Hear No Evil: How Permissive Rules on the Creation and Use of Courtroom Audio Recordings Can Increase Judicial Accountability

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Introduction

On June 29, 2016, the Louisiana Supreme Court found James J. Best, a judge for the Eighteenth Judicial District, guilty of violating six provisions of the Louisiana Code of Judicial Conduct and Article V of the Constitution of the State of Louisiana.[1] The disciplinary action was filed against Judge Best in response to his decision to terminate the parole of Antonia Garcia, a convicted sex offender.[2] Garcia, a thirty-three-year-old teacher and cheerleading coach,[3] "plead[ed] guilty to indecent behavior with a juvenile" after exchanging "a series of lewd and lascivious texts and emails with a sixteen-year-old student at the school where [he] taught."[4]

Upon learning of Garcia's motion to terminate probation, Judge Best, who had developed a personal relationship with Garcia through their mutual involvement in their church's choir, advised Garcia to enlist legal assistance from another friend of the judge.[5] During Garcia's hearing, Judge Best completely disregarded the unrebutted testimony of a probation officer that weighed against terminating the probation before making "statements concerning his own personal observations of Mr. Garcia's character gained through his interaction with Mr. Garcia at church and further indicated that those personal and out-of-court observations provided some basis for terminating Mr. Garcia's probation early."[6] Judge Best concluded the hearing by issuing an order terminating Mr. Garcia's probation.[7] Judge Best knew that the Attorney General's Office was never notified that the hearing was going to take place and decided to proceed even though the proper prosecuting agency was not present.[8]

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1. *In re* Best, 2015-2096 (La. 6/29/16); 195 So. 3d 460, 463, 465.
2. *Id*. at 461.
3. Kiran Chawla, *I-Team: Sex Offender Special Treatment*, WAFB9 (Jan. 23, 2012, 11:00 PM CST), https://www.wafb.com/story/16583089/tonight-on-9news-at-10/ [https://perma.cc/42BV-E7KN].
4. *In re* Best, 195 So. 3d at 461.
5. *Id*. at 461–62.
6. *Id*. at 462.
7. *Id*.
8. *Id*.

Seventeen days after the hearing, investigative journalists at a local media outlet published a news article exposing Judge Best's relationship with Mr. Garcia.[9] That reporting brought the case to the attention of the Attorney General, who quickly filed a motion to set aside the judgment and launched an investigation that would result in the prosecution and eventual conviction of Judge Best.[10] In its disciplinary decision, the Louisiana Supreme Court relied heavily on the record of the probation hearing, specifically noting statements Judge Best made as evidence on which the severity of his sentence would turn.[11] In a concurrence advocating a more severe punishment for Judge Best, one Louisiana Supreme Court justice quoted directly from Judge Best's remarks on the record to "prove actual bias towards Mr. Garcia."[12] The decision of whether or not to convict Judge Best of several charges turned on language in the record of the hearing.[13]

While this case did end with a conviction, it is hard to think that a case would still have been brought against Judge Best if a court reporter had not been present. The Louisiana Code of Judicial Conduct prohibits outside audio recordings unless expressly approved by the presiding judge.[14] Depending on the state and the kind of hearing, there may be no stenographer or court reporter present in a given proceeding.[15] While it is unlikely that record tampering occurred in this particular case, there is no way to be sure that the transcript used in Judge Best's disciplinary decision was accurate. There would have been little to stop Judge Best from utilizing his position of power to manipulate the court record to remove some of the more damning language. He would not have been the first judge to have a court reporter alter an official record in anticipation of misconduct charges.[16] Any court watcher would find it difficult to substantiate allegations of misconduct occurring in a courtroom otherwise filled with friends of the judge. The shorthand notes of a reporter might do little to convince others that misconduct occurred. Audio recordings, however, can provide a comprehensive and

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9. *Id*. at 462–63; Chawla, *supra* note 3.

10. Chawla, *supra* note 3; Terry L. Jones, *Suspensions Recommended for Two 18th JDC Judges; Louisiana Supreme Court to Hear Cases in May*, THE ADVOCATE (Apr. 6, 2016, 9:44 AM), https://www.theadvocate.com/baton_rouge/news/communities/westside/article_18013793-58b9-52c8-89fc-e8719841ce28.html [https://perma.cc/NRR6-4WC3]; *In re* Best, 195 So. 3d at 465.

11. *In re* Best, 195 So. 3d at 466.

12. *Id*. at 469–70 (Johnson, J., concurring).

13. *See id*. ("[A]ll of the above actions and remarks by Judge Best prove actual bias toward Mr. Garcia.").

14. La. Stat. Ann. Code of Judicial Conduct Canon 3(A)(9) (Westlaw current with amendments through 1/15/20) ("Except as herein provided a judge shall prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions.").

15. *See, e.g*., Sarah Lustbader, *States are Blocking Courtroom Recording. But Reform Requires Transparency*., THE APPEAL (July 23, 2019), https://theappeal.org/states-are-blocking-courtroom-recording-but-reform-requires-transparency/ [https://perma.cc/8FPB-JZJQ] (discussing a lawsuit challenging audio recording ban in bail proceedings because "no stenographer is present").

16. *See, e.g*., Brad Hamilton, *Diamond in Rough on 'Cover-Up*,' N. Y. POST (May 7, 2006, 4:00 AM), https://nypost.com/2006/05/07/diamond-in-rough-on-cover-up/ [https://perma.cc/8LRS-J5ET] ("The Commission on Judicial Conduct interviewed court reporter Maurice Schwartzberg two weeks ago – and he admitted making 'substantial revisions' to transcripts at the judge's request in one case.").

accurate record of proceedings. Still, several states have chosen to enforce sweeping provisions that prohibit the broadcasting of courtroom audio, or even the act of recording itself,[17] often citing concerns about fairness and privacy.

While little scholarship directly addresses the issue of audio recording in courts, many parallels can be drawn from the discussion surrounding the use of cameras in courtrooms. Because the fight around court access is so centered around cameras, it is easy to forget that many courts still limit or entirely prohibit the creation and dissemination of audio recordings. Permitting audio recording in courtrooms, however, would offer similar benefits to video while simultaneously avoiding many of its potential drawbacks.

