THE PROP 8 DECISION AND COURTROOM DRAMA IN THE YOUTUBE AGE: WHY CAMERA USE SHOULD BE PERMITTED IN COURTROOMS DURING HIGH PROFILE CIVIL CASES

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Over the years, the public has exhibited a great fondness for courtroom drama—real, simulated, or fabricated . . . Together, Fox and CNN devote two hours of television nearly every night to legal and court news, both relying in part on video captured inside courtrooms across the country. The popular YouTube Web site is filled with video snippets from courtrooms throughout the world, ranging from an argument in the summer of 2007 before the Ohio Supreme Court, to a simulation of the Salem witch trials. Add to the mix the popular television shows—Judge Judy, Judge Hatchett, Judge Joe Brown, and others—and it appears that Americans have a nearly insatiable appetite for courtroom video.[1]

INTRODUCTION

America is obsessed with courtroom drama. From the commercialization of the O.J. Simpson and Anna Nicole Smith trials;[2] to Judge Judy and her sassy, quick wit;[3] to Nancy Grace and her "tot mom" commentary;[4] to television shows such as Ally McBeal, the Practice, and Boston Legal;[5] to the almost 10,000 hits on YouTube for the word "courtroom," there is no more pervasive aspect of American entertainment culture than what goes on between the walls of real—or even made-for-TV—courtrooms.[6] On one hand, the public broadcast of judicial proceedings

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[1] David A. Sellers, *The Circus Comes to Town: The Media and High-Profile Trials*, 71 LAW & CONTEMP. PROBS. 181, 190 (2008).

[2] Hon. Boyce F. Martin, Jr., *Gee Whiz, The Sky is Falling!*, 106 MICH. L. REV. FIRST IMPRESSIONS 1, 3 (2007).

[3] G. David Miller, *Dancing With Itos—What Makes a Good Judge*, 39 COLO. LAW. 77, 77 (2010).

[4] Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 10 (2009).

[5] Michael Asimow, *Popular Culture and the Adversary System*, 40 LOY. L.A. L. REV. 653, 678 (2007).

[6] *See, e.g.*, Christine Alice Corcos, *Legal Fictions: Irony, Storytelling, Truth, and Justice in the Modern Courtroom Drama*, 25 U. ARK. LITTLE ROCK. L. REV. 503 (2003).
Courtroom dramas, such as Witness for the Prosecution, create a body of popular culture that conveys a uniform message with standard conventions that stand for the philosophical and political battles that

serves several vital purposes: it alerts previously unidentified witnesses to a venue in which they can be of help; it serves as a quality check on the criminal justice system; and it educates people on aspects of the judicial system to which non-litigant citizens are generally not exposed.[7] On the other hand, the media's focus on the judicial system can work an injustice: it may be more difficult for a criminal defendant to receive a fair trial; it can create bias in the jury pool; it may expose witnesses at controversial hearings to threats of danger from the public; and it can chill testimony from various witnesses uncomfortable with public exposure.[8]

The issue of whether cameras belong in courtrooms is never more apparent than when matters of public interest are up for review. Recently, this issue was presented in *Perry v. Schwarzenegger*,[9] the lawsuit filed to overturn Proposition 8 ("Prop 8"), California's constitutional amendment that outlawed same-sex marriage in the state.[10] When matters of such public concern are challenged in our courts, public demand increases and the issue of whether the media will be permitted to televise the trial often comes up for debate.[11] Historically, state courts have permitted cameras in courtrooms,[12] while federal courts have not.[13] The differing opinions and practices regarding cameras in courtrooms were brought to light in *Hollingsworth v. Perry*,[14] which originated out of *Perry v. Schwarzenegger*. When trial judge Vaughn Walker issued an order allowing camera coverage of the Prop 8 trial, proponents of Prop 8 appealed the decision to the United States Supreme Court.[15] The Supreme Court, in a five to four decision, banned cameras from the

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rage when people consider the relationship between law and justice. The courtroom itself, as a forum in which good and evil, truth and falsehood, and right and wrong do justice is a familiar one to modern playgoers. It is populated by archetypal characters: particularly easily recognized lawyer types—the ambitious defense lawyer who stops at nothing to obtain an acquittal; the honorable and idealistic lawyer fighting a lone battle to protect a downtrodden and innocent defendant; the cynical and crooked district attorney prepared to railroad an innocent defendant for the sake of his career; the underpaid and overworked prosecutor protecting society from serial killers and uncaring corporate polluters; the bribe-taking judge unfairly overruling the desperate defense attorney's objections; or the courageous jurist suffering with her family through bomb threats and anonymous letter because of a controversial case. *Id.* at 511 (citing David Ray Papke, *The American Courtroom Trial: Pop Culture, Courthouse Realities, and the Dream World of Justice*, 40 S. TEX. L. REV. 919 (1999); Rennard Strickland, *Law and Lawyers in Popular Film: The Magic Mirror and the Silver Screen*, SOONER MAG., Spring 1994, at 25). Simply put, it is just good TV.

[7] *See* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982)).

[8] *See* Robert Trager et al., *Selling Influence: Using Advertising to Prejudice the Jury Pool*, 83 NEB. L. REV. 685, 725 (2005).

[9] No. C 09-2292, 2010 WL 3025614, at *1 (N.D. Cal. Aug. 4, 2010).

[10] *See* CAL. CONST. art. I, § 7.5.

[11] Mary Jane Miller, *Mirrors in the Robing Room: Reflections of Lawyers and the Law in Canadian Television Drama*, 10 CAN. J. L. & SOC'Y 55, 57-58 (1995).

[12] Christo Lassiter, *TV or Not TV—That is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928, 929 n.8 (1996).

[13] M.A. Kautsch, *Press Freedom and Fair Trials in Kansas: How Media and the Courts Have Struggled to Resolve Competing Claims of Constitutional Rights*, 57 U. KAN. L. REV. 1075, 1136 (2009).

[14] 130 S. Ct. 705 (2010).

[15] Hollingsworth v. Perry, 130 S. Ct. 705 (2010).

proceedings based on an administrative issue, but left open a question of first impression: whether the press and the public have a right to televised media coverage of civil cases.[16]

This article will address that issue insofar as it applies to civil trials on controversial issues of public importance, such as *Perry v. Schwarzenegger*. Part I begin with a short review of America's obsession with courtroom drama and the history of camera usage in courtrooms.[17] It will then briefly discuss *Perry v. Schwarzenegger* and *Hollingsworth v. Perry*.[18] Part II will explain the law governing courtroom media access, including *Gannett County v. DePasquale*, *Richmond Newspapers v. Virginia*, and *Press-Enterprise, Co. v. Superior Court* ("*Press-Enterprise II*"), three cases that addressed the press's and public's constitutional right to media access in criminal proceedings.[19] After a brief discussion of cases in which federal courts have extended First Amendment access rights to civil cases,[20] this article will examine *Estes v. Texas* and *Chandler v. Florida*, two cases which specifically addressed the use of cameras in criminal courtrooms.[21] Part III will argue that the Supreme Court's analysis in *Richmond Newspapers*[22] and *Press-Enterprise II*, coupled with its unofficial treatment of the issue,[23] supports a finding that the public and the press hold a constitutional right to access civil judicial proceedings.[24] Then, using concepts discussed in *Estes* and *Chandler*, this article will argue that this constitutional right includes a rebuttable presumption that cameras are permitted in courtrooms to broadcast civil proceedings to the viewing public.[25]

I. CAMERAS IN COURT: PAST AND PRESENT

"What people think about the law is important because ours is a 'public opinion' society, 'which makes heavy use of referenda, and in which government does not lift a finger or move a muscle without regarding the tea leaves of public desire.'"[26] Today, people get their news and develop their perceptions about the law from television and the Internet.[27] For most Americans, television represents

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16 *See generally id.*

17 *See infra* Part I.

18 130 S. Ct. 705. *See infra* Parts I.A-B.

19 *See infra* Parts II.A-C.

20 *See infra* Part II.D.

21 *See infra* Part II.E.

22 448 U.S. 555 (1980).

23 *See infra* Part III.A.2.

24 *See infra* Part III.A.

25 *See infra* Part III.B.

26 Angelique M. Paul, *Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About the Real Law?*, 58 OHIO ST. L.J. 655, 655 (1997) (quoting David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 796 (1993) (quoting Lawrence Friedman, *Law, Lawyers and Popular Culture*, 98 YALE L.J. 1579, 1597 (1989)).

27 Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 7-8

the most important, if not the only, source of information. This is particularly true when it comes to seeking out information about the legal system.[28] The Internet renders "printed material . . . obsolete quickly. . . . It is available to those who might not otherwise seek information due to time constraints, care-giving responsibilities, lack of transportation, physical or social isolation, and physical and psychological disabilities."[29] The truth is that the average American cannot sit in a courtroom on a random Wednesday and learn about the law in person.[30] Instead, the easiest way to access the court system is to watch as "real life" or made-for-TV trials occur on camera. America's obsession with courtroom drama has grown as a result.

The presence of video cameras in the courtroom first became a major issue in 1935 during the trial of Bruno Richard Hauptmann, who was accused of kidnapping and murdering the Lindberg baby.[31] "The Crime of the Century," as it became known, drew international media attention, and the trial judge allowed television cameras to tape portions of the trial.[32] Although the judge later revoked his order and banned cameras from the trial due to the disruptions caused by the publicity, the damage had already been done.[33] In the chaos that followed the Hauptmann trial, the American Bar Association adopted Judicial Canon 35, which recommended that all state and federal courts ban the use of cameras at trial proceedings.[34]

Many states disregarded Judicial Canon 35,[35] and similar high-profile state trials have been broadcast to the viewing public since. Some or all of the criminal trials of O.J. Simpson,[36] Phil Spector,[37] the police officers in the Rodney King police brutality case,[38] and the Menendez Brothers,[39] were televised, and each

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(2009) (citing Press Release, Pew Research Center for the People & The Press, Internet Now Major Source of Campaign News (Oct. 31, 2008)).

