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# Hollingsworth v. Perry: The Supreme Court's Renewed Hostility toward Cameras in the Courtroom

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*HOLLINGSWORTH V. PERRY:*  
THE SUPREME COURT'S RENEWED HOSTILITY  
TOWARD CAMERAS IN THE COURTROOM  
by  
Lucas J. Myers

Submitted in partial fulfillment of the requirements of the  
King Scholar Program  
Michigan State University College of Law  
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## INTRODUCTION

There has long been debate over the propriety of having cameras in American courtrooms.<sup>1</sup> The interests involved are myriad, ranging from the rights of defendants to a public trial as guaranteed by the Sixth Amendment to the rights of the press as famously enshrined by the First Amendment—with many in between. As technology progresses from one generation to the next, so does this debate. Generally speaking, that progression has been from an initial prohibition of all camera use in court to a permissive stance that tolerates the use of cameras so long as certain interests, such as those in a fair trial, are protected. One need think only of the O.J. Simpson and Michael Jackson trials to know that American legal proceedings are more documented now than ever before, and far more accessible to the public.<sup>2</sup> Wider access has increased the public's appetite for transparency in American courtrooms, as evidenced by recurring bipartisan proposals seeking to permit video documentation of federal legal proceedings.<sup>3</sup> The latest such proposal, the Sunshine in the Courtroom Act of 2009, would authorize presiding judges to allow cameras in court except when to do so would violate the due process rights of any party.<sup>4</sup>

As evidenced by the legislation's repeated failure in Congress, however, there remain those who are very much against the notion of cameras in court.<sup>5</sup> Not least among these detractors are five members of the United States Supreme Court, which in *Hollingsworth v.*

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<sup>1</sup> See generally MARJORIE COHN & DAVID DOW, CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE (Roman & Littlefield 2002) (1998); RONALD L. GOLDFARB, TV OR NOT TV: TELEVISION, JUSTICE, AND THE COURTS (New York Univ. Press (1998); GERALD R. MILLER AND NORMAN E. FONTES, VIDEOTAPE ON TRIAL: A VIEW FROM THE JURY BOX (Sage Publications 1979), William O. Douglas, *The Public Trial and the Free Press*, 33 ROCKY MT. L. REV. 1 (1960).

<sup>2</sup> Court TV has televised hundreds of civil cases in areas ranging from torts, product liability, civil rights, parental custody, copyright, and sexual harassment. COURTROOM TELEVISION NETWORK, FACTS AND OPINIONS ABOUT CAMERAS IN COURTROOMS ii (1995).

<sup>3</sup> <http://www.govtrack.us/congress/bill.xpd?bill=s111-657&tab=related> (last visited March 26, 2010).

<sup>4</sup> <http://www.govtrack.us/congress/bill.xpd?bill=s111-657&tab=summary> (last visited March 26, 2010).

<sup>5</sup> <http://www.govtrack.us/congress/bill.xpd?bill=s111-657&tab=related> (last visited March 26, 2010).

*Perry* recently took the unusual step of intervening in the internal operations of a federal district court to prohibit the broadcasting of proceedings concerning the constitutionality of Proposition 8 in California.<sup>6</sup> This action attracted media scrutiny due to the controversy surrounding Proposition 8, a referendum passed in 2008 that amended the California constitution to prohibit homosexual marriage.<sup>7</sup> Advocates for greater transparency in American legal proceedings condemned the decision for denying the public its right to witness “a calm, deliberative debate on a vitally important issue.”<sup>8</sup> One legal observer speculated that the ban on cameras might outlast that particular trial.<sup>9</sup> This article similarly argues that the Court’s decision in *Perry* reflects a renewed and unjustified hostility toward the use of cameras in court that may limit the public’s access to federal legal proceedings for the foreseeable future.

Part I recounts the history of the debate over cameras in the courtroom, beginning with their popular emergence and initial prohibition in the first half of the twentieth century.<sup>10</sup> Part I proceeds with a discussion of state experimentation and the Supreme Court’s camera jurisprudence, concluding with an explication of its decision in *Florida v. Chandler*, in which it first upheld a program that permitted courtroom broadcasting. Part II analyzes the Court’s decision in *Perry*, beginning with the underlying facts and procedural history and concluding with a discussion of the Court’s legal analysis.<sup>11</sup> Part III examines the differences between the Court’s attitude toward cameras in *Perry* and *Chandler*, arguing that the Court’s renewed hostility is unjustified in light of technological developments, empirical research, programmatic improvements, and past precedent.<sup>12</sup>

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<sup>6</sup> *Hollingsworth v. Perry*, 130 S.Ct. 705 (2010).

<sup>7</sup> <http://www.nytimes.com/2010/01/14/opinion/14thu3.html> (last visited March 26, 2010).

<sup>8</sup> <http://www.nytimes.com/2010/01/14/opinion/14thu3.html> (last visited March 26, 2010).

<sup>9</sup> <http://www.scotusblog.com/2010/01/prop-8-court-tv-blocked/> (last visited March 26, 2010).

<sup>10</sup> See *infra* pp. 4-16.

<sup>11</sup> See *infra* pp. 16-23.

<sup>12</sup> See *infra* pp. 23-34.

## I. THE HISTORY OF THE DEBATE OVER CAMERAS IN THE COURTROOM

No one is certain when the camera first appeared in an American courtroom.<sup>13</sup> We do know that still photography of court proceedings was relatively common as early as the 1920s, particularly in tabloids.<sup>14</sup> At the outset, their use provoked controversy.<sup>15</sup> Two trials in particular unleashed a torrent of criticism: the Scopes Monkey Trial and the Hauptmann trial.<sup>16</sup> These trials were both previews of the sensational coverage that we experience today whenever a celebrity faces justice and harbingers of the prohibition of cameras in court.<sup>17</sup> The American Bar Association's adoption of Canon 35 of the Canons of Judicial Ethics in 1937 consequently sought to remove cameras from court altogether.<sup>18</sup> But individual states began to experiment on their own, prompting Supreme Court involvement to determine the constitutionality of particular state pilot programs.<sup>19</sup> Eventually, federal courts were permitted to experiment as well.<sup>20</sup> It was precisely that kind of federal experimentation that the Supreme Court prohibited in *Hollingsworth v. Perry*.

### A. Early Abuses and Complete Prohibition

Featuring two of the greatest lawyers of its time, the Scopes Monkey Trial pitted Clarence Darrow against William Jennings Bryan in the first trial ever broadcast over radio.<sup>21</sup> The defendant, a high school teacher named Thomas Scopes, stood accused of teaching

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<sup>13</sup> See COHN, *supra* note 1, at 14.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 14-15.

<sup>17</sup> *Id.* at 14.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

evolution in violation of a law that allowed only the teaching of creationism.<sup>22</sup> The presiding judge clearly relished the limelight, declaring at one point that his gavel would be heard around the world.<sup>23</sup> But while the Scopes Monkey Trial was largely a novelty in its time, it was the Hauptmann trial that “shaped legal attitudes on [the role of cameras in the courtroom] for decades.”<sup>24</sup> Bruno Richard Hauptmann was tried for kidnapping and murdering the son of famed aviator Charles Lindbergh.<sup>25</sup> Although this trial was widely condemned for its circus atmosphere, it is doubtful that the presence of cameras did much to lessen the decorum attending the proceedings.<sup>26</sup> No video imagery could be broadcast prior to the verdict, the court was usually packed well beyond capacity, and the “case was a magnet for the elite of the writing and broadcast world,” insuring that it would be well covered regardless of the imagery involved.<sup>27</sup> “There were also daily sightings of non-journalistic celebrities as the case assumed a chic role in New York society.”<sup>28</sup> The scene outside the courtroom was downright chaotic, as a crowd chanted “Kill Hauptmann!” while the jury deliberated inside.<sup>29</sup>

Press coverage of the trial was “excessive” and “frequently inflammatory,” reflecting the journalistic standards of the time.<sup>30</sup> Joseph Alsop of the *New York Herald Tribune* was required to write at least 10,000 words each day.<sup>31</sup> The Hearst Corporation paid the defense attorney’s retainer and signed Anna Hauptmann to an exclusive contract.<sup>32</sup> Still, Walter Lister of the *Philadelphia Evening Bulletin* could recall only one confirmed violation of the rule against

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<sup>22</sup> *Id.*

<sup>23</sup> *See* COHN, *supra* note 1, at 14.

