

Witness Hide-and-Seek: Why Federal Prosecutors Should Record Pretrial Interviews

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This Article pays long-overdue attention to a federal appellate court's warning against "playing hide-and-peek" with witnesses. Specifically, prosecutors should record interviews. While courtroom cameras dominate the topic of judicial transparency, cameras can play a critical role in a sleepier corner of criminal proceedings: pretrial witness interviews. The Article first tracks the history of open judicial proceedings as a tradition of our Anglo-American jurisprudence. Next, the Article identifies the normative thread running through that history. Fairness may suffer when cameras transform public proceedings into publicized proceedings. Finally, the Article argues that this same issue of fairness applies to pretrial witness interviews. While fairness provides a reason against proceedings that are overly publicized, it provides a reason for interviews that are more public. Judicial proceedings are designed to ascertain the truth; hidden off camera, witness interviews may obscure the truth. Recording witness interviews would lift those interviews on a par with other discovery aspects of a criminal proceeding and put a welcome end to games of witness hide-and-peek.

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I. INTRODUCTION

Hide-and-seek is a fun game. Ask any kid on the playground. When the scenery shifts from playground to prosecution, the games should end. Yet, many federal prosecutors continue to play a tactical game of hide-and-seek with witnesses, “[e]schewing tape recordings and ordering law enforcement agents not to take notes during pretrial interviews.”¹ With a witness’s statements hidden, defense attorneys are left to seek facts in the dark during cross-examination at trial. Nearly thirty years ago, one federal appellate court warned against such “risky business” on the sovereign’s behalf.² That warning has fallen flat, largely ignored by courts, prosecutors, and Congress alike. Caution aside, and long past the “iPhone revolution” that made handheld recordings a staple of our wired world, it remains an almost universal practice for federal law enforcement not to record pretrial witness interviews.

This Article pays long-overdue attention to the judicial warning against “playing hide-and-seek” with witnesses.³ Specifically, prosecutors should record interviews. While courtroom cameras dominate the topic of judicial transparency, cameras can play a critical role in a quieter corner of criminal proceedings: pretrial witness interviews. The Article first tracks the history of open judicial proceedings as a tradition of our Anglo-American jurisprudence. Next, the Article identifies the normative thread running through that history. Fairness may suffer when cameras transform public proceedings into publicized proceedings. Finally, the Article argues that this same issue of fairness applies to pretrial witness interviews. While fairness provides a reason against proceedings that are overly

¹ *United States v. Houlihan*, 92 F.3d 1271, 1289 (1st Cir. 1996); see Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 851 (2002).

² *Houlihan*, 92 F.3d at 1289.

³ *Id.*

publicized, it likewise provides a reason for interviews that are more public. Judicial proceedings are designed to ascertain the truth. Hidden off camera, witness interviews may obscure the truth. Recording witness interviews would lift those interviews on a par with other discovery aspects of a criminal proceeding and put a welcome end to games of witness hide-and-seek.

II. HISTORY OF OPEN JUDICIAL PROCEEDINGS

The issue of transparency in judicial proceedings arose centuries ago. A tradition of our Anglo-American jurisprudence is that courts are open to the public.⁴ In England before the Norman Conquest, cases were brought before “moots,” such as a local court or county court “formed by assembling the men of the village or tun, the hundred, or the kingdom, or their representatives.”⁵ An Anglo-Saxon or Anglo-Norman court might appear to modern eyes “rather like an ill-managed public meeting.”⁶ But that meeting would not be wholly unfamiliar. Echoing our contemporary notion of jury duty, freemen representing the “patria,” or country, were required to attend and render judgment.⁷ Indeed, King John’s Magna Carta from 1215 is often cited as intellectual inspiration for modern juries summoned from the community, as the charter protected every “Free-Man” against imprisonment except by the “Lawful Judgement of his Peers or by the Law of the Land.”⁸ An English court in the fourteenth century remarked that the King’s will was that “justice should be ministered indifferently to rich as to poor.”⁹ Community attendance would “aid

⁴ *In re Oliver*, 333 U.S. 257, 266 (1948) (“This nation’s accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage.”).

⁵ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 565 (1980); *Press-Enter. Co. v. Superior Ct. of Cal.*, 464 U.S. 501, 505 (1984); *Moot*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁶ SIR FREDERICK POLLOCK, *THE EXPANSION OF THE COMMON LAW* 30 (1904).

⁷ See *Richmond Newspapers, Inc.*, 448 U.S. at 565; *Press-Enter. Co.*, 464 U.S. at 505.

⁸ MAGNA CARTA, ch. 29 (1215), reprinted in *MAGNA CHARTA, MADE IN THE NINTH YEAR OF KING HENRY THE THIRD, AND CONFIRMED BY K. EDWARD THE FIRST, IN THE TWENTY-EIGHTH YEAR OF HIS REIGN* 73 (Edw. Cooke trans., 1680) (also providing historical basis for due process); see, e.g., Robert W. Emerson & John W. Hardwicke, *The Use and Disuse of the Magna Carta: Due Process, Juries, and Punishment*, 46 N.C.J. INT’L L. 571, 605, 617–21 (2021); see *infra* Part III.

⁹ *Richmond Newspapers, Inc.*, 448 U.S. at 566 (quoting Eyre of Kent general court held in 1313–14).

in the establishing of a happy and certain peace,” thus better accomplishing the end of justice immune to economic circumstance.¹⁰

Openness persisted through Colonial America and into current times as “one of the essential qualities of a court of justice.”¹¹ From the Spanish Inquisition to the English Court of Star Chamber to the French monarchy’s *lettres de cachet*, history (at least European) reveals secrecy as “a menace to liberty.”¹² Openness “enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence” in the judicial system.¹³ The Sixth Amendment to the Constitution enshrines this enhancement, guaranteeing every criminal defendant “the right to a speedy *and public* trial.”¹⁴

Decades ago, the United States Supreme Court “note[d] that historically both civil and criminal trials have been presumptively open.”¹⁵ Even courts-martial have been presumptively open “back to the earliest military practices.”¹⁶ While the default is to allow community access, a party may overcome the presumption of open courtrooms by showing that (1) “closure is essential to preserve higher values,” (2) “closure is narrowly tailored to serve those values,” and (3) “the risk of impairing law enforcement or judicial functions and/or the privacy interests of those resisting disclosure outweighs the

¹⁰ *Id.*; see POLLOCK, *supra* note 6, at 98 (describing the jury, “like the ancient courts of the county and hundred, [as] an organ of social and not merely official justice”).

¹¹ *Richmond Newspapers, Inc.*, 448 U.S. at 567 (quoting *Daubney v. Cooper*, 109 E.R. 438, 440 (Ct. King’s Bench 1829)); see POLLOCK, *supra* note 6, at 31.

¹² *In re Oliver*, 333 U.S. 257, 268–69 (1948); see *Estes v. Texas*, 381 U.S. 532, 539 (1965) (recognizing that “secret tribunals were effective instruments of oppression”); *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966) (“The principle that justice cannot survive behind walls of silence has long been reflected in the Anglo-American distrust for secret trials.”) (internal quotation omitted). See generally POLLOCK, *supra* note 6, at 31 (noting that during Queen Victoria’s reign, “[t]he secret inquisitorial proceeding ha[d] become open and judicial”); *Star Chamber*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“An English court having broad civil and criminal jurisdiction at the king’s discretion and noted for its secretive, arbitrary, and oppressive procedures . . .”); *Lettre de Cachet*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A royal warrant issued for the imprisonment of a person without trial.”); *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 812; 2 Wils. K.B. 275, 282–83 (rejecting general warrants as “worse than the Spanish Inquisition”).

¹³ *Press-Enter. Co. v. Superior Ct. of Cal.*, 464 U.S. 501, 508 (1984).

¹⁴ U.S. CONST. amend. VI (emphasis added).

¹⁵ *Richmond Newspapers, Inc.*, 448 U.S. at 580 n.17.

¹⁶ *United States v. Gonzalez*, 12 M.J. 747, 749 (A.F.C.M.R. 1981) (recognizing judges’ “discretion to close the courtroom”), *aff’d*, 16 M.J. 428 (C.M.A. 1983).

presumption of openness.”¹⁷ Given the link between openness and fairness, as well as the appearance of fairness, the bar for such a showing is high.¹⁸ In the words of Justice William J. Brennan, Jr., “open trials are bulwarks of our free and democratic government.”¹⁹

Taking open courtrooms as a given, still the proper level of openness is debatable. And that debate is not new. Writing in 1904, Sir Frederick Pollock, late of both Oxford and Cambridge Universities, recognized judgment in the light of day as the essence of any court of justice.²⁰ The settled view for centuries has been that “publicity in the administration of the law is on the whole . . . worth more to society than it costs.”²¹ But we do well to distinguish between “publicity of the court itself” and “the indiscriminate publication of reports” from the court.²² Court publicity may be codified in the United States’ founding charter, but indiscriminate publication is not. Copyright law addresses indiscriminate publication from a statutory perspective.²³ Sir Pollock’s framing also suggests a conceptual and semantic perspective: a *public* proceeding need not be a *publicized* proceeding.

On the American side of the Atlantic, a debate was soon brewing over publicizing proceedings. In 1935, German immigrant Bruno Hauptmann was tried in New Jersey state court for kidnapping and murdering the child of aviator Charles Lindbergh.²⁴ International attention to the case created an out-of-control atmosphere where “reporters ran amok.”²⁵ The defendant himself expressed “no

¹⁷ Lynch v. Southampton Animal Shelter Found., Inc., No. CV 10-297, 2012 WL 13109966, at *2 (E.D.N.Y. July 10, 2012) (internal quotations omitted); see *Press-Enter. Co.*, 464 U.S. at 510.

¹⁸ See *Richmond Newspapers, Inc.*, 448 U.S. at 570; *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 606 (1982) (stating that “the circumstances under which the press and public can be barred from a criminal trial are limited; the State’s justification in denying access must be a weighty one”).

¹⁹ *Richmond Newspapers, Inc.*, 448 U.S. at 592 (Brennan, J., concurring) (stating that “public access to court proceedings is one of the numerous checks and balances of our system, because contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power”) (internal quotations omitted).

²⁰ POLLOCK, *supra* note 6, at 31.

²¹ *Id.* at 32 (referencing comments of Justice Oliver Wendell Holmes, Jr.).

²² *Id.*

²³ *Id.* at 129–30.

²⁴ *State v. Hauptmann*, 180 A. 809, 813 (N.J. 1935).

²⁵ *On Camera, Not In*, N.Y. TIMES, Jan. 27, 1981, at A18.

complaint” and felt satisfied that the trial was fair.²⁶ It was certainly newsworthy. Hundreds of reporters descended on the courtroom.²⁷ In a politically charged moment with World War II on the horizon, Hauptmann was convicted and ultimately executed.²⁸ Members of the Bar were horrified, at least at the media circus. A committee of the American Bar Association (ABA) derided *State v. Hauptmann* as “the most spectacular and depressing example of improper publicity and professional misconduct ever presented to the people of the United States in a criminal trial.”²⁹

In response to the explosion of photographers’ flashbulbs during the *Hauptmann* trial, the ABA in 1937 adopted a prohibition in its Canons of Judicial Ethics against photographic and broadcast coverage of courtroom proceedings.³⁰ The ABA Special Committee on Cooperation Between Press, Radio, and Bar had flagged the risk of courtroom theatrics from media attention.³¹ Press coverage safeguards judicial integrity, providing “intervention by publicity” to reassure society.³² Yet, reading the room of American tastes, the Committee

²⁶ *Hauptmann Says Trial Is Fairly Conducted*, N.Y. TIMES, Feb. 6, 1935, at 12. *But see Hauptmann*, 180 A. at 827–28 (rejecting the defendant’s arguments on appeal that spectator outbursts and media conduct impaired trial).