[28] Paul, *supra* note 26, at 655 (citing Elliot E. Slotnick, *Television News and the Supreme Court: A Case Study*, 77 JUDICATURE 21, 22 (1993); Brian Lowry, *Chagning Channels: In King Trial Wake, News Media Will Be the Message*, DAILY VARIETY, Apr. 7, 1993).

[29] Laura Silverstein, *The Double Edged Sword: An Examination of the Global Positioning System, Enhanced 911, and the Internet and their Relationships to the Lives of Domestic Violence Victims and their Abusers*, 13 BUFF. WOMEN'S L.J. 97, 114-15 (2005) (internal citations omitted).

[30] Carolyn W. Riemer, Note, *Television Coverage of Trials: Constitutional Protection Against Absolute Denial of Access in the Absence of a Compelling Interest*, 30 VILL. L. REV. 1267, 1291-95 (1985).

[31] William R. Bagley, Jr., Note, *Jury Room Secrecy: Has the Time Come to Unlock the Door?*, 32 SUFFOLK U. L. REV. 481, 489 (1999).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at 490.

[36] Gabriel J. Chin, *Unjustified: The Practical Irrelevance of the Justification/Excuse Distinction*, 43 U. MICH. J.L. REFORM 79, 107 n.90 (2009) (commenting on the media attention at various high-profile criminal trials).

[37] *Id.*

[38] *Id.*

[39] Robert D. Nelon, *The Peculiar Case of State v. Terry Lynn Nichols: Are Television Cameras*

received national media attention from start to finish. While most state courts—as many as forty-seven[40]—have experimented with cameras in the courtroom, the same cannot be said for federal courts. In 1994, most federal courts banned cameras based on the recommendation of the United States Judicial Conference.[41] Although that decision was reversed two years later, many circuit and district courts still maintained policies that prohibited televising federal trial proceedings.[42] For example, until December 2009, local rules from the United States District Court for the Northern District of California banned photography, public broadcasting, televising, or recording of any judicial proceeding.[43] It was not until a recent high-profile civil case came up for review that the camera bans were revisited. Out of this major civil case, *Perry v. Schwarzenegger*,[44] also known as "the Prop 8 trial," a tangential case, *Hollingsworth v. Perry*,[45] reached the United States Supreme Court and sparked public debate about whether cameras should be permitted in courtrooms.

A. Perry v. Schwarzenegger

In May 2008, the Supreme Court of California, in *In re Marriage Cases*,[46] held that California's statutory ban on same-sex marriage violated the California Constitution.[47] With that decision, California officially began recognizing marriages between same-sex couples.[48] The backlash to the decision was significant. Within days, same-sex marriage opponents began collecting signatures to place Prop 8 on the November 2008 ballot.[49] Prop 8 was a proposed amendment to the California Constitution which stated that "[o]nly marriage between a man and a woman is valid or recognized in California."[50] After advertizing and media blitzes from both sides of Prop 8 consumed the six month period before the election, Prop 8 passed with a slight majority, thereby outlawing same-sex marriages in California again.[51]

Really Banned From Oklahoma Criminal Proceedings?, 3 VAND. J. ENT. L. & PRAC. 4, 10 (2001).

[40] Rebecca Leigh Casal, *Cameras in the Courtroom*, 46-SEP FED. LAW. 22 (1999).

[41] Lassiter, *supra* note 12, at 931-32.

[42] *Id.*

[43] Hollingsworth v. Perry, 130 S. Ct. 705, 710-11 (2010).

[44] No. 09-2292, 2010 WL 3025614, at *1, (N.D. Cal., Aug. 4 2010).

[45] 130 S. Ct. 705.

[46] 183 P.3d 384 (Cal. 2008).

[47] *Id.* at 702.

[48] *Id.*

[49] Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1154 (2009).

[50] CAL. CONST. art. I, § 7.5.

[51] Lindsay Cohen, *Seattle Watching Gay Marriage Trial–Literally*, SEATTLE POST-INTELLIGENCER, Jan. 11, 2010.

In May 2009, *Perry v. Schwarzenegger* was filed in federal court challenging the constitutionality of Prop 8. [52] The case proceeded to trial on January 11, 2010, but before trial commenced, Judge Vaughn Walker "issued an order permitting the trial to be broadcast live via streaming audio and video to a number of federal courthouses around the country."[53] Various defendant-interveners sought an emergency stay of the order from Supreme Court Justice Anthony Kennedy, the "duty justice" of the Ninth Circuit,[54] under the caption *Hollingsworth v. Perry*.

B. Hollingsworth v. Perry

When Justice Kennedy received the request for a stay in *Hollingsworth v. Perry*,[55] he had two options: rule on the case himself, or turn the question over to the entire Supreme Court for a full review.[56] Justice Kennedy issued a temporary stay and chose the latter.[57] In a five-to-four decision, the Court granted the defendant-interveners' request for a stay and barred cameras from the Prop 8 trial courtroom.[58] The Court ruled "without expressing any view on whether such trials should be broadcast."[59] Instead, the Court formally addressed an administrative issue: whether the courts below properly followed procedures to allow such broadcast at all.[60]

As early as September 2009, the trail court had notified the parties that the Prop 8 trial may be televised, although no final decision was made at that time.[61] After much administrative controversy,[62] the court announced that the trial would be broadcast via audio and video feed to certain courthouses throughout the

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[52] No. 09-2292, 2010 WL 3025614, at *1 (N.D. Cal. Aug. 4, 2010).

[53] Hollingsworth v. Perry, 130 S. Ct. 705, 707 (2010).

[54] Howard Fischer, *State Will Ask U.S. Justice to Let ID Rule Stay*, ARIZ. DAILY STAR, Oct. 11, 2006, at A1 (identifying Justice Anthony Kennedy as "duty justice" for the Ninth Circuit).

[55] 130 S. Ct. at 705.

[56] Howard Mintz, *Prop. 8 Dispute Enters New Territory: Trial May Lay Groundwork for Supreme Court Case*, SAN JOSE MERCURY NEWS, Jan. 10, 2010, at 1A.

[57] Curry Andrews, *Supreme Court Halts Plan to Broadcast Prop. 8 Trial*, NEWS MEDIA & THE LAW, Jan. 1, 2010.

[58] *Id.*

[59] Hollingsworth v. Perry, 130 S. Ct. 705, 706 (2010) (per curiam).

[60] *Id.*

[61] *Id.* at 708.

[62] In December 2009, the Ninth Circuit Judicial Council approved a pilot program for "'the limited use of cameras in federal district courts within the circuit.'" *Id.* Thereafter, the district court announced an amendment to the district's Civil Local Rule 77-3, "which had previously banned the recording or broadcast of court proceedings. The revised version . . . created an exception to this general prohibition to allow 'for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit.'" *Id.* Immediately, defendant-interveners opposed the rule change, arguing that sufficient notice and a comment period were required before imposing such changes. *Id.* Presumably in response, the court revised its announcement and allowed for public comment on the proposed rule change. *Id.* Prior to the end of the comment period, the court again amended its announcement, stating that the rule change was "'effective December 22, 2009' . . . [and it] was adopted pursuant to the 'immediate need' provision of Title 28 Section 2071(e)" of the local rules. *Id.*

country, and "pending approval of the Chief Judge of the Ninth Circuit, the trial would be recorded and then broadcast on the Internet."[63] In response, the defendant-interveners filed their petition for an emergency stay with the United States Supreme Court.[64]

The Court decided the case on an administrative issue, holding that the district court did not amend its local rules in compliance with federal law.[65] Accordingly, the rule change permitting cameras in the courtroom was invalid, and the trial was to proceed without televised coverage. The Court also noted the potential harms that would be caused to witnesses and trial testimony by the public broadcast of the trial.[66] Using these concepts as a guide, the Court held that the balancing of the equities required by past precedent fell in favor of preventing public broadcast of the trial.[67] The Supreme Court's basing of its decision in *Hollingsworth v. Perry* on administrative grounds, a perceived public desire to see controversial trials in real time, and the long recognized public obsession with courtroom drama raises an important question: on controversial issues of public importance, should cameras be permitted at judicial proceedings for the purpose of broadcasting those proceedings to the public?

II. RELEVANT LAW

The issue of whether cameras should be permitted in civil courtrooms is a two part question. First, it must be determined whether the press and the public have a right to access civil cases at all. If so, then it must be decided whether that

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[63] *Id.* at 709.

[64] *Id.* at 706.

[65] Hollingsworth v. Perry, 130 S. Ct. 705, 706 (2010) (per curiam).

[66] *Id.* at 712-13.

[67] Four justices dissented. Justice Breyer, in his dissenting opinion, stated that the federal requirements for the local rule change had been met, and that notice and an appropriate amount of comment time had been given. *Id.* at 715-16 (Breyer, J., dissenting). The Court gave the parties significant notice—as early as September 2009—that the trial may be broadcast to the public and invited the comments of the parties. *Id.* (Breyer, J., dissenting). In addition, no matter the length of the public comment period provided by the district court, the Court received over 138,000 comments about the issue. *Id.* at 717 (Breyer, J., dissenting). In addition, the dissenting justices noted that the "legal question [before the Court] is not the kind of legal question that [the Supreme] Court would normally grant certiorari to consider." *Id.* (Breyer, J., dissenting). Likening the majority opinion to a "micromanagement" of district court administrative procedures, Justice Breyer argued that the procedures for how district courts amend their local rules are better left to the district courts to decide. *Id.* (Breyer, J., dissenting).