By restricting the public's ability to record and distribute courtroom audio, states are inadvertently removing what could be an important mechanism for preventing judicial abuses of power. Prohibiting members of the public from making and distributing audio recordings is neither an appropriate nor an effective means to protect fairness and privacy in judicial proceedings. By doing so, state court procedures interfere with the ability of public opinion to serve as a check on the judiciary and uphold important democratic values not sufficiently protected by judicial codes of conduct or other law.

This Note will not discuss the constitutionality of restricting public access to courts by barring audio recording. Nor will it survey different state rules on the matter.[18] Instead, it will consider the strength of normative policy arguments for and against adopting rules that provide for members of the public to distribute audio recordings in open court. Part I will discuss the benefits of expansive public access rights generally. Parts II and III will examine the advantages of audio recordings specifically before addressing potential issues with permissive court recording rules. Finally, this Note will advocate for a change in court procedures to allow for unencumbered public access to a complete and accurate record.

I. BENEFITS OF EXPANSIVE PUBLIC ACCESS RIGHTS

The success of our constitutional democracy requires that each branch of our government be held accountable. The independence of the judicial branch limits the extent to which it is accountable to the political branches. While judges may be appointed and removed by members of the other branches, those powers are seldom used.[19] The other branches cannot be expected to oversee the day-to-day

17. *See* Mitchell T. Galloway, *The States Have Spoken: Allow Expanded Media Coverage of the Federal Courts*, 21 VAND. J. ENT. & TECH. L. 777, 818 (2019) (Only eleven states allow unrestricted recording in courtrooms. Four states ban recording criminal proceedings entirely.).

18. *See id.*

19. Stratos Pahis, *Corruption in Our Courts: What It Looks Like and Where It Is Hidden*, 118 YALE L.J. 1900, 1916 (2009) ("While impeachment by the legislative branch was originally the preferred method of accountability for both state and federal judges, this time-consuming and political-capital-draining process has been used less frequently as the obligations of Congress and state legislators have grown.").

operations of every judge.[20]

Historically, the press has played a large part in filling this accountability void.[21] In the case of Judge Best, it was the media, not governmental actors, that first shed light on his misconduct.[22] This is consistent with the fundamental role of the press in our democratic system of government.[23] The press has an indispensable role in providing the public with a window into the function of government, a role that is perhaps nowhere more important than with respect to the judiciary.[24] Because the judiciary is necessarily less accountable to the other two branches of government, the legitimacy of the courts depends largely on transparency.[25] "People in an open society," as United States Supreme Court Chief Justice Warren Burger once wrote, "do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[26]

The judiciary as an institution depends on public trust. As the Supreme Court stated in *Nebraska Press Association v. Stuart*, a case involving a state trial judge's order restraining members of the press from reporting on a criminal trial, "[a] responsible press has always been regarded as the handmaiden of effective judicial administration . . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."[27]

Public access to judicial proceedings is necessary for the judiciary to remain a strong and independent branch of government. Observing courts is one of the most important forms of self-governance in that it ensures the accountability of the judiciary without relying on the other two branches, thereby preserving the impartiality of our courts.[28] The fact that a "right of access" exists is what

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20. *Cf. Id.*

21. *See* Globe Newspaper Co. v. Superior Court for Norfolk Cty., 457 U.S. 596, 596 (1982) ("The right of access to *criminal trials* in particular is properly afforded protection by the First Amendment both because such trials have historically been open to the press and public and because such right of access plays a particularly significant role in the functioning of the judicial process and the government as a whole.").

22. Chawla, *supra* note 3.

23. *See* Paul Coppock, *Doors to Remain Open During Business Hours: Maintaining the Media's (and Public's) First Amendment Right of Access in the Face of Changing Technology*, 58 S.D. L. REV. 319, 328 (2013).

24. *Id.* ("A presumption of openness in general perseveres because history has proven openness to be an indispensable attribute of the judicial system.").

25. *See* David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 839–40 (2017).

26. Floyd Abrams, *Cameras in the Courtroom: Should Judges Permit High-Profile Trials to Be Televised Yes: Cameras Reflect the Process, for Better or Worse*, 81 A.B.A. J. 36 (Sept. 1995).

27. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559–60 (1976) (quoting Shepard v. Maxwell, 384 U.S. 333, 350 (1966)).

28. *See* Ardia, *supra* note 25, at 842.

preserves the courts' autonomy, even if that right is not constantly being exercised.[29] The purpose of the media, especially as it exists today, is to be present as a surrogate for the general public and to inform them of the workings of government.[30] The ability to disseminate reliable information effectively is key to informing the public of the inner workings of our courts.[31] Nevertheless, state courts continue to impose rules that burden those trying to accurately report on their proceedings.[32]

Public interest in government is perhaps nowhere greater than with ensuring that public officials are conducting their business lawfully and ethically. Governmental checks on judges are not sufficient and our institutions are often ineffective at uncovering abuses of power.[33] It is extremely difficult to ascertain the frequency with which abuses of power occur within the judiciary because "the majority of state oversight systems currently fail to publicly declare the extent of judicial (or public) corruption within their respective jurisdictions."[34]

Even where misconduct is uncovered, repercussions rarely amount to more than a slap on the wrist.[35] Judge Best, for example, was sentenced to a mere fifteen-day suspension.[36] This demonstrates the importance of the role the public must play in discovering and preventing repeated misconduct.

Citizens observing the courts "can be a powerful tool to expose the workings of a court system that operates in the shadows, especially if courtroom actors do not realize that court watchers are there."[37] Court watchers, be they members of an institutionalized media or from other walks of life, uphold the integrity of the

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29. Brian T. FitzGerald, *Sealed v. Sealed: A Public Court System Going Secretly Private*, 6 J.L. & POL. 381, 381 (1990).

30. *See* Ardia, *supra* note 25, at 916.

31. *See* Paul Coppock, *supra* note 23, at 346 ("Television news and the Internet cast a much larger net than printed news and are capable of increasing the amount of the population that participate in the judicial system. By capturing more viewers, the public's familiarity with the law is increased and the fact-finding process is improved.").

