WE INTERRUPT YOUR BROADCAST [BAN] TO BRING YOU [GREATER ACCESS]: NEW CONSIDERATION FOR RULE 2.17 DURING A PANDEMIC

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ABSTRACT

In March 2020, the COVID-19 pandemic closed down courthouses across Indiana. While trial courts in other states began conducting proceedings online and live streaming them on media platforms to ensure public access, Indiana Supreme Court rules explicitly outlawed that practice. The Indiana Supreme Court temporarily suspended that rule a month after the governor issued an executive stay-at-home order. While pragmatic, case law suggests the order was unnecessary. Trial courts could have utilized the audio and video accommodations afforded to absent parties to provide access to the public. Opponents argue the Sixth Amendment's public hearing clause requires court proceedings, especially those criminal in nature, to be open to any and everyone who wants to view them. Those arguments fail to correctly recognize that the right to a public hearing does not require access for all, but instead access to those who wish to participate and who successfully gain entry. This article reviews the history of Rule 2.17, highlights how that history would have supported the Indiana Supreme Court's decision to leave the rule unamended, and explain how the inclusion of some at the exclusion of many is still constitutionally sound.

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INTRODUCTION

Staying at home became commonplace following the spread of COVID-19.[1] Schools closed, businesses shuttered,[2] and Netflix subscriptions became a hot commodity.[3] Nevertheless, essential businesses remained open, testing the fortitude of their emergency preparedness plans.[4] Court systems, being designated as one of those essential businesses, shifted from in-person meetings to virtual ones in order to comply with social distancing standards.[5] This was certainly a massive shift for all, but some states' court systems had already integrated broadcasting or televising court proceedings into their normal course of business.[6] Indiana, however, has resisted the implementation of cameras in the courtroom or the broadcasting of court proceedings since the late 1980s.[7] The Indiana Supreme Court holds that line by maintaining the prohibition balances the public's transparency interest and the judiciary's obligation to preserve order and dignity of proceedings and protect litigants' due process and fair trial rights.[8] However, following Governor Eric Holcomb's March 23, 2020, executive stay-at-home order,[9] the Court recalibrated those scales. On April 22, 2020, the Court issued an Administrative Rule (AR) 17 Order,[10] suspending the broadcasting portions of Rule 2.17 of the Indiana Code of Judicial Conduct.[11] In explaining its rationale, the Indiana Supreme Court held that while the closure of government buildings and the issuance of an executive stay-at-home order were necessary for public health, they impeded the public's

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1. *See, e.g.*, 2020 Ind. Exec. Order No. 20-08, at 6 (Mar. 23, 2020) [https://perma.cc/GZK7-452H]; *In Re: COVID-19 Pandemic Emergency Response, Administrative Order Suspending All In-Person Court Proceedings for the Next Thirty-Days* (Mar. 13, 2020), https://www.ncsc.org/__data/assets/pdf_file/0014/19103/alabama-3-13-2020-cov-19-order-final.pdf [https://perma.cc/4A5V-VWXP]; *In re* Response to the COVID-19 Pandemic, 2020 Ark. 116 (2020).

2. *See* Ind. Exec. Order No. 20-08, *supra* note 1, at 5.

3. Wendy Lee, *Record High Netflix Subscriptions In Coronavirus Crisis*, L.A. TIMES (Apr. 21, 2020), https://www.latimes.com/entertainment-arts/business/story/2020-04-21/netflix-usage-profits-surge-during-coronavirus-crisis [https://perma.cc/MJ9T-ECPF].

4. Ind. Exec. Order No. 20-08, *supra* note 1, at 2.

5. *Id.* at 5.

6. *See, e.g.*, Fla. R. Jud. Admin. 2.450, https://www.flcourts.org/content/download/217909/1973400/Florida-Rules-of-Judicial-Administration.pdf (last visited May 31, 2020) [https://perma.cc/D4LD-5ML7].

7. *See* discussion *infra* Part I, section j.

8. *In re* Admin. Rule 17 Emergency Relief for Indiana Trial Cts. Relating to the 2019 Novel Coronavirus (COVID-19), 142 N.E.3d 910 (Ind. 2020).

9. *See* Ind. Exec. Order No. 20-08, *supra* note 1, at 10.

10. This rule focuses on the Indiana Supreme Court's administrative powers over how trial courts are managed during an emergency situation. *See* IND. ST. ADMIN. R. 17 (2008).

11. *See supra* note 8. *See also* IND. ST. CODE OF JUD. CONDUCT R. 2.17 (2020), https://www.in.gov/judiciary/rules/jud_conduct/index.html#_Toc8987525 [https://perma.cc/UT2S-3LMA].

interest in transparency of judicial proceedings.[12] To counteract those negative effects, the Indiana Supreme Court issued an order which permitted trial courts to broadcast court proceedings to online platforms like YouTube.[13]

This article attempts to answer the question of whether such an action was necessary. Did this rare confluence of events (a pandemic, mixed with an executive stay-at-home order, sprinkled with the far-reaching capabilities of the world wide web) require the Indiana Supreme Court to rescind its ban in order to ensure public access to court proceedings? I submit the answer is no. There is preexisting protocol in Administrative Rule 14 for how to deal with absent parties, which could have been applied to non-party participants like the general public and the media.[14] Moreover, Rule 2.17 has consistently stood for the proposition of providing access while simultaneously tempering the quantity of viewers.[15] Similarly, arguments that the Sixth Amendment's public trial clause requires the suspension of Rule 2.17 must also fail because that clause has never been about giving the public access to court proceedings, but about giving the defendant adequate access to the public.[16]

To analyze this question, Part I will review the history of Rule 2.17 of the Indiana Code of Judicial Conduct. This will include an analysis of how the American Bar Association (ABA), the Supreme Court of the United States (SCOTUS), and Indiana appellate courts have shaped the rule as it exists today. This history will demonstrate that the suspension of Rule 2.17 goes against the rationale behind its creation, which was to minimize the adverse impacts of the nation's gaze. Part II will explore how Administrative Rule 14 could have been implemented to restore transparency in judicial proceedings. Part II will also review case law that rebuts the storyline that even if some were able to attend court proceedings, those who were excluded or unable were harmed. Finally, Part III will conclude with a discussion of the Indiana Supreme Court's Administrative Rule 17 Order, its likely origins, and its longevity.

I. HISTORY OF RULE 2.17

A. American Bar Association

1. 1924 – ABA creates first Canons of Judicial Ethics

The first time the ABA considered a code of judicial conduct was not because of publicity about what was going on inside a courtroom, but because of the publicity of a judge outside the courtroom.[17] United States District Court

12. *See In re Admin. Rule 17*, *supra* note 8.

13. *Id.*

14. *See infra* Part II, section b.

15. *See* discussion *infra* Part II.

