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AN ANALYSIS OF THE LEGALITY OF TELEVISION CAMERAS BROADCASTING JUROR DELIBERATIONS IN A CRIMINAL CASE

*Daniel H. Erskine, Esq.**

Recently, ABC News broadcasted the deliberations of several juries in capital murder cases into the living rooms of the American public.¹ This event occurred as a result of administrative orders issued by a number of state supreme courts.² The most recent judicial opinion to confront the problem of televising jury room deliberations in a capital criminal case took place in the Texas Court of Criminal Appeals.³ These events marked the latest skirmish between the media's desire to open the jury room to the public through television and the judiciary's protection of the secrecy of jury deliberations. Additionally, recent cases in Europe challenging the mode of jury trial as violating human rights urge an assessment of public inspection of jury deliberations.

This work sets out the constitutional, statutory, and common law applicable to television's intrusion into the jury room. The first section addresses federal constitutional considerations focusing on Article III Section 2, the Sixth Amendment, and the First Amendment. The second section analyzes certain federal rules and particular statutes applicable to televising federal judicial proceedings, as well as the rationale behind their enactment. Finally, the third section discusses comparative approaches addressing television's intrusion into the courtroom, particularly focusing on recent jurisprudence from the European Court of Human Rights and the Scottish Court of Session.

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1. See Ray Richmond, *In the Jury Room*, available at http://www.hollywoodreporter.com/thr/reviews/review_display.jsp?vnu_content_id=1000602372 (last visited November 18, 2005).

2. See *In re* Special Electronic Access to Superior Court Proceedings, Administrative Order No. 2003-85 (Ariz. 2003), available at <http://www.supreme.state.az.us/orders/admorder/Orders03/2003-85.pdf> (last visited November 18, 2005); Judicial Canons of Ethics, Canon 3(A)(8) (Colo. 2003) (allowing discretionary ruling on expanded media coverage).

3. See *State ex rel. Rosenthal v. Poe*, 98 S.W.3d 194 (Tex. Crim. App. 2003).

I. CONSTITUTIONAL CONSIDERATIONS

Two sections of the United States Constitution control the conduct of a criminal trial. Article III section 2, embodies the only provision in the original Constitution securing the right of trial by jury for all criminal prosecutions.⁴ The Sixth Amendment, ensures the right of public trial by jury.⁵ Because both constitutional provisions mandate trial by jury in the criminal context, an explanation of their relation to each other, as well as an articulation of their origins, is necessary.

A. *Origins*

Article III Section 2 derives its foundation from a variety of sources.⁶ The First Continental Congress announced trial by jury an inherent and invaluable right.⁷ Similarly, the Second Continental Congress complained of the deprivation of the right to jury trial.⁸ Colonists most famously asserted this right in The Declaration of Independence.⁹ These assertions were grounded in the English common law, which applied to British colonial citizens.¹⁰

4. U.S. CONST. art. III, § 2. “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.” *Id.* See also 1 ELLIOT’S DEB., 2ED., 229, 270; 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION, 144, 173, 187, 433, 438, 576, 587-588, 601, 628 (1911).

5. U.S. CONST. amend. VI. “In all criminal prosecutions, the 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, which district shall have been previously ascertained by law. . . .” *Id.*

6. See Bruce P. Frohnen, *Law’s Culture: Conservatism and the American Constitutional Order*, 27 HARV. J.L. & PUB. POL’Y 459, 461-485 (2004) (discussing conservative constitutional ideology integrated into the Constitution); Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J.L. & PUB. POL’Y 489, 490-520 (2004) (describing liberal and conservative philosophies impacting the Constitution’s framing).

7. See SOURCES OF OUR LIBERTIES 270, 288 (Richard L. Perry ed., 1959). “That trial by jury is the inherent and invaluable right of every British subject in these colonies.” Resolutions of the Stamp Act Congress art. VII, reprinted in SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION 32, 33 (Samuel Eliot Morison, ed., 1965). “That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.” Resolutions of Oct. 14, 1774, 5, reprinted in 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 63, 69 (Worthington Chauncey Ford ed., 1904).

8. Resolutions of July 6, 1775, reprinted in 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 140, 145 (Worthington Chauncey Ford ed., 1904) (Declaration of the Causes and Necessity of Taking Up Arms).

9. THE DECLARATION OF INDEPENDENCE, para. 18 (U.S. 1776). “For depriving us, in many cases, of the benefit of Trial by Jury.” *Id.*

10. This work does not reference any civil law influences on the use of juries. Largely, such

English jurisprudence utilizes trial by jury as early as 1087 in the case of *Bishop Gundulf, of Rochester v. Pichot, Viscount of Cambridge*.¹¹ Further evidence exists of juries convening in the twelfth and thirteenth centuries as part of a new procedure where action by the state through arrest of an individual was followed by a “searching examination of accused himself and of witnesses” in the presence of jurors.¹² In criminal cases, trial by jury rather than by compurgation appears to occur before the Fourth Lateran Council’s 1215 edict banning clerics from presiding over trial by ordeal.¹³ Secular statutory enactment of trial by jury occurs in the 1275 Statute of Westminster.¹⁴ Arguably, a right to jury trial received general acceptance for the nobility in the 1215 *Magna Carta* mandate of jury trial as the exclusive means to resolve particular actions; common men received a concomitant right of trial by jury with the declaration in the 1689 English Bill of Rights that “jurors ought to be duly impaneled and returned. . . .”¹⁵ In England, the uniform institution of trial by jury in criminal cases appears at least by the fifteenth century.¹⁶

A few characteristics of these early juries deserve note. First, the principle of jurors undertaking a collaborative effort to return a verdict is evidenced in the fourteenth century proscription that jurors could not separate until rendering a verdict in a matter.¹⁷ During the same century, the method of verdict underwent considerable change. In 1346, jury verdicts were by majority vote, while in 1367, unanimity in juror verdicts found general acceptance.¹⁸ With the requirement of the

influences, if any, appear not to greatly impact jury evolution in England. See DAVID IBBETSON, COMMON LAW AND IUS COMMUNE 3-33 (Seldon Society 2001) (discussing the relationship and impact of civil law on common law tradition).

11. Big. Pl. A.N. 34; See James B. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249, 253 (1892).

12. SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 315 (A.L. Goodhart ed., 7th ed. 1956).

13. See Thayer, *supra* note 11, at 265.

14. THEODORE PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 125-26 (5th ed. 1956).

15. See 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 173 n.3 (2d ed. 1909) (denying jury trial embodied in *Magna Carta*). “39. No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.” *Id.*

16. JOHN FORTESQUE, DE LAUDIBUS LEGUM ANGLIAE 63-64 (Garland Publishing 1979) (c.1490). Fortesque illustrated through formal proof that use of a jury was not repugnant to divine law. *Id.* at 71.

17. *Id.*

18. HOLDSWORTH, *supra* note 12, at 318.

unanimous verdict in the fifteenth century, jury deliberation occurred in the custody of the officers of the Court, apart from the trial participants.¹⁹

At the time when the United States Constitution was proposed to the States, the jury mode of trial in criminal cases was inviolate.²⁰ Urging the Constitution's adoption, Alexander Hamilton expounded that all concurred in the significance of trial by jury as a "valuable safeguard to liberty . . . [and] the very palladium of free government."²¹ Further, Hamilton instructed that the national legislature's discretion, "in regard to criminal cases, is abridged by the express injunction of trial by jury in all such cases."²²

The Sixth Amendment arose in response to demands for enumerated rights circumscribing the federal government.²³ James Madison first proposed the Amendment in 1789 in the United States House of Representatives.²⁴ He may have been influenced by the 1789 French Declaration of the Rights of Man, but more likely Madison drew inspiration from the 1776 Virginia Declaration of Rights written by George Mason.²⁵ Madison proposed to strike Article III section 2 clause

19. FORTESQUE, *supra* note 16, at 61. Cf. ARISTOTLE, ATHENIAN CONSTITUTION, sec. 63-69. (describing the conduct of an Athenian jury from composition to deliberation in secret).

20. See THE FEDERALIST NO. 81, at 545-46 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); WILLIAM E. NELSON, THE JURY AND CONSENSUS GOVERNMENT IN MID-EIGHTEENTH-CENTURY AMERICA, IN THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 333 (Eugene W. Hickok, Jr. ed., 1991) and JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1773-1774, 652-53 (Carolina Academic Press 1987) (1833). "It will not answer to make an express exception of cases which shall have been originally tried by a jury, because in the courts of some of the States ALL CAUSES are tried in this mode." THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* at 545-46; see also Richard Henry Lee, *Letter from a Federal Framer No. 2, 1787*, reprinted in THE ANTI-FEDERALISTS 208-11 (Cecelia M. Kenyon ed., 1966) (similarly advocating for trial by jury).

21. THE FEDERALIST NO. 83, at 568 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

22. *Id.*

23. See Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1688-92 (2000) (recounting congressional debates concerning Madison's proposals and rationale for textual changes).

24. The Amendment and the Judiciary Act were proposed in the same year, the latter articulating in federal courts the use of trial by jury in criminal offenses. See Judiciary Act of 1789, ch. 20, 12, 1 Stat. 73, 88 (1789) (current version at 28 U.S.C. § 1332 (2000)).

25. Section 8 of the Virginia Declaration of Rights states:

That in all capital or criminal prosecutions a man has a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land or the judgment of his peers.

Virginia Declaration of Rights 1776.

3 of the newly ratified Constitution and replace it entirely with an Amendment.²⁶ Despite the proposal's rejection, it remained questionable as to whether the Amendment or the Article superseded the other.²⁷

In 1888, the United States Supreme Court settled the issue of whether the Sixth Amendment negated clause 3 of Article III section 2.²⁸ Concluding no conflict existed between the Amendment and the Article, the Court articulated that the intent of the Amendment was not to supplant the Article.²⁹ Viewing Article III as a reiteration of the principles of trial by jury existing at common law, the Court asserted that the Sixth Amendment expressed those existing common law rules.³⁰

26. The Amendment reads:

Seventhly. That in article 3d, section 2, the third clause be struck out, and in its place be inserted the clauses following, to wit: The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury, shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorised in some other county of the same state, as near as may be to the seat of the offence. In cases of crimes committed not within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.

Cong. Register I, 423-37; Gazette of the United States 10 and 13 (June 1789).

27. Senate Journal, Sept. 4, 1789, 1st Cong., 1st Sess., 71.; Senate Journal, Sept. 9, 1789, 1st Cong., 1st Sess., 77. See *Letter from James Madison to Edmund Pendleton*, Sept. 14, 1789, in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 491 (1865).

28. *Callan v. Wilson*, 127 U.S. 540, 549 (1888). Article I, section 9, paragraph 17 of Constitution of the Confederate States of America, adopted March 11, 1861, provided, in a solitary provision, similar and expanded rights to those articulated in the U.S. Constitution:

In all criminal prosecutions the 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

See JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE CONFEDERACY INCLUDING THE DIPLOMATIC CORRESPONDENCE 1861-65 (1905).

