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Cameras in the Courtroom: Guidelines for State Criminal Trials

In 1965, only two states permitted photographic and electronic media coverage¹ of courtroom proceedings.² Today, forty-three states permit television coverage of their appellate and/or trial proceedings on an experimental or permanent basis.³ This development has not come about in a systematic or uniform fashion. Lacking guidance from the federal courts, the states have independently conducted experiments and adopted their own guidelines in an attempt to accommodate the conflicting constitutional⁴ and policy interests⁵ involved.

The development of state guidelines⁶ has stemmed largely from the belief that media self-discipline is insufficient to ensure fair treatment

1. The phrase "photographic and electronic media coverage," referred to herein as "televising" or "broadcasting," includes both the acquisition of information (through devices such as still news photography, audio taping, motion picture filming and videotaping), and the public dissemination and broadcast of that information. See *Final Report of the Hawaii State Bar Association Committee on "Cameras in the Courtroom,"* 17 HAWAII B.J. 3, 4 n.1 (1982) [hereinafter cited as *Hawaii Report*].

2. See *Estes v. Texas*, 381 U.S. 532, 544 (1965) ("Forty-eight of our States and the Federal Rules have deemed the use of television improper in the courtroom.").

3. See RADIO-TELEVISION NEWS DIRECTORS ASSN., NEWS MEDIA COVERAGE OF JUDICIAL PROCEEDINGS WITH CAMERAS AND MICROPHONES at B-1 (Jan. 8, 1986) [hereinafter cited as RTNDA] ("Thirty-two States have permanent rules permitting extended media coverage; fourteen States have experimental coverage rules. Kansas, Minnesota, and New Jersey have both experimental and permanent rules."). The jurisdictions that presently prohibit any extended media coverage are the District of Columbia, Indiana, Michigan, Mississippi, Missouri, South Carolina, South Dakota, and Virginia. *Id.* at B-2. Copies of the RTNDA survey and the many state reports evaluating courtroom broadcasting can be obtained from RTNDA, 1735 DeSales St., N.W., Washington, DC 20036.

Cases upholding the trial judge's decision to allow televising or photographing of the trial include *Gonzales v. People*, 165 Colo. 322, 326, 438 P.2d 686, 687-88 (1968); *Patten v. State*, 467 So. 2d 975, 979 (Fla.), *cert. denied*, 106 S. Ct. 198 (1985); *Maxwell v. State*, 443 So. 2d 967, 969-70 (Fla. 1983); *King v. State*, 390 So. 2d 315, 318 (Fla. 1980), *cert. denied*, 450 U.S. 989 (1981); *In re Post-Newsweek Stations, Fla.*, 370 So. 2d 764 (Fla. 1979) [hereinafter cited as *Fla. Report*]; *Palm Beach Newspapers v. State*, 378 So. 2d 862 (Fla. Dist. Ct. App. 1980); *State v. Johnson*, 318 N.W.2d 417, 424-25 (Iowa), *cert. denied*, 459 U.S. 848 (1982); *State v. Newsome*, 177 N.J. Super. 221, 228-29, 426 A.2d 68, 72-73 (App. Div. 1980); *State v. Rogers*, 17 Ohio St. 3d 174, 184-85, 478 N.E.2d 984, 994-95, *vacated on other grounds*, 105 S. Ct. 2633 (1985); *State ex rel. Grinnell Communications Corp. v. Love*, 62 Ohio St. 2d 399, 406 N.E.2d 809 (1980) (*per curiam*); *State v. Jessup*, 31 Wash. App. 304, 641 P.2d 1185, 1194 (1982).

4. The constitutional provisions implicated in the cameras in the courtroom debate include the first amendment, the sixth amendment, and the due process clause of the fourteenth amendment. See Part I *infra*.

5. See Part II *infra*.

6. Because of inherent pressures on elected judges, it is wiser to establish restrictive and comprehensive guidelines than to grant a judge absolute discretion to impose restrictions on broadcasters once in the courtroom. See R. CHAPIN, UNIFORM RULES OF CRIMINAL PROCEDURE FOR ALL COURTS 28 (1983) ("Rules that limit discretion are an important safeguard against the abuse of power. When judges . . . have too much discretion, the criminal justice system violates the American ideal of a system of laws and not of men."). Television offers

of trial participants and preserve courtroom decorum.⁷ The states' independent experimentation in this area, however, has produced a large variety of guidelines that approach the problem in markedly different ways. A uniform set of guidelines for televising state criminal trials is needed to safeguard the rights of courtroom participants and promote the smooth functioning of the criminal justice system.⁸

This Note analyzes the conflicting interests involved in televising state criminal trials and proposes a model set of guidelines for consideration by states that decide to permit electronic media in their courtrooms. The Note favors restrictions on broadcasters once in the courtroom and advocates that the defendant's right to a fair trial receive more scrupulous protection than the broadcast media's interest in attendance and the public's "right to know." Part I presents the constitutional principles with which any set of guidelines must comply. Part II analyzes the policy considerations that should guide the

judges an excellent vehicle both to accommodate the press and to impress the voters. Such pressures are likely to influence judges to favor the press over the defendant.

Superior Court Judge Henry S. Stevens told the ABA committee considering revisions of canon 35, *see note 39 infra*, in 1962, "Woe be unto that judge who has sufficient courage to exclude photography in a celebrated case. I venture to say he will not be dealt with in a kindly manner by the press. I know from bitter experience that disfavor with the press can be a pretty rough ordeal." E. GERALD, *NEWS OF CRIME: COURTS AND PRESS IN CONFLICT* 156 (1983); *see also* *Estes v. Texas*, 381 U.S. 532, 548-49 (1965); *Callahan v. Lash*, 381 F. Supp. 827, 833 (N.D. Ind. 1974) (acknowledging the adverse psychological effect of television on judges, particularly elected judges); Gerbner, *Trial by Television: Are We at the Point of No Return?*, 63 JUDICATURE 416, 424 (1979) ("It is difficult to remain oblivious to the pressures that the news media can bring to bear on [trial judges] both directly and through the shaping of public opinion.") (quoting *Estes*, 381 U.S. at 548-49); REPORT OF THE MINNESOTA ADVISORY COMMITTEE ON CAMERAS IN THE COURTROOM TO THE SUPREME COURT 11 (1982) ("[R]ather strong evidence of real lapses in good taste and in concern for the sensibilities of individuals [by the media] was brought to the attention of the Commission, including specific evidence of rather poor taste directed against the presiding judge when rulings adverse to the media were made by him.") [hereinafter cited as MINN. REPORT]; "Television in the Courtroom — Limited Benefits, Vital Risks?", 3 COM. & THE L. 35, 40-41 (1981) (proceedings of the Educational Conference presented by Allied Educational Foundation, Sept. 16, 1980) ("State judges, who must run for reelection, are also not immune from the pressures of public opinion. In criminal cases they are often forced to make unpopular decisions. Whatever else may be said of the quality of the judges who preside over our lower criminal courts, many have displayed a fine instinct for avoiding unpopular decisions. Being 'on camera' will not curb that instinct but rather may encourage further dereliction of duty.") [hereinafter cited as "Television in the Courtroom"]. Since a judge's discretion is likely to be influenced by media pressure, it is important to restrict the influence of the media over the trial process, *see* Gaines & Stuplinski, *Should Trials be Televised, Broadcast, Photographed? "No" Says the Greater Cleveland Bar Association*, 49 CLEV. B.J. 296, 297 (1978).

7. [T]elevision newscasters are not accredited members of any bar association, or any related profession, are not licensed by Government, or restricted by a legal code of ethics. They do have the free choice to edit, capsule, dramatize, sensationalize any issue to satisfy the most basic public appetite in order to generate commercial demand. "Television in the Courtroom", *supra* note 6, at 36 (Statement of G. Barasch, Conference Chairman); *see* Bollinger, *The Press and the Public Interest: An Essay on the Relationship Between Social Behavior and the Language of First Amendment Theory*, 82 MICH. L. REV. 1447, 1457 (1984) ("The press in this country appears to be somewhat uncomfortable with any sense of itself as an institution made up of 'professionals.'"); Friendly, *National News Council Will Dissolve*, N.Y. Times, Mar. 23, 1984, at 11, col. 1 (city ed.); MINN. REPORT, *supra* note 6, at 17.

8. *See* the discussion of uniformity, Part III. B *infra*.

formulation of state guidelines, and concludes that sound public policy requires that the interests of the accused be placed above those of the broadcasters. Part III discusses the manner in which the states have resolved these difficult constitutional and policy questions, noting those resolutions that best accommodate the principles outlined in Parts I and II. Part III also discusses the desirability of promulgating a uniform set of guidelines for application by the states. States are then invited to adopt the model set of guidelines proposed in the Appendix.⁹

I. CONSTITUTIONAL PARAMETERS

The Supreme Court has had two occasions to address the question of whether the televising of a state criminal trial violates the defendant's fourteenth amendment right to due process of law. In 1965, the Court held in *Estes v. Texas*¹⁰ that the circus-like atmosphere created by broadcasters in the courtroom deprived the defendant of due process.¹¹ Indeed, in reversing *Estes*' conviction for swindling, four members of the five-Justice majority¹² endorsed the principle that the televising of criminal trials, at least under the technology prevailing at the time,¹³ amounted to a *per se* violation of due process.¹⁴

It was not until 1981 that the Court once again considered the question, this time in a case in which Florida's guidelines for televising

9. Judge Murray Richtel of the Twentieth Judicial District of Colorado is currently drafting a similar set of guidelines for the National Conference of State Trial Judges. He is chairman of the News Reporting and Fair Trial Committee, Subcommittee on Model Rules for Expanded Media Coverage.

10. 381 U.S. 532 (1965).

11. During the pretrial hearing to consider whether the trial would be televised: [A]t least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings. 381 U.S. at 536.

12. Justice Harlan concurred only in the result. He refused to find that cameras in the courtroom *inherently* violated the defendant's due process rights. 381 U.S. at 590 (Harlan, J., concurring) ("The probable impact of courtroom television on the fairness of a trial may vary according to the particular kind of case involved.").

13. The Court placed great emphasis on the fact that given the state of technology that existed at the time, television was inherently disruptive of the trial process. 381 U.S. at 544 ("Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused."), 551-52 ("It is said that the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics.").

14. The majority opinion acknowledged that "in most cases involving claims of due process deprivations . . . [the Court requires] a showing of identifiable prejudice to the accused." 381 U.S. at 542. In *Estes*, proof of *actual* prejudice was lacking. Nevertheless, the Court observed that "at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." 381 U.S. at 542-43. The broadcasting of criminal trials, the Court held, was just such a procedure. 381 U.S. at 544.

trials were in use. In *Chandler v. Florida*,¹⁵ the Supreme Court affirmed a burglary conviction despite the fact that the trial was televised. In so doing, the Court stated that it was not overruling *Estes*.¹⁶ Instead, the Court relied on Justice Harlan's concurrence in *Estes*, which it interpreted to hold that cameras in the courtroom violated due process only if the trial was *in fact* compromised by the television coverage.¹⁷ In *Estes*, the *Chandler* Court observed, the fairness of the trial *had* been compromised by the television coverage.¹⁸ By contrast, the defendant in *Chandler* was unable to demonstrate that the presence of cameras in the courtroom had actually interfered with his right to receive a fair trial.¹⁹

In upholding the conviction of Chandler, the Supreme Court adopted a states' rights position concerning the broadcasting of state criminal trials.²⁰ While it refused to hold that television coverage is constitutionally prohibited,²¹ the Court also refused to hold that television coverage is constitutionally mandated.²² The Court, declining to "endorse or to invalidate" Florida's guidelines,²³ merely ruled that states should be free to experiment and develop their own court rules in this area.²⁴ In taking this position, the Court referred the entire issue to the states, thus depriving them of guidance as to when the Court would consider the psychological and physical disturbances caused by broadcasters in the courtroom a due process violation.²⁵

15. 449 U.S. 560 (1981).

16. 449 U.S. at 573 ("*Estes* is not to be read as announcing a constitutional rule barring still photographic, radio, and television coverage in all cases and under all circumstances.").

17. 449 U.S. at 581-82; *see also* note 12 *supra*.

18. 449 U.S. at 582; *see* note 11 *supra*.

19. 449 U.S. at 577-82.

20. *See* 449 U.S. at 578 ("Examination and reexamination, by state courts, of the in-court presence of the electronic news media, *vel non*, is an exercise of authority reserved to the states under our federalism.") (quoting Brief for Conference of Chief Justices as *Amicus Curiae* at 2).

For a discussion of the *Chandler* decision and its reliance on federalism principles, *see* Comment, *From Estes to Chandler: Shifting the Constitutional Burden of Courtroom Cameras to the States*, 9 FLA. ST. U. L. REV. 315 (1981). According to the author, the Court in *Chandler* acknowledges the right of the accused to a fair trial but "assigns considerably more importance to the states' right to experiment than it does to the fair trial right of the accused." *Id.* at 328 (citation omitted). The author explains the victory for states' rights embodied in *Chandler* as consistent with "the pattern established by the Burger Court of de-federalizing criminal procedure as a step toward correcting 'a dangerous imbalance' which accords too much constitutional protection to criminals and too little to their victims and to society at large." *Id.* at 335 (citing Burger, *Annual Report to the American Bar Association by the Chief Justice of the United States*, 67 A.B.A. J. 290, 291 (1981)).

21. 449 U.S. at 570-74.

22. The Court did not grant the broadcast media a first amendment right of access to the courtroom. 449 U.S. at 569-70. The case law remains faithful to this aspect of *Chandler*; broadcasters lack a constitutional right of access to criminal trials. *See* notes 25-40 *infra* and accompanying text.

23. 449 U.S. at 582.

24. 449 U.S. at 582-83.

25. *See* Comment, *supra* note 20, at 333. In discussing *Chandler*, the author states that "[n]o

However, an examination of other Supreme Court decisions, not involving televised trials, sheds light on the proper weight that should be afforded the conflicting constitutional interests implicated in the cameras in the courtroom debate.

One of the constitutional provisions at issue in the cameras in the courtroom controversy is, of course, the first amendment. In short, the relevant question is whether the first amendment guarantees broadcasters the "right" to inform the public through the televising of criminal trials. As the case law now stands, the answer to this question is clearly no. In light of *Richmond Newspapers v. Virginia*,²⁶ this answer may seem somewhat surprising. In *Richmond Newspapers*, the Court held that the first amendment provides the public and the print media a right of access to state criminal trials.²⁷ Noting that the first amendment was adopted against a backdrop of open public trials, the Court enunciated in broad terms the benefits of admitting the public and the print media — an open trial is more likely to be conducted fairly, participants are more inclined to honesty, and community outrage and concern tends to be channeled away from "vengeful self-help."²⁸

The Supreme Court has failed to articulate reasons for treating the electronic media differently from the print media in the courtroom context. However, the Court has repeatedly noted distinctions between the media that have persuaded it to uphold regulation of the broadcast media and strike down as unconstitutional similar regulation of the print media.²⁹ While the Court's decisions in this area are

new guidelines for resolving the constitutional stand-off between the free press guarantee of the first amendment and the fair trial guarantee of the sixth amendment are offered." *Id.*; see also Note, *An Assessment of the Use of Cameras in State and Federal Courts*, 18 GA. L. REV. 389, 400 (1984) ("Critical weaknesses in the *Chandler* decision have prevented the formulation of broad constitutional guidelines for the determination of when due process is threatened by the presence of cameras in a criminal trial.").

26. 448 U.S. 555 (1980).