<sup>24</sup> *Id.* at 15.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 16.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

photographing while the court was in session.<sup>33</sup> The American Bar Association nevertheless conducted an extensive investigation of camera and media involvement in the Hauptmann trial.<sup>34</sup> Joseph Costa, founder of the National Press Photographers Association, opined at the time that it was not the photography that was problematic, but the “very nature of the entire story” that generated the unruly environment.<sup>35</sup> Nevertheless, on September 27, 1937, the House of Delegates unanimously adopted Professional Ethics and Grievances Committee revised Canon 35, which called for a blanket ban on courtroom photography and radio broadcasting.<sup>36</sup> In 1952, the House of Delegates amended Canon 35 to prohibit television cameras as well.<sup>37</sup> Although lacking the force of law, Canon 35 proved very powerful, as by the 1950s only four states had moved toward permitting even limited camera coverage of legal proceedings.<sup>38</sup> Today, this prohibition persists in Rule 53 of the Federal Rules of Criminal Procedure, which prohibits photography and radio broadcasting in federal criminal trials.<sup>39</sup>

## B. Relaxation of the Prohibition by Individual States

Colorado was the first state to formally allow television cameras into the courtroom, following an effort by local members of the media to obtain such access.<sup>40</sup> After a steady stream of witnesses, many of whom were members of the media, testified in support of camera access,<sup>41</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> *See* COHN, *supra* note 1, at 17.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* Canon 35 read as follows:

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

*Id.*

<sup>38</sup> *Id.* Oklahoma, Kansas, Texas, and Colorado were the four states that initially moved toward allowing cameras in court during the 1950s. *Id.*

<sup>39</sup> FED. R. CRIM. P. 53.

<sup>40</sup> *See* COHN, *supra* note 1, at 18.

<sup>41</sup> *Id.*

the Colorado Supreme Court concluded that Canon 35 should not be strictly enforced in Colorado and issued a rule giving trial judges the discretion to grant camera access provided that no witness was required to have his picture taken or his testimony broadcast.<sup>42</sup> Justice Moore, speaking for the court, dismissed concerns about sensationalizing trials by embracing the potential for broadcasting to educate the public about the judiciary, stating, “There is no field of governmental activity concerning which the people are as poorly informed as the field occupied by the judiciary.”<sup>43</sup> He also articulated the view that “participants in legal proceedings are far more careful in their conduct and indulge in less bickering in those cases where cameras are permitted to operate under court supervision,” suggesting that the use of cameras would enhance both the accountability of the actors and the legitimacy of the proceedings.<sup>44</sup>

Justice Moore began by disposing with any analysis under the federal constitution because the applicable provision of the Colorado constitution was “more inclusive in its coverage of the subject and equally binding upon us.”<sup>45</sup> Cataloguing the constitutional interests at stake, he noted the inevitable tension between the freedom of speech and the right to a fair trial, but emphasized that there is no particular aspect of the judiciary that enables it, as distinguished from other democratic institutions, to censor its proceedings.<sup>46</sup> He also recognized the inherent authority and obligation of courts to forbid any conduct that might interfere with the orderly conduct of court procedure.<sup>47</sup> Before concluding that Canon 35 was too rigid an accommodation of these competing interests, the Court reasoned that “[i]n every case the power to regulate must not be arbitrarily imposed; it must be so exercised as not, in attaining a

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<sup>42</sup> *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 296 P.2d 465, 472 (Colo. 1956).

<sup>43</sup> *Id.* at 469.

<sup>44</sup> *Id.* at 470.

<sup>45</sup> *Id.* at 467.

<sup>46</sup> *Id.* (citing *Craig v. Harney*, 331 U.S. 367, 374 (1947) (“A trial is a public event. What transpires in the courtroom is public property. . . . There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.”)).

<sup>47</sup> *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 296 P.2d 465, 467 (Colo. 1956).

permissible end, unduly to infringe the protected freedom.”<sup>48</sup> Because Canon 35 improperly assumed that cameras would, in every case, interfere with the administration of justice, it unduly infringed on the freedom of the press.<sup>49</sup> It is noteworthy for a decision rendered in 1956 that the court was moved by the unobtrusive nature of the technology then available, with Justice Moore boasting, “There was nothing connected with the telecast [of the hearing] which was obtrusive. The dignity or decorum of the court was not in the least disturbed. Many persons entered and retired . . . without being aware that a live telecast was in progress.”<sup>50</sup>

In *Lyles v. State*, the Oklahoma Court of Criminal Appeals followed suit, expressly agreeing with the permissive rule adopted by the Colorado Supreme Court.<sup>51</sup> The court explained that the question of whether to permit courtroom broadcasting required it to balance the constitutional rights of free speech and to public trial, on the one hand, against the right of an accused to fair trial and the power of courts to maintain the essential dignity of their proceedings, on the other.<sup>52</sup> While acknowledging that courtroom disruptions should not be permitted, the court was also convinced that when done properly, courtroom broadcasting neither disturbs nor detracts from courtroom dignity or decorum.<sup>53</sup> The court also dismissed the privacy interests of the accused, citing ample precedent that persons accused of crime lose their right of privacy, in favor of the contention that broadcasting is necessary to educate the public about the judiciary.<sup>54</sup>

Decades later, following a year-long pilot program during which the media was permitted to broadcast state court proceedings, the Florida Supreme Court amended Canon 3A(7) of the Florida Code of Judicial Conduct to permit broadcasting of public judicial proceedings subject to

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<sup>48</sup> *Id.* at 468.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> 330 P.2d 734, 745 (Okla. Crim. App. 1958).

<sup>52</sup> *Id.* at 738-39.

<sup>53</sup> *Id.* at 742.

<sup>54</sup> *Id.* at 741.

the authority of the presiding judge.<sup>55</sup> Significantly, the amendment did not require that participants consent to the presence or use of broadcasting technology.<sup>56</sup> The court reasoned that neither the pilot program nor a survey of those involved therein showed any adverse effect upon the administration of justice.<sup>57</sup> Specifically, the court found that a study of the pilot program failed to establish that broadcasting causes excess disruption of court proceedings, exerts an adverse psychological effect on trial participants, exploits the courts for commercial or entertainment purposes, or results in unfair prejudicial publicity.<sup>58</sup> Resting its holding upon a firm commitment to open government, the court asserted that there is more to be gained than lost by permitting courtroom broadcasting.<sup>59</sup> In *Florida v. Chandler*, the United States Supreme Court would later uphold the constitutionality of this particular program, giving states the green light to permit courtroom broadcasting under appropriate circumstances.<sup>60</sup>

### C. The Supreme Court's Courtroom Broadcasting Jurisprudence

It is well settled that there is no constitutional right to broadcast, record, or photograph court proceedings.<sup>61</sup> It is equally well settled that the Sixth Amendment right of an accused to a public trial is satisfied by the mere opportunity of members of the public and the press to attend the trial and to report what they have observed.<sup>62</sup> Although *Estes v. Texas*,<sup>63</sup> the Court's first decision to squarely address the matter of courtroom broadcasting, initially stood for the proposition that broadcasting a trial denies due process to an accused, *Chandler* made clear that courtroom broadcasting does not inherently deny the due process rights of an accused. Whereas

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<sup>55</sup> *In re* Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764, 792 (Fla. 1979).

