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Kathe Aschenbrenner Pate
Kathe.Pate@chicagounbound.edu

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Restricting Electronic Media Coverage of Child-Witnesses: A Proposed Rule

Kathe Aschenbrenner Pate†

In the fall of 1992, the electronic media flooded our living rooms with live coverage of a trial pitting a young Florida boy against his biological mother.1 While few of those in the viewing audience will forget the boy’s poignant plea that he just “wanted to be happy,”2 the circus atmosphere generated by the media and the attendant legal commentators obfuscated the true purpose of the proceeding—to protect the best interests of this particular child—and, in the end, the process may have actually harmed him.3

Although historical and fundamental legal tenets demand that our judicial proceedings be publicly conducted, modern technology enables the press to take this principle to new extremes. Technological advancements enable the press to disseminate accurate visual and aural reproductions of proceedings through still photography, audio tape, television, and radio (collectively referred to as “electronic media”). Moreover, broadcasters transmit much of this coverage “live,” without the benefit of any prior review or edit. By contrast, the traditional print media are subject to editing and self-review.

Advocates of televised courtroom coverage claim that such access enhances the public’s understanding of actual courtroom procedure and diminishes common misconceptions about the administration of justice that fictional television courtroom dramas sometimes foster.4 These proponents also contend that electronic

† A.B. 1987, Harvard University; J.D. Candidate 1994, University of Chicago.


3 See Part IV(A) for description of legal process trauma.

media coverage enhances conventional reporting methods by "transporting the [actual] sights and sounds of the courtroom" void of any editorial slant. Opponents of television coverage counter that electronic media coverage actually skews the public's understanding of trials as a result of broadcasting only sensational cases. Furthermore, television coverage interferes with courtroom procedure, adds to the trauma of trial participants, and may encourage judges to make popular, rather than just, legal decisions. Nevertheless, because forty-seven states have chosen to allow some form of electronic media coverage of the courtroom, at least on an experimental basis, advocates of televised trial coverage currently appear to be winning the debate.

This Comment challenges the majority view in at least one situation—where children are testifying. The current approach to media coverage of minors fails to adequately address the unique problems raised by child-witnesses. Because each state (as well as the American Bar Association ("ABA") and the media themselves) devises its own guidelines for television coverage of legal proceedings, state standards for this important issue are most notable for their lack of uniformity. Most important, the vast majority of states simply leave the matter up to judicial or media discretion. The failure to establish consistent and workable protective guidelines has resulted in erratic, unfair, and potentially harmful press coverage of child-witnesses. This Comment proposes a model rule of court that would prohibit televised coverage of the testimony of child-witnesses in criminal, juvenile, and civil proceedings.

Any proposal to amend the state rules of court governing electronic media access to judicial proceedings necessarily must confront constitutional limitations on media access restrictions generally. Thus, Part I of this Comment sets forth the prevailing constitutional landscape, which currently permits states to develop their own rules regarding electronic media access. Next, Part II briefly describes current approaches to media access, including the ABA and state judicial codes of conduct, the binding state rules of court, and the media industry's own guidelines, highlighting the general inattention to the unique problems posed by child-witnesses. Part III discusses generally the inadequacies of the prevailing judicial discretion approach to electronic media coverage of minor witnesses. Part IV then focuses on the unique problems posed by child-witnesses. Finally, Part V examines the policy arguments

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* Id at xiii.
* Id.
underlying the current presumption in favor of electronic media access and argues that a state’s compelling interest in protecting minor witnesses provides sufficient justification for a ban on broadcasting the testimony of child-witnesses.

I. THE CURRENT CONSTITUTIONAL LAW LANDSCAPE

As early as the 1930s, courts began to consider access rights to courtroom proceedings for members of the press employing visual media, such as cameras. However, the Supreme Court did not definitively recognize a constitutional right of access to trial proceedings until a half-century later. In Richmond Newspapers, Inc. v Virginia, the Court held that the First Amendment guarantees to the press and to the public a right to attend criminal trials. However, the right to access is not absolute. First, the attendance rights bestowed by Richmond Newspapers remained subject to the outer limit of media access established earlier in Estes v Texas, in which the Supreme Court held that a criminal defendant was denied “due process by the televising and broadcasting” of his trial.

Second, in at least one post-Richmond Newspapers case, the Supreme Court intimated that other compelling government interests might justify restrictions on access rights. Most notably, the Supreme Court said that the protection of minors constitutes a compelling government interest and implied, therefore, that such an interest would justify narrowly-tailored restrictions on access rights.

Finally, the Supreme Court has held that the constitutional right of access does not include a right to broadcast trial proceed-

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7 See Ex Parte Sturm, 152 Md 114, 136 A 312 (1927). A Maryland court presiding over a murder trial had attempted to protect the defendant from sensational publicity by refusing to allow any photographing of the trial proceedings. When two newspaper reporters disregarded this ban, took photographs, and published them in a local paper, the court held them in contempt.
8 448 US 555 (1980).
9 Id. The Court reasoned that the First Amendment cannot protect the free discussion of government affairs if the public has no access to information about the operation of the government. Id at 575. However, the Supreme Court has never squarely decided whether there is a constitutional right to attend other types of proceedings (juvenile and civil proceedings, for example). But see note 26.
10 381 US 532 (1965).
11 Id at 534-35. More generally, the Estes Court held that a defendant has the right to a trial closed to the media when access jeopardizes the defendant’s right to a fair trial.
12 Globe Newspaper Co. v Superior Ct for the County of Norfolk, 457 US 596 (1982). See notes 20-24 and accompanying text for additional discussion of this particular governmental interest.
ings. In *Chandler v Florida*, the Court held that *Richmond Newspapers* recognized only a constitutional right of attendance. While acknowledging that technological advances had made the electronic media less obtrusive in the courtroom, the Court refused to grant the electronic media a constitutional right of access that included the right to broadcast the proceeding, quoting with approval its language in *Nixon v Warner Communications, Inc.*:

> [T]here is no constitutional right to have such [live witness] testimony recorded and broadcast[,] . . . [n]or does the Sixth Amendment require that the trial—or any part of it—be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.