27. Chief Justice Burger, in a plurality opinion joined by Justices White and Stevens, and Justice Stewart, in a concurring opinion, concluded that the constitutional right of access to criminal trials applies to both the public and the press. 448 U.S. at 576-77, 599. Justices Brennan and Marshall, concurring in the judgment, described the right of access granted by the first amendment as belonging to the public. 448 U.S. at 585. The Court discussed *Richmond Newspapers* in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982):

Our recent decision in *Richmond Newspapers* firmly established for the first time that the press and general public have a constitutional right of access to criminal trials. Although there was no opinion of the Court in that case, seven Justices recognized that this right of access is embodied in the First Amendment and applied to the States through the Fourteenth Amendment.

457 U.S. at 603 (citation omitted); cf. *Miami Herald Pub. Co. v. Morphonios*, 467 So. 2d 1026, 1029 (Fla. Dist. Ct. App. 1985) ("[T]here is no first amendment protection of the rights of the public and the press to attend pretrial hearings, as distinguished from the right to attend a criminal trial.") (citation omitted).

28. 448 U.S. at 571 (citation omitted).

29. See notes 67-70 & 178-84 *infra* and accompanying text; *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protections."). Compare *Columbia Broadcasting Sys., Inc. v. FCC*, 453 U.S. 367 (1981) (upholding a statutory right of access to television time for political candi-

noteworthy in illustrating an historical reluctance to confer first amendment protections upon television, none of these distinctions particularly relates to courtroom access.

While its rationale for treating the broadcast and print media differently in the courtroom context is unclear, the Court in *Chandler* left little doubt that it is unprepared to recognize a first amendment right of access for broadcasters. In *Chandler*, the Court was faced with a Florida Supreme Court holding that "pointedly rejected" the assertion that there exists a "federal constitutional right of access on the part of photographers or the broadcast media to televise or electronically record and thereafter disseminate court proceedings."³⁰ This holding provided the Court with a clear opportunity to extend its decision in *Richmond Newspapers* to the broadcast media. Yet, the Court neatly avoided the issue by deciding that the television coverage in *Chandler*, whether mandated by the constitution or not, did not violate the defendant's right to due process.³¹ The Court's reluctance to embrace the opportunity to extend *Richmond Newspapers*, coupled with its tolerance of the ban on television in the federal system, is strong evidence that the Court is unwilling to posit a constitutional right of access on the part of broadcasters.³²

While the Supreme Court has been avoiding a definitive decision on the first amendment issue, the lower federal courts have been consistently holding that the first amendment does not guarantee the electronic media a right to televise trials³³ or the public a right to view

dates), and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding the fairness doctrine as applied to broadcasters by the FCC), and *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (approving the system of broadcast regulation initiated by the Communications Act), with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (holding that the fairness doctrine is unconstitutional as applied to the print media).

30. 449 U.S. at 569 (1981).

31. 449 U.S. at 569-70, 582.

32. But cf. Ares, *Chandler v. Florida: Television, Criminal Trials, and Due Process*, 1981 SUP. CT. REV. 157, 175-78, which argues that the Court in *Chandler* was not faced with the question of whether television has a first amendment right of access, and that when it is forced to address the issue, it should extend *Richmond* to include a right of access for the broadcast media. "[T]here do not seem to be any grounds on which television can be denied the same right of access that *Richmond Newspapers* upholds for the public and the press." *Id.* at 177.

33. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978) ("[T]here is no constitutional right to have [live witness] testimony recorded and broadcast") (citing *Estes v. Texas*, 381 U.S. 532, 539-42 (1965)); *United States v. Kerley*, 753 F.2d 617 (7th Cir. 1985) (dictum); *United States v. Hastings*, 695 F.2d 1278 (11th Cir.), cert. denied, 461 U.S. 931 (1983); *Combined Communications Corp. v. Finesilver*, 672 F.2d 818 (10th Cir. 1982). But see *State ex rel. Cosmos Broadcasting v. Brown*, 14 Ohio App. 3d 376, 382-83, 471 N.E.2d 874, 883 (1984). See generally Annot., 14 A.L.R. 4TH 121, §§ 2a & 3 (1982). *Cosmos Broadcasting* implies that a limited first amendment right of television access does exist:

[U]nder the First Amendment, the concept of equal access to courtroom proceedings and the effective reporting of courtroom events means at least this: unless there is an overriding consideration to the contrary, clearly articulated in the trial court's findings, representatives of the electronic news media must be allowed to bring their technology with them into the courtroom, even if only to a small degree (e.g., a single camera . . .).

14 Ohio App. 3d at 382-83, 471 N.E.2d at 883.

trials on television.³⁴ Courts have also upheld the denial of camera access to courtrooms as a legitimate time, place, and manner restriction.³⁵ They contend that the prohibition of cameras does not foreclose the public's right to learn about trials through other media sources or personal attendance and reject the argument that such a restriction unfairly discriminates between newspapers and television.³⁶

The federal courts' reluctance to find a first amendment right of access for broadcasters in the context of state criminal trials may well be explained by the necessary consequences of such a holding on the

34. Recently, the Second Circuit stated:

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

Westmoreland v. Columbia Broadcasting Sys., 752 F.2d 16, 23 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 3478 (1985).

35. See *Richmond Newspapers*, 448 U.S. at 578, 581 n.18; 448 U.S. at 600 (Stewart, J., concurring) ("Just as a legislature may impose reasonable time, place, and manner restrictions upon the exercise of First Amendment freedoms, so may a trial judge impose reasonable limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public."). Cases applying this reasoning to justify the exclusion of cameras from the courtroom include *Westmoreland v. Columbia Broadcasting Sys.*, 752 F.2d 16, 24-25 (2d Cir. 1984) (Winter, J., concurring), *cert. denied*, 105 S. Ct. 3478 (1985); *United States v. Hastings*, 695 F.2d 1278, 1282 (11th Cir.), *cert. denied*, 461 U.S. 931 (1983). The Court recently explained the general nature of the time, place, and manner limitation in *United States v. Grace*, 461 U.S. 171 (1983):

[T]he government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest.

461 U.S. at 177 (citations omitted); see also Kelso & Pawluc, *Focus on Cameras in the Courtroom: The Florida Experience, The California Experiment, and the Pending Decision in Chandler v. Florida*, 12 PAC. L.J. 1, 23 (1980) ("Allowing reporters into a trial but prohibiting television cameras may fall within the plausible scope of a permissible regulation on the manner of access."). But see Zimmerman, *Overcoming Future Shock: Estes Revisited, or a Modest Proposal for the Constitutional Protection of the News-Gathering Process*, 1980 DUKE L.J. 641, 667-68. Zimmerman argues that

bans on cameras and recording equipment are not merely time, place, and manner restrictions. Time, place, and manner restrictions are permissible because they do not regulate the content of the message; rather they restrict the manner in which it is expressed. . . .

. . . Because the content conveyed by photographs or the electronic media cannot be duplicated in written or oral descriptions, the restraint on access directly restricts speech itself.

Id.

36. See *Estes v. Texas*, 381 U.S. 532, 539-40 (1965) (both television and radio journalists have the same access rights — those of the general public); *United States v. Hastings*, 695 F.2d 1278, 1283 (1983) ("We can foresee no additional measure of confidence which might emanate merely from the different manner of media access, e.g., excerpts of live witnesses on the television screen, as opposed to an artist's sketch.") (citing *United States v. Columbia Broadcasting Sys.*, 497 F.2d 102, 106 (5th Cir. 1974)); cf. *KPNX Broadcasting v. Superior Court*, 139 Ariz. 246, 252, 678 P.2d 431, 437 (1984) (petitioners argue that a court order limiting the broadcasting of sketches violates the equal protection clause by restraining only broadcasters and not the print media; the court finds the sketch order to be an unconstitutional prior restraint of speech protected by the first amendment and does not reach the equal protection ground). But see Ares, *supra* note 32, at 157, 177 (arguing that television can not constitutionally receive treatment different from the print media, and that cameras should have access to courtrooms).

conduct of *federal* trials. Surely, if the first amendment guarantees access to state criminal trials, it likewise guarantees access to federal criminal trials. Such a result, however, would upset a fairly rigid set of rules prohibiting or limiting the televising of federal trials. Federal Rule of Criminal Procedure 53 bans television from all federal criminal trials.³⁷ This rule has been upheld and television access denied even when a defendant has requested that his trial be televised.³⁸ In addition, Judicial Canon 3A(7), which governs courtroom photography and televising in all cases not covered by rule 53, provides for televised trials only under a very limited set of circumstances.³⁹ In

37. "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." FED. R. CRIM. P. 53.

38. See *United States v. Hastings*, 695 F.2d 1278 (11th Cir.), *cert. denied*, 461 U.S. 931 (1983). The court in *Hastings* ruled that the first amendment right of access to criminal trials upheld by the Supreme Court in *Richmond Newspapers* did not include a right to cover trials with audio and video equipment and that the prohibitions on visual and aural coverage of federal court proceedings did not violate the first amendment. The court upheld FED. R. CRIM. P. 53, which bans cameras from federal courts. See also *United States v. Kerley*, 753 F.2d 617 (7th Cir. 1985) (court denied defendant's motion to videotape in-court proceedings); *Combined Communications Corp. v. Finesilver*, 672 F.2d 818 (10th Cir. 1982) (denying petition for writ of mandamus to require federal judge to permit televising of in-court negotiation).

39. The House of Delegates of the ABA adopted canon 35 on September 30, 1937 in response to the disruption and sensationalism caused by the media over the trial of Bruno Hauptmann, who was convicted of kidnapping and murdering the Lindbergh baby, see *State v. Hauptmann*, 115 N.J.L. 412, 180 A. 809, *cert. denied*, 296 U.S. 649 (1935). Canon 35 originally read:

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

CANONS OF JUDICIAL ETHICS—Canon 35 (1937), published in 62 A.B.A. REP. 1134-35 (1937) (repealed and replaced in 1979). See Note, *supra* note 25, for a good discussion of the historical development of canon 35.

In 1952, the canon was amended to prohibit television as well. See *Estes v. Texas*, 381 U.S. 532, 598 app. (1965) (Harlan, J., concurring).

The ABA amended canon 35 by inserting a phrase banning the use of television cameras during court proceedings and by adding a phrase stating that broadcasting distracts the witness in giving his testimony. A third sentence was also added that provided for the televising and broadcasting of certain ceremonial proceedings.

Note, *supra* note 25, at 390 n.6.

"At the ABA's 1979 mid-year meeting, the House of Delegates voted solidly against a proposal [of its Standing Committee on Association Standards for Criminal Justice] to allow courtroom photography and radio broadcasting." *Id.* at 391 n.8; see *House Pulls the Plug on Cameras in Court*, 65 A.B.A. J. 333 (1979). The ABA's 1979 action reaffirmed the 1972 replacement of canon 35 with canon 3A(7) of the A.B.A. Code of Judicial Conduct, which stood until August 1982. As adopted, canon 3A(7) read:

A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize: (a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration; (b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings; (c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions: (i) the means of recording will not distract participants or impair the dignity of the proceedings; (ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

1984, the Judicial Conference rejected a petition from twenty-eight radio, television, newspaper, and related media organizations proposing to amend canon 3A(7) and rule 53 to facilitate media access to courtroom proceedings.⁴⁰ Given this reluctance to allow television access to federal courts, it is doubtful that the Supreme Court⁴¹ would hold that broadcasters have a first amendment right of access to judicial proceedings.

In arguing for the right to photograph and televise criminal trials, broadcasters have not relied solely on the first amendment. In addition, they have pointed to the sixth amendment's grant of a "public trial"⁴² as an independent justification for permitting television coverage of courtroom proceedings. This argument has been rejected, however, on the ground that the sixth amendment right to a public trial belongs to the accused rather than the public.⁴³ In *Nixon v. Warner*

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and (iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

Commentary: Temperate conduct of judicial proceedings is essential to the fair administration of justice. The recording and reproduction of a proceeding should not distort or dramatize the proceeding.

CODE OF JUDICIAL CONDUCT Canon 3A(7) (1972), reprinted in RTNDA, *supra* note 3, at A-1 to A-2.

The 1982 revision of canon 3A(7) reads as follows:

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

CODE OF JUDICIAL CONDUCT Canon 3A(7) (1984).

40. See JUDICIAL CONFERENCE AD HOC COMMITTEE ON CAMERAS IN THE COURTROOM, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1984) (recommending that the Conference reject the petition) [hereinafter cited as JUD. CONF. REP.].

41. At least one member of the current Court, Chief Justice Burger, has spoken out strongly against permitting cameras in the courtroom. See *A Closed Mind*, NATL. L.J., Nov. 26, 1984, at 12.

42. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" U.S. CONST. amend. VI.

43. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 379-81 (1979) ("Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant."); *Nixon v. Warner Communications*, 435 U.S. 589, 610 (1978) ("[T]he guarantee of a public trial . . . confers no special benefit on the press."); *Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring) ("[T]he right of 'public trial' is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered."); *United States v. Kerley*, 753 F.2d 617, 620 (7th Cir. 1985); *United States v. Hastings*, 695 F.2d 1278, 1284 (11th Cir.), cert. denied, 416 U.S. 931 (1983); *Geise v. United States*, 265 F.2d 659, 660 (9th Cir. 1959); *Tribune Review Pub. Co. v. Thomas*, 153 F. Supp. 486 (D.C. Pa. 1957), *aff'd*, 254 F.2d 883 (3d Cir. 1958); Fla. Report, *supra* note 3, at 774; see also Douglas, *The Public Trial and the Free Press*, 33 ROCKY MTN. L. REV. 1, 5 (1960) ("The public trial exists because of the aversion which liberty-loving people have toward secret trials and proceedings. That is the reason our courts are open to the public, not because the framers wanted to provide the public with

Communications, the Supreme Court did suggest that the guarantee of a public trial assures the public and press the "opportunity" to attend a trial and report on what they observe.⁴⁴ The Court made clear, however, that this limited access to the courtroom was designed to ensure that the accused was not tried and persecuted in secret.⁴⁵ The "opportunity" of the public and the press to attend the trial was considered enough to avert this danger; beyond this, the sixth amendment did not require "that [a] trial — or any part of it — be broadcast live or on tape to the public."⁴⁶

The sixth amendment's grant of a "public trial," then, is primarily a guarantee that a criminal defendant will be "fairly dealt with and not unjustly condemned."⁴⁷ In this respect, the amendment is largely duplicative of the due process clause of the fourteenth amendment;⁴⁸ both provisions operate to protect the accused against unfair trial procedures.⁴⁹ Indeed, in *Estes v. Texas*, the Court spoke almost interchangeably of the two provisions in reaching its conclusion that the televising of *Estes*' criminal trial was constitutionally impermissible.⁵⁰

To summarize, the Supreme Court's decisions in the cameras in the courtroom area establish the following constitutional principles. First, broadcasters do not possess a first amendment or sixth amendment right to televise criminal trials.⁵¹ Second, states may permit

recreation or with instruction in the ways of government.") (footnote omitted); Note, *supra* note 25, at 397. But see Annot., 49 A.L.R.3d 1007 § 3 (1973).

44. 435 U.S. 589, 610 (1978).

45. 435 U.S. at 610.

46. 435 U.S. at 610.

47. *Estes v. Texas*, 381 U.S. 532, 538-39 (1965).

48. For a good example of a due process violation attributable to improper media activity, see *Sheppard v. Maxwell*, 384 U.S. 333 (1966). In *Maxwell*, the "carnival" atmosphere created by the media made it impossible for the defendant to receive a fair trial:

The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. At a temporary table within a few feet of the jury box and counsel table sat some 20 reporters staring at Sheppard and taking notes. The erection of a press table for reporters inside the bar is unprecedented. The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits, and to confer privately with a client and co-counsel. It was designed to protect the witness and the jury from any distractions, intrusions or influences, and to permit bench discussions of the judge's rulings away from the hearing of the public and the jury. Having assigned almost all of the available seats in the courtroom to the news media, the judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial. And the record reveals constant commotion within the bar. Moreover, the judge gave the throng of newsmen gathered in the corridors of the courthouse absolute free rein. Participants in the trial, including the jury, were forced to run a gauntlet of reporters and photographers each time they entered or left the courtroom.