In addition, Justice Breyer did not believe that the "irreparable harm" argument alleged by the defendant-interveners did not hold water. *Id.* at 718-19 (Breyer, J., dissenting). Justice Breyer noted that,

> although capable of doing so, [the witnesses] have not asked this Court to set aside the District Court's order. And that is not surprising. All of the witnesses supporting the applicants are already publicly identified with their cause. They . . . have either already appeared on television or Internet broadcasts, or . . . engaged in extensive public commentary far more likely to make them well known than a closed-circuit broadcast to another federal courthouse.

Id. at 718 (Breyer, J., dissenting).

right of access includes a right to broadcast the proceedings by video camera or via the Internet. The United States Supreme Court has often considered the public and the press's rights to attend trials. In *Gannett Co., Inc. v. DePasquale*,[68] the Court was first presented with the issue of whether the press has a right to access criminal proceedings, but it decided the case on other grounds.[69] Shortly thereafter, the Court decided *Richmond Newspapers, Inc. v. Virginia*,[70] holding that members of the press maintain a constitutional right, under the First and Fourteenth Amendments, to access criminal trials.[71] In *Press-Enterprise II*,[72] the Court extended the *Richmond Newspapers* holding to criminal pretrial hearings and laid the groundwork for media access analyses.[73] Subsequently, this line of cases has been used by various courts to extend the constitutional rights of the press and public to access civil judicial proceedings, although that issue has never reached the Supreme Court.[74] The Court has, however, considered whether cameras should be permitted in courtrooms. In *Estes v. Texas*[75] and *Chandler v. Florida*,[76] the Court ruled that media broadcasts of court proceedings robbed defendants of fair trials. The Court specifically acknowledged, however, that video cameras are not barred from court proceedings where there is no effect on a defendant's fair trial rights.[77] The concepts discussed in these cases are still applicable today.

A. Gannett County v. DePasquale

Gannett Co., Inc. v. DePasquale[78] became the first case in which the United States Supreme Court fully considered whether the United States Constitution grants a right to attend criminal trials to the public[79] and a right to attend criminal pretrial hearings to members of the press.[80] In *Gannett*, at a pretrial motion to suppress hearing, the defendants requested that the proceedings be closed to the public because media attention had caused an "unabated buildup of adverse publicity [which] had jeopardized the ability of the defendants to receive a fair trial."[81] The Court granted the defendants' motion, sealing the courtroom and the

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[68] 443 U.S. 368 (1979).

[69] *Id. at* 391.

[70] 448 U.S. 555 (1980).

[71] *Id.* at 573.

[72] 478 U.S. 1 (1986).

[73] *Id.* at 11-12.

[74] *See, e.g.*, Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 23 (2d Cir. 1984); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984).

[75] 381 U.S. 532 (1965).

[76] 449 U.S. 560 (1981).

[77] *Id.* at 579.

[78] 443 U.S. 368 (1979).

[79] *Id.* at 370-71.

[80] *Id.* at 393-94.

[81] *Id.* at 375.

hearing transcript from media review.[82] The decision was appealed and eventually reached the Supreme Court.[83]

The Court's analysis was confined to the Sixth Amendment. The Court cited a line of its previous cases to reiterate that the protections of the Sixth Amendment are personal to the accused[84] and do not exist for the public.[85] Although there are clear benefits to trial openness,[86] those benefits are "a far cry . . . from the creation of a constitutional right on the part of the public."[87] Although the petitioner had also claimed that the free press provision of the First Amendment grants both the press and the public a right of access to pretrial hearings in criminal cases,[88] the Court passed on the issue. One year later, the Court revisited that question in *Richmond Newspapers v. Virginia*.[89]

B. Richmond Newspapers v. Virginia

In *Richmond Newspapers*, the Court considered whether the public and the press hold a constitutional right to attend criminal trials.[90] After a series of mistrials in a Virginia murder case, one of which was caused by a juror's exposure to media publicity of the prior trials, the defendant moved for the trial to be closed to the public and press.[91] Neither the prosecutor, nor any of the reporters present in the courtroom, objected to the trial's closure.[92] Later, two reporters representing Richmond Newspapers moved to vacate the closure order,[93] but their request was denied.[94] Richmond Newspapers appealed, and the case reached the United States Supreme Court.[95]

Preliminarily, the Court stated that the question before it was one of first impression,[96] given its avoidance of a similar issue in *Gannett Co., Inc. v. Depasquale*.[97] Citing to the history of Anglo-American law,[98] the Court noted that

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[82] *Id.*

[83] Gannett Co. Inc. v. DePasquale 443 U.S. 368, 377 (1979).

[84] *Id.* at 379-81 (citing Faretta v. California, 422 U.S. 806, 848 (1975) (Blackmun, J., dissenting); Estes v. Texas, 381 U.S. 532 (1965); In re Oliver, 333 U.S. 257 (1948)).

[85] *Gannett Co. Inc.*, 443 U.S. at 391.

[86] The Court cited "improve[d] . . . quality of testimony[;] induce[ment] [of] unknown witnesses to come forward . . .[;] conscientious[ ] . . . perform[ance] . . . of trial participants['] . . . duties[;] and . . . [the] public['s] . . . opportunity to observe the judicial system[,]" as the benefits of media access to trials. *Id.* at 383.

[87] *Id.*

[88] *Id.* at 391.

[89] 448 U.S. 555 (1980).

[90] *Id.* at 558.

[91] *Id.* at 559.

[92] *Id.* at 560.

[93] *Id.*

[94] *Id.* at 561.

[95] *Richmond Newspapers, Inc.*, 448 U.S. 555 at 561-63.

[96] *Id.* at 563-64.

[97] 443 U.S. 368 (1979). In *Gannett Co., Inc.*, the Court considered the constitutional rights of the public and press as they relate to *pretrial criminal hearings*, while in *Richmond Newspapers*, the Court

"criminal trials . . . had long been presumptively open."[99] The Court carried this presumption of openness into its First Amendment analysis, stating that the free press and free speech provisions of the First Amendment were drafted "against the backdrop of the long history of trials being . . . open."[100] Because "[f]ree speech carries with it some freedom to listen[,]"[101] the First Amendment provides a right to "receive information and ideas."[102] In a criminal trial, that freedom prevents a court from closing its doors without a sufficient, articulated justification, i.e. an "overriding interest."[103]

The Court's holding in *Richmond Newspapers* was a landmark decision for free press and free speech rights, but it did not announce a clearly articulated test against which courts could consider media access to criminal trials.[104] The Court revisited its holding from *Richmond Newspapers* in *Press-Enterprise II*.[105] In *Press-Enterprise II*, the Court compressed the concepts discussed in *Richmond Newspapers* into a more articulate test for use by other courts.[106]

C. Press-Enterprise Co. v. Superior Court

In *Press-Enterprise II*, the Court considered the constitutional rights of the public and the press to access pretrial criminal hearings.[107] In a high-profile criminal trial, the trial court closed a majority of the voir dire proceedings—including transcripts—to the public and the press.[108] The court's decision was eventually appealed to the United States Supreme Court.[109]

At the outset, the Court noted that "[t]he right to an open public trial is a shared right of the accused and the public . . . ."[110] In discussing the rights of the public and the press, the Court cited to *Richmond Newspapers* to fashion a "working standard" for future analyses.[111] Under that working standard, the Court held that a First Amendment right to access proceedings "turns on the complementary considerations of 'experience' and 'logic.'"[112] "The experience

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addressed whether the public and press held constitutional rights of access to criminal *trials*.

98 *Richmond Newspapers, Inc.*, 448 U.S. at 564-65.

99 *Id.* at 569.

100 *Id.* at 575.

101 *Id.* at 576.

102 *Id.* (quoting Kleindienst v. Mandel, 408 U.S. 753, 762 (1972)).

103 *Id.* at 577, 581.

104 *See* North Jersey Media Grp., Inc. v. Ashcroft, 205 F. Supp.2d 288, 299 (D.N.J. 2002), *vacated*, 308 F.3d 198, 203 (3d Cir. 2002) (citing Press-Enter. Co. v. Superior Court, 478 U.S. 1, 9 (1986)).

105 478 U.S. 1 (1986).

106 Howard W. Chu, Note, *Is Richmond Newspapers in Peril After 9/11?*, 64 OHIO ST. L.J. 1655, 1660 (2003).

107 478 U.S. at 3.

108 *Id.*

109 *Id.*

110 *Id.* at 7.

111 Chu, *supra* note 106, at 1660.

112 *Id.* (quoting North Jersey Media Grp., Inc. v. Ashcroft, 205 F. Supp.2d 288, 299 (D.N.J. 2002),

prong involves a historical analysis of the tradition of openness for a given proceeding, and the logic prong involves an analysis of whether public access to the proceeding 'plays a particularly significant positive role in the actual functioning of the process.'"[113] A reviewing court will analyze the facts against the experience and logic test to determine whether the press and the public maintain First Amendment rights to access the subject proceeding.[114]

In *Press-Enterprise II*,[115] the Court noted a history of open accessibility to preliminary criminal hearings to find that such proceedings "have been accorded 'the favorable judgment of experience'"[116] necessary to satisfy the first prong of the *Richmond Newspapers* test.[117] In addition, the Court noted that it had previously decided, in *Richmond Newspapers,* that media access to criminal trials plays a positive role in the "proper functioning of the criminal justice system."[118] Because California's preliminary criminal hearings are "sufficiently like a trial," the same conclusion must be reached for those proceedings.[119] The Court held that "the qualified First Amendment right of access to criminal proceedings applies to preliminary hearings . . . ."[120] The Court noted, however, that even when a right of access attaches, "it is not absolute."[121] Where the right to a fair trial is comprised by media publicity, "the presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[122]

On one hand, the Court in *Richmond Newspapers* and *Press-Enterprise II* determined that the public and the press maintain a constitutional right to access to criminal proceedings. On the other, neither majority opinion specifically addresses whether the experience and logic test extends to civil proceedings, and the Supreme Court has never considered the issue. Various United States courts of appeal have, and each has extended the *Richmond Newspapers* test to apply to civil cases.

