

# The States Have Spoken: Allow Expanded Media Coverage of the Federal Courts

## ABSTRACT

*Since the advent of film and video recording, society has enjoyed the ability to capture the lights and sounds of moments in history. This innovation left courts to determine what place, if any, such technology should have inside the courtroom. Refusing to constrain the future capacity of this technology, the Supreme Court “punted” on this issue until a time when this technology evolved past its initial disruptive nature. Throughout the past forty-five years, the vast majority of state courts have embraced the potential of cameras in the courtroom and have created policies governing such use. In contrast, the federal judiciary has, with few exceptions, continued to prohibit expanded media coverage. This Note suggests that cameras have evolved past the concerns of distraction and unfair prejudice in the courtroom. Additionally, this technology offers the public a window into the judiciary to see its operations and to ascertain whether it is functioning properly. Accordingly, the federal judiciary should update its policies—following the pattern of the overwhelming majority of state courts—to allow expanded media coverage of its courts.*

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#### I. THE KAVANAUGH CONFIRMATION PROCESS

*Part of the court’s strength and part of the court’s legitimacy depends on people not seeing the court in the way that people see the other governing structures in this country. . . . People see the court as somehow above the fray.*

– Elena Kagan, Associate Justice of the Supreme Court of the United States<sup>1</sup>

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1. Emily Aronson, *Sotomayor and Kagan Talk Supreme Court, Service and Success at ‘She Roars,’* PRINCETON U. (Oct. 5, 2018, 9:12 PM) (alteration in original), <https://www.princeton.edu/news/2018/10/05/kagan-and-sotomayor-talk-supreme-court-service-and-success-she-roars> [<https://perma.cc/GGX7-T8M7>].

*Televising Supreme Court arguments makes an awful lot of sense. . . . I honestly don't see a particularly compelling argument why the public shouldn't get to see the proceedings televised, and I think if they did, [the public would] have a very high opinion of the Supreme Court of the United States.*

– Paul Clement, former US Solicitor General<sup>2</sup>

On July 9, 2018, President Trump nominated Judge Brett Kavanaugh of the US Court of Appeals for the District of Columbia Circuit to be the 114th Associate Justice of the Supreme Court of the United States.<sup>3</sup> In the weeks following his nomination, Dr. Christine Blasey Ford detailed allegations of Judge Kavanaugh's sexual misconduct during their teenage years in a letter to Senator Diane Feinstein, one of Dr. Blasey Ford's state senators, and in a meeting with Congresswoman Anna Eshoo, her local representative.<sup>4</sup> These allegations, however, were not made public until after Judge Kavanaugh's confirmation hearing in front of the Senate Judiciary Committee.<sup>5</sup> These allegations led to an additional day of testimony by both Dr. Blasey Ford and Judge Kavanaugh in front of the committee.<sup>6</sup> Following their testimony and a subsequent FBI investigation, the Senate confirmed Justice Kavanaugh on October 6, 2018.<sup>7</sup>

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2. *Nomination of the Honorable Brett M. Kavanaugh To Be an Associate Justice of the Supreme Court of the United States (Day 4)*, COMM. ON JUDICIARY at 6:55:54 (Sept. 7, 2018), <https://www.judiciary.senate.gov/meetings/nomination-of-the-honorable-brett-m-kavanaugh-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-day-4> [<https://perma.cc/P6M9-4DPX>].

3. See Robert Barnes, *Who Is Brett Kavanaugh, President Trump's Pick for Supreme Court?*, WASH. POST (Sept. 25, 2018), [https://www.washingtonpost.com/politics/courts\\_law/who-is-brett-kavanaugh/2018/09/03/d9226b68-af7d-11e8-a20b5f4f84429666\\_story.html](https://www.washingtonpost.com/politics/courts_law/who-is-brett-kavanaugh/2018/09/03/d9226b68-af7d-11e8-a20b5f4f84429666_story.html) [<https://perma.cc/8QE8-LTX5>]; Mark Landler & Maggie Haberman, *Brett Kavanaugh Is Trump's Pick for Supreme Court*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/politics/brett-kavanaugh-supreme-court.html> [<https://perma.cc/VP67-9FWD>].

4. Emma Brown, *California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks Out About Her Allegation of Sexual Assault*, WASH. POST (Sept. 16, 2018), [https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b\\_story.html?noredirect=on&utm\\_term=.0134833f8026](https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html?noredirect=on&utm_term=.0134833f8026) [<https://perma.cc/56NN-UEXZ>].

5. *Id.*

6. Janet Hook, Kristina Peterson & Natalie Andrews, *Stark Divide, Raw Emotion in Kavanaugh-Ford Hearing*, WALL ST. J. (Sept. 27, 2018, 9:08 PM), <https://www.wsj.com/articles/on-day-of-high-stakes-hearing-kavanaugh-and-accuser-prepare-to-testify-1538052956> [<https://perma.cc/XG9K-MGVZ>].

7. Sheryl Gay Stolberg, *Kavanaugh Is Sworn in After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html> [<https://perma.cc/QQP5-KKJZ>].

In light of the sexual misconduct allegations brought against Judge Kavanaugh, the confirmation process itself divided the public, with many senators calling the Kavanaugh confirmation “rock bottom.”<sup>8</sup> Compounding this division was the public’s perception that Senate Republicans did not accord Dr. Blasey Ford’s allegations with proper respect.<sup>9</sup> Accordingly, the confirmation of Justice Kavanaugh became the scene of many protests<sup>10</sup> and the subject of several social movements, including efforts to remove senators from office<sup>11</sup> and efforts to reform the federal judiciary.<sup>12</sup> Indeed, protests continued after Justice Kavanaugh took his seat on the bench of the Supreme Court, both in person and online.<sup>13</sup> Online dissatisfaction was rampant, and one nonpartisan organization even purchased the domain name “brettkavanaugh.com” to host a support website for survivors of sexual assault.<sup>14</sup>

This suggests that the public’s trust in the federal judiciary, as a whole, is at a low.<sup>15</sup> Since Justice Kavanaugh’s confirmation, calls to reform the Supreme Court have increased.<sup>16</sup> These reform proposals

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8. Alana Abramson, *Brett Kavanaugh Confirmed to Supreme Court After Fight That Divided America*, TIME (Oct. 7, 2018, 5:11 PM), <http://time.com/5417538/bett-kavanaugh-confirmed-senate-supreme-court/> [<https://perma.cc/N4F7-3BPA>].

9. Alex Lockie, *Republicans Sustain Critical Self-Inflicted Wound from Emotionally Painful Kavanaugh Hearing*, BUS. INSIDER (Sept. 28, 2018, 5:43 AM), <https://www.businessinsider.com/republicans-self-inflicted-wound-from-painful-kavanaugh-hearing-2018-9> [<https://perma.cc/3P23-5MCD>].

10. Dakin Andone & Jasmine Wright, *Groups Rally and Protest During Brett Kavanaugh-Christine Blasey Ford Hearing*, CNN (Sept. 27, 2018, 2:39 PM), <https://www.cnn.com/2018/09/27/us/kavanaugh-blasey-ford-protests/index.html> [<https://perma.cc/QVJ7-P7YN>].

11. See, e.g., Roger Wicker, FACEBOOK (Oct. 9, 2018, 5:15 PM), <https://www.facebook.com/wicker/photos/a.10151170263919845/10156348276799845/?type=3&theater> [<https://perma.cc/5299-WTAU>].

12. See, e.g., *Reform the Supreme Court, and Start with Term Limits*, BOS. GLOBE (Oct. 10, 2018), <https://www.bostonglobe.com/opinion/editorials/2018/10/10/reform-supreme-court-and-start-with-term-limits/biSIkKCSsTFBSqNTyWJ4Ij/story.html> [<https://perma.cc/5VQF-7HSB>].

13. Robert Barnes, Ann E. Marimow & Marissa J. Lang, *At Kavanaugh’s Supreme Court Debut, Protesters Outside, Business as Usual Inside*, WASH. POST (Oct. 9, 2018), [https://www.washingtonpost.com/politics/courts\\_law/at-kavanaughs-supreme-court-debut-protesters-outside-business-as-usual-inside/2018/10/09/34b0afb2-cbdf-11e8-920f-dd52e1ae4570\\_story.html?utm\\_term=.22dbeece80005](https://www.washingtonpost.com/politics/courts_law/at-kavanaughs-supreme-court-debut-protesters-outside-business-as-usual-inside/2018/10/09/34b0afb2-cbdf-11e8-920f-dd52e1ae4570_story.html?utm_term=.22dbeece80005) [<https://perma.cc/4KYQ-H9SH>].

14. Press Release, Fix the Court, Statement on BrettKavanaugh.com (Oct. 9, 2018), <https://fixthecourt.com/2018/10/kavanaughurl/> [<https://perma.cc/YX8E-53W9>].

15. Judy Perry Martinez, *How Lawyers and Judges Can Help Rebuild Public Trust and Confidence in Our Justice System*, ABA J. (Aug. 8, 2018, 6:00 AM), [http://www.abajournal.com/news/article/how\\_lawyers\\_and\\_judges\\_can\\_help\\_rebuild\\_public\\_trust\\_and\\_confidence](http://www.abajournal.com/news/article/how_lawyers_and_judges_can_help_rebuild_public_trust_and_confidence) [<https://perma.cc/PK2D-Z3Y2>].

16. See, e.g., Aaron Blake, *Pack the Supreme Court? Why We May Be Getting Closer*, WASH. POST (Oct. 9, 2018), [https://www.washingtonpost.com/politics/2018/10/09/pack-supreme-court-why-we-may-be-getting-closer/?utm\\_term=.01a71d49cca5](https://www.washingtonpost.com/politics/2018/10/09/pack-supreme-court-why-we-may-be-getting-closer/?utm_term=.01a71d49cca5) [<https://perma.cc/>].

include establishing term limits for justices,<sup>17</sup> packing the court with ideologically-opposite justices,<sup>18</sup> and even completely reforming the structure of the Court.<sup>19</sup> This Note argues that a less extreme reform can effectively redress the issue of negative public perception: allowing expanded media coverage<sup>20</sup> of federal judicial proceedings.

Currently, the public is privy to federal judicial proceedings only when they are able to either physically attend the trial, receive a report from an agent who attends trial, or the trial court allows recording during the proceedings. This has resulted in a public perception of a failing judiciary based on hyper-politicized nominations, chaotic confirmation processes, and ideological splits in “headline-making” cases.<sup>21</sup> However, such perception can be altered by increasing the transparency of the federal courts, following the example set by the majority of state courts.

After years of uncertainty regarding whether the presence of recording devices infringed upon a party’s constitutional rights,<sup>22</sup> the Supreme Court affirmed Florida’s authorization of recording court proceedings in 1981—refusing to create a per se constitutional violation for recording court proceedings.<sup>23</sup> Chief Justice Burger, writing for the majority, emphasized that “[i]t is one of the happy incidents of the federal system that a single courageous [s]tate may, if its citizens

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WS5J-UGKN]; Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, VOX (Oct. 10, 2018, 11:25 AM), <https://www.vox.com/the-big-idea/2018/9/6/17827786/kavanaugh-vote-supreme-court-packing> [https://perma.cc/Z2MH-KDQL]; Alan Morrison, *Term Limits for Justices Are the Way to Fix this Supreme Court Mess*, THE HILL (Oct. 5, 2018, 9:00 AM), <https://thehill.com/opinion/judiciary/410043-term-limits-for-justices-are-the-best-way-to-fix-this-supreme-court-mess> [https://perma.cc/VW4G-3CLG].

17. See, e.g., Morrison, *supra* note 16.

18. See, e.g., Blake, *supra* note 16.

19. See, e.g., Epps & Sitaraman, *supra* note 16.

20. Expanded media coverage is a catch-all term used by some states to describe procedural rules regarding technology in courtrooms for “broadcasting, televising, electronic recording or photographing of judicial proceedings for the purpose of gathering and disseminating news to the public.” See Nancy T. Gardner, Note, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 MICH. L. REV. 475, 510 app. (1985); Press Release, Colorado Courts, Expanded Media Coverage of Court Proceedings (Nov. 2, 2002), <https://www.courts.state.co.us/userfiles/file/Media/Cameras%20in%20the%20Courtroom%202015%20update.pdf> [https://perma.cc/4GC6-KBFZ].

21. Joseph J. Ellis, *The Supreme Court Was Never Meant to Be Political*, WALL ST. J. (Sept. 14, 2018, 4:13 PM), <https://www.wsj.com/articles/stop-pretending-the-supreme-court-is-above-politics-1536852330> [https://perma.cc/9FUD-URTM].

22. See *Estes v. Texas*, 381 U.S. 532, 590–91 (1965) (Harlan, J., concurring) (“The opinion of the Court necessarily goes no farther, for only the four members of the majority who unreservedly join the Court’s opinion would resolve those questions now.”); see *infra* text accompanying note 58.

23. *Chandler v. Florida*, 449 U.S. 560, 583 (1981).

choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>24</sup>

As the Supreme Court noted in an early case concerning recording devices in the courtroom, “When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial[,] we will have another case.”<sup>25</sup> This Note argues that, as evidenced by state court rules, such technological advances have dulled the prior dangers—namely, their intrusive, distracting nature—that devices once posed to a fair trial.

This Note argues that the time has come for federal courts to examine the states’ experiments with recording devices in courtrooms and to adopt new rules allowing recording devices in federal courts. Part II discusses the history of the right to a public trial, Supreme Court jurisprudence regarding recording devices in courts, and current federal legislation in this area. Part III analyzes the different state rules that govern expanded media coverage, focusing on the different limitations that states have implemented to balance technological advances and litigants’ rights. Part IV draws upon the range of state approaches to advocate for the incremental adoption of a new federal rule that permits recording devices in all levels of both civil and criminal court.

## II. PUBLIC AND MEDIA ACCESS TO FEDERAL COURTS

### A. Interpretation of “Public” Trial

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .”<sup>26</sup> This constitutional right during criminal prosecutions is deeply rooted in the common law notion that “justice must satisfy the appearance of justice.”<sup>27</sup> Indeed, the right to a public trial long predates the founding of this nation.<sup>28</sup> As early as the mid-sixteenth century, Sir Thomas Smith made reference to the public trial in his book, *De Republica Anglorum*, stating that court would be held in the presence of as many people as came to the proceedings.<sup>29</sup> Referencing the practices of the Spanish Inquisition, the English Court

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24. *Id.* at 579 (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

25. *Estes*, 381 U.S. at 540.

26. U.S. CONST. amend. VI.

27. *Levine v. United States*, 362 U.S. 610, 616 (1960) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

28. *In re Oliver*, 333 U.S. 257, 266 (1948).

