CAMERA-SHY COURTROOMS: BALANCING EXTRAORDINARY TRANSPARENCY AND THE APPEARANCE OF JUSTICE

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INTRODUCTION

At the peak of the six-week *Depp v. Heard* trial, roughly 3.5 million people watched the live broadcast.[1] A typical seven-person jury courtroom, like the one in

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[1] *See* Bohdan Zaveruha, *Johnny Depp and Amber Heard Trial—How Many Viewers*

the *Depp* trial, is designed to hold thirty-five to fifty people.[2] Historically, viewership has been limited to the physical capacity of a courtroom, but modern technology has increased the public's access exponentially.[3] Because the public's perception of the justice system stems largely from the media, the consequences of these broadcasts extend beyond the outcome of the trial and, certainly, the physical confines of the courtroom.[4]

The remarkable scope of modern public access is a byproduct of the Bill of Rights[5]—both the First and Sixth Amendments have been interpreted to protect the public character of criminal trials.[6]

Gathered and How Was It Discussed on Twitch?, STREAMS CHARTS (June 2, 2022), https://streamscharts.com/news/johnny-depp-vs-amber-heard-trial-viewership [https://perma.cc/KAM9-ET3Y] (reporting that the six-week *Depp v. Heard* trial amassed 83.9 million hours watched).

[2] *Trial Courts*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/courthouseplanning/the-courthouse/trial [https://perma.cc/4SPR-NHB2] (last visited Feb. 19, 2025); *see also Depp v. Heard Trial*, FAIRFAX CNTY. (June 1, 2022), https://www.fairfaxcounty.gov/sheriff/depp-v-heard-trial [https://perma.cc/2MP7-4MCT] (explaining that the number of spectators in the courtroom would be limited to one hundred for the reading of the jury's verdict in the *Depp v. Heard* case).

[3] According to the first U.S. Census, the population of the United States was an estimated 3.9 million in 1790. Andrew Babin, *U.S. Marshals Overcame Hardships and Challenges to Count 3,929,214 People in Young America*, CENSUS (Mar. 9, 2020), https://www.census.gov/library/stories/2020/03/who-conducted-the-first-census-1790.html [https://perma.cc/FL8R-RHXX]. To put the modern scope of public access into perspective, the total U.S. population in 1790 would have represented just over 2% of O.J. Simpson trial viewers, which amassed 150 million viewers during its live broadcast of the verdict. *See* Julia Zorthian, *How the O.J. Simpson Verdict Changed the Way We All Watch TV*, TIME (Oct. 2, 2015), https://www.time.com/4059067/oj-simpson-verdict/ [https://perma.cc/NNV7-SWHG]. More recently, the *Depp v. Heard* trial amassed billions of views via social media. *See* Ayesha Rascoe, *Social Media Sides with Johnny Depp in Trial with Amber Heard*, NPR (May 22, 2022), https://www.npr.org/2022/05/22/1100587924/social-media-sides-with-johnny-depp-in-trial-with-amber-heard [https://perma.cc/R5Q6-EEFE].

[4] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572–73 (1980) ("Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media."); *see also* Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1593–96 (1989) (arguing that Americans know "abysmally little about law and legal systems" and that most of what they think they know is from popular culture—namely, the media, which Friedman claims are "the most powerful carriers of popular culture").

[5] *See Richmond Newspapers*, 448 U.S. at 590–91 ("'Following the ratification in 1791 of the Federal Constitution's Sixth Amendment,' . . . [t]his Court . . . has persistently defended the public character of the trial process.").

[6] *Id.* at 580 (holding that the public has a right to attend criminal trials); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."); *id.* amend. I ("Congress shall make no law . . . abridging the freedom . . . of the press . . . .").

Under the Sixth Amendment, a criminal defendant—"the accused"—has a positive right to a public trial, which applies to the states through the Fourteenth Amendment.[7] The U.S. Supreme Court has explained that a trial qualifies as "public, in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, . . . when the public is free to use those facilities, and when all those who attend the trial are free to report what they observed at the proceedings."[8] While defendants may choose to waive their Sixth Amendment right, they are not entitled to a closed or "private" trial.[9] By requesting a closed proceeding, a defendant implicates the public's right of access.[10]

Nowhere in its plain language does the First Amendment protect the general public's right to attend criminal trials.[11] But the Court has nonetheless protected it, arguing that public access serves the First Amendment's underlying purpose of "protect[ing] discussion of governmental affairs" by ensuring that such discussions are actually informed.[12] In support of its interpretation, the Court has emphasized certain features of the criminal justice system, including its "unbroken tradition of openness"[13] and "significant role in the functioning of the judicial process and the government as a whole."[14] In coordination with other procedural due process protections,[15] these Amendments have substantiated a constitutional "presumption of openness."[16]

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[7] U.S. CONST. amends. VI, XIV, § 1. *But see* Waller v. Georgia, 467 U.S. 39, 48–49 (1984) (holding that closing a trial to the public because of a party's overriding privacy interest is not a Sixth Amendment violation).

[8] Estes v. Texas, 381 U.S. 532, 584 (1965).

[9] Singer v. United States, 380 U.S. 24, 34–35 (1965) ("The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right. . . . [A]lthough a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial . . . .").

[10] *Id.*; *see* U.S. CONST. amend. I.

[11] Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 604 (1982) ("Of course, this right of access to criminal trials is not *explicitly* mentioned in terms in the First Amendment." (emphasis added)).

[12] *Id.* at 604–05 (internal quotations omitted); *see, e.g.*, *id.* at 602–03, 610–11 (holding that the public and press have a First Amendment right to be present during a victim's testimony, albeit subject to a case-by-case determination); Presley v. Georgia, 558 U.S. 209, 212, 214–15 (2010) (holding that the public has a First Amendment right to be present at criminal trials).

[13] *Globe Newspaper Co.*, 457 U.S. at 601.

[14] *Id.* at 606.

[15] *See, e.g.*, *In re* Oliver, 333 U.S. 257, 273 (1948) ("In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.").

[16] *Globe Newspaper Co.*, 457 U.S. at 610 ("[A] presumption of openness inheres in the very nature of a criminal trial under our system of justice." (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980))); *Richmond Newspapers*, 448 U.S. at 569 ("[A]t

Despite this presumption of openness, the right is not absolute.[17] The Supreme Court has justified limiting the scope of public access, by full or partial closure, when "closure is essential to preserve higher values and is narrowly tailored to serve [an overriding] interest."[18] In *Waller v. Georgia*, the Court articulated a test for whether closure was justified, writing:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.[19]

Conversely, many justifications for broadening the scope of public access have also involved ensuring procedural fairness.[20] Consistent with the structure of "self-government" under the First Amendment, public access has been justified "as a check upon the judicial process."[21] In explaining the Court's interpretation of the Sixth Amendment's right to a public trial in *Levine v. United States*, Justice Frankfurter wrote: "[T]hat provision is a reflection of the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.'"[22]

Modern, high-profile trials complicate the Supreme Court's preoccupation with "satisfy[ing] the appearance of justice."[23] Trials in state courtrooms—like those of O.J. Simpson, Alex Murdaugh, and Johnny Depp—have become nationwide

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the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open."). *But see infra* Section I.B (arguing that, in the context of public access rights, the First and Sixth Amendment guarantees are sometimes at odds).

[17] *See Richmond Newspapers*, 448 U.S. at 581 n.18 ("[O]ur holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. . . . [A] trial judge, in the interest of the fair administration of justice, [may] impose reasonable limitations on access to a trial."). *But see Globe Newspaper Co.*, 457 U.S. at 606 ("[T]he circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one.").

[18] Press-Enterprise Co. v. Super. Ct. (*Press-Enterprise I*), 464 U.S. 501, 510 (1984); Waller v. Georgia, 467 U.S. 39, 48–49 (1984) (denying closure of the hearing because the lower court failed to identify the specific privacy interests at issue).

[19] 467 U.S. at 48.

[20] *See, e.g.*, *Press-Enterprise I*, 464 U.S. at 508–09 (finding public trials help ensure fairness); *Globe Newspaper Co.*, 457 U.S. at 606 ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole.").

[21] *See Globe Newspaper Co.*, 457 U.S. at 606.

[22] 362 U.S. 610, 616 (1960) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)); *see also Globe Newspaper Co.*, 457 U.S. at 606 ("[P]ublic access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process.").

[23] *Offutt*, 348 U.S. at 14.

spectacles, exacerbated by pretrial publicity, live broadcasts, and social media.[24] Comparatively, the public has very limited access to federal courtrooms, where electronic media coverage has been prohibited under Federal Rule of Criminal Procedure 53 since 1946.[25] The first federal trials of an American president, however, have prompted a reevaluation of these restrictions.[26]

In November 2023, then-former President Donald Trump requested live, in-courtroom broadcasts of his election interference trial in a federal district court.[27] Filing the initial application for video and audio of the trial, NBC's lawyers argued, "If ever a trial were to be televised, this one should be, for the benefit of American democracy."[28] In response, the prosecutors invoked Rule 53, stressing that cameras in this federal courtroom would potentially put the entire proceeding at risk by prejudicing witnesses or making jurors unwilling to serve.[29] Trump's defense attorneys—without mention of the decades-old Rule 53—joined NBC in their legal filing, asserting: "The prosecution wishes to continue this travesty in darkness. President Trump calls for sunlight."[30]

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[24] *See infra* Part II. Unlike the trials of O.J. Simpson and Alex Murdaugh, *Depp v. Heard* is not a criminal prosecution; it is a civil defamation case. Thus, the case is beyond the explicit protections of the Sixth Amendment. To the extent I rely on it as an example in this Note, I do so primarily to demonstrate the scope and consequences of modern public access.

[25] *See id.*

[26] *See Levine*, 362 U.S. at 616; Application of NBCUniversal Media, LLC to Permit Video and Audio of Trial Proceedings in United States v. Donald Trump at 3, United States v. Trump, No. 1:23-MC-107-TSC (D.D.C. Nov. 25, 2024) [hereinafter NBCU Application] ("NBCU News Group brings this application to ensure that present and future American generations see and hear this . . . momentous occasion—the first time any U.S. President, former or current, will go on trial as a federal criminal defendant."); Anthony Coley, *If You Want the Public's Trust, Broadcast the Trump Trials*, POLITICO (Aug. 29, 2023, 10:49 AM), https://www.politico.com/news/magazine/2023/08/29/broadcasting-the-trump-trials-will-help-preserve-american-democracy-00113293 [https://perma.cc/AYA5-F2RU].

[27] *See* President Trump's Response to Media Coalition's Motion for Audiovisual and Application of NBC Universal Media, LLC to Permit Video and Audio at 2, United States v. Trump, No. 1:23-MC-99-TSC (D.D.C. Nov. 25, 2024) [hereinafter Trump's Response to Motion for Audiovisual]; Michael Sainato, *Donald Trump Pushes for Live Broadcast of His Trial Over Election Subversion*, THE GUARDIAN (Nov. 11, 2023, 11:56 AM), https://www.theguardian.com/us-news/2023/nov/11/donald-trump-live-broadcast-election-subversion-trial [https://perma.cc/Z62N-JS32]. *But see* Amanda Macias & Christina Wilkie, *Trump Georgia Trial Will Be Streamed Live, Judge Rules*, CNBC (Aug. 31, 2023, 6:21 PM), https://www.cnbc.com/2023/08/31/trump-georgia-trial-will-be-streamed-live-judge-rules.html [https://perma.cc/NFV6-6FDZ] (reporting that Fulton County Superior Court Judge Scott McAfee *will* allow Donald Trump's state trial to be televised and livestreamed).