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vacated, 308 F.3d 198, 203 (3d Cir. 2002)) (citing Press-Enter. Co. v. Superior Court, 478 U.S. 1, 9 (1986)).

[113] Katherine Flanagan-Hyde, Note, *The Public's Right of Access to the Military Tribunals and Trials of Enemy Combatants*, 48 ARIZ. L. REV. 585, 601 (2006) (quoting *Press-Enter. Co.*, 478 U.S. at 10-12).

[114] Chu, *supra* note 106, at 1660.

[115] 478 U.S. 1 (1986).

[116] *Id.* at 11.

[117] *Id.* While the experience and logic test was officially iterated in *Press-Enterprise II*, the test has become known as the *Richmond Newspapers* test because the concepts giving rise to the test were first dictated in the *Richmond Newspapers* case. *See* Chu, *supra* note 106, at 1660 (identifying the experience and logic test as the *Richmond Newspapers* test).

[118] *Id.* at 11-12.

[119] *Id.* at 12.

[120] *Press-Enter. Co.*, 478 U.S. 1, 13 (1986).

[121] Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982).

[122] Press-Enter. Co. v. Superior Court, 464 U.S. 501, 510 (1984).

D. Cases Involving Access to Civil Court Proceedings

Publicker Industries, Inc. v. Cohen[123] became the first case where a federal appellate court considered whether the public and the press have a constitutional right of access to civil legal proceedings.[124] Citing to numerous legal authorities,[125] the court paralleled the aspects of the civil justice system[126] to the important concepts of the criminal justice system,[127] which had been the basis of the Supreme Court's decision in *Richmond Newspapers*. The court noted that "[a] presumption of openness inheres in [both] civil trials [and] criminal trials."[128] In addition, the court held that "the civil trial, like the criminal trial, 'plays a particularly significant role in the functioning of the judicial process and the government as a whole.'"[129] Thus, under the experience and logic test, the court held that the First Amendment creates a right of access to civil trials.[130]

In *Westmoreland v. Columbia Broadcasting System, Inc.*,[131] the United States Court of Appeals for the Second Circuit echoed the ruling in *Publicker Industries*. Reasoning that "public access to civil trials 'enhances the quality and safeguards the integrity of the factfinding process, . . . fosters an appearance of fairness,' . . . and heightens 'public respect for the judicial process,'" the court held that the public and the press maintain a First Amendment right to access civil proceedings.[132] The right also permits "'the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self government.'"[133] Similar decisions from other courts have followed, each acknowledging a constitutional right in the public and the press of access to civil proceedings.[134]

Whether the press and the public hold a First Amendment right of access to civil proceedings is merely the beginning of the analysis. We live in the midst of the YouTube age, where access to courtrooms includes not only a person's physical presence in the gallery, but a camera pointed at the parties and broadcast to a potentially massive viewing audience. The issue of whether video cameras are

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123 733 F.2d 1059 (3d Cir. 1984).

124 *Id.* at 1070.

125 *Id.* at 1068-70.

126 *Id.* at 1070.

127 *Id.*

128 *Id.*

129 Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982)).

130 *Id.* (quoting *Globe Newspaper Co.*, 457 U.S. at 606) and (citing Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 177-79 (6th Cir. 1983)).

131 752 F.2d 16 (2d Cir. 1984).

132 *Id.* at 23.

133 *Id.* (quoting *Globe Newspaper Co.*, 457 U.S. at 606).

134 *See, e.g.*, Scott Dairy Farm, Inc. v. Dean Foods, 666 F. Supp. 2d 908, 915 (E.D. Tenn. 2009); Star Scientific, Inc. v. Carter, 204 F.R.D. 410, 416 (S.D. Ind. 2001).

permitted in the trial courtroom was addressed by the Supreme Court in *Estes v. Texas* and *Chandler v. Florida*.

E. Estes v. Texas *and* Chandler v. Florida

In *Estes v. Texas*,[135] a defendant being tried in a matter that commanded "[m]assive pretrial publicity[,]" moved the court to ban television, radio and news photography media at his trial.[136] The trial court denied the motion.[137] On eventual appeal to the United States Supreme Court, Justice Clarke, writing for the majority, noted at the outset that "[t]he videotapes of the[ ] [pretrial] hearings clearly illustrate that the picture presented was not one of that judicial serenity and calm to which [the defendant] was entitled."[138]

When *Estes* reached the Supreme Court in 1965, the Court had not yet heard *Richmond Newspapers* or *Press-Enterprise II*; therefore no First Amendment right in the press and the public to access criminal proceedings had been announced.[139] Nevertheless, the Court acknowledged that "[w]hile maximum freedom must be allowed the press . . . its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process."[140] The Court held that although the First Amendment does not provide unfettered public access to courtrooms, a trial court may not discriminate by permitting print media access, yet excluding video media access.[141] The fundamental question in determining when to close the courtroom doors must be whether a criminal defendant can be afforded a fair trial under the media's watchful eye.[142] In closing, the Court noted that "the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials . . . Our judgment cannot be rested on the hypothesis of tomorrow . . . "[143]

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[135] 381 U.S. 532 (1965).

[136] *Id.* at 535.

[137] *Id.*

[138] *Id.* at 536 (citing Cox v. Louisiana, 379 U.S. 559, 562 (1965); Turner v. Louisiana, 379 U.S. 466, 472 (1965); Wood v. Georgia, 370 U.S. 375, 383 (1962)). Justice Clarke noted that

> at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings . . . With photographers roaming at will through the courtroom, petitioner's counsel made his motion that all cameras be excluded. As he spoke, a cameraman wandered behind the judge's bench and snapped his picture.

Estes, 381 U.S. at 553.

[139] *Richmond Newspapers, Inc.*, 448 U.S. at 577, 581; Press-Enter. Co. v. Superior Court, 478 U.S. 1, 13 (1986).

[140] Estes v. Texas, 381 U.S. 532, 539 (1965).

[141] *Id.* at 540.

[142] *Id.* at 542.

[143] *Id.* at 551-52.

Sixteen years later, the Supreme Court revisited its decision in *Estes* in *Chandler v. Florida*.[144] In that case, the Court "refused to construe *Estes* as having announced 'a constitutional rule barring . . . photographic, radio, and television coverage in all cases . . . .' Rather, [it] construed *Estes* as limiting media coverage when it compromises a defendant's right to a fair trial 'based solely upon the evidence and . . . relevant law.'"[145] The Court then noted that, given the advancements in technology and the procedural safeguards designed to ensure a defendant receives a fair trial, "a defendant must show actual prejudice, rather than the mere possibility of prejudice, in order to substantiate a [constitutional] violation . . . based on media presence in the courtroom."[146]

With its decisions in *Estes* and *Chandler*, the Court clearly held that when video broadcasting actually and adversely impacts a defendant's fair trial rights, cameras should not be permitted in the courtroom.[147] Yet, the Court acknowledged that as video technology advances, the threshold bar for violations of fair trial rights grows higher and higher.[148] Given the technological advances present in today's society, an instant media presence is available in the palm of one's hand, and it can be broadcast to millions of people within seconds. Courts have never before contemplated the technology of the YouTube age. It is time to re-evaluate the height at which that bar lies.

III. ANALYSIS

As has been discussed previously, some of the most controversial and newsworthy cases that reach federal courts today are civil cases. High profile trials such as *Perry v. Schwarzenegger*[149] and constitutional rights cases involving abortion, gun control, or gay marriage are well covered in the print media. There is a clear demand from the public for video broadcasting of these cases, but there is no clear rule to determine whether they can be broadcast by video or the Internet, as is evidenced by *Hollingsworth v. Perry*.[150] Given the strong public interest in the video and Internet viewing of high-profile civil trials, it is time for the Supreme Court to consider the circumstances in which those trials can be broadcast.

In order to determine when civil cases may be broadcast by video or Internet, a threshold question must be answered: whether the press and the public have a constitutional right of access to civil courtrooms. Despite the Supreme Court's

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144 449 U.S. 560 (1981).

145 Henry F. Fradella & Brandon Burke, *From the Legal Literature*, 43 CRIM. L. BULL. (2007) (citing *Chandler*, 449 U.S. at 574).

146 *Id.* (citing *Chandler*, 449 U.S. at 578-79).

147 Estes v. Texas, 381 U.S. 532, 542 (1965).

148 *Id.* at 551-52.

149 Perry v. Schwarzenegger, No. C 09-2292, 2010 WL 3025614 (N.D. Cal. Aug. 4, 2010). A copy of the Complaint in *Perry v. Schwarzenegger* is available at http://online.wsj.com/public/resources/documents/20090522perrycomp.pdf (last visited May 1, 2010).

