the right of access also loses meaning if the media cannot use the tools of their trade. Just as a reporter not at a trial cannot report as fully as if he were there, television coverage cannot be as complete or accurate when the use of cameras is denied.

133. It is submitted that a complete ban on cameras in the courtroom deprives the public of access to information which could otherwise be obtained only through actually being present in the courtroom.

134. For a discussion of a case that had implications of national importance, see *infra* notes 146-49 and accompanying text.
or issues of deep interest to the community.135

Furthermore, the Supreme Court has recognized that the press plays an important role in preserving the integrity of the judicial system since few members of the public actually attend trials.136 Press coverage, then, helps to serve the purposes of the open trial—to foster confidence in the judicial process and to check potential judicial abuses.137 Therefore, the restriction of the media's access to a trial limits its ability to fully and completely report on court proceedings. Since the role the public and press play in ensuring the integrity of the judicial system is one reason access to trials was accorded first amendment protection,138 a restriction that limits the press' ability to fulfill that role is arguably violative of the first amendment.

A related question is whether a distinction between types of media coverage is reasonable under the first amendment. It is submitted that distinguishing the access of cameras from other types of access is not a reasonable distinction. When the press covers a trial, a major concern is the potentially adverse effect that the coverage will have on the trial process.139 Televised coverage of a trial will not necessarily result in prejudice more readily than non-televised coverage of a trial for several reasons. First, a judge has the power to sequester the jury, which would prevent jurors from viewing trial coverage.140 Second, a newsworthy trial will generate extensive media coverage, with or without television coverage of the trial.141

135. For a discussion of a case that would be of interest to a community, see infra note 156 and accompanying text.
136. See Richmond Newspapers, 448 U.S. at 572-73 (plurality opinion). The court noted that public attendance at trials is no longer a widespread occurrence. Id. at 572 (plurality opinion). Since the public no longer receives its information firsthand or by word of mouth, the public acquires this information through the media. Id. at 572-73 (plurality opinion). While the press is entitled only to the same right of access as the public, it often receives special seating and priority of entry so it can report on the proceedings. Id. at 573 (plurality opinion). This, the Court stated, "contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system." Id. (quoting Nebraska Press, 427 U.S. at 587).
137. Hastings, 695 F.2d at 1283 (citations omitted). For a further discussion of the benefits of an open trial addressed in Hastings, see supra note 87 and accompanying text. The Supreme Court has also stressed the importance of open trials. For a discussion of the Supreme Court's view on this issue, see supra notes 57 & 67 and accompanying text.
138. Globe Newspaper, 457 U.S. at 606. The Court in Globe Newspaper commented that access to criminal trials allows the public to scrutinize the judicial process, which safeguards and enhances the quality of the factfinding process. This benefits both the public and the defendant. Id.
139. For a discussion of the potentially prejudicial effect of press coverage, see supra note 20 and accompanying text.
140. For a discussion of the measures a judge can take to limit the potentially prejudicial effects of publicity, see infra notes 163-72 and accompanying text.
141. It is submitted that if the trial is one that interests the press, it will be
Another concern regarding the use of cameras in courthouses is the disruptive effect that their presence could have on the jury and witnesses.142 Numerous technological advances, however, have minimized the disruptive effect that television cameras would have in a courtroom.143 Moreover, the manner in which cameras are operated in the courtroom could be subject to court-imposed guidelines, which would minimize any potentially disruptive presence.144

It is submitted that an absolute ban against cameras in the courtroom, which is in effect in a number of states and the federal court system, is presumptively a violation of the first amendment. There are situations in which all participants determine that coverage of the trial would be proper and beneficial. One such case is Westmoreland,145 which involved allegations by CBS that General William Westmoreland mis-

142. See Estes, 381 U.S. at 544-50. One of the major concerns of the Estes Court was the disruptive effect that cameras could have on the entire proceeding. Id. For a discussion of the concerns of the Estes Court, see supra note 16 and accompanying text.