[28] *See* NBCU Application, *supra* note 26, at 2.

[29] *See* United States' Opposition to Applications to Broadcast the Criminal Trial of United States v. Trump at 15, *Trump*, No. 1:23-MC-99-TSC.

[30] *See* Trump's Response to Motion for Audiovisual, *supra* note 27, at 2; Jack McCordick, *Donald Trump Joins Media in Requesting Live Coverage of Election Interference Trial*,

Anthony Coley, former Director of the Office of Public Affairs at the U.S. Justice Department, pushed the federal courts to change their policy in light of these "extraordinary times."[31] He argued, "By permitting live recordings of trial proceedings to be aired in real time, we uphold the values of democracy, foster an informed citizenry and reinforce trust in the justice system and its outcomes. It is through *transparency* that we will preserve the integrity of our nation."[32] Such arguments for increased transparency pressure both the Judicial Conference of the United States, which is the policymaking body for federal courts, and Congress to allow cameras in federal courtrooms.[33]

The unique nature of this trial highlights the allure of "transparency," specifically within the context of judicial proceedings.[34] The limits of transparency, however, are understated and often misunderstood. In prioritizing transparency over truth, such policies, which would allow unrestrained public access to federal courts, risk distorting the public's ability to generate accountability and the adjudicative process's ability to ensure fairness.

High-profile trials alert us to the dissonance between transparency and accountability in the federal judiciary. This Note will explore this tension and argue that when policymakers respond to calls for "extraordinary transparency," transparency should be subordinate to fairness.[35] Part I will discuss the principles underlying public adjudication and how, through various constitutional challenges, the limits of public access have changed over time. Analyzing modern high-profile trials, Part II

VANITY FAIR (Nov. 11, 2023), https://www.vanityfair.com/news/2023/11/donald-trump-media-jan6-trial-televised [https://perma.cc/QQ93-PL7F]; *see also* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants . . . .").

[31] Coley, *supra* note 26.

[32] *Id.* (emphasis added).

[33] *Governance and the Judicial Conference of the United States*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/governance-judicial-conference [https://perma.cc/7K7S-WRGM] (last visited Feb. 19, 2025).

[34] *See, e.g.*, Rebecca Beitsch, *Long-Shot Bid for Trump Courtroom Cameras Highlights Need for Public Access*, THE HILL (Aug. 12 2023, 6:00 AM), https://thehill.com/homenews/4149398-trump-federal-court-cameras/ [https://perma.cc/4GZD-BX9H] ("It is imperative the Conference ensures timely access to accurate and reliable information surrounding these cases and all of their proceedings, given the extraordinary national importance to our democratic institutions and the need for transparency.").

[35] *See, e.g.*, Coley, *supra* note 26 ("[T]hese are extraordinary times, and extraordinary times demand extraordinary transparency."); Trump's Response to Motion for Audiovisual, *supra* note 27, at 5 ("[T]he Court should . . . allow the movants to broadcast the proceedings of this matter in order to ensure that the American public can *see* the bare truth of this case . . . ." (emphasis added)); NBCU Application, *supra* note 26, at 1 ("Powerful First Amendment values and the extraordinary importance of these proceedings counsel strongly for this Court to exercise its discretion to authorize the public dissemination of the audiovisual record of these proceedings . . . .").

will demonstrate how those very principles are inadequately protected in jurisdictions that allow unrestrained public access to the courtroom. Part III will describe how transparency, when conflated with accountability, threatens procedural due process rights. Finally, Part IV will provide practical considerations for federal courts and policymakers navigating calls for extraordinary transparency, which prioritize ensuring fairness while accounting explicitly for the limits of transparency.

I. THE EVOLUTION OF PUBLIC ADJUDICATION

To understand the breadth of the judiciary's "presumption of openness" in the modern era, it is important to consider first the underlying motivations of such constitutional protections. This Part will contextualize the earliest instances of public adjudication and examine how the degree of openness has since evolved. This evolution has neither been linear, nor consistent between state and federal courts. Such developments, nevertheless, reveal the enduring tension between guaranteeing procedural fairness and accountability. This Part will highlight the role of the observer in the adjudicative process and the adjudicative process's role in a democratic society.

A. Early Practices

The origins of the Sixth Amendment guarantee of a public trial can be traced back to English common law as early as 1565.[36] "Why was adjudication public?"[37] Professor Judith Resnik explains, "Not because of democratic values about the political importance of transparent and accountable decision-making by governing powers."[38] Public adjudication developed out of Renaissance traditions, preceding democracy.[39] In Renaissance Europe, public rituals were actually displays of "very non-democratic power."[40] Rulers, "insist[ing] on their capacity to command obedience," used these public spectacles of judgment and punishment "to build and consolidate the authority of the state."[41] Because "observers had no ability to make demands on rulers," these spectacles could not directly generate accountability, a tenet of democracy.[42]

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[36] *See In re* Oliver, 333 U.S. 257, 266 n.14 (1948).

[37] Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 781 (2008) [hereinafter Resnik, *Courts: In and Out of Sight*].

[38] *Id.*

[39] *See id.*

[40] *Id.* at 782–83; Hon. William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PENN. ST. L. REV. 55, 75–76 n.103 ("[T]he primary justification for open courts prior to the eighteenth century was to demonstrate state power, not to promote or celebrate democratic values.").

[41] Resnik, *Courts: In and Out of Sight*, *supra* note 37, at 781, 783.

[42] *See id.* at 783–84; *see also* Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism*, 56 ST. LOUIS U. L.J. 917, 917 (2012)

Over time, observers "moved into a more participatory stance."[43] Early in the Colonies, open trials resembled the ancient English practice of "town meeting" trials.[44] Although town meeting trials were considered "one of the essential qualities of a court of justice," they were not without risks.[45] Such trials could "become a gathering moved by emotions or passions growing from the nature of the crime."[46] The court of public opinion, when unrestrained, could very well threaten "calm, reasoned decisionmaking based on evidence."[47]

In 1791, the Framers guaranteed the Sixth Amendment right to a "public trial" in the Bill of Rights.[48] In the following century, the United States began shifting away from certain spectacles of state power.[49] Observers recognized that some spectacles—like public punishments—were "debasing" and "did not check crime."[50] Because these "open processes of punishment produced opportunities for an 'unruly crowd' to vent distress, punishment was privatized to enhance the ability of the state to reassert control and discipline."[51] In response to the "privatization of punishment," adjudicative proceedings became "obligatorily public."[52] The "obligatorily public" nature of these proceedings enabled the "Public-opinion Tribunal" to observe government actors and their decision-making processes.[53]

Around this time, English philosopher Jeremy Bentham wrote about public processes, arguing that the public's presence would become a necessary check against corruption.[54] Bentham understood the observer's role as not a passive one, but one

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[hereinafter Resnik, *Constitutional Entitlements to and in Courts*] ("While witnessing power, the public was not presumed to possess the authority to contradict it.").

[43] *See* Resnik, *Courts: In and Out of Sight*, *supra* note 37, at 784.

[44] Press-Enterprise Co. v. Super. Ct. (*Press-Enterprise II*), 478 U.S. 1, 8 (1986).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] Resnik, *Courts: In and Out of Sight*, *supra* note 37, at 785; U.S. CONST. amend. VI.

[49] *See* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1929 (1991).

[50] *Id.*

[51] Resnik, *Courts: In and Out of Sight*, *supra* note 37, at 785.

[52] Resnik, *Constitutional Entitlements to and in Courts*, *supra* note 42, at 922 ("In contrast to the shifting of state punishment into prisons closed to the public, court-based proceedings became obligatorily public."). *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 73–74 (Alan Sheridan trans., 1995) (discussing the privatization of punishment).

[53] Judith Resnik & Dennis Curtis, *Re-presenting Justice: Visual Narratives of Judgment and the Invention of Democratic Courts*, 24 YALE J.L. & HUMAN. 19, 21 (2012); JEREMY BENTHAM, *Constitutional Code* (1843), *in* 9 THE WORKS OF JEREMY BENTHAM 41, 41 (John Bowring ed., Edinburgh, Tait 1843).

[54] Resnik & Curtis, *supra* note 53, at 21; *see, e.g.*, JEREMY BENTHAM, *Rationale of Judicial Evidence*, *in* 7 THE WORKS OF JEREMY BENTHAM 520, 524 (John Bowring ed., London, Simpkin, Marshall & Co. 1827).

possessing "weight and relevance as popular opinions . . . that could affect political rulers."[55] His writings emphasized "the public features of adjudication," which he believed would "generate a desirable form of communication between citizen and the state."[56] He famously observed: "Publicity is the very soul of justice. . . . It keeps the judge himself, while trying, under trial."[57] "Without publicity," he wrote, "all other checks are fruitless."[58]

The U.S. Supreme Court has since used Bentham's writings to illustrate a "traditional Anglo-American distrust for secret trials."[59] These secret proceedings—evident in the Spanish Inquisition, the English Court of Star Chamber, and the French monarchy's *lettre de cachet*—have been described by the Court as "menace[s] to liberty" and "in ruthless disregard of the right of an accused to a fair trial."[60] Accordingly, the Court has recognized and protected publicity as a significant feature of adjudication, explaining, "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."[61]

Today's courtroom reflects a judicial system that leaves room for observers in adjudication.[62] Its design "resembles that of a theater."[63] Professor Jonathan Rosenbloom explains that "[w]hile the [public] . . . do[es] not have any apparent power in the proceedings, they function as a watchful eye on the proceedings and assure that it is not done 'behind closed doors.'"[64] From this position, the observers

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[55] Resnik, *Courts: In and Out of Sight*, *supra* note 37, at 784.

[56] *See id.*; *see also* JEREMY BENTHAM, *Of Publicity and Privacy, as Applied to Judicature in General, and to the Collection of the Evidence in Particular*, *in* 6 THE WORKS OF JEREMY BENTHAM 351, 357 (John Bowring ed., London, Simpkin, Marshall & Co. 1843) (suggesting that judges "giv[e] reasons from the bench" so the public could understand their judicial actions).

[57] *See* JEREMY BENTHAM, *Bentham's Draught for the Organization of Judicial Establishments, Compared with That of the National Assembly, with a Commentary on the Same*, *in* 4 THE WORKS OF JEREMY BENTHAM 305, 316 (John Bowring ed., London, Simpkin, Marshall & Co. 1843).

[58] *Id.* at 317.

[59] *See In re* Oliver, 333 U.S. 257, 266, 268, 270–71 (1948).

[60] *Id.* at 268–70.

[61] *Id.* at 270; *see also* Cowley v. Pulsifer, 137 Mass. 392, 394 (1884) ("[E]very citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."); Resnik, *Constitutional Entitlements to and in Courts*, *supra* note 42, at 923 ("[C]ourts . . . serve[d] as one of many venues contributing to what twentieth-century theorists termed the 'public sphere'—disseminating authoritative information that shaped popular opinion of governments' output.").

[62] *See* Jonathan D. Rosenbloom, *Social Ideology as Seen Through Courtroom and Courthouse Architecture*, 22 COLUM.-VLA J.L. & ARTS 463, 476 (1998) (describing the openness of colonial courthouses and their emphasis on the inclusion of the public).