16. *Id.*

17. *See generally* AM. BAR ASS'N, *About the Commission, Background Paper*, https://www.americanbar.org/groups/professional_responsibility/policy/judicial_code_revision_pr

Judge Kenesaw Mountain Landis grabbed the attention of legal scholars after he accepted the role as Major League Baseball's (MLB) new commissioner.[18] Landis's role was to regain the public's confidence in baseball after the eight Chicago White Sox players were accused of fixing the 1919 World Series.[19] Even though the players were acquitted of all criminal charges, Landis decided the only way to remove the appearance of wrongdoing was to permanently ban the players from professional baseball.[20]

For his efforts, Landis was widely praised as the saving grace of baseball.[21] His compensation also demonstrated MLB's appreciation. As a baseball commissioner in 1924, Landis made $42,500 per year.[22] His federal judicial salary paled in comparison at only $7,500.[23] Even as his private sector peers showered him with praise, his public sector colleagues quickly cut the spigot.[24] The legal community may have thought that Landis was spending a large amount of time on the baseball diamond and not enough time on the bench, but an investigation by the attorney general revealed that was not the case.[25] Nevertheless, the ABA moved to sanction him.[26] Such a sanction, though, was difficult because the ABA could point to no specific law, rule, or policy that Landis had broken.[27] The ABA issued an admonishment which said:

> [T]he conduct of Kenesaw M. Landis in engaging in private employment and accepting private emolument while holding the position of a Federal Judge and receiving a salary from the Federal government, meets with our unqualified condemnation, as conduct unworthy of the office of Judge, derogatory to the dignity of the Bench, and undermining public confidence in the independence of the judiciary.[28]

This language acknowledged that by maintaining his commissioner status he gave the impression that he was not given precedence to his judicial duties. Moreover, given that his commissioner salary was almost six times his judicial salary, the ABA reasoned it gave the appearance that Landis might have been

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oject/background/ [https://perma.cc/6A7H-7NK2] (last visited May 24, 2020) [hereinafter *Background Paper*].

18. *Forty-fourth Annual Association Meeting*, 7 A.B.A. J. 470 (1921).

19. Shayna M. Sigman, *The Jurisprudence of Judge Kenesaw Mountain Landis*, 15 MARQ. SPORTS L. REV. 277, 284 (2005).

20. *Id.*

21. *Id.*

22. *Background Paper*, *supra* note 17.

23. *Id.*

24. Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1923 (2010).

25. *Id.*

26. *Forty-fourth Annual Association Meeting*, *supra* note 18.

27. *Id.* at 477; *see also* McKoski, *supra* note 24.

28. *Forty-fourth Annual Association Meeting*, *supra* note 18, at 477.

letting his financial interest interfere with his judicial duties. Hauntingly, just as Landis punished the eight acquitted baseball players for appearances detrimental to baseball, the ABA sanctioned Landis for appearances detrimental to the judiciary.

2. 1935 – *State v. Hauptmann* agitates the ABA

The trial of Bruno Hauptmann also inspired the ABA to amend the Code of Judicial Conduct. *State v. Hauptmann* involved the kidnap-murder of the Lindbergh baby.[29] The kidnapping of the famous transatlantic aviator's baby occurred on March 1, 1932; the accused, Richard "Bruno" Hauptmann, was indicted in October 1934; and the trial began in January of 1935.[30] This case caught the attention of legal scholars due to the carnival-like atmosphere of the court proceedings. Exterior cameras recorded swarms of citizens moving like schools of fish toward the courthouse entrance, all hankering for a chance to sit courtside.[31] Some estimate that over 20,000 onlookers—including stage and screen actors, United States Senators, and celebrities—lined the streets of Flemington, New Jersey.[32] The inside of the courtroom was described as a dark, overcrowded, poorly ventilated room buzzing from the not-so-subtle whispers of those in the gallery.[33] Some accounts recall there were, "141 press reporters and photographers, 125 telegraph operators, and 40 messenger boys . . . in the courtroom at one time."[34] Interior cameras can be seen investigating each juror's reactions to witness testimony.[35]

The question for the ABA was whether Mr. Hauptmann could receive a fair trial given the circumstances.[36] While they answered in the negative, Mr. Hauptmann was nevertheless convicted and sentenced to death.[37] He would immediately file an appeal with the New Jersey Court of Appeals but find that they were unsympathetic to his plight.[38] In affirming Hauptmann's conviction, the opinion acknowledged that there were outbursts from non-parties and that messengers were "going to and fro" during the proceedings, but insisted that it

29. State v. Hauptmann, 180 A. 809, 813 (N.J. 1935), *cert. denied*, 296 U.S. 649 (1935).

30. *Id.*

31. *Charles Lindbergh – The Trial*, A&E TELEVISION NETWORKS, LLC., https://www.biography.com/video/charles-lindbergh-the-trial-22736451947 (last visited May 25, 2020).

32. CHARLOTTE A. CARTER, MEDIA IN THE COURTS (1981).

33. *Charles Lindbergh*, *supra* note 31. For other descriptions of the courtroom, see Daniel Stepniak, *Technology and Public Access to Audio-Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions*, 12 WM. & MARY BILL RTS. J. 791, 793 (2004).

34. *Charles Lindbergh*, *supra* note 31.

35. *Id.*

36. *See* Richard B. Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14, 20–21 (1979).

37. Louis M. Seidman, *The Trial and Execution of Bruno Richard Hauptmann: Still Another Case That Will Not Die*, 66 GEO. L.J. 1, 2 (1977).

38. State v. Hauptmann, 180 A. 809 (N.J. 1935).

was "not unusual at the trial of a case of great public interest, and in a crowded court room."[39] Hauptmann appealed to the Supreme Court of the United States, but they denied his writ and he was executed on April 3, 1936, by electric chair.[40]

3. 1937 – ABA adds Canon 35

Following the *Hauptmann* trial, the ABA lamented its disdain for the courtroom shenanigans by adding Canon 35.[41] The rule stated that:

> Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, 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.[42]

4. 1952 – ABA amends Canon 35

The next substantive alteration to Canon 35 came in 1952 when the ABA added language that also prohibited the televising of court proceedings.[43] Nevertheless, these were just rules promulgated by the ABA, which meant they were persuasive, but not yet binding on the states.

B. Supreme Court of the United States

1. 1965 – Estes v. State of Texas

After the ABA contributed to the conversations on cameras in the courtroom, the Supreme Court of the United States would join the canticle in *Estes v. Texas*. In *Estes*, the Court overturned the fraud conviction of Texas rancher Billie Sole Estes, holding that allowing cameras in the courtroom and the televised nature of the legal proceedings deprived Estes of his right to a fair trial.[44] Estes had a 40-million-dollar empire based on his production of cotton, grain, fertilizer, and his real estate dealings.[45] Unfortunately, a series of

39. *Id.* at 827.

40. Seidman, *supra* note 37.

41. Charles M. Lyman, *Courts, Communications and Canon 35*, 46 A.B.A. J. 1295 (1960).

42. *Canons of Judicial Ethics*, 62 ANN. REP. A.B.A. 1123, 1134–35 (1937).