29. Max Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 382 (1932).

of Star Chamber, and the French abuse of the *lettre de cachet*, Justice Clark later wrote, “History [has] proven that secret tribunals [are] effective instruments of oppression.”<sup>30</sup> In fact, fifteen years before the Sixth Amendment’s ratification, Pennsylvania and North Carolina provided for the right to a public trial in their respective state constitutions.<sup>31</sup>

Although there is no universally agreed-upon singular purpose for the public trial, it is nearly universally accepted that one purpose is to ensure fairness to the accused at trial.<sup>32</sup> Often-cited rationales for this right include ensuring public knowledge of what happens in court,<sup>33</sup> discouraging perjury,<sup>34</sup> allowing unknown witnesses to potentially come forward with additional knowledge,<sup>35</sup> and allowing members of the public to develop their own opinion of the accused’s guilt or innocence, regardless of the verdict rendered.<sup>36</sup> Additionally, public trials seek to prevent judges from abusing their power and, in the event that judicial power is abused, to provide a check on such abuse.<sup>37</sup> This public check on the judicial process is “an essential component in our structure of self-government.”<sup>38</sup> Ultimately, each of the aforementioned rationales works to assure procedural fairness.<sup>39</sup>

The Sixth Amendment, however, only extends this right to the accused in a criminal prosecution, not civil trials.<sup>40</sup> Accordingly, the Supreme Court has interpreted the First Amendment to include a “right of access” for members of the public and press to have standing

30. *Estes*, 381 U.S. at 539.

31. PA. CONST. of 1776, cl. IX, *superseded by* PA. CONST. of 1873, art. I § 9 (1984); N.C. CONST. of 1971, cl. IX, *superseded by* N.C. CONST. of 1971, art. I § 24 (restricting criminal convictions to those by jury verdict in “open court”).

32. *See In re Oliver*, 333 U.S. at 270–71 (quoting 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

33. *See, e.g., Rovinsky v. McKaskle*, 722 F.2d 197, 201 (5th Cir. 1984) (“A public trial protects the right of the accused to have the public know what happened in court.”).

34. *See, e.g., id.* at 199 (“By subjecting criminal trials to ‘contemporaneous review in the forum of public opinion,’ this right . . . discourages perjury . . .”).

35. *See, e.g., Tanksley v. United States*, 145 F.2d 58, 59 (9th Cir. 1944) (“One of the main purposes of the admission of the public is the reasonable possibility that persons unknown to the parties or their counsel, but having knowledge of the facts, may be drawn to the trial . . .”).

36. *See, e.g., Rovinsky*, 722 F.2d at 201–02 (“A public trial protects the right of the accused . . . to let the citizenry weigh his guilt or innocence for itself, whatever the jury verdict . . .”).

37. *See, e.g., id.* at 199 (“By subjecting criminal trials to ‘contemporaneous review in the forum of public opinion,’ this right prevents the abuse of judicial power . . .”).

38. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

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

40. U.S. CONST. amend. VI; *Estes*, 381 U.S. at 588 (Harlan, J., concurring).

to bring suit if excluded from either a civil or criminal proceeding.<sup>41</sup> Despite no explicit First Amendment guarantee of this access,<sup>42</sup> the Supreme Court held in *Richmond Newspapers v. Virginia* that this right of access is implied from the “amalgam” of the rights explicitly guaranteed in the First Amendment: freedom of speech, freedom of press, and right to assemble.<sup>43</sup> The *Richmond Newspapers* Court held that without such an implicit guarantee to attend criminal trials, “important aspects of freedom of speech and ‘of the press could be eviscerated.’”<sup>44</sup>

*B. Current Federal Rule and Jurisprudence Regarding Recording Devices in Court*

1. Federal Case Law

The Supreme Court first analyzed the presence of recording devices in the courtroom in 1965.<sup>45</sup> At issue in *Estes v. Texas* was whether Estes’s due process rights under the Fourteenth Amendment were violated by the presence of television crews and news photographers during his pretrial hearing and trial.<sup>46</sup> Estes, a well-known financier charged with swindling, moved to exclude all cameras from his trial.<sup>47</sup> At the two-day pre-trial hearing, at least twelve cameramen were actively taking still and video footage, with three microphones pointed at the judge’s bench and more aimed at the jury box and counsel tables in efforts to televise the hearing.<sup>48</sup> The trial was continued until a month later, during which time a booth—where all cameras, photographers, and videographers were confined while recording—was constructed inside the courtroom to accommodate the press.<sup>49</sup> From this booth, cameras had an unobstructed view of the courtroom.<sup>50</sup> Ultimately, however, the only portions of trial telecasted live with sound were the State’s opening and closing arguments, the return of the verdict, and the receipt of the verdict.<sup>51</sup> Various portions

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41. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 577–78 (1980).

42. *See* U.S. CONST. amend. I.

43. *Richmond Newspapers*, 448 U.S. at 577–78.

44. *Id.* at 580.

45. *Estes*, 381 U.S. at 532.

46. *See id.* at 534–37.

47. *See id.* at 534–35; *id.* at 552 (Warren, C.J., concurring).

48. *Id.* at 536 (plurality opinion).

49. *Id.* at 536–37.

50. *Id.*

51. *Id.*



of the remainder of the trial, with exception of the defense's closing argument, were either recorded without sound or photographed.<sup>52</sup>

While the Court reaffirmed the public's right of access to trials, it declined to extend the First Amendment to include the right of the press to televise court proceedings.<sup>53</sup> Reasoning that the press was still free to report on the proceedings and that the press and general public were extended equal privileges, the Court found no infringement of the press' First Amendment rights even if they were not allowed to record inside the courtroom.<sup>54</sup> Ultimately, the Court reversed *Estes*'s conviction, with a four-Justice plurality holding that the atmosphere created by the cameras and recording of the proceedings prevented a fair trial, thus violating *Estes*'s due process rights.<sup>55</sup> Justice Harlan concurred, refusing to establish broad interpretations of the Constitution and preferring to limit the holding to the facts of *Estes*.<sup>56</sup> It is significant to note, however, that six of the justices seemingly agreed, to varying degrees, that technological advances might render a different outcome in a future case, with five justices agreeing that televised proceedings are not a per se constitutional violation.<sup>57</sup>

In the years following *Estes*, much disagreement lingered over the interpretation of the six separate opinions—especially as to what extent Justice Clark's reasoning was in fact binding.<sup>58</sup> The Court finally ended the confusion in *Chandler v. Florida*, announcing that *Estes* does not stand for an absolute ban of photographic, radio, and television coverage, viewing Justice Harlan's concurrence as limiting the holding in *Estes*.<sup>59</sup>

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52. *Id.* (“At the request of the petitioner, the trial judge prohibited coverage of any kind, still or television, of the defense counsel during their summations to the jury.”).

53. *Id.* at 539–41.

54. *Id.* at 540–42.

55. *Id.* at 550–52.

56. *Id.* at 587 (Harlan, J., concurring).

57. *See id.* at 540 (plurality opinion) (“When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case.”); *id.* at 595–96 (Harlan, J., concurring) (“If and when [television becomes a commonplace affair in daily life] the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause.”); *id.* at 614–15 (Stewart, J., dissenting) (“If what occurred did not deprive the petitioner of his constitutional right to a fair trial, then the fact that the public could view the proceeding on television has no constitutional significance. . . . I cannot say at this time that it is impossible to have a constitutional trial whenever any part of the proceedings is televised or recorded on television film.”). *But see id.* at 565 (Warren, C.J., concurring) (“I believe that it violates the Sixth Amendment for federal courts and the Fourteenth Amendment for state courts to allow criminal trials to be televised to the public at large.”).

58. *See Chandler v. Florida*, 449 U.S. 560, 572–73 (1981).

59. *Id.* at 573–74.

The events leading up to *Chandler* began in 1975. The Post-Newsweek Stations of Florida petitioned the Supreme Court of Florida to amend its canon prohibiting electronic media and recording devices in the courtroom, to which the Florida Supreme Court invited presentations on the matter.<sup>60</sup> In 1976, the Florida Supreme Court announced an experimental program allowing for the broadcast of one civil and one criminal trial, subject to specific guidelines, including party consent.<sup>61</sup> The Florida Supreme Court ultimately supplemented its order, expanding electronic media coverage to all judicial proceedings and removing the requirement of party consent during a new one-year pilot program.<sup>62</sup> Following the end of the pilot program, the court surveyed attorneys, witnesses, jurors, court personnel, and judges, and also studied similar experiments of sixteen other states.<sup>63</sup> Concluding that there was “more to be gained than lost,” the Florida Supreme Court revised the canon that prohibited recording devices. It provided that expanded media coverage could be authorized in both trial and appellate courts, subject to the presiding judge’s discretion and specific guidelines.<sup>64</sup>

Appellants in *Chandler* sought to have this canon, as revised, declared unconstitutional on its face and as applied.<sup>65</sup> Petitioning all the way up to the US Supreme Court, appellants relied on an interpretation of *Estes* creating a per se constitutional violation of due process when trials are televised.<sup>66</sup> Satisfied that *Estes* did not create such a rule, Chief Justice Burger rejected the opportunity to create such a rule, noting that while electronic media did have a “mischievous potential[]” to intrude, the appellants had not offered anything to demonstrate that broadcasting had tainted their fair trial.<sup>67</sup> He further reinforced the concept of federalism, lauding the experimental capacity of the states.<sup>68</sup>

Less than two years later, the US Court of Appeals for the Eleventh Circuit affirmed the denial of a motion to televise a trial in the US District Court for the Southern District of Florida in *United*

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60. *Id.* at 564.

61. *Id.*

62. *Id.* at 564–65.

63. *Id.* at 565.

64. *Id.* at 565–66.

65. *Id.* at 567.

66. *Id.* at 570.

67. *Id.* at 578–79.

68. *Id.* at 579 (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

*States v. Hastings*.<sup>69</sup> Hastings argued that the court should reverse the denial under *Chandler* and other Supreme Court decisions that had protected the right of the press to access court proceedings.<sup>70</sup> The Eleventh Circuit disagreed, declining to extend to the press (and general public) greater First Amendment protection than was already granted. It reasoned that “just because television coverage is not constitutionally prohibited does not mean that television coverage is constitutionally mandated.”<sup>71</sup>

In 2010, the Supreme Court stayed an order permitting the broadcast of a federal civil, nonjury trial.<sup>72</sup> Citing procedural deficiencies in the adoption of an amendment to the local rules, the Supreme Court prevented the broadcast of a trial as a part of the US Court of Appeals for the Ninth Circuit’s pilot program.<sup>73</sup>

## 2. Federal Circuits and the Judicial Conference of the United States

In 1972, the Judicial Conference of the United States prohibited “broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto” for both criminal and civil trials.<sup>74</sup> Nearly two decades later and two years after Chief Justice Rehnquist’s appointment of the 1988 Ad Hoc Committee on Cameras in the Courtroom, the Judicial Conference adopted the committee’s report that recommended a pilot program permitting expanded media coverage of civil cases.<sup>75</sup> Reviewing the findings of the pilot program in 1994, the Judicial Conference declined to expand camera coverage in civil proceedings.<sup>76</sup> The Judicial Conference, during the same session, also rejected a proposed amendment to Federal Rule of Criminal Procedure 53 that sought to loosen the prohibition on photography during criminal trials.<sup>77</sup>

In 2010, the Judicial Conference once again authorized a pilot program running from June 2011 until July 2015, this time including

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69. See *United States v. Hastings*, 695 F.2d 1278, 1279 (11th Cir. 1983).

70. *Id.* at 1280.

71. *Id.*

72. *Hollingsworth v. Perry*, 558 U.S. 183, 184 (2010) (per curiam).

73. *Id.* at 189, 192.

74. *History of Cameras in Courts*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/cameras-courts/history-cameras-courts> [<https://perma.cc/W2ZQ-GXAC>] (last visited Jan. 31, 2019).

75. *Id.*

76. *Id.*

77. *Id.*

fourteen district courts.<sup>78</sup> This pilot program allowed judges of participating courts to permit the recording of civil proceedings.<sup>79</sup> Each district court was responsible for recording, editing, and posting the proceeding.<sup>80</sup> Following the conclusion of the pilot program, the Judicial Conference received a report from the Committee on Court Administration and Case Management (CACM) recommending no policy changes to its rules governing expanded media coverage of federal courts.<sup>81</sup> CACM asserted three rationales in support of its recommendation: (1) low participation of judges within participating courts, (2) harm to witnesses, and (3) high implementation costs.<sup>82</sup> The Ninth Circuit Judicial Council, cooperating with the Judicial Conference, extended the pilot program for three districts in the Ninth Circuit to provide longer-term data to CACM.<sup>83</sup>

In 1996, the Judicial Conference did, however, authorize each court of appeals to make its own appellate rules regarding such expanded media coverage.<sup>84</sup> As of May 1, 2018, the US Courts of Appeals for the Second, Third, Seventh, and Ninth Circuits have adopted policies permitting camera coverage, with the Third, Seventh, and Ninth making video recordings publicly available.<sup>85</sup> Chief Judge D. Brooks Smith of the Third Circuit, announcing the Third Circuit's new policy, noted his hope that "the public will see the essential role that our federal judiciary plays in ensuring equal justice for all" through the public availability of these recordings.<sup>86</sup> While it still does not allow

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78. *Id.*

79. COMM. ON COURT ADMIN. & CASE MGMT., CAMERAS PILOT PROGRAM (2016) [hereinafter CACM RECOMMENDATION], <http://pdfserver.amlaw.com/nlj/Cameras%20pilot%20project%20committee%20report.pdf> [https://perma.cc/UH76-9D27].

80. *Id.*

81. *History of Cameras in Courts*, *supra* note 74.

82. CACM RECOMMENDATION, *supra* note 79.

83. *History of Cameras in Courts*, *supra* note 74.

84. *Id.*

85. *Id.*; see also 7TH CIR. OP. P. 11 (2018), <http://www.ca7.uscourts.gov/rules-procedures/rules/rules.htm#opproc11> [https://perma.cc/WH57-EB3F]; *Audio and Video*, U.S. CT. APPEALS NINTH CIRCUIT, <https://www.ca9.uscourts.gov/media/> [https://perma.cc/Z55J-BZ5Z] (last visited Jan. 31, 2019); *Oral Argument Recordings – Video*, U.S. CT. APPEALS THIRD CIRCUIT, <http://www.ca3.uscourts.gov/oral-argument-recordings-video> [https://perma.cc/FQ5U-LGDJ] (last visited Jan. 31, 2019).