32. *See* Galloway, *supra* note 17.

33. *Cf.* Stratos Pahis, *supra* note 19, at 1916–17 (noting that impeachment of judges is a "time-consuming and political-capital-draining process" that "has been used less frequently as the obligations of Congress and state legislators has grown.")

34. Cynthia A. Koller & Elizabeth B. Koller, *Splintered Justice: Is Judicial Corruption Breaking The Bench?*, 47 CRIM. L. BULL. 948, 968 (2011).

35. *See, e.g.*, Cynthia Gray, *A Study of State Judicial Discipline Sanctions*, AM. JUDICATURE SOC'Y, https://www.ncsc.org/~/media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Publications/Study-of-State-Judicial-Discipline-Sanctions.ashx [https://perma.cc/XMS3-V8ZE] (noting that judicial disciplinary bodies utilize informal and private sanctions more often than formal sanctions in cases of judicial misconduct); Joseph Cranney, *South Carolina: The State Where Judges Rule Themselves in Secret*, PROPUBLICA (Apr. 25, 2019, 12:00 AM EDT), https://www.propublica.org/article/what-happens-when-judges-police-themselves-in-secret-not-much [https://perma.cc/W44D-8JX2] (reporting on investigation findings that South Carolina's judicial ethics system is "run largely by judges [and] shields the accused and buries complaints").

36. *In re* Best, 2015-2096 (La. 6/29/16), 195 So. 3d 460, 461.

37. L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 886 (2017) (reviewing NICOLE VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT (2016)).

judicial system and protect the rights of individual litigants in the process.[38] State legislatures have even recognized the importance of court watching, going so far as to consider providing public support to "court watching" organizations.[39] Public court access is an important mechanism by which our judiciary may be held accountable. That right is significantly weakened if the people who exercise it are prevented from being able to effectively bring attention to what they uncover.

Public opinion is more than just a means to apply pressure on officials to impose appropriate disciplinary measures; it itself is a mechanism for accountability. Disciplinary actions and formal charges need not be the be-all and end-all of repercussions for unethical actions. In the wake of the much-publicized Brock Turner case, California State Judge Aaron Persky was recalled by voters after he handed down what the public at-large deemed to be too lenient a sentence for the convicted sex offender.[40] Judge Persky, who was formally cleared of misconduct, sentenced Turner to six months in jail after the Stanford student was convicted of three felony charges for "sexually assaulting an unconscious woman behind a [d]umpster."[41] Public attitudes regarding the morality of a judge's conduct can be influential even if they do not result in recall or impeachment. Even before his recall, Judge Persky asked to be removed from hearing criminal cases in response to public condemnation of his decision.[42]

The kind of discretion afforded to judges in sentencing is necessary to account for different factual circumstances and to provide for an independent judiciary.[43] But, as the Brock Turner case indicates, miscarriages of justice can still happen within those parameters. Even where judges are found guilty of misconduct, they often face minimal repercussions.[44] This is all just to state the obvious—that rules and self-policing do not provide a comprehensive toolkit for protecting ethics.

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38. *See* Kenneth J. Schmier & Michael K. Schmier, *Has Anyone Noticed the Judiciary's Abandonment of Stare Decisis?*, 7 J.L. & SOC. CHALLENGES 233, 250–51 (2005) ("[C]ourt watchers protect individual litigants because they can be expected to, and often do, join with litigants to raise the issue of an incorrect judicial resolution to a supreme court or to executive or legislative bodies.").

39. BOARD OPPOSES PROPOSED 'COURT WATCH' PROGRAM, 24 FLA. B. NEWS (Feb. 1, 1997) (describing the Florida State Bar's position opposing legislation which would create a $6 million program for a state court watchers organization that would monitor judicial proceedings and record observations to report to the legislature. The Board opposed the legislation on the theory that it would violate separation of powers.).

40. *See* Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a 6-Month Sentence for Sexual Assault*, N.Y. TIMES (June 6, 2018), https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html [https://perma.cc/J3BG-HJXX]; Daniel Victor, *Judge in Stanford Sexual Assault Case is Cleared of Misconduct*, N.Y. TIMES (Dec. 19, 2016), https://www.nytimes.com/2016/12/19/us/aaron-persky-stanford-rape-case.html [https://perma.cc/2D4R-8SVB].

41. Victor, *supra* note 40.

42. *See id.*

43. *See* Allyse Falce, *Judges Should be Accountable to the Law, Not Public Opinion*, BRENNAN CTR. (Sept. 17, 2014), https://www.brennancenter.org/our-work/analysis-opinion/judges-should-be-accountable-law-not-public-opinion [https://perma.cc/H34H-66G2].

44. *See, e.g.*, Cranney, *supra* note 35. A parenthetical might be persuasive here since the numbers are pretty crazy (1,000 misconduct complaints but no judge punished publicly. . .).

The court of public opinion upholds a set of values that may not overlap directly with those protected by codes of conduct and other laws. It does not replace those mechanisms and does not have the same weight of institutional power, but it is a flexible means to address the shortcomings of those formal systems.

Public oversight requires that the people be able to access information about what is occurring in the judicial branch. Even if the judiciary were effective at self-policing, the lack of transparency within disciplinary processes would be problematic by failing to contribute to public trust in the system. National media organizations are not highly incentivized to cover local government officials and are largely unable to serve as a sufficient proxy for the public.[45] Moreover, while official court transcripts are important and useful, they are not always accurate, omit important information, are not required in all proceedings, and may be difficult or expensive to obtain. Permitting audio recording in courtrooms helps ensure that proceedings are remembered accurately and facilitates journalists' role in ensuring judicial transparency.

II. ADVANTAGES OF AUDIO RECORDINGS

A. AUDIO RECORDINGS ARE MORE ACCURATE THAN TRANSCRIPTS

The meaning of words and phrases can change drastically based on how they are said.[46] Accordingly, audio recordings contain valuable information that is absent from court records. Two sentences that look identical on paper may have different meanings depending on how they are spoken.[47] Qualities like the volume, emphasis, timing, and emotion of a speaker cannot be effectively conveyed through text alone. As a result, a recording communicates a far more complete version of events than a transcript of the same proceeding would.