²⁷ *United States v. Williams*, 568 F.2d 464, 467 (5th Cir. 1978) (describing media frenzy surrounding *Hauptmann* trial).

²⁸ See Robert R. Bryan, *The Execution of the Innocent: The Tragedy of the Hauptmann-Lindbergh and Bigelow Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 831, 833 (1990–1991).

²⁹ Paul Bellamy et al., *Report of the Special Committee on Cooperation Between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings*, 62 ANN. REP. A.B.A. 851, 861 (1937).

³⁰ *Canons of Judicial Ethics*, 62 ANN. REP. A.B.A. 1134–35 (1937); see John W. Davis et al., *Report of the Special Committee on Televising and Broadcasting Legislative and Judicial Proceedings*, 77 ANN. REP. A.B.A. 610–11 (1952) (recommending an additional proscription against television coverage and noting that intrusion of recording devices “distracts attention from the single object of promoting justice”); *Proceedings of the House of Delegates: Mid-Year Meeting, February 25-26, 1952*, 38 A.B.A. J. 425, 427 (1952) (adopting the Special Committee’s recommended proscription against television coverage); see also *Chandler v. Florida*, 449 U.S. 560, 562–63 (1981) (describing the background of ABA prohibitions); *Estes v. Texas*, 381 U.S. 532, 535 (1965) (observing that the ABA Canon “has of itself no binding effect on the courts but merely expresses the view of the Association”). See generally David Margolick, *Bar Association Still Struggling Over Policy Banning Cameras in Courtroom*, N.Y. TIMES, Jan. 27, 1982, at A21 (reporting views on courtroom cameras); SARAH J. ECKMAN, CONG. RSCH. SERV., R44514, VIDEO BROADCASTING FROM THE FEDERAL COURTS: ISSUES FOR CONGRESS 7–8 & n.36 (2019) (describing the history of the Bar Association’s views on courtroom cameras).

³¹ Bellamy et al., *supra* note 29, at 865.

³² *Id.* at 857.

observed that the media may bend toward “stimulating and gratifying our love of excitement” and convene a “trial in the air” that eclipses the trial in the courthouse.³³ Jurors, witnesses, and court officers may engage in “vaudeville performances” for the audience.³⁴ While the Committee advised against harsh punishments such as contempt against the press, it appreciated that a court must use its inherent power “as far as is necessary to protect the fairness of the proceedings.”³⁵

For its part, Congress took the opposite tack that same year and introduced the first bill to allow “motion pictures” and “talking pictures” in federal courts.³⁶ That bill failed enactment, but it paved the way for future legislative efforts.³⁷ Undeterred, in 1963 the ABA “strongly reaffirmed” its opposition to photographing or broadcasting trials, concerned that cameras would transform trial participants into actors and put political pressure on judges, especially elected judges in state courts.³⁸

Many followed the ABA in favoring a more private, restrained atmosphere. Congress empowers the Supreme Court “to prescribe general rules of practice and procedure” for Article III courts.³⁹ Promulgating the first Federal Rules of Criminal Procedure, adopted in 1944 and effective in 1946, the Supreme Court expressly prohibited photography and broadcasting from courtrooms during judicial proceedings.⁴⁰ The first preliminary draft of a rule for “Regulation of

³³ *See id.* at 856, 861.

³⁴ *Id.* at 859, 865.

³⁵ *Id.* at 866.

³⁶ H.R. 4848, 75th Cong. (introduced on Feb. 17, 1937, and stating: “To provide for the recording of certain proceedings in the district courts of the United States by motion pictures and synchronized sound-recording equipment and for the reproduction of such proceedings by talking pictures in the circuit courts of appeals of the United States and in the Supreme Court of the United States upon the review of any such case.”); *see* 81 CONG. REC. 1353 (1937); ECKMAN, *supra* note 30, at 1 n.1.

³⁷ *See* ECKMAN, *supra* note 30, at Summary.

³⁸ Anthony Lewis, *U.S. Bar Group Again Supports Ban on Cameras in Courtrooms*, N.Y. TIMES, Feb. 6, 1963, at 1.

³⁹ 28 U.S.C. §§ 2072–74; *see* 28 U.S.C. § 331 (creating Judicial Conference of the United States to review court rules of practice and procedure and recommend changes, among other tasks); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (discussing limits of Rules Enabling Act).

⁴⁰ *See* Rules of Criminal Procedure Order, 323 U.S. 821 (1944); *United States v. Ferguson*, No. 1:07-CR-70, 2008 WL 80011, at *3 (E.D. Tex. Jan. 7, 2008) (noting March 21, 1946, was the effective date of the first Federal Rules of Criminal Procedure, as transmitted to Congress).

Conduct in the Court Room” prohibited “[t]he taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings.”⁴¹ The second preliminary draft attached an advisory committee note quoting the ABA: “Proceedings in court should be conducted with fitting dignity and decorum.”⁴² The note also pegged *State v. Hauptmann* as exemplifying “the type of abuse which this rule is designed to prevent.”⁴³ Judges and lawyers reviewing the proposed rule expressed strong support, though one set of federal judges in Tennessee remarked that “it appears to be an announcement of judicial ethics rather than any rule of procedure.”⁴⁴

The Supreme Court’s camera prohibition appeared in the first official printing of the Federal Rules of Criminal Procedure and endures to this day as Rule 53, deleting the archaic specification of radio broadcasting: “[T]he court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.”⁴⁵ An advisory committee note lays bare the sweeping vision of the drafters. The rule was “included with a view to giving expression to a standard which should govern the conduct of judicial proceedings”: a best practice for proceedings generally.⁴⁶ Just two years after Rule 53 became effective, Congress officially applied its provisions to federal courts under the “Decorum in court room” statute.⁴⁷

On the more visible front of case opinions, the Supreme Court remained faithful to its view expressed in Rule 53, at least initially. In

⁴¹ 1 DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE 199 (Madeline J. Wilken & Nicholas Triffin eds., 1991) (including the first preliminary draft, from 1944, of Federal Rule of Criminal Procedure 49).

⁴² 4 DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE 187 (Madeline J. Wilken & Nicholas Triffin eds., 1991) (including the accompanying note to the second preliminary draft, from 1944, of Federal Rule of Criminal Procedure 56).

⁴³ *Id.*

⁴⁴ 5 DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE 201 (Madeline J. Wilken & Nicholas Triffin eds., 1991).

⁴⁵ See 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.”); see also George H. Dession, *The New Federal Rules of Criminal Procedure: II*, 56 YALE L.J. 197, 254 (1947) (“This Rule will not eradicate trial by the press in sensational cases, nor will it resolve the public relations problem of the administration of justice in our culture. But, as a specific and *ad hoc* provision, it is oriented toward those ends.”).

⁴⁶ FED. R. CRIM. P. 53 advisory committee’s 1944 note.

⁴⁷ 18 U.S.C. § 3004 (“Photographing or radio broadcasting prohibited, rule 53.”).

1965, the Court decided *Estes v. Texas* and evaluated the intrusion of cameras.⁴⁸ Defendant Billie Sol Estes was a well-known financier who had wielded “almost magic power” over his West Texas community and church.⁴⁹ After building a \$100 million empire of grain storage, fertilizer, and cotton, Estes fell swiftly.⁵⁰ He was convicted of swindling in Texas state court, following “a heavily publicized and highly sensational affair” of a trial.⁵¹ With camera wires and cables “snaked across the courtroom floor,” three microphones on the bench, and other microphones “beamed at the jury box and the counsel table,” the activities of news photographers and television crews heavily disrupted pretrial hearings.⁵² The judge then adjusted the layout and allowed “live telecasting” of limited portions of the trial.⁵³

Striking a note of self-reverence, the Supreme Court identified the “high function” of court proceedings: “held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial.”⁵⁴ Given the chaos reigning over the tribunal in *Estes*, the use of television there did not “contribute materially” to the “chief function of our judicial machinery[:] to ascertain the truth.”⁵⁵ In fact, the media presence had shattered “judicial serenity and calm.”⁵⁶ Considering these facts, the Supreme Court noted the “indulgence” and “mischief” of television.⁵⁷ Beyond unpleasant optics, televising the case “might cause actual unfairness,” including distracting jurors, swaying jurors toward a vote of guilt or innocence, affording witnesses improper knowledge of other testimony, intimidating witnesses, demanding attention from the judge, and causing “mental—if not physical—harassment” to the defendant.⁵⁸ Thus, finding that

⁴⁸ *Estes v. Texas*, 381 U.S. 532 (1965).

⁴⁹ See *The Wizard of Texas: Billie Sol Estes*, N.Y. TIMES, May 10, 1962, at 26.

⁵⁰ See *id.*

⁵¹ *Estes*, 381 U.S. at 535; *id.* at 590 (Harlan, J., concurring).

⁵² *Id.* at 536.

⁵³ *Id.* at 537 (noting that for trial, “the rules governing live telecasting, as well as radio and still photos, were changed as the exigencies of the situation seemed to require”).

⁵⁴ *Id.* at 540.

⁵⁵ *Id.* at 544.

⁵⁶ *Id.* at 536.

⁵⁷ *Estes*, 381 U.S. at 540, 544; see *id.* at 587 (Harlan, J., concurring) (“Permitting television in the courtroom undeniably has mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process.”).

⁵⁸ *Id.* at 545–49.

broadcasting the proceedings in *Estes* violated due process under the Fourteenth Amendment, the Court reversed the defendant's conviction on a 5-4 vote.⁵⁹

This meeting of the bench-and-bar minds was short-lived. In 1981, the Supreme Court in *Chandler v. Florida* took a more lenient stance on courtroom cameras.⁶⁰ There, the defendants were two officers with the City of Miami Beach Police Department.⁶¹ The officers had been convicted in Florida state court of conspiracy to commit burglary, grand larceny, and possession of burglary tools based on breaking and entering Picciolo's Italian restaurant, a landmark venue on Collins Avenue in Miami Beach.⁶² At the time of the officers' trial, Florida had recently conducted a pilot program that allowed electronic media "to cover all judicial proceedings in Florida without reference to the consent of participants," and the Florida Supreme Court had adopted a new canon allowing media coverage of judicial proceedings subject to the presiding judge's authority.⁶³ The trial judge in *Chandler* denied the defendants' challenges to Florida's experimental canon and allowed television coverage.⁶⁴ The courtroom had a television camera during the afternoon testimony of the State's chief witness and throughout closing arguments.⁶⁵ The eventual

⁵⁹ *Id.* at 538, 550, 552; *see Chandler v. Florida*, 449 U.S. 560, 570-71 (1981) (noting that Justices' votes in *Estes* "creat[ed] only a plurality" and, while "Justice Harlan provided the fifth vote necessary in support of the judgment . . . he pointedly limited his concurrence"); *cf. Sheppard v. Maxwell*, 384 U.S. 333, 335, 355 (1966) (considering a habeas corpus application and finding a due process violation where the trial judge had failed to protect the defendant "sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution" for the murder of his pregnant wife, and observing that "bedlam reigned at the courthouse"); *Dr. Samuel Sheppard, 46, Dies; Imprisoned for Wife's Murder*, N.Y. TIMES, Apr. 7, 1970, at 45 ("What made the case so news worthy was that it involved a successful physician, some spicy rumors and more than the usual amount of gore . . .").