86. News Release, U.S. Court of Appeals for the Third Circuit, U.S. Court of Appeals for the Third Circuit to Make Oral Argument Videos Available to the Public (Jan. 13, 2017), <http://www.ded.uscourts.gov/sites/default/files/news/2017/January/13/Video%20Press%20Release%201-13-17.pdf> [https://perma.cc/DV3S-SGC4].

video recording, the D.C. Circuit implemented a policy of providing live audio streams of its oral arguments beginning in the 2018–2019 term.<sup>87</sup>

At present, the Judicial Conference’s policy on cameras in the courtroom permits, subject to judicial discretion, the use of electronic devices for six enumerated reasons: “(1) for the presentation of evidence; (2) for the perpetuation of the record of the proceedings; (3) for security purposes; (4) for other purposes of judicial administration; (5) for the photographing, recording, or broadcasting of appellate arguments; or (6) in accordance with pilot programs approved by the Judicial Conference.”<sup>88</sup>

### 3. Recently Proposed Federal Legislation

The 115th Congress introduced three bills that would have impacted electronic media coverage. By the close of that Congress, none of the three bills had passed into law.<sup>89</sup> Because it is possible that similar legislation will be introduced in a future congress, it is worth noting the proposed reforms.

In March 2017, Senator Chuck Grassley of Iowa introduced the Sunshine in the Courtroom Act of 2017.<sup>90</sup> Senator Grassley’s bipartisan bill aimed to provide greater media coverage of federal court proceedings.<sup>91</sup> This was not Senator Grassley’s first attempt to provide more widespread media coverage of federal court proceedings, as he has introduced similar legislation in multiple congresses since 1999.<sup>92</sup> The 2017 legislation would have authorized district court judges to allow expanded media coverage of proceedings, only prohibiting coverage of jurors, jury selection, and nonparty witnesses who request privacy.<sup>93</sup> The legislation, as proposed, would have granted the Judicial Conference the authority to promulgate advisory and mandatory guidelines governing federal judges’ exercise of discretion.<sup>94</sup> As with

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87. Press Release, U.S. Court of Appeals for the D.C. Circuit, Policy Regarding Live Audio Streaming of Arguments (May 23, 2018), <https://www.cadc.uscourts.gov/internet/home.nsf/Content/Announcement+-+November+8%2C+2017+-+Policy+Regarding+Live+Audio+Streaming+of+Arguments> [https://perma.cc/PF5Q-A2CW].

88. *History of Cameras in Courts*, *supra* note 74.

89. *See infra* notes 95, 98, 101.

90. *See* Sunshine in the Courtroom Act of 2017, S. 643, 115th Cong. (2017).

91. *Id.*

92. *See* S. 783, 114th Cong. (2015); S. 405, 113th Cong. (2013); S. 410, 112th Cong. (2011); S. 657, 11th Cong. (2009); S. 352, 110th Cong. (2008); S. 829, 109th Cong. (2005); S. 721, 106th Cong. (1999).

93. S. 643.

94. *Id.*

Senator Grassley's previous attempts to legislate in this area, the 2017 bill did not make it out of committee.<sup>95</sup>

In August 2018, Senator Elizabeth Warren of Massachusetts introduced the Anti-Corruption and Public Integrity Act.<sup>96</sup> Among other initiatives, this act would have required federal appellate courts to livestream the audio of every proceeding unless a majority of the court found such coverage to violate a party's constitutional rights.<sup>97</sup> On August 21, 2018, this bill was referred to the Committee on Finance, where it died.<sup>98</sup>

In September 2018, Representative Darrell Issa of California introduced the Judiciary Reforms, Organization, and Operational Modernization Act of 2018.<sup>99</sup> This act would have required the Supreme Court to livestream the audio of each oral argument. It also would have required federal appellate courts to livestream video of each oral argument to the extent practicable for all proceedings open to the public.<sup>100</sup> This bill was referred to the Committee on the Judiciary and the Committee on Transportation and Infrastructure on September 10, 2018, and subsequently died in committee.<sup>101</sup>

### III. THE EXPERIMENTS OF THE STATES

After *Estes* and *Chandler*, states began experimenting with expanded media coverage of their courts. While each state is allowed to set its own rules, most states allowing expanded media coverage have implemented similar types of conditions and limitations on such coverage.<sup>102</sup> Further, each state has implemented varying extents of

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95. *Committees: S. 643—115th Congress (2017–2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/643/committees> [<https://perma.cc/9Z84-XTUV>] (last visited Jan. 31, 2019).

96. Anti-Corruption and Public Integrity Act, S. 3357, 115th Cong. (2018).

97. *Id.* § 404(d).

98. *Committees: S. 3357—115th Congress (2017–2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/3357/committees> [<https://perma.cc/49UE-HNYN>] (last visited Jan. 31, 2019).

99. Judiciary Reforms, Organization and Operation Modernization Act (Judiciary ROOM Act), H.R. 6755, 115th Cong. (2018).

100. *Id.* §§ 301(a)–(b).

101. *Committees: H.R. 6755—115th Congress (2017–2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/6755/committees> [<https://perma.cc/WQY8-BP72>] (last visited Jan. 31, 2019).

102. *Compare, e.g., IOWA CT. R. 25.1–.5* (permitting only media representatives to request expanded coverage and requiring seven-day notice), *with ARIZ. SUP. CT. R. 122* (permitting any individual or organization to request expanded coverage and requiring different notice periods dependent on type of proceeding).

judicial discretion and appellate review to ensure that neither justice nor fairness is impeded.<sup>103</sup>

### *A. Proceedings at the Trial Court Level*

Forty-five states have authorized expanded media coverage to record trial-level proceedings in some, if not all, of their trial-level courts, subject to varying conditions and limitations.<sup>104</sup> Most, if not all, states have provisions governing consent, notice, personnel and equipment, subject matter, and judicial discretion.

#### 1. Consent

Many states require consent as a condition for authorization of expanded media coverage in a proceeding.<sup>105</sup> Up to three types of consent may be required: (1) party consent, (2) victim consent, and (3) witness consent.<sup>106</sup> While a requestor's failure to gain consent is not necessarily fatal to coverage requests, coverage may be subject to more stringent limitations without the required consent.<sup>107</sup>

Most states that allow expanded media coverage do not require party consent for proceedings.<sup>108</sup> Some states do, however, provide parties the opportunity to oppose a request for expanded media coverage.<sup>109</sup> Such opposition may trigger a hearing on the issue to determine if expanded media coverage would result in unfair prejudice or an infringement on due process.<sup>110</sup> Opposition is a permissible factor that a judge may include in her decision to deny coverage requests if the party is objecting to coverage on grounds including, but not limited to, likelihood of an unfair proceeding, right to privacy, or fear of loss of safety or wellbeing.<sup>111</sup> In states that allow objections to expanded media coverage, parties must object prior to the start of the proceeding or else

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103. See, e.g., ALASKA CT. R. 50(g).

104. See LEE LEVINE ET AL., 1 NEWSGATHERING AND THE LAW § 4.04 (Matthew Bender & Co., 5th ed. 2018); *infra* app. 1–2.

105. See, e.g., ARIZ. SUP. CT. R. 122(c)(3)–(5).

106. See, e.g., *id.*

107. See, e.g., *id.* 122(d).

108. See, e.g., COLO. SUP. CT. R. 3. *But see* ALASKA CT. R. 50(c); *infra* Section III.A.5 (discussing certain subject matters that are per se excluded or require additional consent for expanded media coverage).

109. See, e.g., Mississippi Rules for Electronic and Photographic Coverage of Judicial Proceedings 7 (MREPC).

110. See, e.g., ARIZ. SUP. CT. R. 122(c)(3).

111. See, e.g., *id.* 122(d)(1).

consider their right to object waived.<sup>112</sup> For example, in Minnesota, party consent is required for any coverage of criminal proceedings before conviction but is not required for any coverage of proceedings after conviction.<sup>113</sup> Other states have abandoned party consent requirements in totality.<sup>114</sup>

In the case of victims and witnesses, failure to gain consent is not fatal to a coverage request, as a victim's or witness's nonconsent usually results in limiting coverage only during the testimony of the nonconsenting victim or witness.<sup>115</sup> Such limitation may be minimal (e.g., requiring only the censoring of the victim or witness's face),<sup>116</sup> moderate (e.g., allowing only an audio recording of any testimony),<sup>117</sup> or extreme (e.g., prohibiting any coverage of the victim or witness in court).<sup>118</sup> In criminal trials, the prosecutor bears the responsibility of informing victims of their right to object to coverage.<sup>119</sup> Each party is obliged to inform their witnesses of their right to object to expanded media coverage.<sup>120</sup> Usually, victims and witnesses may object any time prior to their appearance or testimony.<sup>121</sup> This right to object does not come without costs—limiting the coverage of a witness's testimony risks that a viewer will perceive the accused's guilt or innocence differently due to an incomplete availability of facts.<sup>122</sup>

## 2. Notice

Despite the expansion of media coverage for trials and other proceedings, no states allow individuals or news reporters to merely show up for proceedings with recording equipment expecting to cover the proceeding through videography, photography, or audio

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112. See, e.g., *id.* 122(c)(4).

113. Mark Zdechlik, *Minn. Supreme Court OKs Cameras in Courtrooms with Conditions*, MPR NEWS (July 3, 2018), <https://www.mprnews.org/story/2018/07/03/minnesota-supreme-court-approves-cameras-in-courtrooms> [<https://perma.cc/S2SQ-V9JA>]; see MINN. R. GEN. PRAC. 4.02(c).

114. See *Chandler v. Florida*, 449 U.S. 560, 564–65 (1981).

115. See, e.g., WIS. SUP. CT. R. 61.11.

116. See, e.g., ARIZ. SUP. CT. R. 122(d)(2)(B).

117. See, e.g., *id.*

118. See, e.g., WIS. SUP. CT. R. 61.11.

119. See, e.g., ARIZ. SUP. CT. R. 122(c)(5).

120. See, e.g., *id.*

121. See, e.g., *id.*

122. See, e.g., Jessica McBride, *14 Pieces of Troubling Evidence "Making a Murderer" Left Out or Glossed Over*, ONMILWAUKEE (Dec. 30, 2015, 9:56 AM), <https://onmilwaukee.com/movies/articles/evidenceagainstavery.html> [<https://perma.cc/U6HG-85Q9>] (detailing pieces of evidence that were left out of the "docuseries" that changed the author's perception of Steven Avery).



recording.<sup>123</sup> Instead, anyone who seeks to record trials or proceedings must first file a request with the court.<sup>124</sup>

States vary, however, on what proper notice entails. Mississippi, for example, merely requires media representatives to notify the clerk and court administrator of their intention to cover using electronic media at least forty-eight hours prior to the proceeding.<sup>125</sup> Iowa, on the other hand, requires media representatives to submit a specific form to the news media coordinator seven days prior to the proceeding.<sup>126</sup> Arizona imposes two different notice requirements. For trials, media representatives must notify the court at least seven calendar days prior to the proceeding. For all other proceedings, media representatives must notify the court at least forty-eight hours prior to the proceeding.<sup>127</sup> Where a proceeding is scheduled without a sufficient notice period for expanded media coverage requests, such a request must be made as soon as practicable.<sup>128</sup>

### 3. Personnel and Equipment Restrictions

States that allow expanded media recording differ with regard to whom they allow to cover court proceedings. While some states allow any person to request permission to cover a proceeding, other states only allow media representatives<sup>129</sup> to request permission.<sup>130</sup> Mississippi, for example, expressly provides that its expanded media coverage rules only allow media representatives to use electronic devices, unless a local rule allows otherwise.<sup>131</sup> For media representatives who are permitted to cover proceedings under these rules, Mississippi requires them to follow court customs including “appropriate attire.”<sup>132</sup> California has a more moderate approach, allowing individuals some expanded coverage access while limiting full expanded media coverage to media representatives.<sup>133</sup> Additionally,

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123. See, e.g., ALASKA CT. R. 50(b).

124. See, e.g., *id.*

125. MREPC 5.

126. IOWA CT. R. 25.3; 25.10 form 1.

127. ARIZ. SUP. CT. R. 122(c)(2)(A), (B).

128. See, e.g., IOWA CT. R. 25.3.

129. See *infra* app. 2. It is worth noting that “media representative” is not used uniformly across the states. See *infra* app. 2. As suggested below, constitutional restraints should render this a non-issue for any federal rulemaking in this area. See *infra* text accompanying notes 135–36.

130. Compare, e.g., MREPC 3(b) (limiting coverage only to “media representatives”), with ARIZ. SUP. CT. R. 122 (allowing any “person” to submit such requests).

131. MREPC 3(b).

132. MREPC 6.

133. CAL. R. CT. 1.150(d)–(e).

California prohibits media logos or insignia from being present on any equipment or clothing.<sup>134</sup> Most expansively, Arizona, for example, does not restrict coverage to only media representatives, allowing any person to request permission to cover a court proceeding with electronic devices.<sup>135</sup> While the states differentiate between the public and official media to varying degrees, the Supreme Court has held that “[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public.”<sup>136</sup> In an effort to ensure full rights for all citizens under the First Amendment, any expanded media coverage should be guaranteed to all public court observers without preference to official media representatives.<sup>137</sup>

Under these expanded media coverage rules, the type and amount of equipment that may be brought into the courtroom is limited.<sup>138</sup> Most states allow only one television camera in the courtroom, with more sometimes allowed subject to judicial discretion, and one television camera operator.<sup>139</sup> Many states also require the television camera to be stationary.<sup>140</sup> Additionally, most states allow one still photographer to cover the proceeding with no more than two cameras.<sup>141</sup> In an effort to minimize the amount of distractions that cameras could potentially cause, states generally prohibit cameras that use external light sources, make sounds, or have lights that indicate recording.<sup>142</sup> States also require that any audio recording must be done through a built-in microphone that is no more acute than the human ear,<sup>143</sup> although some states may permit additional microphones in rare circumstances.<sup>144</sup>

When multiple media representatives request to cover the same proceeding, courts require media representatives to pool resources and independently make a coverage plan.<sup>145</sup> This coverage plan requires the media representatives to agree upon who will operate the cameras, what equipment will be used, and what rights each organization has to

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134. *Id.* 1.150(e)(8)(F).

135. ARIZ. SUP. CT. R. 122.

136. *Nixon v. Warner Commc'ns*, 435 U.S. 589, 609 (1978); *see also* *Estes v. Texas*, 381 U.S. 532, 589 (1965) (Harlan, J., concurring).

137. *See Nixon*, 435 U.S. at 609.