*Chandler* invited states to experiment and develop their own court rules on electronic media access to criminal proceedings. The states have accepted this invitation.

In one notable case, Massachusetts enacted a statute that banned all press, as well as the general public, from sexual offense trials involving minors. The Supreme Court struck down the statute as unconstitutional in *Globe Newspaper Co. v Superior Court for County of Norfolk*. Although the Court found the protection of minors to be a compelling government interest, it held that the interest did not justify the breadth of the statute’s restrictions, which prohibited all attendance by the press and public. The Court reasoned that Massachusetts could have protected minors without impermissibly infringing the press’s and public’s First Amendment right of attendance.

*Globe* is important for two reasons. First, the *Globe* Court explicitly recognized the compelling state interest in protecting child-witnesses from further trauma. Thus, the protection of child-witnesses apparently would justify narrowly-tailored restrictions on

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14 Id at 573-74.
16 *Chandler*, 449 US at 569 (emphasis added).
17 Id at 582-83.
18 See Part II(A) for a brief survey of particular state rules.
19 457 US at 596.
20 Id at 608-09.
21 Id. More particularly, the Court held that the law could have been tailored more narrowly without significant harm to governmental interests.
22 See Part IV for an extended discussion of this point.
the press’s right of attendance—prohibiting the press from revealing a testifying minor’s identity, for example. Additionally, state courts and legislatures may consider whether the protection of child-witnesses also warrants restrictions on broadcasting privileges in the courtroom. As the Florida Supreme Court has recognized:

[F]or certain trial participants [child witnesses], there is a qualitative difference between the printed word and a photograph. . . . [W]e can conceive of situations where it would be legally appropriate to exclude the electronic media where the public in general is not excluded.

Second, the Globe Court did not retreat from its holding in Chandler and recognize a constitutional right to broadcast. Rather, the Court found the Massachusetts statute unconstitutional because the protection of children did not mandate the statute’s broad ban on attendance. Thus, states are still free, at one extreme, to ban electronic media coverage of trial proceedings outright and, at the other, to permit broadcasting in the courtroom freely (subject only to the Estes due process-fair trial requirement in criminal cases). Consequently, a model rule of court prohibiting only broadcasting of testifying child-witnesses raises no First Amendment questions.

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23 Recall that the right of attendance includes the right to attend the trial and to report what has been observed. See notes 14-16 and accompanying text.

24 In re Petition of Post-Newsweek Stations, Florida, Inc., 370 S2d 764, 779 (Fla 1979). In other words, it is one thing for a newspaper reporter to watch a trial and report what she has observed (especially if she refrains from printing the minor’s name) and quite another for that minor to be viewed by an audience of millions (whether or not his or her name is divulged). See also remarks by Fred W. Friendly, On Judging the Judges, in State Courts: A Blueprint for the Future 75 (Aug 1978).


26 Although not necessary to establish the constitutionality of the model rule of court proposed herein, it is worthwhile to consider the broader constitutional landscape. As indicated in note 9, the Supreme Court has never explicitly recognized a right to attend non-criminal proceedings. If no constitutional right of attendance applies to non-criminal proceedings, then a state rule banning attendance of non-criminal proceedings would not raise constitutional questions. If the Supreme Court does recognize a right to attend non-criminal proceedings, a broader ban on attendance (than at criminal proceedings) may still be constitutional because the interests requiring a publicly-conducted criminal proceeding do not necessarily apply to non-criminal proceedings. See Part V. Justice O’Connor may have had this in mind when she remarked in her concurrence in Globe: “I interpret neither Richmond Newspapers nor the Court’s decision today to carry any implications outside the context of criminal trials.” Globe, 457 US at 611 (O’Connor concurring).
II. Survey of Current Guidelines Governing Electronic Media Access

A. Model Codes of Judicial Conduct and Rules of Court

The American Bar Association has long attempted to establish rules regarding press access. In 1937, in the wake of concern over the widely publicized trial of the Lindbergh baby's kidnapper, the Bar enacted the ABA Canons of Judicial Ethics. Canon 35 stated that:

> [t]he taking of photographs in the court room . . . and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.\(^{27}\)

In 1952, the ABA amended the standard to prohibit television coverage as well.\(^{28}\) The ABA rules were not legally binding on the states, however, and in answering Chandler's invitation to experiment, some states promulgated different rules of access for the electronic media.\(^{29}\)

Perhaps following the lead of some state rules, the ABA amended its blanket prohibition in 1982 to allow judges the discretion to permit electronic media coverage, as long as the coverage was consistent with a party's right to a fair trial and provided the coverage was subject to other express conditions that would ensure that it did not otherwise interfere with the administration of justice.\(^{30}\) Although the ABA did not affirmatively recognize a right to broadcast, the new canon, renamed Canon 3A(7), suffered from at least two defects: its imprecise language offered little guidance to judges, and more importantly, the canon ignored important inter-

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\(^{29}\) See Chandler, 449 US at 563 (noting that "[a] majority of the states . . . adopted the substances of the ABA provision [Canon 35] and its amendments"); Note, 30 Vill L Rev at 1269 (cited in note 27) (stating that Texas and Colorado did not adopt Canon 35). For a description of some of these rules see Part II.

