Committee on the Impact of Wireless Mobile Technologies and Social Media on Court Proceedings

Meeting Agenda

Thursday, June 7, 2012

10:00 AM to 3:00 PM

State Courts Building * 1501 West Washington * Conference Room 119 * Phoenix, AZ

Conference call-in number: (602) 452-3193 Access code: 7002

Item no. 1	**Call to Order** **Introductory comments** **Approval of the April 6, 2012 meeting minutes**	*Justice Brutinel, Chair*
Item no. 2	**Use of social media and the internet by jurors**	*Ms. Rosalind Greene*
Item no. 3	**Jury instructions on use of social media and the internet**	*All*
	Lunch	
Item no. 4	**Policy decisions**	*All*
Item no. 5	**Revisions to Rule 122**	*All*
Item no. 6	**Call to the Public** **Adjourn**	*Justice Brutinel*

Items on this Agenda, including the Call to the Public, may be taken out of the indicated order.

Please contact Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda.

Persons with a disability may request reasonable accommodations by contacting Julie Graber at (602) 452-3250. Please make requests as early as possible to allow time to arrange accommodations.

Please note the date of the next Committee meeting:

Thursday, August 30 2012: 10 a.m. to 3 p.m.
State Courts Building, 1501 West Washington, Conference Room 119, Phoenix AZ

ARIZONA SUPREME COURT
Committee on the Impact of Wireless Mobile Technologies and Social Media on Court Proceedings
Draft Minutes
April 6, 2012

Members present:	Members present (cont'd):	Guests:
Hon. Robert Brutinel, Chair	Karen Arra	Jennifer Liewer
Hon. Janet Barton	David Bodney	Cindy Trimble
Hon. James Conlogue	Joe Kanefield	Theresa Barrett
Hon. Dan Dodge	Robert Lawless	Alicia Moffatt
Hon. Margaret Downie	Robin Phillips	
Hon. Michael Jeanes,	Marla Randall	
by Chris Kelly, proxy	George Riemer	Staff:
Hon. Eric Jeffery		Mark Meltzer
Hon. Scott Rash	Members not present:	Ashley Dammen
	Kathy Pollard	Julie Graber

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1. Call to Order; welcome by the Chair; introductions. The Chair called the first meeting of this Committee to order at 10:05 a.m. The Chair welcomed the members and thanked them for their participation. He noted that the Committee would review issues, including jurors' access to materials that are not in evidence and the presence of cameras in the courtroom, which are not unprecedented but that are again timely because of the development of widespread wireless internet access and ubiquitous video recording devices. The Chair then asked the members to review proposed rules for conducting Committee business.

> **Motion:** A motion was made and seconded that the proposed rules for conducting Committee business be adopted, and the motion carried unanimously. **Wireless 12-001**

The Chair provided an outline of Administrative Order 2012-22. The Chair added that the Chief Justice appreciates the members' interest in addressing the innovative subjects before this Committee. The Chair noted that the Committee is required to submit a report of its recommendations to the Arizona Judicial Council by November 30, 2012. The Chair briefly summarized his judicial service for the members, and each of the members, staff, and others in attendance introduced themselves.

2. Overview of wireless mobile technology and social media. The Chair then invited Jennifer Liewer, the Supreme Court's public information officer, to address the Committee.

Ms. Liewer emphasized the goals of achieving justice in court and protecting the integrity of the judicial process during what has been called a "social media revolution." She proceeded to play a YouTube video with that title. The video stressed a fundamental shift over the past decade in the way people communicate because of the new social media. The shift occurred with the

introduction of i-Pods (2001), Facebook (2004), YouTube (2005), Twitter (2006), i-Phones and Kindles (2007), and i-Pads (2010). This technology has allowed a number of bulky items (such as a telephone, a computer, and audio and video players) to be combined into a single, compact device. Many of these devices also have the capacity to take high quality photographs and digital videos.

The most popular social media sites are free of charge, open rather than private, and vast. Ms. Liewer noted that on Twitter, the quality of the content can be more significant than the initial number of followers, and a single tweet can result in quick and global distribution of a popular message or photograph.

Ms. Liewer outlined positive changes brought about by the new technology and social media. The new devices eliminate the need for litigants to take boxes of paper to the courthouse. Jurors can continue to stay in touch with home and work during jury service. Judges now use i-Pads to review briefs and court records. A recent attorney discipline hearing in Arizona was streamed live on-line to 14,000 viewers, and many followed live tweets of the proceeding from a reporter in the hearing room. A Pima County judge recently allowed a political action group, pursuant to Supreme Court Rule 122, to make a video of a court proceeding for posting on YouTube.

There are also negative implications arising from the use of new technology. Citizen journalists in the courtroom may not accurately report the proceeding. Although Ms. Liewer noted studies have indicated jurors will follow applicable rules when given proper instructions, access by jurors to outside sources of information or opinions may continue to interfere with case outcomes. In response to a question, Ms. Liewer stated that rather than being overwhelming, the variety of new media allows her to better manage time and to stay more engaged with others, and that her use of the new media has become second nature.

Ms. Liewer concluded by noting a risk of inaction. She said that social media is here to stay, and courts must consider and manage its impact on judicial proceedings.

3. Roundtable discussion of member experiences with new technology. Ms. Arra, the Public Information Officer for the Maricopa County Superior Court, stated that the new technology has allowed her to provide increased amounts of information about judicial rulings and court activity to large numbers of media and citizens who are not physically present in the courthouse. She provides breaking news in high profile cases on Twitter, and detailed information on programs such as specialty courts on Facebook. Ms. Arra said that the public now has an expectation that she will cover more rather than just a few courtrooms, and provide even more public relations information. Providing content will continue to take more of her time because individual judges do not post or tweet on the court's social media sites, but instead route public information through her office.

One trial judge said that reporters may tweet from her courtroom, and that she has experienced very few problems with the professional media. She noted that the press has an interest in following court rules because they will repeatedly return to the courthouse. Individuals, on the

other hand, usually are in the courthouse concerning a single case and are less interested in abiding by the rules. Her court deputy has made her aware that some court visitors have taken photographs in court, and she has requested that a visitor delete a photo on at least one occasion. She is concerned about clandestine audio recording of court proceedings, which may be difficult to detect. She shared an experience about a juror who brought a dictionary into the courtroom so she could correctly spell technical terms in her notes of trial testimony. She requests court visitors to turn off their cell phones in the courtroom, but this is to avoid disruption rather than to prevent messaging.

Another judge mentioned that in a case involving gang violence, she ordered that a friend of the defendant stop taking photos of prospective jurors, and the defendant later claimed on appeal that this order caused jurors to be biased. Another member related that a family member took a photograph of a defendant in a jail uniform; a judge ordered deletion of this photo. It is challenging to determine if members of the public are taking photographs in courtrooms where there may be less security, or in any crowded courtroom.

On the subject of social media, a judge mentioned a post-trial motion that contended a juror was untruthful during voir dire based on information counsel later observed on Facebook. Another judge mentioned that he spends considerable time during voir dire on the subject of internet use by jurors; he has excused jurors who have stated that they would prefer on-line information over evidence presented in court, or who have acknowledged that they are so accustomed to internet use that they would not refrain from doing on-line research during trial. A judge raised a question about how frequently he must monitor social media and other websites to assure that his name is not used inappropriately on-line.

None of the members advocated that jurors or other court visitors surrender their electronic devices at the courthouse. Not only would it deprive jurors of the ability to contact work and family; it would also be logistically complex for court staff to maintain and to return hundreds of devices daily. Moreover, separating jurors from their devices in court would not affect the ability of jurors to do internet research on a case once they left the courthouse. The members preferred that judges give jurors instructions that are more meaningful. One judge noted that jurors may do internet research because they might not receive the assistance they request from the court. For example, if a jury asks the court to define a word, a judge's instruction that the jury should give the word its "ordinary and common meaning" may not be particularly helpful.

A number of courts have electronic recording systems, including "FTR" ["for the record"]. FTR recordings requested by members of the public have been subsequently posted on YouTube. The public can edit FTR videos of court proceedings and the on-line versions of these videos can therefore be misleading. In some courts, judges also utilize a court reporter in the event portions of the FTR are inaudible, and both the transcript and FTR are official records. Other courts use the recording only to assist the clerk, and it is not an official record. In municipal courts, parties have requested to record a witness' testimony or a court ruling on an i-Phone, and some but not all judges permit this. Judges universally enforce other rules, particularly the rule about not recording images of jurors.

Parties often present evidence in protective order proceedings of harassment or threats posted on social media sites or received on a smart phone, and parties occasionally want to present video evidence of an accident scene recorded on an electronic device. Certain court websites provide instructions to parties to transfer electronic evidence to a disc or other medium so the court does not need to take the device into evidence.

Ms. Kelly advised that the Maricopa County Superior Court Clerk receives about a thousand electronic filings daily in civil cases. Some filers mistakenly believe that a document is processed at the same instant it is filed, but processing still takes time. A few judges prefer to have paper documents in complex cases. The Clerk will be implementing an "e-file foundation" in a few months that will make electronic filing quicker, cleaner, and easier to navigate.

Mr. Kanefield discussed how i-Pads have affected his practice. He uses his i-Pad for remote tracking of client matters, documents, and other information. He can highlight, bookmark, and annotate documents, and he sends send messages and documents to his office for more extensive editing. One of the State Bar's strategic initiatives this year is to familiarize attorneys with new technology and to increase its use by the legal profession.

Although he has personal preferences for handwriting and for paper, Mr. Bodney advised that the State Bar's initiative is well taken. Mr. Bodney is integrating an i-Pad into his practice, and he is using the device to receive and to transmit information, and for note taking. He added that he was recently in a federal courthouse in the Midwest that prohibited members of the public from bringing their telephones past security.

4. Issues arising from the use of new technology. The Chair identified possible legal authorities that the Committee might consider, including Supreme Court Rule 122, the Arizona Code of Judicial Administration, recommended Arizona jury instructions, the Code of Judicial Conduct, and ethical rules for attorneys. Ms. Randall mentioned a "Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees" that was prepared by the federal Judicial Conference Committee on Codes of Conduct in April 2010. The packet is available at http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/SocialMediaLayout.pdf The Chair then asked the members to identify issues involving the use of new media that the Committee might consider at future meetings.

The discussion turned to juries. If schools stop teaching cursive writing, which some have already done, will the court provide electronic devices to jurors for note taking? Who would "own" the notes in that circumstance? Would jurors be less likely to engage in robust note taking if there was a possibility that the court might not destroy their notes after trial? Will attorneys utilize data mining services to determine if jurors used social media sites to post information concerning a trial while it was in progress, and how would that impact post-verdict motions? How frequently and when should the court admonish jurors about not doing internet research, and will jurors follow the admonition? How effective are admonitions in preventing jurors from doing on-line research over the lunch hour, or at home? Should admonitions advise of potential financial (the cost of mistrial) or other consequences (contempt) if a juror fails to

observe the admonition? What rights to due process would a juror have if the court contemplates a sanction for not following an admonition? Is it more productive for courts to provide jurors with Wi-Fi access than it is to prevent internet access, and if the court provides access, what responsibility does the court have for its misuse?

The members then discussed media. Should courts have different policies for journalists' use of social media and for social media use by other stakeholders? What is the differentiation between a blogger, a citizen blogger, and a journalist, and does Rule 122 apply to all of these, or only to some? Are there significant distinctions between professional "pool" cameras and images taken by individuals using i-Phones? Do judges have the inherent authority to prohibit the use of personal cameras in the courtroom, or should this be the subject of a rule? How should the court deal with special situations, such as taking images of someone who is in a witness protection program? Can an individual courtroom require additional screening for electronic devices in this situation or under other unique circumstances? Do journalists have fundamental rights to bring electronic devices into, and to transmit from, courtrooms? Do domestic relations or other case types require special rules regarding cameras, similar to Rule 122(a)'s provision concerning juvenile proceedings? Should there be prescribed consequences for disruptive use or misuse of electronic devices in court? If most court visitors have the ability to take digital video, how should the court prevent recording in the hallways or lobbies outside the courtrooms?

The members believed that Rule 122 contemplated the use of a single, tripod-mounted camera that would function as a pool for mass transmission. Dozens of individuals attempting to record images on personal electronic devices is a wholly different situation that could be as distracting and disruptive as paparazzi in the courtroom. Although transparency is generally positive, even one camera in the courtroom can affect the way court staff and judges behave. Cameras can embolden some witnesses, and make others more inhibited. Because a trial is a search for the truth, what is the best course of action?

The members also asked whether there should be a court rule concerning tweeting. Should the court allow witnesses to tweet? Can counsel tweet a court ruling, and is Ethical Rule 3.6 instructive on this question? When does tweeting prejudice a judicial proceeding? Should courts facilitate the use of Twitter for attorneys who may need to be in multiple courts at the same time?

Ms. Liewer advised the members that she had taken a photograph of the Committee earlier in the day, which she posted on her Facebook page and displayed for the members. No one in the meeting room knew that she had taken the photograph. What could therefore prevent members of the public from taking photos of judges or other participants in the courtroom? What measures are available to detect clandestine audio or video recordings during court proceedings? Will attempts be made to impeach official records of proceedings by introducing surreptitious recordings?

The members also discussed ethical issues involving attorneys as well as judicial officers. If there is no specific ethical constraint against an attorney looking up potential jurors on Facebook or Google, is it nevertheless unprofessional conduct? While the members have not seen potential

jurors use these sites to find background information on trial attorneys, there have been instances of jurors using these sites to research criminal defendants, and that is problematic. Does E.R. 3.5 cover situations where an attorney's use of social media may be tantamount to an ex parte communication with a judge? Some judges in Arizona are elected; is the use of social media proper in election campaigns? While some judges adopt bright line policies that no one who is a friend on Facebook can appear in their court, some judges have active Facebook pages at the time they take office; following such a bright line policy, especially in a small community, might be challenging. Mr. Riemer encouraged the members to be mindful of basic principles of our judicial system when considering ethical issues.

5. Next steps. The Chair requested staff to organize the issues raised today for further discussion at the next meeting. The members then agreed to schedule the next meetings of this Committee for June 7, August 30, and September 28, 2012.

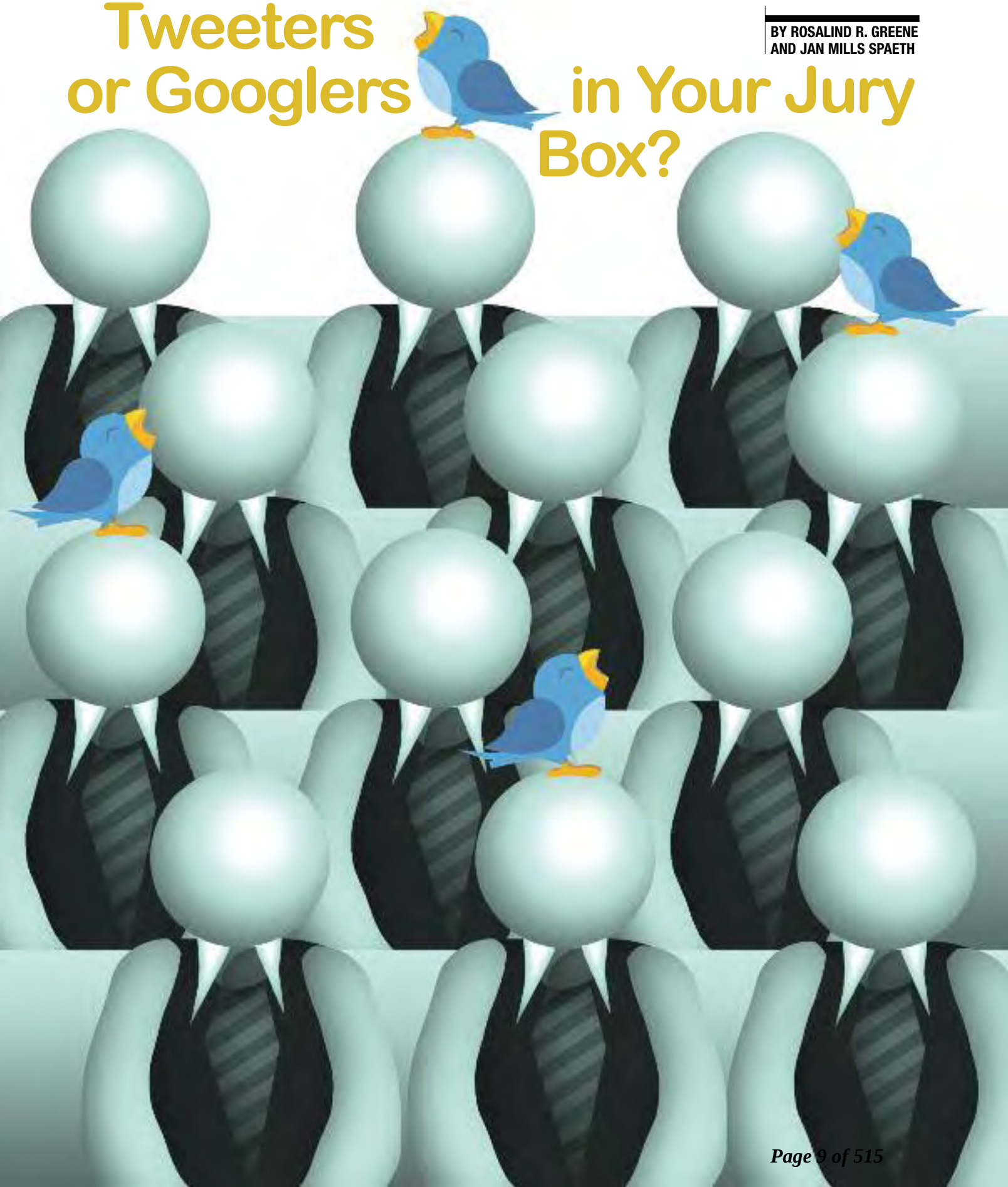
6. Call to the Public; Adjourn. There was no response to a call to the public. The meeting adjourned at 2:20 p.m.

The next meeting date is **Thursday, June 7, 2012.**

DRAFT

Are Tweeters or Googlers in Your Jury Box?

BY ROSALIND R. GREENE
AND JAN MILLS SPAETH



"Guilty until you prove to me otherwise." "I say hang 'em for parking violations and increase punishment from there." "Someone has to do something about these personal injury lawyers." "Hung over for jury duty."

These are just a small sampling of "tweets" found in a 15-minute search at www.twitter.com. Puffing? Perhaps. Exaggeration? Most likely. But wouldn't you want to know if these statements came from your jury pool or seated panel? The information is just a click away. Not all, but many "tweets" are linked to a name and location, and even include a photo of the "tweeter."

Twitter is a rapidly growing, Internet-based communication source. Subscribers send short text messages—"tweets"—to anyone choosing to receive them. These messages transmit through computers or cell phones and are typically used to announce one's activity, such as "went to the movies," or "have jury duty." This newest form of social networking has found its way into the courtroom. Social networking sites and Internet research advancements raise a series of new or at least expanded issues regarding juror communication.

Many attorneys and judges are up to speed with the latest technology and communication media. However, recent survey data indicate that only six percent use Twitter or any other source of microblogging.[1] Therefore, a vocabulary briefing may be in order (see sidebar on p. 40).

Information Moving Out From the Jury Box

The influx of easily accessible and portable communication and research devices affects the jury system in several ways.

Information is being sent out by jurors, responses come back in, jurors are conducting their own Internet research, and attorneys have access to more information about jurors than ever before. In March 2009, attorneys for former Pennsylvania state senator Vincent Fumo sought a mistrial in a five-month federal corruption case because a juror posted updates on Twitter and Facebook during the trial. The judge did not dismiss the juror, and Fumo was convicted on 137 counts. His lawyers plan to appeal. According to the defense motion, the juror posted a message on Facebook that said, "Stay tuned for a big announcement on Monday everyone!" and tweeted, "This is it … no looking back now!" When questioned by the judge, the juror said that his posts were intended to express his thoughts rather than communicate with others.[2]

Within days of the Fumo case, a building products company asked an Arkansas court to overturn a $12.6 million judgment because a juror used Twitter to send trial updates. His tweets included, "I just gave away TWELVE MILLION DOLLARS of somebody else's money" and "Oh and nobody buy Stoam. Its bad mojo and they'll probably cease to Exist, now that their wallet is 12m lighter."[3] The juror insisted that he did not post any substantive messages until after the verdict had been delivered. The judge concluded that although the posts were in bad taste, they did not amount to improper conduct. The defense argued that the tweets showed that the juror was biased against their client, Stoam, and "predisposed toward giving a verdict that would impress his audience."[4]

Some jurors may be looking for their 15 minutes of fame. Cynthia Cohen, President of the American Society of Trial Consultants (ASTC), explained that jurors on big cases may feel empowered because they have a hand in the outcome.

"With Twitter and instant messaging, being first, getting something out immediately is a thrill for them. They get caught up in the excitement instead of following the rules and laws of the legal system. It's definitely a problem."[5] Cohen also noted that the ASTC is working on a handbook on trial ethics that will include juror and social networking.[6]

This electronic communication seems to have an unusual, addictive hold on many. Commenting on the August 6, 2009, social network crash, former ASTC president Douglas Keene observed, "Some 'users' panicked as much as you might have expected from drug addicts. Users were 'jittery,' 'naked,' 'freaked out.'"[7] For such compulsive users, it may be much easier to refrain from discussing the case over dinner than to lay off their technology.

Admonishing jurors not to discuss the case outside the deliberation room is certainly not new. It seems, however, that many jurors do not see blogging, tweeting or posting as communication, or at least they don't consider it to fall within the rubric of traditional admonitions.

In a California felony trial, the judge admonished the jurors orally and in writing to not discuss the case. Nevertheless, a juror (who was an attorney) blogged about the trial, stating, "Nowhere do I recall the jury instructions mandating I can't post comments in my blog about the trial. (Ha. Sorry. will do)." The Court of Appeals vacated the judgment, and the California State Bar suspended the juror.[8]

Another concern is that the advent and popularity of new avenues of communication are increasing the stakes. In the past, the judge's admonition was primarily designed to prevent jurors from discussing the case with family, close friends or co-workers. With Twitter, Facebook, and blogs, the potential impact is raised exponentially. Now a juror can communicate with thousands of people with one click, and the recipients likewise can forward to their groups. In turn, the array of com-

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ments, information and biases coming back is limitless, particularly in high-profile cases. It would be difficult to argue that a juror could remain impartial and untainted upon receiving a barrage of opinions from cyberspace.

Information Coming Into the Jury Box

It is not just outgoing information that causes problems, but also the new propensity for juror research that these handheld portals to information facilitate. Even "good jurors" with no intention of impeding the judicial process can get caught up in the technology.

On Mar. 17, 2009, the front page of the *New York Times* reported that a juror in a federal drug case admitted to conducting Internet research during the case. Moreover, upon questioning the jury panel, the judge determined that eight other jurors had done the same. The judge declared a mistrial after eight weeks of trial. The defense attorney commented, "It's the first time modern technology struck us in that fashion, and it hit us right over the head."[9]

Historically, we have encountered some issues with jurors visiting the scene or conducting amateur sleuthing. Now jurors can click Google Earth and in seconds see the scene in the palm of their hand. Likewise, information on just about any subject is only a Google search away. Motions *in limine* and other pretrial evidentiary rulings will go out the window if jurors conduct their own research.

Curiosity is a powerful driving force. Jurors are generally very astute, and if they sense missing pieces of the puzzle or are left with unanswered questions, the temptation to "cheat" by running a quick Internet search from their couch may be hard to resist. Others may feel compelled to find out as much as possible before they are comfortable rendering a verdict, despite the court's admonition to only consider evidence presented at trial. In such cases, jurors may base their verdicts on excluded or erroneous information.

Even pretrial research by potential jurors can be problematic.

In June, a San Francisco judge had to excuse an entire panel of 600 jurors. During the *voir dire* process, a juror said that he had done Internet research on the case and, when questioned, replied that he hadn't been ordered not to do so. Several more jurors admitted to conducting Internet investigation, as well. Although one recalled some sort of verbal admonishment, the juror didn't understand that it included research on the Internet. The questionnaires did not have a cover sheet with a written admonition. The case prompted the San Francisco Superior Court to propose a new rule requiring jurors to be specifically instructed that, "You may not do research about any issues involved in the case. You may not blog, Tweet, or use the Internet to obtain or share information."[10]

The South Dakota Supreme Court recently upheld an order for new trial in a case where a juror had done two Google searches on the defendant months before his jury duty, and then mentioned the searches in deliberations. In *Russo v. Takata Corp.*,[11] a juror Googled the defendant after receiving a juror summons and questionnaire, but before *voir dire* and being seated on the jury. The summons stated in part: "Do not seek out evidence regarding this case and do not discuss the case or this Questionnaire with anyone."[12] During *voir dire*, attorneys asked if anyone had ever heard of Takata before, and no one answered affirmatively. No one specifically asked about Internet searches, and the juror at issue did not mention his search.

Several hours into deliberations, a juror asked whether Takata had ever been sued. The Googling juror responded that he did a search on Takata but didn't find any lawsuits. Another juror reminded the panel that they were not supposed to consider outside information, but no one reported the breach to the court. The jury returned a verdict for Takata. Plaintiffs learned of the discussion and filed a motion for new trial. The trial judge granted the motion, and the supreme court affirmed, but noted that it was a close case and by its ruling it was not announcing a hard-and-fast rule that all such types of research prior to trial would automatically doom a jury's verdict.[13]

In a footnote, the court commented that the instruction in the jury summons may not have been specific enough for the juror to realize that performing a Google search on the name of the defendant would constitute "seek[ing] out evidence."[14] It suggested that "courts consider using simpler and more direct language in the summons to indicate that no information about the case or the parties should be sought out by any means, including via computer searches." It also recognized, "The potential for inaccuracies and [the Internet's] wide availability also support *voir dire* questions designed to identify any jurors who may have accessed information about the parties on the Internet."[15]

What's Happening in Arizona

Arizona also has seen these technologies disrupt the system.

Pima County Judge Kenneth Lee recently removed a juror for repeatedly tex-

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ting during the trial. The juror explained that his sister had been trying to get him to babysit. There was no indication that the juror was sharing any information about the case, however, the attorneys and judge agreed to replace the juror with an alternate.

Although daydreaming, drowsy or doodling jurors are not new, portable electronic devices present unwarranted competition for a juror's attention. We live in an era in which texting and tweeting occur in the midst of a dinner date, business meeting or class lecture. Why not the courtroom? Moreover, texters are becoming so adept that some can even text from their pockets. We simply cannot assume that jurors even realize that this is not appropriate unless it is clearly specified and reinforced by the courts.

In Maricopa County, a mistrial was called during the penalty phase of a capital murder case. The defendant had been convicted of killing defense attorney Justin Blair in a drive-by shooting. Judge Paul McMurdie specifically directed jurors that they could not tweet, blog or use the Internet in any way to either investigate the case or to communicate about it. After several days of deliberations, a juror informed the judge that he was the only juror favoring death and that the remaining 11 jurors were unduly pressuring him to change his mind. The juror claimed that another juror had accessed the Internet via her cell phone during deliberations to find out what would happen if a unanimous vote was not reached. He further claimed that earlier in the trial, an alternate juror had searched the Internet for elements of the trial.

Subsequently, the judge and attorneys questioned the jurors in detail. According to defense attorney Treasure VanDreumel, it became apparent that the jurors had not used the Internet, as alleged, and the juror who wrote to the judge was just trying to end the deliberations. Ironically, the juror used the judges' explicit instructions regarding the Internet to manipulate the system and cause the mistrial.

Arizona appears to be very progressive in addressing these issues. The Criminal Jury Instructions Committee has drafted Preliminary Criminal 13–Admonition, which is specific and direct about the use of electronic devices, the Internet, and both incoming and outgoing communications during trial. The Admonition, in part, reads as follows:

Proposed Admonition

"Each of you has gained knowledge and information from the experiences you have had prior to this trial. Once this trial has begun you are to determine the facts of this case only from the evidence that is presented in this courtroom. Arizona law prohibits a juror from receiving evidence not properly admitted at trial. Therefore, do not do any research or make any investigation about the case on your own. Do not view or visit the locations where the events of the case took place. Do not consult any source such as a newspaper, a dictionary, a reference manual, television, radio or the Internet for information. If you have a question or need additional information, submit your request **in writing** and I will discuss it with the attorneys.

Do not talk to anyone about the case, or anyone who has anything to do with it, and do not let anyone talk to you about those matters, until the trial has ended, and you have been discharged as jurors. This prohibition about not discussing the case includes using e-mail, Facebook, MySpace, Twitter, instant messaging, Blackberry messaging, I-Phones, I-Touches, Google, Yahoo, or any internet search engine, or any other form of electronic communication for any purpose whatsoever, if it relates in any way to this case. This includes, but is not limited to, blogging about the case or your experience as a juror on this case, discussing the evidence, the lawyers, the parties, the court, your deliberations, your reactions to testimony or exhibits or any aspect of the case or your courtroom experience with anyone whatsoever, until the trial has ended, and you have been discharged as jurors. Until then, you may tell people you are on a jury, and you may tell them the estimated schedule for the trial, but do not tell them anything else except to say that you cannot talk about the trial until it is over.

One reason for these prohibitions is because the trial process works by each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find. As I previously told you, the only evidence you are to consider in this matter is that which is introduced in the courtroom. The law that you are to apply is the law that I give you in the final instructions. This prohibits you from consulting any outside source.

If you have cell phones, laptops or other communication devices, please turn them off and do not turn them on while in the courtroom. You may use them only during breaks, so long as you do not use them to communicate about any matter having to do with the case. You are not permitted to take notes with laptops, Blackberries, tape recorders or any other electronic device. You are only permitted to take notes on the notepad provided by the court. Devices that can take pictures are prohibited and may not be used for any purpose."