29. *Callan*, 127 U.S. at 549.

30. *Id.* at 549-50. The Court continued in *Callan*:

And as the guarantee of a trial by jury, in the third article, implied a trial in that mode and according to the settled rules of the common law, the enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the General Government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property.

Id. Accord *Thompson v. Utah*, 170 U.S. 343, 347-48 (1898), *overruled by* *Collins v. Youngblood*,

Indeed, the Sixth Amendment does not modify Article III, but reflects the meaning of Article III in substantially the same manner.³¹

B. Interpretation

Early on, the Supreme Court grappled with what definition to ascribe to the term “trial by jury.” The Court resolved that the meaning of “jury” within the Constitution coincided with the “meaning affixed to [it] in the law as it was in this country and in England at the time of adoption” of the Constitution.³² The Court, in a subsequent case interpreting the phrase, firmly held the meaning of trial by jury is unquestionably “as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted.”³³

Therefore, a jury, in the constitutional sense, included the elements found in the common law: “(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.”³⁴ These components, comprising a constitutional jury, were held inviolate by any enactment of legislation.³⁵

Under the above-referenced jurisprudence, the Court resorted to English common law and colonial jurisprudence to interpret the rights of a criminal defendant under the Constitution. Utilizing these sources, the Court found the right of trial by jury belonged personally to the criminal

497 U.S. 37 (1990).

31. *Patton v. United States*, 281 U.S. 276, 298 (1930). The *Patton* Court continued:

This provision, which deals with trial by jury clearly in terms of privilege, although occurring later than that in respect of jury trials contained in the original Constitution, is not to be regarded as modifying or altering the earlier provision; and there is no reason for thinking such was within its purpose. The first ten amendments and the original Constitution were substantially contemporaneous and should be construed *in pari materia*. So construed, the latter provision fairly may be regarded as reflecting the meaning of the former. In other words, the two provisions mean substantially the same thing. . . .

Id.

32. *Thompson*, 170 U.S. at 350; see *Collins*, 497 U.S. at 52 n.4 (“To the extent that *Thompson v. Utah* rested on the *Ex Post Facto* Clause and not the Sixth Amendment, we overrule it.”). The Court’s holding in *Thompson v. Utah* - that the Sixth Amendment requires a jury panel of 12 persons - is also obsolete. *Williams v. Florida*, 399 U.S. 78 (1970).

33. *Patton*, 281 U.S. at 288.

34. *Id.*

35. *Maxwell v. Dow*, 176 U.S. 581, 586 (1900); *American Pub. Co. v. Fisher*, 166 U.S. 464, 468 (1897); *Springville v. Thomas*, 166 U.S. 707, 708 (1897).

defendant, and was not part of the government structure.³⁶ That personal right to jury trial was a “valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the court.”³⁷ Yet with the personalization of the right of trial by jury came the interpretative theory that the Constitution did not necessarily enshrine the common law. Therefore, the Court concluded, Article III itself empowered the criminal defendant with the ability to waive his right to jury trial.³⁸ This positive right to waive jury trial expressly contradicted the common law’s prohibition against such a waiver, but the Supreme Court condoned the privilege of the defendant to waive a constitutional jury.³⁹

The Court’s decision called into question the jurisprudence on the definition of trial by jury as inclusive of all common law characteristics. After a number of years, the Supreme Court reexamined the definition of trial by jury within the Constitution. The examination resulted in the Court’s abandonment of the previously unquestionable definition of trial by jury that preserved the common law jury’s elements in the Constitution’s jury provisions.⁴⁰ Referencing the lack of historical documents explaining the drafting of Article III, the Court looked to various objections lodged against the Constitution concerning Article III’s failure to preserve the common law trial by a jury of the vicinage.⁴¹ After reviewing these objections, the Court declared that constitutional and common law juries were not intended to encompass the same characteristics.⁴² Hence, the Court concluded the essential feature of the

36. *Patton*, 281 U.S. at 296. “In the light of the foregoing it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused.” *Id.* at 297.

37. *Id.* at 296-97. “Thus Blackstone, who held trial by jury both in civil and criminal cases in such esteem that he called it ‘the glory of the English law,’ nevertheless looked upon it as a ‘privilege,’ albeit ‘the most transcendent privilege which any subject can enjoy.’ Book III, p. 379.” *Id.*

38. *Id.* at 298.

39. *Id.* at 312; *see* *Kearney v. Case*, 79 U.S. 275 (1870).

40. *Williams*, 399 U.S. at 92.

41. *See* FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT* 33-33, 93 (1951).

42. *Williams*, 399 U.S. at 99. The *Williams* Court continued:

Nothing in this history suggests, then, that we do violence to the letter of the Constitution by turning to other than purely historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution. The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial.

Id. at 99-100; *see also* *In Re Oliver*, 333 U.S. 257, 280 (1948) (Rutledge, J., concurring). The

constitutional jury “lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group’s determination of guilt or innocence.”⁴³ Thus, the constitutional jury does not preserve common law characteristics, which makes the constitutional jury’s attributes malleable.

Another term receiving interpretative gloss is the right to a public trial contained within the Sixth Amendment.⁴⁴ This right rests within the heritage of English common law.⁴⁵ Indeed, many of the original state constitutions also included the right of public criminal trial.⁴⁶ The purpose of this right is to safeguard against attempts to employ trial courts as instruments of persecution and effectively restrain the possible judicial abuse of power.⁴⁷ Presumably, a secret trial would also violate the Fifth Amendment’s Due Process clause.⁴⁸

A jury’s verdict must rest solely upon evidence delivered at public trial.⁴⁹ “Exercise of calm and informed judgment by [jury] members is essential to proper enforcement of law.”⁵⁰ Justice Holmes observed “any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.”⁵¹

Oliver Court stated:

So long as they stand, so long as the Bill of Rights is regarded here as a strait jacket of Eighteenth Century procedures rather than a basic charter of personal liberty, like experimentations may be expected from the states. And the only check against their effectiveness will be the agreement of a majority of this Court that the experiment violates fundamental notions of justice in civilized society.

Id.

43. *Williams*, 399 U.S. at 100. The Court concluded the 12-man requirement of a criminal jury was not a Constitutional requirement. *Id.* at 103.

44. U.S. CONST. amend. VI.

45. *In Re Oliver*, 333 U.S. at 266; see Radin, *The Right to a Public Trial*, 6 TEMP. L. Q. 381-384; SIR THOMAS SMITH, DE REPUBLICA ANGLORUM BOOK 2, 79, 101 (Alston ed. 1906); SIR MATTHEW HALE, HISTORY OF THE COMMON LAW OF ENGLAND 343-45 (Runnington ed. 1820).

46. Penn. Const., Declaration of Rights IX (1776); N.C. Const., Declaration of Rights IX (1776); Vt. Const., ch. I, art. 12 (1786); Del. Const. art. I, § 7 (1792); Ky. Const. art. XII, cl. 10 (1792); Tenn. Const. art. XI, § 9 (1796); Miss. Const. art. I, § 10 (1817); Mich. Const., Art. I, § 10 (1835); Tex. Const., Art. I, § 8 (1845)

47. *In Re Oliver*, 333 U.S. at 270. The right evolves from a historical distrust of secret tribunals utilized in the Spanish Inquisition, the English Court of Star Chamber, and the French Monarchy’s *lettre de cachet*. *Id.* at 268-69; see also 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827).

48. See *In Re Oliver*, 333 U.S. at 272-73; *Gains v. Washington*, 277 U.S. 81, 85-86 (1928) (discussing whether “due process of law exacted in the Fourteenth Amendment in cases tried in state courts must be construed as equivalent to the Sixth Amendment in federal trials”).

49. *Turner v. Louisiana*, 379 U.S. 466, 472 (1965).

50. *Sinclair v. United States*, 279 U.S. 749, 765 (1929).

51. *Frank v. Mangum*, 237 U.S. 309, 349 (1915) (Holmes, J., dissenting).

Yet, Justice Harlan was able to say in 1966 that he knew of no case in which this Court has held that jurors must have been absolutely insulated from all expressions of opinion on the merits of the case or the judicial process at the risk of declaration of a new trial. . .[.]even where this Court has acted in its supervisory capacity it has refused to hold that jury contact with outside information is always a cause for overthrowing a verdict.⁵²

In essence, the right to jury trial “guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.”⁵³ The principle is traced back to Lord Coke, but was first set down by Chief Justice Marshall in 1807.⁵⁴ This right of jury trial is secured by Article III and the Sixth Amendment, which apply to the states through the Fourteenth Amendment, guaranteeing trial by jury in all but petty criminal offenses.⁵⁵

C. *The Privilege of Juror Deliberations*

In the early twentieth century, Lord Mansfield’s 1785 pronouncement – that juror affidavits could not be received into evidence – was relied upon to sustain a prohibition on their introduction in American courts.⁵⁶ The United States Supreme Court’s rationale for exclusion of accounts of juror deliberations was that “if evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation – to the destruction of all frankness and freedom of

52. *Parker v. Gladden*, 385 U.S. 363, 367-68 (1966) (Harlan, J., dissenting).

53. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961), *superseded by statute*, 28 U.S.C. § 2254(d)(1) (1997), *as recognized in* *Moffat v. Gilmore*, 113 F.3d 698 (7th Cir. 1997) (citing *Tumey v. Ohio*, 273 U.S. 510 (1927) and *In re Oliver*, 333 U.S. 257 (1948)). “A fair trial in a fair tribunal is a basic requirement of due process.” *In re Murchison*, 349 U.S. 133, 136 (1955); *see Reynolds v. United States*, 98 U.S. 145, 155 (1878).

54. Justice Marshall stated:

[Light] impressions which may fairly be supposed to yield to the testimony that may be offered; which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them; which will combat that testimony and resist its force, do constitute a sufficient objection to him.

1 *Burr’s Trial* 416 (1807).

55. *Duncan v. Louisiana*, 391 U.S. 145, 156, 160 (1968).

56. *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915) (relying on *Vaise v. Delaval*, 1 Term Repts (Durnford & East) 11 (1785)).

discussion and conference.”⁵⁷ Since the Court’s prohibition on introduction of juror affidavits into evidence, jurors have also been generally precluded from testifying about the occurrences within the jury room in criminal cases.⁵⁸

A juror communications privilege during deliberations soon gained acceptance by the Supreme Court.⁵⁹ This privilege, distinct from use of juror testimony to impeach a verdict, can be defeated by showing “a *prima facie* case sufficient to satisfy the judge that the light should be let in.”⁶⁰ Once this showing is made, “the debates and ballots in the jury room are admissible as corroborative evidence, supplementing and confirming the case that would exist without them.”⁶¹ Hence, the juror privilege bears similarity to the attorney-client privilege in that its abuse causes a waiver of the privilege.⁶² However, even impeachment may be forbidden if a juror waives the privilege, and, further, one may assert the privilege despite the lack of anything to impeach.⁶³

D. Television in the Courtroom

The Supreme Court first faced the advent of television media within the courtroom in 1965.⁶⁴ A criminal defendant claimed infringement of his Fourteenth Amendment right of due process because television stations were present in the courtroom and broadcast his trial.⁶⁵ In truth, the two preliminary hearings, opening and closing State arguments, the jury’s return of the verdict, and the trial judge’s receipt of the jury verdict were the only portions of the trial broadcast live and with sound, although additional portions of the trial (not including any defense

57. *Id.* The Court also stated:

But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict.