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ests beyond a party's right to a fair trial—in particular, the interests of a child-witness.

Rather than addressing these troublesome defects, however, the ABA, in 1990, deleted Canon 3A(7) altogether. The ABA announced that the canon did not "address judicial ethics but [was] rather a matter of court administration, which is regulated more appropriately by separate court rules." Whether Canon 3A(7) did, in fact, concern ethical issues is an important question. A large percentage of state judges are elected and not appointed and televised coverage of trials has only been permitted on non-experimental bases at the state level, raising the possibility that judges may have inappropriate incentives for allowing televised coverage of certain proceedings. In addition, defense attorneys also may utilize television exposure to enhance their private practice. Moreover, "[a]s a system of mutual accommodations and pay-offs develops, controls and inhibitions are likely to fall by the wayside." Paradoxically, although televised trial coverage arguably does present an ethical issue, because those who have the authority to reinstate the canon are the same people who benefitted most from its deletion, it is unlikely that the ABA will reinstate Canon 3A(7).

Even if Canon 3A(7) did not directly address an ethical issue, state judiciaries relied heavily on it in defining their own codes of conduct as well as in defining their rules of court, which, unlike codes of conduct, bind the state courts. By deleting the provision, the ABA has tacitly approved the removal of similar provisions from the state codes of judicial conduct and has thereby eliminated one major source of guidance for the courts on this issue. Because the state courts now lack any national model, a model rule of court has become even more critical to ensure the adequate protection of child-witnesses.

A brief survey of the various state rules highlights the general inattention to the special problem of child-witnesses. The state guidelines vary widely, from the very restrictive rules in Indiana,
Mississippi, and South Dakota, to the very permissive provisions in Florida, where the judiciary has enacted an extremely liberal version of the ABA's Canon 3A(7). It provides:

Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending case, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

The drafters of the Florida canon remarked that it "constitutes a general authorization for electronic media and still photography coverage for all purposes." Furthermore, consent of the participants to coverage is not required; coverage is "[l]imited only by the authority of the presiding judge in the exercise of sound discretion to prohibit filming or photographing of particular participants." In addition, the Florida Rules of Juvenile Procedure provide that a child-witness "may be called to testify in open court by any party to the proceeding, or the court, may be examined or cross-examined as any other witness" except upon a motion and finding that there is a "substantial likelihood that the child will suffer at least moderate emotional or mental harm if required to testify in open court."

Not surprisingly, Florida's liberal approach to electronic media coverage has generally carried over to televised coverage of minors as well. In fact, the first televised case, Zamora v Florida, involved a fifteen-year old accused of murdering an 85-year old woman. While the court considered the merits of televised trial coverage of this case, it was seemingly oblivious to the special impact of

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37 Florida amended its Canon 3A(7) in 1979 to reflect the Florida Supreme Court decision in Petition of Post-Newsweek Stations, 370 S2d at 764-68, to allow televised trial coverage.
40 Id (emphasis added).
41 Florida Rules of Juvenile Procedure Rule 8.255(c)(1)-(2) (1992). Thus, the court may order an in-camera examination of a child under the age of sixteen to be broadcast by closed-circuit television to the courtroom participants. Id.
42 See Gregory K., Docket No. CI 92-5127, JU 90-52-45.
43 422 S2d 325 (Fla App 1982).
television coverage on the minor-defendant. If Florida is any indication, the interests of child-witnesses clearly are not protected in states with permissive access rules.

Many less permissive states also fail to specifically address the problem of child-witnesses. For example, California’s more restrictive Canon 3A(7) permits electronic media coverage in the courtroom or its immediate environs only in a few specifically enumerated situations and only if four conditions are satisfied: (1) it will not distract the participants; (2) parties as well as any witnesses depicted have consented; (3) the reproduction will not be exhibited until after all proceedings, including appeals, have been concluded; and (4) the reproduction is exhibited only for instructional purposes in educational institutions. However, like Florida’s Canon 3A(7), California’s canon does not expressly address the child-witness situation, and, regrettably, California’s binding rules of court are a bit more permissive. In particular, Rule 980(b) provides:

The court may refuse, limit or terminate film or electronic media coverage in the interests of justice to protect the rights of the parties and the dignity of the court, or to assure the orderly conduct of the proceedings. This rule does not otherwise limit or restrict the right of the media to cover and report court proceedings.

Rule 980(b)’s discretionary standard apparently is an improvement over Florida’s rule; fewer cases of television coverage of child-witnesses seem to be reported out of California than out of Florida. However, like the Florida rules, California’s rules do not specifically address child-witnesses.

Illinois has adopted a novel bifurcated approach that at least recognizes the special “human” factors at play during a trial pro-

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44 Id. Ironically, the impact of television upon the defendant was noted in two other instances. First, the defense counsel raised as one of Zamora’s defenses, “voluntary subliminal television intoxication.” Id at 328. Additionally, and perhaps more ironically, in the report submitted to the Florida Supreme Court in Petition of Post-Newsweek Stations, the presiding judge of Zamora, Judge Baker, stated that while the cameras did not distract the jurors, “their concern about the impact of television coverage on the defendant and his family” did. Barber, News Cameras in the Courtroom at 21 (cited in note 4).