Recordings are also more accurate than transcripts in that they provide a record free from human error and bias. Court transcripts contain mistakes.[48] The creation and storage of court records is often characterized by "systemic delay, uncertainty, and expense."[49]

Inaccuracies in the court record are inherently problematic, but they are made even more so by the fact that court reporters' mistakes are not confined to random

45. *See* Joel Mathis, *The sad decline of journalism*, THE WEEK (Aug. 8, 2019), https://theweek.com/articles/857795/sad-decline-journalism [https://perma.cc/U829-AFES].

46. *Cf.* Robbie Gonzales, *One Sentence With 7 Meanings Unlocks a Mystery of Human Speech*, WIRED (June 28, 2018) https://www.wired.com/story/one-sentence-with-7-meanings-unlocks-a-mystery-of-human-speech/ [https://perma.cc/EXJ7-VN9R] ("'I never said she stole my money' is a seven-word sentence that has seven different meanings, depending on which word in the sentence you stress.").

47. *Id.*

48. *See* John Southerst, *The Benefits of Digital Court Recording*, 82 JUDICATURE 133, 135 (1998).

49. *See id.*

errors.[50] Court reporters struggle to accurately transcribe "nonstandard" dialects such as African American English.[51] A study conducted on Philadelphia court reporters "found that participants fell well below their certified 95–98% transcription accuracy, could not accurately paraphrase what they had heard, and generally held negative beliefs about 'Ebonics' and about African Americans."[52] The researchers also concluded that "[t]hese negative attitudes were not limited to African Americans on trial, but in some cases extended to police and judges as well."[53] As a result, court records do not only have the potential to mislead those who rely on them later, but might actually do so in a prejudicial manner.

Bias inserted into the official court record may not always be unconscious. Longtime court reporters may feel loyalty to the judges they serve, even if they attempt to hide their favoritism.[54] There is anecdotal evidence that some court reporters have even been directed by judges they work for to alter records.[55]

Audio recording could serve as a check on inaccuracies and the results of bias (implicit or explicit) in written transcripts. If courts truly trust the work of their recorders, and do not intend to alter the record, then there should be no harm in allowing the creation of another virtually identical record. Allowing court spectators to record audio is consistent with notions of transparency and grants immediate access to a correct and complete record. Immediate access lets journalists substantiate the accuracy of their reporting without having to wait and pay for a court transcript or court-recorded audio. By preventing the public from creating and disseminating their own recordings, courts are (1) tacitly encouraging the publication of material that has not been substantiated against the record; and (2) forcing interested parties to wait and pay for court-made records and recordings. Doing so violates the constitutional principle that "neither policies nor fees should artificially create barriers to essential democratic processes."[56]

B. THE DECLINE OF LOCAL NEWS

Thousands of news organizations have gone out of business in recent years.[57] In the United States, 28,000 newsroom jobs were lost between 2008 and 2018, an

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50. *See* Taylor Jones et al., *Testifying While Black: An Experimental Study of Court Reporter Accuracy in Transcription of African American English*, 95 LANGUAGE e216 (2019).

51. *Id.*

52. *Id.* at 217.

53. *Id.*

54. *Id.* ("John Freeman, the University of South Carolina law school's professor emeritus on professional ethics, said longtime court reporters likely feel loyal to the judges they serve, but most take great pains to avoid an outward appearance of favoritism.").

55. *See, e.g.*, Hamilton, *supra* note 16.

56. Stephen J. Schultze, *The Price of Ignorance: The Constitutional Cost of Fees for Access to Electronic Public Court Records*, 106 GEO. L.J. 1197, 1210 (2018).

57. Clara Hendrickson, *Local journalism in crisis: Why America must revive its local* newsrooms, BROOKINGS INST. (Nov. 12, 2019) https://www.brookings.edu/research/local-journalism-in-crisis-why-america-must-revive-its-local-newsrooms/ [https://perma.cc/6XGW-VMXH].

employment drop of twenty-five percent.[58] Local media has been hit especially hard. Today, "[o]ver 65 Million Americans live in counties with only one local newspaper—or none at all."[59] This is especially problematic because local news organizations are often responsible for the kind of investigative groundwork necessary to expose abuses of power.[60] Even the local outlets that have survived are strapped for resources, and will therefore have trouble fighting the legal battles and paying the fees sometimes necessary to obtain copies of court records.[61] According to Clara Hendrickson, a research analyst at The Brookings Institution:

> The declining capacity of newsrooms to investigate potential stories not only renders newspapers less valuable to news consumers, but also results in a newspaper that is less valuable to its community. When important stories are not told, community members lack the information they need to participate in the political process and hold government and powerful private actors accountable.[62]

National news organizations have far less of an incentive to uncover local corruption and, as a result, are generally unwilling or unable to devote the kinds of resources needed to put reporters in local government buildings and courthouses.[63] Even the digital-native media companies that have experienced recent growth have had to lay off reporters.[64]

Local judges wield substantial power over the communities they serve. This is especially true in more rural areas, where poorer residents are less likely to send issues up on appeal and news deserts are more common.[65] The decline of local news organizations, and the failure of national media organizations to fill the void left by their disappearance, has left a gap that needs to be filled. Without enough journalists to "do the important—if often unglamorous—work of keeping democracy accountable and functioning[,]" local officials are left relatively isolated

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58. Elizabeth Grieco, *U.S. Newsroom Employment Has Dropped by a Quarter Since 2008, with Greatest Decline at Newspapers*, PEW RES. CTR. (July 9, 2019), https://www.pewresearch.org/fact-tank/2019/07/09/u-s-newsroom-employment-has-dropped-by-a-quarter-since-2008/ [https://perma.cc/J6LD-YMCD].

59. Hendrickson, *supra* note 57.

60. *Cf.* Hendrickson, *supra* note 57 (explaining that national newspapers overtaking local organizations has resulted in the "declining capacity of newsrooms to investigate potential stories," and that "[w]hen important stories are not told, community members lack the information they need to participate in the political process and hold government and powerful private actors accountable.").