⁶⁰ *Compare Chandler*, 449 U.S. at 582-83 (finding state's television experiment in courtrooms constitutional) *with* 65 A.B.A.J. 304 (1979) (rejecting the revised ABA standard to allow media coverage of courtrooms).

⁶¹ *Chandler v. State*, 366 So. 2d 64, 66 (Fla. Dist. Ct. App. 1978), *cert. denied*, *Chandler v. State*, 376 So. 2d 1157, 1157 (Fla. 1979), *aff'd sub nom. Chandler v. Florida*, 449 U.S. 560 (1981).

⁶² *Chandler*, 449 U.S. at 567; *see Ray Lynch, Samuel D. Picciolo, 87, Owned Miami Restaurant*, S. FLA. SUN-SENTINEL (Mar. 22, 1988), <https://www.sun-sentinel.com/news/fl-xpm-1988-03-22-8801180078-story.html>.

⁶³ 449 U.S. at 564-66; *see Chandler*, 366 So. 2d at 69.

⁶⁴ *See Chandler*, 366 So. 2d at 66.

⁶⁵ 449 U.S. at 568.

broadcast included only two minutes and fifty-five seconds of the trial, showing the prosecution's side of the case.⁶⁶

The United States Supreme Court reviewed its prior decision in *Estes v. Texas* and determined that the holding “did not announce a constitutional rule that all photographic or broadcast coverage of criminal trials is inherently a denial of due process.”⁶⁷ Writing for the Court, Chief Justice Warren E. Burger refused to promulgate a per se rule now in *Chandler*⁶⁸—a selfless take in light of the Chief Justice’s “antipathy to the televising of his own public appearances.”⁶⁹ Finding no evidence of “prejudice of constitutional dimensions,” and certainly “[n]othing of the ‘Roman circus’ or ‘Yankee Stadium’ atmosphere, as in *Estes*,” the Supreme Court declined to endorse or invalidate Florida’s media experiment.⁷⁰ Accordingly, the Court made clear that, consistent with the Fourteenth Amendment, “a state may provide for radio, television, and still photographic coverage of a criminal trial for public broadcast, notwithstanding the objection of the accused.”⁷¹ By unanimous vote, the Justices affirmed the officers’ convictions.⁷²

In 1982, soon after the *Chandler* decision, the ABA repealed its long prohibition against cameras in the courtroom.⁷³ Disparaged as “an intellectual dinosaur,” the prohibition was already largely ignored.⁷⁴ And audiences have only grown over the years, at least in state courts. In the summer of 2022, for example, one Virginia circuit court captivated both entertainment and legal reporters when it swung

⁶⁶ *Id.*

⁶⁷ *Id.* at 574.

⁶⁸ *Id.* at 574–75, 581 (finding that “appellants have not demonstrated that broadcast coverage is inherently a denial of due process”).

⁶⁹ *On Camera, Not In*, *supra* note 25, at 17.

⁷⁰ 449 U.S. at 582; *see On Camera, Not In*, *supra* note 25, at 17 (“Cases differ, and judges and lawyers are now free to learn when, if ever, the camera poses real risks for justice.”).

⁷¹ *See* 449 U.S. at 562.

⁷² *Id.* at 583 (Justice Stevens took no part in the decision.).

⁷³ Fred Barbash, *ABA Repeals Its 1937 Canon Against Cameras in the Courtroom*, WASH. POST (Aug. 12, 1982), <https://www.washingtonpost.com/archive/politics/1982/08/12/aba-repeals-its-1937-canon-against-cameras-in-the-courtroom/2418b074-dbe0-4aac-acf6-ff0b6b71f5b4>.

⁷⁴ *Id.* (quoting U.S. District Court Judge Norman P. Ramsey); *see* Resolution I, Television, Radio, Photographic Coverage of Judicial Proceedings, adopted at the Thirtieth Annual Meeting of the Conference of Chief Justices, Burlington, Vt. (1978) (by vote of 44–1, allowing each state’s highest court to set standards regarding media coverage).

open its doors for the defamation trial of *John C. Depp, II v. Amber Laura Heard*.⁷⁵ The trial launched salacious headlines; the case was described as a “spectacle” and a “circus,” the social media attention a “frenzy.”⁷⁶ On June 1, 2022, the jury found for actor Johnny Depp on three counts, awarding him \$15 million (later reduced to \$10.35 million due to Virginia’s cap on punitive damages).⁷⁷ The jury also found for actress Amber Heard on one count of her counterclaim, awarding her \$2 million.⁷⁸ But the merits were of little moment, black-letter elements of defamation drowned out by front-page noise of fame and #MeToo and domestic violence and personality disorders.⁷⁹

As in other cases of media obsession, all that noise had an amplifier: courtroom access. The judge overseeing *Depp v. Heard* allowed a media “pool camera system” to broadcast the trial, explaining that “I don’t see any good cause not to do it.”⁸⁰ The judge’s decision was notable for its reach, drawing more than one million viewers on television and livestream, with one internet site logging a peak viewership of over 1.2 million when Depp took the stand.⁸¹ Her

⁷⁵ *Depp v. Heard*, No. CL-2019-2911 (Va. Cir. Ct. 2022).

⁷⁶ See, e.g., Jessica Bennett, *Why Nobody Wins in the Depp-Heard Verdict*, N.Y. TIMES (June 1, 2022), <https://www.nytimes.com/2022/06/01/opinion/depp-heard-won-lost-verdict.html?searchResultPosition=4>; Jenna Benchetrit, *Johnny Depp, Amber Heard Libel Trial Is Nothing Short of a Media Circus*, CBC NEWS (Apr. 24, 2022), <https://www.cbc.ca/news/entertainment/depp-heard-media-circus-1.6428583>; Marlene Lenthang, *Amber Heard’s Lawyer Says ‘Lopsided’ Social Media Frenzy Influenced Jury, Actor Can’t Pay Over \$10M in Damages*, NBC NEWS (June 2, 2022), <https://www.nbcnews.com/news/us-news/amber-heards-lawyer-says-lopsided-social-media-frenzy-influenced-jury-rcna31578>.

⁷⁷ See Sonia Moghe, *Legal Victory for Johnny Depp After He and Amber Heard Found Liable for Defamation*, CNN (June 1, 2022), <https://www.cnn.com/2022/06/01/entertainment/johnny-depp-amber-heard-verdict/index.html>.

⁷⁸ *Id.*

⁷⁹ See, e.g., Michelle Goldberg, *Amber Heard and the Death of #MeToo*, N.Y. TIMES (May 18, 2022), <https://www.nytimes.com/2022/05/18/opinion/amber-heard-metoo.html>; Julia Jacobs, *Amber Heard Testifies About a ‘Pattern’ of Violence by Johnny Depp*, N.Y. TIMES (May 4, 2022), <https://www.nytimes.com/2022/05/04/arts/amber-heard-johnny-depp-violence.html>; Edward Helmore, *Amber Heard Evaluation Revealed Two Personality Disorders, Psychologist Says*, GUARDIAN (Apr. 26, 2022), <https://www.theguardian.com/film/2022/apr/26/amber-heard-johnny-depp-psychologist-shannon-curry-testimony>.

⁸⁰ Order, *Depp v. Heard*, CL-2019-2911 (Va. Cir. Ct. Mar. 29, 2022); Gene Maddaus, *Why Was Depp-Heard Trial Televised? Critics Call It ‘Single Worst Decision’ for Sexual Violence Victims*, VARIETY (May 27, 2022), <https://variety.com/2022/film/news/johnny-depp-amber-heard-cameras-courtroom-penney-azcarate-1235280060/>.

⁸¹ Maddaus, *supra* note 80.

decision also slotted a defamation lawsuit between celebrity ex-spouses as the latest entry in a long line of notorious media cases—from the Lindbergh kidnapping to the murder trials of the Menendez brothers and O.J. Simpson⁸²—that vie for the title of “Trial of the Century.”⁸³

While cameras remain banned from federal criminal proceedings under Rule 53, the federal judiciary’s Committee on Court Administration and Case Management has directed several pilot programs to allow cameras in civil trial and appellate proceedings.⁸⁴ Results are mixed, and cameras are still rare in Article III courts.⁸⁵ The Supreme Court forbids all cameras.⁸⁶ The Court does upload transcripts and audio recordings of oral arguments to its website, but no video.⁸⁷ As stated in a succinct letter from the Court’s Public Relations Officer to the Reporters Committee for Freedom of the Press, “[t]here are no plans to change the Court’s current practices.”⁸⁸ The Second and Ninth Circuit Courts of Appeals, as well as three

⁸² See, e.g., Archibald R. Watson, *Prosecution’s Task in Hauptmann Case*, N.Y. TIMES, Jan 13, 1935, at 2; Linda Deutsch, *Menendez Brothers Sentenced to Life in Prison Without Parole*, ASSOC. PRESS (July 2, 1996), <https://apnews.com/article/47176da8ede19da6d6fec21e34f649e>; Isabel Wilkerson, *Whose Side to Take: Women, Outrage and the Verdict on O.J. Simpson*, N.Y. TIMES, Oct. 8, 1995, at 4-1.

⁸³ See *United States v. Rivas-Estrada*, 906 F.3d 346, 347 (5th Cir. 2018) (“America is captivated by sensational criminal trials. There’s a Trial of the Century virtually every decade.”).

⁸⁴ See CHIEF JUSTICE WILLIAM H. REHNQUIST, JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 84 (1989) (reporting that Ad Hoc Committee on Cameras in the Courtroom recommended relaxing “somewhat” the rules governing cameras); see also ADMIN. OFF. U.S. COURTS, HISTORY OF CAMERAS IN COURTS, <https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts/history-cameras-courts> (last visited July 5, 2022); ECKMAN, *supra* note 30, at 9–10.

⁸⁵ ECKMAN, *supra* note 30, at 9–11; see also U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-437, U.S. SUPREME COURT: POLICIES AND PERSPECTIVES ON VIDEO AND AUDIO COVERAGE OF APPELLATE COURT PROCEEDINGS 28–37 (2016) (describing stakeholders’ comments on benefits and concerns of video and audio coverage); Ruth Ann Strickland, *Cameras in the Courtroom*, FIRST AMEND. ENCYC. (2009), <https://www.mtsu.edu/first-amendment/article/989/cameras-in-the-courtroom>.

⁸⁶ ECKMAN, *supra* note 30, at 2; see also *Etiquette*, U.S. SUPREME COURT, <https://www.supremecourt.gov/visiting/etiquette.aspx> (last visited July 5, 2022) (“No photography or audio/video recording is allowed inside the Courtroom.”).

⁸⁷ See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 85, at 11; see also *id.* at 1 & n.2 (stating that the Supreme Court has approximately 240 seats in its public seating section).