45 Electronic media coverage is permitted to perpetuate the record of a proceeding and in ceremonial or naturalization proceedings.


47 California Rules of Court, Miscellaneous Rule 980(b) (1990).

48 If this is the case, it may be attributed to California’s presumption against allowing electronic media coverage (as opposed to Florida’s presumption to allow), and to Rule 980(b)’s clear contemplation of cases where the electronic media will be banned.
ceeding. In thus fashioning its rule of court, the Illinois Supreme Court limited extended television coverage to appellate proceedings and thereby avoided the "human" problems relating to coverage of trial proceedings. As of late 1992, ten states have adopted this bifurcated approach. Like the provisions of Indiana, Mississippi, and South Dakota, which prohibit all television coverage, the Illinois provision currently affords the child-witness complete protection. However, there is no evidence that these protective rules stem from any particular concern for child-witnesses. Therefore, if any of these states were to abandon their current restrictive approaches, there is little reason to be optimistic that they would make an exception for child-witnesses. Most states simply fail to address the problem. New York, however, has adopted one of the few rules that does address the special needs of children. New York's binding rule of court mandates that the presiding judge "shall consider and give great weight to the fact that any party, prospective witness, victim or other participant in the proceeding is a child." New York's rule marks an improvement as it directs judges to give "great weight" to a child-witness's interests; nevertheless, because it ultimately leaves the decision to judicial discretion, children are not consistently protected.

The widely publicized New York case of Allen v Farrow provides a striking example. Initially, the trial judge permitted television coverage of hearings on the grounds that the parents had waived any privacy rights by appearing voluntarily in the media and that the public's right to know—via television coverage—outweighed the interests of the children involved. On appeal, the reviewing judge reversed the order holding that the children's

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48 The Illinois Supreme Court has held:

A trial is a complex proceeding involving human factors difficult to measure or explicate. There are inherent problems in any trial proceeding which would be exacerbated by the presence of extended coverage. They often involve psychological factors which cannot be reached by rules of court attempting to govern extended coverage of a trial. Trials are too sensitive and important to admit approval of factors that may expose them to prejudicial influences.

In re Photographing, Broadcasting, and Televising Proceedings in the Courts of Illinois, MR No 2634 (Ill 1983) (Illinois Supreme Court order amending Ill Ann Stat ch 110A, S Ct Rule 61, Canon 1 (Smith Hurd 1992)).

49 Id. The Illinois Supreme Court stated that "[t]he function of a court is to do justice in cases that come before it. It is not its role to be a teaching or informational instrument." Id.

50 See Summary of TV Camerás in the State Courts, Table 1, Summary of State Rules (cited in note 36).


52 Allen v Farrow, Index No 68738/92 (NY Sup Ct, Nov 13, 1992).
privacy interests were not waived and must be protected. Then, on a motion to televise a second hearing, the trial judge reversed his original conclusion, ruling that the second hearing should not be televised. Thus, even in states in which the judge is directed to strongly consider the presence of a child-witness, the judge, using his discretion, may allow potentially harmful television coverage.

B. Guidelines and Norms Established by the Media

The media have developed their own sets of working rules, both in the form of a general code of professional conduct as well as individual station and programming guidelines. These rules are critical in states that have permissive broadcast rules of court, as the media's own rules provide the last protective measure afforded to child-witnesses. Nonetheless, these rules prove inadequate.

The leading programmer of live televised coverage of trial proceedings is Court TV. Known for its "gavel-to-gavel" coverage of both legally important and sensational trials, Court TV has developed its own set of guidelines regarding the broadcast of a minor's testimony. Under its guidelines, Court TV does not broadcast the testimony of any witness less than twelve years old; if the witness is a minor, but at least thirteen years old, Court TV does not broadcast testimony that might in any way include intimate or personally sensitive matters. For example, Court TV may cover a fourteen-year-old witness testifying about a car accident, but will not cover that same witness if she testifies about child abuse.

Although it may choose not to televise certain trials involving minors, Court TV may be fully within its rights, as determined by the particular jurisdiction's rules of court, to televise the testimony of a child-witness. Its independent choice not to exercise its rights merely represents a form of "self-policing." While this self-restraint is laudable, the lack of an absolute prohibition against televising testifying child-witnesses remains problematic. For example, both Court TV and Cable News Network ("CNN") televised the

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64 Allen v Farrow, Index No 68738/92 (NY Sup Ct, Dec 11, 1992) (judge emphasized New York rule governing electronic media coverage which directs judges to give great weight to whether a child is involved).
65 Allen v Farrow, Index No 68738/92 (NY Sup Ct, Jan 8, 1993).
66 Conversation with Steven Brill, Chief Executive Officer and President of American Lawyer, Media L.P., and Court TV on Jan 7, 1993, about Court TV's explicit written and implicit internal guidelines.
67 Id.
68 Court TV and, most likely, other media prefer to label this self-restraint "adhering to professional standards" or "tasteful editing"; perhaps these are more apt descriptions. Id.
Gregory Kingsley “divorce” case despite the fact that he was only twelve. As this example illustrates, the media’s good intentions may be swept aside by a legally important or sufficiently sensational case. Professional self-restraint, therefore, does not always succeed in protecting the child-witness—nor should the media be forced to carry the entire burden of protecting such witnesses, particularly when declining to broadcast runs counter to its pecuniary interests. The adoption of a binding, narrow rule of court prohibiting television coverage of minors’ testimony would eliminate this problem by removing the choice from both the media and the bench.