138. *See, e.g.*, TENN. SUP. CT. R. 30.

139. *See, e.g.*, MREPC 4(f).

140. *See, e.g.*, ARIZ. SUP. CT. R. 122(f).

141. *See, e.g.*, VT. R. CIV. P. 79.2(e)(2).

142. *See, e.g.*, TENN. SUP. CT. R. 30(G)(1).

143. *See, e.g., id.* 30(F)(3).

144. *See, e.g., id.* 30(G)(3).

145. *See, e.g.*, VT. R. CIV. P. 79.2(e)(4).

the footage and pictures captured.<sup>146</sup> However, when nonmedia-affiliated persons also request to cover proceedings, courts are willing to intervene, upon request, to determine the appropriate representative and equipment.<sup>147</sup>

Some states also allow electronic devices for note-taking purposes.<sup>148</sup> Tennessee, for example, allows media personnel to make audio recordings with devices no more perceptive than the human ear without requesting authority from the presiding judge.<sup>149</sup> California allows any person to use inconspicuous recording devices in a note-taking capacity with permission from the judge.<sup>150</sup> These audio recordings are limited to use for personal note taking and are not permitted to be used for any other purpose (e.g., in a broadcast).<sup>151</sup> Some states allow larger electronic devices for this purpose as well, so long as the use does not create a distraction in the courtroom.<sup>152</sup>

#### 4. Prohibited Subject Matter

Despite forty-five states' expansion of electronic coverage, no state has opened its doors to all courtroom events.<sup>153</sup> As a general rule, states expand media coverage to proceedings and trials that are open to the public, allowing the media no more physical access to the court than a member of the public.<sup>154</sup> States, however, do explicitly limit these rules from applying to certain open proceedings—particularly portions of criminal proceedings.<sup>155</sup> No state allows expanded media coverage of voir dire or pretrial hearings other than advisements and arraignments.<sup>156</sup> States also explicitly prohibit any recording of conferences that occur in the courtroom, whether between counsel and client, counsel and witnesses, counsel and co- or opposing counsel, or counsel and the judge.<sup>157</sup>

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146. See, e.g., UTAH R. JUD. ADMIN. 4-401.01(4)(B).

147. See, e.g., VT. R. CIV. P. 79.2(e)(4).

148. See, e.g., TENN. SUP. CT. R. 30(F)(3).

149. *Id.*

150. CAL. R. CT. 1.150(d).

151. See *id.*; TENN. SUP. CT. R. 30(F)(3).

152. See CONN. R. SUPER. CT. § 1-10; *Morris Publishing Co. v. State*, No. 1D10-226, 2010 WL 363318, at \*1 (Fla. Dist. Ct. App. Jan. 20, 2010).

153. See, e.g., COLO. SUP. CT. R. 3.

154. See, e.g., *id.*

155. See, e.g., *id.*

156. See, e.g., *id.* Every state includes provisions to protect jurors, prospective jurors, and other pre-trial matters that could contaminate the jury pool from coverage using electronic media. See, e.g., *id.*

157. See, e.g., CAL. R. CT. 1.150(e)(6).

States also have not expanded media coverage in proceedings that involve certain sensitive issues.<sup>158</sup> Generally, states do not allow coverage of minors during any proceeding, unless the minor is being criminally tried as an adult.<sup>159</sup> States also tend to prohibit coverage of family matters, domestic abuse, motions to suppress evidence, and proceedings involving trade secrets.<sup>160</sup> Additionally, states prohibit coverage of certain witnesses, including police informants, relocated witnesses, undercover agents, and victims of sex crimes and domestic abuse.<sup>161</sup>

### 5. Judicial Discretion and Review

While many states provide that requests for expanded media coverage should be granted,<sup>162</sup> every state has left open the possibility that a judge, exercising her discretion, could deny the request based on certain factors.<sup>163</sup> Most states provide that discretion is permitted to determine whether allowing the media coverage will interfere with the parties' rights to a fair trial or will detract from the decorum of the court.<sup>164</sup> Some states, in addition to this standard for judicial discretion, provide judges with a range of factors that may be considered when balancing the interests.<sup>165</sup> Factors vary between the states: Some states, such as Colorado, enumerate three factors for consideration, while other states, such as California, enumerate nineteen factors for consideration.<sup>166</sup> Among California's factors for consideration are the "importance of maintaining public trust and confidence in the judicial system," "the difficulty of jury selection if a mistrial is declared," and "the effect on excluded witnesses who would have access to televised testimony of prior witnesses."<sup>167</sup>

While states are unified in giving judges the discretion to prohibit or limit such coverage, states are divided on whether the denial

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158. See, e.g., MREPC 3. In some states, including Mississippi, judges have the authority to allow coverage by order of an otherwise prohibited proceeding. See *id.*

159. See, e.g., TENN. SUP. CT. R. 30.

160. See, e.g., MREPC 3(e).

161. See, e.g., *id.* 3(d).

162. See, e.g., ARIZ. SUP. CT. R. 122(d). *But see, e.g.,* CAL. R. CT. 1.150(a) ("This rule does not create a presumption for or against granting permission to photograph, record, or broadcast court proceedings.").

163. See, e.g., ARIZ. SUP. CT. R. 122(d).

164. See, e.g., COLO. SUP. CT. R. 3(a)(2).

165. See, e.g., CAL. R. CT. 1.150(e)(3).

166. Compare, e.g., COLO. SUP. CT. R. 3(a)(2), with CAL. R. CT. 1.150(e)(3).

167. CAL. R. CT. 1.150(e)(3).

of a request to use expanded media coverage is reviewable.<sup>168</sup> Colorado, for example, does not allow media representatives or witnesses to appeal a grant or denial of a request,<sup>169</sup> but parties may seek reconsideration by the presiding judge or during a post-trial appeal.<sup>170</sup> Wisconsin limits review to the chief judge as an administrative matter, with no appellate review of either the presiding or chief judge's decision.<sup>171</sup> Maine allows, but does not require, the presiding judge to reconsider her grant or denial of coverage upon request; no other review of such a decision is authorized.<sup>172</sup> Rhode Island offers no recourse after the judge makes the decision to grant or deny a request for expanded media coverage.<sup>173</sup> Some states, including California and Mississippi, do not discuss review in their rules.<sup>174</sup>

### 6. States That Prohibit Expanded Media Coverage

No more than five states prohibit expanded media coverage.<sup>175</sup> Two of these states, Delaware and Pennsylvania, allow coverage of select nonjury, civil trials.<sup>176</sup> Another two states, Montana and Oklahoma, do not have statewide guidance regarding expanded media coverage. In Montana, each judicial district may set its own rules governing cameras, and approximately half of the districts allow some form of expanded media coverage in their trial courts.<sup>177</sup> In Oklahoma, the default rule is that cameras are prohibited,<sup>178</sup> some judicial districts permit the presiding judge to allow expanded media coverage in some

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168. Compare, e.g., COLO. SUP. CT. R. 3(a)(6)(D), with Administrative Order on Cameras and Audio Recording in the Courtroom, JB-05-15 (Sept. 19, 2011) [hereinafter *Maine Recording Order*, JB-05-15], [https://www.courts.maine.gov/rules\\_adminorders/adminorders/JB-05-15%20\(A.%209-11\)%20%20Cameras%20&%20Audio.pdf](https://www.courts.maine.gov/rules_adminorders/adminorders/JB-05-15%20(A.%209-11)%20%20Cameras%20&%20Audio.pdf) [https://perma.cc/6EME-QMM5] (outlining Maine's camera and audio recording policy).

169. COLO. SUP. CT. R. 3(a)(6)(D).

170. *Id.*

171. WIS. SUP. CT. R. 61.10.

172. *Maine Recording Order*, JB-05-15, *supra* note 167.

173. See R.I. SUP. CT. R. art. VII, R. 11.

174. See CAL. R. CT. 1.150; MREPC 1–9.

175. See LEVINE ET AL., *supra* note 104; *infra* app. 1–2.

176. DEL. JUD. BRANCH OP. P. VII, 1(b) (2015) <https://courts.delaware.gov/aoc/operating-procedures/op-media.aspx> [https://perma.cc/S58N-8K4U]; 201 PA. CODE § 1910 (allowing judges to permit expanded media coverage for civil, nonjury trials subject to certain conditions).

177. Compare, e.g., MONT. 17TH JUD. DIST. CT. R. 23(e) & MONT. 22D JUD. DIST. CT. R. 28, with MONT. 13TH JUD. DIST. CT. R. (promulgating no rule permitting cameras in the courtroom).

178. See, e.g., OKLA. 16TH JUD. DIST. CT. R. 1.

cases.<sup>179</sup> Opponents of expanded media coverage of court proceedings tend to argue one or more of the following concerns: Witnesses will be less likely to freely give information during testimony as the risk of witness intimidation is increased. Jurors will be distracted and will be less focused on the trial in front of them. Finally, television often distorts and sensationalizes court proceedings, undercutting any educational value of such recording.<sup>180</sup> Part IV addresses these concerns.

### *B. Proceedings in the Appellate Courts*

While not every state permits expanded media coverage at the trial level,<sup>181</sup> every state does permit some degree of expanded media coverage of its appellate level courts.<sup>182</sup> Despite the states' uniformity in permitting appellate level coverage, states vary in the degree of and limitations on such permission.<sup>183</sup> However, limitations on appellate coverage, if different from trial level limits, are usually comparatively more lenient.<sup>184</sup>

Generally, appellate courts do not require the consent of parties.<sup>185</sup> However, a small number of states, including Alabama, do require affirmative attorney and party consent before permitting expanded media coverage.<sup>186</sup> Appellate judges, like trial judges, must consent to expanded media coverage of a proceeding.<sup>187</sup> While requests to cover appellate proceedings in most states carry a presumption of permission, individuals and media representatives must still submit a request before covering an appellate proceeding.<sup>188</sup>

Some state supreme courts provide video recordings of proceedings on their websites or through social media in addition to

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179. Randy Ellis, *Judge Rules Cameras Permitted in Courtroom for Opioid Trial*, OKLAHOMAN (Aug. 23, 2018, 5:00AM), <https://newsok.com/article/5605663/judge-rules-cameras-permitted-in-courtroom-for-opioid-trial> [<https://perma.cc/TC7Z-MQSW>].

180. See Emily Ittner, *Technology in the Courtroom: Promoting Transparency or Destroying Solemnity?*, 22 COMMLAW CONSPPECTUS 347, 358–59 (2014).

181. See *supra* Section III.A.

182. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-437, U.S. Supreme Court: Policies and Perspectives on Video and Audio Coverage of Appellate Court Proceedings 19 (2016); see also LEVINE ET AL., *supra* note 104.

183. Compare, e.g., ALA. CANONS JUD. ETHICS Canon 3(A)(7B) (limiting coverage to when the attorneys and parties involved affirmatively give written consent), with N.Y. C.L.S. STANDARDS & ADMIN. POL. § 29.2 (2000) ("Consent not required.").

184. See, e.g., N.Y. C.L.S. Standards & Admin. Pol. § 29.2.

185. See, e.g., *id.*

186. See, e.g., ALA. CANONS JUD. ETHICS Canon 3(A)(7B)(b).

187. See, e.g., N.Y. C.L.S. Standards & Admin. Pol. § 29.2.

188. See, e.g., WASH. GEN. R. 16.

allowing the public or media representatives to bring devices into the courtroom.<sup>189</sup> In February 2018, the Florida Supreme Court embraced recent technological advances and the popularity of social media platforms in its expanded media coverage policies.<sup>190</sup> No longer merely allowing cameras into the courtroom or hosting video recordings of oral arguments on the court website, Florida now additionally livestreams oral arguments on the official Florida Supreme Court Facebook page.<sup>191</sup> The Florida Supreme Court creates a live video for each argument day, streaming all arguments for the day in one comprehensive video.<sup>192</sup> In announcing the decision to go “live” on Facebook, Florida Chief Justice Jorge Labarga said, “This court’s experiment with transparency showed everyone a better way to balance First Amendment rights against the rights of people involved in a trial or appeal. Social media will be our next step in moving this highly successful model of openness into the [t]wenty-[f]irst [c]entury.”<sup>193</sup> According to Facebook’s viewership metrics, each video generally receives a few thousand views.<sup>194</sup>

Many states that permit expanded media coverage of both trial and appellate level proceedings do not have separate rules for these different levels.<sup>195</sup> Some state rules, however, specify that particular subsections of the rule apply to only one level of proceeding.<sup>196</sup> Equipment restrictions are typically applicable to all levels of proceedings, but some states give the chief justice and chief judge of the court of appeals the discretion to waive such restrictions.<sup>197</sup>

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189. See Melissa Quinn, *Florida Supreme Court Becomes One of the First Courts to Stream Arguments on Facebook Live*, WASH. EXAMINER (Feb. 7, 2018, 12:27 PM), <http://www.washingtonexaminer.com/florida-supreme-court-becomes-one-of-the-first-courts-to-stream-arguments-on-facebook-live/article/2648381> [<https://perma.cc/VW62-645N>].

190. Mitchell Galloway, *May It Please the Court . . . and Facebook?*, VAND. J. ENT. & TECH. L.: BLOG (Sept. 7, 2018), <http://www.jetlaw.org/2018/03/24/may-it-please-the-court-and-facebook/> [<https://perma.cc/FA3L-G4SZ>].

191. See *id.*

192. See *Florida Supreme Court Oral Arguments*, FLA. SUP. CT. (June 7, 2018), <https://www.facebook.com/floridasupremecourt/videos/vl.127967938039809/581860332195928/?type=1> [<https://perma.cc/QXN6-W8H7>].

193. Press Release, Supreme Court of Florida, *Florida Supreme Court to Begin Facebook Live Broadcasts*, (Jan. 23, 2018), [https://www.floridasupremecourt.org/content/download/242960/2142602/01-23-2018\\_Facebook-Live-Broadcasts.pdf](https://www.floridasupremecourt.org/content/download/242960/2142602/01-23-2018_Facebook-Live-Broadcasts.pdf) [<https://perma.cc/NC58-NWY5>].

194. See *Florida Supreme Court–Videos*, FACEBOOK, <https://www.facebook.com/floridasupremecourt/videos/> [<https://perma.cc/9PN3-SHFY>] (last visited Feb. 17, 2019). These views are tracked during both the initial live stream and subsequent views after the live stream is concluded.