384 U.S. at 355. A similar "circus" atmosphere prevailed in *Estes v. Texas*, 381 U.S. 532 (1965). See note 11 *supra*.

49. *Estes v. Texas*, 381 U.S. 532, 539-40 (1965) (both the due process clause and the sixth amendment "require a procedure that will assure a fair trial").

50. 381 U.S. at 538-44.

51. See notes 26-46 *supra* and accompanying text.

cameras in their courtrooms only if they take steps to protect the defendant's due process and sixth amendment rights to a fair trial.⁵² It is only within the parameters of these constitutional principles that states are free to fashion guidelines governing the use of cameras in their courtrooms. The Court's assignment of greater weight to the defendant's interests than those of the media must serve as a backdrop for all decisions regarding particular guideline provisions. While there may be first amendment *values* served by television coverage, state guidelines must ensure that a defendant's constitutional rights are never threatened in an effort to serve them.

II. CONFLICTING INTERESTS

Part I described the constitutional parameters within which the states must operate in regulating television access to criminal trials. Within these parameters, however, the states have considerable discretion to regulate the manner in which cameras are (or are not) utilized in their courtrooms. The following section seeks to identify those policy interests that the states should consider in promulgating guidelines for the use of cameras in their criminal justice systems.

A. *Reasons to Limit Televised Trials*

1. *Assuring an Untainted Trial*

The physical and psychological disturbances associated with televising a trial have been held to be so bothersome as to violate the defendant's sixth amendment and due process rights.⁵³ However, televising in compliance with Florida's guidelines, which impose minimal restraints on broadcasters,⁵⁴ was upheld in *Chandler v. Florida* as not violative of due process.⁵⁵ Thus, it is likely that televising under other state guidelines, more protective of the defendant, would also be held constitutional. But even when the psychological and physical distractions caused by cameras do not amount to a constitutional violation, they are still undesirable and should be minimized as a matter of policy.

Television equipment and accompanying activity can physically distract trial participants. The Supreme Court in *Estes* stated that disturbances caused by cumbersome equipment, cables, lighting, and

52. See notes 10-25 & 47-50 *supra* and accompanying text.

53. See notes 10-14 & 47-50 *supra* and accompanying text.

54. Florida's guidelines, which were adopted in Fla. Report, *supra* note 3, are in many respects less restrictive than those of other states. For example, guidelines in Alabama, Alaska, Arkansas, Georgia, Minnesota, Oklahoma, and Tennessee require the defendant's consent as a precondition to televising. RTNDA, *supra* note 3, at B-10. In addition, 18 states prohibit coverage of certain types of sensitive proceedings. *Id.* at B-19 to B-25. Florida's guidelines contain neither of these restrictions.

55. See notes 15-25 *supra* and accompanying text.

camera technicians prejudiced the trial.⁵⁶ The Court in *Chandler* argued that advanced technology has greatly reduced these distractions.⁵⁷ While technology has certainly streamlined televising, as long as a camera is in the courtroom, some disruption is likely to remain.⁵⁸

The *psychological* distractions that accompany broadcasting are not as easily measurable or preventable and are potentially more damaging.⁵⁹ The knowledge that the trial is being televised, it is argued, may diminish the jury's attentiveness,⁶⁰ frighten timid witnesses,⁶¹ and cause judges and lawyers to behave differently than they ordinarily would.⁶² As Chief Justice Warren stated in his concurrence in *Estes*, the psychological effects of broadcasting, though subtle, can seriously threaten the administration of a fair trial.⁶³

56. *Estes v. Texas*, 381 U.S. 532, 536-38 (1965).

57. *Chandler v. Florida*, 449 U.S. 560, 576 (1981) ("[M]any of the negative factors found in *Estes* — cumbersome equipment, cables, distracting lighting, numerous camera technicians — are less substantial factors today than they were at that time."); cf. Note, *Televised Trials: Constitutional Constraints, Practical Implications, and State Experimentation*, 9 LOY. U. CHI. L.J. 910, 925 (1978) ("Modern television cameras can be operated noiselessly, without the need for additional lighting, and no longer pose a source of distraction to those present.") (citation omitted).

58. Guidelines can serve to minimize these disturbances. Examples of state restrictions to minimize physical distractions include the following: "Only equipment that does not produce distracting sound or light shall be employed to cover judicial proceedings. . . . No motorized drives shall be permitted, and no moving lights, flash attachments, or sudden lighting changes shall be permitted during court proceedings." CAL. CIV. & CRIM. CT. R. CODE, Rule 980.2(h)(2)(i) (West 1981).

Reports from states that impose guidelines designed to limit noise have found such rules to be successful in reducing physical disruptions. See, e.g., ERNEST H. SHORT AND ASSOCIATES, INC., EVALUATION OF CALIFORNIA'S EXPERIMENT WITH EXTENDED MEDIA COVERAGE OF COURTS 228-29 (1981) [hereinafter cited as CAL. REPORT]; Fla. Report, *supra* note 3, at 768; *Hawaii Report*, *supra* note 1; G. HUMPHRIES, LOUISIANA SUPREME COURT REPORT ON PILOT PROJECT ON THE PRESENCE OF CAMERAS AND ELECTRONIC EQUIPMENT IN THE COURTROOM 2, 4 (1978) [hereinafter cited as LA. REPORT].

59. See *Chandler v. Florida*, 449 U.S. 560, 577 (1981) ("Inherent in electronic coverage of a trial is the risk that the very awareness by the accused of the coverage and the contemplated broadcast may adversely affect the conduct of the participants and the fairness of the trial, yet leave no evidence of how the conduct or the trial's fairness was affected."); *Estes v. Texas*, 381 U.S. 532, 545-50 (1965) (discussing impact on jurors, witnesses, judges, and defendants); *Callahan v. Lash*, 381 F. Supp. 827, 833 (N.D. Ind. 1974) (citing *Estes* with approval); *State v. Green*, 395 So. 2d 532 (Fla. 1981) (requiring evidentiary hearing into psychological effects of media coverage on defendants).

60. *Estes v. Texas*, 381 U.S. 532, 546 (1965).

61. See *Estes v. Texas*, 381 U.S. 532, 547 (1965); Gaines and Stuplinski, *supra* note 6, at 299 ("There is a vast difference between the anticipation there may be spectators in the courtroom and having an individual's picture and actions appearing on the television screen, locally or nationally."); Note, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 COLUM. L. REV. 1546 (1985) (discussing how the intimidation of witnesses can deprive the defendant of a fair trial); JUD. CONF. REP., *supra* note 40, at 5.

62. *Estes v. Texas*, 381 U.S. 532, 548 (1965); see also 381 U.S. at 579 (Warren, C.J., concurring).

63. *Estes v. Texas*, 381 U.S. 532, 565, 578-80 (1965) (Warren, C.J., concurring). For an example of another celebrated case in which psychological distractions were held to contribute to a denial of due process, see the discussion of *Sheppard v. Maxwell* at note 48 *supra*.

The *Chandler* Court correctly acknowledged that there is a lack of empirical evidence concerning the psychological effects that cameras have on defendants, witnesses, and jurors.⁶⁴ Lacking sufficient evidence that cameras inherently burden the judicial process, the Court refused to interfere with state experimentation in this area.⁶⁵ An equally plausible and more cautious response would have been to curb or even deny camera access until sufficient data could be accumulated as to its effects. The Court supported its decision by noting that none of the state experiments were able to show that electronic coverage consistently created psychological distractions.⁶⁶ The surveys done in those reports, however, consisted in part of asking jurors after trial whether they felt that the presence of cameras distracted them and prevented them from making a fair decision.⁶⁷ It is unlikely that jurors after a trial would concede that they were unable, for any reason, to reach a fair, rational decision in the case.

The psychological effects on witnesses of courtroom distractions have been considered a serious enough threat to the fair administration of justice to justify excluding spectators from the courtroom during the testimony of particular witnesses.⁶⁸ Courts have excluded the public in order to safeguard a witness against possible reprisal⁶⁹ or prevent embarrassment and emotional disturbance to the witness.⁷⁰

64. *Chandler v. Florida*, 449 U.S. 560, 576-80 (1981). Both proponents and opponents of cameras in the courtroom acknowledge the deficiency in empirical evidence to support their positions. See, e.g., MINN. REPORT, *supra* note 6, at 16 ("[T]here is almost no solid empirical evidence to support either position.").

65. See notes 20-24 *supra* and accompanying text.

66. *Chandler v. Florida*, 449 U.S. 560, 576 n.11, 578-79 (1981).

67. See, e.g., Fla. Report, *supra* note 3; *Hawaii Report*, *supra* note 1; THE ADVISORY COMMITTEE TO OVERSEE THE EXPERIMENTAL USE OF CAMERAS AND RECORDING EQUIPMENT IN COURTROOMS, 1982 REPORT TO THE SUPREME JUDICIAL COURT [hereinafter cited as MASS. REPORT]; REPORT OF THE SUPREME COURT COMMITTEE TO MONITOR AND EVALUATE THE USE OF AUDIO AND VISUAL EQUIPMENT IN THE COURTROOM (1979) [hereinafter cited as WIS. REPORT].

68. See *Kirstowsky v. Superior Court*, 143 Cal. App. 2d 745, 300 P.2d 163 (1956); *State v. Palm Beach Newspapers*, 395 So. 2d 544 (Fla. 1981) (excluding electronic media because of fear of reprisals against witnesses); *People v. Hagan*, 24 N.Y.2d 395, 248 N.E.2d 588, 300 N.Y.S.2d 835, *cert. denied*, 396 U.S. 886 (1969); see also note 75 *infra*; Annot., 39 A.L.R.3d 852 (1971) (exclusion of public in sex offense cases); Annot., 48 A.L.R.2d 1436 (1956) (exclusion of public during criminal trial).

69. See, e.g., *People v. Hagan*, 24 N.Y.2d 395, 248 N.E.2d 588, 300 N.Y.S.2d 835 (spectators excluded due to witness' fear of reprisal for testifying against alleged murderers of Malcolm X), *cert. denied*, 396 U.S. 886 (1969); see also *United States ex rel. Smallwood v. LaValle*, 377 F. Supp. 1148 (E.D.N.Y. 1974) (spectators excluded partly to protect welfare of pregnant witness and her unborn child, and partly due to subjective fears of reprisal), *affd. without published opinion*, 508 F.2d 837 (2d Cir. 1974), *cert. denied*, 421 U.S. 920 (1975).

70. See, e.g., *State v. Smith*, 123 Ariz. 243, 599 P.2d 199 (1979) (excluding spectators during a rape victim's testimony); *State v. Santos*, 413 A.2d 58 (R.I. 1980) (spectators excluded while witness testified to details of a sexual assault); see also note 75 *infra* (citing additional cases). But see *People v. Smith*, 90 Mich. App. 20, 282 N.W.2d 277 (1979) (dictum hypothesizing that in a trial for criminal sexual conduct, defendant could not prevent media from attending proceedings had media objected to exclusion).

These orders have been upheld as valid discretionary decisions made in part to ensure that the courtroom atmosphere does not inhibit a witness from fully disclosing his or her information. If such concerns at times support excluding the public and the print media from the courtroom, they certainly justify restricting or even excluding the television medium, where the risk that negative psychological reactions may inhibit complete and honest testimony is even greater.⁷¹

2. Protecting Privacy

A second justification for limiting the televising of criminal trials is the privacy interests of the defendant. To be sure, the defendant has no absolute "right" of privacy in the events that transpire in a courtroom. As the Supreme Court held in *Cox Broadcasting Corp. v. Cohn*,⁷² a judicial proceeding is a public event, and information on the public record may be broadcast despite its highly sensitive nature.⁷³

71. See notes 78-82 *infra* and accompanying text.

72. 420 U.S. 469 (1975).

73. 420 U.S. at 492-97. In *Cox*, broadcasters publicized a rape victim's name in violation of a Georgia statute forbidding such publication. The father of the deceased victim sued Cox Broadcasting for money damages alleging an invasion of privacy. 420 U.S. at 471-75. The Court reversed the Georgia Supreme Court's decision on behalf of the father, concluding that "interests in privacy fade when the information involved already appears on the public record." 420 U.S. at 494-95. See also *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 310 (1977) (*per curiam*) (a state may not sanction the press for accurately reporting widely disseminated information obtained at court proceedings open to the public); *Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity."); Fla. Report, *supra* note 3, at 779 (no right of privacy in a judicial proceeding, which is a public event); *State ex rel. New Mexico Press Assn. v. Kaufman*, 98 N.M. 261, 266-67, 648 P.2d 300, 305-06 (1982) (trial court erred in restricting publication of names of jurors where names were announced in open court and filed as part of public record); *Ayers v. Lee Enterprises*, 277 Or. 527, 536-37, 561 P.2d 998, 1002-03 (1977) (no cause of action for publication of rape victim's name, if the name is part of the public record); *State v. Coe*, 101 Wash. 2d 364, 378, 679 P.2d 353, 361 (1984) (the press has an absolute right accurately to publish and broadcast lawfully obtained information that is a matter of public record); RESTATEMENT (SECOND) OF TORTS § 652D, comment b (1977) ("There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public. Thus there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record . . ."). But see Comment, *First Amendment Limitations on Public Disclosure Actions*, 45 U. CHI. L. REV. 180, 189-90 (1977).

One student commentator has expressed a contrary view, arguing that judicial proceedings are not in fact public events:

Buttressing the result dictated by its first two grounds of decision, the Court [in *Cox*] argued that, as recognized by the common law public records defense to a privacy action, there is no substantial privacy interest in information already on the public record. Although the Court was less than explicit, the argument seems to be that because no legitimate privacy interests are infringed by giving publicity to public information, it is unconstitutional to impose sanctions on the press for printing such information, regardless of its importance.

This argument rests on a false premise. Although it is true that a public disclosure action lies only if the facts disclosed are not widely known, it is disingenuous to suggest that all facts on the public record are public facts, in the sense that they are known to a substantial number of people. Giving publicity to little-known facts in the public record may appreciably affect individual privacy.

Id. (footnotes omitted).

However, in *Cox* the Court acknowledged that there may be privacy interests in need of protection in the courtroom. It went on to observe that a valid way to protect such interests is to avoid public documentation or other exposure of private information.⁷⁴ Many state and federal courts have done just that, closing entire trials (or portions thereof) to the public and press to protect witnesses from unnecessary pressures or embarrassment and to maintain order in the courtroom.⁷⁵ Several states acknowledge the privacy interest as a real concern in the cam-

74. 420 U.S. at 496 ("If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish.") (footnote omitted); see also *Briscoe v. Reader's Digest Assn.*, 4 Cal. 3d 529, 541, 483 P.2d 34, 42, 93 Cal. Rptr. 866, 874 (1971) ("[T]he rights guaranteed by the First Amendment do not require total abrogation of the right to privacy.").