III. THE INADEQUACY OF THE CURRENT APPROACH

As described above, the majority of state court rules give presiding judges discretion to prohibit or permit electronic media coverage of their trials. Not surprisingly, discretionary rules have led to a wide variety of results, both at the trial and appellate levels. While the courts have made some progress in defining media access rights to legal proceedings involving minors, case law has not yet developed to a point where courts consistently decide to protect the child-witness. As Allen v Farrow illustrates, judges can reach widely differing decisions even when applying the same rule to the same set of facts.

Not only does this lack of uniformity give rise to inconsistent closure rulings among the states and occasionally even within a

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**Notes:**

88 See Associated Press, Chicago Trib at 9 (cited in note 1) (trial broadcast live on both CNN and Court TV).
89 The media often compete in a “race to the bottom,” in which they broadcast excruciatingly bland or shockingly scandalous programming in order to maximize the size of their audiences, thereby enabling them to maximize advertising revenues.
90 Note that while television programmers, at the very least, recognize that certain witnesses are more vulnerable than others and have taken steps to protect these witnesses, Court TV rightly points out that the print media often publishes still photos of these very same trial participants. Conversation with Steven Brill (cited in note 56). Therefore, a model rule of court including the prohibition of both still and live photography in the courtroom and its environs may be a more comprehensive and effective guideline.
91 For example, in Miami Herald Publishing Co. v Morphonios, 467 S2d 1026 (Fla Dist Ct App 1985), a Florida appellate court reversed a pretrial gag order and granted media access to a pretrial taping of trial testimony of a minor child abuse witness.
92 In civil proceedings, decisions have also varied. For example, Anonymous v Anonymous, 158 AD2d 296, 18 Media L Rep 1560 (NY App Div 1990), noted that the strong constitutional and statutory presumption of open judicial proceedings is overcome in child custody disputes. In contrast, Sprecher v Sprecher, 15 Media L Rep 1773 (NY Sup Ct 1988), recognized the media’s right of access to a child custody proceeding, even permitting the use of television cameras for videotape coverage of such proceedings.
93 Index No 68738/92 (NY Sup Ct, Nov 13, 1992).
single case, but it also discourages reluctant witnesses from coming forward. The dissent in *Globe* explicitly noted this problem and attacked the majority's case-by-case rule as defeating this important, if not compelling, state interest. In the dissent's words, "[t]he mere possibility of public testimony may cause parents and children to decide not to report . . . crimes." A uniform rule of court would alleviate much of this fear, thereby encouraging witnesses to come forward and, in turn, would aid the court's fact-finding function.

Even in states in which television coverage is banned, children and parents are unlikely to be aware of the protection offered in their states. Because parents and children likely base their knowledge of media access policies on what they see on television—which includes national coverage—they are likely to think that television coverage in their state is probable. Thus, even in states with quite restrictive rules, the lack of a uniform rule hampers the state's interest in encouraging witnesses to come forward. A national rule would send a clear signal to parents and children.

Most important, the existing rules of court do not encourage judges to consider the child-witness's interest in these situations. Most states promulgated their rules without contemplating the unique needs of children. Unfortunately, judges are apparently following suit, failing to prohibit television coverage of child-witnesses. Thus, the current state rules do not effectively cabin judicial discretion.

Unfettered judicial discretion aggravates many of the problems that result from the lack of uniformity. For example, some child-witnesses suffer as a result of judges who value television exposure more than the minor's interests. Consequently, decisions are inconsistent, discouraging witnesses from testifying, whether or not they reside in a highly protective jurisdiction.

The media's professional guidelines also fail; pecuniary interests and ratings races override any interest in protecting child-witnesses. Thus, mechanisms depending upon judicial discretion or media self-restraint cannot succeed. Not only is the current approach ineffective, but the special needs of child-witnesses, such as trial process trauma, lack of ability to give meaningful consent,

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64 *Globe*, 457 US at 618-19 (Burger dissenting). Discretionary decisionmaking on an individual, case-by-case basis would likely deter parents and children from reporting crimes as their ability to shield children from publicity would be unknowable.

65 Id at 619.

66 See notes 32-34 and accompanying text.
and reluctance to testify, are also for the most part completely ignored. A flat ban addressing these unique needs would best protect child-witnesses and circumvent failures in judicial discretion and media self-restraint.

IV. CHILD-WITNESSES PRESENT UNIQUE ISSUES

Courts and commentators have long recognized that child-witnesses are different from adult witnesses. In the words of one state research center, “[a] child witness is not a miniature version of an adult witness. . . . They have vulnerabilities, needs and limitations not found among adult witnesses.” Even the Florida Supreme Court, historically the most permissive in allowing electronic media coverage, expressly recognized, in its initial decision allowing television coverage, that electronic media coverage often exacerbates the trauma suffered by child-witnesses:

Electronic media coverage of certain child custody proceedings could have a devastating impact on the welfare of the child participant. The future well-being of the child far outweighs the public’s interest in being informed of such proceedings.