195. See, e.g., MREPC 1.

196. See, e.g., *id.*

197. See, e.g., MREPC 1, 4.

#### IV. FEDERALISM AT WORK: REQUIRE PROGRESS OF THE FEDERAL JUDICIARY

##### A. A New Federal Rule

While Congress could pass legislation to allow expanded media coverage in federal courts,<sup>198</sup> the judiciary is better positioned to address this issue.<sup>199</sup> For example, each proposed bill from the 115th Congress would solve only part of this problem,<sup>200</sup> rendering congressional action less than satisfactory. It is not enough to merely giving judges the discretion to make changes to their policies, as would Senator Grassley's bill, especially if many in the federal judiciary will elect a path of least resistance and make no changes.<sup>201</sup> Nor do Senator Warren's or Representative Issa's bills go far enough, as their requirements are only limited to appellate courts.<sup>202</sup> This Note does recognize the value of successful congressional action, however, as this would (1) require a more serious conversation in the federal judiciary on this issue and (2) allow proponent judges to authorize some expanded media coverage—two small, positive steps toward progress.

This Note proposes that the judiciary should (1) adopt new rules similar to the rules of the recent pilot program, (2) create a new pilot program designed as an empirical study on allowing courtroom observers to engage in expanded media coverage, and (3) create a new pilot program aimed at criminal cases.

##### 1. Adopt a New Rule Using Less Extreme Alternatives Than “Blanket Bans”

In choosing to not change the current rules, the Judicial Conference relied on three rationales: (1) low participation rates; (2) fear of adverse effects on witnesses; and (3) capital costs of equipment and hosting services.<sup>203</sup> Yet, there are less extreme alternatives to a blanket ban on cameras in the courtroom that could counter these issues.

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198. See *supra* Section II.B.3.

199. The judiciary created this opening with knowledge that it would have to continue addressing the question and one day allow devices into federal court. See *Estes v. Texas*, 381 U.S. 532, 595 (Harlan, J., concurring). As such, it is more satisfying and more impactful for the judiciary to allow devices into federal court on its own volition rather than acquiescing to Congress.

200. See *supra* Section II.B.3.

201. See S. 643.

202. See H.R. 6755; S. 3357.

203. CACM RECOMMENDATION, *supra* note 79.



The CACM recommendation cites low participation rates as a reason to not implement an otherwise positive program.<sup>204</sup> However, it should be unsurprising that judges chose to maintain the status quo when given the option.<sup>205</sup> One-third of the federal district judges eligible for participation in the recent pilot program chose to volunteer.<sup>206</sup> While just half of those willing judges ultimately presided over a proceeding on camera,<sup>207</sup> it is unclear from the pilot program why there was low participation: Were the parties who did not consent to cameras opposed to the cameras being in the courtroom, or did they merely accept the status quo? A better way to design a rule that tests participation is to create a default rule of cameras being present in the proceeding—reversing the status quo—and to require parties who do not wish for their proceeding to be recorded to file a motion requesting a prohibition of expanded media coverage.<sup>208</sup> Ideally, judges would grant these motions freely. This would clarify the impacts, if any, of status quo bias on participation data.<sup>209</sup>

The CACM recommendation also cites a fear of adverse effects on witnesses in support of not changing the federal rule regarding cameras.<sup>210</sup> While some participating judges did perceive witnesses to be more nervous in front of a camera,<sup>211</sup> it is unclear how detrimental this fear is.<sup>212</sup> Regardless of whether adverse effects are common or uncommon, it is also unclear why their existence supports a blanket ban on cameras in a courtroom.<sup>213</sup> Alternatives to a blanket ban, many

204. *Id.*

205. See Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 916 (2015) (discussing judicial preference for maintaining the status quo in the context of changing legal doctrine).

206. CACM RECOMMENDATION, *supra* note 79.

207. *Id.*

208. See Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 623–25 (1998) (discussing impact of “status quo bias”); *supra* Section III.A.1 (following many states who require parties to take the affirmative steps to prevent recording).

209. See Shai Davidai, Thomas Gilovich & Lee D. Ross, *The Meaning of Default Options for Potential Organ Donors*, 109 PROC. NAT’L ACAD. SCI. USA (PNAS) 15201, 15201 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3458339/pdf/pnas.201211695.pdf> [<https://perma.cc/SV5M-2RC4>] (analogizing the extreme difference in organ donors in countries depending on whether organ donation is the default rule).

210. CACM RECOMMENDATION, *supra* note 79.

211. MOLLY TREADWAY JOHNSON, CAROL KRAFKA & DONNA STIENSTRA, FED. JUDICIAL CTR., VIDEO RECORDING COURTROOM PROCEEDINGS IN UNITED STATES DISTRICT COURTS: REPORT ON A PILOT PROJECT app. D, tbl.2.b (2016), [https://www.fjc.gov/sites/default/files/2017/Cameras%20in%20Courts%20Project%20Report%20\(2016\).pdf](https://www.fjc.gov/sites/default/files/2017/Cameras%20in%20Courts%20Project%20Report%20(2016).pdf) [<https://perma.cc/C5SR-U6WW>].

212. See Stacy R. Horth-Neubert, Note, *In the Hot Box and on the Tube: Witnesses’ Interests in Televised Trials*, 66 FORDHAM L. REV. 165, 179 (1997) (discussing the wide recognition that witnesses are often nervous about testifying whether cameras are present or not).

213. See *infra* Section IV.B.4.

currently implemented by states, exist to ensure that witnesses are not adversely affected by a camera's presence in the courtroom.<sup>214</sup> State court-implemented alternatives include informing witnesses of their right to not be recorded, censoring a witness's face on the video, modulating the witness's voice on the video, and offering witnesses the choice to opt out of being recorded.<sup>215</sup>

The CACM recommendation further relied on the additional administrative costs to the judiciary in choosing to not change the federal rule.<sup>216</sup> The total cost of the pilot program was just under \$1 million, accounting for equipment costs, labor costs, and web hosting costs.<sup>217</sup> CACM also found that additional costs of increased workloads and court staff's time were extensive and were not included in the \$1 million total cost.<sup>218</sup> Again, alternatives to a blanket rule exist to counter this problem. While CACM was unsatisfied that the benefits of cameras in the courtroom outweigh these costs for the judiciary as a whole, one alternative to a blanket ban would be incremental implementation as judges choose to begin recording their court proceedings. This alternative would render the costs already spent on equipment valuable without increasing the total judiciary expense to install cameras in every courtroom within a short time frame. This approach would also prioritize spending on equipment in courtrooms where the equipment will actually be used. A second alternative is to shift costs from the court to observers and members of the media who value expanded media coverage, as discussed below.

## 2. Allow Observers to Electronically Cover Proceedings in a New Pilot Program and Track the Results

The second step for the federal judiciary should be to expand electronic media coverage of proceedings, beyond the courtroom staff, to observers. Not only does this allow the media to have more accurate and engaging reporting,<sup>219</sup> but it also shifts costs from court staff to observers who seek such coverage.<sup>220</sup> For the risk-averse judiciary, this

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214. See *supra* Section III.A.1.

215. See *supra* Section III.A.1.

216. CACM RECOMMENDATION, *supra* note 79.

217. *Id.*

218. *Id.*

219. See *infra* text accompanying notes 270–75.

220. This cost shifting is loosely inspired by the regulation of private utility companies in the public interest. Regulation is an, albeit imperfect, solution that seeks to balance the interests of utility investors (those who devote their capital to utility infrastructure) and users (those who depend on utility services but have limited choices). Cf. Janice A. Beecher, *Economic Regulation of Utility Infrastructure*, in *INFRASTRUCTURE AND LAND POLICIES* 87, 101–02 (2013). Here, news

could start as a pilot program inspired by many of the states' current rules. A pilot program would both allow more coverage of certain proceedings and allow for data to be collected.

In designing the pilot program, CACM should create a uniform notice requirement, mandating the submission of a standardized form<sup>221</sup> with fields including, but not limited to, employment, age, reason, intent to disseminate, and type of equipment<sup>222</sup> to be filed with the court three business days before the proceeding, with exceptions for proceedings scheduled with less than three-days' notice.<sup>223</sup> With access to this data for every coverage request, the federal judiciary would uncover a clearer picture of what proceedings the public is interested in having recorded as well as in what medium, for what reason, and to what extent the public is benefiting from the coverage. This information would assist the Judicial Conference or Rules Committees in promulgating guidelines as to what proceedings judges should always allow observers to record, allow only on a case-by-case basis, and never allow observers to record. During the pilot program, the federal judiciary should adopt the states' rules regarding the amount of personnel and equipment allowed in the courtroom and the types of content that an observer is allowed to cover with electronic media.<sup>224</sup> Judges receiving proper notices of request should generally permit such coverage of the proceeding. However, where such a request would infringe upon a litigant's right to a fair trial or would substantially detract from the decorum of the court, the judge should deny the request with stated reasons for the denial.

States are divided as to the level of judicial review these decisions should receive.<sup>225</sup> To discourage judges from arbitrarily

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media and interested individuals already have made the capital investment (the technologies to capture coverage and disseminate information). The users are members of the public who have limited opportunities to attend proceedings but seek information regarding such court matters. Similarly, court regulation of the capital investors is a more cost-efficient way to implement such electronic coverage of courts. *Cf. id.*

221. The requirement of a standardized form will also streamline the processing of notice requests and assist non-lawyers in appropriately filing documents to the court.

222. For a suggested draft form, see *infra* app. 3.

223. See *supra* Section III.A.2. Various states require different filing standards and different notice periods for those seeking to cover a proceeding with recording devices. See *supra* Section III.A.2. This Note does not give "three days" as a perfect time requirement, but rather a moderate approach accounting for the range of notice times in the states which vary from twenty-four hours to two weeks.

224. Most states agree on these restrictions and deviate less from each other's practices than other restrictions. See *supra* Section III.A. It is unlikely that the restrictions that the states have seemingly settled upon will be unsatisfactory for the federal judiciary, but this hypothesis can be confirmed through a pilot program allowing observers to enjoy a privilege of expanded media coverage.

225. See *supra* Section III.A.5.

denying requests or denying requests in opposition of such new policies, some form of review should be permitted. In an effort to balance both judicial resources and access to courts, this Note suggests providing limited opportunity for appellate review under an abuse of discretion standard. Requestors should be allowed to request review of an order denying their request for expanded media coverage. There are two avenues by which requestors can request review: (1) seek to intervene in the proceeding, move the court to allow expanded media coverage, and appeal any denial of such motion under the collateral order doctrine<sup>226</sup> or (2) file a writ of mandamus, prohibition, or other extraordinary relief in the reviewing court of appeals.<sup>227</sup> Regardless of which avenue—or both—through which a requestor seeks review, the requestor should additionally seek a stay of proceedings in the trial court, and if denied, in the court of appeals.<sup>228</sup> This stay may be the most important action of the requestor, as a court would unlikely require a new trial solely on this basis.<sup>229</sup>

### 3. Expand the Rules to Allow Coverage of Criminal Cases

The final step for the federal judiciary would be to open the door to allowing coverage of criminal proceedings. Any discussion of expanded media coverage of a criminal proceeding immediately harkens red flags due to the less-than-satisfactory coverage of the O.J. Simpson trial<sup>230</sup> and the “trial by media” that some perceived the Casey Anthony trial to be.<sup>231</sup> However, these examples provide support for

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226. See *United States v. Wecht*, 537 F.3d 222, 225–28 (3d Cir. 2008) (hearing media intervenor-appellant’s appeal challenging jury selection procedures under the collateral order doctrine).

227. See *Herald Ass’n v. Ellison*, 138 Vt. 529, 530 (1980) (hearing media’s petition for extraordinary relief arising from the exclusion of the public and media from a criminal trial).

228. See *Nebraska Press Ass’n v. Stuart*, 423 U.S. 1327, 1333–34 (1975) (granting in part and denying in part the media’s request for a stay of an order restricting their reporting abilities).

229. See *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017) (“[W]hile the public-trial right is important for fundamental reasons, in some cases an unlawful closure might take place and yet the trial still will be fundamentally fair from the defendant’s standpoint.”); *id.* (declining to find a violation public-trial right a structural error warranting reversal without a showing of prejudice to the defendant); *State v. Tallman*, 148 Vt. 465, 468 (1987) (deciding issues of closure after jury trial acquitted the defendant due to the lack of a stay order).

230. Editorial, *Another Casualty of the O.J. Trial: Cameras in Courtrooms*, L.A. TIMES (June 11, 2014, 8:08 PM), [http://www.latimes.com/opinion/editorials/la-ed-oj-20140611-story.html# \[https://perma.cc/6J77-84DR\]](http://www.latimes.com/opinion/editorials/la-ed-oj-20140611-story.html# [https://perma.cc/6J77-84DR]).

231. Brian Stelter & Jenna Wortham, *Watching a Trial on TV, Discussing It on Twitter*, N.Y. TIMES (July 5, 2011), [https://www.nytimes.com/2011/07/06/business/media/06coverage.html \[https://perma.cc/36GZ-AWKK\]](https://www.nytimes.com/2011/07/06/business/media/06coverage.html [https://perma.cc/36GZ-AWKK]).

adding coverage of criminal trials in the future.<sup>232</sup> By incrementally expanding the privilege of recording civil trials from court staff to observers, and finally to both criminal and civil trials by observers, the federal judiciary will be better positioned to create guidelines for media coverage. Such guidelines would then be based on the judiciary's experience in each stage of expansion rather than hypotheses, which would better protect any coverage of "sensational" criminal trials.<sup>233</sup> This final step will likely become necessary and unavoidable as society and technology continue to progress. It is also likely that the expectations and interpretation of "public trial" will also progress to a point where the Supreme Court will, eventually, adopt some constitutional protections for expanded media coverage. While this Note does not argue that society and technology are currently at this point, it is clear that the United States is on this, albeit long and slow, journey.

*B. Benefits and Detriments of Expanded Media Coverage in Federal Courts*

The prospect of allowing cameras into courtrooms has been controversial since technology became available to the judicial system.<sup>234</sup> Traditionally, opponents of allowing cameras in courtrooms espouse four main arguments: (1) negative effects on the courtroom participants, (2) protecting courtroom prestige and decorum, (3) a lack of educational value, and (4) administrative concerns.<sup>235</sup> Proponents of cameras argue the converse.<sup>236</sup> This Note argues that cameras should be allowed into the federal courtroom for three reasons: (1) to increase accessibility to courts; (2) to increase the number of opportunities for and quality of educational value; and (3) to protect the concept of federalism. Finally, this Note argues that cameras do not cripple the integrity of courtroom proceedings.

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232. See Alex Kozinski & Robert Johnson, *Of Cameras and Courtrooms*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1107, 1128–29 (2010) ("While the choice between the court-operated camera and the trusty beat reporter might be a tough one, the choice between the camera and the Twitterverse isn't. The days when a trial could proceed in sleepy obscurity, unless reported by 'reputable' and trustworthy journalists, are gone—if they ever existed.").