143. See Chandler, 449 U.S. 576. The Chandler Court noted the changes in technology occurring since 1965, the time of the Estes trial. Id. As one commentator has suggested, the camera is now on its way to becoming as sensitive and silent as the human eye. J. Gerald, supra note 3, at 151. The concern over disruption caused by cameras in the courtroom stems from a period when equipment was much less sophisticated than it is today. Id. Today, both still and television cameras are less intrusive than they were at the time of the Estes decision. Id. at 161. Videotape can be used, as well as high-speed film, reducing the need for flashes and other supplemental camera lighting. Id. High intensity light bulbs placed in the existing light fixtures also work well when lighting in a courtroom is especially dim. Id.

144. J. Gerald, supra note 3, at 161-63. Florida’s experiment in televising trials provides an example of guidelines designed to control the manner in which cameras operate in the courtroom. For a discussion of these guidelines, see supra note 22 and accompanying text. The Florida program limited the number of cameras allowed in the courtroom and seating for the still cameramen was assigned. J. Gerald, supra note 3, at 161. Certain brand name equipment was not allowed in the courtroom because it was too noisy. Id. at 162. The court rules also prohibited pictures of the jury leaving or entering the courtroom. Id. at 163. One commentator has also suggested that a court could appoint a coordinator to deal with the press on its behalf, so that the judge does not have to assume any extra duties himself. Id. at 161. It is submitted that when the right of access of cameras is only subject to these types of restrictions and is not prohibited, the restrictions, if reasonable, constitute constitutional time, place, and manner restraints.

145. For a discussion of Westmoreland, see supra notes 96-100 and accompanying text.
represented enemy troop strength during the Vietnam War. Westmoreland, CBS, and the trial judge all were in favor of allowing the trial to be broadcast, but both the district court and the circuit court rejected the request on the basis that the judiciary, through its local rules of court, regulates television coverage of trials. Still, the Second Circuit noted that the implications of the trial went far beyond the participants in the lawsuit because the nature of the allegations was of national importance. Thus, despite the desires of the participants in the trial and despite the public's interest and arguably its right to know, cameras were barred from recording the *Westmoreland* proceedings. It is submitted that such a restriction of access is not reasonable under the first amendment.

To preserve the first amendment right of access that was recognized

146. *Westmoreland*, 752 F.2d at 18. In *Westmoreland*, one anticipated issue was whether officers high in the United States military command willfully distorted intelligence data to substantiate optimistic reports on the progress of the war. See *Westmoreland* v. CBS, 596 F. Supp. 1166, 1169 (S.D.N.Y. 1984). This was an issue as to which the American public had a great concern and a need to be informed. *Id.*

147. 752 F.2d at 24. The Cable News Network (CNN) moved for an experimental exception to the ban of cameras in the federal courts so that it could provide television coverage of the trial. *Id.* at 19. All parties to the original suit supported CNN's application. *Westmoreland* v. CBS, 596 F. Supp. 1166, 1170 (S.D.N.Y. 1984).

The district court judge, persuaded by CNN's argument, stated: "My training in the long accepted tradition that banished the camera from the federal courtroom produced an instinctive negative reaction. I have been taught to assume that cameras would turn trials into vaudeville. A more careful reading of the petition, however, reveals a powerful argument." *Id.* at 1167. The judge was convinced by the petition but, nonetheless, rejected the petition because the local rules of court and the ABA's code of judicial conduct prevented him from allowing such coverage. *Id.* at 1170.

148. 752 F.2d at 18. The district court, which originally heard the petition of CNN, stated that

the subject matter of this trial is of the most serious public importance. Among the questions in dispute will be whether the high U.S. military command in Vietnam engaged in willful distortion of intelligence data to substantiate optimistic reports on the progress of the war and whether one of the nation's most important distributors of news and commentary engaged in willful or reckless slander. It can be expected that the trial will go beyond the particulars of those two inquiries into issues of appropriate standards for both military commanders and press commentators.

The public interest is thus not the mere voyeurism that emerges for a sensational murder trial. It is a response to a rare debate and inquiry on issues of the highest national importance.