<sup>56</sup> *Id.* Such consent could not practically be obtained. *Id.*

<sup>57</sup> *Id.* at 780.

<sup>58</sup> *Id.* at 774-78.

<sup>59</sup> *Id.* at 780. "The prime motivating consideration prompting our conclusion is this state's commitment to open government." *Id.*

<sup>60</sup> 449 U.S. 560 (1981).

<sup>61</sup> *Van Orden v. Indiana*, 471 U.S. 1104 (1985).

<sup>62</sup> *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

<sup>63</sup> 381 U.S. 532 (1965).

the Court broadly upheld the constitutionality of Florida’s carefully crafted broadcasting regime in *Chandler*, it had previously condemned the use of cameras in the trial of Billie Estes, holding that their use deprived him of due process under the Fourteenth Amendment by compromising the decorum and dignity of the proceedings.<sup>64</sup>

1. *The Estes Court’s Analysis of the Constitutionality of Courtroom Broadcasting*

Authorities charged Billie Estes with swindling certain Texas farmers into purchasing equipment that did not exist.<sup>65</sup> Intense pretrial publicity resulted in national notoriety for Estes and created such local buzz that the trial venue was changed to a location some 500 miles west.<sup>66</sup> The pretrial proceedings were broadcast live by both radio and television.<sup>67</sup> At least a dozen cameramen were active in the courtroom, cables and wires “snaked across the courtroom floor,” and the parties conceded that the media presence “led to considerable disruption of the hearings.”<sup>68</sup> The extensive publicity “could only have impressed those present, and also the community at large, with the notorious character of the petitioner as well as the proceeding.”<sup>69</sup> Put simply, Estes did not receive “that judicial serenity and calm to which [he] was entitled.”<sup>70</sup> By the time of trial, the media constructed a booth at the back of the courtroom that was painted to blend in and that featured an aperture through which a camera lens protruded.<sup>71</sup> Throughout the trial, there were frequent objections over how the proceedings were covered, resulting in changes to the rules “as the exigencies of the situation seemed to require.”<sup>72</sup> As a result, only the

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<sup>64</sup> *Id.* at 551.

<sup>65</sup> *Id.* at 534.

<sup>66</sup> *Id.* at 535.

<sup>67</sup> *Id.* at 536.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 537.

<sup>72</sup> *Id.*

opening and closing arguments of the State were broadcast live with sound.<sup>73</sup> At the defendant's request, the trial judge prohibited any broadcast of arguments by defense counsel.<sup>74</sup>

The Court began its analysis by noting that the preeminent purpose of all court proceedings is “endeavoring to ascertain the truth which is the sine qua non of a fair trial.”<sup>75</sup> It then recounted the reigning prohibition on broadcasting criminal trials, save in Colorado in Oklahoma under certain circumstances, as “weighty evidence that our concepts of a fair trial do not tolerate such an indulgence.”<sup>76</sup> Declaring that the atmosphere of dignity and decorum “must be maintained at all costs,” the Court proceeded to examine arguments in favor of courtroom broadcasting.<sup>77</sup> Rejecting the argument that the public has a right to be informed about the workings of the judiciary as proving too much, the Court reasoned that media of all stripes were equally free to attend and report on legal proceedings, satisfying the right to a public trial.<sup>78</sup> In reply to the State's argument that *Estes* was unable to show “isolatable prejudice” and that a showing of actual prejudice was required for reversal, the Court noted that some procedures employed by the State involved a sufficient “probability that prejudice will result that it is deemed inherently lacking in due process.”<sup>79</sup> Analogizing the broadcasting of *Estes*' trial to scenarios where the police serve as both witnesses against the accused and escorts for the jury,<sup>80</sup> the Court held the use of cameras under these circumstances to be “inherently suspect” and therefore violative of due process.<sup>81</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 540.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 541-42 (citing *Bridges v. California*, 314 U.S. 252 (1941)).

<sup>79</sup> *Estes*, 381 U.S. at 542-43.

<sup>80</sup> *Id.* at 544 (citing *Turner v. Louisiana*, 379 U.S. 466 (1965)).

<sup>81</sup> *Estes*, 381 U.S. at 544.

The Court then identified the constitutional dangers associated with courtroom broadcasting.<sup>82</sup> It listed the effect of broadcasting on jurors as “perhaps of the greatest significance,” asserting that “[f]rom the moment the trial judge announces that a case will be televised it becomes a cause celebre.”<sup>83</sup> The court was concerned about the conscious or unconscious effect on juror judgment since “realistically it is only the notorious trial which will be broadcast.”<sup>84</sup> Jurors will be unable to “help but feel the pressures of knowing that friends and neighbors have their eyes upon them.”<sup>85</sup> It next identified the reduced quality of witness testimony as a potential danger, noting that some witnesses may be “demoralized and frightened, some cocky and given to overstatement.”<sup>86</sup> The distractions levied upon the trial judge were also of concern, given the need for the judge presiding over the Estes trial to frequently consider and rule upon objections concerning courtroom broadcasting.<sup>87</sup>

Lastly, the Court expressed concern over the impact of broadcasting on the defendant in a criminal trial, asserting that “[t]he inevitable close-ups of his gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before him.”<sup>88</sup> In addition to the prejudice that would “inevitably result” from the heightened public clamor, defendants may be deprived of effective assistance of counsel as his attorney might resort to professional showmanship.<sup>89</sup> The Court refused to afford weight to these considerations simply because they were psychological hypotheticals, instead acknowledging that “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

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<sup>82</sup> *Id.* at 544-50.

<sup>83</sup> *Id.* at 545.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 547.

<sup>87</sup> *Id.* at 548.

<sup>88</sup> *Id.* at 549.

<sup>89</sup> *Id.*

of criminal trials.”<sup>90</sup> Importantly, Justice Harlan, who furnished the fifth vote in *Estes*, subscribed to the Court’s opinion on the premise that it was limited to “cases like this one” and predicted that “the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process.”<sup>91</sup>

## 2. *The Chandler Court’s Analysis of the Constitutionality of Courtroom Broadcasting*

Twenty-five years later, the Court revisited its constitutional analysis of courtroom broadcasting in *Florida v. Chandler*, upholding the constitutionality of Florida’s pilot program, which permitted the broadcasting of all judicial proceedings even absent the consent of the parties.<sup>92</sup> As discussed previously, the Florida Supreme Court amended its rules to permit courtroom broadcasting following a yearlong experimental period running from July 1977 to June 1978.<sup>93</sup> The amended rule provided specific implementing guidelines that restricted media to one camera, required pooling amongst the media, banned artificial lighting, required that equipment not be moved, and prohibited coverage of conversations between parties and counsel and of the jury altogether.<sup>94</sup> The judge was given power to “forbid coverage whenever satisfied that [it] may have a deleterious effect on the paramount right of the defendant to a fair trial.”<sup>95</sup>

The defendants were Miami Beach policemen charged with conspiracy to commit burglary.<sup>96</sup> They were caught by an amateur radio operator “who, by sheer chance, had overheard and recorded conversations . . . over their police walkie-talkie radios during the

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<sup>90</sup> *Id.* at 551-52.

<sup>91</sup> *Id.* at 595-96 (Harlan, J., concurring).

<sup>92</sup> *Chandler*, 449 U.S. 560 (1981).

<sup>93</sup> *Id.* at 565.