233. See Matt Harvey, *Time for Congress to Pass Legislation Authorizing Use of Cameras in Fed Courtrooms*, EXPONENT TELEGRAM (Jan. 26, 2018), [https://www.wvnews.com/theet/opinion/columns/time-for-congress-to-pass-legislation-authorizing-use-of-cameras/article\\_77c34008-be06-532a-a787-ebdac189c21b.html](https://www.wvnews.com/theet/opinion/columns/time-for-congress-to-pass-legislation-authorizing-use-of-cameras/article_77c34008-be06-532a-a787-ebdac189c21b.html) [<https://perma.cc/SP5T-FBZ2>].

234. See Kozinski & Johnson, *supra* note 232, at 1108.

235. See Itay Ravid, *Tweeting #Justice: Audio-Visual Coverage of Court Proceedings in a World of Shifting Technology*, 35 CARDOZO ARTS & ENT. L.J. 41, 59–69 (2016).

236. See *id.* at 50–58.

## 1. Accessibility to Courts

One of the more recognizable symbols of the legal system is that of Lady Justice.<sup>237</sup> Lady Justice is often depicted with a blindfold, which represents the objectivity of justice. Her three depictions in the US Supreme Court serve as a reminder of such objectivity to the Justices.<sup>238</sup> However, just because Lady Justice is blind does not mean the public needs to be.

Since the founding of this nation, Americans have enjoyed a general right of access to trials.<sup>239</sup> A significant rationale behind granting defendants the right to a public trial and, later, the public a right of access under the First Amendment is that public presence “enhance[s] the integrity and quality of what takes place.”<sup>240</sup> Americans have extended this idea beyond the courtroom, expecting transparency and accessibility from both the executive and legislative branches of government, in large part because of the efforts of C-SPAN and state equivalents.<sup>241</sup> In fact, 76 percent of likely voters approve of televising oral arguments at the Supreme Court.<sup>242</sup>

Opponents of allowing devices into the Supreme Court often cite worries of “unveiling the majesty” of the institution.<sup>243</sup> Justice Breyer even adopted a variant of this argument when addressing Stephen Colbert’s question on why the Supreme Court is not camera accessible, stating, “I’m in a job where we wear black robes in part because we are speaking for the law.”<sup>244</sup> However, state justices and judges have no less responsibility to “speak for the law”; yet, every state allows a degree of expanded media coverage of appellate proceedings, as an overwhelming majority of states allow expanded media coverage of trial court proceedings, and Florida even livestreams its oral arguments on

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237. See *Lady Justice*, FOUNDATION OF PATRIOTISM, <https://foundationofpatriotism.org/new-exhibits/lady-justice/> [<https://perma.cc/KPE4-MLA8>] (last visited Feb. 21, 2018).

238. See *id.*

239. See *supra* Section II.A.

240. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980).

241. See, e.g., RONALD L. GOLDFARB, *TV OR NOT TV: TELEVISION, JUSTICE, AND THE COURTS* 82 (1998) (discussing that the “basic impetus” of TVW, the Washington state equivalent of C-SPAN, is to make government more accessible to people).

242. ROBERT GREEN ET AL., *C-SPAN & PENN SCHOEN BERLAND, SUPREME COURT SURVEY: COMPREHENSIVE AGENDA 11* (2017), <https://static.c-span.org/assets/documents/scotusSurvey/CSPAN%20PSB%20Supreme%20Court%20Survey%20COMPREHENSIVE%20AGENDA%20sent%2003%2013%2017.pdf> [<https://perma.cc/7MZX-47DU>].

243. See Lisa T. McElroy, *Cameras at the Supreme Court: A Rhetorical Analysis*, 2012 B.Y.U. L. REV. 1837, 1853–54 (2012) (discussing the story the Court currently tells about why cameras should not be allowed in the Supreme Court).

244. *The Late Show with Stephen Colbert: Justice Stephen Breyer Interview*, CBS, at 4:00 (Sept. 15, 2015), <https://www.youtube.com/watch?v=Oj2yh6QJJk> [<https://perma.cc/2K7Q-7FD2>].

Facebook.<sup>245</sup> In a system where states are allowed to experiment with new procedures to assess what consequences may occur, it is hard not to question the strength of accessibility arguments<sup>246</sup>—especially in relation to federal appellate courts—when every state has adopted rules providing for more accessibility in its courts without any reported adverse effects on its state judicial systems.<sup>247</sup> Some federal appellate courts have even begun posting video recordings of their oral arguments, further crippling the argument that the federal judiciary is different.<sup>248</sup>

Still, the Supreme Court remains staunchly opposed to the possibility of televising its oral arguments.<sup>249</sup> In a June 2018 interview with C-SPAN, Chief Justice Roberts rejected the idea that the Supreme Court should, or even inevitably will, televise its oral arguments.<sup>250</sup> Namely, he argued that even without televising its oral arguments, the Supreme Court is the most transparent branch of government due to the quick availability of audio recordings and the immediate availability of transcripts.<sup>251</sup> Many took to social media to disagree with Chief Justice Roberts regarding both the need to televise oral arguments and the transparency of the Supreme Court.<sup>252</sup>

Admittedly, federal appellate level courts are not completely inaccessible. The Supreme Court makes transcripts of oral arguments available on the day of the argument and makes recordings of oral arguments available at the end of each week.<sup>253</sup> Likewise, every federal

245. See *supra* Section III.B.

246. Cf. *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (looking to consistent practice of states in preventing criminal's profiting from their crimes to be a compelling state interest).

247. See *supra* Section III.B.

248. See *supra* Section II.B.2.

249. @CPSAN, TWITTER (June 29, 2018, 6:15 PM), <https://twitter.com/cspan/status/1012836909041631233> [<https://perma.cc/LF6T-FX4R>].

250. *Supreme Court Chief Justice John Roberts on 2017–18 Term*, C-SPAN (June 29, 2018), <https://www.c-span.org/video/?447323-1/interview-supreme-court-chief-justice-john-roberts> [<https://perma.cc/LV7M-AW9H>].

251. *Id.*

252. See, e.g., Chief Judge Dillard (@JudgeDillard), TWITTER (June 29, 2018, 7:23 PM), <https://twitter.com/JudgeDillard/status/1012884363384623105> [<https://perma.cc/3CKG-78Y6>] (“I have the utmost respect for Chief Justice Roberts, but the time has come for SCOTUS to livestream its oral arguments.”); Eric Segall (@espinsegall), TWITTER (June 29, 2018, 9:06 PM), <https://twitter.com/espinsegall/status/1012879977036075013> [<https://perma.cc/LN92-MYT8>] (“Roberts: ‘We’re the most transparent branch of government.’ I can’t take it anymore. Really can’t.”).

253. Letter from Jeffrey P. Minear, Counselor to the Chief Justice, Supreme Court of the U.S., to Gerald E. Connolly, Ted Poe, Mike Quigley & Jerrold Nadler, Members of Cong., Cong. of the U.S. (Oct. 2, 2017), <https://fixthecourt.com/wp-content/uploads/2017/10/SCOTUS-live-audio->

appellate court makes recordings, whether audio only or audiovisual, available within a week of oral argument, with most uploading recordings on the same day as the argument.<sup>254</sup> Indeed, the Supreme Court already possesses the technology to accommodate livestream video and same-day audio. When Justice Scalia passed away in 2016, the Supreme Court livestreamed a portion of his memorial service.<sup>255</sup> Additionally, the Supreme Court uploaded audio recordings from oral arguments in the recent *Trump v. Hawaii* case within hours of the argument.<sup>256</sup> It is unclear what benefit the Supreme Court perceives from the hour or two delay between argument and upload of audio in this and similar cases, as many would argue there is no difference between livestreaming the argument and providing same-day audio recording.<sup>257</sup> It is also unclear what benefit is gained by allowing audio—but not video—recordings of oral arguments, as video would easily clarify the speaker, nonverbal cues, and visual tenor of argument.<sup>258</sup> For courts who may not possess this technological capacity, allowing media representatives to use electronic devices to cover the proceedings will accomplish a similar result with less capital costs to the court.

## 2. Educational Value

Even justices opposed to the idea of allowing cameras into Supreme Court oral arguments recognize the strong educational value of video-recorded court proceedings.<sup>259</sup> In his interview with Stephen

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rejection-letter-10.3.17.pdf [https://perma.cc/8HHF-SV68]; see also *Argument Transcripts*, SUP. CT., [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcript/2018](https://www.supremecourt.gov/oral_arguments/argument_transcript/2018) [https://perma.cc/Z27T-6VWA] (last visited Jan. 10, 2019).

254. *Circuit Courts Forge Ahead with Modern Broadcast and Wellness Policies*, FIX CT. (Feb. 5, 2018), <https://fixthecourt.com/2018/02/circuit-courts-forging-ahead-modern-broadcast-wellness-policies/> [https://perma.cc/NRU9-78XC].

255. Marcia Coyle, *Supreme Court Webcast, for Scalia Memorial, Will Be a First*, NAT'L L.J. (Nov. 3, 2016, 2:06 PM), <https://www.law.com/nationallawjournal/almID/1202771502637/?slreturn=20190031200959> [https://perma.cc/M8RM-GUXY].

256. Michael McGough, *Commentary, Same-Day Audio Should Be Standard for the Supreme Court*, CHI. TRIB. (Apr. 26, 2018, 4:55 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-perspec-audio-supreme-court-same-day-travel-ban-0430-story.html#> [https://perma.cc/2KEC-42LL] (describing how the Supreme Court treated the oral arguments from *Obergefell v. Hodges* similarly by uploading the recording of its oral argument on the same day).

257. See Erwin Chemerinsky, *There Is No Excuse for Keeping Cameras Out of the U.S. Supreme Court*, SACRAMENTO BEE (May 5, 2018, 7:11 PM), <https://www.sacbee.com/opinion/california-forum/article210141099.html> [https://perma.cc/ZS38-CU65].

258. See *id.*

259. See Chief Justice John Roberts, *Remarks at Univ. of Minn. Law Sch.*, C-SPAN, at 19:10 (Oct. 16, 2018), <https://www.c-span.org/video/?451977-1/chief-justice-roberts-stresses-supreme-courts-independence-contentious-kavanaugh-hearings> [https://perma.cc/



Colbert, Justice Breyer, an opponent of expanded media coverage of court proceedings, offered this as the only argument in support of allowing recording devices into the court.<sup>260</sup> While this Note disagrees that educational value is the only argument for allowing expanded media coverage of court proceedings, it is undeniable that this argument is one of the stronger rationales for this solution.

Following the most recent federal pilot program for cameras in the courtroom, the US Federal Judicial Center (FJC) submitted a report summarizing the findings of the program.<sup>261</sup> While the pilot program was not designed for causal interpretation,<sup>262</sup> the limited findings from its duration support the theory that educational value is a primary benefit of an expanded media coverage program.<sup>263</sup> The pilot program provided only for the court itself to record proceedings and disseminate the recordings online, rather than allowing court attendees—including media representatives—to bring recording devices into the proceeding.<sup>264</sup> Under this limited scope, FJC found that 49 percent of survey respondents who viewed the court recordings were either students, educators, librarians, or trainers.<sup>265</sup> Of the student respondents, a majority of student viewers noted that they were in an undergraduate program; of the educator/librarian/trainer respondents, a majority noted their education setting as law school or graduate school.<sup>266</sup> The Author's own educational experiences reflects this data, having watched recordings of real trials in preparation for mock trials and having watched recordings of trial attorneys in the classroom as examples of good and bad advocacy presentations.<sup>267</sup> Further, with the

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57Q7-6WBK] (transcript and recording) (“I think it would be very helpful getting people familiar with how the court operates . . .”) [hereinafter Roberts Remarks at Univ. of Minn.]; *The Late Show with Stephen Colbert*, *supra* note 244, at 5:25 (Justice Breyer's response to Stephen Colbert's question on the Supreme Court's refusal to allow expanded media coverage of hearings). *But see* Roberts Remarks at Univ. of Minn., *supra*, at 19:15 (“That's not our job to educate people. Our job is to carry out our role under the Constitution.”). For an additional perspective on the compelling nature of educational value, see Steve Leben (@Judge\_Leben), TWITTER (Oct. 17, 2018, 8:39 PM), [https://twitter.com/Judge\\_Leben/status/1052735933467021312](https://twitter.com/Judge_Leben/status/1052735933467021312) [<https://perma.cc/YA26-CG2X>] (“Most judges in state courts believe part of our job is to educate the public about what we do. We will carry on. I've never seen a way in which educating the public about what we do and letting them see court proceedings (even through TV) has interfered with doing my job.”).

260. *The Late Show with Stephen Colbert*, *supra* note 244, at 5:25.

261. JOHNSON, KRAFFKA & STIENSTRA, *supra* note 211, app D, tbl. 2.b.

262. *See id.* at 3.

263. *See id.* at 50–52.

264. *Id.* at 2.

265. *Id.* at 51 tbl.19.

266. *Id.* at 52 tbls.20 & 21.

267. *See* Email from Tyler Yarbro, Adjunct Professor of Law, Vanderbilt Law Sch., to author (Feb. 21, 2018, 17:12 CST) (on file with author). The Author also notes that in his law school Trial Advocacy course, two real-life examples of closing arguments were given from high-profile

decline in the number of cases that actually go to trial, lawyers can benefit from recordings of proceedings to improve performance despite less opportunities for experience.<sup>268</sup> Lawyers with access to recordings of both good and bad advocacy can more quickly and more cheaply improve their advocacy skills before they ever step foot in a courtroom to advocate for their clients than through other alternatives, including mock trial workshops and similar training programs.<sup>269</sup>

The pilot program, unlike most state courts, did not provide an opportunity for another dimension of the educational value to be tested: media's reporting accuracy.<sup>270</sup> A major role of the press in attending a court proceeding is to report relevant information to the public who could not attend the trial in person.<sup>271</sup> In federal courts, no courtroom observers—including media representatives—are allowed to use any electronic device even if not creating an audio or video recording of the proceeding.<sup>272</sup> This precludes media representatives from taking electronic notes during the trial, restricting note taking to pen and paper.<sup>273</sup> When the reporter, upon leaving the courthouse, attempts to write an article, blog post, or tweet regarding the proceeding, she must do so from her handwritten notes and her memory.<sup>274</sup> A few federal courts have remedied this difficulty by providing media representatives a room in the courthouse (outside the courtroom) from which to electronically report on the proceedings during a recess.<sup>275</sup> While this approach does mitigate some accuracy concerns, a more complete

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cases—one from a local, state court proceeding in which a video recording was available and another from the federal “Boston Bomber” trial in which only a transcript was available. While the “Boston Bomber” transcript was informative on a base level of how to use words to convey a strong argument, the video from the local, state court was more beneficial, as students could discern both the words used and the body language, movement, facial expressions, tone, and demeanor of the attorney presenting his closing argument to the jury.