In addition to its specificity, this admonition educates the jurors, providing a rationale for the prohibitions. This type of explanation may prove particularly helpful for those jurors who want to do the right thing, but who have a misguided notion that they are helping by conducting their own research. Pending approval by the Board of Governors, many Arizona judges have already implemented similar language into their admonitions.

Even with the proposed Admonition, several issues remain. Who should be allowed to carry electronic devices into the courthouse? How should people be punished for violating a judge's order? Judge Jan Kearney, the presiding judge of the Pima County Superior Court, would like to form a committee to discuss these issues.[16]

The Director of Jury Management, Maricopa County, Mitch Michkowski, Ph.D., offered his thoughts on the matter:

I believe that most trial courts continue to enthusiastically embrace the fortunes of technology, though as in the case in Maricopa County Superior courts, judges understand the impor-

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tance of wanting to avoid juror misuses of cell phones, computers, and other electronic communication devices. Jurors are customarily cautioned by our judges by means of an admonition which is designed to specifically clarify the ground rules that apply. Jurors are expected to observe and follow all judicial instructions in order to avoid unnecessary mistrials and in the vast majority of cases, our jurors have understood and complied admirably.

Possible Solutions

In addition to strengthening the admonition, some courts are also considering restricting the use of, or banning, cell phones, Blackberries, and other electronic devices in the courthouse, or at least in the jury room.

In the San Diego case regarding Jennifer Strange, the mother who died during a radio contest to see who could drink the most water without going to the restroom, the defense was concerned about jurors conducting independent research due to the vast media coverage. They noted that tens of thousands of results come up when Googling "Hold Your Wee for a Wii" or "water intoxication." As reinforcement to his admonition, the judge ordered that the jurors must sign declarations attesting that they won't use "personal electronic and media devices" to conduct independent research or communicate about the case. These declarations are to be made under the penalty of perjury, both before and after the trial.[17]

Curiosity is a powerful driving force. Jurors are astute, and if they are left with unanswered questions, the temptation to "cheat" may be hard to resist.

Although many of the protections against prohibited juror communication must come from the courts, there are several things that a trial attorney can do, according to Susan C. Salmon of Quarles & Brady:

- Ask the trial judge to expand her boilerplate admonition to incorporate an explicit explanation of the policies behind the rule and the consequences of violating it. Be prepared with your own draft admonition and submit it with your jury instructions.
- To the extent that the judge or your jurisdiction permits you to do so, use *voir dire* to (1) educate the panel regarding why they shouldn't do outside research, including Internet research, and (2) enlist the jurors in helping the court enforce that restriction.
- In Arizona, jurors can submit questions to be asked of a given witness. Sometimes those questions may clue you in that jurors are doing improper outside research. Be alert to that possibility, and be prepared to ask the court to inquire.
- Bone up on your e-discovery law, and be prepared to subpoena text message records, laptop hard drives and other electronically stored information if you suspect juror misconduct created an appealable issue.[18]

In addition, trial attorneys will want to become very familiar with the language and terminology associated with social networking so that they will be prepared to conduct appropriate follow-up during *voir dire*. Moreover, they may want to incorporate a line of questioning during *voir dire* to identify jurors who may have problems fol-

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lowing the court's instruction to only consider the evidence presented during trial, or even believe that such an instruction is wrong. Finally, attorneys can monitor online writing during and after trial. One of the best methods is through a feed reader. Google Reader is user-friendly and will search various Internet sites for key words that you input, such as case name, city, jury duty, and any other terms that might make your case identifiable. It then gathers all relevant writings in one convenient place for your review.

The advancements are not all bad for the jury system. In fact, attorneys can use social networks and Internet capabilities to learn more about their prospective jurors. As referenced at the beginning of this article, some "tweets" can tell you quite a bit about jurors' attitudes. Similarly, paying attention to jurors' social networking, blogs and Web sites can tell a lot about their values, attitudes and experiences that would never be fully revealed in *voir dire*.

Even with this upside, attorneys should proceed with caution. Just as juror Internet research may not be credible, attorneys cannot trust that information from a juror's blog, MySpace or Facebook is truthful. Then again, the fact that someone posted inaccurate information may be telling in and of itself.

Attorneys also may want to tread lightly when questioning jurors about their networks. Although blogs, MySpace and Twitter may be public displays, some jurors might feel personally invaded if they sense they are being researched. Attorneys and consultants will want to be careful not to conjure up images of Gene Hackman in *Runaway Jury*, but they need to address the issue.

Beyond juror use, technology is wreaking havoc in other trial areas, as well. Tucson attorney Laura Udall recently learned that a witness had repeatedly texted another witness during trial to tell him how to testify.[19] In Portland, a judge was shocked to discover that a defendant accused of domestic violence was texting the victim while she was waiting in the courthouse to testify.[20] Jurors, witnesses and parties always have found ways to try to circumvent or thwart the system. However, we can expect that increased ease will directly equate to increased activity and need to be prepared.

The issues are new, many and widespread. The solutions are still evolving. Some will have to come from the courts. For now, carefully addressing these issues in *voir dire* can help identify undesirable or problematic jurors, educate the jurors regarding their role, and reinforce the admonition. It will be critical to query jurors on whether they have mentioned jury duty in Twitter messages or blogs. If so, get them to the bench to determine the exact wording of their comments. Ask jurors if they have been reading Internet information on the jury duty experiences of others, and if so, determine what this entailed. Judges must specifically instruct the panel not to discuss the case through e-mails, Twitter messages, blogs, chat rooms, or other Internet options. Without question, new technology and communications call for new courtroom practices.

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Article

***409** GOOGLE, GADGETS, AND GUILT: JUROR MISCONDUCT IN THE DIGITAL AGE

Thaddeus Hoffmeister [FNa1]

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This Article begins by examining the traditional reasons for juror research. The Article then discusses how the Digital Age has created new rationales for juror research while simultaneously affording jurors greater opportunities to conduct such research. Next, the Article examines how technology has also altered juror-to-juror communications and juror-to-non-juror communications. Part I concludes by analyzing the reasons jurors violate court rules about discussing the case.

In Part II, the Article explores possible steps to limit the negative impact of the Digital Age on juror research and communications. While no single solution or panacea exists for these problems, this Article focuses on several reform measures that could address and possibly reduce the detrimental effects of the Digital Age on jurors. The four remedies discussed in this Article are (1) penalizing jurors, (2) investigating jurors, (3) allowing jurors to ask questions, and (4) improving juror instructions. During the discussion on jury instructions, this Article analyzes two sets of jury instructions to see how well they adhere to the suggested changes proposed by this Article. This is followed by a draft model jury instruction.

***410** *As part of the research for this Article, this author conducted one of the first surveys on juror conduct in the Digital Age. The survey was completed by federal judges, prosecutors, and public defenders throughout the country. The Jury Survey served two purposes. First, it was used to determine the extent of the Digital Age's impact on juror communications and research. Second, it operated as a barometer for the reform proposals suggested by this Article.*

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***411** Introduction

The theory of our [legal] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. [FN1]

In the face of ignorance--or curiosity--we "Google." [FN2]

Like most members of society, jurors have been influenced by the Information or Digital Age. [FN3] In some respects, this impact has been positive. Today's jurors, unlike their predecessors, spend far less idle time at the courthouse. This time is reduced because mundane tasks such as watching orientation videos and filling out juror questionnaires can now be completed online. [FN4] Furthermore, by using email, the court can send out the jury summons [FN5] and complete certain aspects of jury selection electronically. [FN6] Another benefit of the Digital Age includes the creation of court websites that provide jurors with useful information about jury service. [FN7]

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However, the ease with which information is disseminated to and accessed by jurors has drawbacks. Just as jurors use the Internet to learn directions to the courthouse, they also learn definitions of important legal terms, [FN8] examine court case files, [FN9] ***412** view photographs of crime scenes, [FN10] and even download medical descriptions of powerful drugs. [FN11] During one trial, nine of the twelve sitting jurors conducted some form of independent research on the Internet. [FN12] In another trial, a juror enlisted a family member in his quest to unearth online information. [FN13]

Advancements in technology also provide jurors new methods by which to communicate with others. [FN14] In some instances, jurors have communicated with other jurors, [FN15] witnesses, [FN16] attorneys, [FN17] and defendants [FN18] through social media websites and email. While sitting in the jury box, jurors have disseminated their thoughts about the trial and received the views of others. [FN19] On certain occasions, this information has ***413** been made available online for the general public to see and comment. [FN20]

Although this Article focuses on the American judicial system, it should be briefly noted that other countries have experienced similar problems from the widespread use of technology by jurors. [FN21] In England, a juror conducted an online poll to determine the guilt or innocence of a defendant. [FN22] In New Zealand, a judge was so troubled by the possibility of jurors going online to conduct research that he initially prevented the media from printing images or names of two defendants on trial. [FN23] Australia recently amended its Juries Act to raise the amount of potential fines assessed to jurors who improperly access the Internet during trial. [FN24]

These new methods of juror research and improper communications, which have led commentators to coin phrases such as the "Twitter Effect," [FN25] "Google Mistrials," [FN26] and "Internet-Tainted Jurors," [FN27] are problematic. Such activities lead to mistrials, which prove quite costly both financially [FN28] and emotionally for those involved in the trial. [FN29] In addition, ***414** improper juror research and communications call into question whether today's jurors can still function in their traditional role as neutral and impartial fact-finders.

In light of the media attention given to this topic, one might quickly conclude that improper juror research and communications are pervasive and growing problems. [FN30] However, beyond anecdotal discussions, there is little academic research or studies to prove this conclusion. [FN31] The dearth of legal scholarship may be due in large part to the fact that (1) the Digital Age is a recent and still evolving era and (2) juror misconduct is historically an under-examined area of the law. [FN32] The academic articles that address this subject primarily focus on the benefits of technology and how to harness it to aid in juror comprehension of the evidence submitted at trial. [FN33] Thus, there is a possibility that despite the high visibility of a few cases, no systemic problem exists.

In an attempt to resolve this question, the author conducted one of the first surveys on jury service in the Digital ***415** Age. [FN34] This "Jury Survey" was sent to federal judges, prosecutors, [FN35] and public defenders to learn how they viewed the impact of the Digital Age on jurors. The questions in the Jury Survey focused primarily on juror research but briefly touched upon juror communications. [FN36]

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Although conducted anonymously, the Jury Surveys were written to distinguish responses from judges and practitioners. Of the responses received, approximately half were from federal judges, and the other half were from either federal public defenders or prosecutors.

The Jury Survey served two purposes. First, it was used to determine the extent of the Digital Age's negative impact on jury service. According to the Jury Survey results, this effect is statistically significant. Approximately ten percent of the respondents reported personal knowledge of a juror conducting Internet research. [FN37] In light of the difficulty of detecting this type of juror misconduct, this percentage probably under-represents the actual number of jurors who use the Internet to research cases. [FN38] The second purpose of the Jury Survey was to receive feedback from those who regularly interact with jurors in criminal trials. For the most part, the Jury Survey respondents agreed with the proposed reforms discussed in this Article. The one noticeable exception was the topic of allowing jurors to ask questions of witnesses, which was met with disapproval by most Jury Survey respondents.

Obviously, a survey of this scope has some limitations. First, it only examined federal courts, not state courts. Second, all of the Jury Survey respondents were in some way affiliated with the federal government, as no actual jurors or private criminal defense attorneys were surveyed. Third, although ***416** every federal district was surveyed, the overall number of responses received was small. [FN39] However, even with these drawbacks, the Jury Survey provides a good snapshot of current trends in the American legal system. In addition, it offers the views of those who are directly confronted with the problems of improper juror communications and research. Many of the responses provided by the Jury Survey respondents are highlighted throughout the Article.

Part I of the Article begins with a discussion of the Digital Age's influence on juror research and communications. [FN40] Here, the Article examines the traditional rationales for juror research. [FN41] The Article then discusses how the Digital Age has created new reasons for juror research while simultaneously affording jurors greater opportunities to conduct such research. This Section also examines how new technology has altered juror-to-juror communications and juror-to-non-juror communications. Part I concludes by analyzing why jurors violate court rules about discussing the case before deliberations or outside of the deliberation room.

Part II analyzes possible steps to limit the negative impact of new technology on juror research and communications. While no single solution exists for these problems, [FN42] this Part focuses on several reform measures that could address, and possibly reduce, the detrimental effects of the Digital Age on the legal process. The four remedies proposed by this Article are (1) penalizing jurors, (2) investigating jurors, (3) allowing jurors to ask questions, and (4) improving juror instructions. During the discussion on jury instructions, this Part analyzes two sets of jury instructions to see how well they adhere to the ***417** suggested changes proposed by this Article. This is followed by a draft model jury instruction.

I. Problem Areas

A. Research

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Although improper juror communications have raised numerous concerns in the Digital Age, [FN43] the issue presently generating the greatest anxiety is juror research. [FN44] While the underlying concept is not new, the methods by which jurors conduct research are. [FN45] Since the late 1990s, jurors, rather than relying solely on the evidence presented at trial, have increasingly turned to the Internet to obtain information about the case on which they sit. [FN46]

Research by jurors is problematic because their verdict must be based on only the evidence offered in court. [FN47] Allowing jurors to decide a case based on outside information "violates a defendant's Sixth Amendment rights to an impartial jury, to confront witnesses against him, and to be present at all critical stages of his trial." [FN48] Unlike evidence presented in court, attorneys cannot cross-examine, question, or object to information discovered by jurors online. As the Third Circuit noted in United States v. Resko, "extra-record influences pose a substantial threat to the fairness of the criminal proceeding ***418** because the extraneous information completely evades the safeguards of the judicial process." [FN49]

This is not to say that jurors must refrain from relying on life experiences to interpret the evidence presented by the parties. [FN50] Rather, jurors are not to make a decision based on outside or extrinsic evidence [FN51] that lacks proper authentication. [FN52] For example, a juror in a recent murder trial in Rhode Island went online to look up the definitions of "manslaughter," "murder," and "self-defense." [FN53] The definitions discovered by the juror, however, were derived from California statutes and case law. [FN54] This juror's actions ultimately led the trial judge to declare a mistrial. [FN55]

The Digital Age, with its advancements in technology, has exacerbated the problem because, unlike traditional research, online research occurs before voir dire, [FN56] during trial, [FN57] and in the midst of deliberations. [FN58] Furthermore, online research, which generally does not attract the attention of others, can be accomplished almost anywhere. Jurors only need Internet access. [FN59] Some might think that online research is easier to detect than traditional research because the court can search a juror's computer or handheld device. But this presupposes that ***419** (1) the court knows to check those items, [FN60] (2) jurors would be amenable to such a practice, and (3) jurors did not access the Internet through public or non-personal means. To better understand and address the modern-day problem of online research by jurors, it is first necessary to take a step back and examine why jurors feel the need to conduct any research at all.

1. Traditional Reasons for Juror Research

Due to the nature of the adversarial system, limitations are placed on the information received by jurors. First, judges act as gatekeepers, controlling the flow of information to the jurors by limiting what evidence they may hear. [FN61] Second, prospective jurors with pre-existing knowledge of the facts in dispute, the parties, or witnesses are generally challenged and dismissed by the attorneys or the judge. [FN62] In choosing today's juries, "ignorance is a virtue and knowledge a vice." [FN63] This lack of information has led to increased juror curiosity and confusion. In addition, it has left some jurors feeling ill-equipped to determine a defendant's guilt or innocence. [FN64]

According to one legal commentator, "There are people who feel they can't serve justice if they don't

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find answers to certain questions." [FN65] These so-called "conscientious jurors" take their role as fact-finders very seriously and aspire to do a good job. [FN66] ***420** But they feel unprepared to render a verdict that in certain instances requires them to decide between life and death. [FN67] Jurors falling into this category often "want to 'solve' the case," and they think more information might help them. [FN68]

The Ohio case of Ryan Widmer demonstrates how far some jurors will go to ensure that they make the right decision. [FN69] In that case, the defendant was charged with drowning his newlywed wife, Sarah, in the couple's bathroom. [FN70] The defense claimed that Ryan found Sarah in the bathtub and immediately called 911 and started to perform CPR. [FN71] However, emergency medical technicians (EMTs), who arrived on the scene shortly after being called, claimed that Sarah's body was dry when they arrived, which supported the government's theory that Ryan drowned his wife and then staged the 911 call. [FN72] A key question in the case was whether a human body could dry between the time Ryan supposedly pulled his wife out of the bathtub and the time the EMTs arrived. [FN73] Several jurors were so concerned about this issue and possibly convicting an innocent man that, after deliberations ended on the first day, they went home, bathed, and then calculated the amount of time it took for their bodies to air-dry. [FN74]

Another cause of juror research is confusion, which stems from a variety of factors. [FN75] First, some of the more modern ***421** crimes that jurors must consider, such as violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) [FN76] or securities fraud, go "well beyond the general knowledge of the layperson." [FN77] Thus, jurors become reliant on the attorneys or the judge to explain the elements and charges. Unfortunately, both attorneys and judges sometimes fail to provide adequate explanations.

Second, some jurors are unclear about words and phrases used at trial that often go undefined by the attorneys or the judge. [FN78] Jurors have been discovered researching medical or legal terms like "oppositional defiant disorder" [FN79] and "distribution." [FN80] In other instances, jurors have turned to the Internet to learn the definitions of uncommon words like "lividity." [FN81] The problem of juror confusion is compounded by the fact that many jurisdictions prevent jurors from discussing the case until deliberations and, even then, only with other jurors who may be equally as confused. [FN82]

Besides being overly conscientious and confused about the facts at trial, some jurors are just plain curious. [FN83] Like most people, they want to know why certain issues went unexamined and why specific witnesses went uncalled. [FN84] Furthermore, jurors are interested in learning about evidence objected to or deemed inadmissible. [FN85] As one Jury Survey respondent noted, "They want to know all the things they think we are keeping from them." [FN86]

***422** 2. Modern-Day Reasons for Juror Research

In addition to the traditional grounds for juror research, the Digital Age has created new opportunities and reasons for jurors to seek information outside of the courtroom. First, in the Digital Age, Internet usage has become increasingly common and popular. [FN87] As a result, more people have grown accustomed to and reliant on it. [FN88] In fact, "going online" to find information has become almost instinctive, something people do without giving it much thought. [FN89] For many, the customary prepa-

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ration for, or follow-up after, meeting a new person, either professionally or socially, is to research that person by "Googling" or "Facebooking" him or her. [FN90] This practice does not necessarily cease because someone is serving as a juror. When jurors initially see the judge, [FN91] parties, [FN92] attorneys, [FN93] and witnesses, [FN94] they want to know more about these individuals, and, to do this, they go online to find information.

Second, the Internet makes research by jurors much easier to accomplish. According to one state bar journal, "Jurors have ***423** the capability instantaneously to . . . look up facts and information during breaks, at home, or even in the jury room." [FN95] If a juror has a question about an issue that arose in court or wants to know more about where the alleged crime took place, she does not have to physically go to the library or crime scene. [FN96] Instead, she merely needs to access the Internet which, compared to other options, is quicker, less onerous, and less likely to be noticed. [FN97]

The ease of obtaining information from the Internet has also led jurors to more readily seek out facts on their own. [FN98] This in turn has made jurors less deferential to the person offering information in court, whether she is the judge, attorney, or witness. [FN99] With the Internet, even a layperson can be an expert--at least for the moment. [FN100]

Another reason for online juror research is the sheer number of news stories about trials, and the longer shelf-life of those stories. Today, even routine cases are now reported or ***424** discussed on the Internet. [FN101] Also, unlike in the past, information on the Internet about the trial or parties does not necessarily go away just because the case is out of the news cycle of the traditional media. This was noted by several legal commentators who wrote that a "year-old article in an out-of-state publication will show up in an Internet search just as easily as a current headline from the daily local paper." [FN102]

Finally, some jurors unwittingly conduct research because the jury instructions are either unclear or outdated. For example, in Russo v. Takata Corp., a juror named Flynn received a jury summons that stated, "Do not seek out evidence regarding this case and do not discuss the case or this Questionnaire with anyone." [FN103] Flynn "did not recognize Takata by name or product line and wondered 'what they did.'" [FN104] Flynn also wanted to know if Takata had been involved in any previous lawsuits. [FN105] Thus, he went online to investigate the company. [FN106]

Flynn's online research never came out during voir dire because the attorneys handling the case did not directly raise the topic with Flynn. [FN107] Later, however, during deliberations, Flynn told another juror that during his Internet research of Takata he did not find any lawsuits against the company. [FN108] Shortly after reaching a verdict in favor of the defendants, Flynn's actions were uncovered, and the trial judge granted the plaintiff's motion for a mistrial based on juror misconduct. [FN109] The defendants appealed to the South Dakota Supreme Court, which affirmed the actions of the trial judge and also stated that "[i]t may well be that Flynn did not realize that performing a Google Search on the names of the Defendants Takata and TK Holdings constituted 'seek[ing] out evidence.'" [FN110]

***425** Unfortunately, the negative impact of the Digital Age on jurors is not limited to online juror research. Juror communications, which will be discussed in greater detail below, has also become a major

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area of concern in the Digital Age. [FN111]

B. Communications

For the purposes of this Article, juror communications occur either among jurors themselves or with outside third parties. Generally speaking, communications by a juror are not an issue if they are unrelated to the trial on which the juror sits. [FN112] But if the communications relate to the trial, problems can arise. This is because most jurisdictions forbid jurors from discussing trial evidence with other jurors prior to deliberations and with non-jurors before reaching a verdict. [FN113] Yet, as with the prohibition on juror research, the restrictions on juror communications are not always followed.

1. Juror-to-Juror Communications

Traditionally, juror communications with third parties have raised more concerns than juror communications with other jurors. [FN114] In fact, some reformers want to allow jurors to discuss the case among themselves prior to the commencement of deliberations. [FN115] Currently, at least four states allow jurors in civil proceedings to discuss the case before the submission of ***426** all evidence. [FN116] Other jurisdictions are considering or experimenting with the idea for criminal trials. [FN117]

Advocates of pre-deliberation discussions argue that they improve juror comprehension and focus the jury once deliberations commence. [FN118] In addition, these proponents believe that it is naïve and unrealistic to think that jurors will refrain from discussing the trial with anyone until deliberations. [FN119] "[T]he urge to talk about the experience of jury duty is a strong one, in part to release the pent-up emotional pressure inherent in the role of juror." [FN120] Thus, to those supporting juror pre-deliberation discussions, it is better that jurors talk with fellow jurors as opposed to family members or other improper third parties.

Nevertheless, most jurisdictions prohibit jurors from talking about the case with other jurors prior to deliberations. [FN121] This rule is in place in order to (1) prevent premature judgments, (2) increase flexibility during deliberations, (3) ensure quality and broad deliberations, (4) decrease juror stress, and (5) maintain open-mindedness. [FN122] A strong belief exists, especially among the defense bar in both civil and criminal matters, that allowing jurors to discuss the case prior to deliberations puts defendants at a decided disadvantage, as they have yet to present their evidence. [FN123] Some also fear that discussions prior to deliberations might ***427** occur outside the jury room and without the presence of all twelve jurors. [FN124]

Historically, the issue of jurors communicating with one another before deliberations received little attention because most courts viewed it as low-level or minor misconduct. [FN125] Although jurors in the past might talk about the case with each other while leaving the courthouse or discuss it during breaks in the trial, these discussions were uncommon occurrences and not considered grave breaches of a juror's duty. [FN126] Thus, for the most part, courts were hesitant to declare a mistrial based solely on jurors discussing the case before deliberations. [FN127] This was especially true if the juror-to-juror communications did not occur in the presence of third parties. [FN128]

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The difference today is the impact of technology. Jurors can now communicate with each other via email and social networking sites. For example, in the corruption trial of former Baltimore Mayor Sheila Dixon, several jurors kept in contact during and after the trial via Facebook despite admonitions by the judge not to do so. [FN129]

These new forms of juror-to-juror communications greatly increase the possibility that the interactions and discussions of jurors will occur outside of the jury room and be made available to third parties. For example, if conducted in an online forum, these communications can provide the general public--including the parties trying the case--access to the inner workings of the jury room and privileged information, such as informal vote counts or details of closed-door deliberations. In the Dixon case, the defense attorneys were able to read the Facebook posts of the jurors. [FN130] This jeopardized not only jury ***428** deliberations but also the integrity of the legal system itself. [FN131] These new methods of communication also demonstrate how juror-to-juror communications can easily and unintentionally become communications to third parties--a much more problematic issue.

2. Juror-to-Non-juror Communications

While strong arguments exist both for and against allowing jurors to discuss the trial prior to deliberations with each other, [FN132] few, if any, would suggest that jurors be allowed to communicate with third parties about the trial prior to verdict. Yet, despite this uniform disapproval, this communication still happens. Of late, the method of juror-to-third-party contact receiving the greatest amount of attention is online communication. [FN133]

For a variety of reasons, courts want to limit juror communications to third parties until a verdict is reached. First, there is concern about maintaining the confidentiality of jury deliberations. [FN134] Having jurors post information online about ongoing deliberations or other jurors would hinder the traditional method of juror decision-making. [FN135] For example, some jurors may not fully participate or might hold back their ***429** true feelings during deliberations if they know that their views will end up on the Internet. [FN136]

Second, juror communications to third parties undermine the notions of due process and a fair trial by providing attorneys with "inside information" into juror decision-making. Consider this real-life scenario involving a juror in Michigan. At the conclusion of the first day of a two-day criminal trial, a sitting juror posted the following on her Facebook account: "[A]ctually excited for jury duty tomorrow. It's gonna be fun to tell the defendant they're GUILTY.:P." [FN137] The Facebook post was discovered by defense counsel's son, who was running Internet searches on the jurors. [FN138] The defense attorney reported the juror, who was removed prior to the start of the second day of trial. [FN139]

However, it is not difficult to envision a different outcome had the prosecutor discovered the information. Also, a different defense attorney may have taken an alternative approach to this problem. Some attorneys might wait for an unfavorable verdict to reveal the Facebook post. [FN140] Other attorneys might not report the Facebook post at all and instead approach the prosecutor about a mid-trial plea deal or

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use the information to revamp their trial strategy. [FN141] As will be discussed in Part II, ***430** information about jurors is rarely subject to the rules of discovery, and attorneys have a very limited ethical duty to report it to the court.

The final concern with juror-to-non-juror communication is that the juror, by communicating with an outside party about the trial, increases the likelihood that the third party will influence the juror's views. [FN142] This is because most communications involve an exchange of words or ideas. This concept is reflected in People v. Jamison, where the court explained why communications between a juror and a third party are restricted: "[T]he real evil the Court's instruction not to discuss the case was designed to avoid . . . [was] the introduction of an outside influence into the deliberative process, either through information about the case or another person's agreement or disagreement with the juror's own statements . . . ." [FN143] Juror online communication to a third party, however, is somewhat different in that, depending on how it occurs, the juror may or may not receive feedback. For example, a Facebook post or a tweet on Twitter does not always garner a response.

To date, the United States Supreme Court has not addressed the issue of individuals making online comments while serving as jurors. However, several state supreme courts and lower federal courts have taken up the topic. One of the first to do so was the Supreme Judicial Court of Massachusetts in Commonwealth v. Guisti. In Guisti, the defendant was convicted of several serious sex-related crimes. [FN144] During the defendant's trial, one of the jurors sent an email to a 900-person LISTSERV and received at least two responses from individuals on the LISTSERV. [FN145] The juror's email read: "[S]tuck in a 7 day-long Jury Duty rape/assault case . . . missing important time in the gym, working more hours and ***431** getting less pay because of it! Just say he's guilty and lets [sic] get on with our lives!" [FN146] Shortly after the verdict, defense counsel learned of the email and filed a motion for post-verdict voir dire of the juror in question. [FN147] The trial court denied this motion, and defense counsel appealed, claiming that the defendant's Sixth Amendment right to a fair trial had been violated. [FN148]

In reviewing the defendant's appeal, the Massachusetts Supreme Court initially remanded the case to the lower court. [FN149] However, it did not do so because of the email, which the court found to be "improper" and in violation of "the judge's order not to communicate about the case." [FN150] Rather, the court remanded the case because of the responses the juror had received from those on the LISTSERV. [FN151] The Supreme Judicial Court wanted the trial court to determine whether these responses constituted external influences. [FN152] Upon remand and voir dire of the juror, the trial court ultimately determined that the responses from the LISTSERV were not improper external influences. [FN153]

Goupil v. Cattell was another case that addressed the issue of improper online communications by a juror. [FN154] Like Guisti, Goupil involved a defendant convicted of a serious sex-related crime. [FN155] However, unlike Guisti, the improper method of juror communication in Goupil was a blog post, not an email. [FN156] Another distinguishing feature of Goupil is that the trial judge conducted a post-trial voir dire shortly after becoming aware of the juror's blog posts rather than waiting until he was directed to do so by the appellate court. [FN157]

In Goupil, the juror's first questionable post, made prior to voir dire, was as follows: "Lucky me, I

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have Jury Duty! Like my life doesn't already have enough civic participation in it, now I ***432** get to listen to the local riff-raff try and convince me of their innocence." [FN158] In another post, made after voir dire but prior to the start of trial, the juror, who happened to be the foreman, wrote, "After sitting through 2 days of jury questioning, I was surprised to find that I was not booted due to any strong beliefs I had about police, God, etc." [FN159]

The defendant in Goupil argued on appeal that the juror's blog constituted prejudicial extrinsic communication with a third party and that the juror was personally biased against the defendant. [FN160] In upholding the defendant's conviction, the federal court noted the state trial court's extensive post-trial voir dire. [FN161] During this voir dire, the trial court determined that no other juror read the blog or was even aware of its existence. [FN162] The trial court also found that the blog posts did not discuss the defendant's case specifically and that the juror did not demonstrate any pre-trial bias. [FN163] The court also analogized the blog to "a personal journal or diary, albeit one that the author publishes to the Web and permits others to read." [FN164] The court stated that the defendant "surely would not claim that the diary constitutes an 'extraneous communication' with third parties of the sort that gives rise to a presumption of prejudice." [FN165]

As these cases illustrate, courts are less likely to disturb the ultimate verdict because of a juror's online comments absent the presence of one of the following factors: (1) the juror discussed details of the trial, (2) the juror demonstrated a pre-trial bias, (3) other jurors saw the information, (4) the posts revealed that the juror was considering facts not admitted into ***433** evidence, or (5) a third party contacted the juror about her comments. [FN166]

3. Reasons for Improper Juror Communications

In some respects, the reasons for improper juror communications and research are similar. Like juror research, some juror communications occur because of a misunderstanding of the judge's instructions. [FN167] In State v. Dellinger, a West Virginia juror never told the trial judge that she interacted with the defendant via MySpace despite being asked during voir dire whether she knew the defendant. [FN168] When the defendant's conviction was later overturned because of the juror's lack of candor, the court asked the juror why she did not reveal that she knew the defendant and had interacted with him on MySpace. [FN169] According to the juror:

> I just didn't feel like I really knew him. I didn't know him personally. I've never, never talked to him. And I just felt like, you know, when [the trial judge] asked if you knew him personally or if he ever came to your house or have you been to his house, we never did. . . . I knew in my heart that I didn't know him. . . . [M]aybe I should have at least said that, you know, that he was on MySpace, which really isn't that important, I didn't think. [FN170]

Many jurors also do not consider or realize that texting, emailing, tweeting, and blogging are prohibited forms of ***434** communication. [FN171] Noted juror expert Paula Hannaford-Agor points out that, "For some, tweeting and blogging are simply an extension of thinking, rather than a form of written communication." [FN172] Not surprisingly, then, jurors continue to communicate with other jurors (prior to deliberations) and with outside parties (prior to the verdict) despite admonitions from judges. [FN173]

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Also, as with online research, some jurors violate the rules on prohibited communications because they have grown attached to the technological advancements brought by the Digital Age. [FN174] For these jurors, going any extended period of time without communicating via a social media website, text, tweet, or blog is a challenge. [FN175] This desire for constant contact is so strong that it can almost be categorized as an "addiction"--one that they cannot give up even when called to serve on a jury. [FN176] Jurors falling into this category are more likely to discuss the case with others. [FN177]

***435** Finally, in other respects, the reasons behind improper juror communications are completely different from online research. For example, some, like the jury foreman in Goupil, feel the need to constantly chronicle their daily activities to the general public. [FN178] This desire by the so-called "Tell-All Generation" to put their lives on display to the world is not shed just because they are called to serve on juries. [FN179] Rather, this change in daily routine may actually increase the appeal to reveal [FN180] because jury duty "can in its own strange way be an escape from the usual rhythms of city life." [FN181]

Regardless of whether the rationale behind improper juror communications is similar or dissimilar to juror research, one thing is certain: The Digital Age has had a significant influence on juror behavior. With respect to juror research, the impact has been almost entirely negative. Save for the opportunity to become more like grand jurors, [FN182] few positive attributes arise from providing jurors with better methods by which to conduct research. Arguably, even the staunchest advocates of the so-called "Active Jury" [FN183] would deem research by jurors detrimental to the legal process.

