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Death TV: Is There a Press Right of Access to News That Allows Television of Executions

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DEATH TV?* IS THERE A PRESS RIGHT OF ACCESS TO NEWS THAT ALLOWS TELEVISION OF EXECUTIONS?

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I. INTRODUCTION

> Charles Dickens was walking through London in the early morning of Nov. 13, 1849, when he came upon a crowd waiting to watch a public hanging in Horsemonger Lane. People were laughing and singing songs that mocked the condemned person, a Mrs. Manning. Later that day Dickens wrote to The Times of London: 'A sight so inconceivably awful as the wickedness and levity of the immense crowd . . . could be imagined by no man . . . . When the sun rose brightly, as it did, it gilded thousands upon thousands of upturned faces, so inexpressibly odious in their brutal mirth or callousness that a man had cause to feel ashamed of the shape he wore.'[1]

With these words Anthony Lewis began a 1991 *New York Times* column about an action to compel a warden to allow an execution to be televised. Such a lawsuit, Lewis wrote, "seeks to establish, under the United States Constitution, a callousness that not even Dickens could imagine: the right of Californians to enjoy executions in the convenience of their own living rooms. Instead of standing in a cold London street, they could invite friends over for beer, pretzels and death."[2]

Last year there was a similar case that achieved even greater notoriety, because it was brought by Phil Donahue, host of a well-known television talk show.[3] Donahue sued the warden of Central Prison in

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* *See* Naftali Bendavid, *Death TV?*, LEGAL TIMES, May 30, 1994, at 1.

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1. Anthony Lewis, *Abroad at Home: 'Their Brutal Mirth,'* N.Y. TIMES, May 20, 1991, at A15. The last public execution in this country was a Kentucky hanging before 10,000 people in 1936. WENDY LESSER, PICTURES AT AN EXECUTION 36 (1993).

2. Anthony Lewis, *Abroad at Home: 'Their Brutal Mirth,'* N.Y. TIMES, May 20, 1991, at A15.

3. Lawson v. Dixon, No. 94-CVS-03949 (Wake County Super. Ct., N. C.).

North Carolina to compel him to allow a video recording of the execution of David Lawson, a convicted murderer, who was scheduled to be executed the following month.[4] The complaint alleged that Lawson, who was also joined as a plaintiff, had decided that he wanted his life and death story to be used as "an educational medium to aid in the prevention of [crime] and hopefully as a deterrent to others."[5] The complaint also stated that "Lawson wishes to inform the public of the true significance of the death penalty and thus make a meaningful contribution to the public debate over the use of the death penalty."[6] To accomplish his goals, Lawson asked that Donahue produce a television news story of his life and death. Donahue agreed to produce such a television news story.[7]

The complaint claimed that Donahue, as a news reporter and journalist, had "a clear right under the first and fourteenth amendments of the United States Constitution . . . to effective access to the execution which requires that they be allowed the use of 'the tools of their trade' i.e.: television cameras to make a video recording of the event."[8] The warden "informed the Plaintiffs that he would prohibit and not allow them to video record Mr. Lawson's execution because of '. . . interests of the orderly operation and security of this Institution.'"[9]

The case was decided in the first instance by the North Carolina Supreme Court, which granted a motion to bypass the lower court and review plaintiffs' complaint directly.[10] On the merits, the court ruled that plaintiffs did not have a constitutional right to tape the execution.[11] According to the court, "the execution is under the supervision and control of Warden Dixon; and that, as a matter of law, . . . Warden Dixon can [not] be mandamused to permit the requested . . . videotaping."[12] Plaintiff's action was therefore dismissed.[13]

Plaintiffs' attempts to secure federal relief also failed. The U.S. Supreme Court turned down the request to televise the execution on

4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. Lawson v. Dixon, 446 S.E.2d 799 (N.C. 1994).
11. *Id.*
12. *Id.*
13. *Id.*

June 14, 1994.[14] The next day, Lawson was put to death in North Carolina's gas chamber.[15]

After the North Carolina court's decision against him, Donahue stated, in a TV interview, that his purpose in bringing the action "is to shine the disinfectant light of a free and unfettered press on a matter that has divided the nation, divided families, that is one of the most powerful decisions that can be made by the state. Why . . . would you want to conduct this most grievous, irrevocable action behind closed doors?" As stated by one of the interviewers, Donahue's argument was "that this is censorship, in violation of their First Amendment rights."[16]

Was this a valid constitutional argument? Does the First Amendment guarantee more than the right to publish free from governmental restraints? In Justice Steven's words in a 1978 case, "It is not sufficient . . . that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions . . . by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance."[17] The right to publish may be empty if the press does not have access to government information.

Does the Constitution confer upon the press a judicially enforceable right of access to news? This was the key constitutional issue involved in the Donahue action to compel the warden to allow Lawson's execution to be televised. Underlying it is the broader question of whether the First Amendment's Press Clause adds anything to the freedom of speech guaranteed by the amendment. Before we deal with these matters, however, a word should be said about the fact that it was the right of the broadcast media, not the traditional press, that was involved in the Donahue case.

II. Press Freedom and Broadcast Media

The Framers of the First Amendment were, of course, familiar only with the printed press—newspapers, books, periodicals, pamphlets, and leaflets. There is no doubt that they intended the constitutional guarantee to be fully applicable to the traditional press which they knew. During the present century, however, the Age of

14. Lawson v. Dixon, 114 S. Ct. 1208 (1994).
15. *Killer Executed After Losing Videotape Request*, N.Y. Times, June 16, 1994, at A23.
16. *Crossfire* (CNN television broadcast, June 1, 1994).
17. Houchins v. KQED, 438 U.S. 1, 31 (1978) (Stevens, J., dissenting).

Gutenberg has given way to the Age of McLuhan. The linear press has been supplemented by the electronic media which now constitute a primary source of news dissemination. Are the broadcast media protected by the First Amendment? If they are, does that mean that they are protected to the same extent as the traditional print media?

As a starting point, broadcasting is now plainly included within the "press" protected by the First Amendment. "We have no doubt," said the Supreme Court half a century ago, "that . . . radio [is] included in the press whose freedom is guaranteed by the First Amendment."[18] Application of this general principle is illustrated by *Cox Broadcasting Co. v. Cohn.*[19] At issue there was a statute making it a misdemeanor to publish the name or identity of a rape victim. Such a law would plainly be invalid as applied to the traditional press; the First Amendment categorically prohibits government from punishing a newspaper for publishing or not publishing particular news.[20] In *Cox*, however, the statute had been violated, not by a newspaper, but by a television station. A television reporter had learned the name of a rape victim from the indictment and had revealed it in a broadcast.

At the *Cox* conference, the Justices treated the case exactly as they would have if a newspaper had been involved. As such, all at the conference agreed that the statute was invalid. "I think," said Justice Stewart, "that on its face it's unconstitutional. . . . Here we have a truthful report of a public proceeding." Even Justice Rehnquist, who ultimately dissented on other grounds, stated the same view: "On the merits," he told the conference, "I agree that you can't constitutionally [prohibit] the right of a newspaper truthfully to report a public proceeding."[21]

The Court was thus unanimous on the statute's invalidity. As Justice Blackmun put it, "You can't bridle the press constitutionally this way." The Justice recognized that there were dangers of abusive exercise of press power, but he concluded, "As a practical matter, we have to rely on the self-restraint of the press in these cases."[22]

The *Cox* decision followed the conference and ruled that the First Amendment was violated by a statute prohibiting publication of the

18. United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

19. 420 U.S. 469 (1975).

20. *See, e.g.*, Mills v. Alabama, 384 U.S. 214 (1966).

21. BERNARD SCHWARTZ, THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION 177 (1990) [hereinafter ASCENT].

22. *Id.*

rape victim's name. Freedom of the press, said the Court, "command[s] nothing less than that the States may not impose sanctions on the publication of truthful information."[23] Under the First Amendment, government has no power to suppress publication of the news. Under *Cox* the same result may not be accomplished by penalizing publication, which has the same effect as censorship. In Justice Douglas' *Cox* words, "there is no power in government to suppress or penalize the publication of 'news of the day.'"[24] That principle applies to both the traditional press and the newer electronic media.

There are, however, differences between the printed press and the newer media which make for differences in the extent of First Amendment protections available. The crucial difference stems from the technological nature of broadcasting. The mass media of radio and television are such, by their physical characteristics, as to make impossible the literal application of the Blackstone theory of freedom of the press.[25] Every person can distribute handbills or even (if he has the financial means) publish a newspaper or magazine without any governmental permission. But the same is not true of the broadcast media with their inherent physical limitation of frequencies for radio and TV stations. "The scarcity of broadcast frequencies . . . required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters."[26]

In the *Red Lion* case[27] the Court stated that there can be no First Amendment right to broadcast comparable to the right to speak, write, or publish. In broadcasting, government cannot sit by and allow all who choose to use the media. In the words of the 1943 *National Broadcasting Co.* case, "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."[28]

Owing to their physical characteristics, radio and television must both be rationed and regulated by the government. Otherwise, there would be chaos. These practical considerations have led Congress to authorize, and the Court to approve, a scheme of selective licensing by

23. *Cox*, 420 U.S. at 495.
24. *Id.* at 501.
25. 4 WILLIAM BLACKSTONE, COMMENTARIES 151 (1876).
26. Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445, 2456 (1994).
27. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).
28. NBC v. United States, 319 U.S. 190, 226 (1943).

the Federal Communications Commission. The right of free speech does not, in Justice Frankfurter's phrase, include the right to use the facilities of radio or television without a license.[29]

In *Red Lion*, the Court went further and held, in effect, that all the limitations on government power over the press did not apply to the broadcast media.[30] In *Miami Herald Publishing Co. v. Tornillo*,[31] the Court struck down a right-of-reply law on the ground that government may not command a newspaper to publish specified matter.[32] *Red Lion*, on the other hand, upheld the so-called fairness doctrine of the Federal Communications Commission, which required broadcasters to provide reply time to personal attacks or political editorials.[33] Acting under its doctrine, the FCC had ordered a radio station, which had broadcast a vigorous personal attack against an author, to provide reply time without requiring the author to pay for it. The Court justified the decision as one for "enforced sharing of a scarce resource."[34] Government may prevent such a resource from being made available only to the highest bidders to communicate only those views with which the broadcasters agree. The alternative is "private censorship operating in a medium not open to all."[35]

What *Miami Herald* held that government may not require of newspapers *Red Lion* ruled it might demand of broadcasters. "Because of the scarcity of radio frequencies," said the Court, "the Government is permitted to put restraints on licenses in favor of others whose views should be expressed on this unique medium."[36]

Thus, the Supreme Court has not given the broadcast media full First Amendment protection. There is, as it recently stated, "a less rigorous standard of First Amendment scrutiny [for] broadcast regulation."[37] To be sure, the physical nature of the medium may make it impossible for the First Amendment's core prohibition against licensing of the press to be applied to broadcasters. One may wonder, however, whether that should mean that broadcasters should be subject to

29. *Id.* at 227.
30. *Red Lion*, 395 U.S. at 396.
31. 418 U.S. 241 (1974).
32. *Id.* at 258.
33. *Red Lion*, 395 U.S. at 367.
34. *Id.* at 391.
35. *Id.* at 392.
36. *Id.*
37. Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445, 2456 (1994).

regulation that would violate the constitutional rights of the traditional press. If a right-to-reply law or a statutory requirement of access to the medium would infringe upon the First Amendment rights of newspapers, the same should be true so far as broadcasters are concerned.[38] The First Amendment ideal may be the Holmes concept of an open "market place" for ideas.[39] But it is not for government to further that concept by imposing any enforced right of access to the press. That should be true for all the news media, not for the print press alone.