[63] *Id.*

[64] *Id.*

play a more critical role than they did during the Renaissance; they are "denying the government and disputants unchecked authority to determine the social meanings of conflicts and their resolutions."[65] In this sense, as Resnik concludes, "democracy changed adjudication."[66]

The apparent shift in the motives behind public adjudication demonstrates how very different objects can be achieved through public access. During the Renaissance period, rulers did not intend for public access to generate accountability.[67] On the contrary, they wanted observers to be passive without any power to contradict authority.[68] Public access, therefore, enabled spectacles of nondemocratic power. In a democratic society, however, public access ostensibly functions as a check against corruption.[69] The two objects are separated by a degree of accountability, deliberately absent from early English practices.

Democracy and adjudication are inextricably intertwined in the United States, and the guarantee of a public trial subsists at their intersection.[70] Thus, when the U.S. Supreme Court determines the scope of public access, it necessarily balances two fundamental values: democracy and fairness.

B. Constitutionally Protecting the Public Trial

The history of public adjudication bears two instances in which judicial conduct is most likely to go unchecked: public spectacles of state power and secret trials. In public spectacles, observers were not invited to respond to any injustice while they witnessed the adjudication.[71] Tellingly, such spectacles preceded democracy.[72] In secret trials, observers were held no space whatsoever.[73] To be sure, both instances disempowered observers.

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[65] Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2182 (2014) (quoting JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE 302 (2011)).

[66] Resnik, *Constitutional Entitlements to and in Courts*, *supra* note 42, at 922.

[67] *See* Resnik, *Courts: In and Out of Sight*, *supra* note 37, at 783–84.

[68] *See id.*

[69] *See, e.g.*, Simonson, *supra* note 65, at 2177 ("Once the audience leaves the courtroom, the experience of observation then serves a host of functions connected to democracy: it furthers public discourse, checks the government through democratic channels, and promotes government legitimacy.").

[70] *Cf.* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1303 (2012) ("Adjudication may be differently democratic, and possibly . . . less democratic, than political decisionmaking. But it is inaccurate to say that adjudication is nondemocratic." (quoting Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1486 (2000))).

[71] *See* Resnik, *Courts: In and Out of Sight*, *supra* note 37, at 782–84.

[72] *See id.* at 781.

[73] *See In re* Oliver, 333 U.S. 257, 271 (1948).

The U.S. Supreme Court, however, has expressed more concern about the dangers of secret trials—even effecting a "universal rule against secret trials."[74] Such concern presumes that observers contribute to the fairness of judicial proceedings. Thus, the guarantee of a public trial safeguards against the oppression inherent to secret trials.[75] Echoing the language of Bentham, Justice Black wrote: "Without publicity, all other checks are insufficient."[76] The Sixth Amendment protects the accused's right to a public trial by promising fairness, where a secret trial—an "instrument[] of persecution"—would most directly affect the accused.[77] The Court has also recognized that public trials confer other benefits upon society—namely, that public trials play a critical role in democracy.[78] Accordingly, the public's right to access the courtroom is protected under the First Amendment.[79]

The "public trial" subsists at the very intersection of the Sixth Amendment's procedural fairness protections and the First Amendment's democratic values. It follows that the right to an open, public trial is shared between the public and the accused.[80] In theory, their respective interests in public adjudication are "not necessarily inconsistent."[81] The accused wants a fair trial, and the public wants democratic sovereignty, both of which can be achieved by the public trial. Much of the case law, however, has developed in response to instances when their interests are at odds. Over time, the Court has developed frameworks to balance these interests when they conflict. As this Section will explore, the sheer breadth of modern public access has tested the resilience of such frameworks.

1. The Sixth Amendment's "Public Trial"

The U.S. Supreme Court has long protected the right to a fair trial as "fundamental."[82] The provisions of the Sixth Amendment define "the basic elements of a fair trial,"[83] and among those provisions, the public-trial guarantee protects a criminal

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[74] *In re Oliver*, 333 U.S. at 266; Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980) ("[W]here the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.").

[75] *See In re Oliver*, 333 U.S. at 270 ("Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.").

[76] *Id.* at 271.

[77] *See id.* at 270.

[78] *See id.* at 270 n.24.

[79] *Richmond Newspapers*, 448 U.S. at 578, 580.

[80] Press-Enterprise Co. v. Super. Ct. (*Press-Enterprise II*), 478 U.S. 1, 7 (1986).

[81] *See id.*

[82] *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 684 (1984); Powell v. Alabama, 287 U.S. 45, 52–53 (1932); Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938); Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[83] *Strickland*, 466 U.S. at 684–85 ("The Constitution guarantees a fair trial through the

defendant's right to a fair adjudicative process.[84] Critically, a fair trial and a public trial are not synonymous. Hence the public-trial guarantee is not absolute. It has, nevertheless, withstood constitutional challenges by the public.

In *Gannett Co. v. DePasquale*, a newspaper publisher challenged closure orders, alleging that these orders had violated the First and Fourteenth Amendments.[85] The underlying case involved the disappearance of a middle-aged man in upstate New York, who had allegedly been shot while fishing in Seneca Lake and dumped overboard.[86] Once his absence was reported, police initiated an intensive search for his body and the suspects.[87] Throughout the investigation, local newspapers reported stories of the police's theories and the case's latest developments.[88] Soon after the suspects were formally charged, the defense attorneys requested that the trial judge exclude the public from one of the pretrial hearings, arguing "that the unabated buildup of adverse publicity had jeopardized the ability of the defendants to receive a fair trial."[89] While the accused, the prosecutor, and the judge were all in agreement, a reporter moved the court to set aside its exclusionary order.[90] The trial court found that, under the Sixth Amendment, the defendants' right to a fair trial outweighed the interest of the press and the public.[91] The New York Court of Appeals affirmed, reasoning that the presumption of openness was overcome "because of the danger posed to the defendants' ability to receive a fair trial."[92]

The U.S. Supreme Court granted certiorari to consider this question: To whom does the constitutional guarantee of an open public trial belong?[93] In evaluating the public's right, the Court explained:

> There can be no blinking the fact that there is a strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system. But there is a strong societal interest in other constitutional guarantees extended to the accused as well. The public, for example, has a

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Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment . . . .").

[84] *See* Gannett Co. v. DePasquale, 443 U.S. 368, 379–80 (1979).

[85] *Id.* at 376.

[86] *Id.* at 371–72.

[87] *Id.* at 371.

[88] *Id.* at 371–74.

[89] *Id.* at 375.

[90] *Id.* at 370–71, 375.

[91] *Id.* at 376.

[92] *Id.* at 377.

[93] *See id.* at 377, 380–81.

> definite and concrete interest in seeing that justice is swiftly and fairly administered.[94]

Relying on *In re Oliver* and *Estes v. Texas*, the Court found that the "guarantee of a public trial is for the benefit of the defendant," and therefore, a trial judge has an affirmative constitutional duty to safeguard the due process rights of the accused.[95] The Court recognized that "adverse publicity can endanger the ability of a defendant to receive a fair trial" and, in its reasoning, emphasized that "[t]he Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee . . . is personal to the accused."[96]

Denying the public an independent interest in the enforcement of the Sixth Amendment, the Court wrote: "[O]ur adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation."[97] Still, the Court recognized the essential role of the public in its interpretation of the public-trial guarantee, explaining that "the public may see [the accused] is fairly dealt with and not unjustly condemned, and . . . the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions."[98]

Arguing that the majority had effectively reserved the First Amendment issue, Justice Powell, in his concurrence, suggested "a more flexible accommodation between First and Sixth Amendment rights . . . an accommodation under which neither defendants' rights nor the rights of members of the press and public should be made subordinate."[99] Although the *Gannett* decision protected the "public trial" as predominantly a right of the accused, Justice Powell's concurrence anticipated this interpretation's tension with the First Amendment's right of public access.

2. The First Amendment's "Public Access"

In *Press-Enterprise Co. v. Superior Court*, the U.S. Supreme Court, as Justice Powell anticipated, granted certiorari to contend with the First Amendment's right of access.[100] Again, the Court considered this: To whom does the constitutional guarantee of an open public trial belong?[101]

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[94] *Id.* at 383 (citation omitted). *See generally In re* Oliver, 333 U.S. 257 (1948) (finding that the secrecy of a trial violated the accused's right to a public trial); Estes v. Texas, 381 U.S. 532 (1965) (finding that the televising and broadcasting of the accused's trial deprived him of his right to due process of law).

[95] *Gannett*, 443 U.S. at 378, 381.

[96] *Id.* at 378, 79–80; *see also* Faretta v. California, 422 U.S. 806, 848 (1975) (Blackmun, J., dissenting) ("[T]he specific rights in the Sixth Amendment are personal to the accused . . . .").

[97] *Gannett*, 443 U.S. at 384.

[98] *See id.* at 380 (quoting *In re Oliver*, 333 U.S. at 270 n.25).

[99] *See id.* at 400 (Powell, J., concurring).

[100] *Press-Enterprise II*, 478 U.S. 1, 3 (1986).

[101] *See id.* at 5.

The California Supreme Court had decided that "the public's right of access must give way when there is conflict."[102] Weighing the interests of the accused and the public, the U.S. Supreme Court recognized that their interests were "not necessarily inconsistent": "the defendant has a right to a fair trial but . . . one of the important means of assuring a fair trial is that the process be open to neutral observers."[103] "[T]he explicit Sixth Amendment right of the accused," Chief Justice Burger wrote, "is no less protective of a public trial than the implicit First Amendment right of the press and public."[104] Accordingly, the Court held that "[t]he right to an open public trial is a *shared* right of the accused and the public, the common concern being the assurance of fairness."[105]

In balancing this "shared" right, the Court relied on two related considerations: (1) whether the place and process have historically been open to the public; and (2) whether public access enhances the functioning of the process in question.[106] To the first consideration, the Court reasoned that the public trial had long been "one of the essential qualities of a court of justice," finding its roots in ancient English practices, and that procedural mechanisms had evolved to regulate the public's conduct.[107] To the second consideration, the Court found that the "openness in criminal trials . . . 'enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.'"[108]

The Court, in the context of the First Amendment, looks to "whether public access . . . plays a particularly significant positive role in the actual functioning of the process," suggesting that the "public trial" is not necessarily intended for the direct benefit of the public.[109] By that reasoning, the public's interest is protected only to the extent it ensures the fairness of a trial.[110] The public's presence is arguably a procedural mechanism to "enhance[] both the basic fairness of the criminal trial and the appearance of fairness."[111]

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[102] *Id.* at 6.

[103] *See id.* at 7.

[104] *Id.* (quoting Waller v. Georgia, 467 U.S. 39, 46 (1984)).

[105] *Id.* (emphasis added).

[106] *See id.* at 8–9.

[107] *Id.* at 8; *see also supra* Section I.A.

[108] *Press-Enterprise II*, 478 U.S. at 9 (quoting *Press-Enterprise I*, 464 U.S. 501, 501 (1984)).

[109] *Id.* at 11.

[110] *See id.* at 7 ("[T]he common concern is the assurance of fairness."); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring) (arguing that "[t]o resolve the case . . . [the Court] must . . . weigh the importance of public access to the trial process itself").

[111] *Press-Enterprise II*, 478 U.S. at 9 (quoting *Press-Enterprise I*, 464 U.S. at 501); *see also Richmond Newspapers*, 448 U.S. at 578 (reasoning that the presence of the people and representatives of the media has historically "enhance[d] the integrity and quality of what takes place").