***436** In contrast, there is a growing trend in the United States to allow jurors, prior to the close of trial, to discuss among themselves evidence introduced in court. [FN184] For those who support juror-to-juror communications prior to deliberations, the Digital Age--with its smart phones, blogs, and social media websites--is a boon because it facilitates this practice. As for jurors discussing the case with third parties prior to the verdict, little can be said in support of this activity. Similar to juror research, it should not occur, and the technological advancements that support this practice are a detriment to the legal system.

The next portion of this Article, Part II, will discuss four possible remedies to address the problems raised in Part I. The proposed solutions are as follows: (1) imposing penalties on jurors, (2) investigating jurors, (3) allowing juror questions, and (4) improving jury instructions. These remedies take various approaches in regulating juror behavior. The first two rely on punishment and oversight, while the last two use empowerment and education. [FN185]

II. Possible Solutions

A. Imposing Penalties

The first remedy analyzed in this Article is juror penalties, which can take various forms that range from fines [FN186] to public ***437** embarrassment [FN187] to sequestration. [FN188] The common theme with all penalties is that once imposed, they make citizens less inclined to want to serve as jurors. [FN189]

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The average individual views jury duty as a burden that pulls so-called "citizen volunteers" away from their jobs, families, and friends to perform a sometimes stressful, and other times mundane, civic duty for which they receive minimal pay, if any at all. [FN190] In fact, it is quite common for individuals to think of excuses, real or imagined, to get out of serving jury duty. [FN191] Once jurors realize that, in addition to the possibility of sequestration, they run the risk of being penalized, the incentive to avoid jury duty will only increase. [FN192] Therefore, penalties should be a last resort in preventing juror misconduct.

1. Contempt

Contempt is one of the more common penalties for jurors who violate court rules. [FN193] Once imposed, it allows the court to fine the juror. [FN194] To date, at least one state (California) has increased its civil and criminal contempt penalties to address juror misconduct in the Digital Age. The recently enacted California law allows "punishment of jurors who electronically discuss confidential legal proceedings." [FN195] According to the ***438** legislative director of the assemblyman who introduced the initial bill, "It's really just the law catching up with technology when it comes to the sanctity of the jury room." [FN196]

Prior to exercising its contempt authority, a court should first determine why a juror violated the court's rules. [FN197] Jurors violate court rules for a variety of reasons. [FN198] Some do it intentionally; others do it unintentionally. Some do it for personal gain; others do it in a misguided effort to better fulfill their duties as jurors. To discover the juror's motivation for violating the court's instructions, the trial judge should directly ask the juror. In most instances, the juror will be quite candid with the court. [FN199] Many jurors openly state that they disregarded the court's rules because of curiosity [FN200] or a misinterpretation of the judge's instructions. [FN201] In those cases where the juror is not forthcoming or the court questions the juror's credibility, the court should examine the context of the juror's actions.

After determining the reasons behind the juror's conduct, the court should then decide whether a contempt sanction will prevent similar behavior in the future. For example, holding a juror in contempt for misinterpreting jury instructions may not curb similar behavior in the future. However, if the juror did fully comprehend the jury instructions but disregarded them anyway because she wanted to be the first to reveal information about the case on her blog, the court may want to consider sanctions. Finally, the court should weigh the long-term impact of penalties on the legal system--one that needs citizen participation to effectively operate.

***439** 2. The "Luddite Solution" [FN202]

Besides contempt proceedings, the court may also penalize jurors by depriving them of the tools they need to conduct research or communicate with third parties. At present, a number of jurisdictions across the country restrict juror access to cell phones and the Internet. [FN203] This so-called Luddite Solution, which was noted by several Jury Survey respondents, [FN204] can take a variety of forms. Some courts do not allow jurors to enter the courthouse with any electronic communication devices. [FN205] Other courts impose restrictions only during deliberations. [FN206]

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The latter policy appears to make more sense than the former for two reasons. First, depriving jurors of their electronic communication devices for an entire day can constitute a significant hardship and make jurors feel as though they are being controlled. [FN207] Second, it creates a logistical problem for the court, which becomes responsible for ensuring that jurors have alternative forms of communication and can be reached by family members, friends, and employers. Both policies, however, lose effectiveness with trials lasting beyond one day. This is because jurors can simply wait until they get home to violate the judge's instructions. [FN208]

***440** Compared to the traditional methods used to prevent juror misconduct, the Luddite Solution appears to be extreme and an overreaction to the problems presented by online research and communications. For example, courts do not routinely deprive jurors of their radios and televisions even though these devices might be used to learn information about the case. [FN209] Instead, jurors simply are told to avoid watching or listening to programs about the trial on which they sit. [FN210] Even in rare instances of sequestration, jurors are not necessarily deprived of access to the radio or television. [FN211] Thus, jurors should not be deprived of their laptops and smartphones but rather should be instructed that neither is to be used to research the case or to discuss it. [FN212]

***441** 3. Sequestration

Of the possible remedies available, sequestration best ensures juror compliance. This is because the court has direct control of the jurors' environment. While popular in the past and still relied upon in some jurisdictions for high-profile and capital trials, sequestration is not widely used today. [FN213] Despite this fact, some believe that sequestration, because of its deterrent effect, should be mentioned to all jurors upon initial empanelment. [FN214]

Sequestration is generally disfavored because of the burden it places on courts and jurors. [FN215] It is expensive for a court to lodge jurors throughout a trial. [FN216] At present, courts are struggling to pay the nominal fee given to jurors for their service. [FN217] Additional costs might break the budget of many jurisdictions. [FN218] Sequestration also generally results in a longer jury selection process, as many potential jurors will attempt to get excused from jury service because they either cannot or prefer not to be away from their families and friends for an extended amount of time. [FN219] For the most part, jurors view ***442** sequestration negatively because they must live in a controlled environment away from their residences and those with whom they normally associate. [FN220]

One twist to the old idea of sequestration is “virtual sequestration.” [FN221] Here, jurors remain in their own homes but consent to having their access to the Internet and certain electronic devices either monitored or blocked. [FN222] While arguably less burdensome and probably less expensive than regular sequestration, virtual sequestration may be viewed by some as online snooping and overly intrusive. [FN223] However, as discussed next, some attorneys currently conduct an informal version of virtual sequestration by investigating and monitoring the online activities of jurors.

B. Investigating Jurors

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Besides imposing penalties, investigating jurors also works to limit improper juror research and communications. These investigations are carried out primarily by attorneys or their staff and occur via the Internet. [FN224] Most people have at least one online reference or "footprint," whether put there personally or by someone else. [FN225] Attorneys investigate ***443** jurors [FN226] by searching the jurors' digital trails [FN227] or Internet footprints. [FN228] This practice, which occurs before, during, and after trials, can take various forms. [FN229] The most basic level is a name search on an Internet search engine. [FN230] However, many attorneys employ far more sophisticated procedures such as extracting information from social networking sites and databases [FN231] and monitoring the online activities of jurors. [FN232]

Recently, online investigation of jurors has gained increased acceptance among practitioners. [FN233] Moreover, courts and state bar associations have both approved [FN234] and encouraged the practice. [FN235] Proponents argue that the online investigation of jurors by attorneys has uncovered numerous instances of juror misconduct. [FN236] Furthermore, proponents claim that once jurors realize that many of their voir dire answers can be verified, they either will be more truthful or will request dismissal from the case. [FN237] Finally, jurors who ***444** know that their online activities will be investigated are more likely to follow court instructions throughout the trial. [FN238]

While online investigation of jurors will help reduce incidents of juror misconduct associated with the Digital Age, the practice has its limitations. First, as with imposing penalties, investigating jurors does not address the reasons that jurors violate court rules. [FN239] Therefore, it does little to combat the root causes of juror misconduct. Second, unless courts impose virtual sequestration [FN240] by requiring jurors to make all of their online activities and communications subject to review, certain misconduct will go undetected.

Third, and most problematic, looking for information about jurors online raises privacy issues. According to Judge Richard Posner, "Most people dread jury duty--partly because of privacy concerns." [FN241] The following quotation reflects the view held by many on this issue: "The Internet in so many areas creates an extraordinary conflict between the desire for information and the desire for privacy." [FN242] Thus, as more citizens realize that jury duty now includes online background checks and monitoring, it is likely that the low juror summons response rates in certain parts of the country will only get worse. [FN243]

Finally, there is a concern that attorneys will not reveal juror misconduct that they discover to the court or opposing counsel, especially if they think that a particular juror is advantageous to their side or if they agree with the overall outcome of the trial. [FN244] At present, few courts require attorneys ***445** to reveal information uncovered about jurors; most jurisdictions reflect the views of the Jury Survey respondents and consider such information to be attorney work product. [FN245] Only a small number of states make information about jurors discoverable in criminal cases. [FN246] The states that impose such a requirement, generally speaking, place the burden solely on the prosecution and only after a request from defense counsel. [FN247] Furthermore, the duty to disclose, in many instances, is limited to private information as opposed to publicly available information. [FN248] Thus, it is highly unlikely that any information pertaining to juror misconduct will be disclosed through the discovery process.

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As for an attorney's ethical obligation to reveal such information, the Rules of Professional Responsibility have not kept pace with technological advancements brought by the Digital Age. The most relevant rule of professional responsibility with respect to juror misconduct is Rule 3.3, Comment 12, which states:

> Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the ***446** integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. [FN249]

In applying Rule 3.3, Comment 12, to the Facebook post of the Michigan juror discussed in Part I, [FN250] neither the defense attorney nor the prosecution would have an ethical duty to present this information to the court. In that case, the defense attorney wanted to reveal the information discovered in the Facebook post because it was beneficial to her client to remove the juror. [FN251] But the juror's act was neither fraudulent nor criminal, although it was improper and sufficient to cause her removal. [FN252] As that example illustrates, the current legal system lacks adequate safeguards to ensure that all disqualifying juror information is brought forward.

C. Allowing Questions

Allowing jurors to ask questions of witnesses would significantly reduce the detrimental impact of the Digital Age on jury service. [FN253] This is because juror questions, like jury instructions, address the reasons that jurors commit misconduct. [FN254] When jurors have their questions answered, ***447** they become less confused and curious and have greater confidence in their verdicts. [FN255] Prohibiting questions leads jurors to seek alternative avenues for information. [FN256]

Admittedly, resolving issues like juror curiosity is no easy task. [FN257] Many of the questions that arise from a juror's inquiring mind cannot be answered directly due to restrictions imposed by rules of evidence and the constitutional protections guaranteed to parties and witnesses. This does not mean, however, that these questions should be ignored.

For example, a juror might ask the court whether the defendant is presently incarcerated. It is unlikely that the judge would ever answer or pose such a highly prejudicial question. But the judge can use this situation to her advantage by turning it into a teaching point. The judge, even without going into the details of the question, can once again instruct the jury, including the juror who raised the question, that certain evidence must not be examined or considered by the jurors in order to protect the rights of the parties involved in the case. [FN258] This timely re-education of the jury is important because answers to questions like the defendant's incarceration status [FN259] are easily accessible online. [FN260]

***448** Besides reducing curiosity, allowing questions aids jurors in understanding the trial. Questions by jurors signal to the court and the attorneys what areas or topics are unclear and need further clarification. [FN261] This in turn reduces the need for jurors to speculate, conduct research, or contact outside

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third parties for information. [FN262]

Finally, by asking questions, jurors become more confident in their verdicts. [FN263] This is attributable to a variety of factors. First, jurors who ask questions are generally less passive and more attentive during trial. [FN264] Second, questions and their answers decrease both speculation in the deliberation room and uncertainty about the verdict. [FN265]

While some jurisdictions still do not allow jurors to pose questions, many are increasingly allowing them in both civil and criminal trials. [FN266] This is not to say, however, that questions by jurors are routine. Most jurisdictions that allow jurors to submit written questions do so at the discretion of the judge, who also decides whether those questions will be posed to the witnesses. [FN267] Thus, in some courts, jurors are not only kept in the dark about questions but also discouraged or ***449** prevented from asking them. [FN268] This is unfortunate because jurors who are permitted to ask questions "feel more involved in the trial" and report an enhanced satisfaction with their jury service. [FN269]

Contrary to the growing national trend of allowing questions by jurors, few Jury Survey respondents recommended this practice for combating improper juror research and communications. [FN270] In fact, few Jury Survey respondents thought this specific reform proposal would decrease or prevent juror misconduct. Some Jury Survey respondents went so far as to question the connection between juror questions and misconduct. [FN271] Others thought that questions by jurors would cause the judge to lose control of the courtroom. For example, one Jury Survey respondent wrote that she was "[n]ot certain [that allowing juror questions] would help--a judge couldn't be certain where this would lead." [FN272] This response indicates a lack of familiarity with how jurors ask questions in court.

In the courts that allow juror questions, the normal procedure is as follows: At the conclusion of a witness's testimony, the judge asks the jurors whether they have any questions. [FN273] If the jurors do have questions, they write them down and then hand them to the bailiff, who gives the questions to the judge. [FN274] The judge and the attorneys review the questions. [FN275] The judge, after hearing any possible objections from the attorneys, then decides whether she will answer or pose the question to the witness. [FN276] Thus, the concern about "where this would lead" appears to be unwarranted. Judges remain in control because they still serve as gatekeepers, monitoring how questions are handled and what information the jurors will receive. Judges lose control ***450** when jurors, after growing frustrated with the inability to ask questions, seek answers outside of the courtroom. [FN277]

The views expressed by the Jury Survey respondents regarding juror questions may be attributed to the fact that they dislike the idea of allowing anyone else in the courtroom to ask questions. [FN278] At present, only the judge and attorneys have the power to ask questions. By sharing this right with someone else, the judges and attorneys who participated in the Jury Survey might feel that they have lost some power or that jurors are now equal partners in the trial process. [FN279] Also, the Jury Survey respondents may share some of the concerns raised by the Sixth Circuit Court of Appeals when it addressed the issue of jurors asking questions in United States v. Collins:

> There are a number of dangers inherent in allowing juror questions: jurors can find themselves

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removed from their appropriate role as neutral fact-finders; jurors may prematurely evaluate the evidence and adopt a particular position as to the weight of that evidence before considering all the facts; the pace of trial may be delayed; there is a certain awkwardness for lawyers wishing to object to juror-inspired questions; and there is a risk of undermining litigation strategies. [FN280]

The potential problems raised by the Sixth Circuit and Jury Survey respondents regarding juror questions must be examined in the context of what now occurs when jurors are not allowed to pose questions. Jurors go elsewhere and seek answers through alternative means. According to Professor Nancy Marder, jurors who are not afforded the opportunity to ask questions during trial are more likely to engage in self-***451** help. [FN281] And, unlike in the past, self-help in the Digital Age is easier for jurors to accomplish and more difficult for courts to discover. [FN282] By denying jurors even the opportunity to seek answers to their questions in the presence of the judge, the court encourages them to look elsewhere and rely on alternative sources. [FN283]

D. Improving Instructions

The most obvious and popular solution for combating the negative influence of the Digital Age is to modernize jury instructions. [FN284] This proposal received the greatest amount of support from the Jury Survey respondents. [FN285] In addition, several courts have recently recommended improving instructions to jurors. [FN286] Thus, the majority of Part II will be spent on this topic.

The problem with relying on jury instructions is that they are only instructions--nothing more. [FN287] In order for instructions to be effective, jurors must follow them. In the corruption trial of Mayor Sheila Dixon, the jurors, despite repeated admonitions by the judge to desist, continued to communicate via Facebook. [FN288] Absent sequestering jurors and ***452** confiscating all of their communication devices, which is both burdensome and expensive, no surefire methods exist to ensure compliance. [FN289] Thus, jury instructions must be written in such a manner as to create the optimum atmosphere for acceptance.

1. Component Parts

One way to increase the likelihood of adherence is to use language easily understood by jurors. [FN290] This includes avoiding overly technical terms and offering descriptions of improper conduct. [FN291] Some jurors violate the rules against conducting improper research because the instructions in place either are unclear or do not specifically address the technological advancements ushered in by the Digital Age. [FN292] For instance, although jurors are told in their initial summons not to "gather any evidence" about the case, some nevertheless look up the name of a party on the Internet. [FN293] To those jurors, "gathering evidence" may mean going to the library or the actual crime scene, not necessarily performing a name or image search on Google. [FN294] This has caused some judges to "go beyond the current boilerplate instructions to jurors and specifically include references to the Internet and social media." [FN295]

***453** Similar issues arise with instructions about improper juror communications. [FN296] According to one legal commentator, "People tend to forget that e-mail, twittering, updating your status on

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Facebook is also speech . . . . There's an impersonality about it because it's a one-way communication--but it is a communication." [FN297] Therefore, for jury instructions to be effective, they have to reflect the new methods by which members of society communicate and interact.

In addition to being told what they cannot do, jurors need to know why it is impermissible. [FN298] Several Jury Survey respondents echoed this belief, with one respondent stating that jury instructions are "effective, if . . . the reason for the rule is explained." [FN299] Providing the "why" is important because jurors in the Digital Age are more receptive to learning information online. [FN300] Moreover, many jurors today feel comfortable using technology to discover facts for themselves or communicate with others. [FN301] As a result, it is a challenge to get these jurors to give up their methods of learning and acquiring ***454** information and adhere to the court's instructions. [FN302] According to two well-known trial consultants, "The deeply ingrained habit of . . . resolving even minor factual disputes by getting instant answers online makes it difficult to accept the prohibition on doing so when confronted with a truly important decision." [FN303] To make the court's task easier, jurors need to be told why practices that they regularly rely on are incompatible with jury service. [FN304]

While a long discourse on due process is unnecessary, jurors need to know that information obtained outside of the courtroom cannot be considered when deciding a verdict despite how inconsequential or helpful the information may seem. [FN305] Jurors should be told that, to ensure fairness in the trial process, the parties must have the opportunity to refute, explain, or correct the information jurors receive. [FN306] According to Ohio Supreme Court Justice Judith Ann Lanzinger:

> One of the things we as judges need to do is explain why [the rules of evidence are] so important . . . . We're not trying to keep the truth from anyone--pull the wool over anyone's eyes. The rules of evidence are there for a reason to make sure both sides get a fair trial. [FN307]

Failure to provide an explanation of the court's instructions not only decreases the likelihood of juror compliance but also creates mistrust of the judicial system. [FN308]

In addition to providing the rationale behind the instructions, judges must advise jurors of the negative ***455** consequences of ignoring them. [FN309] This starts by reminding jurors that disregarding the court's instructions is a violation of their oath. [FN310] Next, jurors should be told that failure to abide by these rules may cause the court to declare a mistrial, which is costly both in financial terms and in the emotional toll it takes on those involved in the process. [FN311] Also, jurors need to be informed of the potential for contempt of court and the subsequent penalties assessed to jurors who violate the court's instructions. [FN312]

Adding a self-policing section will also encourage compliance with jury instructions. [FN313] While some jurisdictions have shied away from this approach for fear of creating distrust and apprehension among jurors, [FN314] jury instructions should include language requiring jurors to report fellow jurors for failing to follow the rules of the court. [FN315] This watch-dog ***456** requirement is necessary because juror misconduct is difficult to detect and prevent. [FN316] An added benefit of this rule is that if a juror violates the court's instructions, for example by researching the case or communicating with a third party, she, for fear of being reported to the court, is less likely to reveal her findings to other jurors and thereby

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taint the entire jury. [FN317]

Besides the actual substance of the jury instructions, there are procedural questions such as when they should be given and how often. [FN318] As indicated in Part I, improper research and communications by jurors occur at all stages of the trial, including immediately upon receiving a jury summons. [FN319] Thus, the earlier the instructions are given to jurors--for example, in the jury summons or upon initial arrival at the courthouse--the greater the chance for compliance. As for frequency, several Jury Survey respondents stated that instructions should be repeated as often as possible [FN320] because they are easily forgotten. [FN321] This repetition usually comes in the form of brief reminders during breaks in trial. [FN322] Legal commentators have also recommended that jurors be provided with the instructions prior to starting deliberations. [FN323]

Another procedural recommendation involves having jurors sign an oath or affidavit acknowledging the instructions. [FN324] The Jury Survey respondents were split on the benefits of this proposal. One felt that, "[i]f jurors commit to signing [a] declaration, they are more likely to not violate that commitment." [FN325] Another stated that "actually sign[ing] a ***457** document may verify to them the importance." [FN326] Another opposed such a policy, stating that "[w]e can't turn jury duty into a check list of things sworn to." [FN327] And yet another respondent believed that this step is unnecessary if the judge addresses the issue early in voir dire. [FN328]

At present, this Article does not favor requiring jurors to sign an affidavit or contract stating that they will abide by the jury instructions. Obtaining the juror's signature would probably heighten juror awareness about the importance of following instructions; however, it seems overly formalistic. Jurors should not have to enter into written agreements with the court to fulfill their civic responsibilities. Furthermore, it may not be necessary if the other suggestions recommended in this Article are implemented. Moreover, taking such action may lead jurors to falsely believe that these instructions are superior or more important than all other instructions given to them by the court.

Finally, certain jurors are going to ignore the court's instructions regardless of how well they are written and delivered. [FN329] For example, some jurors feel compelled to chronicle every aspect of their life online or learn the entire story about the case prior to rendering a verdict. [FN330] To help deal with these so-called rogue jurors, attorneys or preferably the judge should ask all jurors during voir dire about their online presence and their ability to limit their use of the Internet during the trial. [FN331] On occasion, straightforward and direct questions are quite revealing, as some potential jurors make their inability to follow court rules quite clear. [FN332]

***458** In addition to weeding out jurors who refuse to follow the judge's instructions, these questions help educate jurors and give them early notice about court prohibitions. They let the juror know that some habits such as blogging or looking up information on the Internet that are viewed as normal and inconsequential during everyday life can have profound and harmful consequences when conducted during jury duty. Also, early questioning alerts the court and attorneys to those jurors who might regularly blog or visit social media websites. This in turn facilitates online monitoring of juror activity. [FN333]

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Numerous jurisdictions have updated or are in the process of updating their jury instructions to address the new methods by which jurors communicate and research. [FN334] Many of the updates include the suggestions mentioned above. This Article will now examine two sample jury instructions--one from Multnomah County, Oregon [FN335] and the other from the Judicial Conference Committee on Court Administration and Case Management (Judicial Conference Committee) of the federal courts--to see how well these instructions adhere to the previously discussed recommendations.

2. Sample Instructions

a. Multnomah County, Oregon

> Do not discuss this case during the trial with anyone, including any of the attorneys, parties, witnesses, your friends, or members of your family. "No discussion" also means no emailing, text messaging, tweeting, blogging or ***459** any other form of communication. Do not discuss this case with other jurors until you begin your deliberations at the end of the case. Do not attempt to decide the case until you begin your deliberations.
>
> I will give you some form of this instruction every time we take a break. I do that not to insult you or because I do not think you are paying attention, but because, in my experience, this is the hardest instruction for jurors to follow. I know of no other situation in our culture where we ask strangers to sit together watching and listening to something, then go into a little room together and not talk about the one thing they have in common[:] what they just watched together.
>
> There are at least two reasons for this rule. The first is to help you keep an open mind. When you talk about things, you start to make decisions about them and it is extremely important that you not make any decisions about this case until you have heard all the evidence and all the rules for making your decisions, and you won't have that until the very end of the trial. The second reason for the rule is that we want all of you working together on this decision when you deliberate. If you have conversations in groups of two or three during the trial, you won't remember to repeat all of your thoughts and observations for the rest of your fellow jurors when you deliberate at the end of the trial.
>
> Ignore any attempted improper communication. If any person tries to talk to you about this case, tell that person that you cannot discuss the case because you are a juror. If that person persists, simply walk away and report the incident to my staff.
>
> Do not make any independent personal investigations into any facts or locations connected with this case. Do not look up any information from any source, including the Internet. Do not communicate any private or special knowledge about any of the facts of this case to your fellow jurors. Do not read or listen to any news reports about this case or about anyone involved in this case.
>
> In our daily lives we may be used to looking for information on-line and to "Google" something as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision. You must resist that temptation for our ***460** system of justice to work as it should. I specifically instruct that you must decide the case only on the evidence received here in court. If you communicate with anyone about the case or do outside research during the trial it could cause us to have to start the trial over with new jurors and you could be held in contempt of court. [FN336]

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b. Judicial Conference Committee

Before Trial

> You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.
>
> Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

***461** At the Close of the Case

> During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. [FN337]

c. Analysis

Both instructions avoid overly complex language and appear to be drafted with the layperson in mind. For example, they do not use technical terms or legal homonyms. [FN338] A juror would not need any legal training to understand these instructions. In addition, each instruction specifically references the prohibition against using both old and new forms of communication to discuss the case.

Also, each instruction offers specific examples of inappropriate conduct. Surprisingly, many jurors are still ***462** unsure of what activities run afoul of court rules. [FN339] Examples help connect the instructions to everyday juror behavior. Some judges even go beyond the standard instructions and take it upon themselves to demonstrate how seemingly innocent online communications can jeopardize a trial. [FN340] This is important because jurors need to understand that routine practices such as "Googling" individuals or discussing their lives on social media websites, which they have grown accustomed to and

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reliant on, have to be modified during jury duty.

Of the two instructions, the Multnomah County instructions are superior to those of the Judicial Conference Committee. First, while both tell jurors not to research the case or discuss it until deliberations, the Multnomah County instructions explain, at least partially, why this rule is necessary. Jurors in the Digital Age, more so than in the past, need this explanation. Telling jurors why they should not engage in misconduct, even if only in broad terms, is important because it increases the likelihood that jurors will "buy in" and follow the instructions. [FN341] While the Multnomah County instructions do a good job explaining why improper communications are deleterious, they do not go far enough with respect to research. [FN342] Some states, such as Wisconsin, inform jurors that relying on outside information or conducting research "is unfair because the parties would not have the opportunity to refute, explain, or correct it." [FN343]

***463** Also, the Multnomah County instructions, unlike those of the Judicial Conference Committee, define terms like "discussion" and how such terms are interpreted in the Digital Age. For example, the Multnomah County instructions explain to jurors that "discussion" includes "emailing, text messaging, tweeting, blogging or any other form of communication." [FN344] This is important because many jurors think that "discussion" only concerns face-to-face conversations. [FN345]

As for repetition, the Multnomah County instructions inform jurors that the judge "will give you some form of this instruction every time we take a break." [FN346] The Multnomah County instructions even address the conscientious juror who thinks that by knowing more she will be able to better fulfill her duties. [FN347] The Multnomah County instructions make it clear to this type of juror that "it can be very tempting for jurors to do their own research to make sure they are making the correct decision. You must resist that temptation for our system of justice to work as it should." [FN348]

Finally, the Multnomah County instructions inform the juror that she might be held in contempt of court for violating the instructions. Although penalties should be a last resort to correct inappropriate behavior, they sometimes are necessary. [FN349] Thus, courts should warn jurors that they may be penalized for misconduct. One Jury Survey respondent noted, "When a juror can sit in the privacy of their [sic] own home and find out info about the case they [sic] really need strong discouragement." [FN350]

The one superior aspect of the Judicial Conference Committee instructions is that they directly address the issue of jurors researching "individuals," not just the facts or ***464** circumstances surrounding the case. For example, these instructions tell jurors not to "conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case." [FN351] As illustrated in Russo v. Takata, jurors like to know the backgrounds of the parties in a particular case. [FN352] Thus, jury instructions should address this issue.