⁸⁸ Letter from Kathleen L. Arberg, Public Relations Officer, U.S. Supreme Court, to Bruce Brown, Executive Director, Reporters Committee for Freedom of the Press (Mar. 21, 2014) (on file with authors).

district courts within the Ninth Circuit, allow video recording of noncriminal proceedings in limited circumstances.⁸⁹ Those courts had participated in the judiciary's pilot programs and were allowed to continue using cameras in order to provide longer-term data to the Committee.⁹⁰

By contrast, state courts decide their own camera rules for both criminal and civil proceedings, as evident from *Estes* in Texas, *Chandler* in Florida, and *Depp* in Virginia. All fifty state supreme courts permit video cameras in their courtrooms, and cameras are common in many state trial and appellate proceedings.⁹¹ A lens may capture any stage of the affair, from voir dire to verdict and beyond.⁹²

Congress has also reentered the fray, hoping to crack the judiciary's mystique.⁹³ In recent years, senators and representatives have introduced iterations of the Cameras in the Courtroom Act to require television coverage in the Supreme Court, the Sunshine in the Courtroom Act to authorize cameras in federal courts, the Transparency in Government Act to require televising Supreme Court proceedings and contemporaneous posting of audio recordings, and the Eyes on the Court Act to require cameras in federal appellate courts.⁹⁴ Thus far, enactment remains elusive.

⁸⁹ ECKMAN, *supra* note 30, at 7 n.33.

⁹⁰ *See id.* at 7-10, 7 n.33; ADMIN. OFF. U.S. COURTS, *supra* note 84.

⁹¹ ECKMAN, *supra* note 30, at Summary; *see, also*, Courtroom Television Network, LLC v. State, 1 Misc. 3d 328, 351-52 (N.Y. Sup. Ct. 2003), *aff'd*, 8 A.D.3d 164 (2004), *aff'd sub nom.* Courtroom Television Network, LLC v. State, 833 N.E.2d 1197 (2005) (describing findings of a comprehensive report on cameras in New York state courtrooms).

⁹² *See, e.g.*, Press-Enter. Co. v. Superior Ct. Cal., 464 U.S. 501, 513 (1984) (rejecting the trial judge's order closing six weeks of *voir dire*); *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (noting that "the Sixth Amendment right to a public trial extends to the *voir dire* of prospective jurors").

⁹³ *See* Press Release, House Comm. on Judiciary, Chairman Nadler Introduces Bipartisan "Eyes on the Courts Act" Allowing Cameras in the Courtroom (Jan. 16, 2020), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2551> (quoting Rep. Gerry Connelly that "[t]he Supreme Court is not some mystical, druidic priesthood that periodically deigns to review constitutional issues and hand down their wisdom from on high").

⁹⁴ *E.g.*, S. 807 & H.R. 4257, 117th Cong. (2021); S. 818, 117th Cong. (2021); H.R. 2055, 117th Cong. (2021); H.R. 5645, 116th Cong. (2020); *see also* U.S. Senate Comm. on Judiciary, *Grassley, Durbin Introduce Bill to Put Cameras in the Supreme Court* (Mar. 18, 2021), <https://www.judiciary.senate.gov/press/rep/releases/grassley-durbin-introduce-bill-to-put-cameras-in-the-supreme-court> (quoting Sen. Chuck Grassley that "[d]ecisions made by the Supreme Court can resonate with our nation for generations, yet most Americans will never have a chance to see the highest court in action").

III. THE GOLDILOCKS ZONE FOR FAIRNESS

As courts, Congress, and pundits debate the wisdom of cameras in the courtroom, a common thread runs through the decades of debate on judicial transparency. Grafting Sir Pollock's framing device onto the modern debate, the normative difference between *public* and *publicized* becomes clear. Fairness may suffer when cameras transform public proceedings into publicized proceedings. At one extreme, secrecy is a threat to an individual's liberty; at the other, media saturation is a threat to the judiciary's solemn purpose. Somewhere in the middle lies the Goldilocks zone for fairness: proceedings that are sufficiently open to satisfy the "public" provision of the Sixth Amendment, but not so exposed as to violate the "due process" provisions of the Fifth and Fourteenth Amendments.

The terms "fair" and "fairness" never appear in the Constitution. Yet, they are woven between the lines. Despite lacking express mention within the four corners of the charter, the concept of fairness underlies and animates the guarantees of due process in the Fifth and Fourteenth Amendments.⁹⁵ Like many of the Framers' word choices, "due process" defies precise definition.⁹⁶ Recognizing the flexibility of the phrase, the Supreme Court interprets "due process" to "express[] the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty."⁹⁷ As a result, applying the Due Process Clause in any specific case is an "uncertain

⁹⁵ See U.S. CONST. amends. V, XIV, § 1; cf. AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 97 (2012) (arguing that reading the Constitution invariably involves "reading between the lines of the text and pondering the specific procedures by which the text was enacted and amended," as well as taking account of how Americans have "embodied fundamental rights" in their lives).

⁹⁶ *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 24 (1981); *accord* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (stating that "fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined"); *Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty.*, 457 U.S. 596, 604 (1982) (recognizing that "Framers were concerned with broad principles, and wrote against a background of shared values and practices"); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 13–14 (1980) (rejecting a narrow construction of the Eighth Amendment prohibition against "cruel and unusual punishments" as "untrue to the open-ended quality" of constitutional language).

⁹⁷ *Lassiter*, 452 U.S. at 24; see *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

enterprise” at best, and courts must decipher the Clause’s requirements as a function of context.⁹⁸ Facts matter.

This notion of fairness in context reconciles the Supreme Court’s opinions in *Estes v. Texas* and *Chandler v. Florida*.⁹⁹ In the end, both outcomes rested on due process. In *Estes*, the Court found a constitutional violation based on media coverage of a criminal case in state court.¹⁰⁰ In *Chandler*, the Court found no constitutional violation based on media coverage of a criminal case in state court.¹⁰¹ Given the opportunity, the Court twice declined to impose a per se rule that courtroom cameras violate due process.¹⁰² Facts filled the vacuum. Without a bright-line rule, the high court assessed the mischief of cameras on a case-by-case basis. Did the reporters covering the underlying trial keep their cameras discreet? Or did the news crew resemble Yankees fans?¹⁰³ (The resemblance may be insult or compliment, depending on one’s leanings.)¹⁰⁴ The distinction between *Estes* and *Chandler* lies not in the analysis, but in the predicate facts. Fairness suffered in *Estes* because the media were disruptive; fairness did not suffer in *Chandler* because the media were not disruptive.¹⁰⁵ As Justice John M. Harlan II stated in his concurrence (with a critical fifth vote) in *Estes*, the Court held that “what was done

⁹⁸ See *Lassiter*, 452 U.S. at 24–25; see also *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (noting that “[t]he constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances”); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“Once it is determined that due process applies, the question remains what process is due. . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands.”); *Cafeteria & Rest. Workers Union, Loc. 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961) (noting that “[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation”); *Brewster v. Bd. of Educ. Lynwood Unified Sch. Dist.*, 149 F.3d 971, 983 (9th Cir. 1998) (“Precisely what procedures the Due Process Clause requires in any given case is a function of context.”).

⁹⁹ *Estes v. Texas*, 381 U.S. 532 (1965); *Chandler v. Florida*, 449 U.S. 560 (1981).

¹⁰⁰ *Estes*, 381 U.S. at 534–35.

¹⁰¹ *Chandler*, 449 U.S. at 582–83.

¹⁰² See *Estes*, 381 U.S. at 550–52; *Chandler*, 449 U.S. at 574, 581.

¹⁰³ *Chandler*, 449 U.S. at 580–81.

¹⁰⁴ Compare Mark W. Sanchez, *Guardians Rip Yankees Fans After Altercation: ‘Worst Fan Base on the Planet’*, N.Y. POST (Apr. 23, 2022, 7:04 PM), <https://nypost.com/2022/04/23/guardians-rip-yankees-fans-after-altercation-worst-fan-base>, with Mike Lupica, *The New York Yankees Have the Best Fans of Any Team in the World, Not Just MLB*, N.Y. DAILY NEWS (Oct. 18, 2009, 10:41 AM), <https://www.nydailynews.com/sports/baseball/yankees/new-york-yankees-best-fans-team-world-not-mlb-article-1.382320>.

¹⁰⁵ See *Estes*, 381 U.S. at 536; *Chandler*, 449 U.S. at 582.

in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment.”¹⁰⁶

There are even hints of contextual fairness in the expressions of the Federal Rules of Criminal Procedure, the ABA, and Congress over the years. The hundreds of reporters rampaging through the *State v. Hauptmann* trial informed both Rule 53 and the ABA’s canon banning courtroom cameras, curbing the “abuse” of that media fanaticism with a return to judicial “decorum.”¹⁰⁷ In other words, the specific facts of the *Hauptmann* trial helped give rise to the positions codified in both the procedural rule and the ABA canon. Similarly, the specific facts of every contender for “Trial of the Century” give rise to exasperated criticisms of courtroom theatrics.¹⁰⁸

Acting from the opposite impulse, Congress has sought repeatedly to require courtroom cameras. Sponsoring senators and representatives made clear, however, that their proposed legislation would insert only “modest” cameras and include exceptions for privacy and the smooth running of court business.¹⁰⁹ As the facts demand in any given case, the statutory lens yields to a judge’s discretion to ensure due process.¹¹⁰ The more intense the publicity in fact, the greater the threat to fairness in law.

In *Gannett Co. v. DePasquale*, the Supreme Court crystallized the tension between publicity and fairness.¹¹¹ There, the Court upheld two

¹⁰⁶ *Estes*, 381 U.S. at 587 (Harlan, J., concurring) (emphasis added).

¹⁰⁷ See *Report of the Special Committee on Cooperation between Press, Radio, and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings*, 62 A.B.A. ANN. REP. 851, 861 (1937); sources cited *supra* notes 41–44.

¹⁰⁸ See, e.g., Dominick Dunne, *Why the Civil Case Against O.J. Simpson Would Never Be Enough*, VANITY FAIR (May 6, 2014), <https://www.vanityfair.com/magazine/1997/04/dunne199704> (recalling that O.J. Simpson’s defense lawyer, Johnnie Cochran, “ran Judge Ito’s courtroom in the criminal trial” and “did what a lawyer does when he knows his client is guilty,” “veer[ing] the focus away from the defendant” and giving a “rabble-rousing closing argument”).

¹⁰⁹ See, e.g., Press Release, Rep. Gerry Connolly, Connolly Reintroduces Cameras in the Courtroom Act (June 30, 2021), <https://connolly.house.gov/news/documentsingle.aspx?DocumentID=4332>; News Release, Sen. Chuck Grassley, Grassley Introduces Bipartisan Bill to Allow Cameras in Federal Courtrooms (Mar. 18, 2015), <https://www.grassley.senate.gov/news/news-releases/grassley-introduces-bipartisan-bill-allow-cameras-federal-courtrooms> (promising “appropriate safeguards to protect the privacy of witnesses and jurors and ensuring the due process protections remain intact”); see Nadler Press Release, *supra* note 93 (quoting Rep. Mike Quigley that the bill “ensur[es] that court business is not interrupted”).

¹¹⁰ See Nadler Press Release, *supra* note 93.