61. *Id.* ("Whether cash-strapped from the erosion of advertising revenue or under-resourced due to cost-cutting measures pursued by owners, newsrooms find themselves in the impossible situation of trying to do more with less as their newsroom staffs have been cut in half.").

62. *Id.*

63. *Cf.* Grieco, *supra* note 58.

64. *Id.*

65. Tom Stites, *About 1,300 U.S. Communities Have Totally Lost News Coverage, UNC News Desert Study Finds*, POYNTER, https://www.poynter.org/business-work/2018/about-1300-u-s-communities-have-totally-lost-news-coverage-unc-news-desert-study-finds/ [https://perma.cc/B4BJ-A9JQ] ("[C]ounties with no coverage at all tend to be rural. State and regional papers have also pulled back dramatically, and this 'has dealt a double blow to residents of outlying rural counties as well as close-in suburban areas.'").

from public scrutiny.[66] The decline of local media organizations has left the press struggling more than ever before to fulfill its role as a proxy for the public.

C. THE RISE OF AUDIO JOURNALISM

While the press at-large has fallen on hard times, the evolving landscape of the media market has created new opportunities for some. The advent of the internet has allowed audio journalism to expand beyond the radio airwaves. The popularity of podcasts has increased consistently over the past decade.[67] More than seventy million Americans download podcasts every month.[68] The so-called "podcast boom" is largely attributed to the advantages that audio holds over other mediums, particularly of ease of use and multitasking ability.[69] Advances in both recording and listening technology are also given some credit.[70] Podcasting is increasingly a medium of choice for long-form, investigative reporting.[71] A sterling example of this is Serial, a podcast about the case of Adnan Syed, a Baltimore man convicted under questionable circumstances of killing his ex-girlfriend.[72] Serial, lauded as "podcasting's breakout hit," used courtroom audio in its first season.[73] After its first season was released, however, the podcast's show runners were threatened with prosecution for violating Maryland's court recording laws.[74] As a result, the third season of the show moved to Ohio, a state with more permissive court recording rules.[75] The third season was specifically aimed at giving the public a window into everyday court proceedings, and, among other things, exposing a judge for crossing ethical and constitutional lines.[76]

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66. *See* Joel Mathis, *supra* note 45.

67. David Shadpour, *The Audio Boom: How Podcasts Are Changing the Game for Marketeers*, FORBES (Feb. 8, 2019, 6:00 AM), https://www.forbes.com/sites/forbesagencycouncil/2019/02/08/the-audio-boom-how-podcasts-are-changing-the-game-for-marketers/#585ccb454f73 [https://perma.cc/B8K8-XFMH].

68. *Id.*

69. *See id.*

70. *Id.*

71. Tiffany Stevens, *Maryland Journalists Challenge Ban on Broadcasting Criminal Court Procedures*, COLUM. JOURNALISM REV. (June 6, 2019), https://www.cjr.org/united_states_project/maryland-courts-audio-video-broadcast.php [https://perma.cc/JS3R-CLDD].

72. Lindsay Beyerstein, *Serial Creators don't know what will happen to Adnan Syed*, COLUM. JOURNALISM REV (Nov. 19, 2014), https://www.cjr.org/b-roll/serial_sarah_koenig_adnan_syed.php [https://perma.cc/5D5F-MUAA].

73. Eric Zorn, *Listen Up — Again! The Podcast Boom is Just Getting Started*, CHICAGO TR. (Feb. 16, 2018, 3:20 PM), https://www.chicagotribune.com/columns/eric-zorn/ct-perspec-zorn-podcasting-boom-revolution-audio-0218-20180216-story.html [https://perma.cc/4RGQ-9KER].

74. Stevens, *supra* note 71.

75. Transcript, *Serial*, Season 3 Episode 1, https://serialpodcast.org/season-three/1/transcript [https://perma.cc/9J82-5S3X] ("In most courts though, it's really hard to record. In [some] places, recording of any kind is barred in courtrooms. What is your problem, Pennsylvania? Cleveland though, they let our producer Emmanuel Dzotsi and me wander the courthouse unencumbered with microphones. Extraordinary.").

76. *See* Transcript, *Serial*, Season 3 Episode 2, https://serialpodcast.org/season-three/2/transcript [https://perma.cc/85DJ-AM4D].

Following Serial's relocation, Maryland has become somewhat of a battleground for the constitutionality of court recording rules.[77] Undisclosed, another investigative podcast, has announced that they plan on intentionally violating Maryland law by broadcasting courtroom audio during their next season.[78] The producers of Undisclosed spent the first season reenacting court proceedings in order to comply with Maryland's laws permitting recordings for note-taking use, but prohibiting broadcasting.[79] Moving forward, they plan on using real courtroom audio in an attempt to be more journalistically responsible.[80] That act of civil disobedience coincides with litigation currently challenging the constitutionality of the rules.[81]

Preventing people from using their own recordings places a significant burden on journalists' ability to keep the public informed. Having to fight and pay for access to court records drains time and resources from reporters and producers. Courts, when allowed to control access to recordings, may abuse that power.[82] In instances where records can be successfully obtained, journalists still may have to reenact the audio in order to comply with court rules.[83] The alternative is merely describing proceedings, a route that podcasters think is less desired by audiences and necessarily results in increased editorialization.[84]

Podcasting is unlikely to be a singular solution to the local journalism crisis, but it can serve as an important example. In the absence of an easily identifiable press corps, local news may increasingly have to be cobbled together from a variety of sources. Ensuring governmental accountability may increasingly fall on non-traditional forms of media, and possibly even engaged members of the public. Expanding access to proceedings to allow for a more easily verifiable means of reporting could be a large step towards keeping the public fully informed.