With respect to the negative features of both instructions, they lack the self-policing section advocated by some legal commentators. [FN353] This additional safeguard is important in light of the secrecy and deference normally given to jury deliberations. [FN354] Without this requirement, it is difficult to ensure that the instructions will be followed and that juror misconduct, if it occurs, will be discovered.

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[FN355] Also, neither instruction specifically informs jurors that disobeying court rules violates the juror's oath. This latter point was significant for at least one Jury Survey respondent. [FN356]

***465** 3. Model Instructions

a. Introduction to Model Instructions

The model instructions created in this Article are an amalgamation of jury instructions from across the country. [FN357] They were created because no single jurisdiction had instructions that addressed all of the concerns raised by this Article. Hopefully, these instructions will serve as a model for jurisdictions that have yet to update their instructions or who feel that their updates were insufficient. In addition, these model instructions can be useful to practitioners who are concerned with jurors conducting improper research and communications. [FN358] The instructions assume that the jurisdiction does not allow pre-deliberation discussions between jurors. If that is not the case, then these instructions would have to be slightly modified by removing or altering the section on pre-deliberation discussions.

b. Text of Model Instructions

Introduction: Serving on a jury is an important and serious responsibility. Part of that responsibility is to decide the facts of this case using only the evidence that the parties will present in this courtroom. As I will explain further in a moment, this means that I must ask you to do something that may seem strange to you: to not discuss this case or do any research on this case. I will also explain to you why this rule is necessary and what to do if you encounter any problems with it.

Communications: During this trial, do not contact anyone associated with this case. If a question arises, direct it to my attention or the attention of my staff. Also, do not discuss this case during the trial with anyone, including any of the attorneys, parties, witnesses, your friends, or members of your family. This includes, but is not limited to, discussing your ***466** experience as a juror on this case, the evidence, the lawyers, the parties, the court, your deliberations, your reactions to testimony, exhibits, or any aspect of the case or your courtroom experience. "No discussion" extends to all forms of communication, whether in person, in writing, or through electronic devices or media such as: email, Facebook, MySpace, Twitter, instant messaging, Blackberry messaging, iPads, iPhones, iTouches, Google, Yahoo!, or any other Internet search engine or form of electronic communication for any purpose whatsoever, if it relates to this case.

After you retire to deliberate, you may begin to discuss the case with your fellow jurors and only your fellow jurors.

I will give you some form of this instruction every time we take a break. I do that not to insult you or because I don't think that you are paying attention. I do it because, in my experience, this is the hardest instruction for jurors to follow. I know of no other situation in our culture where we ask strangers to sit together watching and listening to something, then go into a little room together and not talk about the one thing they have in common, that which they just watched together. There are at least three reasons for this

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rule.

The first is to help you keep an open mind. When you talk about things, you start to make decisions about them, and it is extremely important that you not make any decisions about this case until you have heard all the evidence and all the rules for making your decisions, and you will not have heard that until the very end of the trial. The second reason is that, by having conversations in groups of two or three during the trial, you will not remember to repeat all of your thoughts and observations to the rest of your fellow jurors when you deliberate at the end of the trial. The third, and most important, reason is that by discussing the case before deliberations you increase the likelihood that you will either be influenced by an outside third party or that you will reveal information about the case to a third party. If any person tries to talk to you about this case, tell that person you cannot discuss the case because you are a juror. If that person persists, simply walk away and report the incident to me or my staff.

Research: Do not perform any research or make any independent personal investigations into any facts, individuals, or locations connected with this case. Do not look up or consult any dictionaries or reference materials. Do not search the ***467** Internet, websites, or blogs. Do not use any of these or any other electronic tools or other sources to obtain information about any facts, individuals, or locations connected with this case. Do not communicate any private or special knowledge about any facts, individuals, or locations connected with this case to your fellow jurors. Do not read or listen to any news reports about this case. The law prohibits a juror from receiving evidence not properly admitted at trial. If you have a question or need additional information, contact me or my staff. I, along with the attorneys, will review every request. If the information requested is appropriate for you to receive, it will be released in court.

In our daily lives, we may be used to looking for information online and we may "Google" things as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision. However, the moment you try to gather information about this case or the participants is the moment you contaminate the process and violate your oath as a juror. Looking for outside information is unfair because the parties do not have the opportunity to refute, explain, or correct what you discovered or relayed. The trial process works through each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find. You must resist the temptation to seek outside information for our system of justice to work as it should. Once the trial ends and you are dismissed as jurors, you may research and discuss the case as much as you wish. You may also contact anyone associated with this case. [Questions by the judge to the jury: Are there any of you who cannot or will not abide by these rules concerning communication or research with others in any way during this trial? Are there any of you who do not understand these instructions?]

Ramifications: If you communicate with anyone about the case or do outside research during the trial, it could lead to a mistrial, which is a tremendous expense and inconvenience to the parties, the court, and, ultimately, you as taxpayers. Furthermore, you could be held in contempt of court and subject to punishment such as paying the costs associated with having a new trial. If you find that one of your fellow jurors has conducted improper communications or research or if you conduct improper communications or research, you have a duty ***468** to report it to me or my staff so that we can protect the integrity of this

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trial.

Conclusion

The Digital Age, with its advancements in technology, has made it easier for jurors to violate courts' prohibitions against juror research and communications. This Article has suggested four possible solutions to combating this problem. The first two, increased penalties and greater monitoring of juror activity, take a somewhat paternalistic approach to the issue by treating jurors like children who need to be watched and punished when they fail to follow the rules. This course of action, while possibly beneficial in the short-term, may prove ineffective or harmful in the long-term. This is because these solutions only address the symptoms of juror misconduct, not its cause. Thus, courts will always be chasing the next technological advancement that facilitates juror research or communications. Second, and more importantly, these two proposals will discourage citizens from participating in jury service.

In the alternative, the courts could take a more holistic view of the problem. Thus, rather than solely blame the jurors, courts could examine the trial process as a whole and attempt to eliminate the reasons for juror misconduct. This would require the courts to reconsider the type of information made available to jurors. As discussed earlier, many instances of juror misconduct can be traced to a juror's desire for more information. Allowing juror questions will help curb this desire. This solution provides jurors with additional information while not violating the Rules of Evidence or the Constitution. It also allows courts to maintain control of what information jurors see and hear.

Besides permitting questions, courts also need to improve jury instructions. Today's instructions need to inform jurors that routine practices such as “Googling” individuals or discussing their own lives on social media websites, which they have grown accustomed to and reliant on, is incompatible with jury service. In providing these instructions, courts need to ensure that jurors know why such activity is prohibited. While some jurisdictions have updated their jury instructions to reflect the changes brought by the Digital Age, others have not. ***469** In order to facilitate and encourage jurisdictions to re-examine and improve their instructions to jurors, this Article has created model instructions that will hopefully serve as a template for others to use.

The jury, throughout its approximately 400-year history in America, has witnessed many changes and upheavals in the legal system. Through each one, the jury has adapted and survived. Thus, it is highly likely that the jury will weather the storm of the Digital Age. The question becomes: How will it evolve? This author hopes that any changes to the jury go towards empowerment, allowing jurors to function as equal partners in the courtroom.

Appendix (Jury Survey Questions)

1. Do you believe that jurors who access the Internet during trial to find out information about the pending case is a problem? If it is not a problem, please state why you feel this way.

2. Do you or the court in which you sit [FN359] have a policy or rule on jurors accessing the Internet

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while on jury duty? If you answer "No," go to question #6.

3. Can you briefly describe this policy or rule?

4. How long has the rule or policy been in place?

5. Do you think the policy or rule is effective? If not, what changes should be made?

6. To date, have you had instances of jurors improperly accessing the Internet while on jury duty? If "Yes," what action if any did you take as a result of the juror(s) accessing the Internet?

7. Of the following suggestions which one do you think is most effective at preventing jurors from accessing the Internet? Please state why you believe this one is most effective.

(a) Instruct jurors in the initial summons that they must refrain from accessing any information about the trial from the Internet.

(b) Use voir dire questions that actually address Internet use by jurors.

***470** (c) Revise jury instructions with specific language about using the Internet during trial. Repeat these instructions throughout the trial.

(d) Have jurors sign declarations stating that they will not use the Internet to research the trial.

(e) Educate jurors about the importance of jurors deciding cases on the facts presented.

(f) Make it clear that using the Internet to access information about the trial is a violation of the court's instructions.

(g) Allow questions by jurors.

(h) Prohibit jurors from accessing items like cell phones, laptops etc.

(i) Other (please describe).

8. Do you have any additional views about jurors and the Internet not covered by this survey that you would like to discuss?

9. Do you think it is appropriate for opposing parties to conduct Internet research on jurors? If yes, do you believe that such research should be turned over as part of the Discovery process?

10. Do you think it is appropriate for jurors to communicate with one another online or otherwise prior to deliberations?

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[FN1]. Patterson v. Colorado ex rel. Attorney Gen. of Colo., 205 U.S. 454, 462 (1907).

[FN2]. Ellen Brickman et al., How Juror Internet Use Has Changed the American Jury Trial, 1 J. Ct. Innovation 287, 288 (2008).

[FN3]. Id. ("[The Internet] has permeated every aspect of our society, including the American courtroom.").

[FN4]. Nancy S. Marder, Juries and Technology: Equipping Jurors for the Twenty-First Century, 66 Brook. L. Rev. 1257, 1271 (2001); MaryAnn Spoto, Online Juror Surveys Makes Process Easier for Courts, Citizens, Star-Ledger, Feb. 8, 2011, at 16.

[FN5]. Marder, supra note 4, at 1272.

[FN6]. See State v. Irby, 246 P.3d 796, 800-01 (Wash. 2011) (disallowing jury selection by email because not all parties were involved).

[FN7]. For example, the website for the Court of Common Pleas in Franklin County, Ohio, allows potential jurors to learn about juror eligibility, dress code, courthouse security, requests for excuse and postponement, terms of service, and compensation. Jury, Franklin County Ct. Common Pleas, http://www.fccourts.org/gen/WebFront.nsf/wp/658B17FFA9A383B0852574FB006DB07A? opendocument (last visited July 7, 2011).

[FN8]. Brian Grow, As Jurors Go Online, U.S. Trials Go Off Track, Reuters (Dec. 8, 2010, 3:23 PM), http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208. In one Florida case, a criminal conviction was overturned because the foreman of the jury looked up the definition of "prudence." Tapanes v. State, 43 So. 3d 159, 160 (Fla. Dist. Ct. App. 2010).

[FN9]. See Bill Braun, Judge Closes Trial's Internet Window, Tulsa World, May 3, 2010, at A1, available at http://www.tulsaworld.com/news/article.aspx? subjectid=14&articleid=20100503_14_A1_Inasig174831.

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[FN10]. Robert Verkaik, Collapse of Two Trials Blamed on Jurors' Own Online Research, Independent (Aug. 20, 2008), http:// www.independent.co.uk/news/uk/home-news/collapse-of-two-trials-blamed-on-jurorsrsquo-own-online-research-902892.html ("A judge at Newcastle Crown Court was forced to discharge a jury in a man-slaughter trial yesterday when one of the jurors sent him a Google Earth map of the alleged crime scene and a detailed list of 37 questions about the case.").

[FN11]. People v. Wadle, 77 P.3d 764, 770-71 (Colo. App. 2003), aff'd, 97 P.3d 932 (Colo. 2004).

[FN12]. John Schwartz, As Jurors Turn to Google and Twitter, Mistrials Are Popping Up, N.Y. Times, Mar. 17, 2009, at A1, available at http:// www.nytimes.com/2009/03/18/us/18juries.html.

[FN13]. Commonwealth v. Szakal, Legal Intelligencer (Nov. 16, 2009), http:// www.law.com/jsp/pa/PubArticlePA.jsp?id=1202435434751 (paid subscription).

[FN14]. See United States v. Fumo, 655 F.3d 288, 298 (3d Cir. 2011).

[FN15]. United States v. Siegelman, 640 F.3d 1159, 1181-85 (11th Cir. 2011).

[FN16]. See, e.g., Kathleen Kerr, Attorneys: Juror Tried to 'Friend' Witness on Facebook, Newsday (Apr. 7, 2009), http://www.newsday.com/long-island/crime/attorneys-juror-tried-to-friend-witness-on-facebook-1.1217767; see People v. Rios, No. 1200/06, 2010 WL 625221, at *2 (N.Y. Sup. Ct. Feb. 23, 2010) (noting that a juror used Facebook to contact a witness).

[FN17]. See, e.g., Thomas Zambito, Judge Declares Mistrial in Rape After Juror's Email Ridicules 'Doubting Thomases' on the Jury, N.Y. Daily News (June 9, 2011), http://articles.nydailynews.com/2011-06-09/news/29654981_1_ reasonable-doubt-queens-prosecutors-mistrial.

[FN18]. State v. Dellinger, 696 S.E.2d 38, 40-42 (W. Va. 2010) (discussing a juror who failed to tell the court that she was MySpace friends with the defendant).

[FN19]. Christopher Danzig, Mobile Misdeeds: Jurors with Handheld Web Access Cause Trials to Unravel, InsideCounsel (June 2009), http:// www.insidecounsel.com/2009/06/01/mobile-misdeeds ("You've got jurors who could literally be sitting in the box running an Internet search while testimony is going on.") (quoting an attorney).

[FN20]. Deborah G. Spanic, To Tweet or Not to Tweet: Social Media in Wisconsin's Courts, St. B. Wis. (Mar. 5, 2010), http:// www.wisbar.org/AM/Template.cfm?Section=InsideTrack&Template=/ CustomSource/InsideTrack/contentDisplay.cfm&ContentID=90872 (stating that in one trial, a juror tweeted, "I just gave away TWELVE MILLION DOLLARS of somebody else's money!").

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[FN21]. See Afua Hirsch, Is the Internet Destroying Juries?, Guardian (Jan. 26, 2010), http://www.guardian.co.uk/uk/2010/jan/26/juries-internet-justice.

[FN22]. Urmee Khan, Juror Dismissed from a Trial After Using Facebook to Help Make a Decision, Telegraph (Nov. 24, 2008, 10:01 AM), http:// www.telegraph.co.uk/news/newstopics/lawreports/3510926/Juror-dismissed-from-a-trial-after-using-Facebook-to-help-make-a-decision.html.

[FN23]. See Edward Gay, Judge Restricts Online Reporting of Case, N.Z. Herald (Aug. 25, 2008, 5:06 PM), http://www.nzherald.co.nz/nz/news/article.cfm? c_id=1&objectid=10528866.

[FN24]. See Ellen Whinnett, DIY Jury Probe, Herald Sun (May 9, 2010, 12:00 AM), http://www.heraldsun.com.au/news/diy-jury-probe/story-e6frf7jo-1225864033798.

[FN25]. Ira Winkler, An Appeal to a Jury of Your Twittering Peers, Internet Evolution (Mar. 24, 2009), http://www.internetevolution.com/author.asp?section_ id=515&doc_id=173990.

[FN26]. Schwartz, supra note 12.

[FN27]. Daniel A. Ross, Juror Abuse of the Internet, N.Y. L.J. (Sept. 8, 2009), http://www.stroock.com/SiteFiles/Pub828.pdf.

[FN28]. See Amanda McGee, Comment, Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms, 30 Loy. L.A. Ent. L. Rev. 301, 302 (2009-10).

[FN29]. See Annmarie Timmins, Juror Becomes a Defendant, Concord Monitor (Mar. 26, 2009), http://www.concordmonitor.com/article/juror-becomes-defendant? SESSf8ff6c533a0d9d4898d6084f82d9a035=ysearch.

[FN30]. Brickman et al., supra note 2, at 292 ("Although there are no published studies of how often jurors use the Internet to access information about cases, news stories suggest that it is not uncommon."); Grow, supra note 8. Grow notes:

> The data show that since 1999, at least 90 verdicts have been the subject of challenges because of alleged Internet-related juror misconduct. More than half of the cases occurred in the last two years.
>
> Judges granted new trials or overturned verdicts in 28 criminal and civil cases--21 since January 2009. In three-quarters of the cases in which judges declined to declare mistrials, they nevertheless found Internet-related misconduct on the part of jurors.
>
> Id.

[FN31]. In the future, this author expects this area of law to receive increased scholarly attention. See generally Timothy J. Fallon, Note, Mistrial in 140 Characters or Less? How the Internet and Social Networking Are Undermining the American Jury System and What Can Be Done to Fix It, 38 Hofstra L.

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Rev. 935 (2010); McGee, supra note 28.

[FN32]. See Bennett L. Gershman, Contaminating the Verdict: The Problem of Juror Misconduct, 50 S.D. L. Rev. 322, 323 (2005) ("Although a considerable body of scholarship on the jury system, jury selection techniques, and jury decision-making exists, the issue of juror misconduct has not been as closely or systematically studied.") (footnotes omitted); Nancy J. King, Juror Delinquency in Criminal Trials in America, 1796-1996, 94 Mich. L. Rev. 2673, 2673 (1996) ("This article examines two aspects of the jury system that have attracted far less attention from scholars than from the popular press: avoidance of jury duty by some citizens, and misconduct while serving by others.").

[FN33]. See Marder, supra note 4, at 1269-74; Gregory J. Morse, Techno-Jury: Techniques in Verbal and Visual Persuasion, 54 N.Y.L. Sch. L. Rev. 241, 247 (2009-10); Paul Zwier & Thomas C. Galligan, Technology and Opening Statements: A Bridge to the Virtual Trial of the Twenty-First Century?, 67 Tenn. L. Rev. 523, 529 (2000).

[FN34]. For another example of a survey covering similar issues as the Jury Survey, see New Media Comm., Conference of Court Pub. Info. Officers, New Media and the Courts: The Current Status and a Look at the Future, available at http://www.ccpio.org/documents/newmediaproject/New-Media-and-the-Courts-Report.pdf.

[FN35]. A few prosecutors refused to complete the Jury Survey because it was not approved by the Department of Justice.

[FN36]. See Jury Survey of anonymous respondents [hereinafter Jury Survey]. The Jury Survey is reprinted infra Appendix.

[FN37]. Jury Survey, supra note 36.

[FN38]. See Ralph Artigliere et al., Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers, Fla. B.J., Jan. 2010, at 9-10 ("These examples represent recent transgressions that were discovered, and probably represent just the tip of the iceberg of juror behavior.").

[FN39]. Forty-one individuals responded to the Jury Survey.

[FN40]. The Digital Age has also impacted attorneys who investigate jurors online. For information on that topic, see infra Part II.B; see also Thaddeus Hoffmeister, Applying Rules of Discovery to Information Uncovered About Jurors, 59 UCLA L. Rev. 28 (2011), available at http://www.uclalawreview.org/wordpress/?p=2735.

[FN41]. For the purposes of this Article, "jury research" refers to any effort by a juror to discover information about the case beyond that which was presented at trial.

[FN42]. Question 7 of the Jury Survey provided a list of potential solutions and asked respondents to

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select the most effective. One respondent answered, "[t]here is no one best method ... [a] combination is most effective," while another indicated that a combination of three distinct solutions was required. Jury Survey, supra note 36.

[FN43]. See discussion infra Part I.B.

[FN44]. See Schwartz, supra note 12 (citing a trial consultant who suggests that "juror research is a more troublesome issue than sending Twitter messages or blogging").

[FN45]. One of the first reported cases of juror research is Medler v. State ex rel. Dunn, 26 Ind. 171, 172 (1866); see also Caleb Stevens, Lure of the Internet Has Courts Worried About Its Influence on Jurors, Minneapolis/St. Paul Bus. J. (May 10, 2009, 11:00 PM), http://www.bizjournals.com/twincities/stories/2009/05/11/focus3.html ("Since the inception of a trial by jury, jurors have had the temptation of researching cases outside the courtroom against judges' orders."). As a Jury Survey respondent indicated in answering a question regarding Internet research by jurors, "This is just another aspect of an old problem." Jury Survey, supra note 36.

[FN46]. See Grow, supra note 8.

[FN47]. See Turner v. Louisiana, 379 U.S. 466, 472-73 (1965) ("'[E]vidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.").

[FN48]. United States v. Dyal, No. 3:09-1169-CMC, 2010 WL 2854292, at *12 (D.S.C. July 19, 2010).

[FN49]. United States v. Resko, 3 F.3d 684, 690 (3d Cir. 1993). Research also suggests that extrinsic information can greatly influence the decision-making of jurors. Neil Vidmar, Case Studies of Pre- and Midtrial Prejudice in Criminal and Civil Litigation, 26 Law & Hum. Behav. 73, 86 (2002).

[FN50]. See Bibbins v. Dalsheim, 21 F.3d 13, 17 (2d Cir. 1994) ("[A juror's] observation concerning the life of this community is part of the fund of ordinary experience that jurors may bring to the jury room and may rely upon.").

[FN51]. See Brickman et al., supra note 2, at 289-90 ("Research has demonstrated that jurors' exposure to media coverage and other extrinsic information about a case can be highly influential to their decision-making.").

[FN52]. See Dyal, 2010 WL 2854292, at *12; Ken Strutin, Electronic Communications During Jury Deliberations, N.Y. L.J., May 19, 2009, at 5 ("The potential prejudice to the integrity of the process implicates basic fairness embodied in due process, right to a jury trial, confrontation and cross-examination.").

[FN53]. Talia Buford, New Juror Policy Accounts for New Technology, Providence J. (May 17, 2009), http://www.projo.com/news/content/TWITTER_AND_

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THE_JURY_05-17-09_C7EA4AE_v24.3549604.html.

[FN54]. Id.

[FN55]. Id.

[FN56]. See Russo v. Takata Corp., 774 N.W.2d 441, 444-45 (S.D. 2009).

[FN57]. See People v. Carmichael, 891 N.Y.S.2d 574, 574 (App. Div. 2009).

[FN58]. See State v. Aguillar, 230 P.3d 358, 359 (Ariz. Ct. App. 2010).

[FN59]. See Commonwealth v. McCaster, 710 N.E.2d 605, 606-07 (Mass. App. Ct. 1999).

[FN60]. Paula Hannaford-Agor, Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technological Hazards, Ct. Manager, Summer 2009, at 42, 44 ("It is very difficult to frame intelligible questions for jurors if the questioner does not fully understand what he or she is asking about or, for that matter, the responses of individual jurors to those questions.").

[FN61]. See United States v. McKinney, 429 F.2d 1019, 1022-23 (5th Cir. 1970) ("To the greatest extent possible, all factual [material] must pass through the judicial sieve, where the fundamental guarantees of procedural law protect the rights of those accused of crime."); Brickman et al., supra note 2, at 288 ("In a sense, though, the very existence of the Internet is antithetical to the idea of a controlled flow of information.").

[FN62]. Gershman, supra note 32, at 349.

[FN63]. Id. Historically, however, this was not the case. For a discussion of how the Digital Age may resurrect the original notion of a jury in which impartiality only referred to the absence of conflict, not a complete lack of information about the parties, witnesses, or facts in dispute, see generally Caren Myers Morrison, Jury 2.0, 62 Hastings L.J. 1579 (2011).

[FN64]. See infra text accompanying note 74.

[FN65]. Schwartz, supra note 12.

[FN66]. See Bridget DiCosmo, Judge Re-enforces Electronic Gadget Ban, Herald Mail, Jan. 22, 2010, at A1 ("Often, the jurors who end up causing problems by conducting their own research are the most conscientious ones, because they want all of the facts so they can make an informed decision about the case.").

[FN67]. See Janice Morse, Long Road Ahead in Widmer Case, Cincinnati Enquirer (May 22, 2009), http:// news.cincinnati.com/article/20090522/NEWS0107/905230364/Long-road-ahead-Widmer-case;

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see also Gershman, supra note 32, at 347.

[FN68]. See Jury Survey, supra note 36.

[FN69]. See Morse, supra note 67.

[FN70]. Id.

[FN71]. See Dennis Murphy, The Mystery in the Master Bedroom, MSNBC (Sept. 18, 2009) http://www.msnbc.msn.com/id/32860588/ns/dateline_nbc-crime_ reports/t/mystery-master-bedroom.

[FN72]. See id.

[FN73]. Morse, supra note 67.

[FN74]. Id. The actions of the jurors resulted in a new trial for the defendant. His second trial ended in a hung jury, and his third trial ended in a conviction. Janice Morse, Jury Finds Ryan Widmer Guilty of Murder, Cincinnati Enquirer (Feb. 15, 2011), http://news.cincinnati.com/apps/pbcs.dll/article?AID=/20110215/NEWS010702/302150035/&template=artiphone.

[FN75]. See Douglas G. Smith, Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform, 48 Ala. L. Rev. 441, 553-54 (1997).

[FN76]. 18 U.S.C. §§ 1961-68 (2006).

[FN77]. See Thaddeus Hoffmeister, The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield, 98 J. Crim. L. & Criminology 1171, 1189 (2008).

[FN78]. See Jerry Casey, Juries Raise a Digital Ruckus, Oregonian (Jan. 13, 2008), http://blog.oregonlive.com/washingtoncounty/2008/01/juries&uscore;raise_ a_digital_ruckus.html.

[FN79]. Wardlaw v. State, 971 A.2d 331, 334 (Md. Ct. Spec. App. 2009).

[FN80]. United States v. Bristol-Mártir, 570 F.3d 29, 37 (1st Cir. 2009).

[FN81]. Del Quentin Wilber, With Social Networking, Justice Not So Blind, Wash. Post, Jan. 9, 2010, at C1.

[FN82]. See infra text accompanying notes 121-24.

[FN83]. See, e.g., Jeffrey T. Frederick, You, the Jury, and the Internet, Brief, Winter 2010, at 12, 12 (quoting a juror who explained his misconduct by stating, “Well, I was curious.”).

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[FN84]. See Strutin, supra note 52 ("More powerful than any rule of courtroom conduct are human curiosity and the overwhelming need to share our experiences.").

[FN85]. See Susan J. Silvernail, Internet Surfing Jurors, Ala. Ass'n for Just. J., Fall 2008, at 49, 49 ("Judge Vowell says he has observed a change in juror's [sic] attitudes about wanting more information about the cases.").

[FN86]. Jury Survey, supra note 36.

[FN87]. For current information on the number of individuals using the Internet, see Internet Usage Statistics: The Internet Big Picture, Internet World Stats, http://internetworldstats.com/stats.htm (last updated Oct. 6, 2011) (estimating that 78.3% of the North American population uses the Internet); see also Michael K. Kiernan & Samuel E. Cooley, Juror Misconduct in the Age of Social Networking 2 (July 28, 2011) (unpublished presentation), available at http://www.thefederation.org/documents/18.Juror%20Misconduct%C20and%C20Social%Media-Kiernan.pdf.

[FN88]. See Nora Lockwood Tooher, Tackling Juror Internet Use, Laws. USA, Mar. 24, 2009 ("There's a whole generation of people for whom twittering is as natural as breathing.") (quoting litigation consultant Ken Broda-Bahm).

[FN89]. Michelle Lore, Facing Down Facebook: Social Media Use and Juries, Minn. Law. (June 14, 2010), http://minnlawyer.com/2010/06/14/facing-down-facebook-social-media-use-and-juries ("I emphasize [that jurors should not investigate cases] because I think it's almost becoming natural to [go to websites to] satisfy your curiosity and get answers.") (second alteration in original) (quoting a judge); see also Ellen Lee, Pew Survey: Half of Us Have Looked Up People We Know on Internet, S.F. Chron., Dec. 17, 2007, at E1, available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/12/17/BUKETSUFG.DTL ("About half of the online adult population has looked up themselves or someone else online.").

[FN90]. See Brickman et al., supra note 2, at 288 ("[M]any people automatically search the Internet when confronted with a new name, subject, idea or other stimulus.").

[FN91]. Email Interview with Jake Durling (Nov. 10, 2011).

[FN92]. See Russo v. Takata Corp., 774 N.W.2d 441 (S.D. 2009).

[FN93]. See Henry Gottlieb, Should You Design Your Firm's Web Site with Jurors in Mind?, N.J. L.J., Jan. 2, 2007, at 29.

[FN94]. Id.

[FN95]. Artigliere et al., supra note 38, at 9; see also Eric Sinrod, Jurors: Keep Your E-fingers to Your-

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selves, Technologist (Sept. 15, 2009, 9:29 AM), http://blogs.findlaw.com/technologist/2009/09/jurors-keep-your-e-fingers-to-yourselves.html ("It is reasonable to expect that the natural curiosity of some jurors and the ease and habit of Internet research might cause them to let their fingers do their walking into finding out about their cases outside of the courtroom.").

[FN96]. Erika Patrick, Comment, Protecting the Defendant's Right to a Fair Trial in the Information Age, 15 Cap. Def. J. 71, 87 (2002) ("Because the Internet is such a vast resource, the potential exists for jurors to do independent research on matters of law with more ease and stealth than going to the local law library would require.").

[FN97]. See Jocelyn Allison, Tweets Let Attorneys Know When Jurors Misbehave, Law360 (Oct. 23, 2009, 4:18 PM), http:// www.law360.com/topnews/articles/128603 (paid subscription) ("[T]he sheer wealth of data available online makes it easier for [jurors] to look up arcane terms or dig up dirt on the parties.").

[FN98]. See John G. Browning, When All That Twitters Is Not Told: Dangers of the Online Juror (Part 3), Litig. Couns. Am. (Aug. 2009), http:// www.trialcounsel.org/082909/BROWNING.htm ("As [an Oregon district attorney] puts it, the ease of the Internet and handheld technology 'almost invite people to do extrinsic research ....'").