Most courts agree that states have a compelling interest in protecting minors and generally focus on three features that distinguish child-witnesses from adult witnesses: (1) children suffer greater psychological trauma when asked to testify in court; (2) children cannot always give meaningful consent to press access when consent is required for television coverage; and (3) like rape-victim witnesses or government informants, children may require additional inducement to confront the accused due to fear of reprisal or embarrassment.

A. “Legal Process Trauma” and Child-Witnesses

“Legal process trauma” describes the psychological and emotional trauma that children suffer as a result of participating in

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* For example, both the *Globe* majority and dissent recognized that child-witnesses pose unique problems not presented by adult witnesses. *Globe*, 457 US at 607 (“safeguarding the physical and psychological well-being of a minor . . . is a compelling one”); id at 614 (Burger dissenting) (“There is clearly a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors.”).
* Petition of Post-Newsweek Stations, 370 S2d at 779.
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Several aspects of the judicial system may traumatize children. In a recent study of child-witnesses, the most frequently mentioned fear was direct confrontation with the defendant. Other traumatizing elements include “repeated interviews by an array of strangers, the unknown and formal nature of the courtroom, testifying before an audience, attempting to explain confusing events in adult language, cross-examination, and the length of the process.” Like many rape victim-witnesses, children may also suffer self-blame, a sense that “everybody knows,” and embarrassment.

As noted earlier, the Globe majority agreed that safeguarding a child-witness’s psychological well-being was a compelling governmental interest. The dissent expressed a common sentiment, stating that excluding the press and public “rationally serves the [government’s] overriding interest in protecting the child from the severe—possibly permanent—psychological damage. It is not disputed that such injury is a reality.” Numerous psychological studies affirm this empirical conclusion.

B. Children’s Inability to Give Meaningful Consent

Twelve states prohibit electronic media coverage unless some or all of the participants consent. Consent poses problems when the witness is not an adult—how and at what age do the courts establish that a child can give meaningful, fully-informed consent? Unlike an adult witness, a child-witness most likely cannot give meaningful consent to television exposure to a potential audience of millions. Nor can the problem be circumvented, as some states attempt to do, by allowing a parent or state-appointed guardian to consent on behalf of the minor. First, the child-witness may be testifying against that parent (for example, in an intrafamily sexual

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71 Id, citing D. Whitcomb, E. Shapiro, and L. Stellwagen, When the Victim is a Child: Issues For Judges and Prosecutors 17 (United States Department of Justice, 1985).
72 Id at 7-18.
73 Globe, 457 US at 607. However, in Globe, the Supreme Court held only that the psychological well-being of a child-witness did not justify a blanket ban on attendance.
74 Id at 617 (Burger dissenting).
75 See research cited in Soler, Representing the Child Client at §§ 7-18, 7-19 (cited in note 70).
abuse case); second, a state-appointed guardian will unlikely know the child-witness well enough to consent meaningfully on the minor’s behalf. Additionally, judges should not have the discretionary power either to differentiate between children who can and cannot meaningfully consent or to consent on their behalf. Hence, even those states requiring consent fail to adequately protect the interests of the child-witness.

C. Additional Inducement Required for Child-Witnesses

Like rape victim-witnesses, child-witnesses may be reluctant to testify.77 Because a judicial proceeding seeks to discover the facts and resolve the dispute in a just manner, the government has a strong interest in encouraging these witnesses to testify despite their legitimate fears. The Globe Court held that encouraging minor victims of sex crimes to come forward and provide accurate testimony was not a compelling interest, because it did not find the empirical evidence supporting it sufficient.78 Calling this argument a “cavalier disregard of the reality of human experience,” Chief Justice Burger and Justice Rehnquist stated in their dissent that a witness “may well be deterred from reporting a crime on the belief that public testimony will be required.”79 While it remains difficult to gauge empirically a potential witness’s fears about testifying in court, empirical evidence certainly shows that trauma does occur.80

V. THE STATE’S INTEREST IN MINORS OUTWEIGHS COMPETING INTERESTS

These general arguments demonstrate that child-witnesses pose unique problems that must be solved by fashioning rules that reflect their needs. In Globe, the Court implicitly balanced these needs against the asserted competing interests.81 Application of the

77 Globe, 457 US at 619 (Burger dissenting).
76 Id at 609-10.
78 Globe, 457 US at 617, 619 (Burger dissenting). The dissent noted that the state might also (or instead) assert another interest: the protection of witnesses from the trauma of testifying in front of an audience of voyeurs. Id at 618. Moreover, the dissent suggested that this interest in protecting a witness from voyeuristic strangers would be greatly magnified if the audience were expanded through television coverage and “reruns on the evening news.” Id.
80 See note 75 and accompanying text.
81 Although the Court agreed that safeguarding a minor from further trauma is a compelling interest, it suggested that the interest was not compelling “enough.” The Globe dissent stated outright that it was employing a balancing test but reached the opposite conclusion: “Our obligation in this case is to balance the competing interests: the interest of the
RESTRICTING CHILD-WITNESS COVERAGE

Globe balancing test is not constitutionally required in cases where a narrowly tailored ban does not impair the media’s attendance rights. Nevertheless, applying the Globe standard to a ban prohibiting broadcasting during a child-witness’ testimony, the child’s interests outweigh all other interests in any type of proceeding.