III. IMPEDIMENTS TO PERMISSIVE AUDIO RECORDING RULES

A. FAIR TRIAL CONCERNS

One oft-cited concern about broadcasting judicial proceedings is that doing so could lead to cases being overturned if a party's right to a fair trial is violated.[85] Fair trial concerns in this context are not merely hypothetical. In *Estes v. Texas*,

77. *See* Stevens, *supra* note 71.
78. *Id.*
79. *Id.*
80. *See id.*
81. *Id.*
82. *See id.*
83. *Id.*
84. *Id.* ("'If I had to act out every bit of testimony from a state witness, what is to stop me from doing that in a way that is misleading, either inadvertently or purposefully?' McDonell-Parry says. 'It's better to have people speak for themselves.'").
85. *See, e.g.*, Richard G. Elliott, Jr., *Access to Pretrial Criminal Proceedings: The First Amendment vs. the Sixth Amendment*, 15 DEL. L. 14 (Summer 1997); William J. Whelan, III, *Copying and Broadcasting Video and Audio Tape Evidence: A Threat to the Fair Trial Right*, 50 FORDHAM L. REV. 551, 578 (1982).

the United States Supreme Court overturned a conviction on the grounds that extensive media coverage of the trial deprived the defendant of his Fourteenth Amendment due process rights.[86] In its decision, however, the Court relied heavily on the idea that the physical intrusion of television cameras and other equipment into the courtroom created an "ever-present distraction" for the judge and for jurors.[87] That the fair trial concerns in *Estes* stemmed primarily from distractions within the courtroom and not from the act of broadcasting itself illustrates the reasonableness of permitting recording devices in courtrooms, especially considering the advances in technology that have occurred since *Estes* was decided more than half of a century ago.[88] Modern electronic recording technology is discreet to the point of being unnoticeable, and many courts already utilize audio recording in some capacity with no discernible issues.[89]

The Supreme Court did not fail to realize the important role of the press in our democracy in *Estes*, stating:

> The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings. While maximum freedom must be allowed the press in carrying on this important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process.[90]

In fact, the Court only restricted the rights of the media to being the same as those "rights of the general public, namely, to be present, to observe the proceedings, and thereafter, if they choose, to report them."[91] This is an important distinction, as the right to record and distribute audio is one that can and should be held by the general public. Under this conceptualization, the theoretical framework including the distribution of audio recordings under the umbrella of public access rights is consistent with the Court's holding in *Estes*.

Less than two decades after *Estes*, the Supreme Court returned to the issue of state courts providing for the public broadcast of a criminal trial, this time holding that states may permit television coverage of a trial.[92] Writing for the majority,

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86. Estes v. Texas, 381 U.S. 532, 551 (1965).

87. *Id*. at 548.

88. *See id*. at 551–52 ("[T]he ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But . . . [o]ur judgment cannot be rested on the hypothesis of tomorrow.").

89. *See* Galloway, *supra* note 17, at 807–08 ("[E]very federal appellate court makes recordings, whether audio only or audiovisual, available within a week of oral argument, with most uploading recordings on the same day as the argument.").

90. Estes, 381 U.S. at 539.

91. Sonja R. West, *The Monster in the Courtroom*, 2012 B.Y.U. L. REV. 1953, 1963 (2012) (quoting Estes v. Texas, 381 U.S. 532, 585–86 (1965) (Warren, C.J., concurring)).

92. Chandler v. Florida, 449 U.S. 560, 583 (1981).

Chief Justice Burger penned that "[t]he risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage."[93] Even if jurors interact with media coverage, exposure to direct audio of the case already presented to them will prejudice them less than an editorialized recounting of it. In such an instance, being permitted to broadcast real courtroom audio would likely result in less of an opportunity for bias, not more.

Given the scale of this Note's proposal, it could be argued that the type of public access provided by permissive recording rules is outside the scope of the access previously considered by the Court. The standards of professionalism that govern the editorial discretion exercised by members of the press may have given the court a willingness for deference that would not have been afforded to the general public. Far from being a reason to restrict recording rights, however, this criticism actually may highlight another reason that the public should be allowed to utilize recordings. The public at large is generally unqualified to responsibly editorialize complicated proceedings. They do, however, have a right established by law to be present at trial.[94] If an untrained member of the public watches a trial and then attempts to recount it, they will almost certainly make critical mistakes. The account, filtered through their own interpretation, will also be a necessarily editorialized version of the proceeding. If, alternatively, they were able to record audio of the case, that recording would be a much more accurate representation of the trial. Allowing for the public to record does not inflate the credibility of the public to that of the press. The credibility is rooted in the evidentiary value of the recording itself. To be sure, parts of recordings can be taken out of context; but that risk exists with transcripts as well.

B. PRIVACY CONCERNS

Another frequent justification for restricting access to court proceedings is protecting privacy.[95] While privacy is an important principle, alluding to it as a general concept is not sufficient to warrant broad restrictions on public access rights. This section will consider the privacy concerns of involved actors and how they would likely be affected by more permissive court recording rules.

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93. West, *supra* note 91, at 1961 (quoting Chandler v. Florida, 449 U.S. 560, 575 (1981)).

94. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) ("We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'") (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).

95. *See generally* Itay Ravid, *Tweeting #justice: Audio-Visual Coverage of Court Proceedings in a World of Shifting Technology*, 35 CARDOZO ARTS & ENT. L.J. 41, 60–65 (2016).

1. PARTIES AND WITNESSES

Public access rights are essential for preserving fairness and public trust in our judicial system.[96] That right extends beyond merely permitting members of the public to be present during proceedings. One important area where access has been expanded to provide for the increased availability of court records is via online publishing.[97] The practice of publishing court documents online is widespread, despite the fact that such documents can sometimes contain damaging personal information.[98] Realizing the importance of privacy, many states have various sealing and redaction procedures in place to limit the kinds of personal information that can be published.[99] Those procedures exist to balance the public interest in access to government proceedings with individual privacy rights.

Sealing serves as a powerful discretionary tool for courts to protect privacy. Debates over the appropriate use of sealing mirror many of the arguments surrounding permitting recording in courts.[100] It is confounding, then, that even after courts have decided not to (or were legally not permitted to) seal parts of proceedings, they still attempt to limit public access to that information. Sealing procedures exist as they do to effectively balance public interest with the privacy of litigants.[101] It is not only redundant but also a miscarriage of justice to go through that analysis and succeed in unsealing information, only to bar the dissemination of the unsealed information. Some argue that sealing is already used too liberally and hampers public access rights.[102] Existing sealing procedures are sufficient to protect privacy interests, and if they are not, they should be directly reformed. Leaving it up to judges to arbitrarily limit the extent to which public information is available is a partial circumvention of the sealing analysis.