It could even be reasonably argued that the filming of this trial is more important than its decision: historians and commentators on the war and on the press will not accept the verdict of the jury and the rulings of the judge as definitive answers. They will seek lessons and conclusions by analysis of the witnesses' testimony.


149. 596 F. Supp. at 1170.
in Richmond Newspapers, it is also submitted that the presumption should be in favor of permitting cameras in the courtroom.\textsuperscript{150} Such a presumption would be analogous to the well established presumption against prior restraints.\textsuperscript{151} A presumption in favor of access for television coverage puts the burden on those seeking to restrict access, rather than placing the burden on the media to justify why it should be granted access to a trial.\textsuperscript{152} The right of access to trials is not meaningful without a presumption in favor of access for cameras. Limiting the type of media access to courtrooms undermines the media’s ability to fully perform its role in reporting on a trial.\textsuperscript{153} The right of access for cameras, however, should not be absolute since the Supreme Court has made it clear that the general right of access is not absolute.\textsuperscript{154}

The test which the Supreme Court developed in Globe Newspaper for determining when the public and press can be excluded from a trial could be applied analogously when a court faces the question of whether cameras are to be allowed access in a particular instance.\textsuperscript{155} When access for cameras is completely denied, the Globe Newspaper test would require that the government show a compelling interest in denying access and that the order denying access be narrowly drawn. The right to a fair trial, being a constitutionally guaranteed right, would be one such compelling interest. The government would also be able to show a compelling interest when a young child testifies, as in a case involving the sexual abuse of the child.\textsuperscript{156} A complete denial of access, however, would have to be the only way to guarantee a fair trial, if it is to satisfy the narrowly drawn requirement. If a fair trial would be threatened by the presence of cameras in the courtroom, then the order restricting access should be as narrowly drawn as possible. For example, the court could order a partial ban rather than banning cameras from the courtroom for the entire proceeding. It is submitted that the narrowly drawn

\textsuperscript{150} See Richmond Newspapers, 448 U.S. at 577 (plurality opinion). For a discussion of the right of access recognized by the Supreme Court in Richmond Newspapers, see supra note 54 and accompanying text.

\textsuperscript{151} For a discussion of the Supreme Court’s presumption against allowing prior restraints, see supra note 36 and accompanying text.

\textsuperscript{152} As when the government seeks to impose prior restraints, it is submitted the burden should be on the party that seeks to prevent the access.

\textsuperscript{153} For a discussion of the importance of complete access as it affects the media’s ability to function most effectively, see supra notes 132-37 and accompanying text.

\textsuperscript{154} Richmond Newspapers, 448 U.S. at 581 n.18 (plurality opinion). For a discussion of the scope of the right of access recognized by the Supreme Court in Richmond Newspapers, see supra note 55 and accompanying text.

\textsuperscript{155} For a discussion of the Court’s right of access test in Globe Newspaper, see supra notes 64-72 and accompanying text.

\textsuperscript{156} See Turning an Eye on the Lurid, Newsweek, May 7, 1984, at 83. CNN recently requested permission to televise the trial of Virginia McMartin, who was accused of sexually abusing up to 100 children at her preschool in California. Id. For a discussion of other potential competing interests, see supra note 70.
test would require the use of means less restrictive than a complete denial of access, if such means are available. Moreover, the test would not be met if a denial of access for cameras would not further the defendant's right to a fair trial.

The Globe Newspaper test could also be used in conjunction with the test developed in Nebraska Press. The Nebraska Press test, which was developed in a case where prior restraints were imposed on press coverage of a trial, also provides a useful guideline in determining when access should be completely denied. Applying this test, a court would take into consideration the extent and nature of the camera coverage, whether other measures could mitigate the adverse effect of the coverage, and whether the prohibition of access for cameras is the only way to achieve the government's compelling interest. This test would promote a balance between first, fifth, and sixth amendment considerations, while preventing serious infringement of any right. Because a court can protect the defendant's interest, the power of veto need not be given to any of the trial participants, especially in light of the Supreme Court's holding in Chandler that a veto provision is not constitutionally required.