¹¹¹ *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

orders from a New York trial court excluding members of the press and community from pretrial suppression hearings in a sensational murder case.¹¹² A forty-two-year-old man had disappeared after fishing on Seneca Lake in upstate New York.¹¹³ Witnesses had heard gunshots, and the victim's boat was riddled with bullet holes.¹¹⁴ Three suspects were later apprehended in Michigan and prosecuted in New York state court on charges of second-degree murder, robbery, and grand larceny, even though the victim's body was never found.¹¹⁵

The defendants moved for a closed pretrial hearing, and the trial court granted the motion.¹¹⁶ A newspaper publisher challenged the exclusionary orders as unconstitutional.¹¹⁷ The state appellate court agreed with the publisher and vacated the trial court's orders.¹¹⁸ The New York Court of Appeals then reversed, upholding the exclusion of the press and the community from the pretrial hearing.¹¹⁹ The United States Supreme Court granted certiorari and affirmed the judgment of the New York Court of Appeals, finding that the Sixth and Fourteenth Amendments do not confer on members of the public a right to attend criminal trials, extending to pretrial hearings.¹²⁰

The Sixth Amendment, applicable to the States through the Fourteenth Amendment, guarantees a "public trial" to the criminal defendant, not the audience.¹²¹ While publicity benefits the wider community, the right is "personal to the accused."¹²² Accordingly, the

¹¹² *Id.* at 391–93; *see* *Gannett Co. v. De Pasquale*, 372 N.E.2d 544, 550–51 (N.Y. 1977), *aff'd sub nom.* *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

¹¹³ *See* Walt Gable, *Looking Back: Seneca County Case that Made it to the Supreme Court*, FINGER LAKES TIMES (Aug. 20, 2017), https://www.fltimes.com/lifestyle/looking-back-seneca-county-case-that-made-it-to-the-supreme-court-copy/article_309b3d66-1d88-5763-98d9-8a3db917f515.html.

¹¹⁴ *Id.*; *Gannett Co.*, 443 U.S. at 371–72.

¹¹⁵ Gable, *supra* note 113; *Gannett Co.*, 443 U.S. at 374.

¹¹⁶ *Gannett Co.*, 443 U.S. at 375.

¹¹⁷ *Id.* at 375–76.

¹¹⁸ *Id.* at 376.

¹¹⁹ *Id.* at 377.

¹²⁰ *Id.* at 377, 387–91, 394; *see id.* at 393 (also finding that the trial court's exclusionary orders did not violate any First and Fourteenth Amendment right of press to attend criminal trials).

¹²¹ *Id.* at 379–80; *see* *Estes v. Texas*, 381 U.S. 532, 538–39 (1965) ("The purpose of the requirement of a public trial was to guarantee that *the accused* would be fairly dealt with and not unjustly condemned.") (emphasis added); *see also In re Oliver*, 333 U.S. 257, 267, 270 (1948).

¹²² *Gannett Co.*, 443 U.S. at 380; *In re Oliver*, 333 U.S. at 270.

trial court's exclusionary orders could not violate any Sixth Amendment right of society, with or without press credentials, to attend the trial because no such right exists. In later cases, the Supreme Court found that the general public does have a right of access under the First Amendment.¹²³ For now, the Court in *Gannett* considered a case with media spotlight on a "notorious local happening" and pinpointed the constitutional risk of excessive openness: "adverse publicity can endanger the ability of a defendant to receive a fair trial."¹²⁴

Justice Harry A. Blackmun wrote a separate opinion in *Gannett* concurring in part and dissenting in part, stressing the run-of-the-mill nature of media reports on the murder trial.¹²⁵ As in *Estes* and *Chandler*, context matters. To Justice Blackmun's disappointment, the Court oversold and overcolored the "placid, routine, and innocuous nature of the news articles about the case."¹²⁶ In his final paragraph, Justice Blackmun identified publicity as "the soul of justice."¹²⁷ Visible processes, especially in criminal law, "protect against judicial, prosecutorial, and police abuse; provide a means for citizens to obtain information about the criminal justice system and the performance of public officials; and safeguard the integrity of the courts."¹²⁸ All to the good. Still, too much of a good thing carries the potential cost of due process.¹²⁹ Publicity may animate justice, but this soul has a dark side.

¹²³ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577 (1980) ("The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the right of assembly is not without relevance."); see also *Press-Enter. Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 508 (1984) (finding that the public has a right of access to *voir dire*); *Press-Enter. Co. v. Super. Ct. of Cal.*, 478 U.S. 1, 10 (1986) (finding that the public has a right of access to preliminary hearings); *Presley v. Georgia*, 558 U.S. 209, 212 (2010) (per curiam); *Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty.*, 457 U.S. 596, 604–06 (1982).

¹²⁴ *Gannett Co. v. De Pasquale*, 372 N.E.2d 544, 550 (N.Y. 1977), *aff'd sub nom. Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) ("Widespread public awareness kindled by media saturation does not legitimize mere curiosity."); *Gannett Co.*, 443 U.S. at 378.

¹²⁵ See *Gannett Co.*, 443 U.S. at 447–48 (Blackmun, J., concurring in part and dissenting in part).

¹²⁶ *Id.* at 407 (Blackmun, J., concurring in part and dissenting in part).

¹²⁷ *Id.* at 448 (Blackmun, J., concurring in part and dissenting in part).

¹²⁸ *Id.* (Blackmun, J., concurring in part and dissenting in part).

¹²⁹ See *id.* at 447 (Blackmun, J., concurring in part and dissenting in part); see *id.* at 378 ("[B]ecause of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and

One aspect of judicial proceedings could minimize that dark side: government interviews of witnesses in a criminal prosecution. Such interviews occur before trial, before any jury selection and journalistic attention to courtrooms. They lie off the radar and at times entirely off the record. Given the Goldilocks zone between the extremes of privacy and publicity, cameras can play a critical role in this sleepy corner of criminal proceedings.¹³⁰ Interview rooms attract a light for the same reason that courtrooms repel the glare: fairness.

IV. TRAINING THE LENS ON WITNESS INTERVIEWS

A. *Witness Interview Procedure*

Pretrial witness interviews are a routine aspect of any criminal prosecution. Similarly, third-party depositions are a routine aspect of any civil lawsuit. Both conversations are critical to gathering the facts in preparation for trial. Yet, the conversation record is starkly different across the criminal and civil divide. As standard practice in civil cases, a deposition notice or subpoena includes a provision for “audio, audiovisual, or stenographic” recording.¹³¹ The attorney’s questions and the witness’s answers are preserved and available to plaintiffs, defendants, third parties, and the court as a matter of course. With a complete record of prior statements, attorneys cross-examining a witness at trial already know the answers.¹³² Such knowledge is

inescapably necessary.”); *see also* *Irvin v. Dowd*, 366 U.S. 717, 728 (1961) (finding fair trial impossible where jurors believed the defendant to be guilty based on extensive publicity that created “so huge a wave of public passion”); *Rideau v. Louisiana*, 373 U.S. 723, 724–27 (1963) (finding “kangaroo court proceedings” where the community had seen a twenty-minute film of the robbery defendant’s confession). *But see* *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 554 (1976) (recognizing that “pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial”).

¹³⁰ *See* Daniel S. Medwed, *Coaxing, Coaching and Coercing: Witness Preparation by Prosecutors Revisited*, 16 OHIO ST. J. CRIM. L. 379, 398 (2019) (offering an example of unethical witness preparation as “a window into what is likely a larger problem that lurks in the opaque corners of the criminal justice system”).

¹³¹ FED. R. CIV. P. 30(b)(3)(A) (“The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means.”); *see* *Pioneer Drive, LLC v. Nissan Diesel Am., Inc.*, 262 F.R.D. 552, 555 (D. Mont. 2009) (stating that Rule 30(b)(5)(B) addresses concerns over accuracy by providing “that a deposition cannot be recorded in such a way that the appearance and demeanor of the deponent or attorneys are distorted”).

¹³² *See* Gregory A. Hearing & Brian C. Ussery, *Guidelines for an Effective Cross-Examination: There Is a Science Behind the Art*, 17 PRAC. LITIGATOR, Nov. 2006, at 11 (“The

invaluable, particularly when leading the questioning of a hostile witness.¹³³

In theory, interviews in criminal law are as straightforward as depositions in civil law. Criminal depositions are rare, permitted by court order only “because of exceptional circumstances and in the interest of justice.”¹³⁴ But courts have long recognized “[t]he equal right of the prosecution and the defense in criminal proceedings to interview witnesses before trial.”¹³⁵ As in a civil case, in-person interviews are invaluable to both sides in a criminal case. A prosecutor or defense attorney can learn the witness’s knowledge and evaluate his or her credibility before the witness takes the stand to testify.¹³⁶ Inconsistent statements provide ammunition for impeachment once on the stand.¹³⁷

In practice, interviews in criminal law follow a more opaque route than their civil law counterparts. Government interviews are private. Typically, prosecutors or law enforcement agents, or some combination together, interview a witness before trial.¹³⁸ If law enforcement is present, standard practice is for one agent to take notes of the witness’s statements and then edit those notes into a written report.¹³⁹ That report is often the only record of the interview and, in many cases, is written at a later date. Notes are only as good as the notetaker. Government interviews are not preserved on audio or video

classic rule of thumb during cross-examination is ‘never ask a question unless you already know the answer.’ Surprise can destroy even the best of preparation.”).

¹³³ See FED. R. EVID. 611(c) (allowing leading questions on cross-examination and when calling “a hostile witness, an adverse party, or a witness identified with an adverse party”).

¹³⁴ FED. R. CRIM. P. 15(a)(1).

¹³⁵ *Kines v. Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981) (citing cases); see *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966) (“Witnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense.”).

¹³⁶ See *Patton v. Yount*, 467 U.S. 1025, 1038 (1984) (explaining “special deference” given to the trial court’s assessment of individuals’ credibility due to the judge’s privileged vantage point of viewing demeanor in person).

¹³⁷ *United States v. Hale*, 422 U.S. 171, 176 (1975) (“A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness.”).

¹³⁸ See, e.g., *Campbell v. United States*, 373 U.S. 487, 488–90 (1963) (describing the facts of the government’s interview of a robbery eyewitness).

¹³⁹ See *id.* at 489–90 (stating that a federal agent destroyed his longhand notes of an interview after reading back the substance to the witness and dictating an interview report based on both notes and memory).

recording, and a professional stenographer is nowhere on the scene. Cameras are so rare as to be functionally nonexistent.¹⁴⁰

Defense attorneys can receive a copy of the agent's report, though delivery may occur on the eve of trial.¹⁴¹ Even when the prosecutor does provide a copy, there is no meaningful way to test its completeness or accuracy. Granted, defense counsel could test the report if the witness voluntarily agrees to speak with the defense. But because defense counsel cannot subpoena a witness to a criminal deposition, many witnesses shy away from voluntary interviews. So, lacking a complete, unedited record of the interview, defense attorneys often conduct cross-examination without prior statements from the witness, freestyling questions as they hear answers for the first time. Or, in the face of the unknown, they may utter the dreaded phrase "No cross-examination."¹⁴²

Recording the interview in any fashion carries consequences for a prosecutor. Reaffirming the Supreme Court's decision in *Jencks v. United States*, Congress enacted the Jencks Act in 1957, requiring the production of witness statements and reports in the hands of the government after its witness testifies.¹⁴³ The Jencks Act imposes a statutory obligation, separate from a prosecutor's more famous obligations under the Sixth Amendment Confrontation Clause to

¹⁴⁰ See *United States v. Nixon*, No. CR 14-668, 2015 WL 224674, at *2 (D. Ariz. Jan. 15, 2015) (observing that the practice of recording interviews "is not typical"); Gershman, *supra* note 1, at 851–52.