43. *Proceedings of the House of Delegates: 1952 Annual Meeting (cont.)*, 38 A.B.A. J. 1062 (1952). The amendment also included a note permitting the broadcasting or televising of naturalizations proceedings. *Id.*

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

45. Robert D. McFadden, *Billie Sole Estes, Texas Con Man Whose Fall Shook Up Washington, Dies at 88*, N.Y. TIMES (May 14, 2013),

unflattering newspaper articles in 1962 revealed that many of his business ventures were fraudulent.[46] His case received so much attention because it was linked with fraud through the Internal Revenue Service and the United States Department of Agriculture.[47]

During the trial, Estes's attorney argued that the presence of cameras would make it difficult for him to consult with his client and render it impossible to maintain the attention of the jury, witnesses, and lawyers.[48] He also emphasized that cameras in the courtroom was not a part of the normal operating practice for the court.[49] He insisted that the inconsistent inclusion of cameras in court proceedings created the negative impression that Estes's trial was somehow different from the others, thereby biasing the jury against Estes.[50] The trial court disagreed.[51] The trial court ruled that the taking of pictures and televising would be allowed so long as the cameramen stood outside the railing that separated the trial participants from the spectators.[52] Inopportunely, just like the fertilizer tanks Estes purported to have,[53] the Supreme Court found the trial court's words empty. This was likely due to the fact that while Este's attorney made his argument that the media was serving as a distraction, a cameraman wandered behind the judge's bench and snapped his picture.[54] Ultimately, Estes would prevail as the Supreme Court, in a plurality decision, overturned his conviction citing the stunts and shows put on by the media as a violation of his due process rights under the Fourteenth Amendment to the United States Constitution.[55] In the opinion, Chief Justice Earl Warren described the scene as a, "courtroom . . . filled with newspaper reporters, television cameramen, and spectators."[56] He recalled, "[there were] [a]t least 12 cameramen with their equipment . . . and there were 30 or more people standing in the aisles."[57] A *New York Times* article even reported there was a television van, "big as an intercontinental bus," parked outside the courthouse and that the second-floor courtroom was a "forest of equipment," with cables and wires snaking the floor.[58]

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https://www.nytimes.com/2013/05/15/us/billie-sol-estes-texas-con-man-dies-at-88.html [https://perma.cc/B6FF-KUNM].

46. *Id*.

47. AP News, *Billie Sole Estes Dies at 88; Notorious Texas Con Man in 1960s Scandal*, L.A. TIMES (May 16, 2013, 11:40 AM), https://www.latimes.com/local/obituaries/la-me-billie-sol-estes-20130516-story.html [https://perma.cc/HM6A-E36X].

48. *Estes*, 381 U.S. at 553.

49. *Id*.

50. *Id*.

51. *Id*.

52. *Id*.

53. Associated Press, *supra* note 47.

54. *Estes*, 381 U.S. at 553.

55. *Estes*, 381 U.S. 532.

56. *Id*. at 552–53.

57. *Id*.

58. *Id*.

2. 1966 – Sheppard v. Maxwell

In *Sheppard v. Maxwell*, the Supreme Court held that the Ohio state trial court failed to protect the defendant from the inherently prejudicial publicity that saturated the community and failed to control the disruptive influences in the courtroom.[59] As a result, the Court overturned Sheppard's murder conviction, citing a violation of the defendant's right to a fair trial.[60]

In 1954, Samuel H. Sheppard's wife was found murdered in their Ohio home.[61] Sheppard was convicted of the killing and sentenced to life in prison.[62] After a lengthy appeals process, his conviction was overturned.[63] In the decision, the Court acknowledged the trial court prohibited picture-taking in the courtroom while court was in session, but noted no restraints were put on photographers during recesses, which were taken once each morning and afternoon, with a longer period for lunch. The opinion notes that:

> [t]he courtroom in which the trial was held measured 26 by 48 feet. A long temporary table was set up inside the bar, in back of the single counsel table. It ran the width of the courtroom, parallel to the bar railing, with one end less than three feet from the jury box. Approximately 20 representatives of newspapers and wire services were assigned seats at this table by the court. Behind the bar railing there were four rows of benches. These seats were likewise assigned by the court for the entire trial. The first row was occupied by representatives of television and radio stations, and the second and third rows by reporters from out-of-town newspapers and magazines. One side of the last row, which accommodated 14 people, was assigned to Sheppard's family and the other to Marilyn's. The public was permitted to fill vacancies in this row on special passes only. Representatives of the news media also used all the rooms on the courtroom floor, including the room where cases were ordinarily called and assigned for trial[.] Private telephone lines and telegraphic equipment were installed in these rooms so that reports from the trial could be speeded to the papers. Station WSRS was permitted to set up broadcasting facilities on the third floor of the courthouse next door to the jury room, where the jury rested during recesses in the trial and deliberated. Newscasts were made from this room throughout the trial, and while the jury reached its v[e]rdict.[64]

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59. Sheppard v. Maxwell, 384 U.S. 333 (1966).

60. *Id*.

61. *Id*. at 335–36.

62. Sheppard v. Maxwell, 346 F.2d 707, 709 (6th Cir. 1965), *rev'd*, 384 U.S. 333 (1966).

63. For a general timeline of the trial court, see Sheppard v. Maxwell, 231 F. Supp. 37 (S.D. Ohio 1964), *rev'd*, 346 F.2d 707 (6th Cir. 1965), *rev'd*, 384 U.S. 333 (1966).

64. *Sheppard*, 384 U.S. at 342–43.

In the end, the Court ruled that the blatant and hostile trial coverage by radio and print media, the physical arrangement of the courtroom itself, and the improper collaboration between the prosecution and the media, all combined to inflame the juror's minds against Sheppard, thereby denying him a fair trial.[65]

C. Indiana

1. 1970, 1971, & 1975 – Indiana Debuts Code of Conduct

As the Supreme Court of the United States was handing out its latest Razzie Award[66] for worst courtroom production, Indiana convened a commission to study the operation of its judiciary.[67] One result of this study was the 1970 constitutional amendment that created the singular, seven member, two-titled commission—the Indiana Commission on Judicial Qualifications (JQC) and the Indiana Judicial Nominating Commission (JNC).[68] When operating as the JQC, the commission receives and investigates complaints against all justices and judges of the state, and forwards to the Supreme Court any recommendation for the discipline, removal, or retirement of any justice or judge.[69] The commission functions as the JNC when a vacancy occurs on the Supreme Court or Court of Appeals.[70] In that instance, JNC surveys eligible candidates and submits three qualified nominees to the governor who makes the final selection.[71]

With the formation of these two oversight bodies, Indiana took its first steps to control not only how certain judges were selected, but how all judicial officers were instructed on proper conduct. In 1971, the Indiana Supreme Court solidified their expectations with their first Code of Judicial Conduct.[72] The new Code resembled the 1924 Canons adopted by the ABA.[73] In 1975, the court reorganized the code and incorporated the language that photographs and cameras should not be permitted in the courtroom.[74]

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65. *Id*. at 356–57.

66. *Razzie*, *DICTIONARY.COM*, https://www.dictionary.com/browse/razzie (last visited May 25, 2020).

67. *See generally* Edward W. Najam, Jr., *Merit Selection in Indiana: The Foundation for A Fair and Impartial Appellate Judiciary*, 46 IND. L. REV. 15 (2013).

68. *Id*.

69. IND. ADMISSION TO BAR & DISCIPLINE OF ATT'YS R. 25(I)(B). As to proceedings before the Commission involving the removal of justices of the Supreme Court and judges of the Court of Appeals, see IND. CODE § 33-38-13-1 *et seq*. As to proceedings before Commission involving the removal of judges of superior, probate, juvenile, or criminal courts, see IND. CODE § 33-38-14-1 *et seq*.

70. *See* IND. CONST. art. VII, § 10; IND. CODE § 33-27-3-2(a).

71. *See* IND. CONST. art. VII, § 10.

72. *In Re: Code of Judicial Conduct and Ethics*, __ Ind. 123 (Ind. 1971) (on file with author).

73. *Id*.

74. *New Indiana Code of Judicial Conduct Effective January 1, 1975*, 19 RES GESTAE 7 (1975). *See also* In re Pilot Project for Elec. News Coverage in Ind. Trial Cts., 895 N.E.2d 1161, 1163 (Ind. 2006).