Still, the Court has recognized the inherent value of the public's inclusion and protects its right of access accordingly under the First Amendment.[112] In *Richmond Newspapers, Inc. v. Virginia*, for example, the Court noted the public's "fundamental, natural yearning to see justice done," as well as the "educative effect of public attendance."[113] The Court, for the first time, articulated that the First Amendment protects a "right to 'receive information and ideas.'"[114] This right, in the context of public access, directly concerns the "central purpose" of the First Amendment: "to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest . . . thrive[s], for only in such a society can a healthy representative democracy flourish."[115]

Where the Sixth Amendment has opened doors to the public for the purpose of preventing the judiciary from becoming an instrument of persecution, the First Amendment has reinforced the public's protection against unnecessary exclusion.[116] The right of the public to access criminal trials is thus "indispensable to the enjoyment of rights explicitly defined" by the First Amendment.[117] This right of access, however, has been tested by the increase of cameras in the courtroom, which tends to disrupt the fairness of the trial—the central concern of this shared right.[118]

C. Satisfying the Appearance of Justice

In *Estes v. Texas*, the U.S. Supreme Court considered whether the televising and broadcasting of the criminal proceedings had deprived the defendant of his due process rights.[119] In what would later be described as an "untoward situation," the pretrial hearing was televised live, with "a mass of wires, television cameras, microphones and photographers" in the courtroom.[120] These broadcasts reached over 100,000 viewers, including 4 of the jurors.[121] During the trial, the judge was harassed and confused the jury while limiting certain parts of the televised proceedings.[122] The Court asserted that "[c]ourt proceedings are held for the solemn purpose

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[112] *Richmond Newspapers*, 448 U.S. at 580 ("[T]he right to attend criminal trials is implicit in the guarantees of the First Amendment . . . .").

[113] *Id.* at 571–72 (quoting 6 JOHN H. WIGMORE, EVIDENCE § 1834, at 438 (J. Chadbourn rev. 1976)).

[114] *Id.* at 576 (quoting Kleindienst v. Mandel, 408 U.S. 753, 762 (1972)); *see also* David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 889 (2017).

[115] Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 308 (2012) (quoting Buckley v. Valeo, 424 U.S. 1, 93 n.127 (1976)).

[116] *See Richmond Newspapers*, 448 U.S. at 575.

[117] *Id.* at 580.

[118] *See Press-Enterprise II*, 478 U.S. 1, 7 (1986).

[119] 381 U.S. 532, 534–35 (1965).

[120] *Id.* at 550.

[121] *Id.* at 538, 550.

[122] *Id.* at 551.

of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial."[123] While recognizing the press's "important function in a democratic society," the Court held that the press "must necessarily be subject to the maintenance of absolute fairness in the judicial process."[124] To that end, the Court reversed the defendant's conviction, finding the media disrupted the "judicial serenity and calm to which [the defendant] was entitled" and that justice, therefore, did not "satisfy the appearance of justice."[125] The *Estes* decision seemed to counsel against the use of television, reasoning that it would not contribute materially to the "chief function of our judiciary machinery . . . to ascertain the truth."[126]

The following year in *Sheppard v. Maxwell*, the Court similarly held that the defendant was denied a fair trial because the trial judge did not protect him from prejudicial pretrial publicity and disruptive media presence in the courtroom.[127] In its reasoning, the Court emphasized that "legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper" and "insisted that no one be punished for a crime without 'a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.'"[128]

Fifteen years later, in *Chandler v. Florida*, the Court—without overruling *Estes* or *Sheppard*—decided that the Constitution did not prevent states from allowing broadcast coverage of criminal trials.[129] The Court would not sustain an "absolute constitutional ban on broadcast coverage of trials," arguing that courts had developed "curative devices" to mitigate the risks of juror prejudice and impacts on the trial participants.[130] Writing for the majority, Chief Justice Burger cautioned, "Dangers lurk in this, as in most experiments, but . . . the states must be free to experiment."[131] And experiment they have.

1. State Courts

Since *Chandler v. Florida*, states have developed a wide range of policies for broadcasting trials.[132] In 2001, Mississippi and South Dakota became the last states

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[123] *Id.* at 540.

[124] *Id.* at 539.

[125] *Id.* at 536, 543.

[126] *See id.* at 544. *But see id.* at 551–52 ("[T]he ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials.").

[127] 384 U.S. 333, 352 (1966) ("[O]ur system of law has always endeavored to prevent even the probability of unfairness." (quoting *In re* Murchison, 349 U.S. 133, 136 (1955))).

[128] *Id.* at 350 (quoting Chambers v. Florida, 309 U.S. 227, 236–37 (1940)).

[129] 449 U.S. 560, 571 (1981).

[130] *Id.* at 574–75.

[131] *Id.* at 582.

[132] Dimarie Alicea-Lozada, *Tech Series: Lights, Camera, Action in Courtrooms*, NAT'L CTR. FOR STATE CTS. (Aug. 16, 2023), https://cdm16501.contentdm.oclc.org/digital/collection/tech/id/1173 [https:// perma.cc/7R2F-ZVCZ].

to permit cameras in their courtrooms.[133] In Mississippi, the end of the ban was a byproduct of the 2000 presidential election and *Bush v. Gore*, during which Chief Justice Edwin Pittman of the Mississippi Supreme Court realized that "[i]t was good for the American people to have this openness in such an important case."[134] He explained that "[t]he goal . . . was to make the court more accessible and more accountable to the public," predicting "[t]he sunshine will be good for the court system."[135] In South Dakota, "a pilot program" allowed television and still photographers to record only the state supreme court's proceedings.[136] Satisfied by the decision, the general manager of the South Dakota Newspaper Association stated, "When we prove [this can work] and the public benefit is demonstrated, then we can look at opening the other courts."[137]

Although all fifty states now permit cameras at some level of their court system, each has different limitations.[138] Pennsylvania's policies, among the most restrictive, generally prohibit photography and broadcasting, unless the presiding judge expressly authorizes the coverage.[139] The Pennsylvania Cable Network is allowed to record most proceedings of the Pennsylvania Supreme Court but cannot broadcast live.[140] In less restrictive Mississippi, a presiding judge "may limit or terminate coverage at any time if there is a need to (1) control the conduct of the proceedings; (2) ensure decorum and prevent distraction; or (3) ensure fair administration of justice."[141] Further, Mississippi's Rules for Electronic and Photographic Coverage of Judicial Proceedings specify how broadcasting should be conducted, so "[e]lectronic media coverage [does] not distract from the courtroom proceedings."[142]

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[133] *See Breakthroughs for Cameras in Courtrooms in Last Two States*, REPS. COMM. FOR FREEDOM PRESS, https://www.rcfp.org/journals/the-news-media-and-the-law-summer-2001/breakthroughs-cameras-court/ [https://perma.cc/T36Y-9YGT] (last visited Feb. 19, 2025).

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] For a comprehensive online database of state-by-state camera rules, see *Open Courts Compendium*, REPS. COMM. FOR FREEDOM PRESS, https://www.rcfp.org/open-courts-compendium/ [https://perma.cc/CA6Z-86T2] (last visited Feb. 19, 2025). To compare state policies, see *Compare/Sort Filtered Data*, RTDNA, https://courts.rtdna.org/cameras-overview.php [https://perma.cc/466V-ZPR3] (last visited Feb. 19, 2025).

[139] *See Detailed Guide: Pennsylvania*, RTDNA (Dec. 13, 2022), https://courts.rtdna.org/cameras-detail.php [https://perma.cc/B3EM-UJJA] (select "Pennsylvania" in the dropdown menu; then click "View"); Dennis Hetzel & Ruth Strickland, *Cameras in the Courtroom*, FREE SPEECH CTR. (July 9, 2024), https://firstamendment.mtsu.edu/article/cameras-in-the-courtroom/ [https://perma.cc/H4SE-ZKBM].

[140] *See Detailed Guide: Pennsylvania*, *supra* note 139.

[141] *Detailed Guide: Mississippi*, RTDNA (Dec. 13, 2022), https://courts.rtdna.org/cameras-detail.php [https://perma.cc/B3EM-UJJA] (select "Mississippi" in the dropdown menu; then click "View").

[142] *Id.*

2. Federal Courts

Despite the increased media access to state courts, Professor Nancy Marder observes, "the revolution has been stopped cold at the steps to the U.S. federal courthouse."[143] Federal Rule of Criminal Procedure 53, adopted in 1946, expressly prohibits electronic media coverage of criminal proceedings in federal courts, stating: "Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."[144] Although it has been challenged, Rule 53 violates neither the First nor Sixth Amendment.[145]

The Judicial Conference of the United States, the policymaking body for the federal courts, has historically adopted policies that prohibit the broadcasting of federal trial court proceedings.[146] The Judicial Conference, however, has authorized a number of pilot projects in various federal district courts—often considering the recommendations of the Court Administration and Case Management (CACM) Committee.[147] In March 2020, in response to the COVID-19 pandemic, the Judicial Conference approved a temporary exception, allowing judges the "use of teleconference technology to provide the public and the media audio access to court proceedings while public access to federal courthouses generally . . . was restricted."[148] When this exception ended in September 2023, the Judicial Conference adopted a new policy that allows "a judge presiding over a civil or bankruptcy nontrial proceeding . . . to authorize live remote public audio access to any portion of that proceeding in which a witness is not testifying."[149]

On March 16, 2023, Congress introduced a bill, the Sunshine in the Courtroom Act of 2023, "[t]o provide for media coverage of Federal court proceedings."[150] The bill would authorize presiding judges in federal appellate courts (including the Supreme Court) and district courts to "permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that

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[143] *See* Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489, 1491 (2012).

[144] FED. R. CRIM. P. 53; *History of Cameras, Broadcasting, and Remote Public Access in Courts*, U.S. CTS. [hereinafter *History of Remote Public Access in Courts*], https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts/history-cameras-broadcasting-and-remote [https://perma.cc/J96Y-BEL5] (last visited Feb. 19, 2025).

[145] *See, e.g.*, United States v. Kerley, 753 F.2d 617, 622 (7th Cir. 1985) (finding Rule 53 does not violate the First Amendment); United States v. Hastings, 695 F.2d 1278, 1284 (11th Cir. 1983) (finding Rule 53 does not violate the First or Sixth Amendment).

[146] *See History of Remote Public Access in Courts*, *supra* note 144.

[147] *See id.*

[148] *Id.*

[149] *Id.*

[150] S. 833, 118th Cong. (as introduced by Senate Mar. 16, 2023).

judge presides."[151] Within those provisions, certain exceptions are enumerated.[152] For example, in district courts, the presiding judge must advise witnesses that they have the right to request their image and voice be obscured during testimony, and in appellate courts, the presiding judge may not permit broadcasting if that judge (or a majority of the participating judges) finds it would constitute a violation of any party's due process rights.[153] Moreover, the bill would prevent the presiding judge from allowing media coverage of jurors.[154] The Sunshine in the Courtroom Act has since been referred to the Committee on the Judiciary for review.[155]

In considering proposed changes to the federal judiciary, it is important to remember that adjudicative activities are meaningfully distinct from political activities.[156] Professor Heidi Kitrosser qualifies this distinction, explaining: "[P]olitical activities are generally legitimized by their connection to political channels whereas adjudicative activities are generally legitimized by procedural constraints and other norms of reason and fairness in decision-making."[157] Her conclusion, among other things, highlights the nexus between the judiciary's procedures and its legitimacy. Public access, when it allows the public to observe a system based in reason and fairness, legitimizes the court's role in a democratic society.[158] "Judges . . . recognize that their legitimacy rests on public oversight."[159] In that respect, public access is very much tied to the appearance of justice.