¹⁴¹ Cf. *United States v. Jordan*, 316 F.3d 1215, 1253 (11th Cir. 2003) ("Impeachment evidence should be disclosed in time to permit defense counsel to use it effectively in cross-examining the witness."); ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY § 11–2.3(b) (4th ed. 2020) (providing that disclosures in criminal cases "should be made in sufficient time for each party to use the disclosed information to adequately prepare for hearings, the entry of a plea, trial, or sentencing").

¹⁴² See 3 CRIM. PRAC. MANUAL § 84:1 (2022) ("A hard lesson for many lawyers to learn, accustomed as they are to the notion that cross-examination is the heart of the lawyer's craft, is that the best technique may be no technique at all, i.e., simply saying 'No questions.'").

¹⁴³ 18 U.S.C. § 3500; see *id.* § 3500(b) (after direct testimony of government witness, requiring that court "order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified"); *Jencks v. United States*, 353 U.S. 657, 672 (1957) (holding that dismissal is required "when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial"); see also *Campbell v. United States*, 365 U.S. 85, 92 (1961) (recognizing that the Jencks Act "reaffirms" the Supreme Court's holding in *Jencks v. United States*).

produce testimonial evidence¹⁴⁴ and under *Brady v. Maryland* and *Giglio v. United States* to produce exculpatory and impeachment evidence.¹⁴⁵ The Act requires that a prosecutor disclose to the defendant any written or recorded statement by a government witness “which relates to the subject matter as to which the witness has testified.”¹⁴⁶ The Supreme Court subsequently applied a reciprocal disclosure obligation on the defendant.¹⁴⁷

On its face, the Jencks Act reaches only written or recorded statements in existence; it does not require the prosecution team to create such statements.¹⁴⁸ Neither the legislative nor the judicial

¹⁴⁴ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”); *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004); *United States v. Wehrle*, 985 F.3d 549, 556 (7th Cir. 2021) (“Testimonial evidence includes ‘formal statements to government officers, or formalized testimonial materials such as affidavits, depositions, and the like, that are destined to be used in judicial proceedings.’”) (quoting *United States v. Brown*, 822 F.3d 966, 974 (7th Cir. 2016)).

¹⁴⁵ *Brady v. Maryland*, 373 U.S. 83, 86–87 (1963) (holding that the suppression of an accomplice’s confession violated due process); *Giglio v. United States*, 405 U.S. 150, 154–55 (1972) (reversing the conviction based on the prosecution’s failure to disclose material evidence regarding witness credibility); see Laural Hooper & Shelia Thorpe, *Brady v. Maryland* Material in the United States District Courts: Rules, Orders, and Policies: Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States (May 31, 2007), 2007 WL 2591176 (“Although there is some variation in the specific language used to define *Brady* material, twenty-three states have adopted language generally resembling the following: ‘any material or information which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the accused’s punishment therefor.’”).

¹⁴⁶ 18 U.S.C. § 3500(b); *Jencks*, 353 U.S. at 672; see *United States v. Bobadilla-Lopez*, 954 F.2d 519, 522 (9th Cir. 1992) (stating that Jencks Act material “should not only reflect the witness’ own words, but should also be in the nature of a complete recital that eliminates the possibility of portions being selected out of context” and finding a border agent’s radio transmission too rough and incomplete); *United States v. Houlihan*, 92 F.3d 1271, 1288 (1st Cir. 1996) (noting that a defendant’s right to obtain statements “is subject to a temporal condition: it does not vest until the witness takes the stand in the government’s case and completes his direct testimony”). *But see* *United States v. Jordan*, 316 F.3d 1215, 1252 (11th Cir. 2003) (rejecting as Jencks Act statements “an interviewer’s raw notes, and anything prepared from those notes . . . unless they are substantially verbatim and were contemporaneously recorded, or were signed or otherwise ratified by the witness”).

¹⁴⁷ *United States v. Nobles*, 422 U.S. 225, 227, 242 (1975) (upholding a trial court order requiring the defendant to disclose to the prosecution a written statement from a defense witness, as a reverse-Jencks obligation); see FED. R. CRIM. P. 26.2.

¹⁴⁸ See 18 U.S.C. § 3500(e); *United States v. Murphy*, 768 F.2d 1518, 1533 (7th Cir. 1985) (“The prosecution does not have an obligation to generate statements merely because the defendants would like to have them.”); *United States v. Bernard*, 625 F.2d

branch requires the executive branch “‘to develop potential Jencks Act statements’ by demanding that its witnesses reduce to writing every matter about which they intend to testify at trial.”¹⁴⁹ Nor presently does the Confrontation Clause, *Brady v. Maryland*, or *Giglio v. United States* require the government to leave a paper trail of interviews.¹⁵⁰ Following that trend, the best way to avoid a Jencks Act violation is to avoid the Jencks Act altogether. For a tactical edge, a prosecutor can decide not to record a witness interview and even instruct agents to write nothing down.¹⁵¹ (The decision may be cautious or reckless, again depending on one’s leanings.)¹⁵² Then the prosecutor can call the witness to the stand at trial for a fresh start. No tangible statement means no need to disclose a tangible statement.

An incentive not to record pretrial witness interviews is thus baked into the structure of a criminal proceeding. Yet, recalling the long history of open judicial proceedings, from English common law to the Colonies to modern courtrooms, that obscurity is an outlier. It may leave many, particularly defendants facing trial, feeling uneasy. After all, openness as essential to fairness has been an emblem of judicial proceedings, especially criminal proceedings, since before the Norman Conquest. A better option for witness interviews is available, and one federal appellate court flagged it nearly three decades ago.

B. *United States v. Houlihan*

In 1996, the United States Court of Appeals for the First Circuit decided *United States v. Houlihan* and pulled no punches about the

854, 859 (9th Cir. 1980); *United States v. Cruz*, 478 F.2d 408, 411 (5th Cir. 1973) (“[N]o part of the Jencks Act has ever been construed to require the government to develop potential Jencks Act statements so that such materials can be combed in the hopes of obtaining impeaching inconsistencies.”).

¹⁴⁹ *United States v. Martinez-Mercado*, 888 F.2d 1484, 1490 (5th Cir. 1989) (quoting *United States v. Rodarte*, 596 F.2d 141, 145–46 (5th Cir. 1979)).

¹⁵⁰ *United States v. Rodriguez*, 496 F.3d 221, 222, 224–25 (2d Cir. 2007) (adding that “[w]hen the Government is in possession of material information that impeaches its witness or exculpates the defendant, it does not avoid the obligation under *Brady* / *Giglio* to disclose the information by not writing it down”); see also *United States v. Marashi*, 913 F.2d 724, 734 (9th Cir. 1990).

¹⁵¹ See *Houlihan*, 92 F.3d at 1288; cf. *United States v. Monge*, 599 F. App’x 280, 281 (9th Cir. 2015) (finding no legal basis for a defense theory that the jury “could draw an adverse inference from the government’s failure to record a witness interview”).

¹⁵² See *Houlihan*, 92 F.3d at 1288 (“After all, the Act applies only to recordings, written statements, and notes that meet certain criteria, not to items that never came into being (whether or not a prudent investigator—cynics might say an unsophisticated investigator—would have arranged things differently).”).

riveting nature of the case.¹⁵³ The appeal presented “a hothouse of efflorescent issues set against a backdrop composed of roughly equal parts of drugs, money, and mayhem.”¹⁵⁴ In the late 1980s and early 1990s, two defendants had operated a profitable and ruthless cocaine ring out of a flower shop in Charlestown, Massachusetts, a historical neighborhood just north of the Charles River in Boston.¹⁵⁵ With a professional assassin on payroll as a “headache man” to enforce silence, the drug gang “got rid of” several victims.¹⁵⁶

A federal grand jury indicted the two gang leaders and their enforcer on more than forty counts, including racketeering, conspiracy to distribute cocaine, and murder for hire.¹⁵⁷ After a seventy-day trial in the United States District Court for the District of Massachusetts, the defendants were convicted and sentenced to multiple terms of life imprisonment.¹⁵⁸ The defendants appealed, and the First Circuit affirmed the trial court’s judgments in large part, but reversed three convictions and vacated one conviction.¹⁵⁹

The appellate court in *Houlihan* considered numerous self-styled “efflorescent” issues,¹⁶⁰ including waiver by homicide under the

¹⁵³ *Id.* at 1277; see David Margolick, *At the Bar; Sustained By Dictionaries, a Judge Rules That No Word, or Word Play, Is Inadmissible*, N.Y. TIMES, Mar. 27, 1992, at B16 (describing the opinion’s author, Judge Bruce M. Selya, as a linguist who “would forsake the usual boring legalisms for lively, polysyllabic words of the sort found only in the unabridged Oxford English Dictionary, puns of the sort once found in the headlines of Barron’s and The Sporting News, and figures of speech found primarily in the ‘Block That Metaphor!’ department of The New Yorker magazine”).

¹⁵⁴ *Houlihan*, 92 F.3d at 1277.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1277–78.

¹⁵⁸ *Id.*; see generally Jackson Cote, *Joseph Nardone, Assassin and ‘Headache Man’ for Ruthless Boston Drug Ring that Exacted Code of Silence in Charlestown in ‘90s, Seeks Compassionate Release from Prison*, MASSLIVE (Mar. 1, 2021, 7:54 AM), <https://www.masslive.com/boston/2021/03/joseph-nardone-assassin-and-headache-man-for-ruthless-boston-drug-ring-that-exacted-code-of-silence-in-charlestown-in-90s-seeks-compassionate-release-from-prison.html> (picturing a letter from defendant Nardone to a federal judge, requesting release).

¹⁵⁹ *Houlihan*, 92 F.3d at 1277.

¹⁶⁰ See *Efflorescence*, MERRIAM-WEBSTER DICTIONARY (2022) (“the action or process of developing and unfolding as if coming into flower”).

Confrontation Clause,¹⁶¹ waiver by homicide for hearsay objections,¹⁶² and refusal of the trial court to discharge or isolate alternate jurors.¹⁶³ The appellants also raised discovery concerns.¹⁶⁴ Specifically, during the government's investigation into the flower shop drug ring, the leading agents had "instructed all but the most senior prosecutors to refrain from taking notes during pretrial interviews."¹⁶⁵ The appellants complained to the district court, but the judge "found that even the deliberate use of investigatory techniques designed to minimize the production of written reports would not violate the Jencks Act."¹⁶⁶ The First Circuit agreed with the district court, though grudgingly.¹⁶⁷

The First Circuit opined that, perhaps, a defendant might argue that the government violates the Jencks Act when prosecutors and agents act in bad faith, "engag[ing] in manipulative or coercive conduct" with a witness and intentionally failing to memorialize the interview.¹⁶⁸ Or not. That argument would be for another day and another case, as "[t]here is no proof of such a scenario here, and, without such proof, government interviews with witnesses are 'presumed to have been conducted with regularity.'"¹⁶⁹ The court found no legislative command directing whether or how the

¹⁶¹ See *Houlihan*, 92 F.3d at 1278–81 ("We therefore hold that when a person who eventually emerges as a defendant (1) causes a potential witness's unavailability (2) by a wrongful act (3) undertaken with the intention of preventing the potential witness from testifying at a future trial, then the defendant waives his right to object on confrontation grounds to the admission of the unavailable declarant's out-of-court statements at trial.").