2. 1980 – Willard v. State

Just five years after the Indiana Supreme Court adopted its rules that still and motion pictures should not be broadcast or otherwise televised, *Willard v. State* took center stage. In *Willard*, the court noted that the trial court judge violated the Code of Judicial Conduct by allowing cameras in the courtroom, but nevertheless determined that the proceedings were otherwise without disruption, and therefore, upheld Howard R. Willard's conviction.[75]

In May 1977, Indiana heiress Marjorie Jackson was found murdered. Before her death, the widow of former Standard Grocery Company president, Chester H. Jackson, lost faith in her local bank and started making sizeable withdrawals.[76] As a means of safeguarding her riches, Jackson apparently stored millions of dollars of cash in her Indianapolis home. Unfortunately for her,

> [Willard], together with several other persons, became aware that . . . Jackson kept large amounts of cash in her home and laid plans to obtain it. They broke into the home a number of times and took large amounts of cash. On one occasion, . . . Jackson confronted them, and they shot and killed her. . . . [Willard] and his cohorts set . . . fire [to her home] in an attempt to disguise the robbery and murder of . . . Jackson and to destroy any identifying evidence they might have left in the home.[77]

News reporters were excited the case was going to trial as it was going to be the first major Indiana case in which cameras would be permitted in the courtroom.[78] Before the trial began, the court made its media strategy clear. The court's written orders stated that: from external offices, court personnel would operate the inlayed camera equipment; the media could attach tape recorders to the court's audio system; that at the conclusion of each day the recordings would be copied and disseminated to the media with the understanding that the tapes would only be used after the jury had been selected and sequestered; and that no photographs or filming could take place within the courtroom itself, but that media could only capture any still or motion pictures

75. Willard v. State, 400 N.E.2d 151 (Ind. 1980).

76. Tim Evans, *Murder, Mystery, Missing Millions and More*, INDY STAR (Sept. 19, 2015, 8:04 PM), https://www.indystar.com/story/news/2015/09/19/murdered-heiress-mystery-missing-millions/72491350/

[https://perma.cc/MK4K-FCWU**].**

77. *Willard*, 400 N.E.2d 151.

78. Michael Hartz, *1977: Money, Murder and Cameras in Court: Inside the Infamous Marjorie Jackson Murder Trial*, WRTV (Dec. 7, 2017, 11:59 AM), https://www.theindychannel.com/lifestyle/history/1977-money-murder-and-cameras-in-court-inside-the-infamous-marjorie-jackson-murder-trial [https://perma.cc/7HKW-ANKN].

through a window in the door from the rear of the courtroom.[79] Willard objected to this plan, but the court overruled his motion and proceeded with its agenda.[80]

That decision was short-lived. Shortly after the trial began someone contacted the Indiana Commission on Judicial Qualifications and told them what the judge was doing.[81] As a result,

> [t]he Commission notified [the] judge, by a letter dated December 1, 1977, that the practice of permitting the broadcasting or recording of courtroom proceedings is in violation of Canon 3A(7) of the Code of Judicial Conduct, and advised him that any breach of this Canon would be his responsibility as judge of his court. The letter further informed Judge Wilson that any further violation of this Canon would be considered a major breach of judicial conduct and would be dealt with accordingly.[82]

Willard's defense team quickly discovered that the judge's behavior had been condemned by the JQC and swiftly filed for a mistrial.[83]

> The trial court held that, although the violation did subject him to discipline under the Code of Judicial Conduct, it did not necessarily follow that [] Willard had been prejudiced by the procedure that had been followed to that point. The court found that because the jury was sequestered and did not know of the public dissemination of these proceedings, because the videotaping and photographing was done for the most part in an unobtrusive manner, and because the procedure was generally done in this judge's court and not particularly set up for this trial so as to highlight its importance, this defendant was not prejudiced to the extent that a mistrial should be declared. The court accordingly overruled the motion for mistrial and stopped all videotaping and photographing of the proceedings at that point.[84]

Willard was convicted and, in his appeal, argued that *Estes* established a per se ban on cameras in the courtroom and since his trial court failed to honor that precedent, he should be given a new trial.[85] The Indiana Supreme Court rejected that argument, holding instead that *Estes* stood for the proposition that a defendant's right could be negatively impacted but that it depended on the specific circumstances.[86] The Court distinguished the *Willard* trial from *Estes* by noting that beyond the overwhelming evidence that supported Willard's guilt, none of the harbingers of a crazed media were present in his trial.[87]

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79. *Willard*, 400 N.E.2d at 157.
80. *Id*.
81. *Id*.
82. *Id*.
83. *Id*.
84. *Id.*
85. *Willard*, 400 N.E.2d. at 158.
86. *Id*.
87. *Id*.

Indeed, the record reflects that the jury was sequestered and not privy to the cinematic efforts of the local media. As a result, the Court affirmed Willard's conviction.[88]

3. 1981 – Chandler v. Florida

The *Chandler v. Florida* case is a decision by the U.S. Supreme Court, but it is included in this section discussing Indiana's involvement in the debate over cameras in the courtroom because its conclusion addresses a state's authority on the matter.[89] Specifically, the Court held in *Chandler* that the federal courts exercised no supervisory jurisdiction over state court administrative practices.[90] As a result, litigants are without remedy as it relates to state courts experimenting with cameras in the courtroom. Nevertheless, the opinion held that the lack of such jurisdiction did not leave state court actors without federal redress.[91] Indeed, SCOTUS noted that in almost every case of this sort, there is no litmus test, but rather an elastic standard based on a question of degree. Therefore, *Estes* should not be read to require a per se ban on cameras in the courtroom.[92] Instead, it should reinforce the notion that if when taken together the facts demonstrate the state trial court failed to safeguard the defendant's in-court proceedings from the media's limelight, then a violation of federal due process becomes viable.[93]

4. 1987 – 2013: Pilot Season

By the late 1980s, Indiana had clearly articulated its stance on cameras in the courtroom. The Supreme Court had added Canon 3(A)(7) to its Code of Judicial Conduct,[94] the JQC successfully enforced the prohibition in *Willard*,[95] and in *Chandler* the SCOTUS empowered state supreme courts to enact whatever policies they believed best served their populace.[96] Even amongst these realities, many media executives still auditioned for the chance to premier Indiana trial courts to the public in a meaningful way. This was likely due to the fact that, "[s]hortly after the *Chandler* decision, the American Bar Association revised Canon 3A(7) of its Model Code of Judicial Conduct to

88. *Id*. Willard's case was also affirmed when it went up to the U.S. Court of Appeals for the Seventh Circuit. *See* Willard v. Pearson, 823 F.2d 1141, 1145 (7th Cir. 1987).

89. Chandler v. Florida, 449 U.S. 560, 562 (1981).

90. *Id*. at 582–83.

91. *Id*. at 581.

92. *Id*. at 573.

93. *Id*. at 581.

94. *New Indiana Code of Judicial Conduct*, *supra* note 74. *See also* In re Pilot Project for Elec. News Coverage in Ind. Trial Cts., 895 N.E.2d 1161, 1163 (Ind. 2006).

95. *Willard*, 400 N.E.2d at 157.

96. *Chandler*, 449 U.S. at 582.

permit judges to authorize broadcasting, televising, recording, or photographing civil and criminal proceedings subject to appropriate guidelines."[97]

Even still, the Supreme Court maintained that subjecting trial court participants to television coverage significantly jeopardized their ability to fully concentrate and participate in trial proceedings, and that such a practice endangered the reliability and fairness of Indiana trials.[98] The Court held that line for eighteen years.