How then must a court respond when this very "public access" upon which the court's legitimacy depends threatens to disrupt the adjudicative process and thereby its capacity for reason and fairness? Although limiting public access might preserve the actual and apparent fairness of the proceedings, Judge Frank Easterbrook has cautioned against this: "Any step that withdraws an element of the judicial process from public view makes the ensuring decision look more like fiat and requires rigorous justification."[160] The wide range of courtroom policies discussed in this

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[151] *Id.* § 2(b)(1)(A).

[152] *See id.* § 2(a)(1)(B).

[153] *Id.* § 2(b)(1)(B), § 2(b)(2)(A).

[154] *Id.* § 2(b)(2)(B).

[155] *S. 833—Sunshine in the Courtroom Act of 2023*, CONGRESS.GOV (Mar. 16, 2023), https://www.congress.gov/bill/118th-congress/senate-bill/833/text?s=1&r=91 [https://perma.cc/BMW9-3FDU].

[156] *See* Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R. L. REV. 95, 134–35 (2004).

[157] Ardia, *supra* note 114, at 905 (quoting Kitrosser, *supra* note 156, at 135).

[158] *Cf.* United States v. Grace, 461 U.S. 171, 183 (1983) ("Courts are not subject to lobbying, judges do not entertain visitors in their chambers for the purpose of urging that cases be resolved one way or another, and they do not and should not respond to parades, picketing or pressure groups. Neither . . . should it appear to the public that the Supreme Court is subject to outside influence or that picketing or marching, singly or in groups, is an acceptable or proper way of appealing to or influencing the Supreme Court.").

[159] Ardia, *supra* note 114, at 905.

[160] *Id.* (quoting Hicklin Eng'g, L.C. v. Bartell, 439 F.3d 346, 348 (7th Cir. 2006), *abrogated*

Section illustrates not only the constitutional tension between the rights of the accused and the public, but also how different courts have attempted to satisfy—or preserve—the appearance of justice.[161]

II. THE TRANSPARENCY-ENHANCING FEATURES OF HIGH-PROFILE TRIALS

In pursuit of satisfying the appearance of justice, courts have allowed varying degrees of public access. As discussed above, state and federal courts approach this issue differently: state courts are generally open to cameras while, subject to Rule 53's prohibitions, federal courts are not. When cameras are permitted in courtrooms, there are often additional "transparent" practices that engage the public to an even greater extent. In theory, increased observers should offer more checks on the judiciary and positively influence democracy. The attention of the public, however, does not always benefit the accused. By increasing transparency, the line between the judicial proceedings and the court of public opinion blurs. This, in turn, chips away at the appearance of justice when: (1) the court of public opinion has decided someone's guilt, and the judgment/verdict is inconsistent with that opinion; or (2) the public's involvement actually interfered with the fairness of the judicial proceeding. Because adjudication is legitimized by its procedures and fairness, this magnitude of observation could prove detrimental to the functioning of the judiciary and the delivery of justice.

Using modern high-profile trials, this Part will highlight instances in which transparent practices have threatened the fairness of the adjudicative process and, as a result, the appearance of justice.

A. Pretrial Publicity and the Jurors

On March 2, 2023, after a six-week trial in South Carolina state court, Alex Murdaugh, a fourth-generation lawyer with "substantial wealth and powerful connections," was convicted of murdering his wife and son.[162] This, however, was likely not the first time the public had encountered his case. Several TV series of the Murdaugh family saga were released prior to jury selection, scheduled for January 23, 2023.[163]

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by RTP LLC v. ORIX Real Estate Capital, Inc., 827 F.3d 689 (7th Cir. 2016)).

[161] *See generally Open Courts Compendium*, *supra* note 138; Itay Ravid, *Tweeting #Justice: Audio-Visual Coverage of Court Proceedings in a World of Shifting Technology*, 35 CARDOZO ARTS & ENT. L.J. 41, 70 (2016).

[162] Nicholas Bogel-Burroughs, *Alex Murdaugh Convicted of Murdering Wife and Son*, N.Y. TIMES (Mar. 3, 2023), https://www.nytimes.com/2023/03/02/us/alex-murdaugh-guilty.html [https://perma.cc/RYB3-W7BU]; Erik Ortiz, *Alex Murdaugh Found Guilty of Murder: A Summary and Timeline*, NBC NEWS (Apr. 1, 2024, 12:06 PM), https://www.nbcnews.com/news/crime-courts/alex-murdaugh-indicted-murder-charges-summary-timeline-rcna38026 [https://perma.cc/P2AT-SBFA].

[163] *See, e.g.*, *Murdaugh Murders: Deadly Dynasty* (Blackfin 2022) (released June 17,

The media outlets dubbed it South Carolina's "trial of the century"; its fanatical following compared to that of the O.J. Simpson murder trial.[164] *Time Magazine* reported, "If you haven't heard the name Alex Murdaugh over the course of the past few months, you may just not have been paying attention."[165] Murdaugh, following the guilty verdict, was sentenced to two consecutive life sentences.[166] But the spectacle was not quite over.

Having been accused of stealing millions of dollars from his clients, Murdaugh was indicted on twenty-two counts of federal financial fraud and money laundering charges on May 24, 2023.[167] Murdaugh's attorneys moved to transfer venue of the trial, arguing:

> Defendant has received unprecedented media coverage . . . . Defendant's trial on the murder charges was broadcast live to multiple media outlets and seen by millions. . . . Since [March 2023], there have been two docuseries devoted to the trial, and two movies about the Defendant have been released. As a result of this publicity, the jury panel has been provided with a questionnaire . . . about their knowledge of the Defendant . . . . Not surprising, there have been 167 questionnaires returned thus far, and at least 147 panel members admitted having prior knowledge about the Defendant and his criminal charges.[168]

2022); *Low Country: The Murdaugh Dynasty* (HBO Max 2022) (released Nov. 3, 2022); *Alex Murdaugh: Death. Deception. Power.* (Apple TV 2021) (released Dec. 12, 2021); *American Greed: "The Decline of a Dynasty" and "A Legacy of Fraud"* (NBC.com, Peacock). Netflix's "Murdaugh Murders: A Southern Scandal" was released during his trial. *Murdaugh Murders: A Southern Scandal* (Netflix 2023) (released Feb. 22, 2023).

[164] Erik Ortiz, *Lights, Camera, Trial: All Eyes on Alex Murdaugh as a Small South Carolina City Prepares for a 'Circus*,*'* NBC NEWS (Jan. 22, 2023, 8:26 AM), https://www.nbcnews.com/news/us-news/lights-camera-trial-eyes-alex-murdaugh-small-south-carolina-city-prepa-rcna64961 [https://perma.cc/RU66-X28B]. During Murdaugh's trial, O.J. Simpson shared his thoughts in a Twitter video, "A whole lot of people asking me about this Alex Murdaugh trial. I don't know why they think I'm an expert on it." @TheRealOJ32, X (Mar. 2, 2023), https://x.com/TheRealOJ32/status/1631367171397025794?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1631367171397025794%7Ctwgr%5E698b9173c9cec9f14d11579680f48dde0f718d5e%7Ctwcon%5Es1_c10&ref_url=https%3A%2F%2Fwww.theblaze.com%2Fnews%2Foj-simpson-murdaugh-trial-23 [https://perma.cc/CA5D-5V6Q].

[165] Jeffrey Kluger, *Alex Murdaugh and the Evolutionary Reason We're Drawn to Violent Crime*, TIME (Mar. 3, 2023, 3:38 PM), https://time.com/6260225/murdaugh-trial-public-fascination/ [https://perma.cc/LT9J-6QGP].

[166] Emma Bowman & Bill Chappell, *Alex Murdaugh Is Sentenced to 2 Life Terms for the Double Murder of his Wife and Son*, NPR (Mar. 3, 2023, 12:56 PM), https://www.npr.org/2023/03/03/1160815648/alex-murdaugh-murder-trial [https://perma.cc/85GW-AR55].

[167] *See* Ortiz, *supra* note 162.

[168] Beth Baldauf, *Murdaugh Defense Seeks Delay, Change of Venue in November Trial*

The motion's concern about pretrial publicity is not unfamiliar to the U.S. Supreme Court. In *Estes v. Texas*, the Court found that television detracts from "the chief function of our judicial machinery," arguing that "its use amounts to the injection of an irrelevant factor into court proceedings."[169] Specifically, the Court suggested that "pretrial publicity" might lead to "actual unfairness" because of its impact on jurors, "the nerve center of the fact-finding process."[170] The Court explains that "[f]rom the moment the trial judge announces that a case will be televised . . . [t]he whole community, including prospective jurors, becomes interested in all the morbid details surrounding it."[171] When the trial is "highly publicized," like in Murdaugh's case, the likelihood of prejudice increases.[172] The "conscious or unconscious effect that [pretrial publicity] may have on the juror's judgment" will probably have a "direct bearing on his vote as to guilt or innocence."[173] The Court articulated concerns that the way in which pretrial publicity would affect the fairness of a trial would be "so subtle as to defy detection by the accused or control by the judge."[174]

While some concerns about juror prejudice have been addressed directly by Murdaugh's defense team, most prejudice would likely go undetected.[175] Even if the jurors "positively state they will not be influenced by [pretrial publicity]," the Court has argued, "[t]he knowledge on the part of the jury and other trial participants that they are being televised to an emotionally involved audience can only aggravate the atmosphere created by pretrial publicity."[176]

Due to 'Unprecedented Media Coverage,*'* WLTX (Nov. 14, 2023, 10:20 AM), https://www.wltx.com/article/news/special-reports/alex-murdaugh/murdaugh-defense-seeks-delay-venue-change-sc-trial/101-be2f042a-1a61-4e2b-8f16-ed9e54227dfd [https://perma.cc/S77G-CR9A]; Motion to Transfer Venue at 1, South Carolina v. Murdaugh (2023) (No. 2021-GS-47-30), https://www.scribd.com/document/684206061/1113-Alex-Murdaugh-s-Motion-to-Transfer-Venue [https://perma.cc/TFL2-C29D].

[169] 381 U.S. 532, 544 (1965).

[170] *Id.* at 545.

[171] *Id.*

[172] *See id.*

[173] *Id.*

[174] *Id.*

[175] *See id.* at 546 ("[N]ew trials plainly would be jeopardized in that potential jurors will often have seen and heard the original trial when it was telecast."); *see also* Haylee Barber & Erik Ortiz, *Alex Murdaugh's Defense Seeks New Trial Based on Claims of Jury Tampering*, NBC NEWS (Sept. 5, 2023), https://www.nbcnews.com/news/us-news/alex-murdaughs-defense-seek-new-trial-based-alleged-discovered-evidenc-rcna101619 [https://perma.cc/S7TS-WNXU].

[176] *Estes*, 381 U.S. at 592–93 (Harlan, J., concurring); *see also* Rideau v. Louisiana, 373 U.S. 723, 727 (1963) ("[D]ue process of law in this case required a trial before a jury drawn from a community of people who had not seen or heard Rideau's televised 'interview.'"); Irvin v. Dowd, 366 U.S. 717, 728 (1961) ("With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.").