150 130 S. Ct. 705 (2010).

clear holding in *Richmond Newspapers*[151] that the public and the press hold a First Amendment right of access to criminal proceedings, and its experience and logic test finalized in *Press-Enterprise II*,[152] the Court has never officially considered that threshold issue.[153] Based on an analysis of the experience and logic test,[154] and a review of the Supreme Court's unofficial treatment of the issue,[155] it is likely that the Court would find a First Amendment right in the public and the press to access civil proceedings similar to that already found in criminal proceedings.[156] Given today's video and Internet technology, when the press accesses a courtroom, that access assuredly comes with some amount of video broadcasting capability. Today, for instance, cellular telephones can link video clips to Facebook or YouTube within seconds with very little, if any, impact on the courtroom proceedings. Accordingly, this article argues that the Court ought to impose a rebuttable presumption that video broadcasting of civil court proceedings is permitted absent a compelling interest asserted by the party seeking closure.[157]

A. The Supreme Court Would Likely Find that the Public and the Press Hold a Constitutional Right of Access to Civil Trials

Notwithstanding its clear application to criminal cases, the experience and logic test of *Richmond Newspapers* appears to be the beginning of the analysis for civil trials as well. In *Press-Enterprise II*, the Court held that "considerations of experience and logic are . . . related, for history and experience shape the functioning of governmental processes. If the particular proceeding in question passes these tests . . . , a qualified First Amendment right of public access attaches."[158] While in that case, the Court considered whether a pretrial criminal hearing should have been open,[159] the Court's language does not exclude civil cases. In fact, the Court's test specifically speaks to "the particular proceeding in question,"[160] which implies that the test would apply equally to any legal proceeding up for review before a court, criminal and civil alike. Courts have subsequently read this passage of *Press-Enterprise II* accordingly.[161] It is likely,

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151 448 U.S. 555 (1980).

152 478 U.S. 1 (1986).

153 John W. Whittlesey, Note, *Private Judges, Public Juries: The Ohio Legislature Should Rewrite R.C. § 2701.10 to Explicitly Authorize Private Judges to Conduct Jury Trials*, 58 CASE W. RES. L. REV. 543, 560 (2008).

154 *See infra* Part III.A.1.

155 *See infra* Part III.A.2.

156 *See Richmond Newspapers, Inc.*, 448 U.S. at 576-77.

157 *See infra* Part III.B.

158 Press-Enter. Co. v. Superior Court, 478 U.S. 1, 9 (1986).

159 *Id.* at 3.

160 *Id.* at 9.

161 *See, e.g.*, Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 23 (2d Cir. 1984); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984); Scott Dairy Farm, Inc. v. Dean Foods, 666 F. Supp. 2d 908, 915 (E.D. Tenn. 2009); Star Scientific, Inc. v. Carter, 204 F.R.D. 410, 416 (S.D. Ind. 2001).

therefore, that the Court would utilize the experience and logic analysis to determine whether the public and the press hold a constitutional right of access to civil cases.

1. The Experience and Logic Test as Applied to Civil Proceedings

As discussed in *Press-Enterprise II*, a First Amendment right to access proceedings "turns on the complementary considerations of 'experience' and 'logic.'"[162] "The experience prong involves a historical analysis of the tradition of openness for a given proceeding, and the logic prong involves an analysis of whether public access to the proceeding 'plays a particularly significant positive role in the actual functioning of the process.'"[163] Because our judicial system bears historical traditions of openness in civil trials akin to those in criminal trials, and because the openness of civil legal proceedings play an important role in the functioning of our judicial system, the United States Supreme Court would likely find that the experience and logic test is satisfied with regard to civil proceedings. Accordingly, it would hold that a qualified First Amendment right of access to civil proceedings inures in the public and the press.

a. Experience

The Court in *Richmond Newspapers* showed that in considering the experience prong of the experience and logic test, a court must conduct a historical analysis to determine if a particular legal proceeding carries with it a tradition of public openness.[164] The Court's recitation of history was thorough and instructive. Although the modern criminal trial has its origins "back beyond reliable historical records" it is important to note that "throughout its evolution, the trial has been open to all who cared to observe."[165] The Court traced the open criminal trial practice from before the Norman Conquest of the mid-eleventh century, where criminals were brought before "moots" and trials were attended by the "freemen of the community,"[166] to the early fourteenth century, where records recognize the importance of public attendance at criminal proceedings.[167] Openness of criminal proceedings was also found in early colonial America and has continued to the present day.[168] In seemingly every culture that influenced Anglo-American criminal law, criminal trials were not only open to the public, but the public was encouraged to attend.[169] "From this unbroken, uncontradicted history, supported

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[162] Chu, *supra* note 106, at1660.

[163] Flanagan-Hyde, *supra* note 113, at 601 (quoting *Press-Enter. Co.*, 478 U.S. at 10-12).

[164] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-69 (1980).

[165] *Id.* at 564.

[166] *Id.* at 565.

[167] *Id.* at 565-66.

[168] *Id.* at 567-68.

[169] *See id.* at 564-69.

by reasons as valid today as in centuries past, [the Court was] bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice."[170] In *Press-Enterprise II*, the Court affirmatively stated that the historical analysis iterated in *Richmond Newspapers* was the standard by which the experience prong of the experience and logic test would be measured.[171]

The analysis is very similar when considering civil proceedings. After all, "[s]uch proceedings are uniquely amenable to the experience and logic tests, given a largely shared history of openness and of articulated rationales for such openness between civil and criminal trial proceedings."[172] In fact, a plurality of the Supreme Court in *Richmond Newspapers* noted that the presumption of openness in criminal trials transcends civil proceedings as well.[173] In the early seventeenth century, it was noted that the Statute of Marlborough, drafted in 1267, commanded public trials in all cases—both civil and criminal.[174] "'The[ ] words [*In curia Domini Regis*] are of great importance, for *all Causes* ought to be heard, ordered, and determined before the Judges . . . *openly* in the King's courts . . . .'"[175] The common law of England also required openness in all proceedings.[176] In the American Colonies, the practice continued. "From the beginning, the norm was open trials."[177] It was written into the Constitutions of the Colonies, and it has been noted that such openness is critical to our civil justice system.[178] "This survey of authorities identifies as features of the civil justice system many of those attributes of the criminal justice system on which the Supreme Court relied in holding that the First Amendment guarantees to the public and to the press the right of access to criminal trials . . . ."[179]

b. Logic

In *Press-Enterprise II*, the Court concluded that the logic prong of the *Richmond Newspapers* test is satisfied where public access to a given legal proceeding "plays a particularly significant positive role in the actual functioning of the process."[180] In *Richmond Newspapers*, the Court determined that openness in criminal trials served exactly this positive role.[181] In fact, the public aspect of

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170 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980).

171 Press-Enter. Co. v. Superior Court, 478 U.S. 1, 8 (1986).

172 Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95, 116 (2004).

173 *See infra* notes 201-04 and the accompanying text.

174 Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1068 (3d Cir. 1984).

175 *Id.*

176 *Id.*

177 *Id.* at 1069.

178 *Id.*

179 *Id.* at 1070.

180 Press-Enter. Co. v. Superior Court, 478 U.S. 1, 11 (1986).

181 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 568 (1980).

criminal trials is "part of the very nature of" criminal proceedings.[182] Openness in criminal proceedings gives "assurance that the proceedings [are] conducted fairly to all concerned . . . ."[183] A public trial also "discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality . . . 'Without publicity, all other checks are insufficient . . . .'"[184] In addition, open trials serve a therapeutic purpose in the community.[185] "When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion."[186] Without the openness of trial, an "unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted."[187] In other words, publicity serves a vital purpose in "'satisfy[ing] the appearance of justice,' and the appearance of justice can best be provided by allowing people to observe it."[188] Open trials also promote education about our system of justice. "[R]espect for the law increase[s] and intelligent acquaintance [is] acquired with the methods of government" when the public is exposed to the trial process.[189] Combined, these concepts set the standard by which other systems are to be compared when determining whether openness in judicial proceedings plays a positive role in our justice system.

Openness in civil proceedings plays a similar positive role in the civil justice system. Justice Oliver Wendell Holmes noted that "public access to civil judicial proceedings was 'of vast importance' because of 'the security which publicity gives for the proper administration of justice . . . It is desirable that the trial of [civil] causes should take place under the public eye.'"[190] It is important to make those who render decisions accountable to their "sense[s] of public responsibility" and to ensure that the public is satisfied by the public duties those decision makers perform.[191] Public civil trials also secure trustworthiness in witness testimony and verify that decisions are made with neutrality.[192] Civil trial openness "enhances the quality of justice dispensed by officers of the court and thus contributes to a fairer administration of justice."[193] As in criminal trials, a better understanding of our system of justice is readily available through public civil trials. "The educative effect of public attendance is a material advantage. Not only is respect for the law

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182 *Id.*

183 *Id.* at 569.

184 *Id.* (quoting 1 J. Bentham, Rationale of Judicial Evidence 524 (1827)).

185 *Id.*

186 *Id.* at 571.

187 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980).

188 *Id.* at 572 (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)).

189 *Id.*

190 Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1069 (3d Cir. 1984) (quoting Cowley v. Pulsifer, 137 Mass. 392, 394 (1884)).

191 *Id.* (quoting Cowley v. Pulsifer, 137 Mass. 392, 394 (1884)).

192 *Id.* at 1069-70.

193 *Id.* at 1070.

increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy."[194] Like public criminal trials do for the criminal justice system, public civil trials "'enhance[ ] the quality and safeguard[ ] the integrity of the factfinding process. [They] foster[ ] an appearance of fairness, . . . heighten[ ] public respect for the judicial process[,] [and] permit[ ] the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.'"[195]

Given the parallels between the criminal and civil justice systems in Anglo-American jurisprudence, it appears that, under the analysis created by the Supreme Court in *Richmond Newspapers*, civil proceedings carry with them the same presumption of openness found in criminal proceedings.[196] In addition, the openness of civil proceedings plays a vital role in the functioning of our civil jurisprudential system, just as open criminal trials do for our criminal jurisprudential system.[197] Accordingly, it is likely that the Supreme Court would recognize a First Amendment right in the public and in the press to access civil proceedings, just as it did to criminal proceedings in *Richmond Newspapers*.