¹⁶² *Id.* at 1281–83 ("Thus, we hold that a homicidal defendant may by his misconduct waive his hearsay objections, but that waiver does not strip the government of its right to lodge hearsay objections.").

¹⁶³ *Id.* at 1285–88 ("[W]e conclude that the government has carried its burden of demonstrating that the outcome of the trial would have been precisely the same had the district court dismissed the alternate jurors when the jury first retired to deliberate.").

¹⁶⁴ *Id.* at 1288–91.

¹⁶⁵ *Id.* at 1288.

¹⁶⁶ *Id.*

¹⁶⁷ See *Houlihan*, 92 F.3d at 1288–89.

¹⁶⁸ *Id.* at 1289 (quoting *United States v. Lieberman*, 608 F.2d 889, 897 (1st Cir. 1979)).

¹⁶⁹ *Id.* (quoting *Lieberman*, 608 F.2d at 897); *Lieberman*, 608 F.2d at 897 ("But absent any specific indication that agency officials were engaged in manipulative or coercive conduct, we think that proceedings should be presumed to have been conducted with regularity, that is, with any off-the-record discussions being for wholly proper purposes.").

government records interviews.¹⁷⁰ Absent word from Congress, “the choice among available investigatory techniques is, within wide limits, for the Executive Branch in contradistinction to the Judicial Branch.”¹⁷¹ Instructing agents not to take notes during an investigation may raise eyebrows, but it “is not beyond the pale.”¹⁷² Thus, the First Circuit held “that the government did not violate the Jencks Act by instructing agents to minimize note-taking.”¹⁷³

Concluding its analysis of the Jencks Act in *Houlihan*, the First Circuit wrote a paragraph of dicta that laid bare its distaste for the practice of keeping witness interviews off the record:

Still, we do not mean to imply that we endorse the practice. Eschewing tape recordings and ordering law enforcement agents not to take notes during pretrial interviews is risky business—and not guaranteed to redound either to the sovereign’s credit or to its benefit. By adopting a “what we don’t create can’t come back to haunt us” approach, prosecutors demean their primary mission: to see that justice is done. In more parochial terms, the government also loses the advantage of records that it may subsequently need to safeguard against witnesses changing their stories or to refresh recollections dimmed by the passage of time. By and large, the legitimate interests of law enforcement will be better served by using recording equipment and/or taking accurate notes than by playing hide-and-seek.¹⁷⁴

The court’s language stands apart not only because it is unnecessary to the discovery holding, but also because it takes direct aim at federal prosecutors. Without a single citation to precedent, the court effectively wrote a cautionary letter to United States Attorneys’ Offices, delivered inside an appellate opinion.

Despite its provocative delivery, the letter’s “hide-and-seek” language has had negligible impact. The judicial branch has quoted it exactly twice. The First Circuit relied on itself from *Houlihan* in an opinion issued the following year, but again found no bad faith on the part of law enforcement officials who had failed to record interviews.¹⁷⁵ More than a decade passed. The Supreme Court of Connecticut then picked up the trail, quoting the First Circuit in a footnote after

¹⁷⁰ *Houlihan*, 92 F.3d at 1289.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *United States v. Brimage*, 115 F.3d 73, 77–78 (1st Cir. 1997).

concluding “that the police do not have a duty to make a record of all interviews or interrogations with witnesses.”¹⁷⁶ Indeed. Whether or not members of the executive and legislative branches ever read *Houlihan*, the status quo remains. United States Attorneys’ Offices continue the time-honored practice of keeping pretrial witness interviews private, and Congress has not enacted a directive otherwise.

C. *Cameras from Courtroom to Interview Room*

Dusting off the First Circuit’s suggestion in *United States v. Houlihan* for a closer look, is there good reason for prosecutors not to play hide-and-seek with witnesses? Other than the self-interested fact that such gamesmanship may be risky and demeaning to the sovereign? Yes, and that reason emerges from the history of open judicial proceedings.

Many legal scholars argue for the merits of recording pretrial witness interviews, identifying risks and abuses of one-sided discussions with law enforcement.¹⁷⁷ Following this rich scholarship, one reason for recording emerges from the ongoing debate about cameras in the courtroom. The same issue of fairness that justifies courtrooms as public but not publicized applies to witness interviews. All aspects of a judicial proceeding lie on a continuum, sharing a normative overlay. While fairness provides a reason against proceedings that are overly publicized, it provides a reason for interviews that are more public.

¹⁷⁶ *State v. Johnson*, 951 A.2d 1257, 1286 n.41 (Conn. 2008). See generally Sam Roberts, Note, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 *FORDHAM L. REV.* 257, 292 (2005).

¹⁷⁷ See, e.g., Medwed, *supra* note 130, at 392–94; Jason Tortora, Note, *Reconsidering the Standards of Admission for Prior Bad Acts Evidence in Light of Research on False Memories and Witness Preparation*, 40 *FORDHAM URB. L.J.* 1493, 1536–37 (2013); Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing “First Drafts,” Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 *OHIO STATE J. CRIM. L.* 519, 564–66 (2009); John T. Rago, *A Fine Line Between Chaos & Creation: Lessons on Innocence Reform from the Pennsylvania Eight*, 12 *WIDENER L. REV.* 359, 434–35, 438 (2006); Jannice E. Joseph, *The New Russian Roulette: Brady Revisited*, 17 *CAP. DEF. J.* 33, 48–54 (2004); Roberts, *supra* note 176, at 287–97; Gershman, *supra* note 1, at 861–62; Michael S. Ross, *Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals*, 23 *CARDOZO L. REV.* 875, 888 (2002); George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 *PEPP. L. REV.* 1, 61–62 (2000). But see Brittany R. Cohen, Note, “*Whose Line Is It Anyway?*”: *Reducing Witness Coaching by Prosecutors*, 18 *N.Y.U. J. LEGIS. & PUB. POL’Y* 985, 1017–22 (2015) (discussing the shortcomings of the recording rule and offering alternative suggestions).

For years, the Supreme Court has made clear that the propriety of courtroom cameras turns on the level of chaos that those cameras introduce.¹⁷⁸ The greater the spotlight—from notoriety in local newspapers to intrusive wires, cables, and microphones in the jury box—the greater the risk to a fair trial.¹⁷⁹ Judicial proceedings are designed to ascertain the truth in order to ensure a fair proceeding and, thus, respect constitutional due process.¹⁸⁰ That job description demands a level of serenity.¹⁸¹

By contrast, pretrial witness interviews are designed to ascertain one specific version of the truth: the facts that a witness recites after ironing out inconsistencies.¹⁸² Interviews are a black box. That box creates a power imbalance in law enforcement’s favor.¹⁸³ Prosecutors and agents can strategize without oversight, “aggressively persuading” a witness into an account that, at best, does not contradict the government’s case and, at worst, misstates the facts.¹⁸⁴ With all recording equipment turned off, a jury will see no raw footage, no back-and-forth questioning as discussions progress. On the stand, a witness’s recollection is stripped of extraneous matter, potentially including information that “could have substantially affected the

¹⁷⁸ See *Estes v. Texas*, 381 U.S. 532, 536 (1965); *Chandler v. Florida*, 449 U.S. 560, 582 (1981); *Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1979).

¹⁷⁹ See *Estes*, 381 U.S. at 536; *DePasquale*, 443 U.S. at 378.

¹⁸⁰ See *Estes*, 381 U.S. at 540.

¹⁸¹ See *id.* at 536, 544.

¹⁸² See Gershman, *supra* note 1, at 835–38 (arguing that “[a] major incentive for prosecutors to use cooperating witnesses is to support an uncertain but consistent version of the facts, rather than to confirm an inconsistent version of the facts that may represent more of the truth” and describing additional reasons to influence testimony: avoiding embarrassing information and hiding suppressed evidence; see Roberts, *supra* note 177, at 279).

¹⁸³ A scathing example arose in the authors’ home district just before this Article went to print. In a recently unsealed order in *United States v. Pisoni*, the United States District Court for the Southern District of Florida vacated the defendants’ convictions and sentences and granted a new trial upon learning that the government had secretly invaded the defense camp, received privileged information in private interviews, and lied repeatedly to both the court and the defense team. Order Granting New Trial at 11–17, *United States v. Pisoni*, No.: 1:15-CR-20339 (S.D. Fla. Nov. 18, 2022).

¹⁸⁴ See *Resol. Tr. Corp. v. Bright*, 6 F.3d 336, 341 (5th Cir. 1993) (“It is one thing to ask a witness to swear to facts which are knowingly false[,]” but “another thing, in an arms-length interview with a witness, for an attorney to attempt to persuade her, even aggressively, that her initial version of a certain fact situation is not complete or accurate.”); see also Gershman, *supra* note 1, at 833–34; Harris, *supra* note 177, at 55 (describing the “significance and nuance of the prosecutor’s effectively exclusive opportunity to prepare and rehearse with the witness.”).

efforts of defense counsel to impeach the witness.”¹⁸⁵ A defense attorney is left without time to investigate the witness’s statements before trial, conducting cross-examination on the fly.¹⁸⁶ Jurors, too, lack extraneous matter as they assess credibility and find facts.¹⁸⁷ The witness’s account of the truth may or may not coincide with the desired “whole truth and nothing but.”¹⁸⁸ Testimony may or may not be shaded. Nontransparency makes it difficult to say. Our adversarial system is a stress test of evidence, but that test loses confidence without cracks to let in the light.¹⁸⁹

Take it straight from a federal agent. In *United States v. Bernard*, an appeal of a methamphetamine conspiracy conviction before the United States Court of Appeals for the Ninth Circuit, an agent from the Drug Enforcement Administration (DEA) explained his practice of waiting until a final interview to reduce a witness’s statements to writing.¹⁹⁰ Normally, as in many ordinary conversations, “in interviewing either an informant or a defendant over a period of time,

¹⁸⁵ *United States v. Smith*, 77 F.3d 511, 515 (D.C. Cir. 1996) (stating that “undisclosed information” could “call[] into question the fairness of the ultimate verdict”); see *United States v. Bagley*, 473 U.S. 667, 678 (1985) (stating that “defense was free to cross-examine the witnesses on any relevant subject, including possible bias or interest resulting from inducements made by the Government” and “[t]he constitutional error, if any, in this case was the Government’s failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination”); *United States v. Carter*, 313 F. Supp. 2d 921, 925–26 (E.D. Wis. 2004) (noting that “[i]t is well-settled that impeachment material, including prior inconsistent statements, falls within the rule of *Brady* and *Giglio*” and finding that the witness’s prior statement “was useful to the defense in impeaching his credibility”).

¹⁸⁶ See *Crawford v. Washington*, 541 U.S. 36, 61–62 (2004) (analyzing the Sixth Amendment Confrontation Clause); see also Gershman, *supra* note 1, at 833–34; Harris, *supra* note 177, at 55 (arguing that cross-examination cannot “effectively penetrate the witness preparation process”).

¹⁸⁷ See *United States v. Cuffie*, 80 F.3d 514, 518 (D.C. Cir. 1996) (noting that “[i]n light of the axiomatic importance of truthful testimony for the integrity of judicial proceedings, undisclosed evidence of a witness’ prior perjury has a significant impact on the fairness of the trial”); see also Harris, *supra* note 177, at 49; Roberts, *supra* note 176, at 283–84.