In this regard, there is little a court can do to mitigate the effects of pretrial publicity on the actual fairness of the trial. Although the effects of pretrial publicity on a singular juror may be subtle, the pretrial publicity itself is far from it. It matters, then, whether the general public recognizes that the prejudicial effects of pretrial publicity are at play. If the public recognizes pretrial publicity as prejudicial, then the public will appreciate that its own influence in the outcome of the trial would be unfair. If the public does *not* recognize pretrial publicity as prejudicial, then, even if the trial is fair, it might not accept verdicts inconsistent with the court of public opinion. In either scenario, the trial is broadcasted broadly, which intensifies any message to the public that the judiciary is unfair. Such messages damage the appearance of justice and strike at the legitimacy of the adjudicative process.

B. Live Broadcasts and the Trial Participants

The presumption of openness has historically been justified by its effects on trial participants.[177] The U.S. Supreme Court has explained that the "adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in litigation."[178] Specifically, the Court has argued that "[o]penness . . . may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, [and] cause all trial participants to perform their duties more conscientiously."[179] Accordingly, the public trial should function to "subject[ ] the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."[180] The public trial thus "serves to guarantee the fairness of trials."[181] The advent of live broadcasting in high-profile trials, however, has effectively altered the participants' roles.

In the early 1990s, live broadcasting gained immense popularity through The Court Television Network, known as Court TV.[182] Completely unedited, Court TV allows anyone with cable television to "observe the entire judicial process"—but not just any judicial process.[183] Court TV selects trials for its anticipated audience, meaning that the televised trials "contain a larger than normal dose of weighty, topical issues, involve celebrities, lascivious detail, or grotesque or macabre trivia."[184] In this respect, Court TV, without context, gives observers a distorted perception of the judiciary.[185]

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[177] *See* Gannett Co. v. DePasquale, 443 U.S. 368, 384 (1979).

[178] *Id.* at 384.

[179] *Id.* at 383.

[180] Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

[181] Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975).

[182] Christo Lassiter, *The Appearance of Justice: TV or Not TV—That Is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928, 928–31 (1996) (discussing Court TV and O.J. Simpson trial); Estes v. Texas, 381 U.S. 532, 591 (1965).

[183] David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 787 (1993).

[184] *Id.* at 788.

[185] *See id.*

On October 3, 1995, about 57% of the U.S. adult population tuned into Court TV for the verdict of the O.J. Simpson trial.[186] In the wake of the trial, there was renewed debate over broadcasting criminal trials. Some critics worried that the presence of cameras would intimidate trial participants or "turn them into prancing, preening publicity hounds."[187] These concerns harkened back to Justice Harlan's concurrence thirty years prior:

> In the context of a trial of intense public interest, there is certainly a strong possibility that the timid or reluctant witness, for whom a court appearance even at its traditional best is a harrowing affair, will become more timid or reluctant when he finds that he will also be appearing before a "hidden audience" of unknown but large dimensions. There is certainly a strong possibility that the "cocky" witness having a thirst for the limelight will become more "cocky" under the influence of television. And who can say that the juror who is gratified by having been chosen for a front-line case, an ambitious prosecutor, a publicity-minded defense counsel, and even a conscientious judge will not stray, albeit unconsciously, from doing what "comes naturally" into pluming themselves for a satisfactory television "performance"?[188]

Justice Harlan's concurrence suggests that live broadcasting shifts trial participants' accountabilities away from the adjudicative procedures and towards the public.

The spectacle of the trial can be misleading for members of the public given its resemblance to entertainment television. Public access is, in part, justified as a check on the fairness of a trial, which includes the trial participants.[189] But that check is effective only to the extent that the public is paying attention to the fairness of the trial. And what is entertaining is not necessarily fair. Consequently, more of the trial's fairness depends on the trial participants. If a trial participant becomes distracted by the media attention or scale of the audience, they too may fail to effectively protect the fairness of the adjudication process. That Court TV records the

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[186] *The Simpson Case; 57% Watched the Verdict*, N.Y. TIMES (Oct. 5, 1995), https://www.nytimes.com/1995/10/05/us/the-simpson-case-57-watched-the-verdict.html [https://perma.cc/7W87-WPZA].

[187] The Associated Press, *Simpson Case Backlash Keeps Cameras Out of Other Courtrooms*, N.Y. TIMES (Sept. 17, 1995), https://www.nytimes.com/1995/09/17/us/simpson-case-backlash-keeps-cameras-out-of-other-courtrooms.html [https://perma.cc/G7TS-LNC8].

[188] Estes v. Texas, 381 U.S. 532, 591 (1965) (Harlan, J., concurring).

[189] *See* JEREMY BENTHAM, *Bentham's Draught for the Organization of Judicial Establishments, Compared with That of the National Assembly, with a Commentary on the Same*, *in* 4 THE WORKS OF JEREMY BENTHAM, *supra* note 57, at 316 ("[Publicity] keeps the judge, himself, while trying, under trial.").

entirety of trials means that any unfairness, even if subtle, is amplified to an audience of extraordinary scale.

C. Social Media and the Court of Public Opinion

For six weeks in 2022, the public was transfixed by the *Depp v. Heard* defamation litigation.[190] This action, brought by actor Johnny Depp against his ex-wife, Amber Heard, was captured by two cameras in the courtroom and broadcasted to a national audience.[191] The trial amassed billions of views from remote audiences online.[192] These viewers were far from passive in their observation.[193]

Empowered by their access, members of the audience unpacked every moment as though they were the arbiters of truth.[194] For instance, when Heard accused Depp of sexual assault, it became a social media trend to "mock and cast doubt on her claims."[195] Some TikTok users would lip-sync or act out her testimony, receiving

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[190] *See* Julia Jacobs & Adam Bednar, *Johnny Depp Jury Finds That Amber Heard Defamed Him in Op-Ed*, N.Y. TIMES (June 1, 2022), https://www.nytimes.com/2022/06/01/arts/depp-heard-trial.html [https://perma.cc/2RCS-N7GM].

[191] *See* Julia Jacobs, *Johnny Depp's Win in Court Could Embolden Others, Lawyers Say*, N.Y. TIMES (June 2, 2022), https://www.nytimes.com/2022/06/02/arts/depp-metoo-defamation.html [https://perma.cc/3NW2-JJ99].

[192] *See, e.g.*, Rascoe, *supra* note 3; Sarah Do Couto, *TikTok Creators Take Aim at Amber Heard with Degrading Memes Amid Johnny Depp Trial*, GLOB. NEWS (May 10, 2022, 1:42 PM), https://globalnews.ca/news/8822873/amber-heard-johnny-depp-trial-memes-tik-tok/ [https://perma.cc/J55C-A637]; *see also* Katerina Eva Matsa, *More Americans Are Getting News on TikTok, Bucking the Trend on Other Social Media Sites*, PEW RSCH. CTR. (Nov. 15, 2023), https://www.pewresearch.org/fact-tank/2022/10/21/more-americans-are-getting-news-on-tiktok-bucking-the-trend-on-other-social-media-sites/ [https://perma.cc/B7QP-L3MF].

[193] Couto, *supra* note 192; Jacobs & Bednar, *supra* note 190.

[194] *See* Christie D'Zurilla, *Amber Heard's Treatment on Twitter During Depp Trial Was 'Flagrant Abuse,' Report Says*, L.A. TIMES (July 19, 2022, 6:18 PM), https://www.latimes.com/entertainment-arts/story/2022-07-19/amber-heard-twitter-abuse-johnny-depp-trial [https://perma.cc/Y237-LCFV]; Scott Stump, *How Social Media Could Influence Other Cases After Depp, Heard Trial*, TODAY (June 3, 2022, 2:28 PM), https://www.today.com/popculture/popculture/social-media-could-influence-other-cases-after-depp-heard-trial-rcna31804 [https://perma.cc/X225-MCH2]; Jill Filipovic, Opinion, *The Trolling of Amber Heard Sends a Perilous Message to Women*, CNN (May 17, 2022, 6:08 PM), https://www.cnn.com/2022/05/17/opinions/amber-heard-johnny-depp-trial-women-filipovic/index.html [https://perma.cc/SF73-W4MR] (discussing "seemingly average citizens who have become self-styled experts on everything from domestic abuse to body language to personality disorders" during the course of the *Depp v. Heard* litigation); *see also* Jessica Lucas, *YouTube Lawyers Are Getting Famous Covering the Johnny Depp-Amber Heard Trial*, INPUT MAG. (May 16, 2022), https://www.inputmag.com/culture/johnny-depp-amber-heard-trial-youtube-lawyers-commentary [https://perma.cc/9V7R-XLWY] (discussing the commercialization of the public's commentary on the trial).

[195] *See* Couto, *supra* note 192.

millions of likes.[196] Others posted unsubstantiated claims about her "do[ing] drugs on the stand, smuggl[ing] alcohol into the courtroom and pos[ing] for crying photos."[197] By May 2022, the TikTok tag #JusticeforJohnnyDepp had 10.1 billion views while #JusticeforAmberHeard had 37.2 million views.[198] Following the verdict, Depp's lawyer celebrated their success in the court of public opinion, thanking the jury and their supporters: "We are . . . most pleased that the trial has resonated for so many people in the public who value truth and justice."[199]

The use of social media in *Depp v. Heard* demonstrates the public's fundamental misunderstanding about its role in adjudication. A member of the general public, unlike a member of the jury, is not a fact-finder. While the U.S. Supreme Court encourages the "freedom of discussion,"[200] it warns that the public "must not be allowed to divert the trial from the 'very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.'"[201] The Court highlights one of those legal procedures in particular: "that the jury's verdict be based on evidence received in open court, not from outside sources."[202] The general public is not constrained by such procedures in its search for truth. The Court warns that trials are not "to be won through the use of the meeting-hall," as that invites "prejudice, passion, excitement, and tyrannical power" to the tribunal.[203]

Social media thus transforms the members of the public from observers to fact-finders, unrestrained by evidentiary procedures. A successful attempt by the public to play the role of a juror in adjudication would result in an unfair trial. Further, with access to evidence beyond the scope of the trial, the court of public opinion might not accept the outcome of a trial when inconsistent with its own fact-finding. If the public does not find the judiciary to be fair, then the judiciary fails to uphold the appearance of justice, even when it is protective of procedural due process.

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[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] A. Martinez & Andrew Limbong, *Did the Court of Public Opinion Influence the* Depp v. Heard *Verdict?*, NPR (June 2, 2022, 5:20 AM), https://www.npr.org/2022/06/02/1102575229/did-the-court-of-public-opinion-influence-the-depp-v-heard-verdict [https://perma.cc/GG2U-9V4K]; *see also* Priscilla DeGregory, *Johnny Depp Coming Out on Top in Court of Public Opinion, Experts Say*, N.Y. POST (May 27, 2022, 5:06 PM), https://nypost.com/2022/05/27/johnny-depp-winning-court-of-public-opinion-in-amber-heard-trial/ [https://perma.cc/M3UV-BZSL] ("When [Johnny Depp] stepped off the stand, I think he already won based on his definition of winning . . . [b]ecause he already obtained the favor of the court of public opinion . . . once he told his story.").

[200] Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (quoting Pennekamp v. Florida, 328 U.S. 331, 347 (1946)).

[201] *Id.* at 350–51 (quoting Cox v. Louisiana, 379 U.S. 559, 583 (1965) (Black, J., dissenting)).