If a particular restriction on the access of cameras was not absolute, or did not completely deny access to a significant portion of a trial, it could be deemed a time, place, or manner regulation, which would trigger the use of a less stringent constitutional standard than the standard applicable to an absolute ban. Such a standard would involve a determination of whether the restriction promoted a significant governmental interest and whether the restriction unwarrantedly abridged communication of thought. As the standard for a time, place, or manner restriction would be easier to satisfy, it would allow for some restrictions on the access of cameras to courtrooms. For example, regulation of the placement of cameras, the number of cameras, and the use of lights, along with similar limitations that would protect the right to a fair trial, would be permissible. Restrictions on the number and placement of cameras could effectively limit their intrusiveness and adverse impact on trial participants. The less stringent standard governing time, place, or manner regulations would be satisfied because these types of restrictions would not unwarrantedly abridge communication of thought. The quality of the picture being transmitted or the variety of camera angles might be limited by court-imposed restrictions, but the trial would still be broadcast, protecting that channel for the flow of in-

157. See Nebraska Press, 427 U.S. at 562.
158. See Chandler, 449 U.S. at 557. For a discussion of the veto provision in Chandler, see supra note 24 and accompanying text.
159. For a discussion of the basis for a reasonable time, place, and manner restriction on first amendment rights, see supra notes 73-76 and accompanying text.
160. For a discussion of the standard of review applicable to a time, place, and manner regulation, see supra notes 74-76 and accompanying text.
formation. In addition to protecting the communication of information, the other prong of the test would be met in that significant governmental interests generally would be promoted by regulations concerning the number and placement of cameras. Restrictions that limited the intrusiveness of the cameras, for example, would limit their impact on those in the courtroom and promote decorum in the courtroom.

Whether a court should allow live broadcast of a trial is another question that could be governed by the time, place, and manner test. Recently, an increasing number of requests for live broadcasts have been made, as news stations have shown more interest in live television coverage of trials. The live broadcast of a trial poses the threat of immediate and irreparable harm that a delayed broadcast may not present, such as the inadvertent release of a victim's name. A court could reasonably require the media to delay the televising of a trial where a significant governmental interest is present. This type of restriction would not constitute an absolute ban on access of cameras and would not completely deny access. Thus, it would be correctly classified as a time, place, and manner regulation.

There are a number of other factors that courts should consider when applying these constitutional tests. Two of these factors are interrelated—the likelihood that the defendant will receive a fair trial and the trial judge's ability to control the effects of adverse publicity. The judicial system has the capability to mitigate the effects of potentially prejudicial news coverage. First, an appellate court has the power to overturn a conviction if the adverse publicity from the coverage was so extensive as to deprive the defendant of his due process rights. This remedy, however, has serious drawbacks because of the increased institutional

161. There have been a number of recent requests to televise publicized cases. See, e.g., Westmoreland, 596 F. Supp. at 1167; the McMartin child sex abuse case, supra note 166; the Massachusetts gang rape case, infra note 162.

162. See DeSilva, The Gang Rape Story, COLUM. JOURNALISM REV., May/June 1984, at 42-46. For example, if a court required a delay of a broadcast, it could ensure that a rape victim's name would not be inadvertently released during the broadcast of the trial. In February, 1984, six defendants went on trial for the rape of a woman in a New Bedford, Massachusetts, bar. Id. at 42. Prior to the trial, a traditional self-imposed ban by the media not to reveal the name of a rape victim was in place. The trial, however, was being covered live by four news organizations, including CNN. Id. The victim's name was spoken and was heard across the country instantaneously. Id. Thus, while the trial judge prohibited the showing of the victim's face, her name was broadcast nationwide. Id. It is submitted that if the broadcast had been delayed, the victim could have remained anonymous.