268. *Id.* (“Lawyers learn the most from on-your-feet, in-the-courtroom practice, but we can also learn a lot from watching and talking to each other.”).

269. This Note does not intend to diminish the value or importance of mock trial workshops and similar training programs, but merely asserts that lawyers can benefit from other methods of improving advocacy, such as watching recordings of effective advocacy, in a more cost-effective manner. The combination of such methods is the likely the best, and most efficient, alternative to actual in-court experience.

270. See JOHNSON, KRAFKA & STIENSTRA 2016, *supra* note 211, at 2.

271. See *Estes v. Texas*, 381 U.S. 532, 539 (1965).

272. See, e.g., M.D. TENN. L.R. 83.03(b).

273. Shelley Rosenfeld, *Will Cameras in the Courtroom Lead to More Law and Order? A Case for Broadcast Access to Judicial Proceedings*, 6 AM. U. CRIM. L. BRIEF 12, 17 (2016).

274. See *id.*

275. See, e.g., Kathleen F. Brickey, *From Boardroom to Courtroom to Newsroom: The Media and the Corporate Governance Scandals*, 33 J. CORP. L. 625, 657–60 (2008) (discussing Judge Lake's creation of the “media room” for journalists covering the Enron trial as an alternative to devices in the courtroom).

mitigating approach would be to allow reporters to record the proceeding for note-taking purposes—allowing judges to hold reporters in contempt if they disseminate the recording without the court’s permission—to serve as a check for the reporter’s notes, thus allowing the reporter to piece together a more coherent picture of the proceeding and to provide actual, verified quotes from the proceeding. Allowing expanded media coverage, even in this limited scope, also insures against some critics’ fears that the media will distort the legal process.

Admittedly, expanded media coverage will not itself dramatically increase the public’s education of legal proceedings. Yet, using this reasoning to diminish the potential educational value would likewise apply to any reporting of courtroom proceedings.<sup>276</sup> The proper baseline is not whether the public’s education of a topic has increased due to an action. Rather, to assess the educational value of an action, a proper baseline would measure the increase of opportunities for public education. In such a visually-stimulated society, allowing articles to include actual photographs or videos of the proceeding would likely increase access to this information more than an article that includes solely text descriptors.<sup>277</sup>

### 3. Federalism Is Protected

“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>278</sup> This capacity for state experimentation is one of the strongest rationales for federalism in the United States.<sup>279</sup> Indeed, in many instances where the Supreme Court is unsure of a new, broad rule, the Supreme Court will call upon the states to experiment in that area, knowing that the federal system will one day benefit by adopting the best of the states’ approaches.<sup>280</sup>

Cameras in the courtroom are no different. The Supreme Court in both *Estes* and *Chandler* refused to find that cameras in the

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276. As one example, the Author notes that courts allow reporters to publish newspaper articles on trials that serve to educate the public on an ongoing trial. However, not everyone reads the newspaper, and not everyone who reads the newspaper will read that article. Despite the uncertainty of readership, courts allow the reporting to occur in hopes of educating the public.

277. See *Research News: Articles with Images Get 94% More Views Than Those Without*, B2B MARKETING (Aug. 23, 2013), <https://www.b2bmarketing.net/en-gb/resources/news/research-news-articles-images-get-94-more-views-those-without> [https://perma.cc/MKZ8-BZHZ].

278. *Chandler v. Florida*, 449 U.S. 560, 579 (1981) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)).

279. See *id.* at 579–80.

280. See, e.g., *id.*

courtroom were a per se constitutional violation.<sup>281</sup> In both cases, the Supreme Court was unwilling to rule without knowledge of how technology would progress and how society would adapt to the technological advances.<sup>282</sup> In both cases, federalism guided the decision.<sup>283</sup>

Federalism incentivizes states to bear the costs of experimentation in order to improve a current system that the state deems less than optimal.<sup>284</sup> This incentive is two-fold: (1) the state is allowed to change the status quo for itself and (2) the state can effectuate change for the entire country.<sup>285</sup> Yet, when the federal system, guided by the concept of federalism, ignores the progress of the states in an area where a strong majority of states has reached a consensus, the incentives for states to experiment in other areas in the future are weakened.<sup>286</sup> Citizens of a state (e.g., Florida) are subject to two governmental systems: the federal and the state.<sup>287</sup> Florida citizens advocated for changes to the expanded media coverage policies in its state courts, choosing to bear some early costs of experimentation for this largely untested policy.<sup>288</sup> However, these same Florida citizens are still subject to the old rules when they cross the street and enter the federal courthouse.<sup>289</sup> This threatens the states' incentive to bear experimentation costs, as the value of improvement is cheapened by the presence of a system that refuses to acknowledge the positive outcomes.

#### 4. Integrity of the Proceedings

Since the Supreme Court decided *Estes v. Texas*, the concern of judicial integrity has been at the forefront of the discussion concerning

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281. See *supra* Section II.B.1.

282. See *supra* Section II.B.1.

283. See *Chandler*, 449 U.S. at 580 (“This concept of federalism, echoed by the states favoring Florida’s experiment, must guide our decision.”); *Estes v. Texas*, 381 U.S. 532, 587 (1965) (Harlan, J., concurring) (“Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation.”).

284. See Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636, 669 (2017).

285. See Jim Rossi, “Maladaptive” Federalism: The Structural Barriers to Coordination of State Sustainability Initiatives, 64 CASE W. RES. 1759, 1765–69 (2014).

286. See Rick Su, *Intrastate Federalism*, 19 U. PA. J. CONST. L. 191, 248–49 (2016).

287. See Jason Yackee & Shubha Ghosh, *Eli Lilly and the International Investment Law Challenge to a Neofederal IP Regime*, 21 VAND. J. ENT. & TECH. L. 517, 520 (2018) (“In dual federalism, the two levels of government—national and subnational—each enjoy plenary authority (e.g., sovereignty) over distinct issue areas.”).

288. See *supra* Section II.B.1.

289. See, e.g., N.D. FLA. L.R. 77.2.

cameras in the courtroom.<sup>290</sup> However, as technology has progressed and as states have experimented over the last few decades, it has become clear that cameras themselves do not infringe on the integrity of judicial proceedings.<sup>291</sup>

Many opponents draw upon a fear of adverse behavioral effects when arguing that cameras would be detrimental to judicial integrity.<sup>292</sup> A large concern, of course, is that attorneys might play to the cameras, rather than advocate for their client, if placed in front of a camera.<sup>293</sup> However, playing to the cameras, also known as “grandstanding,” occurs independently of whether a camera is present in the courtroom.<sup>294</sup> Moreover, judges have the discretion to sanction lawyers for improper behavior, and this can be a deterrent factor to a lawyer contemplating engaging in such negative behaviors.<sup>295</sup> Lawyers are incentivized to advocate well for their clients—as future clients could use past recorded trials to evaluate lawyers’ effectiveness and will seek advocates who win trials—not those who show off for the camera. Finally, the Model Rules of Professional Conduct suggest that states impose upon lawyers a duty to not disrupt the integrity of proceedings, which grandstanding would likely violate.<sup>296</sup>

Another main fear opponents espouse is that witnesses will be more nervous to testify in front of cameras.<sup>297</sup> Empirical data from the states and the federal pilot programs is inconclusive as to cameras’ effects on witnesses.<sup>298</sup> One study attempting to measure the sources of witnesses’ nerves found witnesses to be less nervous about expanded

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290. See, e.g., *Chandler v. Florida*, 449 U.S. 560, 574–75 (1981); *Wright v. State*, 374 S.W.3d 564, 572 (Tex. App. 2012).

291. See *supra* Part III.

292. See Ravid, *supra* note 235, at 63–64.

293. See *id.* at 63.

294. See, e.g., Steve Korris, *Judge Sentences Baron and Budd Lawyer to Week in Jail for ‘Grandstanding’*, MADISON–ST. CLAIR REC. (Oct. 29, 2009, 2:55 AM), <https://madisonrecord.com/stories/510567708-judge-sentences-baron-and-budd-lawyer-to-week-in-jail-for-grandstanding> [<https://perma.cc/YG5K-5F43>] (sanctioning lawyer for grandstanding in front of a jury); see also 201 PA. CODE § 1910 (prohibiting expanded media coverage of Pennsylvania court proceedings). There is also a fear that lawyers disposed to grandstanding would be more exaggerated in their grandstanding if cameras are in the courtroom. While there is little direct data on this issue, it is interesting that although 26 percent of participating judges in the recent pilot program thought attorneys “more theatrical” to a great extent, only 11 percent of those judges opined that cameras “disrupt courtroom proceedings” to a great extent. See JOHNSON, KRAFFKA & STIENSTRA 2016, *supra* note 211, at 26–27 tbl. 10. It should be noted that “more theatrical” is a difficult data point to draw conclusions upon here because each judge will have a different baseline of “theatrical,” and theatrics are not always adverse behavioral effects.

295. See, e.g., Korris, *supra* note 294.

296. See MODEL RULES OF PROF’L CONDUCT r. 3.5(d) (AM. BAR ASS’N 2018).

297. See Ravid, *supra* note 235, at 61–62.

298. See JOHNSON, KRAFFKA & STIENSTRA, *supra* note 211.

media coverage than other, more intrinsic sources of nervousness.<sup>299</sup> Many similar studies have also concluded that adding expanded media coverage has no effect on participants, including witnesses.<sup>300</sup> However, these studies suffer from methodological problems, including that no two trials are exactly alike, mock trials may not provide witnesses with the same level of anxiety, and mock trial participants might care less than actual trial participants.<sup>301</sup>

Nor is anecdotal evidence conclusive.<sup>302</sup> However, judges surveyed who participated in the pilot program—and therefore saw witnesses testify in front of cameras—found that cameras had a much lower negative impact on witnesses than judges surveyed who did not participate in the pilot program.<sup>303</sup> To combat this potential detriment, most states require witnesses to be informed of their right to not be recorded and allow witnesses to partially or wholly opt out of the recording.<sup>304</sup> Therefore, a blanket ban on expanded media coverage in order to protect all witnesses is unnecessary, as alternative methods for protecting witnesses exist for witnesses who feel uncomfortable or unsafe testifying in front of a camera, and the data is inconclusive on the effects on witnesses who do testify on camera.

Finally, and slightly less relevant to the application of cameras to the integrity of a federal proceeding, is the effect of cameras on a judge. The federal judiciary is different in many ways, but one striking difference is that every federal judge enjoys a lifetime appointment.<sup>305</sup> As such, concerns of elections or even renewed appointments are nonexistent for the federal judge, lying in stark contrast to many state judges.<sup>306</sup> The question that remains, then, is whether judges can be trusted to withstand the temptation to be less fair when a camera is in the courtroom. For the forty-five states that allow expanded media

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299. Eugene Borgida, Kenneth G. DeBono & Lee A. Buckman, *Cameras in the Courtroom: The Effects of Media Coverage on Witness Testimony and Juror Perceptions*, 14 LAW & HUM. BEHAV. 489, 500 tbl.2 (1990) (finding that memory of crime, own testimony, presentation, direct examination, and cross examination were higher sources of nervousness for witnesses than media presence in a simulated trial with expanded media coverage).

300. Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489, 1510 (2012).

301. *Id.* at 1510–11.

302. See JOHNSON, KRAFFKA & STIENSTRA, *supra* note 211, app. D-20 tbl.5(b).

303. *Id.*

304. See *supra* Section III.A.1 (discussing states that blur witness faces, change witness voices, or don't allow the recording of witness testimony).

305. See Lara A. Bazelon, *Putting the Mice in Charge of the Cheese: Why Federal Judges Cannot Always Be Trusted to Police Themselves and What Congress Can Do About It*, 97 KY. L.J. 439, 455 (2009).

306. See Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 726 (2010).

coverage at the trial level, the answer is obviously yes—and those judges can do this while withstanding the temptation to campaign from the bench.<sup>307</sup> For every state appellate judge, the answer is also yes.<sup>308</sup> And while the outlier judge may succumb to such temptations,<sup>309</sup> the states have clearly found, through the authorization of expanded media coverage—that such a rarely effectuated concern is outweighed by the value that cameras bring to courtrooms.<sup>310</sup>

So why are federal judges not trusted to remain neutral, independent arbiters of the law? The answer is unclear. Participating and nonparticipating judges alike in the most recent pilot program generally think that a camera's presence in a courtroom negatively affects a judge by no more than a small extent.<sup>311</sup> Similarly, participating attorneys in the recent federal pilot program overwhelmingly think a camera's presence affects a judge by no more than a small extent.<sup>312</sup> Former Chief Judge Alex Kozinski may be most perceptive in his answer to this question, hypothesizing that when recording past proceedings has gone wrong that “of course we blame the camera, just like generations before us have always shot the messenger.”<sup>313</sup>

## V. CONCLUSION

Public perception of the federal judiciary is waning. In a society of technological advancement, it is problematic that the federal judiciary does not accept some of the technology that could help to educate the public in efforts to bolster the legitimacy of its institutions. After over thirty-five years of state experimentation with how this technology could be used in judicial proceedings, the federal judiciary, with few exceptions, has refused to take advantage of what the states have developed. This not only weakens the federalist system but also deprives the public of educational opportunities and sows seeds of

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307. See *supra* Section III.A.

308. See *supra* Section III.B.

309. See, e.g., Rachel Marshall, *The Moment the Judge in the Larry Nassar Case Crossed a Line*, VOX (Jan. 25, 2018, 1:00 PM), <https://www.vox.com/the-big-idea/2018/1/25/16932656/judge-aquilina-larry-nassar-line-between-judge-advocate-sentencing> [https://perma.cc/PY7P-CTNU] (“But no matter how good Aquilina’s intentions, for a judge to make herself the face of a social cause poses a threat to the fairness of our system. We rely on judges to ensure that people’s lives are decided by neutral, independent arbiters who impartially evaluate the evidence and apply the law.”).

310. See *supra* Section III.A.

311. See JOHNSON, KRAFKA & STIENSTRA, *supra* note 211, app. D tbl. 5.a.

312. *Id.* app. E tbl.2.a.

313. Kozinski & Johnson, *supra* note 232, at 1118.

distrust in the public's perception of the judiciary. The federal judiciary should adopt a new plan that incrementally allows an increase of expanded media coverage of all levels of our federal courts, rather than continuing its decades-long approach of continuing to shoot an innocent messenger: the camera in the courtroom.