Id.

58. *Id.*

59. *Id.*; see *Bushell’s Case*, (1670) 89 Eng. Rep. 2 (K.B.) (discussing freedom of jurors to render their own uninfluenced verdicts); *Penn and Mead’s Case*, 6 State Tr. 951 (1670) (discussing same).

60. *Clark v. United States*, 289 U.S. 1, 14 (1933).

61. *Id.*

62. *Id.* at 15.

63. *Id.* at 18.

64. *Estes v. Texas*, 381 U.S. 532 (1965).

65. *Id.* at 535.

counsel summations) were silently videotaped for later broadcast.⁶⁶ The Court declared the purpose of the Sixth Amendment's provision for public trial guarantees the defendant is "fairly dealt with and not unjustly condemned."⁶⁷ Analyzing the extent of the press' right to televise court proceedings under the First Amendment, the Court determined the press retains the same privilege as the general public to access the courtroom.⁶⁸ At the time, forty-eight states and the federal judiciary denied the media the ability to televise trials.⁶⁹ In finding that televising the defendant's trial violated due process, the Court announced television did not contribute to the attainment of truth.⁷⁰ Indeed, the impact of television upon the jurors was the greatest reason to find the defendant's trial lacking in fairness.⁷¹ In recognizing the power of the television camera, the Court articulated:

It is said that the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today.⁷²

A year later, in 1966, the Court confronted a similar alleged criminal defendant's fair trial deprivation.⁷³ In looking to the totality of the circumstances, including the failure of the trial judge to take precautions against the influence of pretrial publicity, the Court held the defendant's due process right violated.⁷⁴ The espoused role of the

66. *Id.* at 536.

67. *Id.* at 538-39.

68. *Id.* at 540. *Cf.* *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941) (right of press to report on ongoing trial inside the courtroom).

69. *Estes*, 381 U.S. at 544.

70. *Id.* The court concedes: "At the outset the notion should be dispelled that telecasting is dangerous because it is new. It is true that our empirical knowledge of its full effect on the public, the jury or the participants in a trial, including the judge, witnesses and lawyers, is limited." *Id.* at 541.

71. *Id.* at 545. The other concerns of the court were: "The quality of the testimony in criminal trials will often be impaired." *Id.* at 547. "A major aspect of the problem is the additional responsibilities the presence of television places on the trial judge." *Id.* at 548. "Finally, we cannot ignore the impact of courtroom television on the defendant." *Id.* at 549.

72. *Id.* at 551-52.

73. *Sheppard v. Maxwell*, 384 U.S. 333, 335 (1966).

74. *Id.* at 354-55. The Court pointed to the unprecedented allowance of the press inside the bar as one of the causes depriving the defendant of judicial serenity and calm. *Id.* at 355. Additionally, "the total lack of consideration for the privacy of the jury was demonstrated by the assignment to a broadcasting station of space next to the jury room on the floor above the courtroom, as well as the fact that jurors were allowed to make telephone calls during their five-day

responsible press in reporting a criminal trial is to safeguard effective judicial administration.⁷⁵ But, the same press turned the jurors into celebrities by distribution of their images, names, and home addresses, violating juror privacy.⁷⁶ If proper precautions were taken to control trial publicity, then deference to the defendant's right of fair trial would have been achieved.⁷⁷

These two cases laid the battlefield for the conflict between two fundamental constitutional rights: the right of an impartial jury and that of freedom of the press. Such conflagrations between these two rights were not specifically anticipated by the Framers.⁷⁸

Early on, the Court saw the greatest risk of deprivation of the right of fair trial by media publicity occurring in the sensational case.⁷⁹ There, the heinousness of the crime would contribute to public outrage, and possible taint. But, the mere occurrence of publicity, even persuasive and adverse, does not dictate a finding of an unfair trial.⁸⁰

The right of freedom of the press is not absolute, but special protection is afforded against orders that prohibit publication or broadcast of particular opinions and commentary.⁸¹ The same rule applies to the reporting of a criminal trial:⁸² those members of the press afforded the right to broadcast and publish the proceeding of a criminal trial should "direct some effort to protect the rights of an accused to a

deliberation." *Id.*

75. *Id.* at 350. The Supreme Court continued, stating:

The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for 'what transpires in the court room is public property.' The 'unqualified prohibitions laid down by the framers were intended to give to liberty of the press . . . the broadest scope that could be countenanced in an orderly society.'

Id. (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947) and *Bridges*, 314 U.S. at 265) (internal citations omitted).

76. *Sheppard*, 384 U.S. at 353.

77. *Id.* at 358.

78. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 547-48 (1976). The freedom of the press is enshrined in the First Amendment's text: "Congress shall make no law . . . abridging the freedom . . . of the press." U.S. CONST. amend. I. The freedom was made applicable to the states in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931).

79. *Nebraska Press*, 427 U.S. at 551.

80. *Id.* at 554; see *Stroble v. California*, 343 U.S. 181 (1952) (affirming conviction despite pre-trial publicity).

81. *Nebraska Press*, 427 U.S. at 557; see *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1965) (prior constraints on speech strongly presumed constitutionally invalid).

82. *Nebraska Press*, 427 U.S. at 559.

fair trial by unbiased jurors.”⁸³

The trial judge has a constitutional duty to take protective measures to minimize pretrial publicity, even when such measures are not strictly or inescapably necessary.⁸⁴ Pretrial publicity affects the criminal defendant’s right to a fair trial by influencing public opinion against the defendant thereby tainting potential jurors by exposure to inculpatory evidence inadmissible at trial.⁸⁵ Yet, the First Amendment invalidates a prior restraint in the context of an order denying immediate publication of criminal pretrial proceedings.⁸⁶

In considering this duty of curtailing publicity and access, the trial judge comprehends that the public has no constitutional right of presence at a criminal trial; instead the right of public trial belongs to the defendant.⁸⁷ The defendant, then, has a right to have a public trial, but not the correlative right to compel a private trial.⁸⁸ The public has no enforceable right under the Sixth or Fourteenth Amendment to insist, over the objections of the litigants, on a public trial.⁸⁹ Though a recognized common law right may exist supporting public attendance at criminal proceedings, such a right is not a constitutional privilege.⁹⁰

Neither the First nor Sixth Amendments grant the public the right to televise or broadcast any part of a criminal trial.⁹¹ The requirement of a

83. *Id.* at 560.

84. *Gannett Co., Inc. v. Depasquale*, 443 U.S. 368, 378 (1979).

85. *Id.*

86. *Nebraska Press*, 427 U.S. at 570.

The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. . . . But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances.

Id. at 561.

87. *Gannett Co.*, 443 U.S. at 380.

88. *Id.* at 382; see *Singer v. United States*, 380 U.S. 24, 34-35 (1965).

89. *Gannett Co.*, 443 U.S. at 391. The Court announces “we hold that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials.”

Id.

90. *Id.* at 384-85. The Court continued:

Not many common-law rules have been elevated to the status of constitutional rights. The provisions of our Constitution do reflect an incorporation of certain few common-law rules and a rejection of others. The common-law right to a jury trial, for example, is explicitly embodied in the Sixth and Seventh Amendments. . . . But the vast majority of common-law rules were neither made part of the Constitution nor explicitly rejected by it.

Id. Cf. *Daubney v. Cooper*, (1829) 109 Eng. Rep. 438, 440 (K.B.) (openness of courts “one of the essential qualities of a Court of Justice”); HOLDSWORTH, *supra* note 12, at 268.

91. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978); see *infra* note 98 and

public trial protected by the Sixth Amendment is honored by the opportunity of members of the public and press to attend the trial and report their observances.⁹² Yet, a criminal trial is presumed open to the public.⁹³ The First and Fourteenth Amendments guarantee the right of the public to attend criminal trials, and protect against the summary exclusion unsupported by an overriding interest articulated by a trial judge in his findings.⁹⁴ This right of presence at a criminal trial is not expressly articulated within the Constitution, but it shares constitutional protection.⁹⁵ Such a right is subject to reasonable governmental restrictions on time, place, and manner.⁹⁶

Given the above enumerated rights, the Supreme Court took up television in the courtroom again in the context of government sponsorship of televising criminal proceedings over objection of a criminal defendant.⁹⁷ The Court reviewed its determination that televising or photographing a criminal trial results inherently in a denial of due process under the Fourteenth Amendment.⁹⁸ The Court noted no constitutional rule

accompanying text (setting forth the Supreme Court's grant of access to the media to certain portions of the criminal trial).

92. *Nixon*, 435 U.S. at 610. "[One] of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access, . . . appears to have been the rule in England from time immemorial." EDWARD JENKS, *THE BOOK OF ENGLISH LAW* 73-74 (6th ed. 1967); SMITH, *supra* note 45, at 101; SIR FREDERICK POLLOCK, *THE EXPANSION OF THE COMMON LAW* 31-32 (1904); 2 E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 103 (6th ed. 1681); ARTHUR SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* 128-129 (1930) (discussing openness of proceedings); PAUL S. REINSCH, *THE ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES*, in 1 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 367, 405 (1907) (discussing public admittance in trial proceedings).

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

94. *Id.* at 575, 577, 580. "We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'" *Id.* at 580.

95. *Id.* at 579-80. The Supreme Court continued stating:

Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees.

Id.

96. *Id.* at 581 n.18.

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

98. *Id.* at 573.

barring still photographic, radio, and television coverage in all cases and under all circumstances . . . stand[s] as an absolute ban on state experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964, and is, even now, in a state of continuing change.⁹⁹

The Court permitted Florida to experiment with television in the courtroom, given the lack of empirical data illustrating media presence or coverage of a criminal trial inherently causes an unfair effect upon the trial process.¹⁰⁰

Relying on the First Amendment, the Supreme Court found mandatory closure of a sexual assault case to be unconstitutional.¹⁰¹ Two aspects of criminal prosecutions that mitigated in favor of First Amendment protections supported the Court's result. The first was the historic openness of the criminal courts to the public, and the second involved the execution of the public's right of access to the criminal courts assuring the functioning of the judicial process.¹⁰² As a result, if a state seeks to impair the right of public access to criminal trials on the basis of protection of sensitive information, then the state must show a narrowly tailored compelling governmental interest.¹⁰³

The same rationale guaranteed the right of public presence at *voir dire* proceedings in a criminal case.¹⁰⁴ The Court confirmed the presumption of the openness of these proceedings.¹⁰⁵ Additionally, the

99. *Id.* at 573-574; *see also id.* at 576; *Estes*, 381 U.S. at 596 (Harlan, J., concurring). "At the present juncture I can only conclude that televised trials, at least in cases like this one, possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned." *Id.*

100. *Chandler*, 449 U.S. at 578-79, 582-83.

101. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610-11 (1982).

102. *Id.* at 605-06. As the court explains the second point:

[P]ublic scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience.

Id. at 606.

103. *Id.* at 606-07.

104. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984).

105. *Id.* The Supreme Court continued stating:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered. We

right of public presence was extended to suppression hearings under the Sixth Amendment governed by the First Amendment's test for ability to close such a proceeding.¹⁰⁶ The First Amendment assured public access to preliminary criminal hearings.¹⁰⁷ In so ruling, the Court announced "the right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness."¹⁰⁸

As the foregoing discussion illustrates, the Supreme Court considers both the historical and the contemporary rationale for permitting public access to criminal courts. The fundamental constitutional right of public attendance at the criminal trial has been set down. The right is not absolute, but is fiercely protected. The next section analyzes the federal statutory instruments weighing upon public access to juror deliberations.

II. FEDERAL RULES

The first rule of immediate significance to the present discussion is Federal Rule of Criminal Procedure 53, which prohibits courtroom photographing and broadcasting in the Federal District courts.¹⁰⁹ The rule has survived constitutional challenge, despite the above discussed precedent, in a number of federal circuits.¹¹⁰ The absolute ban upon televising federal trial proceedings has been ruled a valid time, place, and manner restriction.¹¹¹

The rule, originally adopted in 1946, garnered support various times by the Judicial Conference of the United States.¹¹² In 1984, this body rejected a proposal from twenty-eight media organizations that

now turn to whether the presumption of openness has been rebutted in this case.

Id.

106. *Waller v. Georgia*, 467 U.S. 39, 47 (1984).

107. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10 (1986).

108. *Id.* at 7.

109. FED. R. CRIM. P. 53. "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." *Id.*

110. *See United States v. Moussaoui*, 205 F.R.D. 183, 185 (E.D. Va. 2002); *Conway v. United States*, 852 F.2d 187, 188 (6th Cir. 1988); *United States v. Edwards*, 785 F.2d 1293, 1295-96 (5th Cir. 1986); *United States v. Kerley*, 753 F.2d 617, 622 (7th Cir. 1985); *United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir.), *cert. denied*, 461 U.S. 931 (1983).

111. *See Conway*, 852 F.2d at 188; *Kerley*, 753 F.2d at 620-21; *Hastings*, 695 F.2d at 1282-84.

112. *See* 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 861 (3d 2004) (citing numerous Judicial Conference Reports affirming a ban on television cameras in the courtroom); 1 KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 2.05 (5th ed. 2000 Supp. 2005) (discussing the 1994 and 1995 Judicial Conference decisions on televising court proceedings).

would permit televising federal district court proceedings.¹¹³ The conference, in 1990, did resolve to permit televising civil proceedings at the trial and appellate levels, but expressly prohibited any similar broadcast of criminal trials.¹¹⁴ Yet, a 1996 statute permits closed circuit television to televise entire criminal proceedings to victims of certain crimes.¹¹⁵ Both Houses of the U.S. Congress have proposed legislation to permit television into all federal proceedings on a discretionary basis.¹¹⁶

Additionally, the Advisory Committee on Criminal Rules proposed a new Rule 43.1 that would permit media exclusion from the courtroom during juror *voir dire* and other proceedings outside the presence of the jury.¹¹⁷ The proposed rule bestows upon the trial judge discretion to

113. 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 861 (3d 2004). See also *No to Cameras*, 70 A.B.A. J. 29 (Nov. 1984).

114. 3B WRIGHT ET AL., *supra* note 112 at § 861; see also *Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Programs in Six District Courts and Two Courts of Appeals*, available at [http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/\\$File/elecmediacov.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/$File/elecmediacov.pdf) (last visited November 15, 2005). The Ninth Circuit and Second Circuit Court of Appeals are the only two federal appeals courts that permit television cameras in the courtroom. See *United States Court of Appeals for the Ninth Circuit Guidelines for Photographing, Recording, and Broadcasting in the Courtroom*, available at [http://www.ca9.uscourts.gov/ca9/Documents.nsf/0/45cab450851f626a882567710062ed97/\\$FILE/camreq.PDF](http://www.ca9.uscourts.gov/ca9/Documents.nsf/0/45cab450851f626a882567710062ed97/$FILE/camreq.PDF) (last visited November 15, 2005); *Cameras in the Courtroom - Second Circuit Guidelines*, available at <http://www.ca2.uscourts.gov/Docs%5CCOAManual%5CCameras.pdf> (last visited November 15, 2005).

115. 42 U.S.C. § 10608 (2003). The pertinent portion of the statute reads:

In general. Notwithstanding any provision of the Federal Rules of Criminal Procedure to the contrary, in order to permit victims of crime to watch criminal trial proceedings in cases where the venue of the trial is changed—

- (1) out of the State in which the case was initially brought; and
- (2) more than 350 miles from the location in which those proceedings originally would have taken place; the trial court shall order closed circuit televising of the proceedings to that location, for viewing by such persons the court determines have a compelling interest in doing so and are otherwise unable to do so by reason of the inconvenience and expense caused by the change of venue.

42 U.S.C. § 10608(a) (2003).

116. Sunshine in the Courtroom Act of 2005, S. 829, 109th Cong.; H.R. 2422, 109th Cong.; To Permit the Televising of Supreme Court Proceedings, S. 1768, 109th Cong.; Sunshine in the Courtroom Act, H.R. 1280, 105th Cong.

117. 91 F.R.D. 289, 365-75 (October 1981).

Rule 43.1 Exclusion of Public to Avoid Jury Prejudice:

(a) PROCEEDINGS COVERED. Except as otherwise provided by law, the provisions of this rule are applicable to:

- (1) any portion of the trial that takes place outside the presence of the jury, if the jury has not been sequestered;
- (2) any *voir dire* examination of prospective jurors; and
- (3) any pretrial hearing.

The provisions of this rule are not applicable to bench conferences, conferences in chambers, or matters customarily handled in camera.

deny media inside the courtroom upon finding a reasonable likelihood that the defendant's right to a fair trial would be prejudiced and no alternative means, other than the exclusion of television media, are viable to secure the defendant's fair trial. The proposal received public comment, and the Advisory Committee deferred further action upon the proposed rule.¹¹⁸ Since 1982, however, the proposed rule has not been resubmitted.

A brief comment on Federal Rule of Criminal Procedure 23 governing jury and non-jury trials is necessary. In the commentaries to the 1983 Amendments to the rule, the Advisory Committee recognized the inherent secrecy of juror deliberations under section b of the rule.¹¹⁹ The provision supports the closure of media access to jury deliberations,

(b) MOTION FOR CLOSURE. Upon a motion for closure of a proceeding or portion thereof made or consented to by any defendant on the record, the court shall permit the parties and members of the public and news media present and objecting to be heard. If necessary, the court may conduct all or part of the hearing on the motion in camera. The court shall order that the public, including representatives of the news media, be excluded from the proceeding or a portion thereof upon a finding (1) that there is a reasonable likelihood that dissemination of information from the proceeding would interfere with the defendant's right to a fair trial by an impartial jury; and (2) that the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means. The court shall make findings for the record supporting the ruling on the motion, but in its discretion some or all of those findings may be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(c) PARTIAL CLOSURE. Whenever the court could otherwise order closure under subdivision (b), it may limit the persons permitted to attend and condition such attendance upon agreement to the court's order restricting the time at which persons in attendance may disclose to others matters occurring at the proceeding or portion thereof partially closed. Findings supporting such ruling and order shall be made for the record as provided in subdivision (b).

(d) PUBLIC ACCESS TO RECORD. Whenever the public has been excluded under subdivision (b) or (c) of this rule, a complete record of the proceeding or portion thereof from which the public has been excluded shall be kept and shall be made available to the public following return of the verdict or at such other time as may be consistent with defendant's right to a fair trial.

Id.

118. 97 F.R.D. 245, 263-64 (April 1983). Rule 43.1 reads as follows:

Rule 43.1 Exclusion of Public to Avoid Jury Prejudice: The proposed new rule quite naturally promoted the most comment from the bench, bar and media, the latter having been specifically invited to present its views. While the media's position is that of absolute opposition, as we anticipated, there were many other questions raised as to our original proposal and we concluded that extensive modifications would have to be made which may necessitate a recirculation of any modified proposal. We, therefore, voted to defer further action until the next meeting of the Committee.

Id.

119. FED. R. CRIM. P. 23(b), 18 U.S.C. App., p. 785 (1983); *see* United States v. Olano, 507 U.S. 725, 734-37 (1993); United States v. Virginia Erection Corp., 335 F.2d 868, 873 (4th Cir. 1964).

but may not comply with the First Amendment.

The next rule necessary for present purposes is Federal Rule of Evidence 606(b).¹²⁰ This rule prohibits jurors from testifying directly or by affidavit to impeach their own verdict by revelation of any discussions or comments occurring during deliberation.¹²¹ Proposed versions of the rule would have allowed jurors to testify as to irregularities occurring within the jury room not limited to the prejudicial effect of outside information related to the jury by the media or an outside influence brought to bear improperly upon a jury.¹²² The intrusion upon the internal communications within the jury's deliberations provided the basis for rejecting the above proposed versions.¹²³

A number of federal statutes are worth incidental mention. The Federal Criminal Code criminalizes the recording or listening to juror deliberations.¹²⁴ Another criminal statute prohibits influencing a juror by written communication.¹²⁵ A civil statute permits a cause of action against an individual intimidating a juror.¹²⁶ These statutes illustrate the profound dislike of the federal government for any media intrusion upon the jury trial process.¹²⁷

III. STATE CONSIDERATIONS

In this section, a survey of selected states' jurisprudence is undertaken in order to compare the interactions between the federal

120. FED R. EVID. 606(b).

Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Id.

121. *See* Hyde v. United States, 225 U.S. 347, 382 (1912); McDonald v. Pless, 238 U.S. 264 (1915).

122. *See* H.R. REP. NO. 93-650 (1973), as reprinted in 1974 U.S.C.C.A.N. 7075, 7083-84.

123. *See* S. REP. NO. 93-1277 (1974), as reprinted in 1974 U.S.C.C.A.N. 7051, 7060.

124. 18 U.S.C. § 1508 (2000).

125. 18 U.S.C. § 1504 (2000).