Perhaps the most persuasive privacy argument against broadcasting audio is that any loss of practical obscurity potentially endangers those present in the courtroom. Practical obscurity is the idea that information, even if it is technically available to the public, can still be made functionally more private if it can only

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96. *See* Hon. Margaret Dee McGarity, *Privacy and Litigation: Two Mutually Exclusive Concepts*, 23 J. AM. ACAD. MATRIM. LAW. 99, 101 (2010) ("Secret judicial proceedings are inherently deemed untrustworthy, and they have historically been a means for punishing those politically unacceptable to those in power. Opening judicial proceedings helps to keep them fair, and it allows citizens to observe and monitor the workings of its system of justice.").

97. *See* David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385, 1387 (2017).

98. *Id.* ("[C]ourt records contain an astonishing amount of private and sensitive information, ranging from social security numbers to the names of sexual assault victims.").

99. *See* McGarity, *supra* note 96, at 102.

100. *See* Sharon L. Sobczak, *To Seal or Not to Seal? In Search of Standards*, 60 DEF. COUNS. J. 406, 407 (1993); Brian T. FitzGerald, *Sealed v. Sealed: A Public Court System Going Secretly Private*, 6 J.L. & POL. 381, 383–84 (1990).

101. Sobczak, *supra* note 100, at 407.

102. *See* FitzGerald, *supra* note 100, at 383–84.

be found through a great investment of time and effort.[103] Practical obscurity is of great concern with respect to the online filing of court documents.[104] In that context, courts have generally determined that the public's right to access outweighs the privacy concerns.[105] That is in spite of the fact that documents often contain the kind of information that can be used to steal parties' identities, or to subject witnesses to "intimidation, retaliation, and harassment."[106] Even those relatively severe potential repercussions have been considered an acceptable cost for allowing continued public access to online filings.[107]

It is not clear that broadcasting audio would result in a significant diminution in practical obscurity for private information. The kind of information that individual parties want to keep confidential would unlikely end up within short clips of audio used by the media, and processing hours of audio searching for specific information would be no easier than searching through documents and records already available to the public. Important qualities contained in audio, such as the volume and tone of a speaker, help to provide a more complete understanding of meaning to listeners but are unlikely to convey any sort of private information that would not have shown up on a transcript or other court document. Where there are concerns about audio recordings being used to identify endangered witnesses, state courts have a number of tools at their disposal to protect anonymity while still allowing proceedings to be recorded.[108]

Some victim advocacy groups have opposed attempts to put cameras in courtrooms citing privacy concerns.[109] Sentencing proceedings in particular can be an extremely emotional time for the families of victims.[110] It is understandable that

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103. Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CAL. L. REV. 1, 21 (2013). Hartzog writes that the Supreme Court:

> [F]ound a privacy interest in information that was technically available to the public, but could only be found by spending a burdensome and unrealistic amount of time and effort in obtaining it. The information was considered practically obscure because of the extremely high cost and low likelihood of the information being compiled by the public.

Id.

104. *See* Schultze, *supra* note 56, at 1206.

105. *See id*.; Ardia, *supra* note 97, at 1396 ("[C]ourts across the country have been moving to make their records available online, and many courts require litigants to file their pleadings, motions, and other documents in electronic format."). *But see* United States Dep't of Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749, 776–80 (1989) (holding that preserving practical obscurity outweighed the public interest in a FOIA case involving an internal government compilation).

106. Schultze, *supra* note 56, at 1206.

107. *Id*.

108. Galloway, *supra* note 17, at 802 ("State court-implemented alternatives include informing witnesses of their right to not be recorded, censoring a witness's face on the video, modulating the witness's voice on the video, and offering witnesses the choice to opt out of being recorded.").

109. *See, e.g*., Pamela Wood, *Maryland Doesn't Allow Cameras in Trial Courts. Two Republicans Want to Change That for Criminal Sentencing*, BALTIMORE SUN (Feb. 6, 2019, 5:05 PM), https://www.baltimoresun.com/politics/bs-md-cameras-in-court-20190206-story.html [https://perma.cc/3ZMF-KHXF].

110. 110. *See id*.

testifying family members would want to avoid being part of a "media circus."[111] This is an area where audio departs significantly from video in practice. Audio recordings can be discreet and therefore could preserve the ability for the family's public statements in open court to be heard as they were given without suffering any additional physical or psychological intrusion. Finally, while victims and family members should be treated with respect, their preferences must be balanced against the rights of the public. Sentencing, to continue with the example, is an area where judges have a substantial amount of discretion and an outsize influence on the lives of those in front of them.[112] Moreover, the fact that judges' behavior with respect to sentencing changes based on whether or not they are elected implies that it is at least perceived to be of great public interest.[113] Special victim populations such as children and victims of sexual assault or domestic violence are frequently afforded additional rights and protections because of their heightened privacy concerns.[114] Those protections could be easily extended to apply to third party recordings.

2. COURT OFFICIALS AND LAWYERS

With measures in place to protect the privacy rights before the court, a more likely explanation for courts favoring rules against recordings is that they want to insulate themselves from criticism. Some cite, as part of this idea, worries that their words will be taken out of context.[115] Restricting court reporting to the medium of text, however, would do little to prevent a judge from being taken out of context. To the contrary, it seems more likely that the court be misquoted if the broadcast of the original audio is not permitted.

These same concerns are likely why some states choose to permit only members of the media to record in courts.[116] Problematically, such limitations significantly reduce the efficacy of audio recordings as a mechanism for judicial accountability. Only permitting members of the media to record and publish audio would require them to identify themselves to the court and obtain permission before recording a proceeding. As a result, the court is always aware of the presence of court watchers and therefore can also be sure of their absence when not asked for permission.