[202] *Id.* at 351.

[203] *Id.* at 350 (first quoting Bridges v. California, 314 U.S. 252, 265 (1941); and then quoting Chambers v. Florida, 309 U.S. 227, 236–37 (1940)).

III. THE DISSONANCE BETWEEN TRANSPARENCY AND ACCOUNTABILITY

The impetus for increased public access to courtroom proceedings is, facially, a call for more transparency. Underlying these kinds of calls is this implicit assumption: "[*S*]*eeing* a phenomenon creates opportunities and obligations to make it accountable and thus to *change* it."[204] In its ideal form, transparency empowers the observer to uncover the truth, promising a form of control over a complex system of governance.[205] Thus, a constitutional presumption of openness represents to the observer more than an opportunity to witness a trial—but a guarantee of accountability.[206]

However, there are significant limitations to this "ideal," which, if not properly contemplated, implicate the integrity of judicial proceedings and the health of democracy. Justice Black characterized this concern, cautioning that public access presented "in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance."[207] By identifying the limits of transparency, observers can better distinguish when certain practices are effectively "cloaks" and not an actual restraint, or "check," on judicial power.[208]

A. Transparency as an Ideal

Implicit promises beget the appeal of transparency. The concept of transparency is malleable and amorphous, invoking different significances in different contexts.[209] Researchers Mike Ananny and Kate Crawford explain that transparency is best understood as not an end state, but "a system of observing and knowing that promises a form of control."[210] They define the concept of transparency through the expectations of the observers, writing:

> Transparency concerns are commonly driven by a certain chain of logic: observation produces insights which create the knowledge required to govern and hold systems accountable. This logic

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[204] Mike Ananny & Kate Crawford, *Seeing Without Knowing: Limitations of the Transparency Ideal and Its Application to Algorithmic Accountability*, 20 NEW MEDIA & SOC'Y 974, 974 (2018).

[205] *See id.*

[206] *See In re* Oliver, 333 U.S. 257, 270 (1948) ("The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.").

[207] *Id.* at 271.

[208] *See id.*

[209] *See* Jonathan Fox, *The Uncertain Relationship Between Transparency and Accountability*, 17 DEV. PRAC. 663, 664 (2007).

[210] Ananny & Crawford, *supra* note 204, at 975.

> rests on an epistemological assumption that "truth is correspondence to, or with, a fact." The more facts revealed, the more truth that can be known through a logic of accumulation. Observation is understood as a diagnostic for ethical action, as observers with more access to the facts describing a system will be better able to judge whether a system is working as intended and what changes are required. The more that is known about a system's inner workings, the more defensibly it can be governed and held accountable.[211]

Transparency has an affective dimension: the observer's "*feeling* that seeing something may lead to control over it."[212] In other words, transparency, in its ideal form, "generates accountability."[213]

This chain of logic—that transparency leads to accountability—has amassed a lot of support by the public, beginning what has been termed "The Transparency Movement."[214] The Movement celebrates U.S. Supreme Court Justice Louis Brandeis's framing of transparency from over a century ago: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most effective policeman."[215] Such promises of transparency, which inspired the Movement, also led to the creation of "domains of institutionalized disclosure."[216] The fruits of this Movement are evident in institutions and cultural interventions across the United States.[217]

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[211] *Id.* at 974 (citations omitted).

[212] *Id.* at 975.

[213] Fox, *supra* note 209, at 664.

[214] Lawrence Lessig, *Against Transparency*, NEW REPUBLIC (Oct. 9, 2009), https://newrepublic.com/article/70097/against-transparency [https://perma.cc/98K8-KVG2] ("[T]ransparency has become an unquestionable bipartisan value."); Josh Haynam, *The Transparency Movement: What It Is, Why It's Important and How to Get Involved*, BUFFER (Apr. 23, 2015), https://buffer.com/resources/transparency-movement/ [https://perma.cc/YHA8-JEE3]; *see, e.g.*, Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1340 (arguing that "[t]ransparency . . . is everywhere; or at least talk of it is everywhere").

[215] BRANDEIS, *supra* note 30, at 92; John D. Donahue, *Seeing Through Transparency*, GOVERNING (Mar. 16, 2010), https://www.governing.com/archive/seeing-through-transparency.html [https://perma.cc/94HQ-G2RW] ("The transparency movement boasts a snappy Louis Brandeis slogan—'sunlight is the best disinfectant'—even though that's not quite what Brandeis wrote, and even though it's not really true.").

[216] MICHAEL SCHUDSON, THE RISE OF THE RIGHT TO KNOW 7 (2015).

[217] *See, e.g.*, Ananny & Crawford, *supra* note 204, at 975–76 (specifying actions to increase transparency such as "the US Administrative Procedures Act of 1946, the 1966 Freedom of Information Act, the Sunshine Act, truth in packaging and lending legislation, nutritional labels, environmental impact reports and chemical disclosure rules, published hospital mortality rates, fiscal reporting regulations, and the Belmont Report on research ethics"); Tal Z. Zarsky, *Transparent Predictions*, 2013 U. ILL. L. REV. 1503, 1507 (noting

The concepts of transparency and accountability are intimately related.[218] Transparency often serves accountability and truth telling.[219] They are, however, not interchangeable.[220] Consider each concept in its purest form. Transparency includes only access to information, and accountability includes only the capacity to sanction or compensate.[221] A transparent system that lacks the capacity to sanction or compensate, much like public spectacles of state power, cannot claim to be accountable to the public.[222]

In the context of the judicial system, it is worth identifying the type of accountability with which the public is most concerned. There are two types of accountabilities: individual and institutional.[223] Both can be relevant in the context of trials.[224] Individual accountability, as the name suggests, focuses on remedying individual failures.[225] Transparency reforms centered around individual accountability might focus on "tack[ling] corruption" on a case-by-case basis.[226] Institutional accountability, on the other hand, focuses on systemic flaws.[227] Transparency reforms centered around institutional accountability would aim generally to improve institutional performance.[228] The ideal of transparency would require that the public, in viewing a trial, had a means of remedying systemic flaws (institutional accountability) and individual failures (individual accountability). The former can be accomplished through the democratic process while the latter is less applicable in the context of a public trial. That said, an illusion of individual accountability arguably creates the most confusion for the public.

Even in its ideal form, transparency is but one means of generating accountability. However, given its pervasiveness, one must contemplate its limits in the context of public trials.

B. Transparency as a "Cloak"

Consider Court TV, which presents "virtually unedited versions of trials."[229] The unfiltered, continuous trial should, theoretically, satisfy members of the public who

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that "[t]ransparency or related terms such as 'Freedom of Information' and 'Open Government'" were "cornerstones" of President Obama's administration).

[218] Fox, *supra* note 209, at 663.

[219] *See* Stephanie Craft & Tim P. Vos, *The Ethics of Transparency*, *in* THE ROUTLEDGE COMPANION TO JOURNALISM ETHICS 175, 176, 179–80 (1st ed. 2021).

[220] *See* Fox, *supra* note 209, at 668.

[221] *See id.* at 668–69.

[222] *See supra* Section I.A.

[223] *See* Fox, *supra* note 209, at 666.

[224] *See id.*

[225] *See id.*

[226] *Id.*

[227] *See id.*

[228] *See id.*

[229] *See* Harris, *supra* note 183, at 787.

want to hold the judiciary accountable. For as much transparency that Court TV allows, it is still misleading.

In a phenomenon known as "inadvertent opacity," transparency allows for "such great quantities of information that important pieces of information become inadvertently hidden in the detritus of the information made visible."[230] In other words, too much information can oversaturate the observer's experience and cause them to miss important information. Court TV, in producing continuous, unfiltered content, risks distracting viewers from scrutinizing the actual fairness of the trial. Court TV selects trials for broadcasting based on their potential entertainment value, which further distracts viewers.[231] Thus, the value of the public's "check" on the judiciary is weakened.

Importantly, Court TV—and transparency generally—privileges seeing over understanding.[232] For instance, because Court TV broadcasts only the trial, "the rest of the process is invisible" to observers.[233] "Seeing inside a system does not necessarily mean understanding its behavior or origins."[234] Court TV is, therefore, not entirely accessible to the public, which predominantly lacks legal sophistication. When the public lacks the legal context to understand what is happening during the trial, they are not equipped to accurately assess the fairness of the trial.

C. The Appearance of Accountability

Congress is calling upon the Judicial Conference for more transparency.[235] These calls, while signaling a desire to hold the judicial system accountable, are aimed broadly toward the entire trial.[236] Past trials have demonstrated that extraordinary public access to the courtroom endangers the court's truth-seeking procedures and thereby its legitimacy.[237]

The Constitution's procedural due process protections represent a promise to the public that the judicial system is fair in seeking truth.[238] A public trial is an integral

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[230] *See* Ananny & Crawford, *supra* note 204, at 979.

[231] *See* Harris, *supra* note 183, at 788.

[232] *Id.*

[233] *Id.*

[234] Ananny & Crawford, *supra* note 204, at 980.

[235] *See* Letter from Congress of the United States to the Honorable Rosslyn R. Mauskopf (Aug. 3, 2023), https://schiff.house.gov/imo/media/doc/trump_trial_transparency_letter.pdf [https://perma.cc/X8DV-JAR5] ("If the public is to fully accept the outcome, it will be vitally important for it to witness, as directly as possible, how the trials are conducted, the strength of the evidence adduced and the credibility of witnesses.").

[236] *See id.*

[237] *See supra* Part II.

[238] *See* Gannett Co. v. DePasquale, 443 U.S. 368, 378 (1979) ("To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity . . . [a]nd because of the Constitution's pervasive

part of procedural due process to the extent that it ensures the defendant *actually* receives a fair trial.[239] But the public's intended role in a public trial is limited. Importantly, the public cannot directly change the substantive outcome of a case.[240] That role belongs to the jury, which serves as the fact-finding body, or the court during a bench trial.[241] During trial proceedings, the general public is allowed to *see* but not touch.[242]

This "see but do not touch" principle guts the public's ideal of transparency during trial proceedings. Recall that central to the implicit assumption of transparency is that "*seeing* a phenomenon creates opportunities . . . to *change* it."[243] The

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concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary."); Williams v. Florida, 399 U.S. 78, 82 (1970) (finding that due process "is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence"); *see also* Kenneth S. Klein, *Truth and Legitimacy (In Courts)*, 48 LOY. U. CHI. L.J. 1, 48 (2016) (arguing that "truth in courts refers to the relative role a colloquial meaning of accuracy has in the family of other values courts seek to advance; meaning there has been adequate procedural process to support a general communal sense of systemic fairness without regard to the outcome in a particular case").

[239] *See supra* Part I; Estes v. Texas, 381 U.S. 532, 538–39 (1965) ("The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned."); *cf. Gannett*, 443 U.S. at 379–80 ("The Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee, like the others enumerated, is personal to the accused.").

[240] *See Estes*, 381 U.S. at 588 (Harlan, J., concurring) ("Thus the right of 'public trial' is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered."); *id.* at 583 (Warren, C.J., concurring) ("[The] public trial provision of the Sixth Amendment is a 'guarantee to an accused' . . . [and] a necessary component of an accused's right to a fair trial . . . .").