126. 42 U.S.C. § 1985 (1994).

127. *See* U. S. v. Miller, 284 F. Supp. 220 (D. Conn. 1968), appeal dismissed, 403 F.2d 77 (2d Cir. 1968) (discussing mentioned statutes and issue of juror disclosure).

constitutional decisions enumerated above and state constitutional law and statutes. The states of New York, Florida, Maine, Arizona, and Texas provide illustrations of how state courts tackle the question of cameras in the court and jury rooms.¹²⁸

A. *New York*

In New York, Civil Rights Law section 52 prohibits television broadcast of trial proceedings and establishes a violation of the statute as a criminal misdemeanor.¹²⁹ Recently, New York's highest appeals court upheld Civil Rights Law section 52 by holding that "no First Amendment or [New York Constitution,] article I, § 8 right to televise a trial" existed.¹³⁰ The case involved a challenge by CourtTV against New York County District Attorney, Robert Morgenthau, for a declaratory judgment that section 52 violated state and federal constitutional provisions.¹³¹ In reaching its decision, the Court of Appeals noted the absolute discretion of the state's legislature to determine whether "audiovisual coverage of courtroom proceedings is in the best interest of the citizens."¹³² Interestingly, as the court noted, New York had suspended Civil Rights Law section 52 for a period of ten years, during which televised criminal trials occurred.¹³³ In 1987, the New York State Legislature enacted section 218 of the Judiciary Law that permitted an experiment, eighteen months in duration, with the use of audio-visual coverage of both civil and criminal trial proceedings.¹³⁴ The legislature reenacted the experimental use of television in the courts continuously for ten years.¹³⁵ Many reports were received by the legislature, even from judges, recommending permanent enactment of the right to broadcast courtroom proceedings. Yet, in 1997, televised trials ceased and Civil Rights Law section 52 became effective once again as a result

128. Other states have codified by statute prohibitions against televising jury deliberations. *See, e.g.*, MICH. COMP. LAWS § 750.120b (2002) (criminal misdemeanor to record or attempt to record jury deliberation); N.C. GEN. STAT. § 14-227.2 (2003) (same); VA. CODE ANN. § 18.2-468 (2002) (felony); S.D. CODIFIED LAWS § 23A-35A-20(3) (2002) (felony); CODE OF AL. § 13A-10-130(a)(5) (2002); H.R.S. § 710-1077(1)(f) (criminal contempt to record jury deliberations).

129. *See* N.Y. Civil Rights Law § 52 (McKinney 1994).

130. *Courtroom Television Network LLC v. State of New York*, 800 N.Y.S.2d 522, 524 (N.Y. App. Div. 2005) [hereinafter *CourtTV*].

131. *Id.*

132. *Id.* at 529.

133. *Id.* at 528-29; *People v. Boss*, 701 N.Y.S.2d 891, 893 (N.Y. App. Div. 2000).

134. *CourtTV*, 800 N.Y.S.2d at 529; *Boss*, 701 N.Y.S.2d at 893.

135. *Boss*, 701 N.Y.S.2d at 893.

of the legislature's failure to reenact section 218 of the Judiciary Law.¹³⁶

An earlier lower appellate court, in *Santiago v. Bristol*,¹³⁷ passed upon the constitutionality of the statute against the New York constitutional provision of Article I section 8 protecting freedom of the press.¹³⁸ There, the court found the state constitution did not endow the media with an exercisable right to televise the criminal trial proceeding.¹³⁹ The trial court had declared the statute unconstitutional under the state constitution.¹⁴⁰

In finding the prohibition on broadcasting trials unconstitutional, another lower court reasoned that the history of the state's constitutional guarantee of freedom of the press traced its roots to none other than the famous trial of "John Peter Zenger" for seditious libel.¹⁴¹ Because these roots of the state constitution ran deeper than those of the Federal Constitution, the lower court found the restraint on broadcast unconstitutional.¹⁴² Nonetheless, New York prohibits televising trial proceedings and does not recognize a media right to broadcast such proceedings under the state's appellate jurisprudence.

B. Florida

Florida, on the other hand, permits television broadcast of its criminal trials. Initially, the state undertook a televising experiment similar to that of New York.¹⁴³ At the end of the experiment, per order of the Florida Supreme Court, academics at one of the state universities

136. *Id. Accord CourtTV*, 800 N.Y.S.2d at 529.

137. 709 N.Y.S.2d 724 (N.Y. App. Div. 4th Dep't. 2000) [hereinafter *Santiago I*].

138. N.Y. CONST. art. I § 8 (2001).

Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

Id.

139. *Santiago I*, 709 N.Y.S.2d at 726.

140. *People v. Santiago*, 712 N.Y.S.2d 244 (N.Y. Co. Ct. 2000) [hereinafter *Santiago II*]. *See Boss*, 701 N.Y.S.2d at 891 (striking statute as unconstitutional also); *see also Associated Press v. Bell*, 515 N.Y.S.2d 432, 434 (N.Y. App. Div. 1st Dept 1987) (denying defendant's motion to close suppression hearing from media).

141. *Santiago II*, 712 N.Y.S.2d at 252.

142. *Id.* at 253.

143. *In re* Petition of Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, 766 (Fla. 1979).

conducted a survey of the impact of television within the courtroom.¹⁴⁴ The survey interviewed witnesses, jurors, attorneys, and court personnel a short time after the televised trial concluded. The majority of individuals surveyed asserted that televising the trials did not greatly impact or interfere with their work or decisions.¹⁴⁵

The Supreme Court of Florida considered the Federal Constitution and the Florida Constitution in ruling that there exists, absent a showing of prejudice, no per se proscription against electronic media coverage of judicial proceedings by either the Fourteenth Amendment or by Article I Section 9 of the Florida Constitution.¹⁴⁶ The court, in analyzing the First and Sixth Amendments to the Federal Constitution, did not find a right existed mandating television's ability to broadcast trials.¹⁴⁷ The court did consider several objections to televising trial proceedings, as well as the benefits of allowing coverage of court proceedings.¹⁴⁸ Assessing

144. *Id.* at 768.

145. *Id.* The Court continued stating:

[The] [p]resence of the electronic media in the courtroom had little effect upon the respondents' perception of the judiciary or of the dignity of the proceedings. . . It was felt that the presence of electronic media disrupted the trial either not at all or only slightly. . . The ability of the attorney and juror respondents to judge the truthfulness of witnesses was perceived to be affected not at all. The ability of jurors to concentrate on the testimony was similarly unaffected. . . The distracting effect of electronic media was deemed to range from almost not at all for jurors, to slightly for witnesses and attorneys.

Id. at 768-69.

146. *Id.* at 774. "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself." FL. CONST. art. I, § 9 (1998).

147. *In re* Petition of Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, 774 (Fla. 1979).

148. The objections were categorized as:

(i) physical disturbance or disruption; (ii) adverse psychological effect on the participants in carrying out their solemn duties in connection with the decision-making process; (iii) exploitation of the courts for commercial purposes as opposed to the performance of an educational function; (iv) prejudicial publicity; (v) effect on particular categories of witnesses, i. e., confidential informants, victims, relatives of victims, minors, witnesses under protection of anonymity, prisoners; and (vi) privacy rights of participants.

Id. The proponents of televising proceedings put forth the following reasons:

(i) there is no logical basis to distinguish between the print and electronic media insofar as access is concerned; (ii) the sixth amendment concept of a public trial is promoted by electronic media coverage; (iii) there is educational value in electronic media coverage; (iv) newsworthy trials will be covered by the electronic media either from within or without the courtroom and that the former is less apt to interfere with a fair trial; (v) the pilot program has demonstrated that the state of the art in television and photographic equipment is such that no disturbance of judicial proceedings results from coverage and, furthermore, that media pooling arrangements prevented any serious problems in connection with coverage; and (vi) the judiciary and the public's confidence in that institution will be enhanced by electronic media coverage.

Id. at 779-80.

both, the court adopted a new judicial canon permitting a trial judge in his discretion to permit televising trials.¹⁴⁹ The new canon's adoption rested upon the supervisory authority granted to the court by the state constitution.¹⁵⁰

Another decision by a lower Florida court, interpreting United States Supreme Court case law, found that the criminal defendant did not enjoy a constitutional right to a television-free trial.¹⁵¹ The Florida Supreme Court also adopted this position in confirming that the lower court correctly enunciated that a criminal defendant does not have an absolute constitutional right to exclude electronic media coverage of trial proceedings.¹⁵² As a result, it is the defendant's burden to raise objection or move *in limine* to exclude media from televising trial proceedings, and such objection or motion must state with specificity the prejudicial effects of trial coverage.¹⁵³

C. Maine

In 1996, the Supreme Judicial Court of Maine authorized, by administrative order, the recording and broadcast of select jury deliberations in civil cases.¹⁵⁴ The non-concurring justices recognized that no public constitutional right permitted public access to jury deliberations.¹⁵⁵ Yet, they also recognized the privilege of confidentiality of juror deliberations is not absolute.¹⁵⁶ Ultimately, the non-concurring justices did not see the educational value of opening the jury room given the overriding historical tradition of preserving the secrecy of juror debate.¹⁵⁷

The order never achieved actual implementation due to legislative action. A bill passed the state's House of Representatives, but failed in the Senate.¹⁵⁸ This was enough to dissuade the television crews from

149. *Id.* at 781.

150. *Id.* at 774.

151. *Agrella v. State*, 372 So. 2d 487, 488 (Fla. Dist. Ct. App. 1979), *cert. denied*, 383 So. 2d 1189, *cert. denied*, 450 U.S. 910.

152. *State v. Green*, 395 So. 2d 532, 536 (Fla. 1981).

153. *Maxwell v. State*, 443 So. 2d 967 (1983), *denial of post-conviction relief rev'd*, 603 So. 2d 490 (1992).

154. Administrative Order, No. SJC-228, 1996 Me. LEXIS 32, at 1 (Feb. 5, 1996).

155. Administrative Order, Statement in Non-Concurrence, No. SJC-228, 1996 Me. LEXIS 32, at 3-6 (Feb. 5, 1996) (citing *In re Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir. 1990)).

156. *Id.* (citing *Clark v. United States*, 289 U.S. 1, 12 (1933), as recognizing conditions and exceptions to the privilege).

157. *Id.*

158. H.P. 1360, 117th Leg., 2d Reg. Sess. (Me. 1996). The house version of the act as passed

entering the jury room. Nevertheless, the precedent of the administrative order authorizing televising juror deliberations stood. Yet, in 2001, the Supreme Judicial Court of Maine determined by administrative order to limit the television broadcast to “all civil matters and in arraignments, sentencings, and other non-testimonial proceedings in criminal matters.”¹⁵⁹ This order supersedes a 1991 order permitting televising criminal trial proceedings in all but these three situations: “(1) A crime where the defendant or any principal victim is a living child; (2) A crime involving sexual assault or sexual misconduct against a living victim; or (3) A crime involving domestic violence against a living victim.”¹⁶⁰ A

read:

An Act to Prohibit the Photographing or Videotaping of Jury Deliberations Emergency preamble.