[FN99]. Renee Loth, Op-Ed., Mistrial by Google, Bos. Globe, Nov. 6, 2009, at A15, available at http://www.boston.com/bostonglobe/editorial_ opinion/oped/articles/2009/11/06/mistrial_by_google.

[FN100]. See Rebecca Porter, Texts and 'Tweets' by Jurors, Lawyers Pose Courtroom Conundrums, Trial, Aug. 2009, at 12, 14 ("Some have a compulsion to know and be viewed as an expert. In the privacy of their own homes at 2 a.m., they do whatever they want.") (quoting jury consultant Amy Singer); see also Strutin, supra note 52 ("Our Internet culture has enlarged the knowledge base of anyone with a smartphone.").

[FN101]. Brickman et al., supra note 2, at 292 ("Virtually every trial is newsworthy to someone and can therefore end up on the Internet where jurors can easily find it.").

[FN102]. Id.

[FN103]. Russo v. Takata Corp., 774 N.W.2d 441, 444 (S.D. 2009) (emphasis added).

[FN104]. Id.

[FN105]. See id. at 446.

[FN106]. Id.

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[FN107]. See id. at 445.

[FN108]. Id. at 446.

[FN109]. Id. at 447.

[FN110]. Id. at 450 n.* (second alteration in original).

[FN111]. See DiCosmo, supra note 66 (“Society's increasing dependence on cell phones, smart phones and social networking sites such as Facebook and Twitter to stay in contact can pose a problem for court officials when it comes to keeping jurors from communicating during a case.”).

[FN112]. For a twist on this general rule, see Pablo Lopez, Juror E-mails Muddy Trial, McClatchy (Apr. 16, 2010), http:// www.mcclatchydc.com/2010/04/16/92318/juror-e-mails-muddy-trial.html. This article discusses a California judge who, upon being selected to serve as a juror, sent emails about his experience to his fellow jurists. “[L]egal observers say it's not clear that [Judge] Oppliger did anything wrong. Jurors are allowed to tell others they are assigned to a trial. But the judge should have known better than to do something that could raise a possible objection, they say.” Id.

[FN113]. David A. Anderson, Let Jurors Talk: Authorizing Pre-deliberation Discussion of the Evidence During Trial, 174 Mil. L. Rev. 92, 94-95 (2002).

[FN114]. Gershman, supra note 32, at 341 (“External influences completely evade the safeguards of the judicial process, whereas internal violations do not raise the fear that the jury based its decision on reasons other than the trial evidence.”).

[FN115]. See Anderson, supra note 113, at 123-24.

[FN116]. These states include Arizona, Indiana, Michigan, and North Dakota. See Jessica L. Bregant, Note, Let's Give Them Something to Talk About: An Empirical Evaluation of Predeliberation Discussions, 2009 U. Ill. L. Rev. 1213, 1215 & n.19; Joe Swickard, Michigan Jurors to Get More Leeway Under New Rules, Detroit Free Press, June 29, 2011.

[FN117]. William J. Caprathe, A Jury Reform Pilot Project: The Michigan Experience, Judges' J., Winter 2009, at 27, 30-31.

[FN118]. The Ariz. Supreme Court Comm. on the More Effective Use of Juries, Jurors: The Power of 12--Part Two 8-9 (1998) [hereinafter Jurors: The Power of 12], available at http://www.azcourts.gov/Portals/15/Jury/Jury12.pdf.

[FN119]. Id.

[FN120]. Marcy Strauss, Juror Journalism, 12 Yale L. & Pol'y Rev. 389, 408 (1994) (citing jury expert

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Hans Zeisel).

[FN121]. For a discussion of the constitutional implications of banning juror speech, see id. at 409-14.

[FN122]. Anderson, supra note 113, at 95.

[FN123]. See Danielle Salisbury, Lawyers, Judges Doubt Jury Reform Will Fundamentally Change the Way Courts Operate, mlive.com (Aug 13. 2011), http:// www.mlive.com/news/jackson/index.ssf/2011/08/lawyers_judges_doubt_jury_ refo.html.

[FN124]. See Anderson, supra note 113, at 105-06.

[FN125]. Nancy S. Marder, The Jury Process 114 (2005) ("Most courts turn a blind eye to the fact that jurors do engage in predeliberation discussions.").

[FN126]. Id.

[FN127]. Id.

[FN128]. See B. Michael Dann & George Logan III, Jury Reform: The Arizona Experience, 79 Judicature 280, 283 (1996) (discussing the Supreme Court's concern about "division among the federal courts of appeals on the question whether permitting juror discussions deprives the defendant of the Sixth Amendment right to an impartial jury").

[FN129]. See Dixon Jurors Ignore Judge, Continue Facebook Posts, WBAL-TV (Jan. 4, 2010, 8:34 AM), http://www.wbaltv.com/r/22117438/detail.html; Dixon Jurors Must Testify About Facebook, United Press Int'l (Dec. 30, 2009, 2:37 PM), http://www.upi.com/Top_News/US/2009/12/30/Dixon-jurors-must-testify-about-Facebook/UPI-75451262201840.

[FN130]. Brendan Kearney, 'Friends on Jury,' Daily Rec., Dec. 3, 2009, at A1.

[FN131]. See Winkler, supra note 25 ("One of the cases ... involving Twitter demonstrates the potential for stock price manipulation if jurors tweet that a company is losing a big lawsuit. It also facilitates jury manipulation, if lawyers or other interested parties tweet back or learn how individual jurors are leaning.").

[FN132]. See Anderson, supra note 113, at 121-23.

[FN133]. See, e.g., Douglass L. Keene & Rita R. Handrich, Online and Wired for Justice: Why Jurors Turn to the Internet, Jury Expert, Nov. 2009, at 14; Robert P. MacKenzie III & C. Clayton Bromberg Jr., Jury Misconduct: What Happens Behind Closed Doors, 62 Ala. L. Rev. 623, 638 (2011) ("The fastest developing area in the realm of juror misconduct involves juror use of e-mail, social networking sites such

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as Facebook, and micro-blogging sites such as Twitter during trial.").

[FN134]. See United States v. Thomas, 116 F.3d 606, 618 (2d Cir. 1997); Strauss, supra note 120, at 403 ("This frank and open exchange by jurors, moreover, is critical to the effectiveness of the decisionmaking process."); see also John H. Wigmore, A Program for the Trial of Jury Trial, 12 J. Am. Judicature Soc'y 166, 170 (1929) ("The jury, and the secrecy of the jury room, are the indispensible elements in popular justice.").

[FN135]. See Clark v. United States, 289 U.S. 1, 13 (1933) ("Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.").

[FN136]. See Note, Public Disclosures of Jury Deliberations, 96 Harv. L. Rev. 886, 889-90 (1983) ("Juror privacy is a prerequisite of free debate, without which the decisionmaking process would be crippled. The precise value of throwing together in a jury room a representative cross-section of the community is that a just consensus is reached through a thoroughgoing exchange of ideas and impressions. For the process to work according to theory, the participants must feel completely free to dissect the credibility, motivations, and just deserts of other people. Sensitive jurors will not engage in such a dialogue without some assurance that it will never reach a larger audience.") (footnotes omitted).

[FN137]. Jameson Cook, Facebook Post Is Trouble for Juror, Macomb Daily (Aug. 28, 2010), http://macombdaily.com/articles/2010/08/28/news/doc4c79c743c66e8112001724.txt? viewmode=fullstory; see also Associated Press, Juror Who Blurted out Verdict on Facebook Fined $250, Ordered to Write Essay, Cleveland.com (Sept. 2, 2010), http://www.cleveland.com/nation/index.ssf/2010/09/juror_who_blurted_out_ verdict.html.

[FN138]. Id.

[FN139]. Id.

[FN140]. Correy Stephenson, Should Lawyers Monitor Jurors Online?, LegalNews.com (Dec. 27, 2010), http://www.legalnews.com/macomb/1004089 (noting that a lawyer "expressed concern that some attorneys might fail to disclose information they learn about a juror--keeping it in 'their back pocket' in case of an unfavorable verdict--and then use the information to seek a new trial").

[FN141]. Richard L. Moskitis, Note, The Constitutional Need for Discovery of Pre-voir Dire Juror Studies, 49 S. Cal. L. Rev. 597, 626 (1976) ("When both the prosecution and the defense can resist discovery of juror information, it is possible for members of the community to view the result of the trial as dependent upon which side enjoyed the advantage of juror information rather than upon impartial jury deliberations ....)" .

[FN142]. See United States v. Fumo, 655 F.3d 288, 305 (3d Cir. 2011) ("Not unlike a juror who speaks with friends or family members about a trial before the verdict is returned, a juror who comments about a

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case on the internet or social media may engender responses that include extraneous information about the case, or attempts to exercise persuasion and influence.").

[FN143]. People v. Jamison, No. 8042/06, 2009 WL 2568740, at *5 (N.Y. Sup. Ct. Aug. 18, 2009).

[FN144]. Commonwealth v. Guisti, 747 N.E.2d 673, 675 (Mass. 2001).

[FN145]. Id. at 678.

[FN146]. Id. (second and third alterations in original).

[FN147]. Id.

[FN148]. Id. at 678-79.

[FN149]. Id. at 681.

[FN150]. Id. at 680.

[FN151]. Id.

[FN152]. See Commonwealth v. Guisti, 867 N.E.2d 740, 742 (Mass. 2007).

[FN153]. Id.

[FN154]. Goupil v. Cattell, No. 07-cv-58-SM, 2008 WL 544863 (D.N.H. Feb. 26, 2008).

[FN155]. Id. at *1.

[FN156]. Id.

[FN157]. Id. at *3.

[FN158]. Id. at *2.

[FN159]. Id.

[FN160]. Id. at *5-6.

[FN161]. Id. at *8.

[FN162]. Id. at *7.

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[FN163]. Id. at *8. The court noted:

The fact that Juror 2 might have come to the criminal justice process with preconceived notions about the "local riff-raff" and even a mistaken understanding of which party bears the burden of proof in a criminal trial is, in this case, of little moment.... [T]he [trial] court reasonably and sustainably concluded that: (1) Juror 2's comments did not relate to [the defendant's] trial; [and] (2) Juror 2 understood the presumption of innocence ....

Id. at *10.

[FN164]. Id. at *7.

[FN165]. Id.

[FN166]. Richard Raysman & Peter Brown, How Blogging Affects Legal Proceedings, Law Tech. News (May 13, 2009), http:// www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202430647333&slreturn=1&hbxlogin=1 (paid subscription) ("When jurors blog about ongoing trials, there are several key considerations: Did the jurors discuss details of the trial? Did the jurors display a pretrial bias for or against one party? Did fellow sitting jurors read the blog or electronic communication during the trial and thus become unduly influenced?").

[FN167]. Rosalind R. Greene & Jan Mills Spaeth, Are Tweeters or Googlers in Your Jury Box?, Ariz. Att'y, Feb. 2010, at 38, 39 ("It seems, however, that many jurors do not see blogging, tweeting or posting as communication, or at least they don't consider it to fall within the rubric of traditional admonitions.").

[FN168]. State v. Dellinger, 696 S.E.2d 38, 40 (W. Va. 2010).

[FN169]. Id. at 41.

[FN170]. Id.

[FN171]. Allison, supra note 97 ("It may seem obvious that you shouldn't broadcast your juror experience live on Twitter, but even sophisticated people need reminders.").

[FN172]. Hannaford-Agor, supra note 60, at 43.

[FN173]. Even some lawyers and judges have difficulty understanding the concept. For example, one lawyer-juror thought that he could blog about a case he was sitting on: "Nowhere do I recall the jury instructions mandating I can't post comments in my blog about the trial." Attorney Discipline, Cal. B.J. (Aug. 2009), http://archive.calbar.ca.gov/%5CArchive.aspx? articleId=96182&categoryId=96044&month=8&year=2009.

[FN174]. See Jerold S. Solovy & Robert L. Byman, Confronting the Fact of Juror Research, Law Tech. News (Nov. 30, 2009), http:// www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202435852040 (paid subscription)

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("[W]e cell phone abusers, we internet junkies, we believe it is our God-given right to be connected.").

[FN175]. See Anita Ramasastry, Why Courts Need to Ban Jurors' Electronic Communications Devices, FindLaw (Aug. 11, 2009), http:// writ.news.findlaw.com/ramasastry/20090811.html ("Citizens have become increasingly reliant on such devices and applications. Indeed, many use them incessantly, as a lifeline to their friends, relatives, and colleagues-- especially when they are at meetings, conferences, or otherwise away from their normal office or home routines.").

[FN176]. See McGee, supra note 28, at 310; Susan Macpherson & Beth Bonora, The Wired Juror, Unplugged, Trial, Nov. 2010, at 40, 42 ("[A]ddiction to Internet access is not limited to young jurors.").

[FN177]. Ralph Artigliere, Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial, 59 Drake L. Rev. 621, 639-40 (2011) ("To some jurors, the cell phone, iPad, notebook, or other digital device is a lifeline to which they feel addicted. These jurors require constant communication with others on events and matters from the mundane to the critical."); see also Cassandra Jowett, 'Google Mistrials' Derail Courts; Critics Say System Ignores Impact of New Technology, Nat'l Post, Mar. 23, 2009, at A1 ("The modern addiction to instant communication appears to have given rise to the 'Google mistrial'--the use of new technology to inadvertently skew the scales of justice.").

[FN178]. Artigliere et al., supra note 38, at 9 ("Some jurors will want to text what they are doing at any given moment and why they are doing it to friends, family, and thousands of strangers.").

[FN179]. See Laura M. Holson, Tell-All Generation Learns to Keep Things Offline, N.Y. Times, May 8, 2010, at A1, available at http:// www.nytimes.com/2010/05/09/fashion/09privacy.html (arguing that, according to conventional wisdom, "everyone under 30 is comfortable revealing every facet of their lives online, from their favorite pizza to most frequent sexual partners").

[FN180]. Michael Bromby, The Temptation to Tweet--Jurors' Activities Outside the Trial (Mar. 26, 2010) (unpublished manuscript), available at http:// papers.ssrn.com/sol3/papers.cfm?abstract_id=1590047 (describing one of the few studies to track Twitter comments by jurors and prospective jurors). For examples of celebrities tweeting about their jury experiences, see Live from the Jury Box, It's Steve Martin!, Zimbio (Dec. 22, 2010, 12:53 PM), http:// www.zimbio.com/Steve+Martin/articles/1StTKdTeaji/Live+jury+box+Steve+Martin, and Debra Cassens Weiss, Media Atwitter over Al Roker's Twitter Photos from Jury Duty Wait, A.B.A. J. (May 29, 2009, 9:08 AM), http:// www.abajournal.com/news/article/media_atwitter_over_al_rokers_twitter_photos_from_jury_duty_wait.

[FN181]. Ariel Kaminer, The Torturous Trials of the Idle Juror, N. Y. Times, Oct. 1, 2010, at MB1, available at http:// www.nytimes.com/2010/10/03/nyregion/03critic.html.

[FN182]. See generally Hoffmeister, supra note 77.

[FN183]. Steven I. Friedland, The Competency and Responsibility of Jurors in Deciding Cases, 85 Nw. U.

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L. Rev. 190, 219-20 (1990). Active juries are generally described as those that are more engaged in the trial process and allowed to ask questions, take notes, and bring the instructions or transcripts back to the jury room. Jannessa E. Shtabsky, Comment, A More Active Jury: Has Arizona Set the Standard for Reform with Its New Jury Rules?, 28 Ariz. St. L.J. 1009, 1011-12 (1996).

[FN184]. See Anderson, supra note 113, at 92.

[FN185]. See Hannaford-Agor, supra note 60, at 43 ("Juror education at every stage of jury service should be the first and foremost preventative measure against Google mistrials.").

[FN186]. See, e.g., Andria Simmons, Georgia Courts to Bar Jurors from Internet, Atlanta J.-Const. (Mar. 30, 2010, 6:54 PM), http:// www.ajc.com/news/georgia-courts-to-bar-420308.html. Also, if fines are indeed used, the court should consider imposing day fines, which "are based on an elementary concept: 'punishment by a fine that should be proportionate to the seriousness of the offense and should have roughly similar impact (in terms of economic sting) on persons with differing financial resources who are convicted of the same offense.'" John W. Clark et al., Social Networking and the Contemporary Juror, 47 Crim. L. Bull. 83, 91-92 (2011) (quoting Bureau of Justice Assistance, U.S. Dep't of Justice, How to Use Structured Fines (Day Fines) As an Intermediate Sanction 1 (1996), available at https:// www.ncjrs.gov/pdffiles/156242.pdf).

[FN187]. See, e.g., Ed White, Judge Punishes Michigan Juror for Facebook Post, Yahoo! News (Sept. 2, 2010), http://news.yahoo.com/judge-punishes-michigan-juror-facebook-post.html.

[FN188]. See infra Part II.A.3.

[FN189]. See Brian Grow, Juror Could Face Charges for Online Research, Reuters (Jan. 19, 2011, 1:11 PM), http://www.reuters.com/article/2011/01/19/us-internet-juror-idUSTRE70I5KI20110119 ("But penalties could also increase resistance to serving on juries. 'It's a Catch-22 for judges,' said Thaddeus Hoffmeister ....").

[FN190]. According to one Jury Survey respondent, "Because jurors are citizen volunteers, the least invasive approach should be used until proven ineffective." Jury Survey, supra note 36.

[FN191]. King, supra note 32, at 2704.

[FN192]. David P. Goldstein, Note, The Appearance of Impropriety and Jurors on Social Networking Sites: Rebooting the Way Courts Deal with Juror Misconduct, 24 Geo. J. Legal Ethics 589, 601 (2011) ("With the knowledge that they could face fines or even prosecution for something as innocuous as updating a Facebook status or sending Twitter messages, people may go even further out of their way to avoid jury duty.").

[FN193]. "Contempt" refers to "[c]onduct that defies the authority or dignity of a court or legislature." Black's Law Dictionary 360 (9th ed. 2009).

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[FN194]. See id.

[FN195]. Cheryl Miller, New Bill Targets Web-Surfing Jurors, Recorder, Feb. 22, 2010, at 1.

[FN196]. Id.; see also Eric P. Robinson, New California Law Prohibits Jurors' Social Media Use, Citizen Media L. Project (Sept. 15, 2011), http://www.citmedialaw.org/blog/2011/new-california-law-prohibits-jurors-social-media-use.

[FN197]. For a good discussion of when to hold a juror in contempt for violating the court's prohibitions against conducting research, see Superior Court of N.J., In the Matter of Lawrence Toppin, Law Off. Donald D. Vanarelli (Oct. 11, 2011), http://www.dvanarelli.com/blog/wp-content/uploads/2011/10/Matter-of-Lawrence-Toppin.pdf.

[FN198]. See supra Parts I.A.1-2, I.B.2.

[FN199]. See supra Part I.A.

[FN200]. See Frederick, supra note 83 and accompanying text.

[FN201]. See, e.g., Russo v. Takata Corp., 774 N.W.2d 441, 450 n.* (S.D. 2009).

[FN202]. “Banning all cell phones, I-Pads [sic], and laptops for everyone called in for jury duty is unlikely to work and will be viewed as a Luddite solution with little support in the jury pool.” The Honorable Dennis M. Sweeney, Circuit Court Judge (Retired), Address to the Litigation Section of the Maryland State Bar Association: The Internet, Social Media and Jury Trials--Lessons Learned from the Dixon Trial 3 (Apr. 29, 2010) (transcript available at http://juries.typepad.com/files/judge-sweeney.doc).

[FN203]. See, e.g., Jury Survey, supra note 36 (“In the CD of Illinois jurors are not allowed to bring cell phones into the courtroom.”; “We take up their cell phones at the door.”). See generally Eric P. Robinson, Jury Instructions for the Modern Era: A 50-State Survey of Jury Instructions on Internet and Social Media, 1 Reynolds Cts. & Media L.J., 307 (2011).

[FN204]. See Jury Survey, supra note 36.

[FN205]. Id.

[FN206]. See id. (“I require them to surrender cell phones and other such devices when they retire to deliberate.”).

[FN207]. Goldstein, supra note 192, at 602 n.108.

[FN208]. Allison, supra note 97 (“Courts can also ban mobile devices from the courtroom--some already

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do--though there could be some backlash from jurors accustomed to being in constant communication with family and friends. And that still doesn't keep them from doing research on Google or tweeting when they get home.").

[FN209]. See Admin. Office of the Ill. Courts, A Handbook for Illinois Jurors: Petit Jury (2011), available at http:// www.state.il.us/court/circuitcourt/Jury/Jury.pdf ("YOU SHOULD AVOID NEWSPAPERS OR RADIO AND TELEVISION BROADCASTS which may feature accounts of the trial or information about someone's participation in it.").

[FN210]. Robert Little, Their Holiday Task: Don't Talk or Listen, Balt. Sun (Nov. 26, 2009), http://articles.baltimoresun.com/2009-11-26/news/bal-md.jurors26nov26_1_pressure-benefit-jurors-informal-vote-counts ("The judge implored the panel to stay away from newspapers, television broadcasts and idle Dixon-related chatter, but few courtroom observers could imagine 12 people spending the next four days in Baltimore without encountering at least a whiff of the criminal case against the city's mayor.").

[FN211]. See Thaddeus Hoffmeister, Lifetime Off Limits for Casey Anthony Juries?, Juries (Apr. 6, 2011), http:// juries.typepad.com/juries/2011/04/lifetime-off-limits-for-casey-anthony-jurors.html.

[FN212]. See Public Hearing Before the Mich. Supreme Court 34 (2009) (statement of Robert P. Young, J.), available at http:// www.courts.michigan.gov/supremecourt/resources/administrative/PublicHearings/051209-PublicHearingTranscript.pdf. Justice Young stated:

> I have a theory about technology. We oughtn't impose on technology more than we impose on similar activities we conduct without technology.... [W]e used to have newspapers, we used to tell people not to read them. We have television [s]--we used to tell people not to listen to them. So ... why would we do more than instruct jurors that [they] may not use this newer technology to do research in the same way that they could do if ... prior to the time we had Blackberrys and PDAs[,] they could have gone to the library and done this research.... I'm struggling to understand why just because we now have the availability of a library in our hands we should be doing more than saying you may not use that library whether it's at a physical location somewhere other than the court or you can bring it in on a PDA.

Id.

[FN213]. See King, supra note 32, at 2713 ("Eventually, the sluggish pace of trials prompted courts to abandon their first line of defense against jury misconduct: sequestration."); see also Marcy Strauss, Sequestration, 24 Am. J. Crim. L. 63, 71-72 (1996).

[FN214]. Fallon, supra note 31, at 966; see also Artigliere, supra note 177, at 643 (quoting a Florida judge as saying, "I have two ways I can do this. I can lock you up--that's called sequestering, it's a fancy word for locking you up--during the course of the trial, or I can have you promise me that you will strictly abide by my instructions during the trial ....").

[FN215]. See Jury Survey, supra note 36 ("Sequestration [is] very burdensome on jurors ... [and] very expensive for taxpayers.").

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[FN216]. See, e.g., Rob Shaw, Costs of Casey Anthony Case Not Just Measured in Dollars, Tampa Bay Online (July 17, 2011), http://www2.tbo.com/news/breaking-news/2011/jul/17/13/costs-of-casey-anthony-case-not-just-measured-in-d-ar-244247 ("It cost more than $30,000 just to feed the Pinellas County jury for six weeks.... The tab was more than $112,000 to put the jurors up at a nice hotel.").

[FN217]. See, e.g., Joe Guillen, Cuyahoga Cuts Jurors' Daily Pay, Plain Dealer, May 14, 2009, at B2 (discussing decisions in several Ohio counties to reduce juror pay in order to help balance county budgets).

[FN218]. See, e.g., Bob Egelko, Budget Woes Slow the Wheels of Justice; Crisis Could Lead to 200 Layoffs, Close 25 S.F. Courts, S.F. Chron., July 19, 2011, at A1 (illustrating that a San Francisco budget crisis will result in the city laying off forty percent of its Superior Court employees).

[FN219]. King, supra note 32, at 2713 ("Judges concerned about jury competence recognized that sequestration deterred many potential 'reliable' jurors from serving as jurors."); Charles H. Whitebread, Selecting Juries in High Profile Criminal Cases, 2 Green Bag 2d 191, 195-96 (1999).

[FN220]. See Strauss, supra note 213, at 106-07.

[FN221]. This idea was recently raised at a conference. See Professor Eric Chaffee, Address at the Legal Scholarship Conference at the University of Toledo College of Law (June 2010). This author is unaware of any jurisdiction that has implemented virtual sequestration. However, at least one enterprising district attorney in Texas is considering offering jurors free access to the court's wireless network in exchange for temporarily "friending" his office, which, depending on privacy settings, would allow the DA to monitor the juror's Facebook account. See Ana Campoy & Ashby Jones, Searching for Details Online, Lawyers Facebook the Jury, Wall St. J., Feb. 22, 2011, at A2; see also Jack Zemlicka, Judges in Wisconsin Set Electronic Media Limits for Juries, Wis. L.J., May 10, 2010 (citing a circuit judge as suggesting that judges "could ask jurors engaged in social networking that, if empanelled, would they consent to being friended by the court").

[FN222]. Address by Eric Chaffee, supra note 221.

[FN223]. Julie Kay, Social Networking Sites Help Vet Jurors, Law Tech. News (Aug. 13, 2008), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp? id=1202423725315 (paid subscription).

[FN224]. See Jonathan M. Redgrave & Jason J. Stover, The Information Age, Part II: Juror Investigation on the Internet--Implications for the Trial Lawyer, 2 Sedona Conf. J. 211, 211 (2001).

[FN225]. Allison, supra note 97 ("Everybody has something on them on the Web, and everybody can look it up.") (quoting attorney Daniel Ross).

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[FN226]. For a discussion of judges investigating jurors, see John DiMotto, Judges and the Internet--Juror Information, Bench & B. Experiences (Apr. 28, 2010), http://johndimotto.blogspot.com/2010/04/judges-and-internet-juror-information.html (the blog of a Milwaukee County Circuit Court Judge).

[FN227]. Hoffmeister, supra note 40, at 32; cf. Tresa Baldas, Open Web, Insert Foot, Nat'l L.J. (May 10, 2010), http:// www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202457874016&slreturn=1 (discussing lawyers "talking trash about clients--online, leaving a digital trail for bar counsel to follow").

[FN228]. Jeffrey T. Frederick, Seasoned Jury Expert Shares Secrets of Voir Dire and Jury Selection, YOURABA (Mar. 2011), http:// www.americanbar.org/publications/youraba/201103article01.html; see also Kay, supra note 223.

[FN229]. See Zemlicka, supra note 221 ("Since the explosion of social networking, [a Wisconsin attorney] regularly researches jurors and monitors their online activity during lengthy trials. 'It's not unusual for someone in my office to run the name of a juror, if we get them ahead of time, through Google, Twitter or Facebook,' he said.") (internal quotation marks added).

[FN230]. Hoffmeister, supra note 40.

[FN231]. Id.

[FN232]. Id.; see also Kay, supra note 223.

[FN233]. Hoffmeister, supra note 40.

[FN234]. See, e.g., Carino v. Muenzen, No. A-5491-08T1, 2010 N.J. Super. Unpub. LEXIS 2154, at *26-27 (N.J. Super. Ct. App. Div. Aug. 30, 2010) (admonishing a trial judge for forbidding counsel from investigating jurors online during jury selection); N.Y. Cnty. Lawyers' Ass'n Comm. on Prof'l Ethics, Formal Op. 743 (2011) [hereinafter N.Y. Ethics Opinion] ("It is proper and ethical ... for a lawyer to undertake a pretrial search of a prospective juror's social networking site.").

[FN235]. See, e.g., Johnson v. McCullough, 306 S.W.3d 551, 558-59 (Mo. 2010) (encouraging attorneys to prevent retrials by investigating jurors' litigation history prior to empanelling the jury).

[FN236]. Hoffmeister, supra note 40.

[FN237]. Molly McDonough, Rogue Jurors, A.B.A. J., Oct. 2006, at 39, 43 ("Because judges are emphasizing [criminal background] checks [for jurors] ... more jurors drop out before the jury is formally seated and thus 'fewer and fewer people are coming up with a criminal record in contradiction of their jury questionnaire.'") (quoting a district attorney).

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[FN238]. Goldstein, supra note 192, at 603 ("With the knowledge that they are under the watchful eye of the court, jurors are less likely to discuss trials on their social networking sites.").

[FN239]. See supra Parts I.A.1-2, I.B.2.

[FN240]. See supra notes 221-23 and accompanying text.

[FN241]. United States v. Blagojevich, 614 F.3d 287, 293 (7th Cir. 2010) (Posner, J., dissenting from denial of rehearing en banc) (citations omitted).

[FN242]. Kay, supra note 223 (quoting litigator Dan Small).

[FN243]. See Elaine Silvestrini, Tampa Judge Threatens Jail for People Ignoring Jury Summons, Tampa Bay Online (Oct. 3, 2011), http://duke1.tbo.com/content/2011/oct/03/041120/judge-threatens-jail-for-residents-who-ignored-jur/news-breaking/.

[FN244]. See John E. Nowak, Jury Trials and First Amendment Values in "Cyber World," 34 U. Rich. L. Rev. 1213, 1225 (2001) ("The attorney with information about cyber activities of potential jurors will be able to use jury challenges for cause, and use preemptive challenges, in a strategically wise manner.").

[FN245]. Jury Survey, supra note 36; see also Moskitis, supra note 141, at 630-33; Jeffrey F. Ghent, Annotation, Right of Defense in Criminal Prosecution to Disclosure of Prosecution Information Regarding Prospective Jurors, 86 A.L.R. 3d 571 (1978). For cases not requiring the release of juror information obtained by the prosecutor to defense counsel, see, for example, Monathan v. State, 294 So. 2d 401, 402 (Fla. Dist. Ct. App. 1974); State v. Jackson, 450 So. 2d 621, 628 (La. 1984); Martin v. State, 577 S.W.2d 490, 491 (Tex. Crim. App. 1979).