¹⁸⁸ 4 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 603:1 n.1 (9th ed. 2021); FED. R. EVID. 603.

¹⁸⁹ See *Bagley*, 473 U.S. at 678 (finding a constitutional error “only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial”); see *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (“The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.”).

¹⁹⁰ *United States v. Bernard*, 625 F.2d 854, 856, 859 (9th Cir. 1980).

a lot of times the facts will differ from one interview to the next.”¹⁹¹ Under the Jencks Act, as well as potentially the Confrontation Clause, *Brady*, and *Giglio*, the prosecution must disclose a written or recorded statement from its witness.¹⁹² So the agent seeks “to avoid contradicting facts.”¹⁹³ He waits: “it is my policy not to write down anything until I am sure the defendant or informant knows exactly what he is saying, and at that time I will make a report, or dictate a report on an IBM dictaphone and have that transcribed.”¹⁹⁴ The witness’s recitation of facts is now clean and consistent, filtering out discrepancies from one interview to the next. The agent’s policy is prophylactic, averting “any problems of getting into court and having contradictions from[,] for instance[,] an interview in March with an interview in July, with an interview in August, with an interview in September, and having the defense counsel come back and say[,] ‘Well, did you say this differently at this time?’”¹⁹⁵ Precisely that, according to the agent, “is the purpose of my not taking notes.”¹⁹⁶

Upon hearing the DEA agent’s candid explanation, the Ninth Circuit in *Bernard* previewed the frustration of its sister court in *Houlihan*: “Playing games with evidence, as [the agent] has done, demeans him, his agency, and the government itself.”¹⁹⁷ Yet, the court’s hands were tied. It could find no statutory or constitutional basis to compel the government to create discoverable statements, only a requirement to produce statements once created.¹⁹⁸ The Ninth Circuit resigned itself to computing the cost of the agent’s conduct: “We do not think that the conduct . . . aids the courts in the search for truth or in the conduct of fair trials, and we hope that such conduct does not become the policy of government investigating agencies.”¹⁹⁹ Same note, different bench.

As the Ninth Circuit lamented, playing games with testimony does little to advance the search for truth, which is the whole point of our

¹⁹¹ *Id.* at 859.

¹⁹² *See id.*; 18 U.S.C. § 3500(b); *supra* notes 143–145.

¹⁹³ *Bernard*, 625 F.2d at 859.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*; *see* Roberts, *supra* note 176, at 292–93.

¹⁹⁸ *Bernard*, 625 F.2d at 859–60 (“[A]s much as we disapprove of that conduct, it is not reversible error here.”).

¹⁹⁹ *Id.* at 860.

Anglo-American adversarial system.²⁰⁰ Indeed, the Supreme Court in *Estes v. Texas* identified truth-seeking as “the *sine qua non* of a fair trial.”²⁰¹ To borrow from French rather than Latin, the *raison d’être* of “our judicial machinery” is to ascertain the truth, as truth is essential to the constitutional underpinning of fairness.²⁰² Congress supports this judicial machinery.²⁰³ A court exercises its inherent power under the Jencks Act “so that the defense may get the full benefit of cross-examination and the truth-finding process may be enhanced.”²⁰⁴ But the machinery breaks down when interviews are secretly gamed.

Keeping witness interviews off the record allows the government to achieve a consistent recitation of facts through rehearsal and repetition. Such manufactured consistency may skew facts in the first instance, thus hampering the ability of judicial proceedings to ascertain the truth in the end.²⁰⁵ The path from truth to fairness to due process skids off. As the Supreme Court famously stated, reliability is best assessed “in the crucible of cross-examination.”²⁰⁶ Rather than one party interviewing a witness over and over until the story is smooth,

²⁰⁰ See *TechSearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1378 (Fed. Cir. 2002) (“The trial court’s inherent search for truth is the basic building block by which the judicial process maintains its credibility within the fabric of our society.”); POLLOCK, *supra* note 6, at 15 (arguing that both a court of law and a court of equity are “aimed at extracting the truth of the matter”).

²⁰¹ *Estes v. Texas*, 381 U.S. 532, 540 (1965).

²⁰² *Id.* at 544.

²⁰³ See 18 U.S.C. § 3500.

²⁰⁴ *United States v. Nobles*, 422 U.S. 225, 231 (1975); see, e.g., *United States v. Perry*, 471 F.2d 1057, 1062 (D.C. Cir. 1972) (“[T]he principal objective of the Jencks Act must be considered to be enhancing the likelihood of truth by enabling the defendant to gain access to previous statements of witnesses and use them as desired to test the accuracy of the actual testimony in court given by the same witnesses.”); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (noting that “wide access to relevant facts serves the integrity and fairness of the judicial process by promoting the search for the truth”).

²⁰⁵ Cf. *Perry v. Leeke*, 488 U.S. 272, 282 (1989) (“[I]t is simply an empirical predicate of our system of adversary rather than inquisitorial justice that cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney.”); *United States v. Brimage*, 115 F.3d 73, 77 (1st Cir. 1997).

²⁰⁶ *Crawford v. Washington*, 541 U.S. 36, 61 (2004); *United States v. Bagley*, 473 U.S. 667, 675 (1985) (describing “the adversary system as the primary means by which truth is uncovered”).

cross-examination “beats and bolts out the Truth much better.”²⁰⁷ To that end, recording an interview would provide both sides the same raw and messy materials to prepare for questioning before a jury.

Respecting the contextual nature of fairness determinations, the government may have good reason to keep certain witness interviews off the record.²⁰⁸ A court may close an interview for cause just as it closes a courtroom for cause. The presumption of open criminal proceedings “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.”²⁰⁹ Similarly, a presumption of open interviews may be overcome by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. For example, the safety of a witness may warrant a protective order for an off-the-record interview, a redacted recording, or anonymity until trial testimony.²¹⁰ With fact-sensitive exceptions, a new rule for witness interviews would absorb recordings into ordinary pretrial discovery, rendering such recordings as fit for public consumption as any other evidence.²¹¹ In essence, the rule would invert the default from black box to open access.

²⁰⁷ MICHAEL HALE, *THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND* 258 (1713); see 3 SIR WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 373 (1768) (noting that “open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth” and, by contrast, “an artful or careless scribe may make a witness speak what he never meant”).

²⁰⁸ See generally Roberts, *supra* note 176, at 287–97 (2005) (discussing arguments for and against recording of witness interviews).

²⁰⁹ *Press-Enter. Co. v. Superior Ct. of Cal.*, 464 U.S. 501, 510 (1984).

²¹⁰ See, e.g., *United States v. Estep*, 151 F. Supp. 668, 673 (N.D. Tex. 1957) (stating that if an “informer is not to have his life protected there won’t be many informers hereafter”); *Roviaro v. United States*, 353 U.S. 53, 67 (1957) (Clark, J., dissenting) (“Once an informant is known the drug traffickers are quick to retaliate. Dead men tell no tales.”); see also *Amendments to Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Crim. Just. of the Comm. on the Judiciary*, 94th Cong. 242–43 (1975) (statement of Assistant Attorney General W. Vincent Rakestraw that Department of Justice objected to Supreme Court’s proposed amendment to Rule 16 to provide a criminal defendant with witness names shortly after indictment, as leading to “dangerous and frightening” consequences); FED. R. CRIM. P. 16(d)(1) (allowing the court to issue a protective order). See generally Edward J. Imwinkelried, *The Worst Surprise of All: No Right to Pretrial Discovery of the Prosecution’s Uncharged Misconduct Evidence*, 56 *FORDHAM L. REV.* 247, 268–69 (1987) (discussing witness intimidation).

²¹¹ See *United States v. Nixon*, No. CR 14-668, 2015 WL 224674, at *2 (D. Ariz. Jan. 15, 2015) (“Information obtained in interviews, whether they have been recorded or not, may be subject to disclosure.”).

Moreover, a rule of openness for witness interviews in a criminal prosecution need not trigger the subpoena formalities and trappings of a deposition in a civil matter. No need to stand on ceremony. The government faces no new burden to hire a stenographer or videographer. Even tracking down witnesses off-site, a prosecutor or agent could simply pull out a smartphone and hit “record” wherever the interview takes place. Back in the “old days” of *United States v. Bernard* (1980), the DEA agent memorialized his reports on a dictaphone.²¹² Now, an agent needs nothing more than a cellphone to preserve the entire encounter with full audio and video. Technology costs are low, both sides can assess the witness’s words and demeanor, and courts are skilled at handling admissibility issues for recordings.²¹³

Thus, recording pretrial witness interviews would lift those interviews on a par with other discovery aspects of a criminal proceeding, out of the shadows and into the Goldilocks zone for fairness.

V. CONCLUSION

Recording pretrial witness interviews would be a salutary reform. But attorneys operating in an adversarial system are not likely to be agents of change here, especially not in a system that provides prosecutors an incentive to play witness hide-and-seek. For all their frustration over congressional inaction, judges still supervise the playground.²¹⁴ The federal rules originate with the federal judiciary. To date, nearly eighty years after promulgation of the original Federal Rules of Criminal Procedure, no mandate or prohibition governs recording witness interviews. Like nature and power, a “judicial mind

²¹² *United States v. Bernard*, 625 F.2d 854, 859 (9th Cir. 1980).

²¹³ *Compare* *United States v. Ford*, 789 F. App’x 117, 122 (11th Cir. 2019) (finding that “district court abused its discretion when” allowing full audio recording of witness interview to be played for jury, as only portions fell under recorded recollection exception to hearsay rule), *with* *United States v. Berríos-Bonilla*, 822 F.3d 25, 31 (1st Cir. 2016) (finding the district court did not abuse its discretion when denying the defendant’s request to play a snippet of the interview tape). *See generally* Gershman, *supra* note 1, at 861 (arguing for videotaping interviews “[t]o enable the defendant to challenge the veracity of the witness effectively, and a jury to assess his credibility”).

²¹⁴ *See* *Campbell v. United States*, 365 U.S. 85, 92 (1961) (stating that “the judiciary is the special guardian” of a shared goal “to further the fair and just administration of criminal justice”).

abhors a vacuum.”²¹⁵ Exercising its grant of statutory authority to prescribe practice and procedure rules, the Supreme Court could propose a new rule that all pretrial witness interviews in criminal proceedings be recorded.²¹⁶ Or, as a less sweeping first step, a willing circuit or district could experiment under the current statutory provision that federal courts “may from time to time prescribe rules for the conduct of their business.”²¹⁷ With great power comes great opportunity. Until Congress steps up, the judiciary holds the key to playground fairness.

²¹⁵ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2478 (2020); see ARISTOTLE, *PHYSICA* IV.8 (circa 300 B.C.) (postulating “*horror vacui*” or “nature abhors a vacuum”); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 500 (2010) (“In a system of checks and balances, power abhors a vacuum, and one branch’s handicap is another’s strength.”) (internal quotation omitted).

²¹⁶ See 28 U.S.C. § 2072(a); Harris, *supra* note 177, at 62 & n.398 (proposing that Federal Rule of Criminal Procedure 16 incorporate a recording rule); Roberts, *supra* note 176, at 298 (proposing that the Model Rules of Professional Conduct be amended to require recording of witness interviews).

²¹⁷ 28 U.S.C. § 2071(a).