Whereas, Acts of the Legislature do not become effective for 90 days after adjournment unless enacted as emergencies; and

Whereas, there is no public right of access to jury deliberations; and

Whereas, it is uniformly recognized that juries function best when there is a free, open and candid debate; and

Whereas, the presence of cameras or other electronic recording devices in jury deliberation rooms could adversely affect the free, open and candid debate of juries being filmed; and

Whereas, this adverse effect would deprive litigants of justice; and

Whereas, the Supreme Judicial Court recently decided to allow CBS News to film jury deliberations in civil trials occurring in Cumberland County by placing cameras in jury deliberation rooms; and

Whereas, filming is planned to begin in May, prior to the expiration of the 90-day period for nonemergency legislation; and

Whereas, in the judgment of the Legislature, these facts constitute an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 4 M.R.S.A. Section 122 is enacted to read:

Section 122. Electronic recording of jury deliberations

The recording or viewing of jury meetings or deliberations by electronic means is prohibited. As used in this section, “electronic means” includes, but is not limited to, still photography, videotaping or audio taping and direct live video or audio feeds. A person who violates this section is guilty of a Class E crime.

Emergency clause. In view of the emergency cited in the preamble, this Act takes effect when approved.

Id.

159. Administrative Order Cameras in the Courtroom, Rules Governing Photographic and Electronic Coverage of Trial Courts ME R CTRM CAMERAS ORDER Appendix A Rule 4(b) (West 2003). “There shall be no coverage of any testimonial proceeding in a criminal case other than arraignment and sentencing.” *Id.*

160. Administrative Order Governing Experimental Photographic and Electronic Coverage of Trial Courts in Bangor and Portland, No. SJC-228, 1991 Me. LEXIS 168, at 6 (July 8, 1991); see also Administrative Order in Regard to Photographic and Electronic Coverage of the Courts, Me. Rptr., 459-66 A.2d XXV (eff. Apr. 2, 1982).

fourth prohibition in the 1991 order denied televising criminal pretrial proceedings other than arraignment.¹⁶¹ The 2001 Administrative decision goes farther and excludes juror selection from coverage in civil and criminal trials.¹⁶² Finally, the 2001 order accomplishes what the legislature could not by ruling “[t]here shall be no camera coverage of the jury or of any individual juror or alternate or prospective juror. There shall be no audio coverage of the jury or any juror except for the announcement of the verdict.”¹⁶³ Seven years after passing on the legality of allowing television broadcast of jury deliberations, the same court concluded by adopted rule that such a ruling was in error.

D. Arizona

In 1996, Arizona allowed CBS to broadcast nationwide criminal jury deliberations in a capital murder case. The highest court of Arizona approved the petition to record and broadcast by television criminal jury deliberations without a written opinion.¹⁶⁴ Support for the decision can be found in a 1973 opinion by the court announcing “not only is the accused entitled to a fair trial, free from prejudicial publicity, but that the public has a right to be informed as to what is occurring within its courts.”¹⁶⁵ Indeed, the rules governing the televising of trials granted the trial judge broad discretion to televise any portion of the trial proceeding.¹⁶⁶ The current rules governing televising court proceedings assert all such proceedings are “open to the public, including representatives of the news media, unless the court finds, upon application of the defendant, that an open proceeding presents a clear and present danger to the defendant’s right to a fair trial by an impartial jury.”¹⁶⁷

161. Administrative Order Governing Experimental Photographic and Electronic Coverage of Trial Courts in Bangor and Portland, No. SJC-228, 1991 Me. LEXIS 168, at 6 (July 8, 1991).

162. Administrative Order Cameras in the Courtroom, Rules Governing Photographic and Electronic Coverage of Trial Courts ME R CTRM CAMERAS ORDER Appendix A Rule 6(b) (West 2003).

163. *Id.* Rule 5(a). The 2001 Administrative Order was superseded on other grounds in 2005. See ME R ADMIN CT Order JB-05-015.

164. State ex rel. Rosenthal v. Poe, 98 S.W. 3d 194, 208 (Tex. Crim. App. 2003) (noting that there was no prior opinion on the matter of televising juror deliberations because all parties consented and the issue was never contested on appeal).

165. State v. Schmid, 509 P.2d 619, 624 (Ariz. 1973).

166. See State v. Cardenas, 704 P.2d 834, 836 (Ariz. Ct. App. 1985).

167. ARIZ. R. CRIM. P. 9.3(b) (1998); see State v. Lee, 944 P.2d 1204, 1215 (Ariz. 1997), *cert. denied*, 523 U.S. 1007 (1998); Phoenix Newspapers Inc. v. Jennings, 490 P.2d 563, 566 (Ariz. 1971).

Eight years later, the State permitted ABC to televise jury selection and deliberation of another capital murder trial. The authority to so broadcast these deliberations came from the Arizona Supreme Court's Administrative Order number 2003-85.¹⁶⁸ Such order permitted the trial judge in Maricopa County to selectively waive provisions of Arizona Superior Court Rule 122 governing the ability of broadcasters to televise superior court proceedings.¹⁶⁹

Rule 122 strictly forbids “[c]overage of jurors in a manner that will permit recognition of individual jurors by the public. . . [and advises the trial judge] where possible, cameras should be placed so as to avoid photographing jurors in any manner.”¹⁷⁰ Under Arizona's Rule 122, the trial judge weighs a number of factors in order to determine whether to permit proceedings to be televised.¹⁷¹ The trial judge's determination to permit or exclude television broadcast of the proceedings is not subject to judicial review.¹⁷² Neither is the judge required to make any written findings in granting or denying television access.¹⁷³

The Order requires the written consent of each juror and all parties via a form clearly articulating that the proceedings shall be broadcast nationwide.¹⁷⁴ The Chief Judge of the Arizona Supreme Court approved these consent forms.¹⁷⁵ The trial judge maintained sole discretion to

168. *In re* Special Electronic Access to Superior Court Proceedings, Administrative Order 2003-85 (Ariz. 2003), available at <http://www.supreme.state.az.us/orders/admorder/Orders03/2003-85.pdf> (last visited November 18, 2005) [hereinafter *Arizona Electronic Access Order*]. The Order was entered pursuant to 6 § 3 to the Arizona Constitution, which empower the Chief Judge of the Supreme Court to create the rules and procedures of the state courts. See also *Jones v. Lopez Plascencia*, 458 P.2d 120 (Ariz. Ct. App. 1969) (affirming the sole power of the Chief Judge to set the procedures governing court proceedings).

169. *Arizona Electronic Access Order*, *supra* note 168.

170. See ARIZ. SUP. CT. R. 122(k) (1997). “Coverage of jurors in a manner that will permit recognition of individual jurors by the public is strictly forbidden. Where possible, cameras should be placed so as to avoid photographing jurors in any manner.” *Id.*

171. These factors are as follows:

- (i) The impact of coverage upon the right of any party to a fair trial; (ii) The impact of coverage upon the right of privacy of any party or witness; (iii) The impact of coverage upon the safety and well-being of any party, witness or juror; (iv) The likelihood that coverage would distract participants or would detract from the dignity of the proceedings; (v) The adequacy of the physical facilities of the court for coverage; and (vi) Any other factor affecting the fair administration of justice.

ARIZ. SUP. CT. R. 122(b) (1997).

172. *Id.* at 122(d). But a defendant may contest a denial of his request to close the courtroom. See *State v. Lee*, 944 P.2d 1204, 1215-16 (Ariz. 1997).

173. *Id.* Cf. COLO. CODE OF JUDICIAL CONDUCT Canon 3(A)(7)-(8) (2005) (setting procedures and guidelines for regular and expanded media coverage).

174. *Arizona Electronic Access Order*, *supra* note 168.

175. *Id.*

terminate the filming of the proceedings at anytime.¹⁷⁶

E. Texas

Texas has most recently opined upon the allowance of television in the jury room.¹⁷⁷ A Texas trial court granted a petition by PBS to allow television cameras to record and subsequently broadcast juror deliberations in a capital murder trial.¹⁷⁸ During the hearing of appeal, the state legislature considered a bill similar to that of Maine prohibiting any televising of jury deliberations. Texas jurisprudence contained the admonition that “[t]he deliberations of a jury are required to be kept secret, and to compel them to disclose in the presence of spectators how they stood and who are the minority, might well be considered a species of pressure which in some instances might require reversal of a case.”¹⁷⁹ Texas possesses a criminal procedure rule forbidding any person “to be with a jury while it is deliberating . . . [or] converse with a juror about the case on trial except in the presence and by the permission of the court.”¹⁸⁰ The appellate court, taking into consideration the ancient protection of jury deliberations from public dissemination and in spite of the fact that the camera recording the deliberations would be unmanned, overturned trial judge’s order.¹⁸¹ No inquiry into the media’s possible federal First Amendment or concurrent state constitutional rights occurred.¹⁸²

IV. COMPARATIVE CONSIDERATIONS

The English experience with televising any court proceedings traces back only to the 1990’s. An Act of Parliament bans completely the taking of photographs or any other electronic media within the courtroom.¹⁸³ The Act provides, *inter alia*:

176. *Id.*

177. See generally Bill Delmore, *Cameras in the Courtroom: Limited Access*, 67 TEX. B.J. 782 (2004).

178. *State ex rel. Rosenthal v. Poe*, 98 S.W.3d 194, 203 (Tex. Crim. App. 2003).

179. *Alsup v. State*, 39 S.W.2d 902, 903 (Tex. Crim. App. 1931).

180. TEX. CODE CRIM. P. art. 36.22 (1981).

181. *Rosenthal*, 98 S.W.3d at 201. Cf. *Glover v. State*, 110 S.W.3d 549, 550-51 (Tex. App. 2003) (discussing privacy of juror deliberations).