2. The Court's Unofficial Treatment of the Issue Indicates that the Court Would Extend a First Amendment Right in the Public and the Press to Civil Proceedings

Beyond the speculation required when the Supreme Court has yet to officially address a specific issue, there is some evidence that the Court would adopt the same or a similar test for civil cases as was set forth for criminal cases in *Richmond Newspapers* and *Press-Enterprise II*. Perhaps the greatest indicator of how the Court will decide a particular issue is found in the dicta of its prior cases.[198] Because the Supreme Court cannot consider every case or issue that may arise, "the Court frequently paints with a brush somewhat broader than necessary to decide the case immediately before it in order that general guidance may be provided to the courts below" on tangential issues as well.[199] Although not as convincing, the fact that the Supreme Court has not considered the issue despite the opportunity may also serve as an indication that the Court is not inclined to disturb the status quo.

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194 *Id.*

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

196 Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3rd Cir. 1984)

197 *Id.*

198 Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 76 n.266 (1994).

199 Comac Co. v. Am. Airlines, 402 F. Supp. 43, 45 (E.D. Mich. 1975).

a. Dicta in Richmond Newspapers

Richmond Newspapers is a landmark case for more than one reason and its dicta is almost as telling as its primary holding. Although the Court's decision was generally confined to criminal cases, it serves as persuasive authority for courts considering the same issue for civil proceedings.[200] In *Richmond Newspapers*, a plurality of the Justices implied that the Court's constitutional analysis of criminal trials also applied to civil cases.[201] After a detailed account of the historical presumption of openness of criminal trials led the Court to recognize a constitutional right in the press and the public to access criminal trials, Chief Justice Burger, in an opinion joined by Justices White and Stevens, stated that: "Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open."[202] In a concurring opinion, Justice Brennan found that trial openness was equally critical to the factfinding process in both criminal and civil cases.[203] In a separate concurring opinion, Justice Stewart stated that the Constitution "clearly give[s] the press and the public a right of access to trials themselves, civil as well as criminal."[204] These discussions appear to show that a plurality of the Court would have extended the First Amendment access rights to civil cases, had that issue been formally presented.

b. Denial of Certiorari on the Issue

As has been discussed above, several federal courts have been faced with the question of whether the press and the public hold a First Amendment right of access to civil trials.[205] In *Westmoreland v. Columbia Broadcasting System, Inc.*,[206] the United States Court of Appeals for the Second Circuit extended the qualified constitutional right in the public and press to access criminal trials to civil cases.[207] The case was appealed to the United States Supreme Court, but certiorari was denied.[208] "'[A] denial [of certiorari] carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review.'"[209] However, Justices frequently publish separate opinions alongside

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200 Huminski v. Corsones, 396 F.3d 53, 82 n.30 (2d Cir. 2004) (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)).

201 *Richmond Newspapers, Inc.*, 448 U.S. at 580 n.17.

202 *Id.*

203 *Id.* at 596 (Brennan, J., concurring).

204 *Id.* at 599 (Stewart, J., concurring).

205 *See, e.g.*, Westmoreland v. Columbia Broad. Sys., 752 F.2d 16, 23 (2d Cir. 1984); Publicker Indus. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984); Scott Dairy Farm v. Dean Foods, 666 F. Supp. 2d 908, 915 (E.D. Tenn (2009)); Star Scientific Inc. v. Carter, 204 F.R.D. 410, 416 (S.D. Ind. 2001)).

206 752 F.2d 16.

207 *Id.* at 23.

208 *See* Cable News Network, Inc. v. U.S. Dist. Ct. for the S.D. of N.Y., 472 U.S. 1017 (1985).

209 Indraneel Sur, *How Far Do Voices Carry: Dissents from Denial of Rehearing En Banc*, 2006 WIS. L. REV. 1315, 1332 (2006) (quoting Singleton v. Comm'r, 439 U.S. 940, 944 (1978) (Stevens, J.,

denials of petitions for certiorari to present "reasons why the Court should have granted the petition and, in many cases,"[210] why the court below ruled incorrectly.[211] No such opinion was filed in the *Westmoreland* appeal.[212] Without drawing any specific conclusions from the Court's treatment of the *Westmoreland* appeal, it can only be inferred that "fewer than four [Justices] deemed it desirable to review [the] decision of the lower court as a matter 'of sound judicial discretion.'"[213] In other words, petitioners could not muster four Justices who were willing for the full Court to consider whether the press and public hold a constitutional right of access to civil proceedings.[214]

3. The Constitutional Right of the Press and the Public to Attend Civil Proceedings is Not Absolute

Although the Court has been clear in holding that the press and the public hold a First Amendment right to access criminal proceedings, it has been equally clear that the right is not absolute. The Supreme Court has stated that "[s]ince a qualified First Amendment right of access attaches to [criminal proceedings] . . . , the proceedings cannot be closed unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'"[215] The higher values contemplated by the Court include: a defendant's right to a fair trial under the due process clause of the Fifth Amendment;[216] a defendant or witness's right of privacy on certain matters that carry adverse public stigma;[217] jurors' privacy interests;[218] and statutory protections, such as confidentiality in juvenile prosecutions.[219] If it is alleged that press and public access to criminal proceedings violates a defendant's right to a fair trial, the proceeding "shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and,

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concurring in denial of cert.).

[210] *Id.* (citing Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1267-77 (1979)).

[211] Linzer, *supra* note 210, at 1267.

[212] *Cable News Network Inc.*, 472 U.S. 1017.

[213] Thomas L. Fowler, *Law Between the Lines*, 25 CAMPBELL L. REV. 151, 158 (2003) (quoting Maryland v. Baltimore Radio Show, 338 U.S. 912, 917 (1950)).

[214] *Id. See also* Linzer, *supra* note 210, at 1267.

[215] Press-Enter. Co. v. Superior Court, 478 U.S. 1, 13-14 (1986) (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 510 (1984)).

[216] Kathleen F. Brickey, *From Boardroom to Courtroom to Newsroom: The Media and the Corporate Governance Scandals*, 33 J. CORP. L. 625, 634 (2008).

[217] *See* Jane K. Stoever, *Stories Absent from the Courtroom: Responding to Domestic Violence in the Context of HIV and AIDS*, 87 N.C. L. REV. 1157, 1198-1200 (2009) (citing Supreme Court case law to state that an individual's HIV status or AIDS diagnosis is protected by a constitutional right to privacy regarding their condition).

[218] Brickey, *supra* note 216, at 634.

[219] Meliah Thomas, Comment, *The First Amendment Right of Access To Docket Sheets*, 94 CAL. L. REV. 1537, 1572 (2006).

second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."[220] These "higher values" provide safeguards that ensure the safe running of the system while still accommodating the press' and the public's right of access to criminal proceedings.[221]

If the Court is to extend the First Amendment right in the press and the public to access criminal proceedings to civil proceedings, it would likely govern the two types of cases by the same rules. Accordingly, a qualified First Amendment right in the press and the public to access civil proceedings would be accompanied by a rule that closure of the proceedings shall only occur where specific, on the record findings demonstrate that closure is essential to preserve higher values and is narrowly tailored to serve that interest.[222] In civil proceedings, these higher values would be similar to those contemplated in criminal proceedings, including the right of either party to a fair trial; and the privacy, security, and safety interests of jurors, witnesses, or juveniles who may be involved.[223]

B. Courts Should Impose a Rebuttable Presumption That Cameras are Permitted in Courtrooms for Civil Proceedings

Having carved out a constitutional right in the press and the public to access civil proceedings, and having discussed the restrictions that may be placed on such access, the technological advances of the YouTube age next require an analysis of how cameras in the courtroom affect that constitutional right. The Supreme Court considered the issue of cameras in the courtroom in *Estes v. Texas*[224] and *Chandler v. Florida*,[225] both of which echoed the argument that cameras are dangerous tools. *Estes* contemplated that, as time passes and technology advances, the effect of camera coverage of court proceedings may change, requiring the way courts address the issue to change as well.[226] Admittedly, "no case . . . has [ever] held that the public has a right to televised trials."[227] But, times have certainly changed. Today, an individual's mere presence at an event, or at a certain place at any given time, creates the possibility for that event or place to be broadcast to millions of potential Internet users within minutes. Handheld devices make video imaging mobile and accessible to almost anyone with Internet access. Therefore, when the press and the public are granted access to court proceedings, it is almost inevitable that those proceedings are then going to be accessible in video form. The Second Circuit Court of Appeals has stated that, while no court has been willing to grant a

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220 *Press-Enter. Co.*, 478 U.S. at 14.

221 *Id.* at 13 (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 510 (1984).

222 *Cf. id.* at 13-14.

223 *Cf. id.*

224 381 U.S. 532 (1965).

225 449 U.S. 560 (1981).

226 *Estes*, 381 U.S. at 551-52.

227 Riemer, *supra* note 30, at 1293 n.98 (quoting Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 22 (2d Cir. 1984)).

right in the people to view televised trials, "when judicial concerns with the difficulties of televising a trial are diminished, the presumption may shift in favor of allowing television coverage."[228] In light of the constitutional goals that led the Court to determine that the press and the public hold a constitutional right to access criminal proceedings, the argument that those same goals would extend the constitutional right of access to civil proceedings, and the technology of today, Courts should impose a rebuttable presumption that video media access to courtrooms is permitted.