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111. *See id.*

112. *See* Christina R. Weatherford, *Judicial Sentencing Discretion Post-Booker: Are Judges Getting A Distorted View Through the Lens of Social Networking Sites?*, 27 GA. ST. U. L. REV. 673, 690 (2011) (describing judicial discretion in sentencing as "unfettered").

113. *See* Sanford C. Gordon & Gregory Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q.J. OF POL. SCI. 107–38 (2007) (finding that elected judges sentence less severely where there are competitive partisan elections).

114. *See About Victim's Rights*, VICTIM LAW, https://victimlaw.org/victimlaw/pages/victimsRight.jsp [https://perma.cc/SAN5-BV8W].

115. *See, e.g.*, West, *supra* note 91, at 1979.

116. *See* Galloway, *supra* note 17, at 818.

Restricting the availability of the full set of access rights to members of the media also is contrary to the theory that the public keeps courts in check.[117] The media certainly plays an important role in keeping the public informed, but in this situation, it is still functioning as an extension of the public.

The late United States Supreme Court Justice Antonin Scalia, among others, suggested that the public's interest in broadcasts is overstated because laypeople would not understand nuanced legal arguments.[118] Even accepting that somewhat elitist perspective, one must admit that to use it as a justification for curtailing access rights deprives the public of an important educational opportunity.[119]

Judges are not superiorly qualified to determine access rights, and their speculative reasoning can lead to inconsistency as they attempt to successfully balance public and private rights.[120] In *Estes*, for example, one major contributing factor to the conviction being overturned was that the trial court judge used his discretion to continually change access rights, thereby contributing to the disruptive nature of the coverage.[121]

It is well established that the public has a legitimate public interest in observing public officials.[122] "[T]here should be a strong presumption that people should be able to watch government proceedings."[123] That strong presumption of access not only denotes the elevated public interest, but also supports the idea that public officials have diminished expectations of privacy when conducting official business.[124] The Supreme Court has repeatedly recognized the importance of subjecting judicial processes and actors to extensive public scrutiny.[125] It seems perverse, then, for states to pass rules that offer little to justify their inhibition of the people's ability to scrutinize public officials.

Grandstanding is possibly the least supported justification for restricting the public's access to courtrooms. While the broadcasting of trials is often blamed for the behavior of attorneys, there is little to actually support the existence of any

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117. Ardia, *supra* note 25, at 842.

118. West, *supra* 91, at 1983 ("Justice Scalia likewise questions the public's ability to understand the Court's work, once quipping in a speech: 'That is why the University of Chicago Law Review is not sold at the 7-Eleven.'").

119. *See id.* at 1985 ("[T]he Justices do not seem to experience problems with the public failing to understand them. Justice Breyer himself has stated that he felt his seventeen-and-a-half hours of confirmation hearings in front of cameras 'was a great opportunity for people to learn about and participate in their supreme court.'").

120. *See, e.g.*, Estes v. Texas, 381 U.S. 532, 551 (1965).

121. *Id.* at 551–52.

122. *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

123. Erwin Chemerinsky, *A Failure to Communicate*, 2012 B.Y.U. L. REV. 1705, 1711 (2012).

124. *See* Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (noting the importance of "subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism").

125. *See, e.g.*, *id.*; Garrison, 379 U.S. at 72–73 ("In any event, where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth.").

causal relationship.[126] Some commentators have noted that attorney grandstanding is a problem that exists whether or not cameras and microphones are present: "Sometimes . . . what the camera shows can be unflattering. But that is the nature of the truth."[127] Litigation is an inherently public undertaking, and those who choose it put on a show to win their case regardless of audience. Judges who have presided over televised cases for the most part seem to think that any effect the coverage has on the behavior of those in the courtroom is negligible and fades quickly.[128]

Moreover, many of the grandstanding concerns offered to oppose cameras do not apply to audio recordings. Digital recorders are far more discreet than cameras, and attorneys may not even notice their presence. The Supreme Court already publishes audio recordings of all of its oral arguments.[129] Permitting members of the public to record in court has the most utility in low-profile cases. The relative obscurity of lower-level court cases would also logically make grandstanding less likely to occur there.

CONCLUSION

A public right of access to open courts is a fundamental feature of our democratic system of government. The ability for information observed during judicial proceedings to be imparted as completely and as accurately as possible results in the kind of transparency that gives the public trust in our judiciary. The decline of local news organizations has left a void that cannot be sufficiently filled by the institutionalized press, increasing the likelihood that judges like Judge Best escape scrutiny altogether. As a result, it is more important than ever to protect public access and enact procedures that support the public's right to be informed. While judicial codes of conduct and anti-corruption laws are essential safeguards, they are too rigid to appropriately handle every instance of unethical behavior. Beyond merely compelling formal action, public opinion itself serves an important accountability function.

Audio recordings offer a number of practical advantages over court transcripts, including accuracy and objectivity. Where courts are allowed too much discretion in the form of providing court-made recordings or regulating others' abilities to

126. *See* Abrams, *supra* note 26, at 36.

127. *Id*.

128. West, *supra* note 91, at 1975 ("Judge Diarmuid O'Scannlain noted that '[m]y personal experience, fortunately, has been that as a general rule my colleagues and practitioners have acted with the civility and decorum appropriate to a federal appellate courtroom, by and large resisting the temptation to play to the television audience.'") (quoting Diarmuid F. O'Scannlain, *Some Reflections on Cameras in the Appellate Courtroom*, 9 J. APP. PRAC. & PROCESS 323, 327 (2007)).

129. *See* Argument Audio, Supreme Court of the United States, https://www.supremecourt.gov/oral_arguments/argument_audio/2019 [https://perma.cc/4XQS-KK8R].

record in court, those recordings lose their efficacy as a tool to promote judicial accountability. Court rules that restrict the public's ability to create and distribute audio recordings of proceedings are insufficiently justified, and therefore do not outweigh the public's interest in having expansive access rights. Using court rules to limit recordings of open proceedings after the applicable sealing analysis has been conducted permits courts to effectively restrict public access without having to meet the balancing test essential for the protection of individual rights.