> In 1987, a group of news organizations petitioned the Court for an amendment of the Code of Judicial Conduct or for permission to conduct an experimental pilot project, which [the] Court denied because [they] "[did] not perceive that the experiment would lead to the production of new, useful information, as there [were] many experiments being conducted in other states and that data [was] available." In 1992, [the Court] declined a similar request, advising that [they] "continue to be interested in receiving information on the results in other states and in the federal system." [They] likewise considered and declined another such request in 1997 presented on behalf of a coalition of media interests.[99]

Not until halfway through 2006 did the Supreme Court finally greenlight its first pilot project.[100] This may have pleased proponents of the project, but it certainly vexed one of Indiana's five leading jurists. In a nine-page dissent, Justice Brent Dickson eviscerated his learned colleagues by referring to the majority's decision to move forward with cameras in the courtroom as a divergence from commonsense.[101] The court's antagonist bemoaned the sensationalism of court proceedings, lambasted the fallacy that such broadcast could have educational value, and openly mocked the majority's failure to select disinterested program evaluators.[102]

Nevertheless, in the summer of 2006, the pilot project began with recordings to commence in eight trial courts covering each quadrant of the state.[103] At the conclusion of the 18-month trial period, the Indiana Broadcasters Association (IBA) and the Hoosier State Press Association

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97. MOLLY TREADWAY JOHNSON & CAROL KRAFKA, FED. JUD. CTR., ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS 3 (1994). *See generally* Fred Barbash, *ABA Repeals Its 1937 Canon Against Cameras in the Courtroom*, WASH. POST (Aug. 12, 1982), https://www.washingtonpost.com/archive/politics/1982/08/12/aba-repeals-its-1937-canon-against-cameras-in-the-courtroom/2418b074-dbe0-4aac-acf6-ff0b6b71f5b4/; M. Peter Moser, *The 1990 ABA Code of Judicial Conduct: A Model for the Future*, 4 GEO. J. LEGAL ETHICS 731, 731 (1991).

98. *In re* Pilot Project for Elec. News Coverage in Ind. Trial Cts., 895 N.E.2d 1161, 1165 (Ind. 2006).

99. *Id*. at 1163–64.

100. *Id*. at 1161–63.

101. *Id*. at 1163–71.

102. *Id*.

103. *Id*. at 1161–63.

(HSPA) had ninety days to compile their data.[104] On March 27, 2008, they submitted their final evaluation to the Indiana Supreme Court proclaiming the project a success.[105] They noted that most judges, court staff, attorneys, and court participants were unphased by the addition of the cameras in the courtroom.[106] The report details one judge's appreciation for the education value, an attorney's statement of being able to tune out the cameras, and the court staff's ability to work collaboratively with the media.[107]

Notwithstanding the self-aggrandizing comments from the project's proponents—who also happen to be its evaluator—the project based its success on what appears to be statistically insignificant data. The report—which looks like a high schooler's attempt to cheat the page requirement by adding two spaces after each period and double spacing before and after headings—reveals that the camera jockeys who so staunchly advocated for this project only managed to successfully film six court proceedings.[108] Of those hearings was a pretrial conference, a plea hearing, a summary judgment hearing, two sentencing hearings, and one criminal bench trial, but not one jury trial.[109] And, although the Court authorized recordings in seven separate jurisdictions, four of the six recorded proceedings took place in one county.[110] The IBA and HSPA attribute this to the Court limiting the types of situations that could be recorded, and the requirement that the project receive signed consent from every party before filming began.[111] Even still, they concluded that they had received predominately positive feedback and that the Court should look favorably on continuing camera and audio coverage of trial courts."[112]

That recommendation, however, fell on deaf ears. The report was filed in March 2008 and by January 1, 2009, the only official response the Court gave was that they were still considering the issue and had not yet decided on a final course of action.[113] In review, that statement was not entirely true because on September 19, 2008, the Court made a decision and that was to amend the Code

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104. *In re* Pilot Project for Elec. News Coverage in Ind. Trial Cts., 895 N.E.2d at 1162.

105. See Final Evaluation and Summary of the Pilot Project filed on March 27, 2008, in In re *Pilot Project for Elec. News Coverage in Indiana Trial Courts*, 895 N.E.2d 1161 (Ind. 2006) (on file with author).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* The report even says that in May 2007, the IBA and HSPA appealed to the court to modify the program so that they could proceed with recording with just the judge's consent instead of each parities consent, but they were unsuccessful.

112. *Id.*

113. *See* Michael W. Hoskins, *Fate of Courtroom Cameras Still Unknown*, IND. LAW. (Jan. 1, 2009), https://www.theindianalawyer.com/articles/21404-fate-of-courtroom-cameras-still-unknown.; IND. SUP. CT., INDIANA SUPREME COURT ANNUAL REPORT 2007–08 6, https://www.in.gov/judiciary/supreme/files/0708report.pdf.

of Judicial Conduct.[114] This amendment—which did not take effect until January 1, 2009—not only reorganized the Code, but also changed the "should prohibit" language in Rule 2.17, to "shall prohibit" language.[115] Therefore, what previously might have reasonably been interpreted as a recommendation not to include cameras and the like in trial courts, was now a command to obliterate the practice.

Following the 2009 amendment to Rule 2.17, it would be 2012 before a second pilot project was authorized.[116] Given the response to the first pilot, a second seemed unnecessary as the Court's makeup had only changed slightly with the exit of Justice Theodore Boehm and the introduction of Justice Steven David.[117] Justice David maintained Justice Boehm's resistance to the cause and Justice Dickson found himself to be the lone dissenter in the 2012 pilot after Justice Robert Rucker aligned himself with the majority.[118] Justice Dickson, unrelenting in his stance, cited to his 2006 dissent to convey his opposition for the 2012 project.[119]

After another 18-month pilot project, the report—this time from Valparaiso University Law School—found the webcasting of court proceedings had little to no effect on witnesses, judges, attorneys, and other court participants.[120] The report also found that webcasting did not make witnesses less likely to appear for court or motivate them to be anything but truthful.[121] The assessments this time around appeared to be more indicative of scientific backed mechanisms for evaluation. The questions were more objective, and the survey allowed participants to respond on a scale from one to six.[122] This modified research method, however, would prove trivial given the project, which was slated to cover three county courts, only covered one court.[123] The final notes of the evaluation state that the program would have been a better success had the courts worked more closely with the media to inform them of the types of cases forthcoming so they could properly advertise to the citizenry.[124] Although it might have been sound advice for a prime-time drama series, the criticism found no audience in the judiciary. This was likely due to the recommendation summoning fears about sensationalizing court proceedings

114. *See* Order Amending Code of Judicial Conduct, No. 94S00-0809-MS, (Ind. Sept. 19, 2008), *available at* https://www.in.gov/judiciary/2791.htm [https://perma.cc/J9C5-XNX9].

115. *Id.*

116. *See* In Re Pilot Project for Webcasting Lake County Circuit and Superior Divisions 2 and 6, No. 94S00-1201-MS-46 (Ind. 2012) (on file with author).

117. *Id.*

118. *Id.*

119. *Id.*

120. In Re Pilot Project for Webcasting Lake County Circuit and Superior Divisions 2 and 6, No. 94S00-1201-MS-46 (Sept. 20, 2013) (Report to Indiana Supreme Court re: Real Court Webcasting) (on file with author).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

for the benefit of spectators. Speculation aside, what is known for sure is that following the September 20, 2013, report, Rule 2.17 endured.