75. See, e.g., *United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272 (2d Cir.) (in an effort to preserve the future usefulness and to safeguard the life of an undercover agent, the court excluded the public from the trial during his testimony), *cert. denied*, 423 U.S. 937 (1975); *United States ex rel. Orlando v. Fay*, 350 F.2d 967 (2d Cir. 1965) (public excluded to maintain order in courtroom), *cert. denied*, 384 U.S. 1008 (1966); *United States ex rel. Smallwood v. LaValle*, 377 F. Supp. 1148 (E.D.N.Y.) (exclusion of public during testimony of teenage expectant mother, based partly on concern for welfare of mother and her unborn child and partly on mother's subjective fear of reprisal), *affd. without published opinion*, 508 F.2d 837 (2d Cir. 1974), *cert. denied*, 421 U.S. 920 (1975); *United States v. Geise*, 158 F. Supp. 821, 824 (D. Alaska) (excluding all spectators except family, close friends, and members of the press and bar in a trial for rape of a nine-year-old girl in which two witnesses were girls seven and eleven years of age, arguing that "a trial judge in the exercise of a sound discretion may exclude members of the public as may become reasonably necessary in order to protect a witness from embarrassment by reason of having to testify to delicate or revolting facts . . ."), *affd.*, 262 F.2d 151 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959); *Tribune Review Pub. Co. v. Thomas*, 153 F. Supp. 486 (W.D. Pa. 1957) (to protect defendant's privacy, banning photographs in vicinity of courtroom), *affd.*, 254 F.2d 883 (3d Cir. 1958); *Brumfield v. State*, 108 So. 2d 33, 38 (Fla. 1958) (Upholding, against claims of first amendment freedom of press, a court order prohibiting photography during the arraignment of a defendant indicted for rape. Without actually so holding the court indicated that the validity of the order would also have been upheld on the ground that it was a legitimate measure to protect the right of privacy of the defendant.), 108 So. 2d 33, 37 ("[P]ortions of the proceedings assume the aspects of a private event in connection with which attendance and conduct could reasonably be restricted or controlled . . ."); *Ex Parte Strum*, 152 Md. 114, 136 A. 312 (1927) (order excluding photographers is necessary in part to preserve the dignity and decorum of the courtroom and did not infringe upon freedom of the press); *Commonwealth v. Hobbs*, 385 Mass. 863, 868, 434 N.E.2d 633, 638 (1982) ("Judges may exclude spectators from the courtroom when necessary to protect witnesses, shelter confidential information, or maintain order.") (citation omitted); *Mack Appeal*, 386 Pa. 251, 126 A.2d 679 (1956) (upholding a court rule prohibiting taking photographs in courtrooms in part on the ground that criminal defendants have a "right of privacy" which courts have an inherent duty to safeguard), *cert. denied*, 352 U.S. 1002 (1957); *State v. Sinclair*, 275 S.C. 608, 614, 274 S.E.2d 411, 414 (1981) ("The public was excluded only while the prosecuting witness testified. . . . The primary reason for the order was to shield the witness, a young girl nine years of age, from public scrutiny while she was recounting the details of an embarrassing and sensitive incident."). For a general discussion of the various tests used to determine if a trial should be closed to the public, see 2 W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 22.1 (1984). The authors cite *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596 (1982), in which the Court held unconstitutional on first amendment grounds a Massachusetts statute mandating closure of every trial involving sex offenses with minors. Although the Court invalidated the Massachusetts statute, it made clear that the first amendment does not necessarily bar exclusion from the courtroom of the press and public in such cases. Instead, the exclusion decision must be made on a case-by-case basis, taking into account the state interest in "the protection of minor victims of sex crimes from further trauma and embarrassment . . ." 457 U.S. at 607.

eras in the courtroom debate. Arizona, for example, explicitly recognizes that the trial participants' interest in privacy is an important element in the decision whether to allow cameras.⁷⁶ The report of the District of Columbia Bar on cameras in the courtroom, in recommending that certain highly sensitive trials not be televised, argues that in such instances the privacy "rights" of the parties outweigh the public's interest in access by the electronic media.⁷⁷ Courts and commentators have thus accepted that privacy invasion is a compelling reason to prohibit the broadcasting of certain evidence.

Opponents of cameras in the courtroom argue that the privacy interests of trial participants are more easily threatened by the broadcast than by the print media,⁷⁸ and that exclusion of cameras may therefore be legitimate even when exclusion of the press is not. This contention is based on the assumption that the electronic media are different from the print media in both their nature and their impact on the public. Although the issue is debated,⁷⁹ there is strong evidence supporting the existence of this difference. For one, the evidence suggests that television is a more pervasive medium than newsprint. Reports show that television is the number one source of news across the nation.⁸⁰ A 1981 study revealed that ninety-eight percent of American homes have a television set and the average family watches television 6.9 hours a day.⁸¹ In contrast, only twenty-three percent of Americans buy a morning newspaper and only thirty-one percent purchase an evening paper.⁸² This suggests that the televising of a trial would provide for more widespread public exposure than a newspaper description.

3. *Avoiding Burdens on Judicial Management*

The added activities of broadcasting create new problems requiring

76. See ARIZ. CODE OF JUDICIAL CONDUCT Canon 3A(7)(b)(ii) (Sup. Ct. R. 81 1985).

77. THE COMMITTEE ON CAMERAS IN THE COURTS OF DIVISION IV OF THE DISTRICT OF COLUMBIA BAR, REPORT 7 (1984) [hereinafter cited as D.C. REPORT].

78. See Cotsirilos & Jenner, *Cameras in the Courtroom — An Opposing View*, ILL. TRIAL LAW. J. Fall-Winter 1982, at 24, 59-60 (television coverage magnifies the trauma of crime victims); Note, *supra* note 57, at 918 ("The television camera's unique ubiquitousness dictates a reconsideration of conventional notions of privacy when evaluating that medium's impact on a judicial proceeding.").

79. Compare articles cited in note 78 *supra* (television magnifies the trauma and publicity of a trial), with Ares, *supra* note 32, at 177 (no constitutional difference between television and print media), and Bollinger, *On the Legal Relationship Between Old and New Technologies of Communication*, 26 GERMAN Y.B. INTL. L. 269 (1983) (questioning the validity of the justification for different regulation of television and the print media).

80. See Ares, *supra* note 32, at 174 (citing ROPER ORG., PUBLIC PERCEPTION OF TELEVISION AND OTHER MASS MEDIA: A TWENTY YEAR REVIEW, 1959-79).

81. "Television in the Courtroom," *supra* note 6, at 41 (statement of Herald Price Fahringer, General Counsel, First Amendment Trial Lawyers Association).

82. *Id.*

judges to expend additional time on administration and oversight.⁸³ Many state guidelines require the judge to hold a hearing in which trial participants may object to televising. If the court decides to allow cameras, the judge must ensure compliance with the guidelines. Some of these administrative burdens are eased by the fact that most state guidelines establish a media pool and a liaison to represent all stations desiring to televise. However, the media pool does not eliminate many of the burdens created by cameras in the courtroom. Significant burdens that remain include increased difficulty in empaneling an impartial jury for retrial, larger jury panels, increased use of marshals,⁸⁴ and more frequent necessity for sequestering jurors. Jury sequestration both burdens judicial management and creates a more hostile jury. Unfortunately, jury sequestration is often unavoidable. If not sequestered, jurors may be unable to resist the temptation to view themselves on television despite the judge's instructions not to do so.⁸⁵

4. *The Questionable Educational Benefits of Televising Criminal Trials*

It is often asserted that cameras in the courtroom help to educate the public on the workings of our criminal justice system.⁸⁶ However, it is questionable whether televised trials actually serve as a useful educational tool. According to the Judicial Conference Ad Hoc Committee on Cameras in the Courtroom, media coverage of state court proceedings has not resulted in increased public understanding of the courts.⁸⁷ Rather than educating the public, the manner of televising has often resulted in miseducation and a distortion of the trial. In *Chandler*, for example, the television stations broadcast merely two minutes and fifty-five seconds of the trial and showed only excerpts from the prosecution's direct examination and closing statements.⁸⁸ Such an abbreviated and one-sided presentation leads to more distortion and miseducation than education.⁸⁹ Moreover, reports show that television is regarded as a more believable medium than newspapers,

83. JUD. CONF. REP., *supra* note 40, at 4.

84. *Id.*

85. See "Television in the Courtroom," *supra* note 6, at 40 (statement of Herald Price Fahringer, General Counsel, First Amendment Trial Lawyers Association) ("[J]urors will . . . find it [hard] to obey a judge's admonition to refrain from watching newscasts which may feature them."); JUD. CONF. REP., *supra* note 40, at 5-6; see also MINN. REPORT, *supra* note 6, at 12, 17 (general discussion of sequestration).

86. See Part II. B *infra*.

87. JUD. CONF. REP., *supra* note 40, at 7.

88. *Chandler v. Florida*, 449 U.S. 560, 568 (1981).

89. See also MINN. REPORT, *supra* note 6, at 17 (finding "no evidence of any meaningful educational and informational value to the public from the limited and unbalanced coverage that is characteristic of presenting video and audio coverage under current commercial television news formats for such coverage").

radio, and magazines.⁹⁰ This fact makes such one-sided and incomplete programming even more dangerous.

Media self-regulation could conceivably cure this disturbing problem of distortion. However, the broadcast media, unlike other professions, do not operate under a sophisticated system of ethical codes.⁹¹ Accordingly, stringent state guidelines are needed to ensure that broadcasters present trials in a representative and unbiased manner.

B. *The Interest in Uninhibited Television Access:
First Amendment Values*

While broadcasters have not been granted a first amendment *right* to televise trials,⁹² such televising serves many first amendment *values*. The traditional arguments given for public trials⁹³ also support televised trials. Media access advances public awareness of the judicial system and its current proceedings, facilitates judicial oversight, and permits community catharsis.⁹⁴ In addition, the unique nature of the television medium offers other benefits beyond those provided simply by opening the courtroom to the public and press.

Televised trials, if broadcast in an undistorted fashion, can educate the public about its judicial system, thus satisfying the public's constitutional "right to know." Although in theory each citizen is entitled to attend trial proceedings,⁹⁵ practicalities such as the small size of a courtroom and the limited amount of time individuals can devote to attending trials mean that, unaided by the media, the public is likely to remain relatively ignorant of the activities that transpire in a courtroom. In addition to teaching the public about courtroom procedure, televising trials provides information about public issues. The broadcasting of criminal trials, such as rape and murder cases, increases public awareness of many serious problems in society.⁹⁶

Televised proceedings also aid in public oversight of the judiciary. According to former Justice Potter Stewart, "[t]he primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside Government as an additional check on the three

90. See Note, *supra* note 25, at 404 n.96.

91. See note 7 *supra* and accompanying text.

92. See notes 26-41 *supra* and accompanying text.

93. See notes 27-28 *supra* and accompanying text.

94. For a discussion of the traditional justifications for open trials, see *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177-79 (6th Cir. 1983).

95. See notes 42-46 *supra* and accompanying text.

96. In a well publicized case, in which six men were charged with raping a woman on a barroom pool table in New Bedford, Massachusetts, a cable network televised large portions of the trial. Although the head of Women Organized Against Rape complained that the coverage might discourage other victims from reporting rapes, she admitted that the publicity could also be helpful in focusing public attention on the problem of sexual assaults and the rights of victims. Friendly, *CNN Plans to Cover Sex Abuse Trial*, N.Y. Times, Apr. 25, 1984, at C22, col. 3.

official branches.”⁹⁷ This judicial oversight role was recognized as well in *Sheppard v. Maxwell*, where the Court observed that “[t]he press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.”⁹⁸

A third benefit gained from televised trials has been described as a “community therapeutic value.”⁹⁹ Criminal acts often provoke public outrage and the urge to retaliate.¹⁰⁰ Opening the criminal justice system to the public through television provides an outlet for such community hostility.¹⁰¹ In addition, this hostility may be abated somewhat when the public is shown that justice is being done. Televising trials may thus serve a prophylactic purpose and reduce the probability that the public will take the law into its own hands.¹⁰²

Lastly, the unique nature of the electronic media enables them to serve these functions in ways the print media cannot. The print media are unable to convey as accurately as television the witnesses’ demeanor and the overall atmosphere of the courtroom.¹⁰³ In addition, the pervasiveness of television¹⁰⁴ makes it a superior device to disseminate information about a trial.

97. Address by Justice Stewart, Yale Law School (Nov. 2, 1974), reprinted in, Stewart, “Or of the Press,” 26 HASTINGS L.J. 631, 634 (1975). But see Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979) (arguing that the freedom of the “press” is not limited to the news media, but is a right for those outside the professional press as well).

98. 384 U.S. 333, 350 (1966), quoted in Marcus, *The Media in the Courtroom: Attending, Reporting, Televising Criminal Cases*, 57 IND. L.J. 235, 237 (1982); see also “Television in the Courtroom,” *supra* note 6, at 40 (“The criminal justice system must be held to a high degree of accountability which can only be obtained by a vigorous and independent press.”).

99. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570 (1980)).

100. See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508-09 (1984) (“Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done.”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (“When a shocking crime occurs, a community reaction of outrage and public protest often follows.”); T. REIK, *Forgiveness and Vengeance*, in *THE COMPULSION TO CONFESS* 408 (1959) (stating that human beings have a “truly unquenchable need for vengeance”).

101. See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509 (1984) (“when the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions”); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 571 (1980) (“the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion”).

102. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 571 (1980) (expressing concern that, without public access to criminal trials, “natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful self-help”).

103. Cf. *Hendricks v. Swenson*, 456 F.2d 503, 506 (8th Cir. 1972) (use of videotaped confession is superior to a written statement because jury could tell if defendant was hesitant or uncertain). But see Note, *supra* note 61, at 1554 (arguing that the presence of cameras can create witness nervousness that a jury might erroneously interpret as uncertainty or dishonesty).

104. See text at notes 80-82 *supra*.

C. *Maintaining a Proper Balance*

The preceding discussion has attempted to sketch the policy arguments both in favor and against cameras in the courtroom. While there are clearly first amendment values promoted by televised trials, there is also the potential danger that trial participants will be prejudiced and judicial integrity undermined. Interests in privacy, fairness, judicial efficiency and even public education necessitate that strict limitations be imposed on those broadcasters permitted to televise criminal trials.¹⁰⁵ Traditional notions of the place of criminal trials in our society further support limitations on cameras in the courtroom. The primary purpose of a criminal trial is to provide the defendant with an impartial forum in which the truth will emerge,¹⁰⁶ not to educate or entertain the public.¹⁰⁷ States have an overriding interest in preserving the dignity and solemnity of the courtroom and should develop guidelines that further these goals.¹⁰⁸

105. Many courts and commentators agree that these interests must be weighed more heavily than the relevant first amendment values. See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("*No right* ranks higher than the right of the accused to a fair trial.") (emphasis added); *KPNX Broadcasting v. Superior Court*, 139 Ariz. 246, 257, 678 P.2d 431, 442 (1984) (Feldman, J., concurring in part, dissenting in part) ("In those exceptional cases in which we are forced to choose between First and Sixth Amendment rights, the balance weighs most in favor of the Sixth Amendment when the information withheld is information which may subject jurors to influence, prejudice or pressure which may affect jury deliberations. The trial court's power in the balance between First Amendment and Sixth Amendment rights is therefore at its greatest when dealing with jury problems. It may even impose regulations that prevent the press from obtaining the names and addresses of the jurors."); *State v. Palm Beach Newspapers, Inc.*, 395 So. 2d 544, 549 (Fla. 1981) ("[I]t remains essential for trial judges to err on the side of fair trial rights for both the state and the defense. The electronic media's presence in Florida's courtrooms is desirable but not indispensable."); MINN. REPORT, *supra* note 6, at 9 ("The Commissioners, petitioners and the opponents of video and audio coverage of trial court proceedings who appeared before the Commission as 'Interested Parties' all accept the fact that, where a likelihood exists of a conflict between the rights of a litigant to a fair and public trial and the desire of the media for video and audio coverage of the proceedings, the former must prevail."); Note, *supra* note 57, at 929; Comment, *The Prejudicial Effects of Cameras in the Courtroom*, 16 U. RICH. L. REV. 867, 874-76 (1981-82). See generally Fatzer, *Cameras in the Courtroom: The Kansas Opposition*, 18 WASHBURN L.J. 230 (1978-79) (discussing the balancing process between sixth and first amendment interests in having media present in the courtroom).