182. See TEX. CONST. art. I § 8 (1997). “Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. . . .” *Id.*

183. Criminal Justice Act 1925, c. 86, § 41 (Eng.).

(1) No person shall—

(a) take or attempt to take in any court any photograph, or with a view to publication make or attempt to make in any court any portrait or sketch, of any person, being a judge of the court or a juror or a witness in or a party to any proceedings before the court, whether civil or criminal; or

(b) publish any photograph, portrait or sketch taken or made in contravention of the foregoing provisions of this section or any reproduction thereof. . .¹⁸⁴

Another Act permits criminal prosecution for the publication of information divulged at trial.¹⁸⁵ The English courts have frequently prosecuted media entities for violation of this act.¹⁸⁶ The most recent case dealing with televising court proceedings occurred in 2001. In *R. v. Loveridge*,¹⁸⁷ the Court of Appeals addressed the issue of whether “the police arranged for the *Loveridge* applicants to be filmed by a video camera, without their knowledge, while they were at a magistrates’ court” violated the prohibition on televising trial proceedings notwithstanding the broadcast occurred on closed circuit television.¹⁸⁸ The Court held the “filming which took place at the court contravene[d]” statutory law prohibiting such broadcast.¹⁸⁹ In short, the legal philosophy governing English thought rejects any television media admission to trial proceedings.¹⁹⁰

On the other hand, Scotland permitted television cameras in its civil

184. *Id.*

185. Contempt of Court Act, 1981, c. 49, § 2 (Eng.).

186. *See, e.g.*, Attorney-General v. Guardian Newspapers Ltd., 7 ENT. & MEDIA L. REP. 904, 913 (Q.B. Div’l Ct. 1999); Attorney-General v. Birmingham Post & Mail Ltd., [1999] 1 W.L.R. 361, 361 (Q.B. Div’l Ct. 1998); Regina v. Evening Standard Co., 1 Q.B. 578 (1954); Rex v. Clarke (Ex parte Crippen), 27 T.L.R. 32 (K.B. 1910).

187. 2 Crim. App. R. 29 (2001).

188. *Id. Cf.* The Contempt of Court Act 1981 (Scotland), ch. 49 § 4(2) (Scot.) (authorizing the court, where reporting on case poses substantial risk of prejudice to the administration of justice, to delay any publication of the proceedings).

189. *Loveridge*, 2 Crim. App. R. 29.

190. *See* Lord Falconer of Thoroton, *Broadcasting Courts*, CP 28/04 (November 2004) (extensive consultation paper of the British Department for Constitutional Affairs on television cameras in English courts), available at <http://www.dca.gov.uk/consult/courts/broadcasting-cp28-04.pdf> (last visited November 18, 2005).

courtrooms on an experimental basis.¹⁹¹ A 1992 Practice Note by then Lord President Hope articulated specific guidelines for permitting television cameras into Scottish courts. The guidelines provided:

(a) The rule hitherto has been that television cameras are not allowed within the precincts of the court. While the absolute nature of the rule make it easy to apply, it is an impediment to the making of programmes of an educational or documentary nature and to the use of television in other cases where there would be no risk to the administration of justice.

(b) In future the criterion will be whether the presence of television cameras in the court would be without risk to the administration of justice.

(c) In view of the risks to the administration of justice the televising of current proceedings in criminal cases at first instance will not be permitted under any circumstances.

(d) Civil proofs at first instance do not normally involve juries, but the risks inherent in the televising of current proceedings while witnesses are giving their evidence justify the same practice here as in the case of criminal trials.

(e) Subject to satisfactory arrangements about the placing of cameras and to there being no additional lighting, which would make conditions in the court room intolerable, the televising of current proceedings at the appellate level in both civil and criminal cases may be undertaken with the approval of the presiding judge and subject to such conditions as he may impose.

(f) Subject to the same conditions, ceremonies held in a court room may also be televised for the purpose of news broadcasting.

(g) The taking of television pictures, without sound, of judges on the bench—as a replacement for the still photographs currently in use—will be permitted with the consent of the judge concerned.

191. See *X v. British Broad. Corp. and Lion Television Ltd*, 2005 S.L.T. 796, 798-99 (Outer House) (discussing Lord Hope's 1992 Guidelines for televising trial proceedings); see also Alistair Bonnington, *Let the Cameras Speak*, 49 THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND 9 (September 2004) (discussing 1992 guidelines for televising trials issued by Lord Hope and indicating if trial permitted to be taped, then broadcast occurs only after all appeals exhausted), available at <http://www.journalonline.co.uk/article/1000748.aspx> (last visited November 18, 2005).

(h) Requests from television companies for permission to film proceedings, including proceedings at first instance, for the purpose of showing educational or documentary programmes at a later date will be favourably considered. But such filming may be done only with the consent of all parties involved in the proceedings, and it will be subject to approval by the presiding judge of the final product before it is televised.¹⁹²

The most articulated opinion on the propriety of televising criminal proceedings occurred in a recent ruling of the Scottish High Court of the Justiciary.¹⁹³ Petitioners asked for the ability to broadcast the criminal prosecution of the Lockerbie Pan Am bombers.¹⁹⁴ As Scotland is a member of the European Community, it is a party to the European Convention on Human Rights and Fundamental Freedoms. The Convention, much like federal law, imposes requirements upon the process of criminal prosecution within signatory nations.

Petitioners urged for the public broadcast of the Lockerbie criminal trial, requesting permission to use the cameras already installed to broadcast the trial over closed circuit television to victims' families and to the public.¹⁹⁵ In ruling upon the petition, the court ruled on whether denial of public broadcast by television violated the defendant's rights under Article 10(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁹⁶ The Article embodies a

192. RENTON AND BROWN CRIMINAL PROCEDURE LEGISLATION, SC RBL C1-07.1 (2005) (emphasis added).

193. British Broad. Corp., Petitioners (No 2), 2000 S.T.L. 860 (High Court of the Justiciary) [hereinafter *British Broad.*].

194. *Id.* at 861.

195. The closed circuit television was obtained by consent of the presiding judge to the request of the United States Office for Victims of Crime. *Id.* at 861.

196. *Id.* at 863, 867. Article 10(1) reads:

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Convention for the Protection of Human Rights and Fundamental Freedoms, Europ. T.S. No. 140 (heading provided under Protocol No. 11, Europ. T.S. No. 155), available at <http://www.pfc.org.uk/legal/echrtxt.htm> [hereinafter *Convention*] (last visited May 14, 2006).

similar provision to the American First Amendment. The court observed that the media were permitted to access the court and to report its proceedings, but the closed-circuit television signal petitioners desired access to did not fall within the protection of Article 10.¹⁹⁷ As the court announced, “[t]he right to ‘receive information’ conferred by Article 10 (1) is the right to receive information only from persons who are willing to impart it to them. Article 10 (1) does not give the petitioners a right of access to information that is in the hands of others who are not willing to impart it to them.”¹⁹⁸ The court further espoused that Article 10(2), a type of governmental security provision similar to the American discretionary exclusion of the media for a compelling governmental interest, would permit restricting public broadcast of the trial even if Article 10(1) applied.¹⁹⁹

The court went further in asserting the trial court’s lawful inherent authority to exclude all television broadcast of its proceedings.²⁰⁰ Therefore, even if the restriction forbidding public broadcast was found to violate Article 10(1), an unconditional right to broadcast would not follow.²⁰¹

A number of civil cases in Scotland that have addressed Article 6(1) of the European Union’s Convention on Human Rights provided the basis for recent challenges to the use of civil juries as an institution in Scotland. Each case alleged that the civil jury deprives a litigant of his Convention right to fair process.²⁰² As explained in subsection C, these cases inform upon challenges that may be lodged against the use of criminal juries.

A. Inner House Cases

The first case to allege that civil juries violate Article 6 of the European Convention occurred in 2001. The action was one for damages arising out of a motor vehicle accident.²⁰³ The defender was found liable for negligent driving of an automobile, causing injury to the pursuer, and the case proceed to jury trial on the sole issue of the amount of damages

197. *British Broad.*, *supra* note 193 at 867.

198. *Id.* at 866.

199. *Id.*

200. *Id.* at 867. The power of the court is both affirmative, i.e. to grant television broadcast with conditions, and negative, i.e. to deny all television broadcast.

201. *Id.* The court further went on to denounce any precedential value in their judgment. *See id.* at 868 (Lord Marnoch’s opinion).

202. *See infra* notes 203, 208, and 230 and accompanying text.

203. *Gunn v. Newman*, 2001 S.L.T. 776 (Inner House 1st Div.).

be award the pursuer.²⁰⁴ The pursuer claimed, among other things, “*solatium* for pain and suffering resulting from the accident.”²⁰⁵ The Lord Ordinary permitted issues solely on the *solatium* claim for damages, effectively severing this claim from other damage claims and permitting a separate award on this pain and suffering claim. The defender asserted the Lord Ordinary erred in his decision on two grounds:

[F]irst, the contention that jury trial does not secure the necessary fair hearing to which a defender, such as the present defender, has a Convention right; secondly, the contention that, in order to secure that fair hearing by way of a proof, the court must reinterpret § 9 (b) of the 1988 Act in such a way as to permit a Lord Ordinary to allow a proof in all cases of this kind where a claim for *solatium* falls to be assessed.²⁰⁶

Both elements went unaddressed because it was determined that the Scottish ministers needed to be joined in the action in order to address both incompatibility between the Court of Session 1988 Act and the European Convention, as well as the necessary impact on the Scottish system of jury trial.²⁰⁷ Unfortunately, the objections raised by the defender were not addressed in subsequent litigation.

The second case, decided in the Extra Division of the Inner House, arose out of an action for personal injuries seeking damages for a motorcycle accident.²⁰⁸ The defender objected to use of the jury as violative of Article 6(1) of the Human Rights Convention on six separate grounds.²⁰⁹ The first ground for objection rested on the procedural

204. *Id.* at 776.

205. *Id.* at 777.

206. *Id.* at 778. The 1988 Court of Session Act section 9 provides:

The Lord Ordinary may allow a proof— (a) in any action, other than an action enumerated in section 11 of this Act, without the consent of both parties and without reporting to and obtaining the leave of the Inner House; (b) in any action enumerated as aforesaid, if the parties to the action consent thereto or if special cause is shown.

The Court of Session Act of 1988, ch. 36 Pt. III § 9.

207. *Gunn*, 2001 S.L.T. at 779 (incompatibility prong relates to 1998 Human Rights Act s. 3 and 4 (1), (2) implementing Convention); *see* Human Rights Act 1998, ch. 42 § 3.

208. *Heasman v. J M Taylor & Partners*, 2002 S.L.T. 451 (Inner House Ex. Div.) (liability was admitted and defenders objected before jury trial commenced).

209. Article 6(1) of the European Convention on Human Rights provides:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the

inability to lay before the jury, as one could before a judge sitting without a jury, comparable cases and amounts of awards in damages.²¹⁰ Second, the jury was unskilled, insensitive, and not properly instructed in assessing damages.²¹¹ Third, an award of damages itself by a jury is unfair because there is no likelihood that an appeal of the jury decision will be successful.²¹² Fourth, the unfairness of trial by jury could not be remedied through the appellate process.²¹³ Fifth, proof before a judge, rather than a jury, permitted “legitimate expectation that an award would fall within the well understood parameters for awards in similar cases, so that it was open to the defenders to protect their position by making a tender.”²¹⁴ This legitimate expectation is part of the inherent fairness of the judicial process. Sixth, juries do not give reasons for their decision, but only articulate an award with no explanation.²¹⁵ Additionally, the defenders argued that the Convention must be applied to the Court’s reading of section 11 of the 1988 Court of Session Act.²¹⁶ Application of the Convention to section 11 leads, the defenders argued, to the term special cause meaning substantial cause—and therefore mandated removal of actions for personal injuries involving damages from jury trial.²¹⁷

Lord Coulsfield surveyed the European Court of Human Rights jurisprudence regarding trial by jury in criminal and civil contexts to address the defender’s objections. Specifically, Coulsfield found only the criticism that jury fails to give reasons for its award to be possibly sufficient to raise a claim under Article 6 of the Convention.²¹⁸ Ultimately, Lord Coulsfield concluded that “the Convention jurisprudence recognised that there was no requirement for reasons in every case.”²¹⁹ Particularly, Coulsfield focused on *Tolstoy v. United*

extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Convention, supra note 196.