The argument, based on scarcity of broadcast frequencies, on which the Court relied in *Red Lion*, does not really justify any governmental takeover of editorial judgment that would plainly be unconstitutional if imposed upon the printed media. The law should also take account of the changing picture with regard to media and media outlets. There are now far more broadcast stations than there are daily newspapers. What Justice Stewart at the *Miami Herald* conference called "the monopoly of newspapers," as opposed to the "spectrum of frequencies" which he asserted "is not limited as claimed,"[40] may now make the scarcity argument more applicable to newspapers than broadcasters. At any rate, the time may have come for our law to require a greater equation between the newer media and the traditional press. A bifurcated First Amendment was, after all, the last thing that Madison and his colleagues had in mind.

The Court has, however, recently confirmed the *Red Lion* approach. "Although courts and commentators have criticized the scarcity rationale since its inception," the Court stated in 1994, "we have declined to question its continuing validity as support for our broadcast jurisprudence . . ., and see no reason to do so."[41]

Yet, even if *Red Lion* is still correct and there is a difference between the First Amendment position of the printed press and the broadcast media, should that make for a difference in their right of access to news? If a reporter is given access to an execution, must the same necessarily be true of a television broadcaster?

In the interview of Phil Donahue already referred to, one of the interviewers stated that, years earlier when he had been a reporter, he

38. *But see* CBS v. FCC, 453 U.S. 367 (1981).
39. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
40. ASCENT, *supra* note 21, at 178.
41. Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445, 2457 (1994).

had been given permission by the warden to witness two executions. There then occurred the following exchange:

> Mr. DONAHUE: Why can't other people have—be similarly moved to watch this kind of thing?
> BUCHANAN: If you want to go in there, [be] my gues[t], without your camera—
> Mr. DONAHUE: What's wrong with the TV camera? Why does the TV camera make it different?[42]

The last Donahue query was based upon the assumption that the traditional press is in a privileged position, compared with television, so far as access to executions is concerned. That assumption is, however, inaccurate under the Supreme Court decisions on the matter. Under them, we shall see, *neither* the traditional press nor the broadcast media have a general First Amendment right of access to news.

III. WARREN AND ACCESS TO NEWS

In the Earl Warren papers in the Library of Congress, there is a memorandum by a Warren law clerk which summarizes the remarks the Chief Justice had made to him about a recently argued case[43] that involved television in the courtroom. Warren told his clerk that televising criminal trials "turns the clock backwards and converts the courtroom into a public spectacle."[44] The Chief Justice denied that the freedom of the press guaranty gave the news media any special right of access to the courtroom. On the contrary, he said, "The press is entitled to be present at trials not because it is the press, but because it is a part of the public."[45]

This meant that the press had only the same right as members of the public to be present at a trial. Chief Justice Warren summarized the law on the matter for his clerk:

> Like any other segment of the public it has the right within the limits of the courtroom's facilities to be present, to speak publicly of what transpires, and to communicate courtroom events to the other members of the public. But there is no specific right of the news media to be present at trials, there is merely the right of the public to be present.[46]

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42. *See Crossfire, supra* note 16.
43. Estes v. Texas, 381 U.S. 532 (1965).
44. Memorandum from D.M.F., Law Clerk for Chief Justice Warren, to Chief Justice Earl Warren 1 (April 12, 1965) (Earl Warren Papers, Library of Congress).
45. *Id.*
46. *Id.*

The Warren statement brings into sharp focus the issue of access to news. No one doubts that the press is entitled to the full freedom of expression guaranteed by the First Amendment. Clearly, the press has the broadest right to publish whatever information it may possess, free from any governmental restraint or penalty. Yet that is only the same as the right possessed by all of us to speak and write freely. The press, all the same, is more than a private individual exercising his right of free expression. The press is an institution—indeed, the only private institution given specific constitutional protection. The institutional role of the press is to give effect to the people's right to know—to inform the public and in particular to serve as a check on government by exposing misdeeds and other actions contrary to the public interest.

The informing function of the press has not, however, meant a superior constitutional position, so far as access to news is concerned. Instead, the Supreme Court has followed the view expressed by Chief Justice Warren to his law clerk: The press has only the same right of access as the general public. There is no constitutional right of access for the press as such. Where members of the public have such a right, the press does also. But where proceedings or files may be closed to the public, the press has no right of access to them. To repeat Warren's words to his clerk, the "right of the news media . . . is merely the right of the public."[47]

IV. Access to Public Institutions

The Supreme Court first dealt with the right of access to news in *Estes v. Texas*[48]—the case on television in the courtroom about which Chief Justice Warren spoke to his law clerk. The original draft opinions in *Estes* rejected the notion that the First Amendment gives the press as such any right of access. The original draft opinion of the Court by Justice Stewart stated, in a footnote, "A majority of the Court believe that the demands of television, radio, and press photographers to set up their equipment in a courtroom and portray or broadcast all or part of a trial are not supported by any valid First Amendment claim."[49]

47. *Id.*

48. 381 U.S. 532 (1965).

49. Bernard Schwartz, The Unpublished Opinions of the Warren Court 205 (1985) [hereinafter Warren Court].

The draft dissent of Justice Clark, who ultimately wrote the *Estes* opinion, also contained strong language rejecting the claim that the First Amendment gives the press any right of access to trials.[50] The Sixth Amendment, the draft notes, guarantees the accused a public trial, however "[t]he Constitution says nothing of any comparable right to the public or to the news media."[51] The draft then refers specifically to the assertion that the First Amendment gives the press, including television, a right of access to the courtroom.[52] According to Justice Clark's draft, "This is a misconception of the rights of the press. . . . [I]t is clear beyond question that no language in the First Amendment grants any of the news media such a privilege."[53]

Had this categoric language not been deleted from the final *Estes* opinion of the Court, it might have foreclosed fresh consideration in later cases. Instead, the final Clark opinion of the Court in *Estes* said that the press was "entitled to the same rights as the general public"[54] —i.e., the view stated by Chief Justice Warren to his clerk.[55]

The rule stated by *Estes* and Warren turned out to be the basis for the decision in *Houchins v. KQED*,[56] now the leading case on the press' right of access to news.[57] Houchins was the sheriff of Alameda County, just across the bay from San Francisco.[58] KQED, which operates television and radio stations in the San Francisco area, reported the suicide of a prisoner in the Greystone portion of the county jail and requested permission to inspect and use their equipment in Greystone.[59] After permission was refused, KQED filed suit, arguing that Houchins violated the First Amendment by refusing to allow the media to secure the means by which the public could be informed of conditions at Greystone.[60]

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50. *Id.* at 209-10.

51. *Id.*

52. *Id.* at 210.

53. *Id.*

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

55. *See* Memorandum from D.M.F., Law Clerk for Chief Justice Earl Warren, to Chief Justice Earl Warren 1 (April 12, 1965) (Earl Warren Papers, Library of Congress).

56. 438 U.S. 1 (1978).

57. *See* Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post, 417 U.S. 843 (1974). Between *Estes* and *Houchins*, the Court decided *Pell* and *Saxbe* holding that journalists had no First Amendment right to interview prison inmates. *Pell*, 417 U.S. at 835; *Saxbe*, 417 U.S. at 850.

58. *Houchins*, 438 U.S. at 3.

59. *Id.*

60. *Id.* at 3-4.

Houchins then announced regular monthly tours for twenty-five persons to parts of the jail.[61] But Greystone was not included and cameras, tape recorders, and interviews with inmates were forbidden.[62] The lower court enjoined Houchins from denying KQED and other responsible news media access to the jail, including Greystone, and from preventing their using photographic or sound equipment or from conducting inmate interviews.[63]

At the conference on the case, the Justices were closely divided.[64] The case for reversal was stated bluntly by Justice White: "I don't see any right of access for anyone or why, if [they] let the public in, [they] must let the press in with their cameras."[65] On the other side, Justice Stevens asked, "Can a policy denying all access be constitutional? I think not."[66] Stevens emphasized the public interest "as to how prisons are run."[67]

Of particular interest, in view of his position as the "swing vote," was the ambivalent statement of Justice Stewart: "The First Amendment does not give [the press] access superior to that of the general public. Moreover, there is no such thing as a constitutional right to know."[68] Nevertheless, the Justice concluded, "Basically, I think the injunction here does not exceed [the permitted] bounds."[69] Stewart also noted, "If the sheriff had not allowed public tours, he did not have to allow the press in."[70]

The conference, with Justices Marshall and Blackmun not participating, divided four (Justices Brennan, Stewart, Powell, and Stevens) to three (Chief Justice Burger and Justices White and Rehnquist) in favor of affirmance.[71] The opinion was assigned to Justice Stevens who circulated a draft opinion essentially similar to the dissent ultimately issued by him.[72] It contained a broad recognition of a constitutional right of access to information on the part of the press—a right

61. *Id.* at 4.
62. *Id.* at 5.
63. *Id.* at 6.
64. ASCENT, *supra* note 21, at 163.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*

that "is not for the private benefit of those who might qualify as representatives of the 'press' but to insure that the citizens are fully informed regarding matters of public interest and importance."[73]

Under the Stevens draft, "information-gathering is entitled to some measure of constitutional protection,"[74] and had it come down as the *Houchins* opinion of the Court, it would have established a First Amendment right of access to news.[75] The Stevens draft was, however, not able to retain its majority.[76] Justice Stewart, whose vote had helped to make up the bare majority for affirmance, wrote to Stevens, "Try as I may I cannot bring myself to agree that a county sheriff is constitutionally required to open up a jail that he runs to the press and the public.... [I]t would be permissible in this case to issue an injunction assuring press access equivalent to existing public access, but not the much broader injunction actually issued by the District Court."[77] This was essentially the view taken in Justice Stewart's *Houchins* concurrence.[78]

Chief Justice Burger prepared a draft dissent which he explained in a Memorandum to the Conference: "I have devoted a substantial amount of time on a dissent in this case with some emphasis on systems of citizen oversight procedures which exist in many states.... This approach, rather than pushy TV people interested directly in the sensational, is the way to a solution.... I agree with Potter's view that media have a right of access but not beyond that of the public generally."[79]

But the Burger draft was not to be a dissent.[80] Its holding for reversal received a majority when Justice Stewart concurred in the judgment for reversal.[81] The Chief Justice then sent a "Dear Potter" letter that pointed out that any press right of access could hardly be limited to the news media:

> [T]here are literally dozens of people . . . who tour prisons.... Many of them write books, articles, or give lectures or a combination. I'm sure you will agree they have the same rights as a TV

73. BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE BURGER COURT 363 (1988) [hereinafter BURGER COURT II].
74. *Id.* (quoting *Houchins v. KQED*, 438 U.S. 1, 32 (1978)).
75. ASCENT, *supra* note 21, at 163.
76. *Id.*
77. *Id.* at 164.
78. *Id.* (quoting *Houchins*, 438 U.S. at 16).
79. ASCENT, *supra* note 21, at 164.
80. *Id.*
81. *Id.*

> reporter doing a 'documentary.' Can they have greater First Amendment rights than these others whose form and certainty of communications is not so fixed?[82]

"I do not believe," the Burger letter declared, "First Amendment rights can be circumscribed by the scope of the audience. If so, the early pamphleteers who could afford only 100 sheets were 'suspect.'"[83] On the contrary, the Chief Justice noted, "a team of TV cameramen (camera-persons!) will tend to produce far more disruption than the serious student or judge, lawyer, or penologist who wants to exercise First Amendment rights with a somewhat different objective."[84]