Others believe that a balance in favor of the defendant is less obvious. In *Bridges v. California*, 314 U.S. 252 (1941), Justice Black stated that "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." 314 U.S. at 260.

106. See Douglas, *supra* note 43, at 2-3 ("The courtroom by our traditions is a quiet place where the search for truth by earnest, dedicated men goes on in a dignified atmosphere.").

107. See Douglas, *supra* note 43, at 5; Gaines & Stuplinski, *supra* note 6, at 298 ("The function of a trial . . . is 'not to provide an educational experience,' but to resolve the dispute between the parties in conformity with constitutional standards and with concern for procedural and substantive fairness.") (quoting *Estes v. Texas*, 381 U.S. 532, 575 (1965) (Warren, C.J., concurring)).

108. See JUD. CONF. REP., *supra* note 40, at 5-9 (Noting the threat of cameras in the courtroom to human rights, privacy, and the search for truth, and concluding that the ban on photography and broadcasting in federal court proceedings should not be lifted); Douglas, *supra* note 43, at 5 (Justice Douglas opposing extension of photography, television, and broadcasting into the courtroom, arguing that they would transform a trial into "as much of a spectacle as if it were held in the Yankee Stadium or the Roman Coliseum"); Corry, *Rape Trial Covered Live by*

III. STATE GUIDELINES AND THE NEED FOR UNIFORMITY

A. Major Areas Differentiating State Guidelines

States experimenting with televised trials have adopted guidelines to direct their judges confronted with requests to televise. These guidelines represent varying accommodations of the constitutional and policy interests outlined in Parts I and II. The substantive differences among the guidelines lie in several areas: (1) the effect of an objection from a litigant or witness on the decision whether to televise the trial or the objector's testimony; (2) whether the jury should be televised; (3) whether certain types of trials should be off-limits to broadcasters; (4) procedural rules including whether there should be review of the pretrial decision allowing or excluding cameras; and (5) the extent to which broadcasters should be subject to an obligation of balanced reporting. Some of these guideline provisions are discussed below; others are simply included in the proposed model guidelines without discussion because they are technical rules that most states have adopted and found successful.

1. Consent

State guidelines vary as to whether parties or witnesses can preclude broadcasting of their testimony or the entire trial. The best compromise of the various rules is that presented by the District of Columbia committee evaluating cameras in the courtroom.¹⁰⁹ This committee suggests that no *party* would be granted the unilateral right to prevent broadcasters from televising trial proceedings. *Witnesses*, on the other hand, would be given the power to preclude the televising of their testimony.¹¹⁰

In their initial experiments with cameras, many states granted the defendant a right to limit or preclude broadcasting in order to provide maximum protection for the nonconsenting defendant. Although seven states still require the defendant's consent as an absolute precondition for televising a criminal trial,¹¹¹ most states have rejected this

Cable Network, N.Y. Times, Mar. 1, 1984, at C22, col. 5 ("Television, simply by being at an event, can rob it of solemnity and meaning.").

109. D.C. REPORT, *supra* note 77, at 14-20.

110. *Id.* at 7, 14-20. This provision is embodied in the proposed model guidelines. See Appendix, section IV(b), *infra*.

111. See RTNDA, *supra* note 3, at B-10. An "absolute" precondition means that the party's refusal precludes the televising of *any* portion of the trial. A "limited" precondition means that the party's refusal precludes the televising of his or her testimony only. The following data lists the number of states that place absolute or limited preconditions on the televising of their criminal trials: Witness' consent is an absolute precondition (1 state); witness' consent is a limited precondition (14 states); juror's consent is an absolute precondition (0 states); juror's consent is a limited precondition (7 states); defendant's consent is an absolute precondition (7 states); defendant's consent is a limited precondition (3 states); prosecutor's consent is an absolute precondition (5 states); prosecutor's consent is a limited precondition (0 states). *Id.* at B-8 to B-18.

requirement. Those states rejecting it found that, contrary to the intent of the experiment, a defendant's consent requirement effectively barred the televising of all trials.¹¹² While it is disturbing to deprive the defendant of a veto because of practical considerations, certain limitations on the media, to be discussed below, can ensure that television does not deprive the defendant of a fair trial. These include: (1) prohibiting filming of the jury;¹¹³ (2) prohibiting broadcasting of certain sensitive trials;¹¹⁴ (3) requiring a pretrial hearing in which the defendant can raise objections;¹¹⁵ and (4) granting the accused a pretrial right to appeal a decision to allow cameras.¹¹⁶

Conversely, fourteen states wisely allow witnesses to bar the televising of their own testimony.¹¹⁷ States justify the distinction between witnesses and defendants by noting the differences in circumstances leading to their attendance in court. The District of Columbia committee points out that "certain witnesses, such as victims of violent crimes, police informants, and defense witnesses who are reluctant to 'get involved' with the criminal process, will be adversely affected if their testimony is televised."¹¹⁸ Television coverage, it is argued, may increase the risk that these witnesses will become "unavailable" or will alter their testimony.¹¹⁹ Defendants, on the other hand, will be present for trial despite any reluctance to be televised.¹²⁰ Moreover, any incentive on the part of the defendant to fabricate testimony arises from the defendant's predicament, not from the presence of cameras. Therefore, television coverage of the defendant's testimony does not threaten the same damage to the criminal justice system as does the televising of a witness' testimony.¹²¹

Some states provide that a judge may in his discretion prohibit tel-

112. States that changed their rule from requiring to not requiring consent of the defendant include Florida, Hawaii, Colorado, California and Louisiana. See RTNDA, *supra* note 3, at A-12 to A-16, A-23 to A-24, A-26 to A-27, A-38 to A-39; D.C. REPORT, *supra* note 77, at 18 ("A realistic appraisal of the effect of the party-consent requirement suggests that it will lead to the broadcast of very few trials.").

113. See notes 125-37 *infra* and accompanying text.

114. See notes 138-56 *infra* and accompanying text.

115. Cf. *Chandler v. Florida*, 449 U.S. 560, 577 (1981) (discussing Florida's procedure).

116. See notes 161-72 *infra* and accompanying text.

117. States that have adopted this provision are Alabama, Alaska (except victims of sexual offenses), Arkansas, Iowa (victims of sexual abuse only), Kansas, Maryland (victims only), Minnesota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Utah, and Washington. See RTNDA, *supra* note 3, at B-15 to B-16.

118. D.C. REPORT, *supra* note 77, at 14.

119. *Id.*

120. *Id.* at 16.

121. The notion that witnesses in criminal trials must be encouraged to come forward and offer their testimony is not a novel one. The Victim and Witnesses Protection Act § 4(a), 18 U.S.C. §§ 1512-15 (1982), is but one example of a statute designed to encourage witnesses to testify in criminal cases.

Some commentators also contend that witnesses deserve extra protection because they retain more of their right to privacy than do defendants. See Tongue & Lintott, *The Case Against*

evision coverage of an objecting witness upon a showing of good cause by the witness.¹²² A flat rule requiring judges to ban the televising of an objecting witness' testimony¹²³ is preferable because it enables attorneys to assure reluctant witnesses before trial that they will not be televised against their will.¹²⁴ Such prior assurance will increase the likelihood of gaining the cooperation of witnesses which is so critical to the criminal justice process.

2. *Limitations on Broadcasting the Jury*

Filming the jury, during the trial and during voir dire, poses such serious dangers that it should be banned.¹²⁵ Televising the jury can impinge on its impartiality and thus threaten the fairness of the trial. Those who view jurors on television may harass them, attempting to influence their decision.¹²⁶ By causing an increase in outside pressure, broadcasting can enable public opinion to become an "unwanted and powerful thirteenth juror."¹²⁷

Another concern is that broadcasting will distract the jury, both inside and outside the courtroom. Inside, the jurors' attention may be distracted by the physical noise of the cameras or the mere knowledge that they are being filmed.¹²⁸ Outside, the jurors may be tempted to watch themselves on television, despite the judge's order not to read or

Television in the Courtroom, 16 WILLAMETTE L. REV. 777, 792-94 (1980); Note, *supra* note 57, at 917-18.

122. See RTNDA, *supra* note 3, at B-15 to B-16. States that do not require witnesses' consent to televise their testimony are Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Iowa, Kentucky, Maryland (except victims), Massachusetts, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, West Virginia, and Wisconsin. *Id.*

123. States that prohibit the televising of an objecting witness' testimony are Alabama, Alaska, Arkansas, Iowa (victims of sexual offenses only), Kansas (police informant, juvenile witness or victim/witness, undercover agent, relocated witness), Maryland (victims only), Minnesota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Utah, and Washington. *Id.*

124. See "*Television in the Courtroom*," *supra* note 6, at 41 (statement of Herald Price Fahringer, General Counsel, First Amendment Lawyers Association) ("[M]any witnesses will resist coming to court if they know their testimony will be viewed by hundreds of thousands of people."); Tongue & Lintott, *supra* note 121, at 792 (describing how television aggravates a lawyer's difficult task of inducing a witness to appear in the courtroom voluntarily); D.C. REPORT, *supra* note 77, at 15. *But see* Note, *supra* note 25, at 408 (arguing that courts should require a witness to offer a legitimate reason for refusing consent).

125. See Appendix, sections IV(a) & V *infra*.

126. See *Estes v. Texas*, 381 U.S. 532, 546 (1965) (If depicted on television, jurors "would be subjected to the broadest commentary and criticism and perhaps the well-meant advice of friends, relatives and inquiring strangers who recognize them on the streets."); see also *Cotsirilos & Jenner*, *supra* note 78, at 60 ("The experience of viewing a trial, unlike reading reports in the printed media, causes a person to feel more knowledgeable about the trial and leads to stronger opinions concerning the 'correct' outcome. It is a near certainty the jurors will be approached by such people and will become engaged in discussions about the trial.").

127. Note, *supra* note 57, at 928; see also *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court and not by any outside influence, whether of private talk or public print.") (quoting Justice Holmes in *Patterson v. Colorado*, 205 U.S. 454, 462 (1907)).

128. See *Estes v. Texas*, 381 U.S. 532, 545-47 (1965); Part II. A. 1 *supra*. For the suggestion

watch reports of the trial.¹²⁹ Jurors who watch the broadcast may learn of evidence not admitted or see facts presented in a different light. At a minimum, they will receive additional exposure to those facts deemed most significant by the broadcasters. Such pollution of the fact-finding process raises grave policy and constitutional concerns.

Furthermore, televising the jury during the trial may invade the jurors' legitimate interest in privacy.¹³⁰ Of all the trial participants, jurors are most likely to be in court involuntarily. Jurors performing their civic duty should not have to be exposed to public scrutiny. Such exposure is of special concern with regard to voir dire, since judges (and in some states attorneys) often question jurors regarding highly personal matters.¹³¹ Jurors may be required to reveal, for example, information about their past associations or criminal behavior. The jurors' privacy is thus more easily threatened by the televising of voir dire proceedings in which they are active participants than by the broadcasting of a trial in which they are silent spectators. The set of model guidelines should therefore incorporate the rule already adopted by nine states prohibiting the televising of voir dire proceedings.¹³²

that jurors are *not* distracted by the presence of cameras, see CAL. REPORT, *supra* note 58, at 228; Fla. Report, *supra* note 3, at 768-69; LA. REPORT, *supra* note 58, at 2.

129. See note 85 *supra* and accompanying text.

130. Courts have recognized a juror's privacy interest as a valid concern that must be safeguarded. The defendant, the state, and the juror herself may all share this interest. Recently, Justice Blackmun explained these interests, stating:

[T]he defendant has an interest in protecting juror privacy in order to encourage honest answers to the *voir dire* questions. The State has a similar interest in protecting juror privacy even after the trial — to encourage juror honesty in the future — that almost always will be coextensive with the juror's own privacy interest.

Press-Enterprises Co. v. Superior Court, 464 U.S. 501, 515 (1984) (Blackmun, J., concurring) (footnote omitted). In *Press Enterprises*, however, Justice Blackmun emphasized that the jurors merely have an interest in privacy. The Justice "put off to another day consideration of whether and under what conditions that interest rises to the level of a constitutional right." 464 U.S. at 516. See also *Sheppard v. Maxwell*, 384 U.S. 333, 353 (1966) ("The fact that anonymous letters had been received by prospective jurors should have made the judge aware that this publicity seriously threatened the jurors' privacy."); *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979) (approving the trial court's decision to protect the anonymity of jurors in a narcotics case by refusing to make public their names and addresses), *cert. denied*, 446 U.S. 907 (1980); *KPNX Broadcasting v. Maricopa County Superior Court*, 139 Ariz. 246, 258, 678 P.2d 431, 443 (1984) (Feldman, J. concurring in part, dissenting in part) ("In my view, the whole system is much better served if jurors are allowed a sense of privacy and anonymity.").

131. See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 514 (1984) ("[A] juror has a valid interest in not being required to disclose to all the world highly personal or embarrassing information simply because he is called to do his public duty.").

132. The nine states are Colorado, Connecticut, Hawaii, Iowa, Massachusetts, Minnesota, New Mexico, North Carolina and Rhode Island. See RTNDA, *supra* note 3, at B-24. It should be noted that the Supreme Court has recently decided that the presumption of openness secured for the press and public by *Richmond Newspapers*, see notes 26-28 *supra* and accompanying text, extends as well to the voir dire examination of potential jurors in a criminal trial. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505-10 (1984). However, the Court merely established a *presumption* of openness; it refused to adopt a flat rule mandating a right of access to voir dire

A ban on televising the jury is further supported by the fact that the benefits of broadcasting are few in the jury context. Televising the jury watching the trial contributes little to the public's understanding of judicial proceedings.¹³³ In addition, filming of the jury in voir dire proceedings or at trial does little to advance the goal of judicial oversight. To protect truly against a "miscarriage of justice,"¹³⁴ the public would need to witness the actual deliberations of the jury. Neither the televising of voir dire nor the broadcasting of jurors viewing the trial would enlighten the public as to whether the jury was adequately performing its assigned role.

Most states that permit cameras impose some restrictions on televising members of the jury. Some prohibit televising the jury altogether,¹³⁵ while others prohibit filming in such a way that individual jurors are recognizable.¹³⁶ This rule prohibiting close-ups or "zooming in" on individual jurors offers some protection against outside pressure and interferences with privacy, and may curtail the juror's urge to watch the trial on television. However, reports have shown that this partial restriction is technologically difficult to implement.¹³⁷ Therefore, a total ban on jury broadcasting is more likely to guarantee an impartial jury and protect jurors' privacy.

3. *Limitations on Televising Highly Sensitive Trials*

The broadcasting media should be excluded from certain types of highly sensitive trials,¹³⁸ such as juvenile proceedings,¹³⁹ domestic re-

proceedings. Moreover, as evidenced by the Court's decision not to extend *Richmond Newspapers* to the electronic media, see notes 32-36 *supra* and accompanying text, openness to the public does not necessarily mean that television coverage cannot be restricted.

133. See Note, *supra* note 25, at 422 ("[P]hotographing the jury does not educate the public nor does such coverage help monitor the courts — it is exposure for exposure's sake. . . . The state's strong interest in protecting the jury from outside influence coupled with the negligible first amendment interests involved clearly justify banning the photographing of juries.").

134. See note 98 *supra* and accompanying text.

135. States that completely prohibit television coverage of the jury include Arkansas, Connecticut, Hawaii, Minnesota, New Mexico, North Carolina, Ohio and Utah. RTNDA, *supra* note 3, at B-10 to B-11.

136. States that allow coverage of the jury but only in a manner that will prevent recognition of individual jurors include Arizona, California, Colorado, Kansas, Massachusetts, and New Jersey. RTNDA, *supra* note 3, at B-17 to B-18.