5. 2016 – 2017: Tweeting in the Court

The next time broadcasting was broached by the Court would not be until the 2016 *Compton v. State* opinion.[125] In *Compton*, the Court of Appeals of Indiana (COA) rejected the defendant's claim that the trial court violated his due process rights by allowing the media to post live updates of his trial via the social media platform Twitter.[126] In this case, Christopher Compton was found guilty but mentally ill on three counts of murder after he started a fire that killed his former girlfriend, her daughter, and another person.[127] After being sentenced to 200 years, the COA affirmed the trial court's decision.[128] In their ruling, they did not address whether Tweeting live updates was considered broadcasting under the Code of Judicial Conduct.[129] Instead, they held that even if live tweeting was broadcasting, Mr. Compton failed to prove that such an action was prejudicial.[130] The Court reinforced this claim by noting that the evidence against Compton was overwhelming and that

> prior to trial, the trial court instructed the jury not to receive information about the case from any source, including internet sources; the jury was sequestered during the Twitter discussion; the trial court instructed the media not to Tweet in a manner that would disrupt proceedings; the trial court instructed the attorneys to notify their respective witnesses not to use Twitter until after they testified; and there [was] no evidence any witnesses or jurors viewed any Tweets pertaining to the trial.[131]

The Indiana Court of Appeals handed down its decision on August 24, 2016,[132] the Indiana Supreme Court denied transfer on November 22, 2016,[133] and by January 1, 2017, the Commission on Judicial Qualifications added its voice to the now three-part harmony.[134] In its four-page advisory opinion, the Commission adopted the same view as the court in *Compton* by concluding that posting updates live on Twitter did not constitute broadcasting.[135] The

125. Compton v. State, 58 N.E.3d 1006 (Ind. Ct. App. 2016).

126. *Id.*

127. *Id.* at 1009.

128. *Id.* at 1013.

129. *Id.* at 1011.

130. *Id.*

131. *Compton*, 58 N.E.3d at 1011–12.

132. *Id.* at 1012.

133. Compton v. State, 64 N.E.3d 1205 (Ind. 2016).

134. Indiana Judicial Ethics Advisory Opinion # 1 - 17, 2017 WL 1193226 (IN Comm. Jud. Qual. 2017).

135. *Id.*

Commission did, however, distinguish appropriate tweeting by delineating specific functions within the social media platform.[136] Specifically, the opinion notes that broadcasting is not tweeting except in those limited situations when a user transmits video or audio of court proceeding or provides a link to videotaped court testimony.[137] Nonetheless, the Commission notes that "a judge continues to act within the spirit of the Code of Judicial Conduct if he or she imposes reasonable restrictions on how and when an individual may use Twitter or other electronic communication tools during courtroom proceedings."[138]

6. 2017 – The Closing Act: *WPTA-TV v. State*

The most recent tussle with Rule 2.17 did not concern broadcasting during a hearing like the progeny of cases before it. In *WPTA-TV*, the court held Rule 2.17 not only permits a trial court to prohibit the broadcast of live hearings, but also to prohibit the broadcast of hearings after they had concluded.[139] In *WPTA-TV v. State*, Dr. John Mathew was charged with rape, but ultimately pleaded guilty to two counts of sexual battery against a former employee.[140] He was sentenced to two years of home detention and required to register as a sex offender.[141] A news station submitted a request for the audio of the hearing so that they could air it on television.[142] The court granted the request but included a specific prohibition on broadcasting the audio.[143] The news station filed an appeal arguing that the trail court could only prohibit broadcasting of contemporaneous testimony and that an after the fact restriction was improper.[144] The COA found

> WPTA–TV's interpretation of [the rule] too narrow. [They held that] [p]ermitting the audio of a proceeding to be broadcast to the public in general by way of any type of media, would have an intimidating impact, not only on the behavior of the witnesses and other actors – causing possible fear and reluctance to testify – but also on the openness and candidness of any trial testimony. [As a result,] [they] perceive[d] no difference between the effect of broadcasting a hearing *ex post facto* versus the contemporaneous dissemination of the proceeding.[145]

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136. *Id.*

137. *Id.*

138. *Id.*

139. WPTA-TV v. State, 86 N.E.3d 442, 444 (Ind. Ct. App. 2017).

140. *Id. See also*, Olivia Covington, *TV Station Challenging Ban On Airing Court Audio*, IND. LAW. (July 11, 2017), https://www.theindianalawyer.com/articles/41273-coa-calls-for-guidance-on-social-media-use-during-criminal-trials [https://perma.cc/2CTM-MU8N].

141. *WPTA-TV*, 86 N.E.3d at 444.

142. *Id.*

143. *Id.* at 444–45.

144. *Id.*

145. *Id.* at 447.

This ruling reinforced the idea that it was not the words the Court was attempting to shield from the public, but rather the physical likenesses and auditory reverberations of a participant's voice. The Court spoke more directly to this idea when it dismissed WPTA-TV's first amendment argument. In that argument, the news opined the trial court's order violated the First Amendment to the United States Constitution as it constituted a "gag order" intended to muzzle the media and thus amounted to an impermissible prior restraint on free speech.[146] The COA disagreed, ruling that the trial court's order did not prohibit WPTA–TV from reporting on Dr. Mathew's sentencing hearing and using the transcript of the hearing in its publication or broadcast; rather the trial court only prohibited the dissemination of the audio recording of the hearing to the public at large while leaving all other forms of communication available.[147] And, since the state judiciary narrowly tailored Rule 2.17 to advance its legitimate interest while granting the media access to both audio recordings and transcripts of the proceeding, any argument to the contrary must fail.[148]

WPTA-TV's decision to appeal was even more perplexing in light of *Nixon v. Warner Communications, Inc*.[149] In *Nixon*—the case about President Richard Nixon's Watergate Scandal—the court held, amongst other things, that there was a common-law right of access to judicial records, but that trial courts could place reasonable restrictions on those records.[150] In this case, the media requested copies of the Nixon tapes so they could play them on the nightly news and market them for resale.[151] The trial court denied the request finding that the prejudicial value of their release was too great given the impending appeal.[152] The news stations appealed, and the SCOTUS found that the trial court properly exercised its discretion to limit access to court records for the purpose of safeguarding the defendant's due process rights.[153] The Court reasoned that when the trial court provided everyone in the courtroom with headphones to hear the twenty-two hours of audio and gave them a transcript, which was reproduced in news reports, the public was sufficiently involved in the proceedings to ward off any violations of the Sixth Amendment's guarantee of a public trial and the First Amendment right for the press and public to be present and observe.[154]

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146. *Id.*
147. *WPTA-TV*, 86 N.E.3d at 448.
148. *Id.* at 448–49.
149. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589 (1978).
150. *Id.*
151. *Id.* at 594.
152. *Id.* at 595.
153. *Id.* at 597–611.
154. *Id.* at 589–90.

D. Summary

In reviewing Indiana's score card on accepting cameras in its trial courts, there are three denials, two pilot projects, and still one rule—Rule 2.17. If there is one thing to which the court seems quite indifferent, it is the perception that it is an outlier amongst the other forty-nine states on the issue of cameras in the courtroom. This rule has sustained through the ire of the media and the consternation of defendants who have mounted many a constitutional challenge against it. Nevertheless, the judiciary's sword and shield has been, and will likely continue to be, at the ready to protect its trial courts from joining the spectator sport that is reality television.