A. Child-Witnesses in Criminal Proceedings

The historic tradition of an open criminal trial has been a fundamental tenet of our judicial system since its inception. Historically, public access to the criminal trial has served as a check against unjust convictions, excessive punishment, and the undeserved taint of criminal charges. Public access to trials also bolsters society’s trust in the judicial system, and it may alleviate society’s urges for retribution, allowing the public to participate vicariously in the application of justice. The public has informational and educational interests in the proceeding as well. Thus, both the defendant and the public have great interests in criminal proceedings. The state’s interest in protecting a minor from legal process trauma, therefore, faces its greatest challenge in a criminal proceeding. The state’s acknowledged compelling interest in protecting child-witnesses outweighs the media’s interest in broadcasting, however, and neither impairs the defendant’s right to a fair trial nor the public’s right to attend.

A defendant’s Sixth Amendment right to confront his accused does not require that the witness testify in open court. For example, courts have approved the practice of using closed-circuit television to reduce a child-witness’s uneasiness about facing the defendant. If the judiciary recognizes the trauma a child-witness may experience when testifying in open court, then it must acknowledge the even greater trauma a child-witness experiences

media for instant access, against the interest of the state in protecting child rape victims from the trauma of public testimony." Globe, 457 US at 616 (Burger dissenting).

** See Richmond Newspapers, 448 US at 569.

** Globe, 457 US at 606.

** Richmond Newspapers, 448 US at 571.

** The Supreme Court upheld the practice of testifying by closed circuit television in Maryland v Craig, 497 US 836 (1990). The child-witness did not see the defendant, but the defendant could still monitor the child’s testimony. The Supreme Court, citing Globe, held that Maryland had shown that its interest in protecting the child-witness from the trauma of testifying in front of the defendant was sufficiently compelling. Id at 852-53.
when his or her testimony is broadcast to an audience of millions via the electronic media.\textsuperscript{86}

This same concern appears in other trials involving sensitive testimony, most notably with rape victim-witnesses. The television media has generally responded to the problem by blurring the facial identity of the witness (although the audio testimony is often not obfuscated). Given the magnification of the fears and trauma a child suffers during any legal proceeding, this resolution is arguably inadequate with a child-witness, especially when the child is also the victim.\textsuperscript{87} Moreover, those from whom the child most fears identification (classmates, for example) will likely be able to identify the child despite any blurring.

Nevertheless, the public's safeguarding function and right to information is strongest in the context of a criminal trial. The public must be able to weigh each witness's testimony and credibility in order to ensure that the trial is conducted fairly and that the outcome reflects a just resolution. However, electronic media coverage is not necessary to vindicate these interests. As the Supreme Court recognized in \textit{Nixon}, the guarantee of an open trial requires only the right to attend and to report what was observed.\textsuperscript{88}

On the other hand, the need to protect the child-witness may also be the most critical in the criminal context, given that children do not ordinarily testify in criminal proceedings unless they are the victim or have witnessed a crime, either event by itself traumatizing. Television exposure may exacerbate whatever trauma the child has already suffered. States have a compelling interest in preventing this additional harm.

B. Child-Defendants in Juvenile Proceedings

The argument against broadcasting child-witnesses' testimony is even stronger in juvenile proceedings, in which the child-witness is the defendant. The juvenile courts focus on rehabilitation, not retribution.\textsuperscript{89} Because children are believed to be more responsive

\textsuperscript{86} The precise size of the viewing audience—whether it numbers in the thousands or millions—is irrelevant. The presumption of a large audience on the part of the child-witness or parent is sufficient to cause the legal process trauma. See \textit{Globe}, 457 US at 599, 600 n 5 (minor witnesses less concerned with media presence than the idea that their identity would be divulged to a large audience).

\textsuperscript{87} See note 75, citing studies examining the additional trauma that minors involved in legal proceedings may suffer.

\textsuperscript{88} \textit{Nixon}, 435 US at 610.

\textsuperscript{89} Indeed, a juvenile offender is neither convicted nor sent to prison, and a juvenile offender's record is expunged upon reaching the age of majority. In some courts a juvenile
to treatment, the chance for rehabilitation into productive and law-abiding citizens is thought to be greater than for adult offenders. Proponents of juvenile offender anonymity argue that electronic media coverage of a juvenile court trial would impede the achievement of these goals. They argue that such coverage would permanently stigmatize the juvenile offender, hinder the development of socially acceptable behavior, and perhaps even confer celebrity status upon the juvenile, spurring him or her to engage in future delinquent behavior. Opponents of closed juvenile proceedings counter that publicity deters juvenile crime by forcing the young offender to take responsibility for his or her deviant conduct.

However, most states have focused on the potentially harmful effects of publicity on a juvenile offender and have enacted closure policies for their juvenile courts. In fact, one court refused a juvenile's request for an open hearing, not only because of the possible deleterious effects on the juvenile's rehabilitation, but also because opening the proceeding might convey to the "immature respondent an impression of celebrity rather than solemnity." The Supreme Court echoed these sentiments in In re Gault and endorsed the traditional juvenile court policy "to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past." Critics of closed juvenile proceedings also claim that the public has informational and safeguarding interests similar to any other proceeding. However, as in the criminal setting, vindicating these interests does not require electronic media coverage of testifying juveniles. As nearly all states recognize, the balancing test offender is not even called a "defendant," but a "respondent." The system functions in this manner because the juvenile offender is considered "highly salvageable." Paul R. Kfoury, Children Before the Court: Reflections on Legal Issues Affecting Minors 53 (Butterworth Legal Publishers, 2d ed 1991).