210. *Heasman*, 2002 S.L.T at 453.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *See id.*

219. *Id.* at 455 (citing *R. v. Belgium*, application no 15957/90; (1992) 72 D.R. 195, *Saric v Denmark*, E.C.H.R., application no 31913/96, 2 February 1999, unreported, and *Tolstoy Miloslavsky v U.K.* 20 Eur. Ct. H.R. 442 (1995)).

Kingdom, a civil case involving libel and the assessment of a large amount of damages.²²⁰ The case concerned the circulation of a pamphlet written by a historian to members of Parliament and the House of Lords asserting that the Warden of Winchester College, Lord Aldington, committed atrocious unpunished war crimes.²²¹ The case went to trial before a jury of twelve, who ruled for Lord Aldington finding the charge of libel substantiated and awarded damages three times higher than any such award in English legal history.²²² The Court of Human Rights dismissed a contention of the defendant that the jury trial process under Article 6 was unfair, and instead focused on whether posting of security to effectuate an appeal violated Article 6.²²³ The Court did not find a violation of Article 6 in this circumstances, but went on to consider whether, under Article 10 of the Convention on Human Rights, the jury's award of damages constituted an abridgement of the defendant's right of freedom of expression.²²⁴ The defendant argued that no guidelines existed to circumscribe jury damage awards, and the Court found such a violation of Article 10.²²⁵

Lord Coulsfield asserted that the *Tolstoy* decision informed the Court's reasoning, but affirmed the European Court's dismissal of defendant's claim that trial by jury itself was unfair.²²⁶ After detailing the procedures utilized in Scotland for jury trial and appeal, Coulsfield concluded that trial by jury was not inherently unfair and noted that change in the law concerning jury trial is a matter of public policy to be determined by the legislature.²²⁷ The Court remanded the case to the Lord Ordinary to allow issues for trial by jury.²²⁸

A final noteworthy comment about this case: Lord Coulsfield rejected the contention that section 9(b) should require in an action for *solatium*, in order to be compatible with the 1998 Human Rights Act and the Convention, proof by judge because jury trial was inherently unfair.²²⁹ Lord Coulsfield directly addressed the issue left unanswered

220. Heasman, 2002 S.L.T. at 453 (citing *Tolstoy Miloslavsky v. U.K.*, 20 Eur. Ct. H.R. 442 (1995)).

221. *Tolstoy Miloslavsky*, 20 Eur. Ct. H.R. at 448.

222. *Id.* at 449-51.

223. *Id.* at 459-60.

224. *Id.* at 462-66.

225. *Id.* at 467.

226. Heasman, 2002 S.L.T. at 459.

227. *Id.* at 460.

228. *Id.*

229. *Id.* at 454 (discussing public policy reasons for jury trial, English jurisprudence, and European cases to affirm fairness of jury trial in awarding damages unsupported by articulated reasons).

in *Gunn v. Newman* by affirming the current system of civil jury trial in Scotland as procedurally fair.²³⁰

B. Outer House Cases

Outer House actions presented similar challenges to the fairness of jury trial.²³¹ A particular case merits individual attention because each defender in the separate actions asserts a variation of the theory why a civil jury in accessing an award of damages in a personal injury action violates Article 6(1) of the Convention.

Sandison v. Graham Begg, Ltd. involved a suit between an employee against her former employer for personal injuries resulting from the employee's fall during working hours.²³² The defenders objected to issues being presented to the jury for determination of past and future earnings.²³³ The defenders argued that an unreasoned decision of a jury awarding past and future earnings violated defenders' Convention right to a fair hearing.²³⁴ A jury award of past and future earnings as damages, unsupported by written reasons for such award, would "inhibit the defenders' ability to exercise their right to appeal."²³⁵ Defenders urged that proof by judge, with a written decision articulating reasons and figures for the award of past and future earnings, as the only means to preserve their appellate and convention rights.²³⁶

Further, defenders argued that special cause existed under section 9(b) of the 1988 Court of Session Act to preclude the entry of issues for jury trial.²³⁷ This argument rested upon defenders' previous contention that an unreasoned decision of a jury in awarding past and future earnings as damages in a personal injury action violated defenders' Convention right.²³⁸ Thus, defenders asserted, a finding that special cause existed under section 9(b) must follow.²³⁹

Lord Mackay of Drumadoon disagreed with defender's argument that an unreasoned jury damage award for past and future earnings

230. *Id.*

231. *See Sandison v Graham Begg Ltd*, 2001 S.L.T. 1352 (Outer House); *Gunn v Newman*, 2001 Sess. Cas. 525 (Outer House).

232. *Sandison*, 2001 S.L.T. at 1352-53.

233. *Id.* at 1353.

234. *Id.* (defender expressly denied the argument advanced in the Inner House in *Gunn v. Newman* alleging any jury determination of damages to be an infringement of Article 6(1) right).

235. *Id.*

236. *Id.*

237. *Id.* at 1353.

238. *Id.* at 1352-53.

239. *See id.* at 1353-54.

necessitated finding special cause under Scottish statutory law because such an award violated defenders' Convention rights.²⁴⁰ Instead, Mackay affirmed that current Scottish law adequately protected defenders' rights. A jury trial on the issue of awarding past and future earnings as damages in a personal injury action remained lawful under Scottish and European precedents.²⁴¹

C. Relation to Criminal Cases

The principle that an unreasoned jury verdict violates the Convention has been addressed in England as well in the 2001 *Review of the Criminal Courts of England and Wales*.²⁴² The Review recommends the "trial judge in each case to give the jury a series of written factual questions, tailored to the law as he knows it to be and to the issues and evidence in the case" for the jury to publicly answer each question in rendering a verdict of guilty or not guilty.²⁴³ The secrecy of juror deliberations may also violate the European Convention Article 6's right to an effective appeal.²⁴⁴ The House of Lords addressed the following issues arising in criminal trials:

(1) Should the common law prohibition on the admission of evidence of the jury's deliberations prevail even if the Court of Appeal is presented with a statement from a juror which, if admitted, would provide *prima facie* evidence of jury partiality in breach of Art 6? (2) Does s. 8 of the Contempt of Court Act 1981, when interpreted in the light of s. 3 of the Human Rights Act 1998 and Art 6 of the European Convention, prohibit the admission into evidence of a statement from a juror which, if admitted, would provide *prima facie* evidence of partiality in breach of Art. 6? If so, is s. 8 incompatible with Art. 6 to the extent that it prohibits the admission into evidence of such a statement?²⁴⁵

240. *Id.* at 1354.

241. *Id.* (case set for proof before judge for other reasons).

242. The Right Honorable Lord Justice Auld, *Review of the Criminal Courts of England and Wales* 75 (2001), available at <http://www.criminal-courts-review.org.uk/ccr-05.htm#p75> (last visited November 18, 2005).

243. *Id.* at para. 97.

244. *Id.* at para. 98 n.116; *Remli v. France*, 22 E.H.R.R. 253 (1996) (applying Article 6(1) to jurors and noting lack of ability to challenge unreasoned jury verdict on appeal); *Sander v. United Kingdom*, 31 E.H.R.R. 44 (2001) (right to fair trial violated by juror racism and decision addresses UK prohibition on inquiring of jury on any details of deliberation); *R. v. Stephen Andrew Young*, 2 Cr. App. R. 379 (1995) (Court of Appeal decision affirming inability for trial judge to inquire about details of juror deliberations).

245. *R. v. Mirza*, 2 Cr. App. R. 8, 114 (2004) (House of Lords).

The House of Lords held that secrecy during deliberations is an essential feature of English jury trials.²⁴⁶ As such, after a verdict is rendered, no evidence of the deliberations is admissible; during deliberations, the trial judge could inquire about irregularities brought to the judge's attention by jurors.²⁴⁷ Thus, jurors in a criminal trial will be informed before deliberations of their duty to inform the Court of irregularities and the trial judge must ensure a detailed written recording of any such irregularities for the Appellate court to review.²⁴⁸ The House also referenced a European Court of Human Rights case dealing with irregularities in juror conduct.²⁴⁹ In that case, the European Court announced that because "juries in the United Kingdom deliberate in private, give no reasons for their decisions and that there is, at the very least, a strong inhibition on enquiring about the nature of juror discussions. . ." the United Kingdom would do well to ensure other appropriate procedural measures guarantee the impartiality of the jury and the defendant's right to a fair trial.²⁵⁰

Examining this jurisprudence illuminates the conceptions of fair trial and secrecy of juror deliberation in the United States. Since the Convention is inapplicable to the United States, the bearing upon the above-articulated jurisprudence of television's intrusion into American jury rooms may be minimal. Yet, the Supreme Court's increasing reference to foreign judicial sources to inform on constitutional interpretation may cause the cases discussed in this present section and their ideas to influence future decisions.²⁵¹

V. CONCLUSION

The various rules adopted by the federal and state governments maintain great protection for the secrecy of jury deliberations. Allowing television cameras into the jury room might provide citizens a better understanding of the criminal justice system, as well as their role in such a system. In realizing the public's power as jurors, they may undertake jury service with a different attitude. Further, publicizing juror deliberations could permit a greater number of individuals to experience

246. *Id.* at 130.

247. *Id.* at 142.

248. *Id.*

249. Gregory v. United Kingdom, 25 E.H.R.R. 577 (1998).

250. *Id.* at 587-88.

251. The most recent example of the Supreme Court's reference to foreign judicial decision is *Roper v. Simmons*, 543 U.S. 551 (2005) (citing international opinions regarding the death penalty and juvenile defendants).

the process of trial.

Despite these considerations, most courts are reluctant to open an area of decision-making that remained closed for so many centuries. Their reasons are time-honored and rational. The argument is hard to make that juror deliberations should be televised when England, the originator of the common law tradition, does not even permit television cameras in trial proceedings. Reference to foreign judicial decisions provides a broader context to discuss the issue of television entering the jury room.

Presently, consent of the participants and waiver of appellate rights appears as the solution utilized in the states permitting television broadcast of jury deliberations. Whether the issue will be taken up in the appellate forum is unlikely, but a defendant's challenge to consent might properly raise the issue. Hopefully, the Supreme Court will have the opportunity to analyze the issues raised in this work to address the constitutionality of state's permitting television cameras into their jury rooms.