II. PUBLIC ACCESS DURING EXECUTIVE STAY-AT-HOME ORDERS

A. Introduction

Although the Court may appear recalcitrant as it relates to cameras in the courtroom, it has been adroit on incorporating technology into the courtroom.[155] From a statewide electronic filing system to telephonic and audiovisual appearances in court, technology has been a predominant figure in Indiana's administration of justice.[156] This section posits that even during a pandemic the courts could have successfully navigated the executive stay-at-home orders without suspending Rule 2.17's broadcasting prohibition.

B. Administrative Rule 14 – Party & Non-Party Accommodations

In addition to the available research produced on using remote technologies,[157] Administrative Rule (AR) 14 confirms that Indiana trial courts could have successfully implemented virtual proceedings during a national emergency without modifying Rule 2.17.[158] AR 14 controls when telephones and audiovisual telecommunication tools can be used in both criminal and civil

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155. *See generally* IND. SUP. CT., INDIANA SUPREME COURT ANNUAL REPORT: JULY 1, 2001–JUNE 30, 2002, https://www.in.gov/judiciary/supreme/files/0102annualrept.pdf [https://perma.cc/CGS2-4T9Z]; IND. SUP. CT., JUDICIAL TECHNOLOGY & AUTOMATION PROJECT (2020), http://www.state.in.us/sba/files/BC_Hearing_2010_022_JTAC_Fund_48050_Narrative.pdf [https://perma.cc/Q47B-Q6BD]; Gary R. Roberts, *Tribute to Justice (Now Professor) Frank Sullivan, Jr.*, 46 IND. L. REV. 169 (2013).

156. INDIANA SUPREME COURT ANNUAL REPORT, *supra* note 155.

157. *See generally* MIKE L. BRIDENBACK, NAT'L ASS'N FOR PRESIDING JUDGES AND CT. EXEC. OFFICERS, STUDY OF STATE TRIAL COURTS USE OF REMOTE TECHNOLOGY (Apr. 2016), http://napco4courtleaders.org/wp-content/uploads/2016/08/Emerging-Court-Technologies-9-27-Bridenback.pdf [https://perma.cc/738J-BMPR]; *see also* Karen Campbell, *Marion County Court System Announces Several Temporary Changes*, WTHR (Mar. 18, 2020, 3:28 AM), https://www.wthr.com/article/marion-county-court-system-announces-several-temporary-changes [https://perma.cc/KR4W-MV9C].

158. *See generally* IND. ST. ADMIN. R. 14.

matters.[159] Different sections of Rule 14 dictate when these remote participation tools may be used in different types of conferences, hearings, and proceedings.[160] The rule's grant of authority would raise many questions in a post-stay-at-home time. The first is whether a rule meant to serve as an accommodation for absent parties would also be available to the general public when their physical presence is forbidden.[161] The second inquiry, assuming the first is answered in the affirmative, would be to what extent must trial courts in criminal prosecutions accommodate the general public's presences in virtual courtrooms. Must trial courts grant access to everyone who seeks it, or can they limit the number of attendees? And, if the trial court can implement such limitations, will it nevertheless be subject to reversal for violating a defendant's Sixth Amendment right to a public trial for those who were excluded?

AR 14(C)(2)(e) suggests the answer to the first query is yes. This rule states that "[t]he use of telephonic or audiovisual technology in conducting hearings and proceedings shall in no way abridge any right of the public."[162] Therefore, if a court conducts remote proceedings in virtual courtrooms, then the general public has a right to be present. The answer to the second question is that virtual courtrooms would be limited based on the capacity of the online platform. Initially, this may seem at odds with our understanding of the infinite nature of the world wide web. Nevertheless, virtual meeting platforms do limit the number of individuals in any given meeting depending on the subscription type.[163] This restriction is commonsensical as it is akin to occupancy limits set for physical spaces. Most jurisdictions have some capacity limits placed on their physical spaces by fire safety codes. Once capacity is reached, further entry is denied. However, denying a citizen entry into the courtroom does not translate into a violation of the defendant's right to a public trial. Recall, in *Hauptmann* the courtroom was filled to the brim and the streets chockfull of news reporters and passersby, and SCOTUS did not rule that Mr. Hauptmann was denied due process because they were excluded.[164] Quite the opposite, SCOTUS held, due to the legions of spectators and their free reign in the courtroom, Mr. Hauptmann's trial was void of the fairness and impartiality required by the Constitution.[165]

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159. C.S. v. State, 131 N.E.3d 592, 601 (Ind. 2019).

160. *Id.*

161. For details on the Governor's stay-at-home order, see 2020 Indiana Executive Order No. 20-08, *supra* note 1.

162. *See* IND. ST. ADMIN. R. 14(C)(2)(e).

163. *See generally Zoom Meeting Plans for Your Business*, ZOOM, https://zoom.us/pricing (last visited May 28, 2020) [https://perma.cc/XGZ9-H3CM]; *What is the Maximum Number of Participants in a Webex Session or Call?*, CISCO WEBEX, https://help.webex.com/en-us/WBX26731/What-is-the-Maximum-Number-of-Participants-in-a-Webex-Session-or-Call (last visited May 28, 2020) [https://perma.cc/X4T4-CMC5].

164. *See generally* State v. Hauptmann, 180 A. 809 (N.J. 1935), *cert. denied*, 296 U.S. 649 (1935).

165. *Id.*

Justice Marshall Harlan II's concurrence in *Estes vs. State of Texas* galvanizes this idea. In his opinion he highlighted that the public trial mandate was instituted because it embodied a view of human nature that judges, lawyers, witnesses, and jurors would perform their respective functions more responsibly in an open court than in secret proceedings.[166] Therefore, the right to a public trial is not one belonging to the public, but one belonging to the accused.[167] He went on to state that:

> [T]he public-trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats. The guarantee will already have been met, for the "public" will be present in the form of those persons who did gain admission. Even the actual presence of the public is not guaranteed. A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process. It does not give anyone a concomitant right to photograph, record, broadcast, or otherwise transmit the trial proceedings to those members of the public not present . . . .[168]

The SCOTUS reaffirmed this belief in its *Nixon v. Warner Communications, Inc.* decision. In *Nixon* the Court held that the Sixth Amendment to the United States Constitution does not require that a trial be broadcast live or on tape to the public.[169] The requirements of a public trial are satisfied by the opportunity for both the public and the press not only to attend the trial but to report what they observe.[170]

The Indiana Supreme Court also chimed in on this point in their *Van Orden* decision. In *Van Orden v. State*, Julie Van Orden was charged and convicted in the 1980 murder of former Evansville Mayor Russell G. Lloyd, Sr.[171] Prior to trial, she filed a motion to televise the proceedings, which was denied by the trial court.[172] In her appeal, she contended that she was denied a fair and public trial due to the failure of the trial court to televise her proceedings.[173] In rejecting her position and affirming her conviction, the Indiana Supreme Court cited to the *Nixon* case.[174] They held that since the defendant was tried in a courtroom that was open to the public and the press to attend and to publish or report on what they observed, her Sixth Amendment rights were properly attended.[175]

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166. Estes v. Texas, 381 U.S. 532, 587–89 (1965).
167. *Id.*
168. *Id.*
169. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 610 (1978).
170. *Id.*
171. Van Orden v. State, 469 N.E.2d 1153, 1155 (Ind. 1984).
172. *Id.* at 1157.
173. *Id.*
174. *Id.*
175. *Id.*

C. Summary

Although some have voiced transparency concerns with virtual courtroom,[176] the dimensions of an online setting can increase courtroom viewership beyond conventional means. The public no longer has to leave their homes to see what their courts are doing; they must simply enter cyberspace. Thus, public access seems to be magnified by virtual courtrooms instead of diminished by them.