Id.

Id. at 53-54.

Id. Additionally, proponents claim that publicity itself is a form of punishment, a type of media pillory inconsistent with the rehabilitative goals of the juvenile justice system. Kfoury, Children Before the Court at 54 (cited in note 89).

Id.


In re Gault, 387 US 1, 24 (1967).

Kfoury, Children Before the Court at 55 (cited in note 89).

Some juvenile court systems, however, have succeeded in addressing these interests while maintaining the confidential nature of juvenile proceedings. For example, the Circuit Court of Cook County, Illinois has created the Citizens Committee on the Juvenile Court, Juvenile Court of Cook County Information Booklet 5 (Circuit Court of Cook County, Sept
favors protecting the juvenile offender when the sole competing interest is the public's "right to know."  

C. Child-Witnesses in Civil Proceedings

The argument against broadcasting child-witnesses' testimony is strongest in the context of a civil proceeding. In a civil proceeding, because there is no criminal defendant whose freedom is at stake, the role of the public as a watchdog guarding against an arbitrary or unjust government is not as critical as in a criminal or juvenile proceeding. A civil proceeding often involves issues uniquely personal to the parties, and the public's interest therefore may constitute no more than an entertainment or prurient interest. The equation, therefore, tips heavily in favor of protecting the child-witness from the possible trauma of electronic media coverage in civil proceedings.

Although civil proceedings are rarely fodder for televised trial coverage, the situation does arise and the need for protection and uniformity can be just as great as in a criminal proceeding. A case in point is the custody battle between Mia Farrow and Woody Allen, in which each hearing and proceeding became a battlefield for the television media to attack the parties' desire for a closed proceeding. Although the unique problems of child-witnesses greatly outweigh the interests of the public in civil proceedings, courts fail to consistently protect child-witnesses, even in this context.

D. Proposed Model Rule of Court

Having concluded that the state interest in protecting the child-witness outweighs any interest in coverage by the electronic media, this Comment proposes the following model rule of court:

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1989), which, since 1963, has served as an independent body representing society's interests in the Juvenile Court and in the Juvenile Temporary Detention Center by monitoring the policies and the practice of the juvenile court system. The Citizens Committee on the Juvenile Court Annual Report 5-7 (1990). Adoption of similar watchdog groups in other jurisdictions would do much to satisfy the public's interests while safeguarding the juvenile court system's aspirations.

** Summary of TV Cameras in the State Courts (cited in note 36).

** This conclusion was explicitly stated in Petition of Post-Newsweek Stations: "The future well-being of the child [in certain custody proceedings] far outweighs the public's interest in being informed of such proceedings." 370 S2d at 779.

100 Sensational criminal proceedings generally draw the highest audiences and are, therefore, preferred.

101 See, for example, Richard Pérez-Peña, Judge Scolds Lawyers In Woody Allen Case, NY Times 1-1, 1-13 (Jan 9, 1993).
In criminal, juvenile, and civil proceedings, electronic media coverage of a witness under the age of eighteen in the courtroom or its immediate environs is prohibited. The testimony of the witness shall not be photographed, recorded, or broadcast. Attendance by the electronic and print media shall be permitted at the discretion of the presiding judge.

This model rule of court prohibits television or radio coverage of a child-witness while testifying and while in the environs of the courthouse. The rule does not, however, prohibit attendance by any representative of the media at the trial itself. In this sense, representatives of the electronic media are free to report on the trial events in much the same manner as their print media counterparts and have an equal right of access. Instead of using the printed word, a television reporter could orally relay the events of the day to the television audience either after the day’s proceedings or outside of the courthouse. This rule satisfies the public’s informational and watchdog interests as well as the defendant’s right to a fair trial while protecting the child-witness from traumatic media exposure.

CONCLUSION

Current judicial treatment of television coverage of child-witnesses is inadequate. Rules of court governing electronic media coverage of child-witnesses are not uniform and are inconsistently applied. Moreover, rules which rely on judicial discretion have not prevented child-witnesses from being exposed to deleterious television coverage. The self-restraint mechanisms of the professional media have been selectively applied.

The model rule proposed by this Comment affords absolute protection to the child-witness while ensuring fairness to other trial participants. First, it prevents the additional trauma that television coverage of a child-witness would likely produce. Second, it encourages children and their parents to come forward by imposing uniformity. Third, the proposed rule is fair to the defendant and to the media, banning only broadcasting, not attendance, thereby ensuring the defendant’s right to a public trial and the media’s right of access. Fourth, the proposed rule avoids failures in

103 Note that the judge in a particular trial still retains any existing discretionary power to close the courtroom or limit attendance—consistent with the Constitution—as he or she deems appropriate.
judicial discretion and alleviates any ethical concerns. Finally, it likewise avoids weaknesses in the media's self-restraint.

The proposed rule adequately addresses the special needs of children testifying before the court. Moreover, it is narrowly tailored to safeguard the interests of the public and the other trial participants. While the proposed rule admittedly infringes upon the electronic media's ability to report without constraint, a prohibition of this kind represents only a "minimal interference with the freedom of the press." The adoption of the proposed model rule of court, which better serves the interests of the government and the child-witness while preserving the constitutional rights of the other participants, surely justifies such a minimal impediment.

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103 Smith v Daily Mail, 443 US 97, 109 n 2 (1979) (Rehnquist concurring) (referring to a standard by which the state banned the publication of the youth's name).