A later draft summarized the Burger approach in the case: "As a legislator I would vote for a reasonably orderly access to prisons, etc., by media, because it would be useful. But that is not the issue. The question is whether special access rights are *constitutionally compelled.*"[85] He answered in the negative.[86]

The Burger opinion was joined by Justices White and Rehnquist.[87] This made it the plurality opinion of a seven-Justice Court, as Justice Stewart's concurrence enabled the decision for reversal to come down as the Court decision.[88] Justice Stevens' affirmation of a First Amendment right of access became the dissenting view.[89]

When he joined the *Houchins* opinion, Justice White sent a "Dear Chief" letter in which he explained that he had joined the new majority because of the broad implications of the result reached in the original Stevens draft opinion.[90] "If the First Amendment," Justice White wrote, "requires a government to turn over information about its prisons on the demand of the press or to open its files and properties not only to routine inspections but for filming and public display, it would be difficult to contain such an unprecedented principle. I would suppose there are many government operations that are as important for the public to know about as prisons, or more so; yet I cannot believe that the press has a constitutional right to be at every administrator's elbow and to read all of his mail."[91]

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82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* (emphasis in original).
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. BURGER COURT II, *supra* note 73, at 373.
91. *Id.*

It is not for the courts, the White letter urged, to impose a duty on "governments to submit themselves to daily or periodic auditing by the press."[92] What the final *Houchins* decision did, as White saw it, was to "resist taking over what is essentially a legislative task and by reinterpreting the First Amendment assigning to ourselves and other courts the duty of determining whether the state and Federal Governments are making adequate disclosures to the press."[93]

V. Access to Court Proceedings

Houchins illustrates the general rule followed by the Supreme Court — that the press has no constitutional right of access to news.[94] Instead, the Court has taken the position stated by Chief Justice Warren to his law clerk: the right to publish does not carry with it the right to gather information.[95] As the Court summed it up in another case, "The Constitution does not... require government to accord the press special access to information not shared by members of the public generally."[96] The Court explained that:

> It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public.... It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court.[97]

The Supreme Court has, however, confirmed a press right of access in one important area—court proceedings.[98] But it did so hesitantly. Indeed, its first decision on the matter ruled against the press claim—although the first draft opinion would have given a broad right of access.[99] But a Justice changed his vote six weeks later and that opinion became the dissent.[100]

The difficult constitutional cases are not those in which the courts are asked to protect a given right but those in which conflicting

92. *Id.*
93. *Id.*
94. *See* Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post, 417 U.S. 843 (1974).
95. Memorandum from D.M.F., Law Clerk for Chief Justice Warren, to Chief Justice Earl Warren 1 (April 12, 1965) (Earl Warren Papers, Library of Congress).
96. *Pell*, 417 U.S. at 834.
97. *Id.*
98. Richmond Newspapers v. Virginia, 448 U.S. 555 (1980).
99. Ascent, *supra* note 21, at 166.
100. *Id.* at 167.

rights—each by itself deserving of judicial protection—are at issue. The courts must then balance the rights in light of the social and other values involved and define the precise course and texture of the interface between the competing rights. Just such a conflict between rights was presented in *Gannett Co. v. DePasquale*.[101] On the one hand, criminal defendants asserted their right to a fair trial, which could require exclusion of the public and press from a pretrial hearing at which evidence and issues not permitted at the trial itself would be aired.[102] On the other hand, a reporter claimed that the press and the public had a right of access to judicial proceedings even where the accused, the prosecutor, and the trial judge all had agreed to closure.[103]

Gannett arose out of a murder prosecution in New York. Defendants moved to suppress certain evidence.[104] At the pretrial hearing on the motion, defendants requested that the public and the press be excluded from the hearing, arguing that the unabated buildup of adverse publicity had jeopardized their ability to receive a fair trial.[105] The district attorney did not oppose the motion, and it was granted by the trial judge.[106] A newspaper challenged the exclusion order,[107] but it was upheld by the highest New York court.[108]

The claims of the press in *Gannett* rested on both the Sixth Amendment guaranty of a public trial and the First Amendment guaranty of freedom of the press.[109] During the post-argument conference on the case, Chief Justice Burger indicated that neither amendment supported a reversal.[110] In his view, the Sixth Amendment public trial right did not apply "because the motion to suppress [is] not part of the trial."[111] And, as for the "First Amendment argument, there isn't any for me."[112]

Justice Stewart, who ultimately wrote the *Gannett* opinion, also spoke in favor of the exclusion order.[113] He agreed with the Chief

101. 443 U.S. 368 (1979).
102. *Id.* at 375
103. *See id.*
104. *Id.* at 374-75.
105. *Id.* at 375.
106. *Id.*
107. *Id.*
108. *Id.* at 394.
109. *Id.* at 384, 392.
110. ASCENT, *supra* note 21, at 166.
111. *Id.*
112. *Id.*
113. *See id.*

Justice on the First Amendment: "I don't think the First Amendment claim is valid, since the press has no greater rights than the public."[114] On the Sixth Amendment issue, Stewart reached the same result as the Chief Justice, but he refused to follow the Burger approach, saying, "I can't agree it's not part of the trial."[115]

Justice Stewart, nevertheless, reached the same result because, he said, "the right to a public trial is explicitly given to the accused; but there is a public interest and who but the accused can trigger that?"[116] Stewart answered this query, "I'm inclined to hold that only the prosecutor can speak for the public where a motion for closure is made by the defendant."[117]

Justices Rehnquist and Stevens also were in favor of exclusion.[118] "The Sixth Amendment," said Justice Rehnquist, "means for me only protection for the rights of the accused. . . . [T]he Framers didn't give the public a right to access."[119] Justice Stevens relied on what he called "a critical difference between seeing a live hearing and reading a transcript of it.[120] If the public has a right of access to the live performance, we'll be holding that the electronic media must be allowed."[121]

The other five Justices spoke in favor of reversal.[122] They were led by Justice Brennan, who wanted to establish a constitutional right of access for the press and the public.[123] Justices White and Marshall took the same approach, saying that the suppression hearing was part of the trial.[124] "The public," Justice Marshall declared, "has a right because, if the accused is done dirt, the public interest is hurt. The public is entitled to know what happens when it happens."[125]

Of particular interest were the statements of Justice Blackmun, who wrote the first *Gannett* draft, and Justice Powell, who was ultimately the swing vote in the case.[126] Justice Blackmun said that he agreed that the Sixth Amendment provided for the "public character

114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 166-67.
124. *Id.* at 167.
125. *Id.*
126. *Id.*

of trial.... I think the public directly and the press indirectly have an interest in preventing the abuse of public business. I'd take the Sixth Amendment approach."[127] Justice Powell, who was to change his mind on this point, agreed.[128] As he put it, "This is Sixth [Amendment] and not First."[129] Powell also agreed that this "suppression hearing is part of a criminal trial."[130] In his view, "the trial judge didn't do enough when he heard the accused and the prosecutor agreed to closure."[131] The judge should also have allowed the press to be heard.[132]

In a letter to Justice Blackmun, Justice Powell wrote that, at the *Gannett* conference, "I do not think a majority of the Court agreed as to exactly how the competing interests in this case should be resolved."[133] On the other hand, the tally sheet of a Justice present at the conference indicates that a bare majority (Justices Brennan, White, Marshall, Blackmun, and Powell) favored reversal.[134]

The opinion was assigned to Justice Blackmun, who circulated a draft of the Court that was a broadside rejection of the decision below.[135] In his final *Gannett* dissent, Blackmun began by stating that he could not "join the Court's phrasing of the 'question presented.'"[136] How he saw that question was indicated by the first sentence of the Blackmun draft opinion of the Court:

> This case presents the issue whether, and to what extent, the First, Sixth, and Fourteenth Amendments of the Constitution restrict a State, in a criminal prosecution, from excluding the public and the press from a pretrial suppression-of-evidence hearing, when the request to exclude is made by the defendant himself.[137]

Justice Blackmun's draft was virtually the same as his *Gannett* dissent, with the omission of the statement of facts (which was used by Justice Stewart in the opinion of the Court ultimately issued) and those changes made to convert the draft from a majority opinion to a dissent (e.g., changing "we" in the draft opinion of the Court to

127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. Gannett Co. v. DePasquale, 443 U.S. 368, 406 (1979).
137. BURGER COURT II, *supra* note 73, at 418-419.

"I").[138] The Blackmun draft implied a broad right of public and press access to all criminal proceedings from the Sixth Amendment's public trial guaranty: "The public trial guarantee . . . insures that not only judges but all participants in the criminal justice system are subjected to public scrutiny as they conduct the public's business of prosecuting crime."[139]

Had the Blackmun draft opinion come down as the final *Gannett* opinion, it would have completely resolved the issue of access to criminal proceedings in favor of a wide right on the part of the public and the press. Such a broad holding would have made the *Richmond Newspapers*[140] decision unnecessary. It would also have answered the question left unanswered by *Richmond Newspapers*—does the press have a right of access to pretrial proceedings as well as to criminal trials?—with a strong affirmative.[141]

But the Blackmun draft was not able to secure the five votes needed to make it into a Court opinion.[142] The day after it was circulated, Justice Stewart sent a "Dear Harry" note: "I shall in due course circulate a dissenting opinion."[143]

The same day, Justice Blackmun received a letter from Justice Stevens indicating that, "Although I agree with a good deal of what you say in your opinion," he would not change his conference vote.[144] Justice Stevens also stated, "I probably will adhere to my view that the public interest in open proceedings can be adequately vindicated by the combined efforts of the two adversaries and the trial judge, coupled with a right of access to a transcript promptly after the risk of prejudice has passed."[145] Justice Stevens saw dangers to defendants in the Blackmun holding.[146] "I am fearful that your holding will tolerate prejudice that may not be serious enough to violate the defendant's constitutional rights but will nevertheless enhance his risk of conviction."[147]

The promised Stewart draft dissent was an abbreviated version of his opinion of the Court in *Gannett* with changes made in the latter to

138. *Id.* at 416.
139. *Id.* at 416, 432.
140. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).
141. BURGER COURT II, *supra* note 73, at 483.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*

convert the draft dissent into the Court opinion (this time changing "I" in the draft to the "we" of the opinion of the Court).[148] Justice Stewart stressed that the Sixth Amendment public trial guaranty is one created for the benefit of the defendant alone and was personal to the accused.[149] Even if the contrary were the case, the tentative decision was wrong; the public trial guaranty applies only to trials, not pretrial proceedings.[150] Nor does the First Amendment compel a different result, since it gives the press no right superior to that of the public.[151] As Justice Stewart stated in his dissent, "If the public had no enforceable right to attend the pretrial proceeding in this case, it necessarily follows that the petitioners had no such right under the First and Fourteenth Amendments."[152]

Justice Stevens also circulated a brief draft dissent, which asserted, "I do not believe the Court has the authority to create this novel remedy for a random selection of bystanders."[153] The Stevens draft was, however, withdrawn by its author several weeks later.[154]

The general expectation in the Court was that the Blackmun draft would come down as the *Gannett* opinion.[155] Then, a month and a half after the drafts were circulated, Justice Powell wrote to Justice Blackmun: "I was inclined to view this case as presenting primarily a First Amendment rather than a Sixth Amendment issue . . . . I had become persuaded that my views as to the Sixth Amendment coincide substantially with those expressed by Potter . . . . I therefore will join his opinion."[156] Justice Powell also wrote a draft, originally as a dissent, which would be issued as a concurring opinion, in which he addressed the First Amendment issue.[157] He wrote to Justice Blackmun that, "I am sorry to end up being the 'swing vote.' At Conference I voted to reverse. But upon a more careful examination of the facts, I have concluded that the trial court substantially did what in my view the First Amendment requires."[158]