III. INDIANA SUPREME COURT EMERGENCY INTERVENTION

The case law discussed in the previous section suggests the Supreme Court could have successfully operated a virtual courtroom without modifying Rule 2.17.[177] Still, about a month after the stay-at-home order was instituted, the Court temporarily lifted the ban on broadcasting.[178] Court documents prove that throughout the pandemic the Supreme Court relied on other jurisdictions in reaching decisions on best practices for Indiana.[179] As a result, the temporary amendment likely stems from several rationales.

First, had the ban not been lifted trial courts would have been responsible for managing each of the meeting participants.[180] Admittedly, this problem seems imagined given trial courts are at all times responsible for maintaining order and decorum.[181] The difference, however, lies in the venue. For in-person meetings, the courthouse is familiar territory for a judge. In addition to a judge's awesome contempt powers,[182] they have the imposing nature of the bench, the armed sheriff's deputies, and entry into the bar to help regulate behavior. Online meetings lack some of that gravitas, thereby making the court less foreboding.

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176. *See generally* Bridget Murphy, *Advocates: Public Access to Virtual Courtrooms Worrisome as NY Expands Electronic Proceedings*, NEWSDAY (Apr. 11, 2020, 2:51 PM), https://www.newsday.com/news/health/coronavirus/coronavirus-nassau-courts-1.43782179 [https://perma.cc/5SA5-DXWQ].

177. *See* discussion s*upra* Part II.

178. In re Admin. Rule 17 Emergency Relief for Indiana Trial Courts Relating to 2019 Novel Coronavirus (COVID-19), 142 N.E.3d 910 (Ind. 2020).

179. The Court explained that it utilized many other states decisions in determining best practices for the state of Indiana. *See generally* IND. SUP. CT., OFF. OF JUD. ADMIN., RESUMING OPERATIONS OF THE TRIAL COURTS: COVID-19 GUIDELINES FOR INDIANA'S JUDICIARY 4 (2020), https://www.in.gov/judiciary/files/covid19-resuming-trial-court-operations.pdf [https://perma.cc/7CWE-2NL2].

180. *Zoom Meeting Plans for Your Business*, *supra* note 163. Zoom is the example because most Indiana courts used Zoom during this pandemic. *See* IND. OFF. OF JUD. ADMIN., *Tips for Attending Remote Court Hearings*, IND. SUP. CT. (May 6, 2020), https://www.in.gov/judiciary/files/remote-hearings-tips.pdf [https://perma.cc/WL6P-66QS].

181. *See* IND. ST. CODE OF JUD. CONDUCT R. 2.8(A).

182. For a review of the court's contempt power review, see IND. CODE § 34-47-2-1 to § 34-47-2-5 (direct contempt of court); IND. CODE § 34-47-3-1 to § 34-47-3-8 (indirect contempt of court).

Consequently, judges have to become proficient at deploying corrective measures in a space in which they too are unfamiliar. And, given the vulgarity displayed in some public meetings due to a failure to control the virtual setting,[183] the Court likely opted for the one-way transmission benefits of broadcasting.

Secondly, as outlined in its April 2020 order, the amendment served to accommodate the public's access to non-confidential court proceedings while the state was on lockdown.[184] The Court, nevertheless, reaffirmed that the other provisions of Rule 2.17 were to remain in full effect and that trial courts were charged with reminding viewers of those requirements at the beginning of each session.[185] This willingness to go above the norm is in line with other Indiana practices designed to better serve its citizens.[186]

CONCLUSION

The Court's treatment towards those who wish to advance cameras in the courtroom has been both inviting and dismissive. Whether this pandemic is a propitious moment for changing Rule 2.17 has yet to be fully seen. The temporary modification may be the first step to altering a seemingly steadfast rule. The Court's May 13, 2020, Order contributes to this idea as it expanded the scope of the April 13, 2020, Order.[187] Nonetheless, the Court's "Resuming

183. *See generally* Taylor Lorenz, *'Zoombombing': When Video Conferences Go Wrong*, N.Y. TIMES (Apr. 7, 2020), https://www.nytimes.com/2020/03/20/style/zoombombing-zoom-trolling.html [https://perma.cc/9D3E-HCGU]; Rosanna Xia et al., *USC, School Districts Getting 'Zoom-bombed' with Racist Taunts, Porn as They Transition to Online Meetings*, L.A. TIMES (Mar. 25, 2020, 6:00 PM), https://www.latimes.com/california/story/2020-03-25/zoombombing-usc-classes-interrupted-racist-remarks [https://perma.cc/52RB-ELTD]; Nick Anderson, *'Zoombombing' Disrupts Online Classes at University of Southern California*, WASH. POST (Mar. 25, 2020, 4:15 PM), https://www.washingtonpost.com/education/2020/03/25/zoombombing-disrupts-online-classes-university-southern-california/ [http://perma.cc/UX98-QB4X]; Sophie Davies, *Risk of Online Sex Trolling Rises as Coronavirus Prompts Home Working*, REUTERS (Mar. 18, 2020, 3:11 PM), https://www.reuters.com/article/us-women-rights-cyberflashing-trfn/risk-of-online-sex-trolling-rises-as-coronavirus-prompts-home-working-idUSKBN2153HG [https://perma.cc/2J2J-VVZM]; Mitch Ryals, *Sex Moans, Fart Noises, and Chirping Bird Sounds Interrupt Ward 7 Virtual ANC Meeting*, WASH. CITY PAPER (Mar. 27, 2020, 10:00 AM), https://www.washingtoncitypaper.com/news/loose-lips/article/21124857/porn-interrupts-ward-7-virtual-anc-meeting [https://perma.cc/X9AU-8BV3].

184. In re Admin. Rule 17 Emergency Relief for Ind. Trial Cts. Relating to 2019 Novel Coronavirus (COVID-19), 142 N.E.3d 910 (Ind. 2020).

185. *Id.*

186. See Taylor v. State, 904 N.E.2d 259, 263 (Ind. Ct. App. 2009) for a discussion regarding greater protections for search and seizures in Indiana, and Hughley v. State, 15 N.E.3d 1000, 1004 (Ind. 2014) regarding the heightened summary judgment standard implemented to ensure a litigant has his or her day in court. *See also* Marianne L. Vorhees, *Summary Judgement Motions*, IND. CT. TIMES (Apr. 1, 2019), https://indianacourts.us/times/2019/04/summary-judgment/ [https://perma.cc/ZSP8-ENXZ].

187. In re Admin. Rule 17 Emergency Relief for Ind. Trial Cts. Relating to the 2019 Novel Coronavirus (COVID-19), 142 N.E.3d 910 (Ind. 2020).

Operations of the Trial Courts" plan, which was issued on the same day, articulates that there will be a time in which all emergency measures will end and court practices will return to pre-COVID-19 status.[188] It seems, therefore, that as the lights begin to shine in courthouses, they will dim for a third time on the airwaves and remain that way until the next time the Court decides to interrupt our regularly scheduled programing.[189]

188. IND. SUP. CT., OFF. OF JUD. ADMIN., *supra* note 177.

189. On November 15, 2021, the Indiana Supreme Court authorized a new pilot project regarding cameras in the courtroom. *See* In re Order Authorizing Pilot Project to Broadcast Court Proceedings, No. 21S-MS-454 (Ind. 2021).