[FN246]. See, e.g., People v. Murtishaw, 631 P.2d 446, 465 (Cal. 1981), rev'd on other grounds sub nom. Murtishaw v. Woodford, 255 F.3d 926 (9th Cir. 1999) (finding that judges may permit discovery of juror information obtained by opposing counsel); State v. Bessenecker, 404 N.W.2d 134, 138-39 (Iowa 1987) (holding that a juror "rap sheet" can be discoverable in certain circumstances); Commonwealth v. Smith, 215 N.E.2d 897, 901 (Mass. 1966) (finding that information about prospective jurors obtained by the police should be available to both parties).

[FN247]. See, e.g., Bessenecker, 404 N.W.2d at 138-39 (limiting access to juror information obtained by county attorneys and requiring county attorneys to disclose to the defense any information obtained).

[FN248]. See, e.g., State v. Beckwith, 344 So. 2d 360, 370 (La. 1977) (holding that the prosecution was not required to disclose a compilation of prospective jurors' voting records where there was no evidence that such information was unavailable to the defendant through independent means); State v. Matthews, 373 S.E.2d 587, 590-91 (S.C. 1988) (holding that the prosecution was not required to disclose results of investigation into potential jurors' backgrounds where defense counsel had an opportunity on voir dire to

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explore jurors' "backgrounds, attitudes, and characteristics").

[FN249]. Model Rules of Prof'l Conduct R. 3.3 cmt. 12 (2007). At least two states--New York and Tennessee--have more expansive rules. See Tenn. Rules of Prof'l Conduct R. 3.3(i) (2011) ("A lawyer who, prior to conclusion of the proceeding, comes to know of improper conduct by or toward a juror or a member of the jury pool shall report the improper conduct to the tribunal," confidentiality requirements notwithstanding.); N.Y. Ethics Opinion, supra note 234. In addition, one court has held that "[i]t is unquestioned that each party has an obligation to report the incompetency of any juror upon discovery." Cowden v. Wash. Metro. Area Transit Auth., 423 A.2d 936, 938 (D.C. 1980). However, the Cowden decision has yet to be followed by any other court.

[FN250]. See supra notes 137-39 and accompanying text.

[FN251]. See supra notes 137-39 and accompanying text.

[FN252]. See supra notes 137-39 and accompanying text.

[FN253]. See Brickman et al., supra note 2, at 296 ("If jurors are turning to the Internet because they are confused by important ideas or terminology in a trial, it is in everyone's best interest to forestall that by maximizing comprehension and minimizing confusion.").

[FN254]. See supra Part I.A.1. Consider also the case of Commonwealth v. Cherry, where the defendant faced capital murder charges for killing his girlfriend's infant child. After finding the defendant not guilty on the charge of first-degree murder, the jury retired for the day in order to consider involuntary manslaughter and third-degree murder charges the next day. During the night, one juror researched the term "retinal detachment," which was a key issue with respect to the injuries sustained by the infant. The juror's online research resulted in the judge declaring a mistrial. Interestingly, this same juror wanted to ask questions during the trial, but the judge refused to allow questions. Sheena Delazio, Mistrial Declared in Baby's Death, Times Leader (Jan. 15, 2011), http://www.timesleader.com/news/Mistrial_declared_in_baby_ rsquo_s_death_01-14-2011.html.

[FN255]. See supra notes 66-103, 170-80 and accompanying text.

[FN256]. See supra notes 95-97 and accompanying text.

[FN257]. See Judge Dennis Sweeney (Retired), Social Media and Jurors, Md. B.J., Nov. 2010, at 44, 48 (arguing that, in addition to allowing jurors to ask questions, judges "should prompt counsel to consider answering the obvious questions presented instead of leaving them open").

[FN258]. Robert F. Forston, Sense and Non-sense: Jury Trial Communication, 1975 BYU L. Rev. 601, 630 (stating that juror questioning would "pinpoint ... areas of improper speculation and enable the trial judge to neutralize [its] effects by appropriate admonition") (quoting Bertram Edises, One-Way Communications: Achilles' Heel of the Jury System, 48 Cal. St. B.J. 134, 137 (1973)).

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[FN259]. See, e.g., Persons in Custody, Montgomery County Sheriff Phil Plummer, http://www.mont.miamivalleyjails.org (last updated Sept. 17, 2011) (listing all inmates housed in the Montgomery County Jail in Ohio by name).

[FN260]. Brickman et al., supra note 2, at 291 ("With the advent of the Internet and the ease with which it can be accessed anytime, anywhere, concerns about exposure to pre-trial or mid-trial information obtained outside of the courtroom and about juror use of such information take on a whole new dimension.").

[FN261]. See Kim Smith, AZ Jurors Are Given Bigger Say in Trials, Ariz. Daily Star (Feb. 28, 2011, 12:00 AM), http://azstarnet.com/news/local/article_ c3c684dc-f816-512e-b4cb-a5814300f65e.html.

[FN262]. See Brickman et al., supra note 2, at 298 ("The more they understand what they hear in court, the less motivated they may be to do Internet research for clarification.").

[FN263]. See Judge John R. Stegner, Why I Let Jurors Ask Questions in Criminal Trials, 40 Idaho L. Rev. 541, 543 (2004). See generally Steven Penrod & Larry Heuer, Tweaking Commonsense: Assessing Aids to Jury Decision Making, 3 Psychol. Pub. Pol'y & L. 259 (1997).

[FN264]. B. Michael Dann & Valerie P. Hans, Recent Evaluative Research on Jury Trial Innovations, Ct. Rev., Spring 2004, at 12, 15.

[FN265]. Id. (citing various studies discussing the positive attributes of allowing juror questions). "The overwhelming majority of jurors felt that being allowed to put their questions to witnesses improved their role as decision makers .... When asked how the question procedure helped, almost 75% of jurors answered that the procedure helped them better understand the evidence." Id.

[FN266]. See Nancy S. Marder, Answering Jurors' Questions: Next Steps in Illinois, 41 Loy. U. Chi. L.J. 727, 747 (2010); see also Martin A. Schwartz, Selected Evidence Issues Illustrated--Recent Decisions, Famous Trials, Movies and Novels, 855 Practising L. Inst. 19, 147-52 (2011); Colleen Jenkins, Change Lets Jurors Submit Questions for Trial Witnesses, St. Petersburg times (Jan. 4, 2008), http://www.sptimes.com/2008/01/04/State/Change_lets_jurors_ su.shtml ("The tweaks in the state's jury system follow a nationwide trend toward fuller participation by the citizen deciders of fact.").

[FN267]. See State v. Fisher, 789 N.E.2d 222, 226-28 (Ohio 2003) (reviewing court holdings on juror questioning in various jurisdictions).

[FN268]. Marder, supra note 266, at 747.

[FN269]. Dann & Hans, supra note 264, at 15.

[FN270]. Only six of forty-one Jury Survey respondents recommended allowing jurors to ask questions. Jury Survey, supra note 36.

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[FN271]. Id.

[FN272]. Id.

[FN273]. Barry A. Cappello & James G. Strenio, Juror Questioning: The Verdict Is In, Trial, June 2000, at 44, 48.

[FN274]. Id.

[FN275]. Id.

[FN276]. Id.

[FN277]. Macpherson & Bonora, supra note 176, at 43 ("However, allowing and even encouraging jurors to ask their questions in the courtroom is the best way to maintain control over the evidence they consider, as it will reduce--if not eliminate--the jurors' motivation to get their questions answered online.").

[FN278]. See Cappello & Strenio, supra note 273, at 48-49 ("Simply put, if a trial judge sitting as a trier of fact without a jury can ask questions, jurors should have the same right in the careful search for the truth.").

[FN279]. See Smith, supra note 75, at 559 ("The fact that [juror questioning] is not more widely employed may be due to a basic distrust of juries on the part of judges and their fear that they will lose control of the trial process.").

[FN280]. United States v. Collins, 226 F.3d 457, 461 (6th Cir. 2000).

[FN281]. Marder, supra note 125, at 113 ("There are instances in which jurors have, on their own, made site visits or consulted reference books, the Internet, and lawyers who are not involved in the case.") (footnote omitted).

[FN282]. See supra Part I.A.2.

[FN283]. See generally Macpherson & Bonora, supra note 176.

[FN284]. See King, supra note 32, at 2728. As Professor King notes, this interest in more specific jury instructions is not new: "Calls for more explicit instructions to jurors to keep out of mischief appeared as early as 1893 ...." Id.

[FN285]. Twenty-six of forty-one Jury Survey Respondents cited jury instructions as an effective method of decreasing online research and improper communications by jurors. Jury Survey, supra note 36.

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[FN286]. See, e.g., United States v. Fumo, 655 F.3d 288, 305 (3d Cir. 2011); State v. Mitchell, 252 P.3d 586, 591 (Kan. Ct. App. 2011) ("We encourage our PIK committee to consider a revision to the general instruction on juror communication along the lines of that utilized in New York."); Superior Court of N.J., supra note 197 ("To avoid any similar instances from happening again, the court recommends the model instructions to the attention of The Supreme Court Committee on Model Criminal Jury Charges for a possible revision, which should make unquestionably clear the prohibition on juror research and outside materials is absolute.").

[FN287]. People v. Jamison, No. 8042/06, 2009 WL 2568740, at *6 (N.Y. Sup. Ct. Aug. 18, 2009) ("No matter what the instructions may be, they are only as effective as the integrity of the juror who hears them.").

[FN288]. Dixon Jurors Ignore Judge, Continue Facebook Posts, supra note 129. In another example, a federal judge warned jurors in a death-penalty trial forty-one times not to discuss the trial with outside third parties, yet the jury foreperson still contacted the press about the case prior to the end of the trial. See United States v. Basham, 561 F.3d 302, 316-21 (4th Cir. 2009); Mark Sherman, Kagan: No Need for Court Review of Rogue Juror, Wash. Times (May 31, 2010), http://www.washingtontimes.com/news/2010/may/31/kagan-no-need-court-review-rogue-juror.

[FN289]. See supra Part II.A.3.

[FN290]. Russo v. Takata Corp., 774 N.W.2d 441, 450 n.* (S.D. 2009) ("We suggest circuit courts consider using simpler and more direct language in the [jury] summons to indicate that no information about the case or the parties should be sought out by any means, including via computer searches. This type of admonishment is warranted given the ease with which anyone can obtain information via the internet ....").

[FN291]. See Zemlicka, supra note 221 ("Judges admit there is little they can do to completely keep jurors from avoiding electronic communication, which is why many stress the potential problems that even inane interaction can create.").

[FN292]. See id. ("I think people know they can't go home and talk to their wife about a case, but they don't think anything about firing off a bunch of texts .... That is why you have to state it explicitly.") (quoting a judge).

[FN293]. See, e.g., Russo, 774 N.W.2d at 452.

[FN294]. See id.; see also Sweeney, supra note 202, at 3 ("[A] deliberating juror conducted an on-line search for the terms 'livor mortis' and 'algor mortis' on Wikipedia .... When asked about it, the juror said, 'To me that wasn't research. It was a definition.'").

[FN295]. Browning, supra note 98.

[FN296]. See Jason Cato, Burgeoning Social Networking System Has Legal Community in a Twitter,

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Pittsburgh Trib.-Rev. (Feb. 8, 2010), http:// www.pittsburghlive.com/x/pittsburghtrib/news/pittsburgh/print_666211.html.

[FN297]. Greg Moran, Revised Jury Instructions: Do Not Use the Internet, Sign on San Diego (Sept. 13, 2009, 2:00 AM), http:// www.signonsandiego.com/news/2009/sep/13/revised-jury-instructions-do-not-use-internet (quoting professor Julie Cromer Young); see also Trish Renaud, Watch out for Blogging Jurors, Law Tech. News (Feb. 17, 2009), http:// www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202428284825 (paid subscription) (quoting a juror posting on his blog, "Hey guys! I know jurors aren't supposed to talk about their trial, but nobody said they couldn't LIVE-BLOG it, right?").

[FN298]. Diane Jennings, Dallas Judges Take Pains to Keep Web from Undermining Fair Trials, Dall. Morning News (Jan. 30, 2010), http:// www.dallasnews.com/news/community-news/dallas/headlines/20100130-Dallas-judges-take-pains-to-keep-8754.ece ("Courts have to explain to people why, not just tell people, 'Don't read the newspaper, don't do your own research and don't Twitter' .... Explain the rationale behind it.") (quoting an attorney); see also Macpherson & Bonora, supra note 176, at 42 ("To get through to jurors who can't quite believe that the judge really means no communication and no research, the judicial admonition needs to do more than 'just say no.' Social science research on persuasion has demonstrated that compliance can be measurably increased by simply adding the word 'because' and some type of explanation.").

[FN299]. Jury Survey, supra note 36.

[FN300]. See Christopher Hope, Web-Savvy Young Make Bad Jurors Because They Cannot Listen, Says Lord Chief Justice, Telegraph (Nov. 6, 2008, 7:33 PM), http://www.telegraph.co.uk/news/uknews/law-and-order/3393061/Web-savvy-young-make-bad-jurors-because-they-cannot-listen-says-Lord-Chief-Justice.html.

[FN301]. Id.

[FN302]. See Macpherson & Bonora, supra note 176, at 42 ("Many jurors under 40 are used to keeping their electronic devices close at hand and ignoring any authority figure who attempts to impose prohibitions on their access to the Internet.").

[FN303]. Id.

[FN304]. According to one Jury Survey Respondent, jury instructions can be effective if "given forcefully but fairly and [if] the reason for the rule is explained." Jury Survey, supra note 36.

[FN305]. See Brickman et al., supra note 2, at 297 ("Judges can acknowledge the temptations of Internet research, but then can explain to jurors why their cooperation in refraining from extrinsic research is so vitally important to the fairness of the judicial system.").

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[FN306]. See supra Part I.A.

[FN307]. Jacob Lammers, Courts Adapting to Technology, News-Herald (June 13, 2010), http://www.news-herald.com/articles/2010/06/13/news/nh2621582.txt.

[FN308]. See Gareth S. Lacy, Untangling the Web: How Courts Should Respond to Juries Using the Internet for Research, 1 Reynolds Cts. & Media L.J. 167, 178 (2011).

[FN309]. Artigliere et al., supra note 38, at 14 ("Some judges tell jurors why it is important to follow the instructions. Many jurors respond better to direction if they understand the reason the requirement has been placed on them.").

[FN310]. The value of the oath was recently illustrated in the first trial of former Illinois Governor Rod Blagojevich. Holdout Juror in Blagojevich Case Explains Her Reasoning, stltoday.com (Aug. 28, 2010, 12:00 AM), http://www.stltoday.com/news/national/article_f803c33c-18ef-5244-be18-7235b1fc26a5.html ("[S]tanding her ground in the jury room was not easy. Other jurors have acknowledged pressuring [the holdout] to change her vote on the Senate seat.... One person asked the judge for a copy of the juror's oath, implying that [the holdout] wasn't fulfilling her obligation.").

[FN311]. Judge Margaret R. Hinkle, Criminal Practice in Suffolk Superior Court, Bos. B.J., Nov.-Dec. 2007, at 6, 6 ("With a jury impasse, not only do jurors feel a sense of incompleteness, but any mistrial imposes an enormous emotional and financial cost on the prosecution, the defense, the victim and the Commonwealth.").

[FN312]. See Fallon, supra note 31, at 967.

[FN313]. See Artigliere et al., supra note 38, at 14 ("Another tactic is to 'empower' all jurors to report transgression by informing them of their duty to report any violation of the court's instructions, including any communication of any juror with the outside about the case or any attempt to bring into court information from outside the trial."); see also Edward T. Swaine, Note, Pre-deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility, 98 Yale L.J. 187, 201 (1988).

[FN314]. Michigan proposed a rule on electronic device usage by jurors that contained a requirement for jurors to report other jurors who violate the court's instructions. Correy Stephenson, Michigan Considers Rule on Juror Device Use, allBusiness (May 12, 2009), http://www.allbusiness.com/legal/evidence-witnesses/12333409-1.html (paid subscription). This requirement was later removed. See Order: Amendment of Rule 2.511 of the Michigan Court Rules, Mich. Supreme Ct. (June 30, 2009), http://courts.michigan.gov/supremecourt/Resources/Administrative/2008-33.pdf.

[FN315]. Daniel William Bell, Note, Juror Misconduct and the Internet, 38 Am. J. Crim. L. 81, 97 (2010) ("Courts should conclude their preliminary instructions by telling the jurors that they have a responsibility to inform the court of any misconduct that they witness.").

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[FN316]. Strutin, supra note 52 ("The hallowed ground of jury deliberations makes it difficult to unearth, preserve and authenticate surreptitious electronic communications and Web postings or to seek redress when they are uncovered.").

[FN317]. Brickman et. al., supra note 2, at 298.

[FN318]. Artigliere et al., supra note 38, at 14.

[FN319]. See, e.g., Russo v. Takata Corp., 774 N.W.2d 441, 444 (S.D. 2009).

[FN320]. Jury Survey, supra note 36 ("Because it is repetitive and comes from the judge I believe this is effective.").

[FN321]. One Jury Survey respondent stated, "This is o.k. but would be forgotten during the time delay from summons and jury duty. Moreover, it is more effective when the jurors hear it from the judge." Id.; see also Bell, supra note 315, at 91 ("Perhaps in part because Internet activity is such an integral, reflexive part of many Americans' lives, some judges not only give ... instructions [not to use the Internet] at the inception of trial, but also repeat them before each recess.").

[FN322]. Artigliere et al., supra note 38, at 14.

[FN323]. Jurors: The Power of 12, supra note 118, at 8-9.

[FN324]. See Moran, supra note 297.

[FN325]. Jury Survey, supra note 36.

[FN326]. Id.

[FN327]. Id.

[FN328]. See id.

[FN329]. Strutin, supra note 52 ("Sharing the minutest details of our lives through mobile telecommunications has become second nature in the Information Age.").

[FN330]. See supra Part I.A.2.

[FN331]. See Judge Linda F. Giles, Does Justice Go Off Track When Jurors Go Online?, Bos. B.J., Spring 2011, at 7, 8-9 ("At the risk of sounding like a Luddite, it seems to me that succumbing to the temptation of technology and allowing jurors to go rogue is not the solution."); Allison, supra note 97 ("I find that judges are asking now during voir dire whether jurors have a blog and what the name of the blog is .... If

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you get that commitment from the juror upfront, you're more likely to avoid problems down the line.") (quoting a trial consultant).

[FN332]. Ross, supra note 27. Ross cites the following example:

> In Kansas City, attorney Peter Carter asked potential jurors during voir dire if they would follow instructions not to do Internet research. In response, about six to 10 said that they would not. Carter also discovered, simply by asking, that some six or seven of the 80 potential jurors already had researched the case on the Internet.

Id.

[FN333]. See supra Part II.B.

[FN334]. Even the military is getting into the act. See Kent Harris, Jury Instructions to Include Rules on Use of New Media, Stars & Stripes (June 21, 2009), http://www.stripes.com/news/jury-instructions-to-include-rules-on-use-of-new-media-1.92649 (noting that, following cases of juror misconduct, a military judge "said he's been working on specific language addressing networking phenomena such as Twitter and Facebook that judges would use when instructing troops who sit on court-martial panels"). For a comprehensive overview of the various instructions across the country, see Robinson, supra note 203.

[FN335]. Of the jury instructions surveyed at the time this Article was written, Multnomah County, Oregon, along with New York, appeared to have the most comprehensive instructions addressing juror research and communications in the Digital Age.

[FN336]. Jury Instructions, Multnomah County, Or. (2009), available at http://bit.ly/cb3y3a [hereinafter Multnomah County Jury Instructions].

[FN337]. Judicial Conference Comm. on Court Admin. & Case Mgmt., Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate About a Case (2009) [hereinafter Judicial Conference Comm. Instructions], available at http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018-Attachment.pdf. These instructions have been endorsed by the Third Circuit Court of Appeals. United States v. Fumo, 655 F.3d 288, 305 (3d Cir. 2011) ("We enthusiastically endorse these instructions and strongly encourage district courts to routinely incorporate them or similar language into their own instructions.").

[FN338]. See Peter Tiersma, The Rocky Road to Legal Reform: Improving the Language of Jury Instructions, 66 Brook. L. Rev. 1081, 1101-02 (2001) ("One of the most obvious problems with jury instructions, or any other legal language that is meant to be understood by the general public, is technical vocabulary. Some legal terms are completely unknown in ordinary language, like quash or expunge or res gestae. Others, which I have elsewhere called legal homonyms, are ordinary words but have a specific legal meaning. Examples include brief, burglary, mayhem, complaint, notice, aggravation, and many others. Legal homonyms are potentially dangerous because a layperson may think that he knows what they mean, whereas the terms may mean something quite different in the law.") (footnote omitted).

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[FN339]. Many jurors who are discovered conducting research claim that they did not know that they were doing anything wrong. In one Florida case, after the judge declared a mistrial because a juror went to Wikipedia to look up the terms "sexual assault" and "rape trauma syndrome," the juror said, "I didn't read about the case in the newspaper or watch anything on TV.... To me, I was just looking up a phrase." Susannah Bryan, Davie Police Officer Convicted of Rape to Get New Trial, Palm Beach Post (Dec. 16, 2010), http://www.palmbeachpost.com/news/crime/davie-police-officer-convicted-of-rape-to-get-1126441.html; see also Zemlicka, supra note 221 ("But the situation served as a cautionary tale as to how even seemingly harmless online banter can potentially influence jurors and their verdict.").

[FN340]. See Artigliere et al., supra note 38, at 14 ("Some judges are already enhancing the standard instructions on their own.").

[FN341]. See supra notes 298-304 and accompanying text.

[FN342]. See Multnomah County Jury Instructions, supra note 336.

[FN343]. Social Networking, Jurors and Jury Instructions, Wis. Law. (Feb. 2011), http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_ Lawyer&template=/CM/ContentDisplay.cfm&contentid=100316 (quoting Wisconsin Jury Instructions).

[FN344]. Multnomah County Jury Instructions, supra note 336.

[FN345]. See Hannaford-Agor, supra note 60, at 45. According to Lake County Common Pleas Court Judge Vincent Culotta: "The definition of talk has changed. Talk now includes blogging, [posting] on [your] Facebook account, text messaging, e-mailing." Lammers, supra note 307 (second alteration in original) (quoting Judge Culotta).

[FN346]. Multnomah County Jury Instructions, supra note 336.

[FN347]. According to one Jury Survey respondent, "Jurors want to do the right thing--that is a double-edged sword. They think the more info they have the better job they will do." Jury Survey, supra note 36.

[FN348]. Multnomah County Jury Instructions, supra note 336.

[FN349]. See Pamela MacLean, Jurors Gone Wild, Cal. Law. (Apr. 2011), http://www.callawyer.com/story.cfm?eid=914907&evid=1.

[FN350]. Jury Survey, supra note 36.

[FN351]. Judicial Conference Comm. Instructions, supra note 337.

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[FN352]. See supra notes 103-10 and accompanying text.

[FN353]. Judge Dennis M. Sweeney (Retired), Worlds Collide: The Digital Native Enters the Jury Box, 1 Reynolds Cts. & Media L.J. 121, 141 (2011) ("If you become aware that any other juror has violated this instruction, please also let me know by a note."); see also Brickman et al., supra note 2 at 298. Several states also impose a duty on jurors to report misconduct by fellow jurors. A Tennessee jury instruction reads as follows: "Any juror who receives any information about this case other than that presented at trial must notify the court immediately." Robinson, supra note 203, at 389 (2011) (quoting Tenn. Judicial Conference, Comm. on Pattern Jury Instructions (Civil), Tenn. Pattern Jury Instructions (2010)). "[T]he only way to ensure that deliberations are not tainted by information that shouldn't be brought into the jury room is to 'get jurors to police themselves."' Porter, supra note 100, at 14 (quoting trial consultant Amy Singer).

[FN354]. See Zemlicka, supra note 221 ("Under [Judge] DiMotto's instructions, a fellow juror would be responsible for reporting misconduct to the court."). See generally Alison Markovitz, Note, Jury Secrecy During Deliberations, 110 Yale L.J. 1493 (2001).

[FN355]. Hirsch, supra note 21 ("Unless a juror informs the court that another juror has conducted internet research, or ... the material is discovered, [juror research] is impossible to police.") (quoting barrister Eleanor Laws); see, e.g., Altman v. Bobcat Co., 349 F. App'x 758, 760-61 (3d Cir. 2009).

[FN356]. Jury Survey, supra note 36.

[FN357]. These instructions also benefitted from the useful suggestions of Eric P. Robinson, Deputy Director of the Donald W. Reynolds Center for Courts and the Media at the University of Nevada at Reno.

[FN358]. The defense team representing Barry Bonds in his 2011 perjury trial used a modified version of these instructions. Howard Mintz, Jurors Must Lay Off Twitter, Facebook, iPhones and All Else for Barry Bonds Trial, Oakland Trib., Mar. 5, 2011.

[FN359]. The Jury Survey sent to federal prosecutors and defenders was very similar to the one in the Appendix. Slight changes were made in the language (for example, "which you sit" was changed to "where you practice").

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THE COURTS ARE ALL A 'TWITTER': THE IMPLICATIONS OF SOCIAL MEDIA USE IN THE COURTS

Emily M. Janoski-Haehlen*

I. INTRODUCTION

Tweet, poke, post, friend, like, blog, link, comment, and share—the opportunities to communicate electronically using social media tools seem never ending. Facebook,[1] Twitter,[2] YouTube,[3] MySpace,[4] and LinkedIn[5]—these are just a few of the social media sites that allow people to communicate and "connect" with others across the world in seconds. E-mail and text messaging are two other ways to communicate electronically, but neither e-mails nor text messages can keep up with the speed, accessibility, and popularity of social media. Social media is entrenched in our lives as evidenced by the fact that adult profiles on online social media sites are up from eight percent in 2005 to forty-seven percent in 2009.[6] Similarly, the legal profession jumped aboard the social media bandwagon with forty percent of judges reporting that they use

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1 *See* FACEBOOK, http://www.facebook.com (last visited Sept. 18, 2011) (depicting a social networking site that connects people to others who live, study, and work around them). Facebook's mission is to give people the power to share and make the world more open and connected. *Id*.

2 *See* TWITTER, http://twitter.com (last visited Sept. 18, 2011) (depicting a social networking website that encourages users to update their followers, in 140 characters or less, about what they are doing). Twitter is also used to follow the "tweets" of others in order to stay up-to-date on current situations and personal lives. *Id*.

3 *See* YOUTUBE, http://www.youtube.com (last visited Sept. 18, 2011) (depicting a social media site that allows users to discover, watch, and share videos). It also provides a forum for people to connect, inform, and inspire others around the world. *Id*.

4 *See About Us*, MYSPACE, http://www.myspace.com/Help/AboutUs (last visited Sept. 18, 2011) (depicting a social networking site aimed at the Generation Y audience that allows people to connect, share photos and videos, and view entertainment).

5 *See About Us*, LINKEDIN, http://press.linkedin.com/about (last visited Sept. 18, 2011) (noting that LinkedIn is the world's largest professional network on the Internet and that it allows members to connect and network with other professionals in their field).

6 Amanda Lenhart et al., *Social Media & Mobile Internet Use Among Teens and Young Adults*, PEW INTERNET & AM. LIFE PROJECT (Feb. 3, 2010), http://www.pewinternet.org/~/media//Files/Reports/2010/PIP_Social_Media_and_Young_Adults_Report_Final_with_toplines.pdf.

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social media sites[7] and fifty-six percent of attorneys reporting that they are on social media sites.[8] Technology has made communication instantaneous no matter which "social networking" or communication method is chosen. Unfortunately, social media communication can be dangerous to the integrity of the courts.

The jury is still out on whether social media will have a positive or negative impact on the legal community. There are many different uses for social media aside from personal use and networking. The courts argue that it interferes with the trial process—even though they have created their own social networking sites—while attorneys argue that it is pivotal to jury selection and evidence. Besides, what better way is there to communicate with the twenty-first century public than through Facebook and Twitter? Some courts have already recognized the utility of Facebook and Twitter to keep court users informed and they are doing so in an effective manner.[9] Attorneys also view social media as a method for advertising and discovery while bar associations and courts view it as another area to regulate. This Article will examine social media and how it impacts the courts, including the judiciary's response to the use and abuse of social media by jurors, judges, and other court personnel. This Article will also examine ways in which the judiciary can regulate or attempt to control the use of social media sites in courtrooms.

II. SOCIAL MEDIA TOOLS IN THE COURTS: IMPACT ON THE TRIAL COURTS

Courtrooms across the country are affected daily by the Internet and social media. Social media creates a challenge for courts because a simple "tweet" or "comment" can be posted, copied, and republished around the world within seconds. If the tweet, post, or comment relates to an ongoing case or trial, the availability of such information can cause

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7 Christopher Davey et al., *New Media and the Courts: The Current Status and a Look at the Future*, CONF. CT. PUB. INFO. OFFICERS (Aug. 26, 2010), http://www.kms.ijis.org/db/attachments/public/4338/1/New-Media-and-the-Courts-Report.pdf.

8 Adrian Dayton, *ABA Survey: Lawyers Profiting From Web 2.0*, ABOVE THE LAW (Sept. 30, 2010, 12:22 PM), http://abovethelaw.com/2010/09/aba-survey-lawyers-profiting-from-web-2-0/.