<sup>94</sup> *Id.* at 566.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 567.

burglary.”<sup>97</sup> The media response to these “novel factors” was predictable, as the case attracted much attention from local media outlets.<sup>98</sup> The defendants unsuccessfully sought to have the amended Florida rule declared unconstitutional both on its face and as applied.<sup>99</sup> Each juror was instead asked whether the media coverage would affect his or her judgment and each responded in the negative.<sup>100</sup> The court further instructed the jury to avoid the local news.<sup>101</sup>

The Court began its analysis by rejecting the argument that *Estes* announced a per se constitutional rule that courtroom broadcasting is inherently a denial of due process, emphasizing the confining nature of Justice Harlan’s concurrence.<sup>102</sup> The Court then gave its reasons for not announcing such a per se rule, as the defendants requested. Echoing the Colorado Supreme Court’s concern that an absolute ban would needlessly infringe on protected liberties, the Court declared, “An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matters.”<sup>103</sup> Seeming to reject language in *Estes*, the Court argued that cases attract publicity not because of a decision to allow courtroom broadcasting, but instead “because of [their] intrinsic interest to the public and the manner of reporting the event.”<sup>104</sup>

The Court then took notice of numerous amici briefs “in support of continuing experimentation such as that embarked upon by Florida,” as well as of “the change in television

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 573. “Justice Harlan’s opinion . . . must be read as defining the scope of that holding; we conclude that *Estes* is not to be read as announcing a constitutional rule barring still photographic, radio, and television coverage in all cases and under all circumstances.” *Id.*

<sup>103</sup> *Id.* at 574-75.

<sup>104</sup> *Id.* at 575.

technology since 1962, when *Estes* was tried.”<sup>105</sup> No longer was the technology itself disruptive, for the “cumbersome equipment, cables, distracting lighting, [and] numerous camera technicians” were strictly creatures of the past.<sup>106</sup> Additionally, empirical evidence had come to support the proposition that a per se ban on all courtroom broadcasting was needlessly harsh to other constitutional interests.<sup>107</sup> After conceding that the research remained limited, the Court observed, “Still, it is noteworthy that the data now available do not support the proposition that, in every case and in all circumstances, electronic coverage creates a significant adverse effect upon the participants in trials—at least not one uniquely associated with electronic coverage as opposed to more traditional forms . . . .”<sup>108</sup>

The Court also thought significant the many safeguards built in “to avoid some of the most egregious problems envisioned . . . in the *Estes* case,” noting that the amended rule admonished Florida judges to protect certain vulnerable classes of witnesses and to enforce the right of the accused to a fair trial.<sup>109</sup> The amended rule further required that objections by the accused be heard and decided on the record by the trial court, giving the accused an opportunity to appeal and show that courtroom broadcasting unfairly prejudiced his particular trial.<sup>110</sup> Thus, because the defendants failed to show that broadcasting was inherently prejudicial or that it actually prejudiced their trial,<sup>111</sup> there were no grounds to adopt a per se constitutional ban that would offend basic notions of federalism by ending further state experimentation in the field.<sup>112</sup> Emphasizing the limits of its authority in the debate over courtroom broadcasting, the Court

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<sup>105</sup> *Id.* at 576.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 576 n.11.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 576-77.

<sup>110</sup> *Id.* at 577.

<sup>111</sup> *Id.* at 578-79.

<sup>112</sup> *Id.* at 579-80.

remarked, “Absent a showing of prejudice of constitutional dimensions to these defendants, there is no reason for this Court either to endorse or to invalidate Florida’s experiment.”<sup>113</sup>

## II. THE COURT’S DECISION IN *PERRY*

In *Hollingsworth v. Perry*, the Supreme Court addressed the matter of courtroom broadcasting for the third time, albeit indirectly. In staying the broadcast of the proceedings below, the Court insisted that it was not “expressing any view on whether such trials should be broadcast,”<sup>114</sup> but instead confining itself strictly to the question of “whether the District Court’s amendment of its local rules to broadcast this trial complied with federal law.”<sup>115</sup> The Court’s analysis of whether irreparable harm would result from the denial of a stay nonetheless featured a discussion of courtroom broadcasting that reflects a shift away from its tolerant approach in *Florida v. Chandler*.<sup>116</sup> The Court conceded that “[t]he arguments in favor of developing procedures and rules to allow broadcast of certain cases have considerable merit.”<sup>117</sup> Still, because the case “involv[ed] issues subject to intense debate in our society” and the district court intended to broadcast witness testimony, the Court concluded that “[t]his case is therefore not a good one for a pilot program,” suggesting that any high-profile case of great public import will be inappropriate for broadcasting.<sup>118</sup>

### A. The Factual and Procedural History of *Perry*

In November 2008, California voters passed Proposition 8, which amended the State Constitution to say that “[o]nly marriage between a man and a woman is valid or recognized in California.”<sup>119</sup> Gay rights advocates promptly filed suit alleging that the amendment violates the

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<sup>113</sup> *Id.* at 582.

<sup>114</sup> *Hollingsworth v. Perry*, 130 S.Ct. 705, 706 (2010)

<sup>115</sup> *Id.* at 709.

<sup>116</sup> *Id.* at 712-14.

<sup>117</sup> *Id.* at 713.

<sup>118</sup> *Id.* at 714.

<sup>119</sup> CAL. CONST. ART. I, §7.5.

Equal Protection and Due Process Clauses of the United States Constitution. The State of California declined to defend Proposition 8's constitutionality, at which point the amendment's proponents intervened to defend its constitutionality.<sup>120</sup> On September 25, 2009, Chief Judge Walker of the Northern District Court of California informed the parties at a hearing of the public interest in broadcasting the proceedings, noting that related Judicial Conference positions may well change to accommodate that interest.<sup>121</sup> Meanwhile, with this case in mind, a committee of judges recommended to the Ninth Circuit Judicial Council that district courts be allowed to experiment with courtroom broadcasting.<sup>122</sup> On December 17, 2009, the Judicial Council announced its approval of such a pilot program, amending a 1996 policy that had banned all photography of Ninth Circuit court proceedings.<sup>123</sup>

On December 21, a group of media companies officially requested permission from the district court to televise the trial challenging Proposition 8.<sup>124</sup> Two days later, on its website, the court amended a local rule banning courtroom broadcasting to allow for participation in the pilot program or other projects authorized by the Judicial Council.<sup>125</sup> On December 31, that amendment was removed and a new announcement was posted stating that a proposed revision to the local rule had been approved for public comment.<sup>126</sup> The proposed revision was the same as the previously announced amendment.<sup>127</sup> Comments were welcome until January 8, 2010.<sup>128</sup> But on January 4, the court again revised the posting, declaring that the revised local rule was effective as of December 22, 2009, pursuant to an "immediate need" provision that obviated the

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<sup>120</sup> *Perry*, 130 S.Ct. at 707.

<sup>121</sup> *Id.* at 708.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

need for prior notice and comment.<sup>129</sup> After a hearing held on January 6 regarding the recording and broadcasting of the upcoming trial, the court announced that the trial proceedings, set to begin January 11, would be streamed live to certain other federal courthouses.<sup>130</sup> On January 7, the court formally requested inclusion of the trial in the pilot program “subject to the terms and conditions discussed at the . . . hearing.”<sup>131</sup> The applicants simultaneously filed a petition for a writ of mandamus seeking to stay the district court’s order.<sup>132</sup> The next day, a three-judge panel of the Ninth Circuit denied the petition and issued an order approving the decision to broadcast the trial simultaneously to five federal courthouses.<sup>133</sup> On January 9, 2010, the applicants filed an application for a stay of the district court’s order with the United States Supreme Court.<sup>134</sup>

#### B. The *Perry* Court’s Majority Opinion<sup>135</sup>

In a per curiam opinion, the Court opened its analysis by again insisting, “We do not here express any views on the propriety of broadcasting court proceedings generally.”<sup>136</sup> The Court then proceeded by setting forth the law on obtaining stays pending the filing and disposition of petitions for writs of certiorari and mandamus, noting first that the applicants had “shown a fair prospect that a majority of this Court” would later grant such petitions.<sup>137</sup> The only remaining consideration under the Court’s rubric for deciding whether a stay should issue was “the likelihood that irreparable harm will result from the denial of a stay.”<sup>138</sup> But before tackling that

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<sup>129</sup> *Id.*

<sup>130</sup> *Perry*, 130 S.Ct. at 709.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* The courthouses were in the cities of San Francisco, Pasadena, Portland, Seattle, and Brooklyn. *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> The per curiam opinion was joined by Chief Justice Roberts and justices Kennedy, Scalia, Thomas, and Alito.