The case was now assigned by the Chief Justice to Justice Stewart, whose revised version of his draft dissent was issued as the *Gannett*

148. *Id.*
149. *Id.*
150. *Id.* at 484.
151. *Id.*
152. *Id.* at 480.
153. *Id.* at 482.
154. *Id.* at 484.
155. ASCENT, *supra* note 21, at 168.
156. *Id.*
157. *Id.*
158. *Id.*

opinion of the Court.[159] The most substantial change was pointed out in Stewart's covering memorandum: "You will note that I have unabashedly plagiarized Harry Blackmun's statement of facts in Part I and discussion of mootness in Part II. I offer two excuses: (1) the pressure of time, and (2) more importantly, I could not have said it better."[160]

When Justice Blackmun learned that he had lost his *Gannett* majority, he wrote a "Dear Bill, Byron, and Thurgood" letter: "You were kind enough to join me when I attempted an opinion for the Court. Please feel free to unhook, if you wish, in my conversion of that opinion to a concurrence in part and a dissent in part."[161] As it turned out, none of the Blackmun supporters wanted "to unhook," and all joined the *Gannett* dissent that he issued.[162]

As finally decided, *Gannett* held that the press did not have a Sixth Amendment right of access to the preliminary hearing on the motion to suppress.[163] The *Gannett* decision did not, however, finally resolve the issue of access to criminal proceedings.[164] The next year, the Justices were again presented with the issue in *Richmond Newspapers v. Virginia*.[165] Once again, the trial court had closed a criminal proceeding to the public and the press and refused to grant a newspaper's motion to vacate the closure order.[166] This time it was the trial itself that was closed.[167] The closure order was upheld by the highest state court.[168]

According to Chief Justice Burger at the post-argument conference, the fact that the case involved the trial and not a pretrial proceeding differentiated this case from *Gannett*.[169] Hence, he began his presentation, "*Gannett* didn't decide this case."[170] The Chief Justice noted that open trials were always the practice in our system.[171] "The assumption has been that trials must be public. They were taken for

159. *Id.*
160. *Id.*
161. BURGER COURT II, *supra* note 73, at 485.
162. *Id.*
163. *Id.*
164. *Id.*
165. 448 U.S. 555 (1980).
166. *Id.*
167. *Id.* at 561.
168. *Id.* at 562.
169. BURGER COURT II, *supra* note 73, at 485.
170. *Id.*
171. *Id.*

granted from 1787 to 1791"—that is, from the drafting of the Constitution to the ratification of the Bill of Rights.[172] "There's a common thread for public trials."[173] But that still left the question: "What's the constitutional handle?"[174]

The Chief Justice's answer was different from that given by the other Justices.[175] "I'm not persuaded," Burger said, "it's in the First Amendment either as an access right or an associational right."[176] Then the Chief Justice indicated the constitutional approach he would favor, "I would rely on the fact it was part of judicial procedure before adoption of the Bill of Rights. The Ninth Amendment is as good a handle as any."[177]

Had the Burger suggestion of reliance on the Ninth Amendment been followed, *Richmond Newspapers* might have become a leading case in the revival of what used to be termed "the forgotten amendment."[178] But the Chief Justice's suggestion was not supported by the others, and the Burger *Richmond Newspapers* opinion does not discuss the Ninth Amendment beyond a brief reference in a footnote.[179]

Justice Rehnquist, who alone spoke for affirmance, asserted, "There are tensions between *Gannett* and this case."[180] The others (with the exception of Justice Powell, who did not participate) all agreed with the Chief Justice that *Gannett* did not apply and that the lower court decision in *Richmond Newspapers* should be reversed.[181] At the argument, Professor Lawrence Tribe, speaking for the newspaper, had relied on the Sixth as well as the First Amendment, despite the categorical *Gannett* restriction of the public trial guaranty's scope.[182] Justice White alone said that the court "might get some mileage out of the Sixth."[183] The others who spoke on the matter agreed with Justice Stewart when he said, "Tribe's Sixth Amendment argument is not appealing."[184]

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172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*; *see also* Griswold v. Connecticut, 381 U.S. 479, 490 n.6 (1965).
179. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 555 n.15 (1980).
180. BURGER COURT II, *supra* note 73, at 486.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*

Instead, the majority relied upon the First Amendment to support the right of access.[185] Once again, their view was best expressed by Justice Stewart, who pointed out, "The Sixth was resolved against public trials in *Gannett.* The press has no right superior to the public of access to institutions like prisons which are traditionally closed."[186] On the other hand, Justice Stewart recognized, "trials have been open traditionally subject to time, place, and manner regulations."[187] The Justice concluded that the First Amendment furnished the basis for a reversal. "I agree there is a First Amendment right, subject to the overriding interest in a fair trial."[188]

The ultimate conference conclusion was, as stated by Justice Stevens, that "the First Amendment protected some right of access . . . . I'd be prepared to hold that, in the absence of any rational basis for denying access, the benefits of openness argue for it."[189]

The *Richmond Newspapers* draft opinion of the Court was circulated by Chief Justice Burger.[190] He realized by then that none of the others supported his conference reliance on the Ninth Amendment.[191] Therefore, he wrote in his covering memorandum, "I have refrained from relying on the Ninth Amendment but the discussion of its genesis gives at least 'lateral support' to the central theme."[192] The discussion referred to was, as stated above, relegated to a footnote in the Burger opinion.[193] Even so, Justice White wrote to the Chief Justice "that as I see it, your invocation of the Ninth Amendment is unnecessary, and in any event, it may be that I shall disassociate myself from that portion of the opinion."[194] There were also animadversions against the Burger reference to the Ninth Amendment in the opinions issued by Justices Blackmun[195] and Rehnquist.[196]

The White letter also repeated the Justice's preference for the Sixth Amendment approach, "Although I thought, and still do, that the Sixth Amendment is the preferable approach to the issue of public access to both pretrial and trial proceedings, particularly the latter, it

185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 486-487.
193. *See supra* note 179 and accompanying text.
194. BURGER COURT II, *supra* note 73, at 487.
195. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 603 (1980).
196. *Id.* at 605.

does not appear that the Conference is prepared to proceed on this basis."[197] Because of this, Justice White went on, "I join your opinion based on the First Amendment and would expect to stay hitched if three or more Justices in addition to myself join your opinion. If there is a Court only for the judgment, I may leave you and say my own piece."[198]

As it turned out, the Burger opinion could only attract support from Justices White and Stevens.[199] Except for Justice Rehnquist, who dissented,[200] the other Justices issued separate opinions concurring in the judgment.[201] This included Justice White, who wrote a short concurrence pointing out that the *Richmond Newspapers* case would have been unnecessary had *Gannett* ruled that the Sixth Amendment gave the public and the press a right of access to criminal proceedings[202]—that is, the approach taken in Justice Blackmun's draft *Gannett* opinion of the Court.[203] That approach would also have answered the question still left open by *Richmond Newspapers*—whether the First Amendment right of access recognized by the decision there is limited to trials or extends to pretrial proceedings, such as that closed in *Gannett.*

The opinions in *Richmond Newspapers*—both the plurality opinion of the Chief Justice and the concurring opinions of Justices Stevens, Brennan, Stewart, and Blackmun—followed the Stewart conference approach.[204] The Court squarely held that access to court proceedings is protected by the First Amendment.[205] This is a more satisfactory basis for decision than the Sixth Amendment route followed in the Blackmun *Gannett* draft.[206]

Even after *Richmond Newspapers*, many assumed that the case held only that the First Amendment guaranteed access to trials, not to the *Gannett* type of pretrial proceedings.[207] A case decided during the last Burger term—*Press-Enterprise Co. v. Superior Court*[208]—dealt specifically with a closed preliminary hearing in a California murder

197. BURGER COURT II, *supra* note 73, at 487.
198. *Id.*
199. *Richmond Newspapers*, 448 U.S. at 581-84.
200. *Id.* at 604-06.
201. *Id.* at 584-604.
202. *Id.* at 581-82.
203. BURGER COURT II, *supra* note 73, at 418-64.
204. ASCENT, *supra* note 21, at 169.
205. *Id.* at 169-70.
206. *Id.* at 170.
207. *Id.*
208. 478 U.S. 1 (1986).

case.[209] A newspaper sued to have the transcript of the proceedings released.[210] The state court held that there was no First Amendment right of access to preliminary hearings.[211]

At the *Press-Enterprise* conference, Justice Brennan delivered the strongest statement in favor of reversal, saying "that there is a First Amendment right of public access to judicial proceedings" because

> at its core, the First Amendment protects public debate about how government operates. The ultimate reason for protecting such speech is to facilitate the process of self-governance .... [T]he right to speak necessarily includes a corollary right to obtain the information necessary to speak; in other words, a 'right to know.'[212]

Justice Brennan asserted that a right of access would not mean the "parade of horribles" urged by the state.[213] It would not mean access to grand jury proceedings or police interrogations, which "must be private to work effectively. In fact, a First Amendment right of access is appropriate for only a very few government functions. Other than judicial proceedings, the only candidates I can think of are legislative debates and perhaps administrative hearings."[214]

The Brennan conference conclusion was, "it is clear that there is a right of public access to preliminary hearings."[215] That was true, in the Justice's view, because

> The same considerations that led to the results in our earlier cases apply here with equal force. Historically, preliminary hearings have been open to the public in the same way and for the same reasons as trials.... [T]he preliminary hearing serves exactly the same sort of 'public show' purposes as the trial.[216]

Justice Brennan's crucial point was that

> the preliminary hearing is really a part of the 'trial' for purposes of the right of public access. It is part of the state's official proceedings for dealing with criminals, part of the public show that—like the trial—reveals how we treat criminals. Consequently, the importance of public access in fulfilling the purposes of preliminary hearings and the public's need to be able to attend such hearings are the same as for the trial.[217]

209. ASCENT, *supra* note 21, at 170.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*

The *Press-Enterprise* decision held that the First Amendment right of access to criminal proceedings applied to the preliminary hearing in the California criminal case.[218] The same is presumably true of other pretrial proceedings, such as that in *Gannett*.[219] But Chief Justice Burger's *Press-Enterprise* opinion was not as forthright as one would have wished.[220] The opinion stressed that the right of access applied to California, where there had been a tradition of public accessibility.[221] There may be an implication that the same result might not be reached in a case from another state.[222] Thus the question raised by *Richmond Newspapers* may not have been unqualifiedly answered in favor of a First Amendment right of access.[223]

As a general proposition, however, *Richmond Newspapers* and *Press-Enterprise* do give the press a right of access to the courtroom.[224] But that right is not one that flows from a press right of access to news—a right which the Court refused to recognize in the *Houchins* case.[225] Instead the right exists because American courts have traditionally been open to the public (including the press) since colonial times.[226] Thus, the *Richmond Newspapers* and *Press-Enterprise* decisions are consistent with the basic principle stated by Chief Justice Warren and followed in *Houchins*: "the right of the news media . . . is merely the right of the public."[227] In the case of the courtroom, since the public has the right, the press does also. But where a public institution such as a prison may be closed to the public, the press has no right of access to it.[228] Despite Justice Stevens' *Houchins* assertion, the First Amendment does not grant the press "protection for the acquisition of information about the operation of public institutions."[229]

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218. *Id.* at 171.

219. *Id.*

220. *Id.*

221. *Id.*; *see also* Press-Enterprise Co. v. Superior Court of California for the County of Riverside, 478 U.S. 1, 10 (1986).

222. BURGER COURT II, *supra* note 73, at 170.

223. *Id.*

224. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); *see Press-Enterprise*, 478 U.S. at 10.

225. *See* Houchins v. KQED, Inc., 438 U.S. 1, 16 (1978).