[241] *See* U.S. CONST. amend. VI ("[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."); *id.* amend. VII ("In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."); Gallick v. Baltimore & Ohio R.R., 372 U.S. 108, 115 (1963) ("It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."); Colgrove v. Battin, 413 U.S. 149, 157 (1973) (stating that "the purpose of the jury trial in criminal cases [is] to prevent government oppression and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues"); *see also* Pettaway v. Barber, 645 F. Supp. 3d 1269, 1283 (M.D. Ala. 2022) ("Because the jury will be the finder of fact and determine the outcome in this case, maintaining the integrity of the jury's verdict goes to the very heart of ensuring that justice be fairly administered.").

[242] Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) ("Due process requires that the accused receive a trial by an impartial jury *free from outside influences*." (emphasis added)).

[243] Ananny & Crawford, *supra* note 204, at 974.

general public is not empowered to change the course of a trial because doing so would substantially interfere with the accused's due process rights, which courts are constitutionally bound to protect over the public's right of access.[244] If the public accurately understands its role, which is to not interfere with the substantive outcome of a trial, it will not feel the sense of control or security that the ideal of transparency promises. Alternatively, if the public does not understand its role, it will feel called upon to change the outcome, which would be detrimental to procedural due process and negate the purpose of the "public trial."[245] Moreover, these effects are exacerbated when members of the public lack requisite knowledge about legal proceedings. Something that may appear unfair, like the exclusion of certain evidence, may in fact comply with procedural due process. Thus, the appearance of justice may be distorted, even when it is procedurally fair and substantively just.

In the context of the Sixth Amendment's guarantee of a "public trial," transparency is not fair to observers. For observers to feel empowered by the transparency or openness of a trial, the theory assumes their incompetence.[246] Transparency is merely the appearance of accountability.

IV. RESPONDING TO CALLS FOR "EXTRAORDINARY TRANSPARENCY" IN FEDERAL COURT

As state courts experiment with more transparent practices in adjudication, there is more pressure for federal courts to do the same. For the first time in this nation's history, a former president—and now president—was prosecuted as a federal criminal defendant, meaning that arguments for more sunlight were grounded in an extraordinary event.[247] More "extraordinary times" are inevitable. Having already been met with bills like the Sunshine in the Courtroom Act—which received bipartisan support[248]—and new Judicial Conference–approved broadcasting procedures, policymakers will need to decide how to approach future calls for "extraordinary

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[244] *See Estes*, 381 U.S. at 538–39.

[245] *See id.*

[246] *See* Ananny & Crawford, *supra* note 204, at 975 ("Autonomy-through-openness assumes that 'information is easily discernible and legible; that audiences are competent, involved, and able to comprehend' the information made visible . . . .").

[247] Madeline Halpert, *Special Counsel's Last Criminal Case Against Trump Dismissed*, BBC (Nov. 26, 2024), https://www.bbc.com/news/articles/c4gvd7kxxj5o [https://perma.cc/N8QN-69Z8]. *But see id.* ("The cases were dismissed 'without prejudice,' meaning charges could be refiled after Trump finishes his second term as president.").

[248] *S. 833: Sunshine in the Courtroom Act of 2023*, GOVTRACK, https://www.govtrack.us/congress/bills/118/s833/cosponsors [https://perma.cc/TW9X-UFDQ] (last visited Feb. 19, 2025); Scott MacFarlane, *Bipartisan Group of Senators Optimistic About Push to Allow Cameras in Federal Courtrooms*, CBS NEWS (Apr. 28, 2023), https://www.cbsnews.com/news/cameras-federal-courts-sunshine-in-the-courtroom-act-grassley-blumenthal/ [https://perma.cc/65QA-CAJ9].

transparency." This Part will explore the concerns that lead to these kinds of demands and provide practical considerations for policymakers' and federal judges' responses.

A. Extraordinary Confusion

Democracy has the capacity to change adjudication.[249] Those changes were evident in the historical shift away from public spectacles of state power and secret trials.[250] The U.S. Supreme Court has since tried to balance the rights of the accused with the rights of the public with procedural fairness at the center of its decisions.[251] Since the Court opened the door to live broadcasting in state courts, the public has had more exposure to judicial proceedings, particularly high-profile cases. That the federal judiciary has largely maintained its closed-door policy is disorienting.

For instance, not long after the broadcasts of Johnny Depp's and Kyle Rittenhouse's trials in state court, the public was confused why the trial of Ghislaine Maxwell was not being televised.[252] Some members of the public began developing theories, believing "the lack of cameras in Maxwell's courtroom prove[d] . . . a larger cover up."[253] Law professors responded to the public's concerns, clarifying that the rule prohibiting cameras "covers all federal courts in the whole country," and assured that "[t]his is not some dark conspiracy."[254] The widespread confusion was a reasonable reaction to the current state of public access, which oscillates between extremes—secrecy and spectacle.

Many transparency-enhancing practices disrupt the fairness of trial in subtle ways, such that they become difficult for judges to detect and control.[255] Extraordinary transparency thus strikes at the legitimacy of the judiciary. As policymakers grapple with the extent to which federal courts should be open to the public, they will face more arguments like this: "[T]hese are extraordinary times, and extraordinary times demand extraordinary transparency."[256] Transparent practices in federal

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[249] *See supra* Section I.A.

[250] *See id.*

[251] *See supra* Section I.B.

[252] *See* Colin Moynihan, *Why Isn't the Ghislaine Maxwell Trial Being Televised?*, N.Y. TIMES (Dec. 1, 2021), https://www.nytimes.com/2021/12/01/nyregion/ghislaine-maxwell-trial-tv.html [https://perma.cc/RV8L-MVBX]; Angelo Fichera, *Coverage of Depp's Libel Suit Misleadingly Compared to Maxwell Trial*, AP NEWS (Apr. 25, 2022, 8:07 PM), https://www.apnews.com/article/fact-check-depp-heard-trial-maxwell-stream-316243011547 [https://perma.cc/BAG8-BQCT].

[253] *See Fact Focus: Media Not Banned from Ghislaine Maxwell Trial*, AP NEWS (Nov. 29, 2021, 6:40 PM), https://www.apnews.com/article/ghislaine-maxwell-media-social-media-ap-fact-check-jeffrey-epstein-db6a8154b337314798312c58a5b97707 [https://perma.cc/LSV5-YZN5].

[254] *See id.*

[255] *See supra* Part II.

[256] *See* Coley, *supra* note 26.

court should not be motivated by this demand; rather, they should be motivated by the central concern of the "shared right" to an open public trial: "the assurance of fairness."[257]

B. Between Secrecy and Spectacle

In protecting the integrity of the public trial, the U.S. Supreme Court has interpreted the Sixth Amendment to avoid both secret trials and pure spectacles.[258] The Court has expressed concerns that secret trials would go unchecked and therefore become corrupt.[259] On the other hand, the Court has also recognized the threat to the legitimacy of the judiciary when the public's involvement makes the adjudicative process a spectacle, in which fairness and reason cannot be adequately protected.[260] This Section will propose two guiding principles, structured to help decision-makers protect the right of the accused to a fair trial while bolstering public confidence in the federal judiciary.

1. Protecting Procedural Due Process

Compared to state courts, federal courts have tended toward secrecy. They are transparent to an extent—publishing opinions, transcripts, and some audio.[261] Less transparency, in some ways, insulates federal courts from the court of public opinion, thereby shielding them from unfair public influence. Secret trials, however, are inherently suspect and do little to bolster public confidence in the court's procedures. Chief Justice Burger described this well: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[262]

To strike a balance between transparency and fairness, the public should function primarily as a "check" on procedural due process—not as fact-finders. Indeed, the institution's procedures demand public scrutiny.[263] As Professor Peter Arenella argues, "[C]riminal procedure can perform a legitimation function by resolving

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[257] *Press-Enterprise II*, 478 U.S. 1, 7 (1986).

[258] *See generally supra* Section I.B.

[259] *See id.*; *see also In re* Oliver, 333 U.S. 257, 272 (1948) ("[A] criminal trial conducted in secret would violate the procedural requirements of the Fourteenth Amendment's due process clause . . . .").

[260] *See supra* Section I.B.

[261] *See generally supra* Section I.C.

[262] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980).

[263] *See generally* Jeffrey Bellin, *The Evidence Rules that Convict the Innocent*, 106 CORNELL L. REV. 305 (2021) (identifying evidentiary procedures that lead to false convictions); Craig M. Bradley & Joseph L. Hoffmann, *Public Perception, Justice, and the "Search for Truth" in Criminal Cases*, 69 S. CAL. L. REV. 1267, 1281 (1996) (discussing how some procedures "are in direct conflict with . . . the search for truth").

state-citizen disputes in a manner that commands the community's respect for the fairness of its processes . . . ."[264] In navigating calls for more transparency, federal courts should empower the observer to scrutinize the integrity of the procedure, which is designed to ensure fairness. General calls for the public's participation only exacerbate the limits of transparency and distort the observer's sense of control. When public access effectively operates as a "cloak," judicial power goes unchecked.

2. Enhancing Comprehension

Current spectacles in state courts highlight how dangerous adjudication can be to the accused, the public, and the judiciary when influenced by the court of public opinion. The accused is not afforded a fair trial when the court of public opinion finds their guilt before the adjudicative process has run its course. Members of the public, believing they can hold the judiciary accountable to the truth, misunderstand and abuse their role, which is ultimately to their detriment. The judiciary cannot preserve its legitimacy when the appearance of justice becomes a spectacle of unfairness.[265]

Transparency, however, need not be limited to preserve the fairness of the adjudicative process. The Court has historically recognized the value of public trials as educational, writing: "The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy."[266] The public must understand the distinction between its role in the adjudicative process and its role in democracy. After all, its presence—remote or in-person—is justified by its ability to ensure the fairness of the adjudicative process.

Policymakers and courts may protect the appearance of justice by directing the public's attention to the limits of transparency. Extraordinary transparency, especially in the context of high-profile trials, risks obscuring the procedure from the public by oversaturating its observation with information. To properly evaluate the procedural fairness of trials, the public must have some understanding of the underlying procedures. By supplementing broadcasts with accessible and reliable information about the procedures governing the adjudications, the public can better comprehend the proceedings and, thereby, scrutinize the actual fairness of the trials. That informed assessment is then well-suited for generating institutional accountability in

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[264] Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 188 (1983) (footnote omitted).

[265] *See* Bradley & Hoffmann, *supra* note 263, 1273 ("[W]hen criminal trials are viewed more as entertainment and lawyer make-work than as a just and fair 'search for truth,' then the system has failed in its symbolic, cathartic purpose.").

[266] *Richmond Newspapers*, 448 U.S. at 572 (1980) (quoting 6 JOHN H. WIGMORE, EVIDENCE § 1834 at 438 (J. Chadbourn rev. 1976)).

a democratic society. When narrowly supplemented with objective procedural information, transparency has a greater potential for generating accountability in the context of public adjudication.

CONCLUSION

Calls for extraordinary transparency must be evaluated in light of the underlying purpose of the Sixth Amendment: to preserve the fairness of the trial. The appearance of justice is a fragile thing. When the public does not properly understand its role in the adjudicative process, it can unduly influence actual justice and fairness. The solution to preserving the integrity and legitimacy of the judiciary is not closing the doors to the public; rather, it is to educate the public on adjudicative proceedings. The adjudicative process should not assume the observers' incompetence. Then, transparency is a cloak. In extraordinary times, courts and policymakers have the opportunity to build the public's confidence in the judiciary, taking heed that the appearance of accountability is no substitute for actual justice.