<sup>136</sup> *Perry*, 130 S.Ct. at 709.

<sup>137</sup> *Id.* at 710

<sup>138</sup> *Id.*

question directly, the Court addressed the applicants' allegation that the district court violated federal law in promulgating its revised local rule.<sup>139</sup>

Although district courts have discretion to adopt local rules, the Court reasoned, federal law requires that they follow certain procedures to adopt or amend a local rule.<sup>140</sup> Specifically, “[l]ocal rules typically may not be amended unless the district court ‘giv[es] appropriate public notice and an opportunity for comment.’”<sup>141</sup> A limited exception allows courts to dispense with prior notice and comment where “there is an immediate need for a rule.”<sup>142</sup> The Court then concluded that the amended local rule was invalid due to the district court’s failure to provide for an appropriate notice and comment period, complaining that only “five business days” were given for notice and comment.<sup>143</sup> The court then juxtaposed the functions of a district court with those of an administrative agency engaged in rulemaking, noting that agencies “usually” allow thirty days for comment.<sup>144</sup> The Court dismissed the argument that the parties were alerted and permitted to brief on the subject as early as September 25, 2009, three months before the rule change, noting that the first public announcement did not arise until December 23, 2009.<sup>145</sup> Without any citation to legal precedent or reference to legislative intent, the Court declared that

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* (citing 28 U.S.C. § 2071(b)). Section 2071 pertains to the rulemaking authority of courts generally. Subsection 2071(b) reads:

Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

*Id.* There are no reported cases that address the meaning of “appropriate” within the specific context of a local rule promulgated by a district court.

<sup>142</sup> *Perry*, 130 S.Ct. at 710 (citing 28 U.S.C. § 2071(e)). Subsection 2071(e) reads, “If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.” *Id.* There are no reported cases detailing what constitutes an “immediate need.”

<sup>143</sup> *Perry*, 130 S.Ct. at 711.

<sup>144</sup> *Id.* (quoting *River-Bend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992)).

<sup>145</sup> *Perry*, 130 S.Ct. at 711.

the period allowed by the district court fell “far short” of the appropriate notice and comment required under the statute governing rulemaking by the courts.<sup>146</sup>

Emphasizing the importance of this reasoning to its holding, the Court remarked that “[t]he need for a meaningful comment period was particularly acute in this case” because “courts and legislatures have proceeded with appropriate caution in addressing this question.”<sup>147</sup> The Court then cited a multiyear study of the issue by the Federal Judicial Center which concluded simply that “the intimidating effect of cameras on some witness and jurors [is] cause for concern.”<sup>148</sup> The fact that the Judicial Conference had continued to adhere to its position on courtroom broadcasting also, the Court argued, reinforced the importance of adopting “a proposed rule only after notice and an adequate period for public comment.”<sup>149</sup>

As for the argument that notice and comment was unnecessary under the “immediate need” exception, the Court declared that the district court’s desire to conform its rules with those of the Ninth Circuit Judicial Conference in order to broadcast the trial did not qualify as an immediate need, again without citation to legal precedent or legislative intent.<sup>150</sup> The Court again likened this situation to that of an administrative agency and concluded that the exception “likely” would not have been available to an agency.<sup>151</sup> The Court also asserted that the original local rule prohibiting all photography was not inconsistent with the pilot program adopted by the Ninth Circuit Judicial Conference, remarking that “nothing in that program . . . required any ‘immediate’ revision in local rules.”<sup>152</sup> Thus, the district court should simply have allowed more

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 712.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* (citing 5 U.S.C. § 553(b)(B), which says that agencies cannot invoke an exception to notice and comment unless the procedures involved would be impracticable, unnecessary, or contrary to the public interest).

<sup>152</sup> *Perry*, 130 S.Ct. at 712.

time for comment if it wished to change the rule, notwithstanding any resulting inability to broadcast a trial of great public interest.<sup>153</sup>

Having concluded the revised local rule was invalid, the Court proceeded to weigh the balance of equities pertaining to the applicants' request for a stay.<sup>154</sup> Here the Court detoured from its analysis of the "narrow legal issue"<sup>155</sup> of whether the procedure employed by the district court violated federal law to discuss the relative merit of broadcasting in this particular case. The Court began with the conclusion that "[i]t would be difficult—if not impossible—to reverse the harm from those broadcasts."<sup>156</sup> In support of this assertion, the Court noted that the trial would feature numerous witnesses, specifically mentioning same-sex couples, academics, and those who participated in the campaign to adopt Proposition 8.<sup>157</sup> Then, citing *Estes*, the Court noted its prior recognition that "witness testimony *may* be chilled if broadcast."<sup>158</sup> The Court elaborated, "Some of applicants' witnesses have already said that they will not testify if the trial is broadcast, and they have substantiated their concerns by citing incidents of past harassment."<sup>159</sup>

Without demonstrating how courtroom broadcasting would exacerbate these matters given the high profile these witnesses already had,<sup>160</sup> the Court opined that "[t]here are qualitative differences between making public appearances regarding an issue and having one's testimony broadcast *throughout the country*."<sup>161</sup> This claim is difficult to reconcile with the facts of this case, for these supporters were already the subject of so much publicity that any

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 712-14.

<sup>155</sup> *Id.* at 709.

<sup>156</sup> *Id.* at 712.

<sup>157</sup> *Id.* at 712-13.

<sup>158</sup> *Id.* at 713 (citing *Estes v. Texas*, 381 U.S. 432, 547 (1965)) (emphasis added).

<sup>159</sup> *Perry*, 130 S.Ct. at 713.

<sup>160</sup> Indeed, the applicants provided 71 news articles showing incidents of harassment of supporters of Proposition 8, indicating just how public their identities already were. *Id.*

<sup>161</sup> *Id.* (emphasis added).

additional attention would be marginal at most.<sup>162</sup> Nonetheless, the Court continued, claiming 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.”<sup>163</sup> The Court made no reference to any empirical research or literature to support its conclusion. Next, the Court noted that “witnesses subject to harassment *as a result* of broadcast of their testimony might be less likely to cooperate in any future proceeding,” again without any empirical or other support.<sup>164</sup>

The Court then briefly disposed of the public interest in courtroom broadcasting, noting that “respondents have not alleged any harm if the trial *is not* broadcast.”<sup>165</sup> It also claimed a “significant interest in supervising the administration of the judicial system” and a duty to invalidate local rules that violate federal law that is “particularly acute when those rules relate to the integrity of judicial processes.”<sup>166</sup> In concluding, the Court stressed that “the order in question complied neither with existing rules or policies nor the required procedures for amending them.”<sup>167</sup> The lack of a regular rule thus threatened the dignity and decorum “that courts rely upon to ensure the integrity of their own judgments.”<sup>168</sup> The Court then elaborated further, noting that even had the local rule been revised properly, questions would remain about the propriety of broadcasting “this particular trial, in which several of the witnesses have stated concerns for their own security.”<sup>169</sup> Citing favorably to instances of courtroom broadcasting that were not “high profile” or did not involve witnesses, the Court concluded that this case was not

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<sup>162</sup> Indeed, the Court says as much earlier in its opinion, when it noted that donors supporting Proposition 8 were being systematically and publically identified on websites designed to promote boycotts and other protests. *Id.* at 707.

<sup>163</sup> *Id.* at 713.