1. The Need for a Rebuttable Presumption in Favor of Cameras in the Courtroom

In *Estes v. Texas*[229] and *Chandler v. Florida*,[230] the Supreme Court was faced with the question of whether cameras should be permitted in courtrooms. In both cases, the argument against allowing video broadcast of the proceedings was based on the defendants' respective rights to a fair trial.[231] Both cases iterated a general disfavor for video broadcasting of court proceedings, but neither "announce[d] a constitutional rule that all photographic or broadcast coverage of criminal trials is inherently a denial" of a defendant's fair trial rights.[232] However, in *Estes*, the Court stated that "'[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.'"[233] The Court felt that video transmission of trial proceedings compromised that intent.[234] However, the Court acknowledged that "the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials."[235] Given the major advances made in video technology since *Estes* was decided in 1965, the issue is ripe for reconsideration.

Following the Court's decision in *Estes*, the Court heard *Richmond Newspapers*[236] and *Press-Enterprise II*.[237] The Court fashioned its decisions in those cases with certain constitutional goals in mind. These constitutional goals—enhancing the quality and safeguarding the integrity of the factfinding process; ensuring the appearance and establishment of fairness in the proceedings; heightening public respect for the judicial system; and educating the public on the

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228 *Id.* at 1294 (citing *Westmoreland*, 752 F.2d at 23).

229 381 U.S. 532 (1965).

230 449 U.S. 560 (1981).

231 *Estes*, 381 U.S. at 542; *Chandler*, 449 U.S. at 574.

232 *Chandler*, 449 U.S. at 574.

233 *Estes*, 381 U.S. at 551 (quoting Patterson v. Colorado, 205 U.S. 454, 462 (1907)).

234 *Estes*, 381 U.S. at 542; *Chandler*, 449 U.S. at 574.

235 *Estes*, 381 U.S. at 551-52.

236 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

237 Press-Enter. Co. v. Superior Court, 478 U.S. 1, 13-14 (1986).

judicial system to the point they can participate in, and serve as a watchdog on, the judicial process—not only make up the logic prong of the experience and logic test, but establish factors against which the court weighs the interests of a party seeking closure of court proceedings.[238] Reconsideration of the permissibility of cameras in the courtroom, and an evaluation of how advances in technology have affected fair trial rights, turn on an analysis of these factors.

In *Richmond Newspapers*[239] and *Press-Enterprise II*,[240] the Supreme Court, by announcing a First Amendment right in the press to access criminal proceedings, tacitly approved newsprint stories and second-person television reporting as more beneficial to the constitutional factors than harmful to a defendant's fair trial rights. The Court has also announced that the burden is on the party seeking to have the trial closed—i.e. the defendant in a criminal case—to show that his right to a fair trial has been violated, or will be violated, due to media coverage.[241] With that in mind, it can be inferred that the Court has already established a rebuttable presumption that press coverage of criminal proceedings is permissible. To determine whether that rebuttable presumption extends to camera media coverage, the necessary analysis is confined to the change in the effect on the constitutional factors versus the change in the effect on the defendant's fair trial rights.

The Court asserted in *Press-Enterprise II* that each of the constitutional factors is met by granting press access to criminal proceedings. Although there is some increased risk of prejudice to a defendant's right to a fair trial as a result of press access, the benefits to the public and to the system outweigh the prejudice to the defendant in most circumstances.[242] When that analysis shifts to whether press access includes general video camera coverage of judicial proceedings, the benefit to the public increases greatly, while the risk of prejudice to the defendant increases only slightly.

As mentioned previously, the factors to consider in determining whether there should be a rebuttable presumption that cameras are permissible in courtrooms are: quality, depth, and accuracy of fact-finding; actual and perceived fairness of the proceedings; public respect for the judicial system; and education.[243] Each factor is enhanced by shifting the analysis from mere press coverage to video camera coverage. Video imaging is certainly unique. "Unlike the print medium, [video] has the capability to cover a trial in its entirety—every word, every sentence, every gesture . . . . [I]t can convey the moods and nuances of a trial, and provide . . . first-hand information about a trial or testimony rather than second-

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238 Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982)).

239 448 U.S. 555 (1980).

240 *Press-Enter. Co.*, 478 U.S. 1 (1986).

241 Chandler v. Florida, 449 U.S. 560, 581 (1981).

242 *Press-Enter. Co.*, 478 U.S.at 9-11.

243 *See id. See also* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984).

hand information" through a reporter's words.[244] Only a few members of the public have the ability to attend full trials, and video coverage fills the gap in ways that other forms of media coverage cannot.

One does not tell a story the way it happened; one tells a story as he remembers it. When a news personality reports what happened at a court proceeding in his or her own words, the story is colored by that reporter's viewpoint, sensationalized and dramatized to draw additional viewers, and adjusted to fit within a certain available time slot. Video coverage offers viewers an opportunity to develop their own viewpoints on the proceedings. In this manner, viewers can assess the actual and perceived fairness of the proceedings by developing their own opinions about the case, rather than seeing the case through the eyes of a reporter. In addition, seeing a judicial proceeding in its entirety fosters respect for the judicial system and alerts viewers to the detail and expense of litigation they may not otherwise realize.

Video and Internet coverage exponentially expands the population of people who can access the information. With video clips available on the Internet, more people in more places can access the information. This enhances the quality, depth, and accuracy of the witness testimony. Witnesses previously unaware of a certain proceeding for which they have vital information are more likely to be able to access the information from video imaging. In other words, video coverage—and Internet coverage—casts a wider net than print media. Moreover, this expanded population of viewers increases the educational benefit of the public proceeding. When more people have access to a piece of information, more people will learn that information.

While video imaging of the court proceedings greatly enhances the benefits of the constitutional factors, it also slightly increases the risk of prejudice to the defendant. The presence of video cameras in courtrooms, and the resulting prejudice to defendants, caused the Supreme Court to overturn criminal convictions in *Estes v. Texas* and *Chandler v. Florida*. But, those cases were decided in different times.

The main ways video coverage of proceedings enhances the constitutional factors are through expanding the group of people able to access the information and allowing viewers to develop personal opinions of the proceedings unaffected by the perceptions of others who report the stories. However, by expanding the population of people who have access to the information, the media also increases the number of potential jurors who will access the information inappropriately. In addition, the presence of cameras in the courtroom can sometimes affect how witnesses, lawyers and judges handle cases. "'Frequently, when the media turns its spotlight on a case, the reality is that people behave differently; cases get handled

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[244] Riemer, *supra* note 30, at 1299.

differently. [It] can only [be] imagine[d] the extent to which that would be exacerbated by the presence of cameras in the courtroom.'"[245]

Outside of a defendant's fair trial rights, such far-reaching coverage of court proceedings can also risk harm to jurors who decided a case in an unpopular way; to witnesses who testified for various parties on controversial issues; or to acquitted defendants accused of notorious crimes, once the trial is over.[246] Nevertheless, judges still maintain control of their courtrooms, and they can limit any media access that compromises the safety of the participants or the fair trial rights of a defendant.[247] Under this analysis, the enhancements to the constitutional factors continue to outweigh the prejudice to the defendant. Because a rebuttable presumption allows a defendant to prove that video coverage of his or her trial will compromise his or her right to a fair trial, the defendant, under this model, maintains safeguards to his or her constitutional rights. In the meantime, the public benefits from increased video exposure of the trial process and the judicial system benefits from more accurate factfinding, increased fairness, and a more educated public.

2. Translating the Constitutional Factors to Civil Cases

Because the Supreme Court has never fashioned a constitutional right in the public and the press to access civil proceedings, previous analyses by courts have almost universally been confined to criminal cases. Admittedly, the constitutional factors are most applicable to criminal cases because they contemplate a defendant's fair trial rights in criminal proceedings. However, the constitutional factors are easily convertible to civil cases. Assuming, as has been argued in this article, that the Supreme Court adopted a First Amendment right in the press and the public of access to civil proceedings, the constitutional factors would stay the same. Factfinding, fairness, public respect and education would all still be increased by video access to civil courtrooms as compared to simple print media access. In fact, it can be argued that exposure to a wider population of people would be even more likely to bring to light widespread problems with product liability, consumer protection, and other similar matters. Moreover, the risks that exist in criminal cases are not as powerful in civil cases.

In the context of civil cases, particularly high profile cases, the burden on the party seeking to close the proceeding to video coverage would be particularly difficult to meet. While the right to a fair trial exists in civil cases, even where there is some question as to whether a party received a fair trial, a "new trial will

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[245] Raleigh Hannah Levine, *No Lights, No Camera, No Action*, 65-JUL BENCH & B. MINN. 23, 25 (2008) (quoting Testimony of Jeffrey Degree before the Minnesota Supreme Court Advisory Committee on General Rules of Practice (Jan. 11, 2008), available at http://www.mncourts.gov/district/0/?page=NewsItemDisplay&item=20511).

[246] *See* Hollingsworth v. Perry, 130 S. Ct. 705, 712-13 (2010).

[247] *Id.* at 719 (Breyer, J., dissenting).

not be ordered unless there [is] an error that caused some prejudice to the substantial rights of the parties."[248] The presence of cameras in the courtroom is unlikely to compromise the substantial rights of the parties such that they would receive a truly unfair trial, especially where the parties maintain a right to move the court for closure in anticipation of an adverse media impact on the trial. In addition, major civil cases that draw media interest frequently involve constitutional challenges to various statutes. These cases are often decided through pretrial motions to dismiss or motions for summary judgment, and many of those that do reach the trial stage are tried without a jury. Therefore, the possibility of a tainted jury pool because of media coverage is less likely in civil cases.