226. *See Press-Enterprise*, 478 U.S. at 10; *see also Richmond Newspapers*, 448 U.S. at 555.

227. Memorandum from D.M.F., Law Clerk for Chief Justice Warren, to Chief Justice Earl Warren 1 (April 12, 1965) (Earl Warren Papers, Library of Congress).

228. *See Houchins*, 438 U.S. at 16.

229. *Id.* at 32.

VI. TELEVISION IN THE COURTROOM

We have just seen that reporters, as well as members of the public, have a general right of access to the courtroom. Is the same true of the broadcast media? More specifically, if reporters may enter with pencils, pads, and sketchbooks, may broadcasters enter with their television cameras? If they may, what impact does that have upon the right to a fair trial demanded by due process?

Here again, we can start with Chief Justice Warren, for there is no doubt about how he felt regarding television in the courtroom.[230] After Fred W. Friendly had been appointed President of CBS News, he met the Chief Justice at a 1964 cocktail party.[231] Warren wished Friendly well in his new job.[232] In thanking the Chief Justice, Friendly said he hoped he would still head CBS News when they had television cameras on the moon and on the floor of the Supreme Court.[233] Warren responded with a smile, "Good luck! You will have more luck with the former than the latter."[234]

Later that year, the Chief Justice turned down a CBS request to televise the Supreme Court arguments.[235] Warren wrote that "the Court has had an inflexible rule to the effect that it will not permit photographs or broadcasting from the courtroom when it is in session."[236] The Chief Justice was sure that the Court "has no intention of changing that rule."[237]

Chief Justice Warren believed even more strongly that television had no legitimate place in a courtroom.[238] To allow televising of judicial proceedings, he declared in an unissued draft dissent in *Estes v. Texas*,[239] means "allowing the courtroom to become a public spectacle and source of entertainment."[240]

Estes itself was the first Supreme Court case involving the television-in-the-courtroom issue. At that time, only two states (Texas and Colorado) allowed television cameras in the courtroom, and both the

230. BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 543 (1983) [hereinafter SUPER CHIEF].
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. 381 U.S. 532 (1965).
240. *Id.*

federal rules and the American Bar Association Canons of Judicial Ethics excluded them.[241] The *Estes* trial was notorious and received national attention.[242] Defendant moved to exclude television and other cameras.[243] A two-day hearing on the motion was itself televised.[244] Twelve cameramen jostled for position in the courtroom.[245] Their activities, even Justice Stewart's dissent concedes, "led to considerable disruption of the hearings."[246] For the trial itself, a booth was constructed at the rear of the courtroom to televise the proceedings.[247] The Texas courts rejected defendant's claim that the televised hearing and trial had deprived him of due process.[248]

To Chief Justice Warren, the *Estes* issue was not difficult. The very idea of televised trials was repulsive to him. If they are permitted, he told his law clerk, "we turn back the clock and make everyone in the courtroom an actor before untold millions of people. We are asked again to make the determination of guilt or innocence a public spectacle and a source of entertainment for the idle and curious."[249]

The Chief Justice recalled for his law clerk how "The American people were shocked and horrified when Premier Castro tried certain defendants in a stadium."[250] The same thing could happen here, Warren warned his clerk

> [I]f our courts must be opened to the pervasive influence of the television camera in order to accommodate the wishes of the news media, it is but a short step to holding court in a municipal auditorium, to accommodate them even more. As public interest increases in a particular trial, perhaps it will be moved from the courtroom to the municipal auditorium and from the auditorium to the baseball stadium.[251]

The presence of the television camera, the Chief Justice asserted in his remarks to his clerk, meant that all in the courtroom would act differently because, "To the extent that television has such an inevitable impact it deprives the courtroom of the dignity and objectivity that is

241. WARREN COURT, *supra* note 49, at 191.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* (quoting *Estes v. Texas*, 381 U.S. 532, 604 (1965)).
247. *Id.*
248. *Id.*
249. Memorandum from D.M.F., Law Clerk for Chief Justice Warren, to Chief Justice Earl Warren 1 (April 12, 1965) (Earl Warren Papers, Library of Congress).
250. *Id.*
251. *Id.*

so essential for determining the guilt or innocence of persons whose life and liberty hinge on the outcome of the trial."[252] Feeling the way he did, it is hardly surprising that Chief Justice Warren led the case against televised trials at the *Estes* conference.

"I think," he declared to the conference, "this violates due process. To stage a trial this way violates the decorum of the courtroom, and TV is not entitled to special treatment."[253] Warren rejected any First Amendment claim the other way, saying he could "see no violation of [freedom of] speech or press. They may be in the courtroom, like the press, only as part of the public. The way this is set up bears on the question of fair trial."[254] The Chief Justice went far toward excluding television in all circumstances, noting that, "Here, there was objection. But, even with the consent of the accused and his lawyers, I'd be against it."[255]

Warren was supported by Justices Douglas, Harlan, and Goldberg.[256] "The constitutional standard," Douglas pointed out, "is a fair trial. Trial in a mob scene is not a fair trial."[257] Here, Douglas referred to the 1936 case of *Brown v. Mississippi*,[258] where the Court had reversed convictions because of mob violence.[259] He said, "that was a judgment not hinged to any particular specific."[260] Douglas seconded the Chief Justice in his objection to televised trials.[261] "A trial," he observed, "is not a spectacle, whether [the defendant] objected or not. This is the modern farce—putting the courtroom into a modern theatrical production."[262]

Justice Harlan said that the case "comes down to the concept of what is the right to a public trial. It doesn't mean for me that the public has the right to a public performance. This goes more deeply into the judicial process than just the right of the defendant."[263] Justice Goldberg asserted that "the shambles deprived defendant of a fair

252. *Id.*
253. SUPER CHIEF, *supra* note 230, at 544.
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. 297 U.S. 278 (1936).
259. SUPER CHIEF, *supra* note 230, at 544.
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*

trial. In the present state of the art, this was an obtrusive intervention of the outside into this trial."[264]

Justices Clark, Stewart, and White opposed a flat ban on television in the courtroom.[265] Clark stressed that the trial judge's finding that no prejudice had been shown was not clearly erroneous.[266] The Justice had tried to avoid the constitutional issue by moving to dismiss the case as one in which certiorari had been improvidently granted.[267] In a later memorandum, Justice Clark recalled,

> not mustering any other votes for this disposition I then voted to affirm on the narrow basis of the facts, *i.e.*, the pre-trial televising of September 23-24 indicated no prejudice; the trial on the merits in October was telecast piecemeal—only picture, for the most part, without sound; the jury was sequestered and no prejudice was shown.[268]

Justice Brennan was not as certain in his presentation.[269] "What," he asked, "is the concept of a fair trial? Is there a court concept independent of the individual?"[270] He pointed out that "technology may bring this into line within the courtroom."[271] He then referred to the trial "as theatre or spectacle that's been part of our heritage," as well as to a "legislative inquisition," and asked about them, in light of this case.[272] The Justice stressed that "this was no sham. The jury was sequestered. There's no suggestion that the witnesses, the judge, or others were affected in a way to hurt."[273] Brennan conceded that, in such a case, "the totality [of circumstances] might knock it down," but said that was not the case here.[274]

Justice Black, who had spoken after Chief Justice Warren, indicated even greater doubt.[275] As a starting point, he said, "I'm against television in courts. But this is a new thing that's working itself out."[276] Justice Black conceded that the case presented difficulties for his normal constitutional approach.[277] "For me," he affirmed, "the

264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.* at 544-45.
268. *Id.* at 545.
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*

test is, 'what is in the Constitution on which I can grasp as a handle?' On lawyers, confrontation, etc., I have no problem. I can't do this on how bad it is short of the *Brown* [*v. Mississippi*] test."[278] Justice Black concluded that "the case for me comes down to only a slight advance over what we've had before."[279] He also noted that, "some day the technology may improve so as not to disturb the actual trial."[280] But, even with the disturbance involved in Estes' trial, Justice Black ultimately came down on the side of affirmance.[281]

The *Estes* conference vote was for affirmance by a bare majority consisting of Justices Black, Clark, Stewart, Brennan, and White.[282] The senior member of the conference majority, Justice Black, assigned the case to Justice Stewart.[283] He circulated a draft opinion of the Court that would have affirmed the decision below holding that the televising of the *Estes* trial did not involve any constitutional violation.[284] If the draft had come down as the *Estes* opinion, it would have adopted the reasoning of the ultimate Stewart dissent as that of the Court and substantially changed the legal picture with regard to TV in the courtroom.[285]

The Stewart draft rejected the claim that the introduction of cameras into a criminal trial, over defendant's objection, violates the Fourteenth Amendment.[286] "On the record of this case," the draft stated, "we cannot say that any violation of the Constitution occurred."[287] It pointed (much as Stewart's final dissent does) to the facts, saying that, while the situation during the pretrial hearing was plainly disruptive, there was nothing to indicate that the conduct of anyone in the courtroom during the trial was influenced by the television.[288]

This meant, according to Justice Stewart, that the Court was

> presented with virtually an abstract question. We are asked to pronounce that the United States Constitution prohibits all television cameras and all still cameras from every courtroom in every State whenever a criminal trial is in progress. . . . We are asked to hold

278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.* at 545-46.
285. Justice Stewart's draft opinion was substantially the same as the dissent he issued in *Estes*. *Id.* at 545; *see* Estes v. Texas, 381 U.S. 532, 615 (1965) (Stewart, J., dissenting).
286. WARREN COURT, *supra* note 49, at 192-93.
287. *Id.* at 193.
288. *Id.*

> that the Constitution absolutely bars television and cameras from every criminal courtroom, even if they have no impact upon the jury, no effect upon any witness, and no influence upon the conduct of the judge.[289]

This, the Stewart draft concluded, the Court could not do and the judgment below was affirmed.[290]

Justice Stewart's draft made the important point noted above[291] that was not contained in his *Estes* dissent. The draft stated that a majority of the Court believed that the demands of TV and other photographers to set up their equipment in a courtroom and portray or broadcast a trial "are not supported by any valid First Amendment claim."[292]

In his *Estes* dissent, not only did Justice Stewart delete this rejection of the First Amendment claim, but he also included an intimation that the First Amendment did support the right of the press to be in the courtroom.[293] The Stewart dissent declares, "The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms."[294] This First Amendment presumption was rejected in the *Estes* opinion of the Court ultimately delivered by Justice Clark.[295] It was, however, the basis for the already-discussed decision in *Richmond Newspapers v. Virginia*.[296] One may wonder what effect the original rejection of the First Amendment claim in the Stewart *Estes* draft would have had on the recent law, culminating in *Richmond Newspapers*, if the Stewart draft had been issued as the final *Estes* opinion of the court.[297]

If nothing more had occurred in the Court's deliberative process, the Stewart draft would have become the *Estes* opinion of the Court.[298] That would have drastically changed the law on the subject.[299] The Court's imprimatur might well have led to the widespread televising of trials two decades before that practice was to become

289. *Id.*; *see generally* Estes v. Texas, 381 U.S. 532, 601 (1965) (Stewart, J., dissenting).
290. WARREN COURT, *supra* note 49, at 193.
291. *See supra* text accompanying note 49.
292. WARREN COURT, *supra* note 49, at 205 n.9.
293. *Id.* at 193.
294. Estes v. Texas, 381 U.S. 532, 615 (1965) (Stewart, J., dissenting).
295. *Id.* at 539-40.
296. 448 U.S. 555 (1980).
297. WARREN COURT, *supra* note 49, at 193.
298. *Id.*
299. *Id.*

common.[300] That was not to happen, however, as the bare majority for affirmance in *Estes* did not hold.[301]