<sup>164</sup> *Id.* (emphasis added).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 714.

appropriate for broadcasting in any event.<sup>170</sup> “Even the studies that have been conducted thus far have not analyzed the effect of broadcasting in high-profile, divisive cases,” the Court added, raising the bar on future courtroom broadcasting.<sup>171</sup>

### III. THE *PERRY* COURT’S UNJUSTIFIED HOSTILITY TOWARD COURTROOM BROADCASTING

Although the Court insisted that it was not addressing the merits of courtroom broadcasting, one cannot help but feel that its opinion reflects a renewed hostility toward the prospect of cameras in the courtroom, even under circumstances that minimize the dangers initially recognized in *Estes*. The Court insisted that the potential effect on witness testimony and safety was its overriding concern when the facts cited by the Court ably demonstrated that courtroom broadcasting would at most incrementally increase the level of publicity involved. Ignoring the weight of empirical evidence and legal precedent in support of broadcasting courtroom proceedings, the Court instead rested its holding on the dubious proposition that the revised local rule was promulgated with inadequate notice and comment and therefore invalid. This action is beyond compare in the Court’s precedent, for it has never before micromanaged the internal affairs of a district court in such a manner.<sup>172</sup> The Court also overlooked historical and technological developments that work to mitigate the dangers of courtroom broadcasting, in spite of prior promises to the contrary in both *Estes* and *Chandler*.

#### A. The *Perry* Court’s Renewed Hostility toward Cameras in Court: A Return to *Estes*

In a vigorous dissent joined by justices Stevens, Ginsburg, and Sotomayor, Justice Breyer took issue with nearly every assertion made by the Court in its analysis of both the narrow legal issue of whether the district court amended its local rule properly and the broader question of

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Perry*, 130 S.Ct. at 718 (Breyer, J. dissenting).

whether courtroom broadcasting would work irreparable harm on the applicants.<sup>173</sup> On the question of courtroom broadcasting, Justice Breyer aptly acknowledged that “the wisdom of a camera policy is primarily a matter for the proper administrative bodies to determine. This Court has no legal authority to address that larger policy question *except insofar as it implicates a question of law.*”<sup>174</sup> Noting that the only legal principle that invokes that policy question here is the nature of the harm at issue and the resulting balance of equities, including the public interest, Justice Breyer first addressed the harms alleged by the Court.<sup>175</sup> Finding no basis for the Court’s conclusion, he asserted, “Certainly there is no evidence that such harm could arise in this nonjury civil case from the simple fact of transmission itself.”<sup>176</sup> Then, citing to *Chandler*, he pointed out that the applicants were unable to produce any empirical data to suggest that courtroom broadcasting inherently has an adverse effect on legal proceedings.<sup>177</sup> Finally, any harm to the parties would be reparable through appeal.<sup>178</sup>

Given these considerations, Justice Breyer could not see how any fair balancing of the equities weighed in favor of the applicants, for the applicants’ equities consisted solely of potential harm to witnesses that was “either nonexistent or that [could] be cured through protective measures . . . .”<sup>179</sup> On the other side of the ledger, the competing equities included both the plaintiff’s interest in broadcasting the proceedings but also “the public’s interest in observing trial proceedings to learn about this case and about how courts work.”<sup>180</sup> Observing that the Court’s institutional competence, historical practice, and governing precedent all

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<sup>173</sup> *Id.* at 715.

<sup>174</sup> *Id.* at 718.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* (citing *Chandler v. Florida*, 449 U.S. 560, 578-79 (1981)).

<sup>178</sup> *Perry*, 130 S.Ct. at 718 (Breyer, J. dissenting).

<sup>179</sup> *Id.* at 719.

<sup>180</sup> *Id.*

counseled “strongly against the issue of this stay,” Justice Breyer concluded that the “scales tip heavily against, not in favor, of issuing the stay.”<sup>181</sup>

Indeed, the Court made no reference to any of the countervailing equities listed by Justice Breyer, allowing no room for the public interest in courtroom broadcasting in its analysis. Although the Court’s due process analysis of courtroom broadcasting in *Estes* and *Chandler* properly omitted reference to the public interest therein, the balancing of equities in *Perry* called for the inclusion of that consideration. In *Perry*, the proceeding involved no criminal defendant with due process rights uniquely sensitive to prejudice by way of courtroom broadcasting. Rather, the proceeding concerned one of the most controversial and debated subjects of our time: whether homosexual couples should have the right to marry. One can think of few cases that are of such interest to the public, yet the Court counted the public interest not at all in its balancing of the equities. On the contrary, the Court strongly implied that any controversial case of great public interest would be inappropriate for courtroom broadcasting, effectively inverting that consideration.<sup>182</sup> This deviated noticeably from the approach taken by the *Chandler* Court, which recognized that cases attract publicity “because of [their] intrinsic interest to the public,” not because of courtroom broadcasting itself.<sup>183</sup> Thus, while the *Chandler* Court appreciated that any increased publicity would be marginal in high-profile cases, the *Perry* Court concluded simply that any increased publicity in such cases was unacceptable. Although it is true that the *Chandler* Court also placed great weight on the numerous safeguards established by the Florida Supreme Court,<sup>184</sup> the *Perry* Court made no mention of that either, perhaps because Ninth Circuit

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<sup>181</sup> *Id.*

<sup>182</sup> *Perry*, 130 S.Ct. at 714.

<sup>183</sup> *Chandler*, 449 U.S. at 575.

<sup>184</sup> *Id.* at 576-77.

judges had experience directing the broadcast of civil nonjury trials<sup>185</sup> and the “terms and conditions” had been discussed with the parties at the hearing of January 6, 2010, presumably resolving such concerns.<sup>186</sup>

Just as the *Perry* Court deviated from the forward-looking approach of *Chandler*, it returned to the blanket hostility characteristic of *Estes*. To be sure, the *Perry* Court’s failure to recognize the public’s interest in observing the proceedings was akin to the *Estes* Court’s rejection of that consideration outright,<sup>187</sup> though in *Perry* the federal pilot program was explicitly created to satisfy the public’s interest in the proceedings,<sup>188</sup> as was the case in *Chandler*.<sup>189</sup> But while the Court’s concerns about courtroom broadcasting in *Estes* were perhaps justified in the name of caution, its unsupported assertion in *Perry* that broadcasting would work irreparable harm to the applicants’ witnesses is outdated in light of the sheer weight of precedent, logic, and empirical literature suggesting that the effect on witnesses is nominal. Gone are the days of unwieldy technology that inevitably disrupts the proceedings.<sup>190</sup> No longer is society unfamiliar with or intimidated by broadcasting technology.<sup>191</sup> Yet the majority opinion, which cited to *Estes* but not *Chandler*, seemed to adopt the *Estes* position that it was the fact of courtroom broadcasting that made a case a “cause celebre,”<sup>192</sup> rather than the intrinsic nature of the case itself, when it suggested that any broadcast of a high-profile case was

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<sup>185</sup> *Perry*, 130 S.Ct. at 715-16 (Breyer, J. dissenting).

<sup>186</sup> *Perry*, 130 S.Ct. at 709.

<sup>187</sup> *Estes v. Texas*, 381 U.S. 532, 541-42 (1965).

<sup>188</sup> *Perry*, 130 S.Ct. at 708. Indeed, Chief Judge Walker of the Ninth Circuit Judicial Conference said that this particular case “was very much in mind at that time because it had come to prominence then and was thought to be an ideal candidate for consideration.” *Id.*

<sup>189</sup> *Chandler*, 449 U.S. at 565-66. “The Florida court was of the view that because of the significant effect of the courts on . . . the citizenry, it was essential that the people have the confidence in the process. It felt that broadcast coverage of trials would contribute to wider public acceptance and understanding of the decisions.” *Id.*

<sup>190</sup> *Estes*, 381 U.S. at 536.

<sup>191</sup> *Id.* at 595-96 (Harlan, J., concurring). “[T]he day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process.” *Id.* Clearly, that day has arrived.