163. For a discussion of the cases in which the Supreme Court has overturned convictions because of prejudicial publicity, see supra note 20 and accompanying text. In Chandler, the Supreme Court also noted that when Florida allowed cameras in its courtrooms, Florida required that the defendant's objections be considered on the record, which would ensure that the defendant preserved his right to appeal on the ground that his trial was prejudiced by the television coverage. 449 U.S. at 577.
costs stemming from an appeal and possible retrial, and because the passage of time might prevent the case from being retried at all.\textsuperscript{164} Despite these drawbacks, a conviction nonetheless can be overturned, thereby preventing permanent harm to the individual if the conviction resulted from prejudicial publicity. Second, a court can use voir dire examination to determine not only potential juror prejudice, but also to determine whether the presence of cameras in the courtroom would be likely to distract a potential juror.\textsuperscript{165} The defense and prosecution could be given additional peremptory challenges to ensure that the jurors will not be prejudiced by the presence of cameras in the courtroom.\textsuperscript{166} Third, a court could grant a continuance or change of venue when publicity is excessive, but the effectiveness of these measures would be proportional to the media’s and the public’s interest in the trial.\textsuperscript{167} If a trial is one that the media has a strong interest in televising, a continuance or change of venue would not likely result in a reduction of the coverage.

A trial judge may also instruct the jury not to allow the presence of a camera to distract them or interfere with their deliberations. Further, the judge could instruct the jury not to watch themselves or the trial on television.\textsuperscript{168} If the case warranted it, the judge could sequester the jury to prevent any prejudicial effect.\textsuperscript{169} In addition, witnesses could be sequestered if exposure to the trial coverage would be likely to prejudice their testimony.\textsuperscript{170} It is submitted that the use of these measures, either

\textsuperscript{164.} \textit{Nebraska Press}, 427 U.S. at 555. In addition, the appeals process places a hardship on the defendant. Not only are there delays and increased costs for the defendant, but delay also makes a case more difficult to try. Moreover, there are increased costs for the state. D. Pember, \textit{Mass Media Law} 261 (1977).

\textsuperscript{165.} D. Pember, \textit{supra} note 164, at 262. There are difficulties with this procedure as well. Voir dire examination of jurors only uncovers prejudice that the juror is aware of, and that the juror is not too embarrassed to admit. \textit{Id.}

The Senate Subcommittee on Constitutional Rights noted in its 1976 report that in a sensational trial, the court would give leeway to counsel on voir dire to extend their questioning beyond the traditional scope of examination. \textit{Free Press-Fair Trial, supra} note 41, at 18.

\textsuperscript{166.} \textit{Free Press-Fair Trial, supra} note 41, at 18. The report concluded that the number of peremptory challenges necessary to counter jury bias should be expanded. \textit{Id.}

\textsuperscript{167.} D. Pember, \textit{supra} note 164, at 263. Even with a change of venue or continuance, publicity might move with a trial commanding great public attention. The more sensational the trial, the less likely a change of venue will affect the amount of publicity. \textit{Id.}

\textsuperscript{168.} \textit{Id.} The Senate Subcommittee on Constitutional Rights concluded that an admonition would be effective generally in countering juror prejudice and that such counseling from the judge would have a profound psychological influence on the jurors. \textit{Free Press-Fair Trial, supra} note 41, at 19.

\textsuperscript{169.} \textit{Free Press-Fair Trial, supra} note 41, at 18. While sequestration is a highly effective means of countering potentially prejudicial publicity during a trial, it is costly and poses a hardship to jurors. \textit{Id.}

\textsuperscript{170.} \textit{ABA Standards, supra} note 41, at 8-3.6(b). In addition to sequestering witnesses, standard 8-3.6(b) provides that if witnesses are likely to be ex-
singly or in combination, would be effective in protecting a defendant against unfair prejudice.\textsuperscript{171} These protective measures potentially add costs to operating the judicial system, but increased costs cannot be a consideration in deciding whether the right of access of cameras to the courtroom is guaranteed under the Constitution.\textsuperscript{172}