137. See CAL. REPORT, *supra* note 58, at 231.

138. It should be noted that states that bar the media from sensitive *criminal* trials employ similar justifications to bar the media from especially sensitive *civil* trials. Thus, eight states bar the media from adoption proceedings, eleven states bar the media from child custody proceedings, and eleven states bar the media from divorce proceedings. RTNDA, *supra* note 3, at B-19 to B-21. Accordingly, the model guidelines proposed by this Note provide that the media should be precluded from televising all sensitive trials, whether criminal or civil. See Appendix, section II(b), *infra*.

139. Thirteen states prohibit the televising of juvenile proceedings. See RTNDA, *supra* note 3, at B-21; see also Geis, *Publicity and Juvenile Court Proceedings*, 30 ROCKY MTN. L. REV. 101, 102 (1958) ("privacy has typically been among the few unchallenged keynotes in juvenile pro-

lations disputes, and sexual offenses,¹⁴⁰ in order to protect the privacy of the participants.¹⁴¹ Many state guidelines either mandate such an exclusion or state a presumption¹⁴² that such broadcasting should be prohibited. Other states leave the decision solely to the discretion of the judge.¹⁴³

Guidelines should require courts to exclude cameras from certain highly sensitive trials for the same reasons that they completely close them to the public and the print media.¹⁴⁴ Closing a trial may spare a witness, especially one who is a victim, embarrassment, harassment, or reprisal. Because trials involving sexual offenses typically raise sensitive and personal matters, many courts exclude spectators at least during the victim's testimony.¹⁴⁵ Judges presiding over trials involving children have also taken extra precautions.¹⁴⁶ Indeed, there are a variety of protections afforded children — including the closure of juvenile proceedings¹⁴⁷ — that acknowledge that children are more easily scarred than adults both by crimes in which they are involved and by

ceedings"); Note, *supra* note 25, at 421-22 ("[A]uthorities regard the confidentiality of juvenile proceedings as indispensable to the successful functioning of the juvenile system.").

140. Eight states prohibit the televising of sexual offense trials. See RTNDA, *supra* note 3, at B-23; see also D.C. REPORT, *supra* note 77, at 7, 21-22 (arguing that no television coverage should be allowed in cases, such as sexual offense trials, which will likely invade litigants' privacy interests); Fla. Report, *supra* note 3, at 779 (arguing that it might be appropriate to prohibit the filming of sex crime victims, confidential informants, prisoners, and those involved in custody disputes).

141. See D.C. REPORT, *supra* note 77, at 21-22 (discussing the types of trials most likely to invade the participants' privacy interests); see also *State v. Gilroy*, 313 N.W.2d 513, 517 (Iowa 1981) (upholding exclusion from expanded media coverage of witness undercover agents in order to protect "effective and necessary law enforcement processes").

142. States that have a presumption rule include Maryland and Wisconsin. See RTNDA, *supra* note 3, at B-20.

143. An example of one such state is New Mexico. See RTNDA, *supra* note 3, at B-21.

144. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (closure may be permitted to conceal a victim's identity or protect her privacy); note 68 *supra* and accompanying text; note 139 *infra*.

145. See, e.g., *State v. Smith*, 123 Ariz. 243, 599 P.2d 199 (1979) (court excluded spectators during victim's testimony); *State v. Santos*, 413 A.2d 58 (R.I. 1980) (temporary exclusion of all spectators permissible during testimony of rape victim).

In the New Bedford rape case, see note 96 *supra*, the judge ruled that neither the print nor the broadcast media could photograph the victim or reveal her name. Corry, *supra* note 108, at C22. Instead, viewers were to hear only the victim's "voice, flat and unemotional, responding to questions." *Id.* Unfortunately, the judge's ruling was inadvertently violated; because the coverage was live, the broadcaster was unable to prevent the transmission of the victim's name when it was spoken in open court. See Friendly, *supra* note 96, at C22. This highlights how difficult limited exclusion is to administer and the need to supervise the broadcast to ensure compliance with the judge's orders.

146. See *Boy, 7, Is Witness in Child Abuse Case*, N.Y. Times, Jan. 23, 1985, at A9, col. 1 (spectators ordered to watch child's testimony on closed-circuit television; child's name edited out of the videotape). See generally Annot., 14 A.L.R.4th 121 §§ 2b, 7c (1982).

147. Most states close juvenile court proceedings to the public, relying heavily on the importance of the privacy rights of the child. See S. FOX, JUVENILE COURTS IN A NUTSHELL 184-87 (1984). The constitutionality of complete closure of juvenile proceedings is very much in doubt in light of *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). See note 75 *supra*. However, the fact that *some* access to juvenile proceedings may be required under certain cir-

the judicial process itself.¹⁴⁸

Permitting the broadcasting of sensitive trials also creates broader crime-control problems. Victims of sexual offenses, for example, may opt not to report or prosecute crimes if they believe they will be televised at trial.¹⁴⁹ To encourage these victims to prosecute their attackers, guidelines are needed that require judges not to permit the televising of particularly sensitive trials.¹⁵⁰

Although courts desire to make such decisions on a case-by-case basis,¹⁵¹ leaving decisions to the judge's discretion subjects the victim's privacy interests to the whim of the judge. In Florida, for example, judges have refused requests not to be televised made by a widow of a murder victim, a prisoner in fear of retaliation, and a sixteen-year-old rape victim, on the ground that television broadcasting would not have a qualitatively different effect than newspaper reports.¹⁵² These examples (especially the last) demonstrate the injustices made possible when judges, insensitive to the legitimate privacy concerns of litigants, are not constrained by rules mandating that privacy be protected.¹⁵³

The Supreme Court has ruled on this issue regarding the print media and the public. In *Globe Newspaper Co. v. Superior Court*,¹⁵⁴ the Court overturned a state statute that uniformly excluded the public and press from trials of specified sexual offenses involving victims under the age of eighteen. The Court acknowledged that trial participants may have an interest in excluding the press during sensitive trials, but held that the first amendment required that exclusion decisions be made on a case-by-case basis.¹⁵⁵ The Seventh and Eleventh Circuits have held, however, that *Globe* does not prevent a ban on the televising of federal criminal trials. Such a ban, they held, merely limits one type of news coverage; in comparison, the statute struck

cumstances does not mean that television coverage of such proceedings must be permitted. See notes 154-56 *infra* and accompanying text; cf. note 132 *supra*.

148. See also Geis, *supra* note 139, at 102 ("the notoriety which would result from dissemination by mass media of the facts of a juvenile's case would tend to scar, rather than scare, him permanently and handicap his prospects for future adjustment and law-abiding behavior").

149. See Friendly, *supra* note 96, at C22 ("[T]he coverage of the rape in Big Dan's Tavern could 'terrorize' other victims and discourage them from reporting sexual assaults.") (quoting Senator Arlen Specter, a Pennsylvania Republican and a former district attorney).

150. Cf. notes 122-24 *supra* and accompanying text; Appendix, section II(b), *infra*.

151. Indeed, the Supreme Court adopted such a case-by-case approach in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). See note 75 *supra*. *Globe*, however, did not involve the broadcasting of juvenile proceedings. See notes 154-56 *infra* and accompanying text.

152. See Fla. Report, *supra* note 3, at 778; see also Hoyt, *Prohibiting Courtroom Photography: It's Up to the Judge in Florida and Wisconsin*, 63 JUDICATURE 290 (1980); Note, *supra* note 25, at 406.

153. Cf. note 6 *supra*.

154. 457 U.S. 596 (1982).

155. See note 75 *supra*.

down in *Globe* prohibited *all* types of coverage.¹⁵⁶ Thus, *Globe* is probably not authority for striking down state guidelines that preclude cameras in highly sensitive cases.

4. *Procedural Safeguards*

Many state guidelines provide rules about notice — both that the court receive notice of a request to televise well before the actual trial date,¹⁵⁷ and that the court notify the parties of any request received.¹⁵⁸ The first requirement enables the judge, during the few days before the trial, to address substantive matters undistracted by any media-related issues.¹⁵⁹ The second requirement insures that the parties will not be surprised at trial by the broadcaster and will be prepared to raise any objections that, under *Chandler v. Florida*, they have a right to make at the pretrial hearing.¹⁶⁰

In addition to requiring notice, guidelines should allow the defendant to make an interlocutory appeal of a pretrial decision to permit broadcasting. Until *Chandler*, the Supreme Court maintained that a post-trial appeal was a poor remedy for an accused.¹⁶¹ However, the *Chandler* Court, while requiring that the defendant be given an opportunity to voice objections to coverage,¹⁶² upheld Florida's rule under which the only opportunity to challenge the decision to televise was on appeal,¹⁶³ after any damage had already been done.

Chandler did acknowledge that coverage may adversely affect the conduct of trial participants and the fairness of the trial without leaving evidence that such prejudice occurred.¹⁶⁴ It thus may be impossible to prove after the fact that a trial was unfair as a result of the

156. See *United States v. Kerley*, 753 F.2d 617, 620-21 (7th Cir. 1985); *United States v. Hastings*, 695 F.2d 1278, 1281 (11th Cir.), *cert. denied*, 461 U.S. 931 (1983).

157. See RTNDA, *supra* note 3, at B-8 to B-9 (listing thirty-five states that require prior notice).

158. See, e.g., ARIZ. CODE OF JUDICIAL CONDUCT Canon 3A(7)(f) (Sup. Ct. R. 81 1985); IOWA CODE OF JUDICIAL CONDUCT Canon 3A(7) (Rules of Procedure for Expanded Media Coverage 3(b) 1985).

159. Letter from Judge Murray Richtel to the Subcommittee on Model Rules for Expanded Media Coverage (Jan. 11, 1985), at 2.

160. 449 U.S. 560, 577 (1981).

161. See *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 555 (1976); *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966); Comment, *supra* note 20, at 330-31 ("*Nebraska Press* . . . indicated that a less desirable alternative to restricting first amendment press rights is reliance on appellate review as a means of redressing fair trial violations resulting from prejudicial publicity.").

162. See note 160 *supra* and accompanying text.

163. 449 U.S. at 581. For a criticism of the *Chandler* position on interlocutory appeals, see Note, *supra* note 105, at 867-68.

164. Inherent in electronic coverage of a trial is the risk that the very awareness by the accused of the coverage and the contemplated broadcast may adversely affect the conduct of the participants and the fairness of the trial, yet leave no evidence of how the conduct or the trial's fairness was affected.
449 U.S. at 577.

broadcasting. Nonetheless, the Court placed the burden on the defendant to prove that the televising was prejudicial.¹⁶⁵ This difficult burden is made even more onerous by the high standard of appellate review of discretionary trial court decisions.¹⁶⁶ Limiting the defendant's relief to a post-conviction appeal may thus offer little benefit to the defendant whose conviction has already been broadcast nationwide.¹⁶⁷ Although interlocutory appeals can crowd appellate court dockets and delay trials, they are warranted when legitimate claims may be jeopardized if not heard and appealed before trial.¹⁶⁸

The District of Columbia Bar report recommends a rule under which a party would have the right to an interlocutory appeal of a pretrial decision allowing coverage, but the media and nonparties would be denied a similar right to appeal a pretrial decision barring coverage.¹⁶⁹ Prohibiting interlocutory appeal on a decision to bar the media reduces the delay before the trial.¹⁷⁰ The compromise also shows proper deference for the accused over the interests of the media.¹⁷¹ Few would doubt that the damage to the defendant of an improper decision allowing cameras is greater than the damage to the public of the converse decision. The public will learn of the trial from newspapers and television reports even without the live broadcast.¹⁷²

165. 449 U.S. at 575, 581-83.

166. See *Lasley v. State*, 274 Ark. 352, 357, 625 S.W.2d 466, 469 (1981).

167. D.C. REPORT, *supra* note 77, at 19, 20. Few state guidelines discuss the interlocutory appeal issue. Some states explicitly deny the defendant or the media the right to appeal the court's determination before trial. See, e.g., ILL. ANN. STAT. ch. 110A, § 61(c)(24) (Smith-Hurd 1985), amended by *In re Photographing, Broadcasting, and Televising Proceedings in the Courts of Illinois*, MR No. 2634 (Nov. 29, 1983) (adopted on a permanent basis by order entered Jan. 22, 1985); *In re Canon 3A(7)*, 9 MEDIA L. REP. 1778, 1779 (Minn. 1983).

168. The federal courts generally disfavor interlocutory appeals. Interlocutory appeals as of right are limited by statute, see 28 U.S.C. § 1292(a) (1982), while discretionary appeals, 28 U.S.C. § 1292(b) (1982), are rarely granted, see J. COUND, J. FRIEDENTHAL, A. MILLER, & J. SEXTON, CIVIL PROCEDURE: CASES AND MATERIALS 1034 n.5 (4th ed. 1985). Many states, however, have more liberal provisions for interlocutory appeals. See, e.g., MINN. R. CIV. APP. P. 103.03; N.Y. CIV. PRAC. LAW AND R. 5701 (providing for "appeal . . . as of right . . . from an order . . . [that] affects a substantial right").

169. D.C. REPORT, *supra* note 77, at 19-20.

170. See D.C. REPORT, *supra* note 77, at 19 (citing *In re Canon 3A(7)*, 9 Media L. Rep. (BNA) 1778, 1779 (Minn. 1983) and *In re Canon 3A(7)*, 5 Media L. Rep. (BNA) 2609, 2611 (Nev. 1980)).

171. See Parts II. A. 2 and C *supra*.

172. See *United States v. Kerley*, 753 F.2d 617, 620-21 (7th Cir. 1985); *United States v. Hastings*, 695 F.2d 1278, 1280-82 (11th Cir. 1983); "Television in the Courtroom," *supra* note 6, at 42 (The public is being adequately informed about criminal prosecutions by newspaper coverage and the filming outside the precincts of the courtroom. Journalists have always been free to report the most minute details and events of a trial. Excluding cameras from the courtroom will not infringe upon the public's right to know about criminal prosecutions.).

Some challenge this argument on the ground that it discriminates against broadcasters in favor of the print media. See Ares, *supra* note 32, at 175-78. This complaint was effectively countered in *Estes v. Texas*, 381 U.S. 532, 540 (1965), where the court argued that the "television and radio reporter has the same privilege. All are entitled to the same rights as the general

5. Limitations on Reporting

Distortion in reporting trials is a serious concern with broadcasting.¹⁷³ Some fear that trials will be presented in a fashion most likely to entertain.¹⁷⁴ Others fear that broadcasters will, as in *Chandler v. Florida*,¹⁷⁵ present only one side of the case, thereby distorting the public's understanding of the proceeding and reducing the educational value of the broadcast.¹⁷⁶

Given the length of many trials and the high cost of television time, a requirement that the entire trial be broadcast is probably unrealistic.¹⁷⁷ On the other hand, a requirement of balanced reporting is both realistic and appropriate. Admittedly, such a restriction would probably be unconstitutional as applied to the print media.¹⁷⁸ However, the difference in impact between the two media¹⁷⁹ justifies a requirement that broadcasters offer a balanced presentation of criminal trials.

A requirement of balanced reporting that applies only to broadcasting is not foreign to our system of media regulation. For example, the federal election laws require that "[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office"¹⁸⁰ Such equal time and space provisions are not required of newspapers.¹⁸¹ Similarly, the FCC's fairness doctrine requires broadcasters to cover public issues adequately, and, in so doing, provide for the expression of opposing views.¹⁸² The fairness doctrine may not constitutionally be applied to

public. The news reporter is not permitted to bring in [to court] his typewriter or printing press."