*Mitchell T. Galloway\**

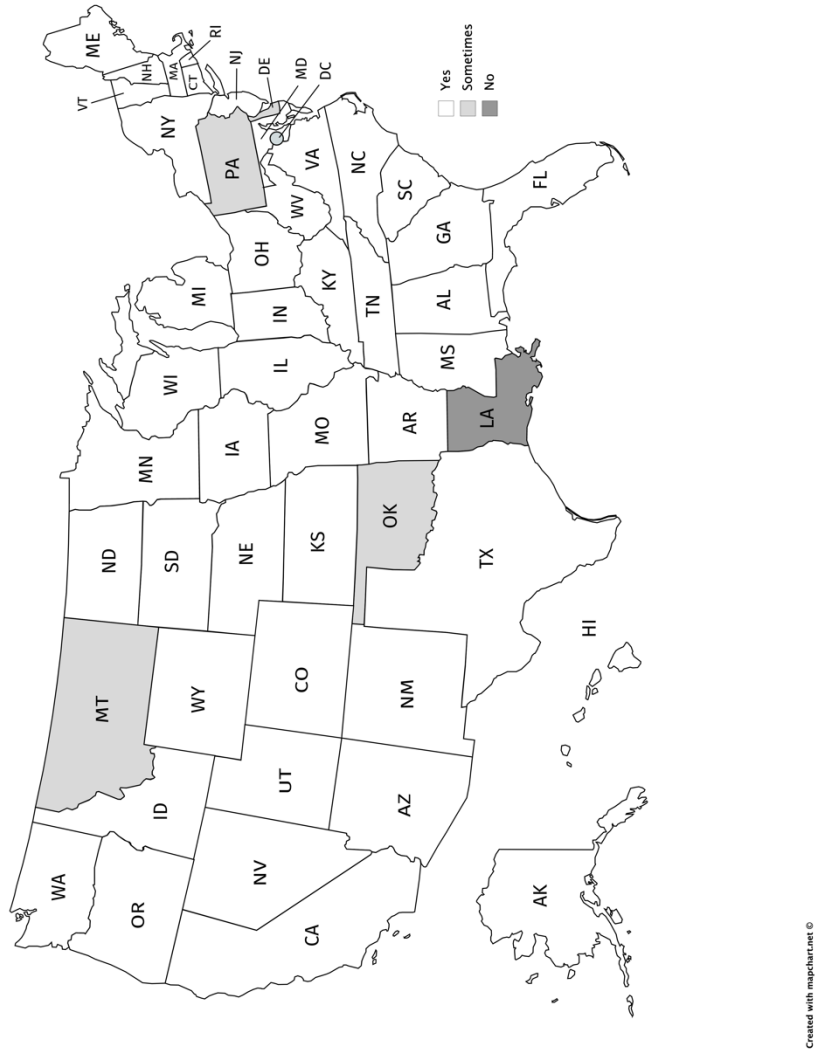
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\* J.D. Candidate, Vanderbilt University Law School, 2019. MBA, Freed-Hardeman University, 2016. BBA, Freed-Hardeman University, 2016. The Author would like to thank his parents, Brian and Sharon Galloway, for their unfailing love and nurturing throughout his educational pursuits. Many thanks to Natalie Pike, Erin Meyers, and Reem Blaik for their suggestions and guidance, to Michael Buschmann and Josh Schoch for their dedication and insights, and to the rest of the *Vanderbilt Journal of Entertainment & Technology Law* editors for their hard work and commitment to excellence.



APPENDIX

A.1. Color-Coded Map of States That Allow Expanded Media Coverage of Trial Level Proceedings<sup>314</sup>



314. This chart was created using Custom Map Creator, MAPCHART, <https://mapchart.net> [<https://perma.cc/YP9J-LHDZ>] (last visited Feb. 14, 2019). See also *infra* app. 2 for each state's rule(s) governing expanded media coverage of court proceedings.

*A.2. State-by-State Guide of Expanded Media Coverage Authorizations  
at the Trial Level*

STATE	WHO CAN COVER? <sup>315</sup>	CIVIL	CRIMINAL
Alabama <sup>316</sup>	Anyone	Yes	Yes
Alaska <sup>317</sup>	News Media	Yes	Yes
Arizona <sup>318</sup>	Anyone	Yes	Yes
Arkansas <sup>319</sup>	News Media Representatives	Yes	Yes
California <sup>320</sup>	Anyone	Yes	Yes
Colorado <sup>321</sup>	Media	Yes	Yes
Connecticut <sup>322</sup>	Media	Yes	Yes
Delaware <sup>323</sup>	Media	Yes	No
Florida <sup>324</sup>	Media Personnel	Yes	Yes
Georgia <sup>325</sup>	Anyone	Yes	Yes
Hawaii <sup>326</sup>	Media or Educational Institution	Yes	Yes
Idaho <sup>327</sup>	Media	Yes	Yes
Illinois <sup>328</sup>	Media	Yes	Yes
Indiana <sup>329</sup>	Anyone	Yes	Yes
Iowa <sup>330</sup>	News Media	Yes	Yes
Kansas <sup>331</sup>	News Media	Yes	Yes

315. States are inconsistent on how they refer to parties that courts permit to cover proceedings using expanded media coverage. This chart reflects the language of the state rules.

316. ALA. CANONS JUD. ETHICS Canon 3(A)(7)–(7B).

317. ALASKA CT. R. ADMIN. 50.

318. ARIZ. SUP. CT. R. 122.

319. ARK. SUP. CT. ADM. ORDERS 6.

320. CAL. R. CT. 1.150.

321. COLO. SUP. CT. R. ch. 38, r. 3.

322. CONN. R. SUPER. CT. § 1-10, 1-10A, 1-10B, 1-11A, 1-11B, 1-11C.

323. DEL. JUD. BRANCH OP. P. VII, § 1(a)–(b), <https://courts.delaware.gov/aoc/operating-procedures/op-media.aspx> [<https://perma.cc/S58N-8K4U>].

324. FLA. R. JUD. ADMIN. 2.450.

325. GA. UNIF. SUPER. CT. R. 22.

326. HAW. SUP. CT. R. 5.1.

327. IDAHO CT. ADMIN. RULES R. 45.

328. ILL. SUP. CT. ORD. M.R. 2634.

329. IND. CODE JUD. CONDUCT R. 2.17(3).

330. IOWA CT. RULES 25.1–25.5.

331. KAN. SUP. CT. R. 1001.

Kentucky <sup>332</sup>	Media	Yes	Yes
Louisiana <sup>333</sup>	No discussion	No	No
Maine <sup>334</sup>	Recording Personnel	Yes	Yes
Maryland <sup>335</sup>	News Media or Educational Institution	Yes	Yes
Massachusetts <sup>336</sup>	News Media	Yes	Yes
Michigan <sup>337</sup>	Media Agency	Yes	Yes
Minnesota <sup>338</sup>	Media	Yes	Yes
Mississippi <sup>339</sup>	Media Representatives	Yes	Yes
Missouri <sup>340</sup>	Media	Yes	Yes
Montana <sup>341</sup>	Anyone	Sometimes	Sometimes
Nebraska <sup>342</sup>	News Media	Yes	Yes
Nevada <sup>343</sup>	News Reporter	Yes	Yes
New Hampshire <sup>344</sup>	Anyone	Yes	Yes
New Jersey <sup>345</sup>	Anyone	Yes	Yes
New Mexico <sup>346</sup>	News Media	Yes	Yes
New York <sup>347</sup>	News Media	Yes	Yes
North Carolina <sup>348</sup>	Anyone	Yes	Yes

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332. KY. ST. SUP. CT. R. 4.310.

333. LA. CODE JUD. CONDUCT Canon 3.

334. ME. SUP. JUD. CT. ADMIN. Order No. JB-05-15.

335. MD. RULES 16-601–16-608.

336. MASS. SUP. JUD. CT. R. 1:19.

337. MICH. SUP. CT. ADMIN. Order No. 1989-1.

338. MINN. R. GEN. PRAC. 4.01–4.04.

339. MISS. CT. RULES FOR ELECTRONIC & PHOTOGRAPHIC COVERAGE JUD. PROC. R. 3.

340. MO. S. CT. OP. R. 16.

341. *See, e.g.*, MONT. 13TH JUD. DIST. CT. R. (not promulgating a rule permitting cameras in the courtroom); MONT. 22D JUD. DIST. CT. R. 28 (permitting cameras without designating a limit as to who can request electronic media coverage).

342. NEB. CT. R. § 6-2003.

343. NEV. SUP. CT. R. 229–246.

344. N.H. SUP. CT. R. 19; N.H. SUPER. CT. R. 204.

345. N.J. SUP. CT. REV. CODE JUD. CONDUCT R. 3.11; Admin. Office of the Courts, Directive No. 08-14 (N.J. Courts 2014), [https://www.njcourts.gov/attorneys/assets/directives/dir\\_08\\_14.pdf?cacheID=Gc8UEgP](https://www.njcourts.gov/attorneys/assets/directives/dir_08_14.pdf?cacheID=Gc8UEgP) [<https://perma.cc/53GJ-P3QS>].

346. N.M. SUP. CT. R. 23-107; N.M. BAR, REFERENCE GUIDE ON MEDIA ISSUES 3–4 (2013), <https://www.nmbar.org/NmbarDocs/PubRes/RefGuideMediaIssues.pdf> [<https://perma.cc/P98B-DT9Z>].

347. 22 N.Y. CODES, RS. & REGS. 29.1–29.3, 131.

348. N.C. GEN. R. PRAC. SUPER. & DIST. CT. 15.

North Dakota <sup>349</sup>	Media Personnel	Yes	Yes
Ohio <sup>350</sup>	Media Representative	Yes	Yes
Oklahoma <sup>351</sup>	No discussion	Sometimes	No
Oregon <sup>352</sup>	Anyone	Yes	Yes
Pennsylvania <sup>353</sup>	No discussion	Sometimes	No
Rhode Island <sup>354</sup>	Media	Yes	Yes
South Carolina <sup>355</sup>	Media Representatives	Yes	Yes
South Dakota <sup>356</sup>	News Media	Yes	Yes
Tennessee <sup>357</sup>	Media Representatives	Yes	Yes
Texas <sup>358</sup>	Anyone	Yes	Yes
Utah <sup>359</sup>	News Reporters	Yes	Yes
Vermont <sup>360</sup>	Anyone	Yes	Yes
Virginia <sup>361</sup>	Media	Yes	Yes
Washington <sup>362</sup>	News Media	Yes	Yes
West Virginia <sup>363</sup>	Media Representatives	Yes	Yes
Wisconsin <sup>364</sup>	News Media	Yes	Yes
Wyoming <sup>365</sup>	Media	Yes	Yes

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349. N.D. Sup. Ct. Admin. R. 21.

350. Ohio Sup. R. 12.

351. *See, e.g.*, OKLA. 16TH JUD. DIST. CT. R. 1. *But see* Ellis, *supra* note 179.

352. ORE. UNIFORM TRIAL CT. R. 3.180.

353. 201 PA. CODE § 1910.

354. RI SUP. CT. R. art. VII.

355. Rule 605, SCACR.

356. S.D. SUP. CT. R. 10-09.

357. TENN. SUP. CT. R. 30.

358. TEX. R. CIV. P. 18C; *Wright v. State*, 374 S.W.3d 564, 572–75 (Tex. App. 2012) (affirming that presence of news media in Texas criminal trial did not violate right to fair trial).

359. UTAH R. JUD. ADMIN. 4-401.01.

360. V.R.C.P. 79.2; V.R.Cr.P. 53.

361. VA. CODE ANN. § 19.2-266 (2018).

362. WASH. GR 16.

363. W. VA. TRIAL CT. R. 8.

364. WIS. SCR 61.01–61.12.

365. W.R.Cr.P. 53; U.R.D.C. WYO. 804 (applying W.R.Cr.P. 53 to civil proceedings).

A.3. Draft Form for Providing Notice of Request to Cover Proceeding Using Electronic Media<sup>366</sup>

IN THE UNITED STATES DISTRICT COURT FOR THE \_\_\_\_\_ (filing district)

PLAINTIFFS (Full name: first, middle, last) ) vs. DEFENDANT (Full name: first, middle, last) ) CASE NO. \_\_\_\_\_ JUDGE \_\_\_\_\_

NOTICE OF REQUEST FOR EXPANDED NEWS MEDIA COVERAGE OF TRIAL OR PROCEEDING

The undersigned states as follows:

- 1. Certain representatives request to use the following items in courtroom coverage of the above captioned proceeding (check each that applies): A. [ ] Photographic equipment; B. [ ] Television cameras; C. [ ] Electronic sound recording equipment; D. [ ] Laptop for note-taking or digital communication; E. [ ] Cellular phone for note taking or digital communication; and / or F. [ ] Other electronic devices;

2. The trial or proceeding to be covered by expanded news media coverage is scheduled for \_\_\_\_\_ (date and time of proceeding). The request for expanded news media coverage includes every part of such proceeding as allowed under Federal Rule of Procedure.

3. The request for expanded news media coverage is described as follows (i.e., the number of photographers with still cameras): \_\_\_\_\_

4. This notice of request for expanded news media coverage is filed (check one): A. [ ] At least three days in advance of the proceeding for which expanded news media coverage is requested; or B. [ ] This notice cannot be filed within three days of the proceeding because of the following reason(s): \_\_\_\_\_

366. See IOWA CT. R. 25.10, Form 1 (providing some language of this draft form).

5. The undersigned requestor is:

A. \_\_\_\_\_ (occupation),

B. \_\_\_\_\_ (age), and

C. requesting to use electronic media to cover this proceeding to

\_\_\_\_\_ (reason for request).

6. The undersigned

A.  intends, or

B.  does not intend

to disseminate the electronic media coverage of the above proceeding via

\_\_\_\_\_ (medium of dissemination).

\_\_\_\_\_  
*Requestor's signature*

\_\_\_\_\_  
*Requestor's printed name*

*Street Address*

*City, State ZIP Code*

*Phone Number*

*Email Address*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Notice has been sent by U.S.

Mail, postage prepaid, to:

Attorneys (with address):

\_\_\_\_\_  
\_\_\_\_\_

Parties appearing without attorney representation (with address):

\_\_\_\_\_  
\_\_\_\_\_

this \_\_\_\_ day of \_\_\_\_\_, 20xx.

\_\_\_\_\_  
*Requestor's signature*

\_\_\_\_\_  
*Requestor's printed name*