9 *See* Press Release, N.J. Judicial Branch, Judiciary Uses Social Media to Keep Court Users Informed (Aug. 18, 2009), *available at* http://www.judiciary.state.nj.us/pressrel/2009/pr090818a.htm (explaining that the New Jersey Judicial Branch is utilizing SMS, Twitter, Facebook, and YouTube to communicate with court users); *see also* Davey et al., *supra* note 7, at 10 (reporting that a survey stated that "[a] very small fraction of courts (6.7 percent) currently have social media profile sites like Facebook; 7 percent use microblogging sites like Twitter; and 3.2 percent use visual media sharing sites like YouTube").

serious complications for the courts.[10] With the creation of smartphones, access to social media applications has become rampant because most jurors, attorneys, judges, and other court personnel have cell phones, personal computers, or tablets with the ability to text, tweet, or post at any time. The unregulated access to social media in the courts can cause ethical problems for judges as well as attorneys.[11] As a result, the judiciary has begun to regulate the use of social media tools.

The use of social media in the courtroom leads to mistrials, and it is beginning to have an impact on the integrity of the trial courts and the right to a fair trial.[12] As Dr. Douglas L. Keene, a psychologist and past-president of the American Society of Trial Consultants, noted, "[i]f a burglar can't resist checking his Facebook status while in the high-adrenaline process of burglarizing your home, what's to stop a juror during courtroom tedium?"[13] Along those same lines, what's to stop a judge from networking with other attorneys on social media or vice versa? There are no signs of decreasing social media usage. Thus, the judiciary—and the legal system in general—need to take a hard look at how social media affects the trial process.

A. Jurors Using Twitter and Facebook

Imagine a judge's surprise when a jury verdict is posted on a social media site and is subsequently published by a newspaper before the verdict is handed down by the court.[14] Or, contemplate what might result when a juror is discovered sending updates on the case to his Twitter and Facebook accounts.[15] A lawyer understands that

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10 *See* Davey et al., *supra* note 7, at 24–26 (discussing the effect social media has on court proceedings).

11 *See generally* Angela O'Brien, Comment, *Are Attorneys and Judges One Tweet, Blog or Friend Request Away from Facing a Disciplinary Committee?*, 11 LOY. J. PUB. INT. L. 511, 518–19 (2010) (explaining ex parte communications via social networking).

12 *See* Denise Zamore, *Can Social Media Be Banned from Playing a Role in Our Judicial System?*, LITIG. NEWS, http://apps.americanbar.org/litigation/litigationnews/practice_areas/minority-jury-social-media.html (last visited Sept. 18, 2011) (discussing the different ways social media can affect the outcome of trials).

13 Douglas L. Keene & Rita R. Handrich, *Online and Wired for Justice: Why Jurors Turn to the Internet*, THE JURY EXPERT, Nov. 2009, at 15, *available at* http://www.thejuryexpert.com/wp-content/uploads/KeeneTJENov2009.pdf (footnote omitted).

14 Martha Neil, *Judge Linked to 'Lawmiss' Web Comments Removed from Case*, A.B.A. J. (Apr. 22, 2010, 4:32 PM), http://www.abajournal.com/news/article/i_did_nothing_wrong_judge_linked_to_lawmiss_post_tells_ohios_top_court/.

15 *Committee Suggests Guidelines for Juror Use of Electronic Communication Technologies*, THE THIRD BRANCH (Apr. 2010), http://www.uscourts.gov/News/TheThirdBranch/10-04-01/Committee_Suggests_Guidelines_for_Juror_Use_of_Electronic_Communication_Technologies.aspx. [hereinafter *Committee Suggests Guidelines*].

communications dealing with a case made outside the courtroom are strictly prohibited under the rules of professional conduct, but jurors are not held to the same standards.[16] There is no standard, other than perhaps the court rules or judicial guidelines, for monitoring or punishing a juror who tweets, posts, or blogs about case information online. If this juror misconduct begins to affect the trial process and a person's right to trial by an impartial jury, the possibilities of mistrials, motions to dismiss, and motions for new trials could become endless.

Take, for example, the added time the court in *United States v. Fumo* was required to use in deciding the following issues: whether a juror's conduct on Facebook and Twitter constituted grounds for removal of the juror; and whether refusing to remove the juror constituted grounds for a new trial.[17] The court in *Fumo* issued a separate order addressing the defendant's request to remove a juror and his motion for a new trial after Juror Eric Wuest posted comments about the case on Facebook and Twitter.[18] Specifically, Juror Wuest posted comments about the trial on his Facebook and Twitter accounts that were picked up by the local media.[19] After reviewing the juror's online comments, the court held that they were innocuous and provided no information about the trial, much less his thoughts on the trial. Therefore, the juror's statements were not prohibited.[20] Fortunately, the court in *Fumo* was able to examine the juror's conduct and decide what to do about it before the trial ended.

Similarly, in an Arkansas products liability case, the defendant tried to get a $12.6 million verdict overturned because a juror used Twitter to send updates during the trial.[21] The juror claimed that the tweets were sent after the trial ended, and he was no longer obligated under the court instructions to keep quiet about the trial.[22] The company's appeal, based on the juror's tweets, was unsuccessful.[23] But how could his comments not affect the judicial system, or the defendant's rights in some way or another? One tweet sent by the juror stated "oh and nobody buy Stoam. Its [sic] bad mojo and they'll probably cease to [e]xist, now that their

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16 MODEL RULES OF PROF'L CONDUCT R.3.5 (2010).

17 639 F. Supp. 2d 544 (E.D. Pa. 2009).

18 United States v. Fumo, CR No. 06-319, 2009 WL 1688482, at *65–66 (E.D. Pa. June 17, 2009).

19 *Id.* at *58.

20 *Id.* at *67.

21 John Schwartz, *As Jurors Turn to Web, Mistrials are Popping Up*, N.Y. TIMES (Mar. 17, 2009), http://www.nytimes.com/2009/03/18/us/18juries.html.

22 *Id.*

23 Beth C. Boggs & Misty L. Edwards, *Does What Happens on Facebook Stay on Facebook? Discovery, Admissibility, Ethics, and Social Media*, 98 ILL. B.J. 366, 367 (2010).

wallet is 12m [sic] lighter."[24] Depending on who follows this juror's tweets and how accessible his Twitter feed is to the public, this seemingly harmless tweet could wreak havoc on the integrity of the judicial system and the company's rights. If the juror's tweets affected the outcome of the trial in the slightest way, then a mistrial might be declared or a new trial granted, which would ultimately cost the court and interested parties time and money. The judicial system simply cannot afford to re-try cases or declare mistrials after eight weeks of trial; if these types of problems continue to occur, society will begin to question the power and integrity of the courts. The judiciary must operate with a high level of concern for the rights of individuals or it fails to perform its basic function in society: interpreting and applying the laws with fairness, equality, and integrity.[25]

Juror misconduct on social media sites often goes unnoticed by the courts, but it can undermine an individual's right to trial by an impartial jury.[26] Juror misconduct is often not discovered until after the trial is over, and courts are hesitant "to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences."[27] In *Wilgus v. F/V Sirius*, a Maine federal district court case, a juror sent the plaintiff's attorney an e-mail four days after the trial asking whether he knew that the "plaintiff[s] advocated the use of mushrooms and weed smoking, and binge drinking all over the [I]nternet[.]"[28] When the judge asked the juror in a separate inquiry proceeding how he knew such information about the plaintiffs, the juror

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24 Schwartz, *supra* note 21 (internal quotation marks omitted).

25 *See generally* BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T JUST., TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY 28–30 (1997), *available at* http://www.ncjrs.gov/pdffiles1/161570.pdf (explaining that "[t]he most common method of measurement in this performance area is the review and analysis of case-related information").

26 *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

27 United States v. Moon, 718 F.2d 1210, 1234 (2d Cir. 1983); *see* United States v. Ianniello, 866 F.2d 540, 543 (2d Cir. 1989) (explaining the court's reluctance to conduct post-verdict inquiries due to the potential "evil consequences" that may occur as a result) (quoting United States v. Moon, 718 F.2d 1210, 1234 (2d Cir. 1983)) (internal quotation marks omitted); *see, e.g.*, United States v. Anwo, 97 F. App'x 383, 387 (3d Cir. 2004) (holding that the district court did not abuse its discretion by declining to conduct a post-verdict voir dire of the jurors); United States. v. Barshov, 733 F.2d 842, 850 (11th Cir. 1984) (citing United States v. Williams, 716 F.2d 864, 865 (11th Cir. 1983) (holding that the district courts have broad discretion in deciding whether to interrogate jurors regarding alleged misconduct).

28 Wilgus v. F/V Sirius, Inc., 665 F. Supp. 2d 23, 24 (D. Me. 2009).

said he learned these facts from Facebook.[29] The juror gained access to the plaintiff's Facebook pages by sending friend requests that were accepted by the plaintiff.[30] Ultimately, the judge decided that the juror who sent the e-mail did not discover the information about the plaintiff until after the trial had ended, so the plaintiff's motion for a new trial was denied.[31]

In some instances, however, juror misconduct on the Internet during a case leads to a mistrial. In a Florida federal drug case, after eight weeks of trial, a juror admitted to the judge that he had been researching the case on the Internet.[32] Perhaps what was most shocking was that, after questioning the rest of the jury, the federal judge presiding over the case found that eight other members of the jury had been doing the same thing.[33] Judge Zloch decided that he had no other choice than to declare a mistrial (popularly coined the "Google mistrial").[34] Imagine the public and private resources wasted, not to mention the delays caused, after eight weeks of trial. Given these problems, it is not hard to conceive why judges have started banning the use of smartphones in the courtroom. However, a juror on a break can easily search Google, Facebook, Twitter, or Wikipedia for information about the case or laws involved.

Jury members are not taking this issue seriously as evidenced by the fact that even when judges give strict instructions to jurors not to communicate with each other outside of the jury room, they still do so. For example, in 2009, Baltimore Mayor Sheila Dixon sought a new trial after five of the jurors became Facebook "friends" and chatted on the social networking site.[35] The judge had given the jurors strict instructions not to communicate with each other outside of the jury room.[36] Prosecutors argued that the jury members' "friend[]" requests and subsequent comments on Facebook were innocuous because the jurors

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29 *Id.* at 26.

30 *Id.* For a person to become a "Facebook . . . 'friend,'" that person must send a friend request to the other person. *Id.* Then the person receiving the friend request must confirm the person is actually their friend. *Id.* Once confirmation is complete, the two parties are friends and can view each other's profiles. *Id.*

31 *Id.* at 27–28.

32 *See* Schwartz, *supra* note 21 (discussing a federal drug case on distribution of pharmaceuticals on the Internet).

33 *Id.*

34 *Id.*; *see also* Brief for Petitioner for Writ of Certiorari, Rodriquez v. FedEx Freight East, Inc., 131 S. Ct. 3028 (2011), dismissed (No. 10–1226), 2011 WL 1356669.

35 Debra Cassens Weiss, *Jurors' Wikipedia Research, Friending at Issue in Two Md. Cases*, A.B.A. J. (Dec. 14, 2009, 8:01 AM), http://www.abajournal.com/news/article/jurors_wikipedia_research_friending_at_issue_in_two_maryland_cases/.

36 *Id.*

did not discuss details of the case.[37] Ultimately, a plea agreement was reached that included Dixon's resignation.[38] The court then imposed a blanket ban on "'the use of any device to transmit information on Twitter, Facebook, Linked In [sic] or any other current or future form of social networking from any of the courthouses within the Circuit Court for Baltimore City.'"[39]

Interestingly, no court has specifically defined what comments on social media sites would be considered grave enough to warrant a mistrial or new trial. Courts handle these issues on a case-by-case basis, but with the increase in social media site usage, a uniform standard for determining what types of comments are prohibited is necessary. A simple model rule or amended jury instruction that includes language prohibiting the use of electronic communication devices and software during jury selection and jury service might solve the problem of juror misconduct on social media sites. If a straight prohibition on the use of social media sites does not work, then specific language could be added to the rule or instructions defining what types of comments would be inappropriate. Courts could specifically define the term "[s]ocial [m]edia" to ensure there is no confusion about its meaning. Social media profile sites are categorized by the ability to "allow users to join, create profiles, share information, and view still and video images with a defined network of 'friends.'"[40] Using this general categorization, courts could develop a working definition of social media sites that would be prohibited during the course of a trial including, but not limited to, Facebook, Twitter, YouTube, Wikis, blogs, MySpace, and chat rooms. Courts could also require jurors to sign a declaration indicating that they will not communicate about jury selection, the case, members of the court, or jury duty on social media sites or any other means of electronic communication.

A last resort could be to require jurors to report other juror misconduct that occurs both inside and outside the courtroom. However, making jurors responsible for reporting the misconduct of other jury members places the burden of recognizing such misconduct on the juror who might resent jury duty even more with this type of rule in effect. What incentive do jury members have to report the misconduct

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37 Daniel Guzman, *Lawyers: Facebook Warrants New Trial For Baltimore Mayor*, 9 NEWS NOW (Jan. 6, 2010, 6:27 AM), http://www.wusa9.com/news/local/story.aspx?storyid=95614&provider=top.

38 *Id.*

39 Mary Massey, *Twitter in the Court,* THE BALTIMORE SUN (Feb. 15, 2010), http://articles.baltimoresun.com/2010-02-15/news/bal-ed.twitter15feb15_1_social-media-twitter-proceedings.

40 Davey et al., *supra* note 7, at 8.

of their fellow jurors? The outcome of reporting juror misconduct on social media sites could be more time spent in the jury box, which is enough to make jurors wary of relaying such information.

The problem of jurors posting on social media sites before, during, and after trial is not going to go away. What currently happens when a juror disobeys the court's instructions and communicates about a case using social media? Unfortunately, the only avenues available to courts to deter juror use of social media sites are threats of harsh punishments, such as contempt charges.[41] The problem with contempt charges is that instructions on the use of social media tools are not expressly addressed in all courts. Further, if jurors face charges of contempt for discussing specific details of the case on social media sites, some attorneys would argue that there is an issue of free speech (citing the *Schenck* case),[42] while others would argue that it interferes with the right to privacy.[43] Jurors have also been asked to produce copies of the comments posted on Facebook and Twitter or to sign consent forms for social media sites to release the information. In California, a juror noted on his Facebook

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41 *See* Keene & Handrich, *supra* note 13, at 16–17 (discussing juror misconduct via social networking sites and potential jury instructions to alleviate the problem); *see also* Molly McDonough, *Juror Faces Contempt for Watching YouTube Video Before Deliberations*, A.B.A. J. (Apr. 23, 2010, 9:06 AM), http://www.abajournal.com/news/article/juror_faces_contempt_for_watching_youtube_video_before_deliberations/ (reporting that after the verdict two jurors came forward to report that one juror admitted to watching an A&E report on the case on YouTube). Louisville, Kentucky Circuit Court Judge Gibson upheld the conviction, but called the juror in to appear to face contempt charges. *Id.*; *see also* Martha Neil, *Oops. Juror Calls Defendant Guilty on Facebook, Before Verdict*, A.B.A. J. (Sept. 2, 2010, 2:28 PM), http://www.abajournal.com/news/article/oops._juror_calls_defendant_guilty_on_facebook_though_verdict_isnt_in (reporting that a Michigan juror was sentenced to pay a $250 fine and write an essay on the Sixth Amendment right to a fair trial and impartial jury after posting the verdict on her Facebook page). The defense attorney stated the conduct "'compromises the integrity of the system.'" *Id.*; Raul Hernandez, *Juror Held in Contempt for Blog of Murder Trial*, VCSTAR.COM (Jan. 23, 2008, 12:00 AM), http://www.vcstar.com/news/2008/jan/23/juror-held-in-contempt-for-blog-of-murder-trial (explaining that Juror number 7 wrote a daily blog about the details of the case during trial and even posted a photo of the murder weapon). The judge charged the juror with contempt of court and the defendant appealed his conviction. *Id.*

42 *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (stating that there must be a determination of whether "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about . . . substantive evils"). This topic is a separate issue than the one being discussed in this Article and could warrant a separate article.

43 *See* Katz v. United States, 389 U.S. 347 (1967) (listening to and recording defendant's conversation on a public telephone booth violated his privacy). This topic is a separate issue than the one being discussed in this Article and could warrant a separate article.

page that "he was 'still' on jury duty and 'bored' during the case."[44] He also posted other comments regarding evidence of the case.[45] The California trial court ordered the juror to issue a consent form to Facebook to release the comments (Facebook was originally asked to release the comments, but declined to be involved due to the terms and conditions of the agreement the juror had signed with Facebook); the juror filed a complaint in California federal court for a temporary restraining order, but this was denied.[46] The juror then appealed to the California Supreme Court arguing that supplying the postings would violate his privacy rights.[47] If Juror Number One is required to consent to the search and release of his records by Facebook, then prospective jurors in California and other states who post on social media sites during jury duty might be faced with the real possibility that their personal information and communications could be obtained by defendants to get new trials or overturn verdicts.[48] This is the argument against requiring jurors to consent to the reproduction of their personal Facebook comments and tweets. Ultimately, threatening contempt charges or requiring jurors to produce consent forms for access to their personal social media sites will only create more legal issues and will not lead to a sustainable solution.

Drafting a model rule on the use of social media for courts to use when instructing jurors would begin to alleviate the problems of juror misconduct on social media sites, but it might not stop jurors from communicating electronically outside the courtroom. Short of punishing juror misconduct on the Internet, the only way to ensure that jurors are not engaging in online communication about a trial on social media sites is a court-entered gag order or sequestration.[49]

B. Judges Using Twitter and Facebook

Jurors are not the only ones taking heat for using social media tools in the courtroom. Judges are using social media sites to connect with "friends" and post comments. Whether they are allowed to do so in their personal or professional capacity is still under scrutiny in many

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44 Juror Number One v. California, No. CIV. 2:11–397 WBS JFM, 2011 WL 567356, at *1 (E.D. Cal. Feb. 14, 2011); *Civil Procedure – Discovery: Younger Bars Federal Relief for Juror on Facebook*, 79 U.S.L.WK. 2200 (Mar. 15, 2011).

45 *Civil Procedure – Discovery*, *supra* note 44.

46 *Id.*

47 Complaint at 7, Juror Number One v. California, No. CIV. 2:11–397 WBS JFM (E.D. Cal. Feb. 11, 2011).

48 *See id.* at 6.

49 Zamore, *supra* note 12.

states. Several states are interpreting judicial canons to apply to communications on, and the use of, social media tools, while other states are remaining silent on the issue until a situation calls for an advisory opinion or public reprimand.[50]

Most judges know better than to communicate on Facebook, Twitter or blogs before, during, or even after a trial, but there are always exceptions. In Ohio, Cuyahoga County Common Pleas Judge Shirley Strickland Saffold was accused of posting comments about a serial murder case on the Internet.[51] Anonymous internet comments by "'Lawmiss,'" concerning Attorney Rufus Sims and his client Anthony Sowell, were linked to Judge Saffold's personal email account and court computer. After discovering the posts, the attorney asked for the judge's recusal from the case even though Judge Saffold denied writing them.[52] A similar situation occurred in England where a magistrate and former mayor, Professor Steve Molyneux, got in trouble for tweeting about his cases.[53] After tweeting details of cases week after week, the magistrate found himself in trouble over tweets about a bail application when a fellow magistrate discovered them.[54] Ultimately, the magistrate resigned, stating, "'I did nothing wrong, I did nothing illegal. I didn't mention any names or write about anything in the retiring room. All I wrote was in the public domain already.'"[55]

The Federal Courts are not immune to the issue of judges using social media sites either. In *Purvis v. Commissioner of Social Security*, Judge Susan Davis Wigenton used Facebook to investigate a witness.[56] Judge Wigenton expressed her doubts about the merits of the plaintiff's claim in a footnote stating:

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50 *See Judicial Ethics Advisory Committee Op. 2009–20*, FLORIDA SUPREME COURT (Nov. 17, 2009), http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html (citing Fla. Code of Judicial Conduct Canon 2B); In re Terry, No. 09-234 (N.C. Jud. Standards Comm'n Apr. 1, 2009) (stating a judge violated the judicial standards posting comments on an attorney's Facebook "wall" during and regarding an active lawsuit); Advisory Comm. on Standards of Judicial Conduct, No. 17-2009 (S.C. Jud. Dept. Oct. 2009); *see also* MODEL RULES OF JUDICIAL CONDUCT R. 2.11(A) (2010) (stipulating when a judge must "disqualify himself or herself").

51 Martha Neil, '*Lawmiss' Comment on Accused Serial Killer Is Linked to Judge Overseeing His Case*, A.B.A. J. (Mar. 26, 2010, 4:46 PM), http://www.abajournal.com/news/article/is_lawmiss_post_on_accused_serial_killer_by_judge_overseeing_the_case.

52 *Id.*

53 Simon Hardy, *Magistrate quits in Twitter row*, SHROPSHIRE STAR (Apr. 25, 2009, 4:00 PM), http://www.shropshirestar.com/latest/2009/04/25/magistrate-put-case-thoughts-on-internet/.

54 *Id.*

55 *Id.*

56 Purvis v. Comm'r of Soc. Sec., No. 09–5318 (SDW) (MCA), 2011 WL 741234, at *7 n.4 (D.N.J. Feb. 23, 2011).

> [a]lthough the Court remands the ALJ's decision for a more detailed finding, it notes that in the course of its own research, it discovered one profile picture on what is believed to be Plaintiff's Facebook page where she appears to be smoking. . . . If accurately depicted, Plaintiff's credibility is justifiably suspect.[57]

If jurors are researching the case details and attorneys are researching potential jurors, it is not at all shocking that judges are investigating parties and witnesses on social media sites. These outside research situations pose the question: Is it appropriate to access social media sites for use in trial and decisions? If so, attorneys should start advising clients to take down their social media sites.

Professional codes of conduct are written and enforced for a reason.[58] Judges should be aware of the repercussions of dishonoring the judicial system and should try to avoid doing so at all costs.[59] That is not to say that judges cannot participate in social media sites in their personal capacity, but they must be cautious in what they post, share, comment, and tweet on social media sites. If violations of the professional codes of conduct continue, then the judiciary will need to examine what can be done to decrease violations including meting out harsher punishments for violators.

III. THE RESPONSE TO THE USE AND ABUSE

Questions and concerns regarding social media site usage in the courts have seen an overwhelming response, yet confusion remains due to the lack of uniformity in the courts. Federal courts have created some sample guidelines,[60] but have set no clear precedent. The Judicial Conference has issued reports and articles on social media use guidelines for judges and court personnel.[61] At the state level, some states have amended court rules and model jury instructions, calling for jurors to

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57 *Id.*

58 *See* MODEL CODE OF JUDICIAL CONDUCT SCOPE (2010) (explaining that the Model Code establishes a set of ethical cannons to which all judges should strive).

59 *See generally* MODEL CODE OF JUDICIAL CONDUCT (2010) (establishing ethical guidelines judges should follow in order to maintain the integrity of the judiciary).

60 *See Committee Suggests Guidelines, supra* note 15 (suggesting specific jury instructions to deter jurors from using electronic devices during the trial and jury deliberations).

61 *See* Comm. on Codes of Conduct, *Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees*, THE JUD. CONF. OF THE UNITED STATES (2010), *available at* http://www.ce9.uscourts.gov/jc2010/references/mjep/Use_of_Social_Media_by_Judicial_Employees.pdf.

refrain from using electronic media and social media in the courtrooms while serving on juries.[62] Other states remain silent on the issue.

A. Judicial Ethics

Given the prevalent use of social media sources by lawyers and laypeople, one must consider how judges themselves are using social media. Should judges make a distinction between their personal and professional lives? In most cases, there does not seem to be a distinction on social media sites between personal and professional profiles. If a judge posts or tweets about his career or work on his personal profile or Twitter feed, like most users do, does the social media site usage affect the judicial system? The State of Florida says that this type of conduct does affect the judicial system and is prohibited. Judges in Florida are not allowed to be "'friends'" with practicing attorneys in Florida.[63] Citing Canon 2B of the Florida Code of Judicial Conduct, the Supreme Court emphasized the need to avoid giving the impression that certain lawyers were in a "special position to influence the judge."[64] This is an understandable outcome as judges often recuse themselves from proceedings due to personal relationships with the parties, but what judge doesn't interact with attorneys that he or she went to school with or knew in a personal capacity before becoming a judge? Judges in every state would benefit from a judicial ethics guideline that outlines the boundaries of participation in online social media sites. For example, the judiciary could issue an ethical guideline suggesting that judges not participate in social media sites at all, be extremely cautious if doing so, or be required to set privacy settings on social media sites to the highest level and refrain from remarking about their professional lives. Adopting this type of ethical guideline would mean that judges would not be left to define their own boundaries regarding their participation on social media sites.

Judges might not be left on their own regarding this issue for long. The Conference of Court Public Information Officers ("CCPIO") is beginning to address social media and the courts.[65] In August 2010, the

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62 *See* CONN. CIVIL JURY INSTRUCTION 1.1-1; REV. ARIZ. JURY INSTRUCTION (CRIM.) 3RD (2009), PRELIM. INSTRUCTION 13; FLA. STAT. ANN. STANDARD CRIMINAL JURY INSTRUCTION 3.13; MICH. COURT RULE 2.511(H)(2); NEB. SUPREME COURT RULE § 2-118; WIS. JURY INSTRUCTION, CRIM. NO. 50; *In re* Standard Jury Instructions in Criminal Cases—Report No. 2010-01 and Standard Jury Instructions in Civil Cases—Report No. 2010-01, No. SC10-51 (Fla. Oct. 21, 2010) (per curiam).

63 *Judicial Ethics Advisory Committee Op. 2009–20*, *supra* note 50.

64 *Id.*; FLORIDA CODE OF JUDICIAL CONDUCT CANON 2B (2008).

65 Davey et al., *supra* note 7, at 7–10.

CCPIO released a report on new media and the courts, which included a section on social media.[66] At the beginning of the report, the CCPIO used the performance standards implemented by the National Center for State Courts and the Bureau of Justice Assistance of the U.S. Department of Justice to examine the impact of new media on the courts.[67] These standards stress the importance of "public trust and confidence" in the courts.[68] This public trust and confidence judicial performance standard has three main components:

> Standard 5.1 requires that the trial court be perceived by the public as accessible. Standard 5.2 requires that the public believe that the trial court conducts its business in a timely, fair, and equitable manner and that its procedures and decisions have integrity. Finally, Standard 5.3 requires that the trial court be seen as independent and distinct from other branches of government at the [s]tate and local levels and that the court be seen as accountable for its public resources.[69]

After considering these components, the CCPIO recognized how social media use could adversely impact the court's ability to meet Standard 5.2, especially with regard to the integrity of the court.[70] The CCPIO recognized that social media use by judges allows for collaboration and communication, but also creates the risk that the public will view the judges' conduct on the sites negatively.[71] Public perception of the courts is an important part of the judicial standards, and judges are required to promote public trust and confidence in the judicial system.[72] It is obvious from the media attention directed at judges posting on social media sites that they often recklessly post comments on Facebook or Twitter about trials, attorneys, or plaintiffs and defendants.[73] This will

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66 *Id.*

67 *Id.* at 23; *see* BUREAU OF JUSTICE ASSISTANCE, *supra* note 25, at 28–30 (discussing the performance standards that were enacted to stress the importance of "public trust and confidence").

68 Davey et al., *supra* note 7, at 23.

69 *Id.* at 24.

70 *Id.* at 24–25.

71 *Id.* at 26.

72 *Id.* at 25.

73 *See* John M. Annese, *Criminal Court Judge to be Transferred: Sciarrino Being Sent from Island to Brooklyn; Sources Cite His Activities on Social Networking Site*, STATEN ISLAND ADVANCE, Oct. 15, 2009, at A1; Adrienne Meiring, *Ethical Considerations of Using Social Networking Sites*, IND. CT. TIMES, Nov/Dec. 2009, at 10–11; Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It's Also Dangerous*, A.B.A. J. (Feb. 1, 2011, 5:20 AM), http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of

only serve to undermine the public's trust and confidence in the courts. The CCPIO and the U.S. Department of Justice need to solve this potential problem by creating rules or setting standards for what is to be considered appropriate use of social media sites. In fact, the CCPIO recommends the formation of a standing committee to study and report on new media issues, on an ongoing basis, and the development of tools to help the courts respond to and manage new media.[74] Judges should be permitted to maintain social media sites to connect and communicate with the public, especially in the case of elected judges, but there must be safeguards in place to protect the integrity of the courts.

The Judicial Conference of the United States has addressed the issue of judicial employees using social media sites, and some federal courts have already implemented rules to safeguard against improper use of social media sites by employees.[75] In 2010, the Judicial Conference Committee on Codes of Conduct published the *Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees*.[76] This guide provides information to help courts develop policies on the use of social media by judicial employees.[77] The guide also includes sample policy provisions and existing policy examples from U.S. District Courts.[78] Some of the examples suggest disciplinary actions to be taken, including termination, if an employee of the judiciary violates the rules on social media use.[79] Using the Canons of Judicial Conduct as guidance, the Committee's resource packet defines social media, lists examples of improper communication, and gives sample policies for its use by employees.[80] However, this leaves the decision to draft and implement such policies up to each individual court.[81] Why not draft a uniform policy that each court must adopt? A uniform policy would ensure that each judicial employee's conduct on social media sites is

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_social_media_is_obvious_dangerous?utm_source=maestro&utm_medium=email&utm_campaign=default_email; Stephanie Francis Ward, *Justice Breyer's on Twitter and Facebook, But Don't Count on him Friending You*, A.B.A. J. (Apr. 14, 2011, 1:46 PM) http://www.abajournal.com/news/article/breyer_on_facebook_but_dont_count_on_him_friending_you/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

74 Meiring, *supra* note 73, at 11–12.

75 Comm. on Codes of Conduct, *supra* note 61.

76 *Id.*

77 *Id.* at 5–6.

78 *Id.* at 27–42.

79 *Id.* at 38. "Employees who participate in online communication deemed not to be in the best interest of the Court may be subject to disciplinary action. . . . Disciplinary action can include termination or other intervention deemed appropriate by Human Resources." *Id.*

80 *Id.* at 9–19.

81 *Id.*

treated in the same manner. It would also safeguard against discrepancies in disciplinary actions and could clearly define what conduct is prohibited on social media sites by judicial employees.