In addition to constitutional considerations, there are practical considerations that favor permitting cameras in the courtroom. Providing access for cameras to courtrooms satisfies the public's need to know and its interest in knowing the workings of the judicial system.\textsuperscript{173} The televising of trials would help educate the public as to the American legal process and the law,\textsuperscript{174} and provide the public with the opportunity to

posed to reports that will influence their testimony, the judge should instruct jurors and court personnel not to make statements to the press, admonish the jury not to be distracted by the presence of cameras, and question jurors about their exposure to the publicity. \textit{Id.}

171. Free Press-Fair Trial, supra note 41, at 15. A survey of judges contained in this Senate report reflects how effective they consider certain actions to be in countering potentially prejudicial publicity:

\begin{tabular}{|l|l|}
\hline
Method & Strongly or Moderately Effective \\
\hline
Continuance & 82.1\% \\
Severance & 77.8\% \\
Change of Venue & 77.2\% \\
Voir Dire & 47.6\% \\
Sequestration & 86.9\% \\
Admonition & 62.1\% \\
\hline
\end{tabular}

\textit{Id.} This survey was based on the use of only one of these methods at one time. If these measures were used in conjunction with one another their effectiveness would likely increase. \textit{Id.}

172. While these measures could be more costly and could produce an additional burden on the judiciary, it is submitted that the determination of whether a constitutional right exists should not be based solely on considerations of cost and convenience. Additional cost should not be sufficient to satisfy the compelling state interest required to close a trial to the press and public. For a discussion of factors that would be compelling, see \textit{supra} note 70 and accompanying text. Cost considerations, however, could comprise the significant governmental interest required to justify a time, place, or manner restriction such as a partial closing of proceedings. Such a governmental interest would only be sufficient upon a showing that a limitation on camera or television coverage alone, as distinct from a limitation on the coverage of the media as a whole, would save the court from having to take such measures as sequestering the jury and witnesses. Thus, if a court bans television cameras from the courtroom, the court must justify such a ban on the basis of why broadcast coverage infringes on the right to a fair trial when other types of media coverage would not infringe on that right. For a discussion of reasonable time, place, and manner restrictions, see \textit{supra} notes 74-76 and accompanying text.

173. For a discussion of the purposes served by open trials, see \textit{supra} notes 57 & 67 and accompanying text.

174. See \textit{In re} Extension of Media Coverage, 472 A.2d 1232, 1234 (R.I. 1984). The Rhode Island Supreme Court noted that its primary reason for allowing television coverage in state courtrooms was the potential contribution.
witness important debates on issues of public interest.175

V. Conclusion

The Supreme Court has not yet directly addressed whether an absolute ban against cameras in courtrooms is constitutionally permissible in light of the existence of a constitutional right of access to criminal trials. Arguably, an absolute ban of cameras from courtrooms is not a reasonable restriction on the first amendment right of access. The constitutional right to have cameras in the courtroom, however, should not be an absolute one. Rather, this right of access should be subject to restrictions based on compelling governmental interests or restrictions that are reasonable time, place, or manner regulations. Cameras in the courtroom do not necessarily infringe upon a defendant's right to a fair trial. Providing a constitutionally guaranteed right of access for cameras in the courtroom, under an analysis that provides for restrictions when there is a sufficiently important governmental interest, ensures the fullest realization of first, fifth, and sixth amendment rights.

Carolyn E. Riemer

the media could make in increasing public understanding of judicial proceedings and decisions. Id. at 1234.

In Westmoreland, the trial court also argued that it would be in the federal judicial system's interest to allow cameras in the courtrooms to give the public a chance to observe the judiciary in action. 596 F. Supp. at 1169. The court stated:

I believe in sum that the federal judges are on the whole an admirable bunch who little deserve the low esteem in which they are held by public reputation. I suggest that the gap between the reality and the perception results largely from the fact that the public has little opportunity to see how scrupulously, how painstakingly and how fairly federal judges conduct court business.

Id.

175. The Westmoreland case provides an excellent example of an issue of public interest. For a discussion of this case, see supra notes 96-100 & 146-49 and accompanying text.