The crucial shift was by Justice Clark. Almost two months after he had voted for affirmance at the *Estes* conference, Justice Clark circulated a *Memorandum to the Conference* telling of his change in position.[302] "After circulation of the opinions and dissents, along with my interim study," Clark informed the Justices, "I became disturbed at what could result from our approval of the emasculation by TV of the trial of a case. My doubts increased as I envisioned use of the unfortunate format followed here in other trials which would not only jeopardize the fairness of them but would broadcast a bad image to the public of the judicial process."[303]

"It appears to me," the Clark memo stated, "that the perils to a fair trial far outweigh the benefits that might accrue in the televising of the proceedings."[304] Justice Clark then enumerated the factors that made him conclude "simply that such an operation, at least in its present state, presents too many hazards to a fair trial."[305] Justice Clark's list is the most complete statement by a Supreme Court Justice of the undesirable elements that would be introduced by televising of trials and, for that reason, deserves quotation in full:

1. The quality of the testimony would be impaired because of the confusion of the witness caused by the knowledge of being televised; accuracy would be jeopardized; memories would fail because of stage fright; self-consciousness would be uppermost because of the knowledge that millions were watching every expression and gesture; and witnesses would evade appearance in order to avoid the attendant embarrassment and torture.
2. The intermittent selection by the telecaster of the parts of testimony to be telecast would not portray a fair image of the trial; a distorted picture of the case would result and our present problem in newspaper reporting would be compounded. The entire proceedings could not be telecast from a profitable commercial standpoint; telecasting is expensive, particularly outside of the studio and video tape together with the clipping of it to show only the most publicly appealing parts of the trial would result.
3. The accused is placed in a helplessly precarious position. He unwillingly, despite his constitutional protections, becomes a

300. *Id.* at 193-94.
301. *Id.* at 194.
302. SUPER CHIEF, *supra* note 230, at 549.
303. *Id.*
304. *Id.*
305. *Id.*

victim of the continual glare of the close range lens of the camera revealing his most intimate and personal sensibilities. Such a psychological torture is reminiscent of the third degree. In addition, the accused must risk being mugged, lip read and otherwise overheard when in consultation over his defense with his lawyer at the counsel table.

4. The camera is an all powerful weapon. It may leave, intentionally or not, a distorted impression of the facts with consequent prejudgment of the witness that may be most damaging to the defense.
5. Many states do not sequester the juries in all felony cases and the additional hazard of jury misconduct in viewing the telecast would be present.
6. Witnesses placed under the rule would be able to view the telecast and contrary to the rule would be advantaged by the testimony of previous witnesses.
7. In case of a new trial or reversal being granted it would be impossible to secure a jury that had not witnessed the previous trial thus placing the fairness of the second trial in jeopardy.
8. Telecasting will lead inevitably to discrimination because the media will televise only the horrendous trials. As a result only the most sordid crimes will be telecast or possibly those that appeal to the prurient interest. This will but accumulate a wrongful store of public information as to the courts.
9. The judge and the jury's attention—as well as that of the lawyers—will be distracted from the serious work of the trial. In this case the court was interrupted time and time again on account of the presence of the television and radio media.
10. Commercials would degrade the judicial process, making the court a 'prop' for some product of the sponsor and forcing the parties to become its actors and raise attendant connotations of some connection between the trial participants and the sponsor.[306]

Justice Clark then circulated a draft opinion embodying his changed view.[307] It was intended as a potential opinion of the Court and, with important changes, was used as the ultimate *Estes* opinion.[308] The Clark draft contains strong language rejecting the claim that the First Amendment gives the press any right to attend trials.[309] The Sixth Amendment, the draft notes, guarantees the accused a public trial.[310] "The Constitution says nothing of any comparable right to

306. *Id.* at 549-550.
307. *See* WARREN COURT, *supra* note 49, at 206-221.
308. *Id.* at 222.
309. *Id.*
310. *Id.*

the public or to the news media."[311] The draft then refers specifically to the assertion that the First Amendment gives the press, including television, a right of access to the courtroom.[312] According to Justice Clark, "This is a misconception of the right of the press. . . . [I]t is clear beyond question that no language in the First Amendment grants any of the news media such a privilege."[313]

Had this categoric language not been deleted from the final *Estes* opinion of the Court (which stated only that the press was "entitled to the same rights as the general public"),[314] the subsequent law on the press and the First Amendment might have been different—particularly if Justice Stewart had left in the rejection of the press's First Amendment right contained in his original *Estes* draft opinion of the Court.[315]

The major difference between the Clark draft and the Clark opinion of the Court in *Estes* was the draft's specific rejection of the state's contention "that the televising of portions of a criminal trial does not constitute per se a denial of due process."[316] Toward the end of the draft, there is the flat statement "The facts in this case demonstrate clearly the necessity for the adoption of a per se rule"[317]—a statement substantially watered down (with the "per se" language eliminated) in the final opinion.[318] The draft contains other passages that support the statement of a per se rule, such as the following: "The introduction of television into petitioner's trial constituted a violation of due process regardless of whether there was a showing of isolatable prejudice;"[319] "Such untoward circumstances are inherently bad and prejudice to the accused must be presumed;"[320] "In light of the inherent hazards to a fair trial that are presented by television in the courtroom I would hold that its use violated petitioner's right to due process."[321]

311. *Id.* at 209-10.

312. *Id.* at 222.

313. *Id.* at 210.

314. Estes v. Texas, 381 U.S. 532, 540 (1965).

315. WARREN COURT, *supra* note 49, at 222.

316. *Id.* at 212.

317. *Id.* at 220.

318. *Id.* at 222.

319. *Id.* at 209. This language was omitted from the final *Estes* opinion. *Id.* at 222.

320. This language was changed in the final opinion to read, "Such untoward circumstances as were found in those cases [four cited Supreme Court decisions] are inherently bad and prejudice to the accused must be presumed." Estes v. Texas, 381 U.S. 532, 544 (1965).

321. WARREN COURT, *supra* note 49, at 221. This language is the draft's concluding sentence and is absent from the published opinion. *Id.* at 223.

One interested in what John Greenleaf Whittier called the "might have been" has ample cause for speculation in *Estes v. Texas*.[322] If Justice Stewart's original draft opinion of the Court had been the final *Estes* opinion, the law on television in the courtroom would have evolved differently.[323] Instead of the relatively slow development of televised court proceedings that has occurred, *Estes* might have opened the broadcast floodgates.[324] By now, the TV camera might be as common in every courtroom as it is in other areas of American life.[325]

On the other hand, had Justice Clark's draft come down as the *Estes* opinion of the Court, television in the courtroom might have been constitutionally doomed.[326] The Clark draft announced a per se rule, under which TV by its very nature became constitutionally incompatible with the proper conduct of criminal trials.[327] Regardless of the circumstances of the particular case, and any improvements that might be made in TV coverage, any televised trial would, under the Clark draft's rule, automatically violate due process.

After Justice Clark sent around his *Estes* draft, Justice Stewart revised his draft opinion of the Court and circulated it as a dissent.[328] The Stewart draft dissent was intended as an answer to the Clark draft opinion.[329] As such, it began, "If, as I apprehend, the Court today holds that any television of a state criminal trial constitutes a per se violation of the Fourteenth Amendment, I cannot agree."[330]

The Stewart draft led Justice Clark to delete the per se references from his final *Estes* opinion, and Justice Stewart in turn removed the sentence just quoted from his *Estes* dissent.[331] The *Estes* opinion of the Court, as it was finally issued, could be characterized in the Stewart dissent as a "decision that the circumstances of this trial led to a denial of the petitioner's Fourteenth Amendment rights."[332]

Justice Harlan issued a concurrence which also stressed that the *Estes* holding was only "that what was done in this case infringed the

322. WARREN COURT, *supra* note 49, at 223.
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. SUPER CHIEF, *supra* note 230, at 551-552.
331. WARREN COURT, *supra* note 49, at 223.
332. Estes v. Texas, 381 U.S. at 532, 601 (1965) (Stewart, J., dissenting).

fundamental right to a fair trial assured by the Due Process Clause."[333] On the other hand, Harlan stressed

> that the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to reexamination.[334]

Justice Brennan also issued a separate short *Estes* opinion emphasizing that, because of Justice Harlan's concurrence, only four members of the majority held that televised trials would be invalid, regardless of the circumstances.[335] Brennan also joined the White dissent asserting that the Clark opinion of the Court prevented a flexible approach to use of cameras in the courtroom.[336] In effect, Justice Brennan was having it both ways, joining with Justice White to condemn the majority's inflexible approach and then denying that a majority had really voted for it.[337]

It was, nevertheless, the Brennan approach that the Court was to follow in *Chandler v. Florida*,[338] which upheld a Florida rule permitting television coverage of criminal trials, notwithstanding the objections of the accused.[339] All the Justices agreed at the conference that the Florida rule did not violate due process, but there was disagreement over whether a holding to that effect could be made without overruling *Estes*.[340] Chief Justice Burger pointed out that "this is like *Estes* in some respects. No prejudice is shown in either case and both were notorious cases."[341] The basic question was: "Should the states be left to experiment?"[342] Chief Justice Burger replied: "I think so, in general. Anything that endangers a fair trial is suspect and must be justified on some ground."[343] The Chief Justice concluded his presentation by stating that he agreed with Justice Harlan. According to

333. *Id.* at 587.
334. *Id.* at 595-96 (Harlan, J., concurring).
335. WARREN COURT, *supra* note 49, at 224.
336. *See Estes*, 381 U.S. at 615 (White, J., dissenting).
337. WARREN COURT, *supra* note 49, at 224.
338. 449 U.S. 560 (1981).
339. ASCENT, *supra* note 21, at 174.
340. *Id.*
341. *Id.*
342. *Id.*
343. *Id.*

Burger, Harlan's *Estes* concurrence had denied that the decision there categorically prohibited any televised trials.[344]

As Justice Stewart saw it, *Chandler* was "indistinguishable from *Estes* which I'd overrule and affirm."[345] Justice White was less categorical, saying, "I think [we] have to chop up *Estes* some to affirm, but I'd do that."[346] Justice Marshall, however, stated, "I'd leave *Estes* alone"; and Justice Blackmun said, "I don't think this is *Estes*."[347]

Justice Powell indicated that he was troubled by televised trials and that there was "a substantial per se argument that ought to exclude TV from the courtroom."[348] At the same time, "*Estes* can be read as you want. I'd leave it on the books and follow John Harlan's notion that TV is part of everyday life, like it or not."[349]

In his *Estes* dissent, Justice Stewart had deleted the statement that "the Court today holds that any television of a state criminal trial constitutes a *per se* violation of the Fourteenth Amendment."[350] In the *Chandler* conference, however, Stewart asserted "that *Estes* announced a per se rule."[351] He said that a decision for the Florida rule would require the overruling of *Estes* and "I would now flatly overrule it."[352] The majority agreed with the Chief Justice and Justice Powell, and their position was stated by Justice Blackmun, who wrote to Burger, "I share your reading of *Estes*."[353]

The *Chandler* opinion of the Court was based upon a laborious effort to distinguish *Estes*, rather than overrule it.[354] The *Chandler* opinion relies on Justice Harlan's *Estes* concurrence to show that the statement of a per se rule in the Clark opinion of the Court received the support of only a plurality of four Justices.[355] Yet the final Clark *Estes* opinion, as we saw, did not announce a per se rule.[356] And Justice Harlan, in his *Estes* concurrence, did no more than stress what should have been obvious once Justice Clark deleted the per se references from his draft—namely, that the *Estes* decision held that the

344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.*
350. *Id.*; *see supra* note 330 and accompanying text.
351. ASCENT, *supra* note 21, at 174.
352. *Id.*
353. *Id.*
354. *Id.*
355. *Id.*
356. *See* Estes v. Texas, 381 U.S. 532, 534-52 (1965).

televised trial deprived defendant of due process under the "facts in this case."[357] Despite the contrary assumption in the *Chandler* opinion, Justice Harlan's *Estes* concurrence was not issued to demonstrate Harlan's refusal to subscribe to a per se rule, since the *Estes* opinion of the Court stated no such rule. Instead, Justice Harlan was only stressing that, in an area of such rapid technological change, the decision was based upon "television as we find it in this trial."[358]

In these circumstances, whether the Burger or Stewart view on *Estes* was correct may be irrelevant.[359] As Justice Blackmun said in a "Dear Chief" letter, "I am not really sure that the ultimate disposition of *Estes v. Texas* by way of overruling it or not overruling it, is very important. Whether overruled or not, *Estes* now certainly fades into the background."[360]

In practice, *Chandler* has served as a virtual green light for television in the courtroom. In the decade since *Chandler*, cameras have proliferated in courts throughout the nation. Such a result would undoubtedly have dismayed Chief Justice Warren and probably most of the Justices who sat with him.