One parallel that can be drawn between civil cases and criminal cases in this analysis is the potential of harm to witnesses and parties relative to their testimony on controversial issues. In *Hollingsworth v. Perry*,[249] this argument was made to the United States Supreme Court. In that case, the defendant-interveners who were in favor of Prop 8, alleged that various witnesses had been harassed for their positions on the controversial issue.[250] These witnesses feared that if the trial were to be broadcast publicly, they would face criticism and possibly even violence, because of their testimony.[251] Some witnesses stated that they would not testify at all if the trial was broadcast.[252] The Court was concerned that the media attention could cause some witnesses to modify their testimony or would chill testimony altogether.[253] Because one of the constitutional factors is ensuring the quality, depth and accuracy of fact-finding, these arguments would certainly be relevant to an inquiry as to whether a rebuttable presumption that cameras are permitted in civil courtrooms is to be overcome in a certain case.

Assuming, as this article argues, that a First Amendment right exists in the public and in the press of access to civil proceedings, that right of access should include camera coverage. The constitutional "logic" factors iterated in *Richmond Newspapers* and *Press-Enterprise II* are substantially enhanced by public video and Internet broadcast of civil cases. The exposure to a wider range and increased number of people through video broadcasting allows for more accurate witness testimony; safeguards the actual and perceived fairness of the proceedings; enhances public respect for our system of civil justice; and educates society about our civil justice system and the civil issues facing the community at large. These factors are the goals intended to be met under the First Amendment, therefore courts should create a rebuttable presumption, in line with what this article argues should exist in criminal cases, that cameras are permitted in courtrooms in civil

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248 Lemons v. Skidmore, 985 F.2d 354, 357 (7th Cir. 1993) (citing MCI v. AT&T, 708 F.2d 1081, 1173 (7th Cir. 1983)).

249 130 S. Ct. 705 (2010).

250 *Id.* at 712-13.

251 *Id.* at 713.

252 *Id.*

253 *Id.*

cases. The risks inherent in media access to civil trials, such as the possibility that a party's fair trial rights will be compromised, that media presence will chill trial testimony, or that witnesses, litigants, judges, or attorneys will be harmed for the positions they take at trial, are less likely to occur than in criminal trials. The ability to close the trial to video coverage would still exist where a litigant can show a compelling interest which supports closure.

C. Cameras Should Have Been Permitted in the Prop 8 Trial Courtroom

With the concepts discussed in this article in mind, and with all administrative considerations aside,[254] the Supreme Court should have permitted camera access to the Prop 8 trial. Because the Court ruled on an administrative issue,[255] the topics in this paper were generally avoided. However, had the Court adopted this article's proposed rule—that a presumption of permissibility of cameras in civil courtrooms exists—rebuttable only by a compelling interest shown by the party seeking closure, then the Prop 8 trial should have been broadcast to various federal courtrooms around the country, and eventually broadcast on the Internet.

Under this article's analysis, the First Amendment grants the press and the public a right of access to civil proceedings, such as the Prop 8 trial. Along with this right of access comes a rebuttable presumption that cameras are permitted in civil proceedings. In order to ban cameras from the trial, therefore, the defendant-interveners would have to show that a compelling interest supports closure of the courtroom to cameras. In *Hollingsworth v. Perry*, the defendant-interveners alleged that fear of harm from opponents of Prop 8 would chill trial testimony if the Court allowed the trial to be broadcast.[256] Some witnesses had vowed not to testify if the trial was broadcast, citing instances of previous harassment for the positions they have taken on the issue.[257] Stating that "[i]t is difficult to demonstrate or analyze whether a witness would have testified differently if his or her testimony had not been broadcast[,] [a]nd witnesses subject to harassment as a result of broadcast of their testimony might be less likely to cooperate in any future proceedings[,]" the Court balanced the equities in favor of the defendant-interveners and barred broadcast of the trial.[258]

Justice Breyer, writing for four dissenting justices, disagreed with the majority's analysis regarding the potential harm to witnesses.[259] Justice Breyer

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254 While the Supreme Court ruled in favor of the defendant-interveners in *Hollingsworth v. Perry* on administrative grounds, this article will not endeavor to analyze whether that decision was correct. Instead, this article focuses only on what the Court should have done had it been forced to rule on the issue of cameras in the courtroom at trial.

255 Hollingsworth v. Perry, 130 S. Ct. 705, 706 (2010).

256 *Id.* at 712-13.

257 *Id.*

258 *Id.* at 713.

259 *Id.* at 718-19 (Breyer, J., dissenting).

noted that "[a]ll of the witnesses supporting the applicants are . . . publicly identified with their cause. They are all experts or advocates who have . . . appeared on television or [the] Internet[,] . . . toured the State advocating a 'yes' vote on Proposition 8, or . . . engaged in extensive public commentary . . . ."[260] Any of these actions were more likely to make these witnesses notorious in the eyes of their opponents than a closed-circuit video feed from one courthouse to another.[261] In addition, "hundreds of national and international newspapers [were] already covering [the] trial and reporting in detail the names and testimony of all of the witnesses."[262] Justice Breyer could see no increase in the harm to the witnesses by broadcasting the video of the trial on closed-circuit television.[263]

To satisfy the test created in this article, such that it would allow the defendant-interveners to block video broadcast of the trial, the defendant-interveners would be obligated to show that a compelling interest supported closing the trial to video broadcast and that the order blocking video broadcast was narrowly tailored to achieve that interest. While protection of witness testimony is certainly a compelling interest, as this article argues, the facts in *Hollingsworth v. Perry* do not give rise to a consideration that harm to witnesses was likely due to the video broadcast of the trial. The entire nation watched as Prop 8 passed on November 4, 2008, and public interest mounted when the civil complaint was filed to overturn it. The defendant-interveners were the face of Prop 8 throughout its journey from ballot initiative to constitutional amendment.[264] Those individuals did not fear harm while they were canvassing streets with "Yes on 8" posters, being interviewed on local and national news outlets about their positions, or fundraising to promote passage of the amendment. And none of the proposed witnesses actually sought relief themselves in *Hollingsworth v. Perry*, although they were permitted to do so.[265] Moreover, hundreds of news companies reported on the trial live from the courtroom gallery through Twitter, Facebook, and various blogs.[266] These news outlets identified the witnesses by name and paraphrased their testimony in real time.[267] This information was available to millions of readers on the Internet within seconds, while the closed-circuit video broadcast would only have increased the number of observers to the select number of people present in the various courtrooms. Simply put, the defendant-interveners failed to allege facts that supported their compelling interest.

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260 *Id.* at 718 (Breyer, J., dissenting).

261 Hollingsworth v. Perry, 130 S. Ct. 705, 718 (2010) (Breyer, J., dissenting).

262 *Id.* at 719 (Breyer, J., dissenting).

263 *Id.* (Breyer, J., dissenting).

264 *Id.* at 718-19 (Breyer, J., dissenting).

265 *Id.* at 718 (Breyer, J., dissenting).

266 *Id.* at 719 (Breyer, J., dissenting). *See also* David R. Fine, *Televising Trials: The Court's Ruling Against Broadcasting the Proposition 8 Trial Offers Slim Support for any Risk of Witness Intimidation*, 32 NAT'L L.J. 38 (2010).

267 Fine, *supra* note 266, at 38.

Even if the facts supported the compelling interest alleged, the government action—i.e. the order blocking video broadcast of the trial—was not narrowly tailored to support that interest. Often, in controversial cases, or in cases where there is an interest in maintaining confidentiality of the identities of witnesses or parties, courts will address various individuals by their initials or pseudonyms, such as John Doe or J.D. Both of these methods were available to the court. In addition, the court could have allowed audio and video of the trial while focusing the camera on inanimate objects such as the courtroom seal, or on the judge or lawyers involved, rather than the witnesses' faces. Any of these solutions is a less restrictive means of protecting the alleged compelling interest while still permitting video access to the courtroom. Of course, given the Court's decision on administrative grounds, these arguments must be saved for the next major civil case of national attention.

CONCLUSION

"[T]he . . . camera records precisely what it sees and nothing more."[268] In an age where interest in the law, and interest in how the law affects our daily lives, has never been higher, it is difficult to understand why some courts ban the only method by which the average American can obtain the whole story, unclouded by the perceptions of others. On issues of national magnitude, particularly civil cases alleging violations of constitutional rights, the public is interested. But, save for a select few individuals who are able to venture to a federal court, find a seat in the gallery, and watch as a controversial trial unfolds "live," most Americans must obtain their news on controversial cases by reading a reporter's or blogger's rendition of the trial events the next morning.

Americans are able to receive this information from reporters because, as asserted by the United States Supreme Court, the constitution guarantees it—at least for criminal matters where a defendant's fair trial rights are not compromised.[269] The Court has not made the same ruling in civil cases, having thus far avoided the question. Based on the history of openness in civil and criminal proceedings and the importance of public access to both civil and criminal proceedings, one can infer that the Supreme Court would extend the constitutional guarantees to civil cases as well.[270] Those constitutional concepts, however, do not yet guarantee video access to court proceedings. In fact, "no case . . . has [ever] held that the public has a right to televised trials."[271] The time has come to change

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[268] Hon. Gerald Kogan, Hon. Stanley Weisberg, & Rikki Klieman, *Television Coverage of State Criminal Trials*, 9 ST. THOMAS L. REV. 505, 506 (1997).

[269] *Compare* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (holding that a First Amendment right in the public and the press to access criminal proceedings exists) *with* Estes v. Texas, 381 U.S. 532 (1965) (holding that a defendant's fair trial rights must be protected, even if it involves closing courtroom access to television cameras).

[270] *See* notes 158-97 and accompanying text.

[271] Riemer, *supra* note 30, at 1293 (quoting Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d

that. With the technological advances of the YouTube age that allow video cameras and instant Internet uploads in the palm of one's hand, video access to courtrooms is not the disruption it once was. These cases will shape the lives of the American people. The courts simply need to let the people watch it all unfold.

16, 22 (1984)).