173. See Tongue & Lintott, *supra* note 121, at 785; Gerbner, *supra* note 6.

174. See MINN. REPORT, *supra* note 6, at 10 ("[Opponents of video and audio coverage] believe that the media, in deciding what to cover, is much more concerned with the sensational, the frequently prurient interests of the public and with what will perhaps improve the ratings of one television . . . or radio station as compared to its competitors.").

175. 449 U.S. 560, 568 (1981).

176. See "Television in the Courtroom," *supra* note 6, at 35-36 (statement of G. Barasch, Conference Chairman); Cotsirilos & Jenner, *supra* note 78, at 59 ("Pity the poor accused who has been found not guilty only to return to a community that viewed selected and edited portions of his trial reflecting only the prosecution's case, as was done in *Chandler*"); notes 88-89 *supra* and accompanying text.

177. See JUD. CONF. REP., *supra* note 40, at 7 ("Economic considerations and time constraints preclude the universal televising of entire trials, requiring selection of trials and parts of trials sufficiently sensational to attract viewers.").

178. See note 183 *infra*.

179. See notes 79-82 *supra* and accompanying text.

180. The Communications Act of 1934 § 315, 47 U.S.C. § 315(a) (1982).

181. See Bollinger, *supra* note 79, at 272-75.

182. See *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 378-79 (1969); see also Bollinger, *supra* note 79, at 274-75; Zimmerman, *supra* note 35, at 642-43. The fairness doctrine received

the print media.¹⁸³ Such provisions acknowledge the differences between the two kinds of media and accordingly provide stricter rules to ensure balanced reporting by television broadcasters.¹⁸⁴

A balanced reporting provision should require broadcasters to express the arguments of both the defendant and the prosecution. It need not require strict equal time in reporting as imposed on television by the election laws,¹⁸⁵ because this would prove unworkable in a judicial proceeding. For example, it might not be clear to broadcasters which side a particular witness' testimony will ultimately benefit. In addition broadcasters would have to decide how many minutes to devote to the prosecutor's case without knowing the length of the defendant's presentation. Nonetheless, a general requirement of balanced reporting would help eliminate the most egregious distortions of criminal trials; distortions that can jeopardize the fairness of the trial and minimize the public's opportunity to understand the judicial process.

6. *Technical Rules*

States have devised a variety of rules aimed at limiting the physical distractions caused by cameras in the courtroom. Although specific requirements vary from state to state, these technical rules are rarely

congressional sanction in a 1959 amendment of the Communication Act. See 47 U.S.C. § 315(a) (1982).

183. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (a Florida statute that grants a political candidate equal space to reply to criticisms by a newspaper violates the first amendment guarantee of a free press). See generally Barrow, *The Fairness Doctrine: A Double Standard for Electronic and Print Media*, 26 HASTINGS L.J. 659, 665-91 (1975).

184. Several theories are offered to justify the disparate treatment of newspapers and television. See generally Bollinger, *supra* note 79. One theory is that the airwaves are a limited resource, such that only a certain number of stations can effectively communicate at any given time. Thus regulations should be imposed to ensure that the few stations that do have the privilege to broadcast do not present the public with a one-sided view of important issues. See *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 400 (1969) (adopting the "physical scarcity" rationale). But see Bollinger, *supra* note 79, at 273 ("[E]verything is scarce, including all those things used by newspapers and magazines for that particular form of communication (newsprint, metal and the like).") (emphasis in original). A second theory asserted is that broadcasters are public trustees and fiduciaries and thus should be regulated in the public interest. See *Red Lion*, 395 U.S. at 383, 389-90. A third justification for regulation is known as the "impact" thesis, which asserts that television messages have a subliminal impact that can undermine viewers' rationality and make the message seem more believable than if read. See *Banzhaff v. FCC*, 405 F.2d 1082, 1100-01 & n.77 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); see generally Bollinger, *Elitism, the Masses and the Meaning of the First Amendment*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 99 (R. Collins ed. 1980) (noting that, of all media, television is suspected of having the greatest impact on the largest audience). Finally, some courts justify restrictions as necessary to protect viewers who are in certain respects a "captive audience." See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978); *Columbia Broadcasting Sys. v. Democratic Natl. Comm.*, 412 U.S. 94, 127 (1973). This rationale is closely related to the assertion that because the television set is located in the home, a place in which the privacy interests of the audience are entitled to extra deference, heightened regulation is required to ensure the propriety of the broadcasting material. *Pacifica*, 438 U.S. at 749 & n.27.

185. See note 180 *supra* and accompanying text.

in controversy in debates over media access. Reports from states experimenting with televised trials have found that such rules help minimize distractions and thus serve to provide fairer trials.¹⁸⁶

Examples of technical rules include (1) prohibiting the changing of camera lenses during the trial; (2) requiring media pooling so that only one camera is in the courtroom at any given time; (3) requiring camerapersons to dress appropriately for the proceeding; and (4) prohibiting insignias on either the cameras or clothes of the broadcasters that identify the station.¹⁸⁷ Judge Murray Richtel, chairman of the National Conference of State Trial Judges committee responsible for drafting model rules for electronic coverage of trials,¹⁸⁸ favors the additional requirement that photographers remain in the courtroom throughout the proceedings: "I [want] them to stay because if the jurors [see] them coming and going they might [be] given the impression that one part of the trial [is] more important than the other"¹⁸⁹

B. *The Merits of a Uniform Set of Guidelines*

All states should adopt the model guidelines proposed in the Appendix to this Note, not only because they properly balance the conflicting constitutional and policy interests involved in the cameras in the courtroom debate, but also because uniformity in this area is itself a worthy goal.

In contrast to the rules governing civil procedure,¹⁹⁰ there is currently no uniform set of rules of criminal procedure generally accepted by most states.¹⁹¹ Nonetheless, efforts have been made in this direction. The National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted uniform rules of criminal procedure in 1974.¹⁹² Other groups such as the American Law Institute and Amer-

186. See, e.g., Fla. Report, *supra* note 3, at 18; MINN. REPORT, *supra* note 6, at 6-7.

187. Almost every state has a similar set of technical rules designed to minimize physical distractions. See, e.g., ARIZ. CODE OF JUDICIAL CONDUCT Canon 3A(7)(n)-(s) (1985); CONN. CODE OF JUDICIAL CONDUCT Canon 3A(7A)(9) (1986); IOWA CODE OF JUDICIAL CONDUCT Canon 3A(7) (1985).

188. See note 9 *supra*.

189. Reaves, *Cameras in Court*, 69 A.B.A. J. 1213 (1983).

190. As of 1979, well over half the states had civil rules closely patterned after the Federal Rules of Civil Procedure. See Rowe, *A Comment on the Federalism of the Federal Rules*, 1979 DUKE L.J. 843, 843 (citing C. WRIGHT & F. ELLIOT, *FEDERAL PRACTICE AND PROCEDURE: INTERIM PAMPHLET TO JURISDICTION AND RELATED MATTERS* §§ 9-9.53 (1977)). In addition, the movement toward adoption of the federal rules continues in some nonconforming states. *Id.* at 843.

191. The Federal Rules of Criminal Procedure have served as a model for rules of criminal procedure in only 18 jurisdictions. See R. CHAPIN, *supra* note 6, at 8. For an excellent discussion of the merits of uniform rules of criminal procedure, see *id.* at 17-19.

192. UNIF. R. CRIM. P., 10 U.L.A. (1974). "The object of the National Conference, as stated in its constitution, is 'to promote uniformity in state laws on all subjects where uniformity is deemed desirable and practicable.'" *Id.* at III. The set of criminal procedure rules adopted by the Conference, however, does not directly address the issue of televised trials. The only refer-

ican Bar Association have also promulgated draft codes, rules and standards in an effort to improve state rules of criminal procedure.¹⁹³

There are three advantages of a uniform set of rules for cameras in state criminal trials. First, they would ensure fairness; second, they would promote judicial efficiency; and third, they would benefit those broadcasters that operate across interstate lines. The principal objection to uniform rules, that federalism might be threatened, is not sufficiently certain or compelling to outweigh the benefits.

First, uniform rules would serve to ensure fairness in criminal trials by treating those accused consistently from state to state.¹⁹⁴ Uniform rules of procedure regarding the broadcasting of trials would raise the visibility of the cameras in the courtroom issue, provide certainty of procedures, and help eliminate the perception of arbitrary actions by the courts. Uniform rules would also help prevent "favoritism, corruption, and local prejudice."¹⁹⁵

Second, the adoption of one set of rules to govern televised trials would promote judicial efficiency. With only one set of state guidelines to construe, the Supreme Court and other appellate tribunals could more easily assure compliance with first, sixth, and fourteenth amendment requirements.¹⁹⁶ If the Supreme Court were to uphold the uniform set of rules, as it did the Florida guidelines in *Chandler*,¹⁹⁷ the number of appeals would be reduced. Parties could still challenge the interpretation and application of the rules (e.g., argue that the judge abused his or her discretion), but could no longer challenge the validity of the rules themselves. Efficiency would also be increased in the separate states. As the uniform guidelines became more accepted, states considering cameras in the courtroom would not have to conduct their own experiments and evaluations.¹⁹⁸ Instead, they could be assured that the guidelines worked merely by the number of states using them successfully.

Third, uniform rules offer benefits to broadcasters. Almost all current state guidelines consist of complex rules containing both procedural requirements and technical rules regulating equipment. The major broadcasters are interstate networks and are likely to be interested in broadcasting trials in various states. Under the current system, the network must carefully study the guidelines of the particular

ence in the model rules to broadcasting appears in section 714(e), which provides that sound and visual recordings of closed trial proceedings may be shown publicly *after* the trial. *Id.* at 319.

193. See R. CHAPIN, *supra* note 6, at 7.

194. See *id.* at 29.

195. See *id.*

196. See *id.* at 17 n.73.

197. See notes 15-25 *supra* and accompanying text.

198. Almost all states considering cameras in their courts have gone through a lengthy period of experimentation and evaluation. States issuing comprehensive reports include California, Florida, Hawaii, Minnesota, Washington and Wisconsin.

state in which it seeks to televise. Given the variety of equipment specifications, this may entail using certain equipment in one state and different equipment in others. Notice requirements also differ markedly from state to state; the time period within which a broadcaster must file a request to televise ranges from one day in advance of trial in Colorado,¹⁹⁹ to fourteen days in advance of trial in Iowa,²⁰⁰ to a "reasonable time before" trial in California.²⁰¹ A uniform set of guidelines would ease these burdens by requiring stations to master only one set of rules.

The most commonly asserted challenge to uniformity is that it threatens federalism. Imposed uniformity diminishes the value of states as laboratories for the development of innovative approaches and overrides values that are the primary responsibilities of the states.²⁰² Indeed, in *Chandler* the Supreme Court explicitly lauded the value of state experimentation in this area.²⁰³

There are two responses to this concern. First, federalism will not be impaired because the rules, rather than being *imposed* by constitutional amendment or judicial fiat, will be available for states to adopt or reject.²⁰⁴ The Supreme Court's desire to encourage state experimentation does not mean that it disapproves of a state's informed decision to adopt rules similar to those used in other states. Second, the fact that the Supreme Court in *Chandler* has taken a states' rights approach and praised the benefits of experimentation does not mean

199. COLO. CODE OF JUDICIAL CONDUCT, Canon 3(A)(8), 7A COLO. REV. STAT. (Supp. 1984) (temporary two-year provision adopted in 1983).

200. IOWA CODE OF JUDICIAL CONDUCT Canon 3A(7) (1984).

201. 23 CAL. CIV. & CRIM. CT. R. 980(b)(1) (West 1981) (Supp. 1985).

Connecticut requires notice at least three days before trial, *see* CONN. CODE OF JUDICIAL CONDUCT, Canon 3(A)(7A)(3) (1984); Kansas, one week before trial, *see* KAN. CODE OF JUDICIAL CONDUCT, Canon 3(A)(7) (1986); and Nebraska, ten days before trial, *see In re Media Coverage of Proceedings Before the Nebraska Supreme Court*, slip op. at 3 (Neb. Oct. 1, 1982) (temporary one-year provision).

202. *See* R. CHAPIN, *supra* note 6, at 22 (describing the argument that imposed uniformity by a constitutional amendment would destroy state sovereignty and erode the principle of federalism).

203. *Chandler v. Florida*, 449 U.S. 560, 578-79 (1981). *See* notes 20-25 *supra* and accompanying text.

204. A flier distributed by the National Conference on Uniform State Laws makes clear that states are totally free to adopt or reject the uniform laws passed by the Conference. In any event, some commentators argue that "federalism has outlived its usefulness," R. CHAPIN, *supra* note 6, at 23-24 (describing position taken by some proponents of uniformity), and should not stand in the way of an improved nationwide criminal justice system. As one commentator puts it, there is abundant evidence that federalism has not worked very well in guaranteeing the rights of the criminally accused to an impartial trial Earlier Supreme Courts have recognized the limits of federalism, and have given the accused the specific safeguards against improper confession, illegal searches and denial of counsel. Present and future Supreme Courts have a continuing responsibility in this area — "fundamental fairness" requires national standards.

Dubnoff, *Publicity and Due Process in Criminal Proceedings*, 92 POL. SCI. Q. 89, 108 (1977).

that its position is immune to challenge.²⁰⁵ In fact, the *Chandler* view represents a switch in the Court's position regarding state activities that involve constitutional rights.²⁰⁶ When constitutional rights have been implicated in the past, the Court has prescribed criminal procedure rules that states must follow to insure the protection of those rights.²⁰⁷ Thus, the Court has required specific safeguards against improper confessions,²⁰⁸ illegal searches,²⁰⁹ and denial of counsel.²¹⁰ Proponents of the pre-*Chandler* approach in situations involving constitutional rights properly view uniformity as a desirable solution to the Court's refusal to promulgate guidelines in this area.

CONCLUSION

In the last two decades there has been an explosion in the number of states that permit televising of their criminal trials. The Supreme Court, while not endorsing this development, has allowed it to occur. But the Court's hesitant position, along with the ever-present federal ban against televising federal criminal trials, has left states without guidance as to the proper way to accommodate the various constitutional and policy interests of the trial participants, media, and public. As a result, there are almost as many variations in guidelines as there are states allowing coverage. Uniformity is needed.

The absence of a first amendment right of television access on the one hand, and the potential of broadcasting to impair the fairness of the trial and invade the privacy interests of trial participants and jurors on the other hand, suggest that any state that permits televised

205. [The Court's] deference to the states which rings so harmoniously to ears tuned to rejecting claims of "substantive due process" seems strangely jolting when offered as a response to a claim that a state's criminal procedure has violated due process. The recitation of Justice Brandeis's familiar statement of federalism . . . hardly seems an adequate justification.

Ares, *supra* note 32, at 159 (citation omitted).

206. The Burger analysis departs substantially from the recurring concerns and analytical schemes incorporated into prior Court decisions which involved fair trial rights and the rights of the press. . . .

. . . In the area of due process rights, the Court has often refused to accept state guidelines as sufficiently protective of an accused's constitutional rights.

Comment, *supra* note 20, at 325, 326 n.72.

207. See Dubnoff, *supra* note 204, at 89 ("Much of the controversy surrounding the Warren Court centered on its willingness to 'federalize' rules of criminal procedure."); Comment, *supra* note 20, at 326 ("*Chandler* thereby appears to subject broadcasters and defendants alike to potentially arbitrary and inconsistent treatment by various state courts. By disavowing any constitutional right of access, the Court has permitted the electronic media to get one foot inside the courtroom door, but has failed to lay a basis for the states to proceed uniformly in developing procedures and safeguards for the broadcasting of trials. The Court justifies shifting this responsibility to the states by citing sophisticated technology and state-imposed due process safeguards. The latter, at least, was viewed by prior Supreme Court decisions as wholly inadequate to support such a reliance on the states.") (footnotes omitted).

208. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

209. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

210. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

trials should be cautious not to give the media too much latitude once in the courtroom. The model guidelines proposed in the Appendix to this Note strike the proper balance between the conflicting interests and should therefore be considered by any state permitting or experimenting with television coverage of its criminal trials.

APPENDIX

PROPOSED MODEL GUIDELINES

Subject at all times to the authority of the Judge to

- (i) control the conduct of proceedings before the Court;
- (ii) ensure decorum and prevent distractions; and
- (iii) ensure the fair administration of justice in the pending case,

electronic media and still photography coverage of public judicial proceedings in the Courts of this state may be allowed in accordance with standards of conduct and technology adopted by the Supreme Court of _____.

(I) DEFINITIONS

"Judicial proceedings" or "proceedings" as referred to in these rules shall include all public trials, hearings or other proceedings in a trial or appellate court, for which expanded media coverage is requested, except those specifically excluded by these rules.

"Expanded media coverage" includes broadcasting, televising, electronic recording or photographing of judicial proceedings for the purpose of gathering and disseminating news to the public.

"Judge" means the magistrate, district associate judge, or district judge presiding in a trial court proceeding or the presiding judge or justice in an appellate proceeding.

(II) STANDARDS FOR AUTHORIZING COVERAGE

- (a) The judge has discretion to allow or deny expanded media coverage. In making that decision, the judge should consider the following factors:
 - 1. whether there is a reasonable likelihood that expanded media coverage would interfere with the rights of the parties to a fair trial; or
 - 2. whether there is a reasonable likelihood that expanded media coverage would unduly detract from the solemnity, decorum and dignity of the court.²¹¹

211. For similar state provisions, see, *e.g.*, ALASKA CODE OF JUDICIAL CONDUCT Canon 3A(7)(a) in ALASKA RULES OF COURT (1985); ARIZ. CODE OF JUDICIAL CONDUCT Canon 3A(7)(b) in ARIZ. RULES OF COURT (1985); COLO. CODE OF JUDICIAL CONDUCT Canon 3A(8)(b) in COLO. COURT RULES (1984) (temporary); OHIO CODE OF JUDICIAL CONDUCT Canon 3A(7)(c)(ii) in OHIO RULES OF COURT (1986); OKLA. CODE OF JUDICIAL CONDUCT

- (b) There shall be no expanded media coverage of any court proceeding which, under the laws of the state of _____, are required to be held in private. Additionally, no such coverage shall be permitted in any cases involving sex crimes, juvenile proceedings, marriage dissolution, adoption, child custody, motions to suppress evidence, police informants, undercover agents, and trade secrets, unless consent on the record is obtained from all parties (including the parent or guardian of a minor child).²¹²

(III) LIAISON

The Administrative Director of the Courts shall maintain communication and liaison with media representatives so as to insure smooth working relationships.²¹³

(IV) LIMITATIONS ON EXPANDED COVERAGE

- (a) Notwithstanding an authorization to conduct expanded media coverage of a proceeding, there shall be no expanded media coverage of
1. communications between counsel and client or co-counsel;
 2. bench conferences;
 3. *in camera* hearings;
 4. communications between judges in appellate proceedings;
 5. members of the jury at any time, including voir dire;²¹⁴
 6. hearings that take place outside the presence of the jury.
- (b) No witness who expresses to the judge any prior objection shall be photographed by any camera, nor shall the testimony of such a witness be broadcast or telecast.²¹⁵

Canon 3A(7)(b) in OKLA. COURT RULES AND PROCEDURE (1985-86); TENN. CODE OF JUDICIAL CONDUCT Canon 3A(7)(c) in TENN. RULES OF COURT (1985).

212. See notes 138-56 *supra* and accompanying text. For similar state provisions, see, for example, *In re Arkansas Bar Assn.*, 271 Ark. 358, 362-65, 609 S.W.2d 28, 30-31 (1980), *modified*, *In re Modification of Code of Judicial Conduct Relating to Broadcasting & Photographing Court Proceedings*, 275 Ark. 495, 628 S.W.2d 573 (1982); CONN. CODE OF JUDICIAL CONDUCT Canon 3A(7A)(4) in CONN. RULES OF COURT (1986); IOWA CODE OF JUDICIAL CONDUCT Canon 3A(7)2(d) in IOWA RULES OF COURT (1985); N.C. CODE OF JUDICIAL CONDUCT Canon 3A(7)(2)(b & c) in N.C. RULES OF COURT (1985) (temporary).

213. See, e.g., HAWAII CODE OF JUDICIAL CONDUCT 19.1(e) in RULES OF COURT: THE JUDICIARY OF HAWAII (1983); IOWA CODE OF JUDICIAL CONDUCT Canon 3A(7)3(a) in IOWA RULES OF COURT (1985); TENN. CODE OF JUDICIAL CONDUCT Canon 3A(7), Media Guidelines 3 & 4 in TENN. RULES OF COURT (1985).

214. See, e.g., CONN. CODE OF JUDICIAL CONDUCT 3A(7A)(6 & 7), in CONN. RULES OF COURT (1986); HAWAII CODE OF JUDICIAL CONDUCT 19.1(g)(2 & 3), in RULES OF COURT: THE JUDICIARY OF HAWAII (1983); IOWA CODE OF JUDICIAL CONDUCT Canon 3A(7)2(e & f) in IOWA RULES OF COURT (1985); *In re Canon 3A(7)*, 9 Media L. Rptr. 1778, 1779 (Minn. 1984); see also notes 125-37 *supra* and accompanying text.

215. See, e.g., GA. CODE OF JUDICIAL CONDUCT Canon 3A(7)(c)(ii), in GA. COURT RULES AND PROCEDURE (1986); KAN. RULES RELATING TO JUDICIAL CONDUCT Canon 3A(7)(c)(ii) in KAN. COURT RULES AND PROCEDURE (1986); MD. COURT RULES AND JUDICIAL CANONS

- (c) There shall be no expanded media coverage within the courtroom during the recesses or at any other time in which the trial judge is not present and presiding.

(V) AUTHORITY TO IMPOSE RESTRICTIONS ON EXPANDED MEDIA COVERAGE

In authorizing expanded media coverage, a judge may impose such restrictions or limitations as may be necessary to preserve the dignity of the court and to protect the parties, witnesses, and jurors. A judge may terminate expanded media coverage at any time upon a finding that

1. rules established herein or additional rules imposed by the judge have been violated; or
2. substantial rights of individual participants or rights to a fair trial will be prejudiced by such coverage if it is allowed to continue.²¹⁶

(VI) PROCEDURE

- (a) *Prior request for permission and notice.* Requests for permission for expanded media coverage in the courtroom shall be made in writing at least ten days before the proceedings are scheduled to begin, unless such time is reduced or extended by court order upon a showing of good cause. The attorneys of record shall be notified by the Court Administrator or by the Clerk of the Court at least seven days in advance of the time the proceedings are scheduled to begin unless such time is reduced or extended by court order. The written permission of the judge shall be made a part of the record of the proceedings.²¹⁷
- (b) *Objections.* A party to a proceeding objecting to expanded media coverage shall file a written objection, stating the grounds therefore, at least three days before commencement of the proceeding. All witnesses shall be advised by counsel proposing to introduce their testimony of their right to object to expanded media coverage of their testimony and all objections shall be filed prior to commencement of the proceeding.

Rule 1209(e)(i) (1984); *In re* Canon 3A(7), 9 Media L. Rptr. 1778, 1779 (Minn. 1984); OHIO CODE OF JUDICIAL CONDUCT Canon 3A(7)(c)(iii) in OHIO RULES OF COURT (1986); OKLA. CODE OF JUDICIAL CONDUCT Canon 3A(7)(c) in OKLA. COURT RULES AND PROCEDURE (1985-86).

216. See, e.g., COLO. CODE OF JUDICIAL CONDUCT Canon 3A(8)(b) in COLO. COURT RULES (1984); IOWA CODE OF JUDICIAL CONDUCT Canon 3A(7)2(h) in IOWA RULES OF COURT (1985).

217. See, e.g., IOWA CODE OF JUDICIAL CONDUCT Canon 3A(7)3(b) in IOWA RULES OF COURT (1985); see also notes 157-60 *supra* and accompanying text.

All objections shall be heard and determined by the judge prior to commencement of the proceedings. Time for filing of objections may be extended or reduced at the discretion of the judge. A criminal defendant shall be entitled to an immediate appeal of a decision to permit televising.²¹⁸

(VII) LIMITATIONS ON BROADCASTING

- (a) Film, videotape, photography and audio reproductions may not be used for advertising purposes.
- (b) Television broadcasters must present balanced coverage of the prosecution and the defense.
- (c) None of the film, videotape, still photographs or audio reproductions developed during, or by virtue of, coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent or collateral thereto, or upon any retrial or appeal of such proceeding.²¹⁹

(VIII) MEDIA PERSONNEL

Media representatives shall conduct themselves in a manner consistent with the decorum and dignity of the courtroom. The following practices shall be observed in this regard:

- (a) Media representatives shall present a neat appearance in keeping with the dignity of the proceedings.
- (b) Personnel shall not wear clothing bearing any insignia or identification of the individual or network involved. Identifying marks, call letters, logos, symbols and legends shall be concealed on all equipment.
- (c) Media representatives shall not move about the court facility while proceedings are in session.²²⁰

Comment:

If the judge believes that the appearance and position of media personnel in the courtroom might mislead the jury into thinking that the media personnel are officers of the court, the judge should instruct the jury that they are not associated with the court in any official manner.

218. See IOWA CODE OF JUDICIAL CONDUCT Canon 3A(7)3(c) in IOWA RULES OF COURT (1985); see also notes 161-72 *supra* and accompanying text.

219. See, e.g., *In re* Canon 3A(7), 9 Media L. Rptr. 1778, 1781 (Minn. 1984); see also notes 173-85 *supra* and accompanying text.

220. See, e.g., CAL. CIV. & CRIM. CT. R. 980(b)(3) (West 1979); COLO. CODE OF JUDICIAL CONDUCT Canon 3A(8)(e)(III) in COLO. COURT RULES (1984); IOWA CODE OF JUDICIAL CONDUCT Canon 3A(7)4(e & f) in IOWA RULES OF COURT (1985); MD. COURT RULES AND JUDICIAL CANONS Rule 1209(f)(10) (1984); *In re* Canon 3A(7), 9 Media L. Rptr. 1778, 1780 (Minn. 1984); PA. CODE OF JUDICIAL CONDUCT Canon 3A(7)(c)(i) in PA. RULES OF COURT (1986).

(IX) EQUIPMENT

Expanded media coverage shall be conducted only under the following conditions:

- (a) *Equipment specifications.* Equipment must be unobtrusive and must not produce distracting sounds. In addition, such equipment must satisfy the following criteria:

1. *Television cameras and related equipment.*

- (a) Not more than one portable television camera [film camera — 16 mm sound on film (self blimped) or video-tape electronic camera], operated by not more than one person, shall be permitted in any trial court proceeding.
- (b) Television cameras are to be designed or modified so that participants in the judicial proceeding are unable to determine when recording is occurring.
- (c) Where possible, recording and broadcasting equipment that is not a component part of a television camera shall be located outside of the courtroom.
- (d) The camera operators shall remain in a single location throughout the proceeding.
- (e) No artificial lighting device of any kind shall be employed in connection with the television camera.

2. *Audio.* The court's audio system shall be used if technically feasible and, in that event, the media will ensure that they do not interfere with the court's use of the system. If the court's system is not technically suitable, then all audio recording shall be done on one audio system installed by the media at their own expense. All microphones and related wiring shall be unobtrusive and shall not interfere with the movement of those in the courtroom. Microphones for use of counsel and judges shall be equipped with on/off switches. Where possible, electronic audio recording equipment and any operating personnel shall be located outside of the courtroom.

3. *Still Cameras.* All photographs shall be taken by one still photographer using an unobtrusive tripod and using not more than two still cameras. The photographer shall remain in a single location throughout the proceeding. Such still camera equipment shall produce no greater sound or light than a 35 mm Leica "M" Series Rangefinder camera, and no artificial lighting device of any kind shall be employed in connection with a still camera.

4. *Lighting.* No movie lights, flash attachments, or sudden lighting changes shall be permitted during a proceeding.

No modification or addition of lighting equipment shall be permitted without the permission of the judge.

5. *Operating Signals.* No visible or audible light or signal (tally light) shall be used on any equipment.
 6. In proceedings involving a jury, all equipment and personnel must be present during the entirety of the proceeding.
 7. It shall be the affirmative duty of media personnel to demonstrate to the judge adequately in advance of any proceeding that the equipment sought to be utilized meets the sound and light criteria described herein. A failure to obtain advance judicial approval for equipment shall preclude its use in any proceeding.
 8. All equipment shall be in place and tested fifteen minutes in advance of the time the court is called to order and shall be placed in an unobtrusive or hidden location designated by the judge.
 9. Equipment involved in expanded media coverage shall not be placed in, or removed from, the courtroom except prior to commencement or after adjournment of proceedings each day, or during a recess. Neither television film, magazines, video cassettes, nor still camera film or lenses shall be changed within a courtroom except during a recess in the proceedings.²²¹
- (b) *Pooling arrangements.* The media shall be solely responsible for designating one media representative to conduct each of the categories of expanded media coverage listed in subsection (I) of this section, and for arranging an open and impartial distribution scheme with a distribution point located outside the courtroom. If no agreement can be reached on either of these matters, then there shall be no expanded media coverage. Neither judges nor other court personnel shall be called upon to resolve any disputes that may arise in this connection.²²²

221. See, e.g., *In re Arkansas Bar Assn.*, 271 Ark. 358, 363-64, 609 S.W.2d 28, 31 (1980); CAL. CIV. & CRIM. CT. R. 980(b)(3) (West 1979); COLO. CODE OF JUDICIAL CONDUCT Canon 3A(8)(e)(I) in COLO. COURT RULES (1984); CONN. CODE OF JUDICIAL CONDUCT 3A(7A)(9-11) in CONN. RULES OF COURT (1986); IOWA CODE OF JUDICIAL CONDUCT Canon 3A(7)4(a & b) in IOWA RULES OF COURT (1985); MD. COURT RULES AND JUDICIAL CANONS Rule 1209(f) (1984); OKLA. CODE OF JUDICIAL CONDUCT Canon 3A(7)(f) in OKLA. COURT RULES AND PROCEDURE (1985-86); TENN. CODE OF JUDICIAL CONDUCT Canon 3A(7), Media Guidelines 3-10 in TENN. RULES OF COURT (1985); see also notes 186-89 *supra* and accompanying text.

222. See, e.g., CONN. CODE OF JUDICIAL CONDUCT Canon 3A(7A)(12) in CONN. RULES OF COURT (1986); FLA. CODE OF JUDICIAL CONDUCT Canon 3A(7), Standards of Conduct and Technology 1(d) in FLA. RULES OF COURT (1984); HAWAII CODE OF JUDICIAL CONDUCT 19.1(h)(4) in RULES OF THE COURT: THE JUDICIARY OF HAWAII (1983); *In re* Canon 3A(7), 9 Media L. Rptr. 1778, 1780 (Minn. 1984); N.C. CODE OF JUDICIAL CONDUCT Canon 3A(7)(5)(d) in N.C. RULES OF COURT (1985); OR. CODE OF JUDICIAL CONDUCT Canon 3A(8)(a)(iv) (1983) (temporary).

(X) AGREEMENT OF MEDIA REPRESENTATIVES

All persons who request and are granted permission to cover a judicial proceeding are subject to this plan and agree to abide by its provisions.²²³

— *Nancy T. Gardner*

223. See *In re* Canon 3A(7), 5 MEDIA L. REP. 2494, 2496 (Alaska 1979).