Chief Justice Burger may have written the *Chandler* opinion, yet he was far from personally favoring television in the courtroom. "For me," he wrote to Justice Stewart, "there *may be* a risk of due process and equal protection violations in putting a few out of thousands of trials on TV or in a 'Yankee Stadium' setting."[361] Indeed, when a network asked permission to carry live coverage of the arguments in what promised to be a landmark case, Chief Justice Burger replied with a one-sentence letter: "It is not possible to arrange for any broadcast of any Supreme Court proceeding."[362] Handwritten at the bottom was a postscript: "When you get the Cabinet meetings on the air, call me!"[363]

The other *Chandler* Justices were also troubled at the notion of TV in every courtroom. Justice Powell wrote in a letter of the "enduring concern . . . that the presence of the camera may impair the fairness of a trial, but not leave evidence of specific prejudice."[364] Powell

357. *Id.* at 550.
358. *Id.* at 588.
359. ASCENT, *supra* note 21, at 175.
360. *Id.*
361. *Id.* (emphasis in original).
362. *Id.* at 5.
363. *Id.*
364. *Id.* at 175.

suggested that the *Chandler* opinion should be "clear as to the protection that the Constitution affords a defendant who objects to his trial being televised . . . . I am inclined to think it desirable that we make explicit that the defendant who makes a timely motion to exclude the cameras, and alleges specific harms that he fears will occur, is entitled as a matter of right to a hearing."[365]

There was a general uneasiness at what Justice Blackmun called "the risk of adverse psychological impact on various trial participants."[366] In criminal trials, Blackmun wrote in a letter to Chief Justice Burger, "any type of media coverage is capable of creating an impression of guilt or innocence. Assuming arguendo that more people are likely to watch the news than read about it, the incremental risk of juror prejudice seems to me a difference in degree rather than kind."[367]

Chandler indicates that a rule of court that permits television coverage of a trial does not violate due process. But that is far from holding that broadcasters have a constitutional *right* to televise court proceedings—much less a right of access with their cameras to executions. On the contrary, the governing rule on right of access is still that followed by the *Houchins* case—that, as stated by the Court three decades ago, "[t]he right to . . . publish does not carry with it the . . . right to gather information."[368]

VII. Other Press Privileges

The complaint by Phil Donahue to permit him to videotape an execution was based upon the claim that the First Amendment gives the press a right of access to news not possessed by the general public.[369] We have seen how the Supreme Court has dealt with such a claim in the *Houchins* and *Richmond Newspaper* situations.[370] The general rule that the press has no greater right than the public was, as stated, the foundation of the decisions in those cases.[371]

Has the same been true in other cases where the press has urged that the First Amendment gives it privileges which are not available to other persons?

365. *Id.*
366. *Id.*
367. *Id.* at 175-176.
368. Zemel v. Rusk, 381 U.S. 1, 17 (1965).
369. Naftali Bendavid, *Death TV?*, Legal Times, May 30, 1994, at 1.
370. *See supra* text accompanying notes 56-93, 165-206.
371. *See supra* text accompanying notes 73, 186.

A corollary of the right to publish, it is claimed, is the right to gather news. Informants are necessary to the news gathering process. Many of them would be unwilling to provide information if their confidentiality could not be assured.[372] Nondisclosure, it is claimed, is necessary for most investigative news gathering.[373] Hence, Justice Stewart argued in his dissent in the *Branzburg* case (discussed in the next paragraph), that "[t]he right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source."[374] Forcing reporters to reveal their sources would violate the so-called "reporter's privilege" which, the press has claimed, is implicit in the First Amendment.[375]

The reporter's privilege was, however, put to the constitutional test and found wanting in *Branzburg v. Hayes*.[376] It arose out of three cases in which reporters had refused to reveal their sources for stories involving alleged criminal activities.[377] In the lead case, Branzburg, a *Louisville Courier-Journal* reporter, had written articles describing his interviews with drug dealers in Kentucky.[378] He refused to testify about those he had interviewed before grand juries investigating drug use and sales.[379] He made the argument already summarized: To gather news, he had to protect his sources; otherwise, the sources would not furnish information, to the detriment of the free flow of information protected by the First Amendment.[380]

At the *Branzburg* conference, Chief Justice Burger declared, "I reject categorically the suggestion that this is a specific constitutional right."[381] He didn't "think anyone except the President of the U.S." was immune from a grand jury subpoena.[382] The Chief Justice declared that "[t]hey must appear."[383]

Justice White, who wrote the opinion, agreed. "Presently, I don't think I'd establish any privilege at all. . . . I would not in any event allow a privilege to the extent of keeping confidential what [he] has

372. *See* Branzburg v. Hayes, 408 U.S. 665, 679-81 (1972).
373. *Id.*
374. *Id.* at 728.
375. *Id.* at 673.
376. *Id.* at 667.
377. *Id.* at 667-79.
378. *Id.* at 667-69.
379. *Id.* at 668.
380. *Id.* at 669 n.5.
381. ASCENT, *supra* note 21, at 165.
382. *Id.*
383. *Id.*

seen as [an] actual crime."[384] Justices Blackmun, Powell, and Rehnquist agreed with the Burger-White view. "It would be unwise," said Justice Powell, "to give the press any constitutional privilege and we're writing on a clean slate, so we don't have to give constitutional status to newsmen. I'd leave it to the legislatures to create one."[385]

The other four favored the claimed privilege, though Justice Marshall did state, "I think the press exaggerates the importance of [confidentiality]."[386] The dissenters asserted the view that, as Justice Stewart expressed it, "The First Amendment requires some kind of qualified privilege for confidences to reporters."[387] Justice Douglas based his vote for the reporters on a different theory.[388] "The Ninth Amendment," he said, "stated the proper constitutional rule. It's in the realm of items of association, belief, etc."[389]

The *Branzburg* decision, reflecting the conference division, ruled against the reporter's privilege by a bare majority.[390] The White opinion of the Court stated the issue narrowly: "The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime."[391] The Court held that reporters have the same obligation as other citizens to respond to grand jury subpoenas.[392] The public interest in the investigation of crimes outweighs whatever interest there may be in protecting sources.[393]

Nor was the Court convinced that the failure to recognize the privilege would unduly chill the First Amendment right to gather news. According to Justice White's opinion, "this is not the lesson history teaches us. From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished."[394] The lack of privilege has thus not been a serious obstacle to the gathering of news based upon confidential sources.

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384. *Id.*
385. *Id.*
386. *Id.*
387. *Id.*
388. *Id.*
389. *Id.*
390. *See* Branzburg v. Hayes, 408 U.S. 665, 709 (1972).
391. *Id.* at 682.
392. *Id.* at 708-09.
393. *Id.* at 700-01.
394. *Id.* at 698.

In addition, there is the point made by Chief Justice Burger in his already quoted letter to Justice Stewart in the *Houchins* case:[395] If a reporter's privilege is recognized, who would be entitled to claim it? "Sooner or later," states the *Branzburg* opinion, "it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods."[396] After all, as Justice Rehnquist asked during the conference on another case, "Why, should only *Time* and the *New York Times* have First Amendment protection?"[397]

The *Branzburg* approach was applied in *Zurcher v. Stanford Daily*[398] to a search warrant based upon probable cause to search a newspaper office for evidence of crimes committed by other persons. It was argued that whatever might be true of third-party searches generally, where the third party was a newspaper, there were additional factors derived from the First Amendment that justified a nearly *per se* rule forbidding the search warrant.[399] The Court rejected the argument.[400] Warrants may be subjected to restraints under the Fourth Amendment, but there are no additional limitations where the press is concerned.[401] Like other persons, the press is subject to properly issued warrants.[402] With a warrant, indeed, any business may be searched, even, as in *Zurcher*, for evidence of third-party criminality.[403]

Thus, in refusing to accept the newspaper's claim, the Court treated the case as a virtual *Branzburg* reprise. The Fourth Amendment's warrant requirements must, of course, be complied with in every search case. Yet, the Court held that "[a]s we see it, no more than this is required where the warrant requested is for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper."[404]

395. *See supra* note 82 and accompanying text.
396. *Branzburg*, 408 U.S. at 704.
397. ASCENT, *supra* note 21, at 140.
398. 436 U.S. 547 (1978).
399. *Id.* at 563.
400. *Id.* at 563-67.
401. *See id.* at 564-65.
402. *See id.* at 565.
403. *See id.* at 560-61.
404. *Id.* at 565.

Whether or not we agree with the result in the cases discussed in this article, we must conclude that they do make for a consistent corpus on the subject, governed by the principle stated by Chief Justice Warren when he was discussing the *Estes* case with his law clerk—that whatever right the press has of access to news it possesses "not because it is the press, but because it is part of the public."[405] Under a case like *Houchins*, the press does not possess a constitutional right of access to information not available to the public generally; under *Branzburg* and *Zurcher* it does not have any immunity from grand jury subpoenas or search warrants not possessed by other citizens.

VIII. OTHER DEATH TV CASES

Phil Donahue is not the only broadcaster who has tried to get the courts to order televised executions to be allowed. In 1991, KQED, the broadcast station in the *Houchins* case, brought an action to require the warden of San Quentin prison to allow the televising of a convicted murderer's scheduled execution.[406] The federal court upheld the prohibition of cameras.[407] In his oral opinion, District Judge Schnacke stated that "the press has a right of access to whatever the public has a right to, but [it has] no *special* [right of] access."[408] Our courts, the judge continued, "are constitutionally mandated to conduct public trials [and] the press and the public are entitled to equal access. But neither the public nor the press have been found to have the right to bring cameras, still or television, into a courtroom."[409]

Judge Schnacke emphasized that no prison had ever allowed photographs or filming of an execution.[410] But there has been one other case in which a television reporter sought access to the execution chamber. In 1977, Tony Garrett, a TV reporter for Station KERA in Dallas, filed a federal action against the Texas Department of Corrections, asserting a First Amendment right to record on film, for later showing on televisions news, the execution of the first person to be

405. Memorandum from D.M.F., Law Clerk for Chief Justice Warren, to Chief Justice Earl Warren 2 (April 12, 1965) (Earl Warren Papers, Library of Congress).

406. KQED v. Vasquez, No. C-90-1383RHS (N.D. Cal. June 7, 1991); *see* Anthony Lewis, *Abroad at Home: 'Their Brutal Mirth,'* N.Y. TIMES, May 20, 1991, at A15.