<sup>192</sup> *Estes*, 381 U.S. at 545.

unacceptable.<sup>193</sup> While that may have been true in the days of the Scopes Monkey and Hauptmann trials, when a radio broadcast of legal proceedings counted as popular entertainment, the same cannot be said today. Many of the *Estes* Court’s statements regarding the impact of courtroom broadcasting on witnesses, jurors, and other participants have since been debunked by empirical research.<sup>194</sup> Furthermore, the concern of “greatest significance” to the *Estes* Court—the effect of broadcasting on jurors<sup>195</sup>—was of course no concern at all in *Perry*. Nevertheless, the *Perry* Court adopted the presumption in *Estes* that prejudice would “inevitably result” from the heightened public clamor,<sup>196</sup> despite its incongruity with the facts of the case, which suggest that the witnesses would suffer little or no additional publicity as a result.<sup>197</sup> This renewed hostility toward courtroom broadcasting is thus unjustified.

#### B. The Court’s Exaggeration of the Effect on Witness Testimony and Other Potential Harms Involved

The Court’s argument that courtroom broadcasting will work irreparable harm to the witnesses themselves, “presumably by increasing the public’s awareness of who those witnesses are,” fails upon closer scrutiny.<sup>198</sup> It is claimed that testifying before a limited broadcast to five other courthouses, as opposed to simply testifying publicly in a room full of hundreds, is qualitatively different.<sup>199</sup> The Court speculated further that courtroom broadcasting may lead to violence against witnesses, thus discouraging any future participation.<sup>200</sup> But, as Justice Breyer

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<sup>193</sup> *Perry*, 130 S.Ct. at 714.

<sup>194</sup> See COHN, *supra* note 1, at 62-64.

<sup>195</sup> *Estes*, 381 U.S. 532 at 545.

<sup>196</sup> *Id.* at 549.

<sup>197</sup> *Perry*, 130 S.Ct. at 719 (Breyer, J. dissenting).

<sup>198</sup> *Id.* at 718.

<sup>199</sup> *Perry*, 130 S.Ct. at 713.

<sup>200</sup> *Id.*

pointed out, the witnesses did not ask the Court to set aside the order, even though they were entitled to do so.<sup>201</sup> “And that is not surprising,” he reasoned:

All of the witnesses supporting the applicants are already publicly identified with their cause. They are all experts or advocates who have either already appeared on television or Internet broadcasts, already toured the State advocating a “yes” vote on Proposition 8, or already engaged in extensive public commentary far more likely to make them well known than a close circuit broadcast to another federal courthouse.<sup>202</sup>

Moreover, the possibility of irreparable harm is further reduced by the mere fact that the order in question only increases the viewing audience from the size of one courtroom to the size of several.<sup>203</sup> Rather than broadcasting these events around the country, the court was accommodating an overflow crowd given the tremendous public interest in this case. Simple logic suggests that the marginal increase in publicity caused by courtroom broadcasting would do little to sway a timid witness who is already appearing in public and before possibly hundreds of onlookers, let alone the professional expert witness hired by the applicants. Anyone familiar with public speaking knows that it matters little to the nerves whether one speaks before a hundred or a thousand. Adrenaline does not distinguish.

To further demonstrate the incremental effect that courtroom broadcasting would have in this case, it is worth noting that there were literally hundreds of national and international newspapers and “reporting in detail the names and testimony of all of the witnesses.”<sup>204</sup> Justice Breyer could therefore see “no reason why the incremental increase in exposure caused by transmitting these proceedings . . . would create any further risk of harm, as the Court apparently believes.”<sup>205</sup> Finally, Justice Breyer noted another consideration, prominent in *Chandler*, which

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<sup>201</sup> *Perry*, 130 S.Ct. at 718 (Breyer, J. dissenting).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 719.

<sup>205</sup> *Id.*

weighed in favor of courtroom broadcasting. If it were shown that transmission would harm a particular witness, the district court would be perfectly able to prevent it by ending the transmission for that portion of the proceeding.<sup>206</sup> Firm control by a trial judge “will be sufficient to address any possible harm, either to the witnesses or the integrity of the trial.”<sup>207</sup> This was all too clear to the *Chandler* Court, which also took notice of the conclusion reached by other courts that television coverage “did not have an adverse impact on the trial participants sufficient to constitute a denial of due process.”<sup>208</sup> In embracing the applicants’ fear of harm to the witnesses, the *Perry* Court thus ignored both the dictates of logic and much legal precedent to the contrary.

### C. The Court’s Superfluous Concern over Inadequate Notice and Comment

Perhaps the most extraordinary aspect of the Court’s opinion is the extent to which its holding rests on the inadequacy of the notice and comment period provided by the district court.

As Justice Breyer concluded,

[I]t is inappropriate as well as unnecessary for this Court to intervene in the procedural aspects of local judicial administration. Perhaps that is why I have not been able to find any other case in which this Court has previously done so, through emergency relief [as here] or otherwise. Nor am I aware of any instance in which this Court has preemptively sought to micromanage district court proceedings as it does today.<sup>209</sup>

He reached that conclusion for several reasons. First, the parties themselves “had more than adequate notice and opportunity to comment” and both sides in fact submitted written arguments to the trial court.<sup>210</sup> Second, the members of the judiciary who were involved did not lack

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Chandler v. Florida*, 449 U.S. 560, 579 n.12 (1981) (citing *Bradley v. Texas*, 470 F.2d 785 (5th Cir. 1971); *Gonzales v. People*, 438 P.2d 686 (Colo. 1968)). The Court also acknowledged the need for further research, of course. *Id.*

<sup>209</sup> *Perry*, 130 S.Ct. at 717-18 (Breyer, J. dissenting).

<sup>210</sup> *Id.* at 715.

information about the issue.<sup>211</sup> In fact, the Ninth Circuit Judicial Council adopted a permissive policy with regard to appellate proceedings in May 1996.<sup>212</sup> Moreover, in 2007, both lawyers and judges resoundingly approved a resolution favoring the use of cameras in district court civil nonjury proceedings at the Ninth Circuit Judicial Conference.<sup>213</sup> The Judicial Council then adopted the pilot program, compelling the district court to revise its rules to conform therewith.<sup>214</sup> Thus, Justice Breyer argued, the district court properly availed itself of the immediate need exception.<sup>215</sup> The applicants could point to no interested person unaware of the change or who lacked an opportunity to comment, leading Justice Breyer to inquire, “How can the Majority reasonably demand yet more notice in respect to a local rule modification that a statute likely requires regardless?”<sup>216</sup>

The Court’s analogy to administrative agencies is also without precedent and, seemingly, logical support. Whereas the notice and comment procedures under the Administrative Procedure Act insure some measure of democratic participation in the rulemaking process, it does not follow that they serve the same function for the judiciary, the least political and most independent of the three branches. Moreover, even assuming the purpose of notice and comment in the judicial setting is to facilitate public participation in the local rulemaking process, here “the entire public was invited by the District Court to submit comments after the rule change was announced, right up to the eve of trial.”<sup>217</sup> There were 138,574 comments submitted, “all but 32

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 715-16.

<sup>214</sup> *Id.* at 716. Justice Breyer interpreted 28 U.S.C. § 2071(c)(1) as requiring the district court to amend its rule to conform with Judicial Council policy because “federal statutes render district court rules void insofar as they have been modified or abrogated by the counsel. *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 716-17.

<sup>217</sup> *Id.* at 717.

of which favored transmitting the proceedings.”<sup>218</sup> This suggests that the Court’s interest in an adequate notice and comment period was pretextual, for its interest could not truly have been in aiding the prospects of participatory democracy.