407. Katherine Bishop, *Judge Upholds Ban on Videotaping of Executions at San Quentin*, N.Y. TIMES, June 8, 1991, at A9.

408. WENDY LESSER, PICTURES AT AN EXECUTION 247 (1993) (emphasis in original).

409. *Id.*

410. Katherine Bishop, *Judge Upholds Ban on Videotaping of Executions at San Quentin*, N.Y. TIMES, June 8, 1991, at A9.

executed in the electric chair in Texas since 1964.[411] The district court ruled that "the absolute ban on" TV access "to the execution chamber . . . infringes on the First Amendment freedom of press."[412]

The Court of Appeals for the Fifth Circuit reversed.[413] Though its decision was made a year before *Houchins*, it relied upon the same principle *Houchins* was to rely upon—"the general principle . . . that the press has no greater right of access to information than does the public at large; and that the first amendment does not require government to make available to the press information not available to the public."[414] Nor did it make a difference "that the death penalty is a matter of wide public interest."[415] As the fifth circuit put it, "we disagree that the protections of the first amendment depend upon the notoriety of an issue."[416] Thus, the existence of a constitutional right of access "is not predicated upon the importance or degree of interest in the matter reported."[417]

IX. "OR OF THE PRESS"

What has been said thus far clearly supports the decision to deny Phil Donahue the right to televise an execution. The relevant cases confirm the point made by Chief Justice Warren to his law clerk in their discussion of the *Estes* case: the press has only the same right of access to news and only such privileges with regard to news as the general public possesses.[418] To repeat again Warren's statement to his clerk, the "right of the news media. . . is merely the right of the public."[419]

There are, however, indications that the Framers intended the press to have more rights than the public so far as the gathering of news was concerned. When James Madison and his colleagues prohibited Congress from making any law "abridging the freedom of speech," they specifically added, "*or of the press.*"[420] Why were those words added if all that was intended was to guarantee publishers the

411. Garrett v. Estelle, 424 F. Supp. 468, 472 (N.D. Tex. 1977).
412. *Id.*
413. Garrett v. Estelle, 556 F.2d 1274 (5th Cir. 1977).
414. *Id.* at 1278.
415. *Id.* at 1279.
416. *Id.*
417. *Id.*
418. Memorandum from D.M.F., Law Clerk for Chief Justice Warren, to Chief Justice Earl Warren 2 (April 12, 1965) (Earl Warren Papers, Library of Congress).
419. *Id.*
420. U.S. CONST. amend. I (emphasis added).

freedom of expression which they were already entitled to under the Free Speech Clause? As Justice Stewart put it in a noted 1974 address, "If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy."[421] If the words "or of the press" are not redundant, what, if anything, do they add to the freedom of expression previously secured by the Free Speech Clause?

There is no doubt that the First Amendment was intended to guarantee full freedom of expression to the press. Yet that right was already guaranteed to all Americans by the Free Speech Clause. There are suggestive indications that, in adding "or of the press" to the First Amendment, Madison and his colleagues meant the words to be more than a repetitive appendage to the free speech guaranty. The language they used indicated an intention to provide a guaranty that is unique among those contained in the Bill of Rights. This difference was pointed out in Justice Stewart's 1974 speech: "Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution."[422]

More specifically, said Justice Stewart, "The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches."[423]

Thomas Carlyle tells us, in his book *Heroes and Hero Worship*, "[Edmund] Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a *Fourth Estate* more important far than they all."[424] Carlyle went on, "It is not a figure of speech or a witty saying; it is a literal fact—very momentous to us in these times."[425] "Indeed," Carlyle noted, "in modern Society . . . the Press is to such a degree superseding the Pulpit, the Senate, the *Senatus Academicus* and much else."[426]

421. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975).

422. *Id.*

423. *Id.* at 634.

424. THOMAS CARLYLE, ON HEROES, HERO-WORSHIP AND THE HEROIC IN HISTORY 164 (1903 ed.) (emphasis in original).

425. *Id.*

426. *Id.*

The Fourth Estate aphorism does not appear in Burke's published speeches and other writings.[427] Yet it is unlikely that Carlyle made up this attribution. If Burke did make the statement, it is most likely that it was known on this side of the Atlantic, since Burke's words were as widely known here as they were in England. What is clear, at any rate, is that, influenced by Burke or not, Americans did develop a concept of the press as a Fourth Estate institution by the time the Bill of Rights was ratified.

Under the Burke notion, Justice Stewart tells us, "a free press was not just a neutral vehicle for the balanced discussion of diverse ideas. Instead, the free press meant organized, expert scrutiny of government."[428] This was precisely the concept of the press that was stated in the First American document asserting a right to freedom of the press—the Address to the Inhabitants of Quebec of 1774, in which the Continental Congress presented its case to our northern neighbor.[429] It contained an exposition of the fundamental rights of the colonists as they were understood by the representative assembly chosen from all the Colonies. For the first time in an American official document, freedom of the press was recognized as an essential right. The right was stated to be important not only because of its "advancement of truth, science, morality, and arts in general," but also because by the press's actions "oppressive officers are shamed or intimidated, into more honorable and just modes of conducting affairs."[430]

There are further indications as well that, whether or not they were influenced by any Burke statement, the Americans of the day had a concept of the press similar to that attributed to Burke by Carlyle. Leonard Levy, in his book *Emergence of a Free Press*[431] (the leading history of freedom of the press in early America), concludes that, by the time of the First Amendment, American newspapers had achieved a "watchdog function as the Fourth Estate."[432] Indeed, Levy tells us, "Freedom of the press . . . meant that the press had achieved a special status as an unofficial fourth branch of government, 'the Fourth Estate'; whose function was to check the three official

427. David Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77, 90 n.79 (1975).

428. Stewart, *supra* note 421, at 634.

429. Address to the Inhabitants of Quebec of 1774, *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 221 (1971).

430. *Id.* at 223.

431. LEONARD LEVY, THE EMERGENCE OF A FREE PRESS 291 (1985).

432. *Id.*

branches by exposing misdeeds and policies contrary to the public interest."[433]

To support this conclusion Levy cites a 1790 statement by a Virginia paper that the press was the source from which the people

> learn the circumstances of our country, its various interests, and relations. Here too public men and measures are scrutinized. Should any man or body of men dare to form a system against our interests, by this means it will be unfolded to the great body of the people, and the alarm instantly spread through every part of the continent. In this way only, can we know how far our public servants perform the duties of their respective stations.[434]

A year earlier, John Adams, in a letter to Chief Justice William Cushing, had referred to "[o]ur chief magistrates and Senators &c" and asked, "How are their characters and conduct to be known to their constituents but by the press?"[435] It was freedom of the press, said Philip Freneau, a leading Jeffersonian editor, that allowed newspapers to "estimate justly the wisdom of leading measures of administration."[436]

To the Framers of the First Amendment, it can be argued, freedom of the press meant an institutional role for publishers and editors to criticize government and public officials to ensure that they would act properly in the exercise of their powers. From this point of view, the First Amendment was intended to confirm what the Supreme Court has called "the basic assumption of our political system that the press will often serve as an important restraint on government."[437]

What is clear is that, starting with the 1776 Virginia Declaration of Rights,[438] the first American Bill of Rights, American organic instruments provided separate protection for freedom of the press, in addition to constitutional guarantees protecting freedom of speech. When Madison drafted the amendments that became the Federal Bill of Rights, he followed the same approach, providing separate guarantees for both freedom of speech and of the press, in what became the First Amendment.[439]

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433. *Id.* at xii.
434. *Id.* at 291.
435. *Id.* at 200.
436. *Id.* at 291.
437. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983).
438. VIRGINIA DECLARATION OF RIGHTS, 1776, Art. 12, *reprinted in* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 234 (1971).
439. 2 SCHWARTZ, *supra* note 438, at 1026.

Indeed, in his proposed amendments, Madison went even further in providing specific protection for the press. The Madison proposals included a provision that "No State shall violate . . . the freedom of the press."[440] Though Madison said that he "conceived this to be the most valuable amendment in the whole list,"[441] it was eliminated by the Senate and never became a part of the Federal Bill of Rights.

Both his draft of the First Amendment and his rejected amendment prohibiting the states from infringing upon freedom of the press indicate that Madison sought to provide specific protection for the press in addition to that secured under the freedom of speech guaranty. In so doing, he was following the constitutional practice that had prevailed in the drafting of the state Bills of Rights, from the 1776 Virginia Declaration of Rights, to that of New Hampshire in 1783.[442]

The record is, of course, too obscure to enable us to speak with assurance, but it can be argued that the First Amendment was intended to give effect to the institutional Fourth Estate conception of the press. If that is true, freedom of the press is not limited to the freedom of expression otherwise guaranteed by the First Amendment. The press becomes a protected institution and the First Amendment becomes the instrument that enables the press to perform its institutional role.

If this was the intent behind the First Amendment, it has in large part been frustrated by the decisions discussed in this article. Except in one area—that of defamation[443]—the Court has refused to treat the press differently from the public generally. The governing principle in the cases is that the press has only the rights possessed by the public. Under the prevailing jurisprudence, the press as an institution has no greater rights to enable it to fulfill a Fourth Estate function. Instead, in the words of Chief Justice Warren, the press possess First Amendment rights "not because it is the press, but because it is part of the public."[444]

The Fourth Estate concept might have served as the basis for a broad press right of access to news. That would give the news media a right of access to public institutions and documents so that they can

440. *Id.* at 1027.

441. *Id.* at 1113.

442. 1 SCHWARTZ, *supra* note 429, at 378.

443. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

444. Memorandum from D.F.M., Law Clerk for Chief Justice Warren, to Chief Justice Earl Warren 2 (April 12, 1965) (Earl Warren Papers, Library of Congress).

perform their function of informing the public and thus holding government to proper standards. As a federal court stated in a 1965 case enjoining enforcement of a state senate resolution barring a paper's reporters from its proceedings, "To sanction such a use of state power would be to take a dangerous step toward press control and censorship."[445]

In his dissent in the *Houchins* case, Justice Stevens urged that the need for a press right of access "rested upon the special importance of allowing a democratic community access to knowledge about how its servants were [acting]."[446] As we saw, the Stevens opinion was originally prepared as the draft *Houchins* opinion of the Court, but a vote switch changed the decision and the opinion became the Stevens dissent. If the opinion had come down as the opinion of the Court, our law would have been on the way to confirming a press right of access to news. The final *Houchins* decision, however, meant that the new right was stillborn. Instead of the affirmation of the right of access to news that it would have been under the Stevens opinion, *Houchins* stands as the leading case denying that the right of access of the press is any greater than that of the public.[447]

There is no doubt that the Supreme Court jurisprudence on the matter has rejected the Fourth Estate concept of the press with additional institutional rights and has instead accepted the Warren notion of the press vested only with the same rights as members of the public. In practice, this means that the press is, in the main given only the right guaranteed to everyone by the Free Speech Clause — full freedom of expression. From this point of view, the First Amendment did not give the press more rights than it would have if the Press Clause had never been added by Madison and his colleagues.

This result may make the words "or of the press" in the First Amendment superfluous. If the Framers intended the Press Clause to vest additional institutional rights in the press to enable it to perform a Fourth Estate function, that intention has been frustrated by the case law. The public's right to know about its government is protected by the existence of a free press, but the protection is indirect,[448] since it is based upon the broad right of expression under the Free Speech Clause, not on any greater rights to secure and report information vested in the press.

445. Kovach v. Maddux, 238 F. Supp. 835, 844 (M.D. Tenn. 1965).
446. Houchins v. KQED, 438 U.S. 1, 38 (1978) (Stevens, J., dissenting).
447. *Id.* at 1.
448. *Compare with* Stewart, *supra* note 421, at 636.