Taking notice of this oddity, Justice Breyer observed that “this legal question is not the kind of legal question that this Court would normally grant certiorari to consider. There is no conflict among the state or federal courts . . . . Nor do the procedures below clearly conflict with any precedent of this court.”<sup>219</sup> For over 80 years, local judicial administration had been left to the “exclusive province” of the Circuit Judicial Councils, “and this Court lacks their institutional experience.”<sup>220</sup> In *Bank of Nova Scotia v. United States*, Justice Scalia himself went even further, arguing forcefully that although courts have “inherent supervisory authority over the proceedings conducted before [them],” the Supreme Court has only the authority to review a lower court’s exercise of that authority insofar as it relates to a judgment brought before the Court.<sup>221</sup> Thus, Justice Scalia concluded, “I do not see the basis for any direct authority to supervise lower courts.”<sup>222</sup> Similarly, in *Frazier v. Heebe*, Justice Scalia joined a dissent authored by Chief Justice Rehnquist that disputed any authority to “review and revise local Rules of a District Court . . . .”<sup>223</sup> Not only are such interventions unprecedented, but members of the majority doubt the Court’s authority to review rulemakings by lower courts. This further suggests that the Court’s reasoning is but a means to an end, with the desired outcome determining the analysis.

#### D. Overlooked Historical and Technological Developments That Favor Courtroom Broadcasting

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<sup>218</sup> *Id.* at 716.

<sup>219</sup> *Id.* at 717.

<sup>220</sup> *Id.*

<sup>221</sup> 487 U.S. 250, 264 (1988) (Scalia, J., concurring).

<sup>222</sup> *Id.*

<sup>223</sup> 482 U.S. 641, 651 (1987) (Rehnquist, C.J., dissenting)

As noted by Justice Breyer, what empirical research that has been done suggests that the impact of courtroom broadcasting on witness testimony is minimal at most.<sup>224</sup> One of the most highly regarded studies done to date evaluated the California experiment with courtroom broadcasting by surveying participants from 200 legal proceedings ranging from criminal arraignments to trials.<sup>225</sup> “Three-quarters of those surveyed said they were either unaware, or only a little aware of the televised coverage, and four-fifths insisted they were either not at all distracted or were distracted only at first by the presence of the cameras.”<sup>226</sup> Most distractions came not from television cameras, but from still photography.<sup>227</sup> Ninety percent of the lawyers and judges involved reported little or no interference with courtroom dignity and decorum.<sup>228</sup> Significantly, only two percent reported that the camera’s presence affected their behavior, half the number that reported being affected by the presence of the general media.<sup>229</sup> Jurors, meanwhile, actually reported “slightly greater attentiveness” when the cameras were present.<sup>230</sup>

Similar results were found by the Federal Judicial Center in its evaluation of a pilot program involving electronic coverage in six district courts and two courts of appeals.<sup>231</sup> Another study done at the University of Wisconsin reached similar results even when it corrected for the self-reporting bias that is associated with surveys generally.<sup>232</sup> It found no difference in the ability of students to remember events in a film seen earlier when testifying before a camera.<sup>233</sup> Notably, those students “who faced an obvious camera provided answers that were

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<sup>224</sup> *Perry*, 130 S.Ct. at 718 (Breyer, J. dissenting).

<sup>225</sup> *See* Cohn, *supra* note 1, at 62-63.

<sup>226</sup> *Id.* at 63.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *See* Cohn, *supra* note 1, at 63.

more correct, lengthier, and more detailed.”<sup>234</sup> A study done at the University of Minnesota also found the impact of courtroom broadcasting on participants to be limited, conceding that while those who testified before a camera were slightly more nervous, their performance was unaffected otherwise,<sup>235</sup> in line with the logical considerations discussed in Part III.B *supra*. “Those who testified before a camera recalled just as much correct information and committed no more errors than witnesses who testified with only a print journalist present or no coverage at all.”<sup>236</sup> As Justice Breyer observed, a survey of these and other studies showed that while no study found any tangible harm to witness testimony, some found that courtroom broadcasting actually increased the accuracy of the proceedings and the accountability of those involved.<sup>237</sup>

This echoes the sentiment of Justice Moore of the Colorado Supreme Court, who was among the first to suggest that the use of cameras would enhance both the accountability of the actors and the legitimacy of the proceedings.<sup>238</sup> His words would later prove prophetic, for subsequent research overwhelmingly suggests that courtroom broadcasting does little to adversely affect legal proceedings, but may enable observers to see through the hysteria. One study concludes that television cameras do not inhibit two thirds of witnesses.<sup>239</sup> Another study conducted by Court TV in the wake of the O.J. Simpson trial, which raised anew many of the *Estes* concerns over courtroom broadcasting, found that trial participants “are not affected in any special way by the presence of a silent camera in the courtroom and certainly less affected than they were in the last century when major community trials were much-heralded spectator events and the talk of the town.”<sup>240</sup> That same text aptly observes that sensational trials existed long

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<sup>234</sup> *Id.* at 64

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Perry*, 130 S.Ct. at 718 (Breyer, J. dissenting).

<sup>238</sup> *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 296 P.2d 465, 470 (Colo. 1956).

<sup>239</sup> SUSANNA BARBER, NEWS CAMERAS IN THE COURTROOM: A FREE PRESS—FAIR TRIAL DEBATE 74 (1987).

<sup>240</sup> *See* COURTROOM TELEVISION NETWORK, *supra* note 2, at ii.

before television cameras did, noting that over a dozen trials in the previous 75 years had been dubbed “the trial of century,” none of which were recorded on television until the trial of O.J. Simpson.<sup>241</sup> As for the O.J. Simpson trial as an example of the hysteria that supposedly ensues from courtroom broadcasting, the study found that, “[i]n fact, the camera inside the courtroom act[ed] as an antidote to the abuses of the ‘circus’ by allowing viewers to make their own judgments independent of the circus elements.”<sup>242</sup>

Moreover, the Court failed to acknowledge the steady progression by federal and state courts alike away from a complete prohibition of courtroom broadcasting and toward a permissive regime that vests authority in judges to protect against the concerns raised by the Court. At the time of the Court’s decision in *Chandler*, nineteen states permitted coverage of both trial and appellate courts.<sup>243</sup> Now, as Justice Breyer remarked, “42 States and two Federal District Courts currently give judges the discretion to broadcast civil nonjury trials.”<sup>244</sup> Instead, the *Perry* Court selected one study that reached the ambiguous conclusion that courtroom broadcasting may affect witness testimony, a speculative and conclusory statement one might expect to find in the *Estes* decision, but not as the Court’s primary reason for forbidding the broadcast of a nonjury civil trial at a time when broadcasting technology is undeniably commonplace. It is now clear that a majority of the Court’s members no longer believe that “the day may come when television will have become so commonplace an affair . . . as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process.”<sup>245</sup>

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<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Chandler*, 449 U.S. at 565 n.6.

<sup>244</sup> *Perry*, 130 S.Ct. at 718 (Breyer, J., dissenting).

<sup>245</sup> *Estes*, 381 U.S. at 595-96 (Harlan, J., concurring).

## CONCLUSION

Although the Court insisted that it expressed no view as to the merit of courtroom broadcasting in *Hollingsworth v. Perry*, one cannot help but detect a renewed hostility toward cameras that resembles the kneejerk suspicion characteristic of *Estes v. Texas*. Given the wealth of research suggesting the harm is minimal, such an attitude toward broadcasting technology is anachronistic. But the Court's suggestion that any high-profile case would be inappropriate to broadcast is perhaps more damaging to the future prospects of courtroom broadcasting.<sup>246</sup> Indeed, if a nonjury civil trial of tremendous importance to the public at large is inappropriate for broadcasting, one is left to wonder what federal proceedings would be appropriate. In an answer that will satisfy few, the Court spelled this out: cases that are “not high profile” and which do “not involve witnesses.”<sup>247</sup> Still, one can take comfort in both the continued efforts of forty-two states to increase transparency in legal proceedings as well as in bipartisan efforts to enact the Sunshine in the Courtroom Act. At this stage, it appears only a legislative solution will do with respect to high-profile cases brought in federal court.

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<sup>246</sup> *Perry*, 130 S.Ct. at 714.

<sup>247</sup> *Id.*