Absent a set of rules or guidelines like the ones provided by the Judicial Conference of the United States, how can a state prevent judges from abusing social media sites? Perhaps existing rules can be used without specifically creating a rule for social media. For example, in North Carolina, a judge was publicly reprimanded for establishing contact with an attorney in an active case through a social networking site.[82] After an investigation, the Judicial Standards Commission found that the district court judge presiding over a custody matter had become "'friends'" on Facebook with an attorney involved in the custody proceedings.[83] During the proceedings, the judge and the attorney commented about the trial back and forth to each other on Facebook.[84] The Commission found that the judge had violated the canons of judicial ethics by having *ex parte* communications with the attorney of a party in a matter being actively tried before him.[85] The Commission rather harshly criticized the judge, stating that his actions:

> evidence a disregard of the principles of conduct embodied in the North Carolina Code of Judicial Conduct, including failure to personally observe appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved (Canon 1), failure to respect and comply with the law (Canon 2A), failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Canon 2A), engaging in *ex parte* communication with counsel and conducting independent *ex parte* online research about a party presently before the Court (Canon 3A(4)).[86]

In this case, the Commission was able to use an existing rule to attempt to control the use of social media sites by judges. Similar to the CCPIO, the North Carolina Commission focused on promoting the public

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82 *Public Reprimand B. Carlton Terry Jr. District Court Judge*, Inquiry No. 08-234, N.C. JUD. STANDARDS COMM'N (Apr. 1, 2009), *available at* http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf.

83 *Id.* at 2.

84 *Id.*

85 *Id.* at 3–4 (citing a violation of North Carolina Judicial Canon 3A(4)).

86 *See id.* (noting that the judge was also reprimanded for conducting independent research about the party by looking at the party's photography website).

confidence in the integrity of the judiciary by reminding judges of their standards of professional conduct.[87] Other states disagree with North Carolina and allow judges to communicate freely on social media sites so long as the conduct does not violate the judicial standards of conduct.[88]

Obviously, tweets and blog posts can land judges in hot water with other members of the judiciary and the public. In some instances, public reprimands or advisory opinions are necessary to set examples of how the rules of judicial ethics can be violated by using these sites. Yet, there are some states that are open to allowing judges to interact online with attorneys, the public, and court personnel on social media sites. For example, in New York, the Advisory Committee on Judicial Ethics issued an opinion prompted by an inquiry from a judge who received an invitation to join a social networking site.[89] The judge asked the Advisory Committee whether or not it was appropriate for a judge to accept the offer and participate in the social network; the Committee answered in the affirmative, with some qualifications:

> Provided that the judge otherwise complies with the Rules Governing Judicial Conduct, he/she may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules.[90]

The Committee also stressed the importance of maintaining the dignity of the judicial office and noted that the judge should "recognize the

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87 *See id.* Judge Terry's actions constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute. *Id.* (citing N.C. CONST. art IV, § 17 and N.C. GEN. STAT. § 7A-376(a) (2009)).

88 *See* Bd. of Comm'rs on Grievances and Discipline, SUP. CT. OF OHIO, Op. 2010–07 (Dec. 3, 2010) (explaining that a judge may be a "friend[ ]" on a social networking site with a lawyer who appears as counsel in a case before the judge); *Judges' Membership on Internet-Based Social Networking Sites*, ETHICS COMM. OF THE KY. JUDICIARY, Formal Judicial Ethics Op. JE-119 (Jan. 2010); N.Y. ADVISORY COMM. ON JUD. ETHICS, Op. 08-176 (Jan. 29, 2009), *available at* http://www.nycourts.gov/ip/judicialethics/opinions/08-176.htm; *see also* Meiring, *supra* note 73 (stating that generally judges are allowed to join social networks under rule 3.1 of the Indiana Judicial Code of Conduct).

89 N.Y. ADVISORY COMM. ON JUD. ETHICS, Op. 08–176 (Jan. 29, 2009), *available at* http://www.nycourts.gov/ip/judicialethics/opinions/08-176.htm.

90 *Id.*

public nature of anything he/she places on a social network page and tailor any postings accordingly."[91]

It appears that, in New York, judges are allowed to interact online with attorneys and members of the public just as they would in a face-to-face social situation. The New York Advisory Committee explained that there is not much of a difference between adding a person's contact information to your personal address book and adding them as a friend on Facebook.[92] Similarly, the South Carolina Advisory Committee on Standards of Judicial Conduct in opinion No. 17–2009 concluded that a magistrate judge could have law enforcement personnel and court employees as "friends" on the magistrate judge's Facebook page.[93] The Committee concluded that, "[a] judge may be a member of Facebook and be friends with law enforcement officers and employees of the Magistrate as long as they do not discuss anything related to the judge's position as magistrate."[94] The Committee reasoned that the judge should be allowed to be a member of social networking sites to foster good relationships with the community and to give the community a better understanding of their viewpoints.[95]

In the Commonwealth of Kentucky, the Ethics Committee of the Judiciary issued a 2010 opinion concluding that judges may be members of Facebook and "'friends'" with people who may appear before them in court.[96] The Committee reasoned that simply listing other people as "'friends'" does not convey a special relationship between the judge and

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91 *Id.*; *see* N.Y. ADVISORY COMM. ON JUD. ETHICS, Op. 07–135 (Oct. 18, 2007), *available at* http://www.nycourts.gov/ip/judicialethics/opinions/07-135.htm (stating that it is permissible to provide a link to newspaper articles on a judge's website provided they are dignified, truthful, and not misleading); N.Y. ADVISORY COMM. ON JUD. ETHICS, Op. 01–14 (Mar. 8, 2001*), available at* http://www.nycourts.gov/ip/judicialethics/opinions/01-14.htm (explaining that a judge should not provide a link on its page for an advocacy group).

92 *See supra* note 89 ("The judge also should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge's court through a social network. In some ways, this is no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e., other users can normally see the judge's friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond.").

93 S.C. ADVISORY COMM. ON STANDARDS OF JUD. CONDUCT, Op. No. 17–2009 (Oct. 2009), *available at* http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009.

94 *Id.*

95 *Id.*

96 *Judges' Membership on Internet-Based Social Networking Sites*, ETHICS COMM. OF THE KY. JUDICIARY, Formal Jud. Ethics Op. JE–119, at 1 (Jan. 2010).

the "friend[ ]."[97] In the Committee's view, the terms "'friend,'" "'fan'" and "'follower'" are terms of art used by the social media sites and are not used in the ordinary sense of the words.[98] This rationale promotes access to justice by allowing judges to communicate with the public. However, judges should still be cautious when deciding whether to join a specific social media site because participating in the sites could lead to disqualifications in matters pending before the court or to an appearance undermining the judge's independence or impartiality.[99]

The ethics opinions from Florida, Kentucky, New York, North Carolina, and South Carolina suggest that creating a new rule of judicial conduct may not be necessary to solve the issue of judges using social media sites.[100] The ethics committees in those states relied on established canons of judicial conduct to analyze whether participation in social media sites is appropriate conduct for judges, and they ultimately used the language of the established canons or codes to issue their respective opinions.[101] Ethics committees across the country can simply follow the lead of these states and rely on established rules of conduct, interpreting the rules in favor of or against judges using social media sites. It is important to note, however, that all of the opinions mentioned are advisory and not binding under the law.[102] States should consider creating a binding rule or policy for judges and judicial employees or, at the very least, encourage each individual court to implement such a rule or policy. By doing so, states will begin to address the problem of social media affecting the integrity of the judicial system and the public trust and confidence in the courts.

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97 *Id.* at 2.

98 *See id.* (discussing how the Committee also noted that other states have reached conflicting results citing Florida, New York, and South Carolina).

99 *See* MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2010) ("A judge shall act at all times in a manner that promotes public confidence in the *independence*, integrity, and *impartiality* of the judiciary, and shall avoid impropriety and the appearance of impropriety.") (emphasis added).

100 *See supra* notes 63, 82, 89, 93 & 96 (discussing these states' ethics opinions).

101 *See* FLORIDA CODE OF JUDICIAL CONDUCT CANON 2B (2008); NORTH CAROLINA CODE OF JUDICIAL CONDUCT CANON 1, 2A, & 3A(4) (2010).

102 *See* KY. SUPREME COURT R. 4.310(3) ("Both formal and informal opinions shall be advisory only; however, the commission and the Supreme Court shall consider reliance by a justice, judge, trial commissioner or by any judicial candidate upon the ethics committee opinion."); ARK. R. JUDICIAL ETHICS COMM. R. 6 ("All opinions shall be advisory in nature only. No opinion shall be binding on the Judicial Discipline & Disability Commission or the Supreme Court in the exercise of their judicial discipline responsibilities."); FLA. STAT. ANN. JUDICIAL ETHICS COMM. R. 5 ("The Committee shall render advisory opinions to inquiring judges relating to the propriety of contemplated judicial and nonjudicial conduct, but all opinions shall be advisory in nature only. No opinion shall bind the Judicial Qualifications Commission in any proceeding properly before that body.").

B. New Court Rules and Jury Instructions

The question then becomes: "What kinds of binding authority are available to help the courts deal with social media use by jurors and is there a need for binding authority or will clearer jury instructions and court rules be enough to deter jurors and members of the court from discussing cases on social media sites?" Some courts and legislatures have already responded to the use and abuse of social media in the courts by creating amended jury instructions and new rules of civil and criminal procedure relating to electronic communication.[103]

Adopting pattern jury instructions that specifically address the use of social media sites is the most logical place to start. The judicial system as a whole will only benefit from adopting pattern jury instructions on the appropriate use of online social media sites and electronic communication technology. In December 2009, the Judicial Conference Committee on Court Administration and Case Management took the first step in establishing this type of instruction by issuing guidelines for juror use of electronic communication technologies.[104] The guidelines include one set of sample jury instructions that judges could consider reading to jurors before trial and a different set of instructions for the close of the case.[105] The instructions go above and beyond prohibiting the juror from communicating about the case outside of the jury room.[106] In fact, the instructions are pretty clear about what electronic communication is forbidden: "You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, MySpace, LinkedIn, and YouTube."[107]

The model jury instructions were written to help deter jurors from using electronic technologies when hearing testimony and deliberating on a case.[108] Reading these model jury instructions at the beginning and end of a court proceeding is the better alternative, rather than the harsher policy of confiscating all electronic communication devices before entering a courtroom. Some judges are even telling jurors

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103 *See supra* note 62 (discussing state jury instructions that forbid certain electronic communication).

104 *Committee Suggests Guidelines, supra* note 15.

105 *Id.*

106 *Id.*

107 *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case*, JUD. CONF. COMMITTEE ON CT. ADMIN. & CASE MGMT. (Dec. 2009), http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018-Attachment.pdf.

108 *Committee Suggests Guidelines, supra* note 15.

outright that "no tweeting [is allowed] during the trial,"[109] while others are asking during jury selection if anyone has a blog.[110] However, would it be better to wait until the jury is selected before asking if any of the jurors have a blog, Twitter feed, or Facebook page, and then prohibit them from communicating about the trial on these sites?

Or should this type of question be a part of voir dire? Dr. Cynthia Cohen, the 2009 President of the American Society of Trial Consultants, believes that the problem could be eliminated, and mistrials could be avoided, by asking about the use of social media sites during voir dire.[111] The rationale behind Dr. Cohen's belief is that "'[i]f prospective jurors are better scrutinized during voir dire, [it is] more likely . . . to eliminate the problem and avoid a mistrial.'"[112]

What happens when a juror says he or she posts on Facebook every day and maintains a blog? Do the attorneys disqualify that person as a juror just because he or she is a member of social media sites? Would that not be considered a form of juror bias? With over 350 million users on Facebook,[113] and another 18 million on Twitter,[114] who will be left to serve jury duty if having a social media account eliminates you as a juror? The better solution would be to monitor juror use of social media sites. This presents a new type of challenge for the courts: How should jurors be monitored to make sure they are not communicating electronically about the trial without creating an invasion of privacy issue?

To avoid monitoring jurors and members of the court, why not create a rule prohibiting all electronic communication devices in the courtroom? The United States District Court for the Southern District of Florida took the recommendations of the Judicial Conference seriously and issued an administrative order prohibiting electronic transmission and cell phone use inside its courtrooms.[115] The Order prohibits "emailing, text messaging, twittering, typing, and using cellular

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109 Robert K. Gordon, *Facebook, Twitter Causing Judges to Amend Jury Instructions*, BIRMINGHAM NEWS (Oct. 20, 2009), http://www.al.com/news/birminghamnews/metro.ssf?/base/news/1256026558309710.xml&coll=2.

110 *See id.* (quoting Dr. Cynthia Cohen, President of the American Society of Trial Consultants, when she stated "[w]hat we're seeing is judges now having to ask during . . . (jury selection) if anyone has a blog").

111 *Id.*

112 *Id.*

113 CAROLYN ELEFANT & NICOLE BLACK, SOCIAL MEDIA FOR LAWYERS: THE NEXT FRONTIER 6 (2010).

114 *Id.* (citing Mashable.com statistic located at: http://mashable.com/2009/10/14/twitter-2009-stats/).

115 S.D. Fla. L.R., Admin. Order 2009–12 (Mar. 13, 2009).

phones . . . [from] inside . . . courtrooms."[116] The court noted that the prohibited actions "violate the sanctity of the courtroom and disrupt ongoing judicial proceedings," and any violations will result in contempt of court.[117] At the same time, however, this order amended a previous order that specifically allowed news reporters to bring electronic communication devices, including cell phones, into the courtroom as long as they are not used.[118] Does this new rule violate the public's right to know what happens in the court?[119] The answer is likely no, because reporters can always revert back to the old pen and paper method. The court policy does not prohibit reporters in the courtroom and ensures that reporters can exit the courtroom to use electronic communication devices if necessary.[120] Therefore, public access to the court is still available.[121] The strict prohibition of electronic communication devices and social media tools in the courtroom might be considered extreme, but if it solves the problem of jurors, court employees, and the media posting comments about cases on social media sites, then perhaps more courts will take a similar stance.

Another court that has recognized the impact of juror communication on social media sites is the United States District Court

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116 *Id.*

117 *Id.*

118 S.D. Fla. L.R., Admin. Order 2006–16 (July 28, 2006).

119 *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (holding "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"). The Court also noted in footnote 17, "[w]hether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open." *Id.*; *see also* Presley v. Georgia, 130 S. Ct. 721 (2010) (noting that the public has a right of access to the courts under the First Amendment). *But see* Hollingsworth v. Perry, 130 S. Ct. 705 (2010) (striking down a district court's local rule that allowed cameras to broadcast the California Proposition 8 non-jury trial to other courts).

120 S.D. Fla. L.R., Admin. Order 2009–12 (Mar. 13, 2009).

> To balance the interest in preserving the sanctity and conduct of judicial proceedings against the public's right to know what occurs inside the District's courtrooms, this Order amends Administrative Orders 2006–16 and 2008–07 to allow news reporters to bring cellular phones, Blackberries, iPhones, Palm Pilots, and other similar electronic personal digital assistants ("PDAs") into the courthouse consistent with what is permitted of attorneys, as long as the news reporters agree in writing not to email, text message, twitter, type, or use their cellular phones or other electronic device inside the District's courtrooms. . . . The Clerk of Court shall also make space available in each courthouse for those listed reporters to use their cellular phones and other electronic devices outside of the courtrooms.

Id.

121 S.D. Fla. L.R., Admin. Order 2009–12 (Mar. 13, 2009).

for the Eastern District of Michigan. The Eastern District of Michigan's local rule differs from the Florida rule in that it does not prohibit all electronic communication devices in the courtroom.[122] The local rule states:

> Once summoned to a courtroom for selection and until discharged, jurors must refrain from any outside contact or communication that relates to the case, which includes the use of cell phones, Black[b]erries, iPhones, and other smartphone devices, the Internet, e-mail, text messaging, instant messaging, chat rooms, blogs, or the use of social networking websites such as Facebook, MySpace, LinkedIn, YouTube, or Twitter.[123]

This local rule is not as strict as the one in Florida, as it does not expressly prohibit the use of electronic communication devices in the courtroom.[124] Rather, the Michigan rule merely asks jury members to *refrain* from using the technology.[125] Which method works best: strict prohibition or instructions warning against the use of social media? The answer is unclear, but the federal district and circuit courts have begun to propose jury instructions on the use of electronic communication in the courts.[126]

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122 E.D. Mich. L.R. 47.1.

123 *Compare* S.D. Fla. L.R., Admin. Order 2009–12 (Mar. 13, 2009) ("[E]mailing, text messaging, twittering, typing, and using cellular phones shall continue to be prohibited inside the District's courtrooms.") *with* E.D. Mich. L.R. 47.1(b) ("Once summoned to a courtroom for selection and until discharged, jurors must refrain from any outside contact or communication that relates to the case, which includes the use of cell phones, BlackBerries, iPhones, and other smartphone devices, the Internet, e-mail, text messaging, instant messaging, chat rooms, blogs, or the use of social networking websites such as Facebook, MySpace, LinkedIn, YouTube, or Twitter.").

124 *See* S.D. Fla. L.R., Admin. Order 2009–12 (Mar. 13, 2009) (providing a strict prohibition of communication devices in the courtroom); E.D. Mich. L.R. 47.1(b) (explaining that the local rule merely instructs jurors to "refrain from any outside contact or communication that relates to the case").

125 *Id.*

126 *See Committee Suggests Guidelines, supra* note 15 (suggesting jury instructions to deter juror misconduct); *see also* MANUAL OF MODEL CIV. JURY INSTRUCTIONS FOR THE DIST. CTS. OF THE EIGTH CIR. § 1.05 (2011), *available at* http://www.juryinstructions.ca8.uscourts.gov/civ_manual_2011.pdf (providing detailed jury instructions that will deter juror misconduct). Detailing:

> You must not communicate with anyone or post information about the parties, witnesses, participants, [claims, charges], evidence, or anything else related to this case. You must not tell anyone anything about the jury's deliberations in this case until after I accept your verdict or until I give you specific permission to do so. . . . During the trial, while you are in the courthouse and after you leave for the day,

At the state level, each individual court is free to adopt its own set of jury instructions. Some courts, however, have followed the federal judiciary's lead and have released similar model jury instructions to address the issue of jurors using social media sites.[127] For example, the Florida Supreme Court issued an order authorizing the publication and use of new, amended, and model uniform jury instructions for civil and criminal cases on the issue of electronic communication device use during jury selection and juror service.[128] The new jury instructions

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> do not provide any information to anyone by any means about this case. Thus, for example, do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, Blackberry, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or Website such as Facebook, MySpace, YouTube, or Twitter, or in any other way communicate to anyone any information about this case until I accept your verdict. *Sixth*, do not do any research—on the Internet, in libraries, in the newspapers, or in any other way . . . .

Id.; NINTH CIR. MANUAL OF MODEL JURY INSTRUCTIONS CIV. § 1.12 (2007) (explaining how the Ninth Circuit was among the first federal appellate courts to have jury instructions on Internet use). The instruction includes "e-mail, text messaging, or any Internet chat room, blog, [or] Website" in its admonition against jurors discussing the case prior to deliberations, and also explains that:

> The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address. A juror who violates these restrictions jeopardizes the fairness of these proceedings[, and a mistrial could result that would require the entire trial process to start over].

Id. The Ninth Circuit Criminal Jury Instruction 1.9 includes the same language. *Id.*

[127] Supreme Court of Fla., IN RE: STANDARD JURY INSTRUCTIONS IN [CIV. AND CRIM.] CASES No. SC10–51 (Oct. 21, 2010); N.M. UNIF. JURY INSTRUCTION—CRIM. No. 14-101 (2011), *available at* http://www.nmcompcomm.us/nmrules/NMRules/14-101_1-24-2011.pdf.; Indiana, ORDER AMENDING INDIANA JURY RULES (Mar. 1, 2010), *available at* http://www.in.gov/judiciary/orders/rule-amendments/2010/0301-jury.pdf (noting that Indiana Jury Rules 20(b) & 26(b) (eff. July 1, 2010) also prohibit juror use of social media and permit the court to collect electronic devices from jurors during deliberations); CONN., CIV. JURY INSTRUCTIONS § 1.1-1 (Nov. 20, 2009), *available at* http://www.jud.ct.gov/JI/Civil/part1/1.1-1.htm; HAW. PATTERN JURY INSTRUCTIONS—CRIM., No. 2–01 (rev. 2009), *available at* http://www.courts.state.hi.us/docs/legal_references/jury_instruct6.pdf; MICH. CIV. JURY INSTRUCTIONS § 2.06, *available at* http://courts.mi.gov/mcji/general-instructions/gen-instructions-ch2.htm#ji206; N.Y., JURY ADMONITIONS IN PRELIMINARY INSTRUCTIONS § 6 (rev. May 5, 2009), *available at* http://www.nycourts.gov/cji/1-General/CJI2d.Jury_Admonitions.pdf; OHIO STATE BAR ASS'N JURY INSTRUCTIONS, Jury Admonition, *available at* http://www.lawriter.net/NLLXML/getcode.asp?statecd=OH&codesec=UndesignatedJURY%20ADMONITION&sessionyr=2009&Title=i&version=1&datatype=OHOSBAJI&cvfilename=ohohosbajicv2009TopicIUnprefixedC.htm&docname=JURY+ADMONITION&noheader=0&nojumpmsg=0&userid=PRODSG&Interface=CM; WIS., JURY INSTRUCTION (CRIM.) § 50, *available at* http://www.postcrescent.com/assets/pdf/U014968718.PDF.

[128] Supreme Court of Fla., IN RE: STANDARD JURY INSTRUCTIONS IN [CIV. AND CRIM.] CASES No. SC10–51, 4 (Oct. 21, 2010).

stress that a juror or potential juror "must not use electronic devices or computers to talk about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all."[129] This instruction focuses on the problem of jurors using social media sites to communicate electronically and it prohibits the practice during a case, but the instructions also ask jurors to report any violations to the bailiff, which could be problematic.[130] The odds that another juror will report a violation before deliberations end are slim because the reporting juror would have to explain the violation to the judge, which would ultimately prolong jury duty.[131] If a juror waits to report the violation after the trial has ended, which is typically how the reporting occurs, then a motion for a new trial could be granted.[132] To avoid mistrials and new trials, why not start monitoring jurors' social media site usage?[133] While this issue remains a challenge, the simplest solution is to draft and implement clearer jury instructions dealing with the issue of social media site use in the courtroom.

What type of jury instruction will work to negate this problem once and for all? The State of Arizona provides a promising example of what a jury instruction should include regarding electronic communication and social media sites.[134] The Arizona jury instruction, entitled "The Admonition," stresses to the jury that the instruction is comprised of "mostly don'ts."[135] Throughout the instruction the court stresses the importance of the trial process and the established procedures for viewing evidence and deliberating, and it strictly prohibits the use of social media sites for communication:

> Do not talk to anyone about the case, or about anyone who has anything to do with it, and do not let anyone talk to you about those matters, until the trial has ended, and you have been discharged as jurors. This prohibition about not discussing the case includes using e-mail, Facebook, MySpace, Twitter, instant messaging, Blackberry messaging, I-Phones [sic], I-Touches [sic], Google, Yahoo, or any internet search engine, or any

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129 *Id.* at 6 (citing the Appendix with Amendments to Standard Jury Instructions).

130 *Id.*; FLA. STANDARD JURY INSTRUCTIONS IN CRIM. CASES § 3.13 (2011).

131 Schwartz, *supra* note 21.

132 *Id.*

133 *See* Katz v. United States, 389 U.S. 347 (1967) (explaining that this question cannot be answered without examining the privacy issue, which is outside the scope of this Article).

134 PRELIMINARY CRIMINAL INSTRUCTIONS 13 (State Bar of Ariz. 2009), *available at* http://www.azbar.org/media/58829/preliminary_criminal_instr.pdf.

135 *Id.*

> other form of electronic communication for any purpose whatsoever, if it relates in any way to this case. This includes, but is not limited to, blogging about the case or your experience as a juror on this case, discussing the evidence, the lawyers, the parties, the court, your deliberations, your reactions to testimony or exhibits or any aspect of the case or your courtroom experience with anyone whatsoever, until the trial has ended, and you have been discharged as jurors.[136]

In addition to specifically laying out what communication and technology are prohibited in the courtroom, the Arizona instructions explain the reasons behind the prohibitions.[137] This type of jury instruction is an excellent example of how specific language in jury instructions can bring the issue to the attention of the jurors and provide a rationale for the prohibition of discussing details of the case, or jury duty on social media sites.

What more can courts do to deter the abuse of social media sites by jurors? The Arizona jury instruction language provides an excellent starting point, but if the court is going to implement a jury instruction on the use of social media and electronic communication, the impact of using the technology must be clearly written in the instruction. Violations must also be detailed in the instruction, and courts should consider giving the instructions orally as well as in writing at the beginning and end of the case. The courts could also require jurors to read and sign a copy of the instructions indicating that they understand the rules and punishment if violations should occur. Giving the instruction orally and in writing, as well as clearly outlining the punishment for misconduct, could serve to prevent jurors from tweeting, commenting, posting, or blogging about cases. This type of instruction should be given to every person in a potential jury pool before jury selection, before trial, and before deliberations begin in order to avoid mistrials, appeals, and motions for new trials. If such an inclusive

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136 *Id.*

137 *Id.* (explaining why technology prohibitions in the courtroom exist). For example:

> One reason for these prohibitions is because the trial process works by each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find. As I previously told you, the only evidence you are to consider in this matter is that which is introduced in the courtroom. The law that you are to apply is the law that I give you in the final instructions. This prohibits you from consulting any outside source.

Id.

instruction is given to juries, the number of mistrials or new trials due to juror abuse of social networking sites could be diminished drastically.

IV. CONCLUSION

As technology changes and social media sites grow in popularity, courts will continue to face the challenge of adopting new rules to address the problems created by such technology. New court rules and procedures relating to technology need to be in place to protect the right to a fair trial, impartial jury, and the public trust and confidence in the judiciary. Preventative measures such as judicial ethics rules, admonitions for the jury, and clearly laid out punishments for violators are the appropriate measures to address the impact of social media on the judicial system. How much regulation of the use of social media sites is enough? It will be up to each individual state or court to decide, but at the very least, each court should adopt some form of instruction addressing social media or electronic communication.

To protect the integrity of the judicial system, courts should adopt jury instructions that are over-inclusive regarding the use of social media sites and electronic communication. Creating a broad jury instruction that prohibits jurors from using all forms of electronic communication is not enough because the definition of "electronic communication" could mean one thing to the court and an entirely different thing to the members of the jury. For judges, states must encourage judicial ethics rules that address appropriate usage of social media sites. This will prevent any negative backlash or criticism of a judge's conduct by the public or media.

In this technology driven world, jurors and judges will continue to use social media sites to communicate; however, whether they do so appropriately will need to be monitored closely. The necessity of adopting or utilizing judicial ethics rules that adapt to the use of social media sites for communication is just one of the challenges facing the judicial system. The biggest hurdle for the judicial system is stopping jurors from communicating about details of cases on sites like Twitter and Facebook. This will prevent courts from becoming all *a 'twitter*.'

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JAN 27 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

STAR PUBLISHING CO., an Arizona corporation, Petitioner, v. HON. DEBORAH BERNINI, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, Respondent, and THE STATE OF ARIZONA and TIMOTHY LYNN KREUS, Real Parties in Interest.	2 CA-SA 2011-0095 DEPARTMENT B O P I N I O N

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR20100688001

JURISDICTION ACCEPTED; RELIEF DENIED

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K E L L Y, Judge.

¶1 In this special action, petitioner Star Publishing Co. (the Star), challenges respondent Judge Deborah Bernini's denial of its request made pursuant to Rule 122, Ariz. R. Sup. Ct., to photograph proceedings in the jury trial of real-party-in-interest Timothy Kreus. The Star argues the respondent erred by denying its request without holding a hearing before trial or making specific findings, by considering the timeliness of the request as a basis for denying it, and by "prohibiting access entirely rather than entering an order tailored to [her] specific concerns about privacy and safety." We accept jurisdiction but deny relief.

¶2 Two working days[1] before Kreus's criminal trial was scheduled to begin, a representative of the Star filed a request pursuant to Rule 122 that the Star be permitted to photograph the proceedings. The respondent judge summarily denied the request because she had been "advised of an objection to a camera being in the courtroom." The Star moved for reconsideration, asserting Rule 122 requires that objections be made on the

[1]The respondent stated the Star's request was filed five days before trial. We observe that the Star filed the request "very late" on Thursday, September 15, 2011, or very early the following morning, and trial was scheduled to begin Tuesday, September 20, leaving only two working days during which the respondent could have notified the parties, scheduled a hearing, or otherwise could have addressed the Star's request. *See* Ariz. R. Civ. P. 6(a) (weekends excluded from time computation when "period of time specified . . . is less than 11 days").

record and that the respondent conduct a hearing and make necessary findings before denying the request. On the third day of trial, the respondent conducted a brief hearing in which she outlined the objections to the Star's request and heard argument from the Star's counsel. The respondent acknowledged that Rule 122 required her to conduct a hearing, but explained she had denied the request summarily, in part, because of when it had been made and, given her court calendar,[2] it was not possible to conduct a hearing before trial was scheduled to begin. The respondent also outlined other bases for her rejection of the Star's request, including privacy and security concerns for the victims, defendant, and witnesses. The respondent denied the motion for reconsideration, and this petition for special action followed.

¶3 We first address whether we should accept jurisdiction over this special action. *See Potter v. Vanderpool*, 225 Ariz. 495, ¶ 6, 240 P.3d 1257, 1260 (2010) ("Whether to accept special action jurisdiction is for this court to decide in the exercise of our discretion."). Rule 122(e) provides that the exercise of a trial court's discretion "in limiting or precluding electronic or still photographic coverage shall be reviewable only by special action." And special action jurisdiction is appropriate when, as here, there is no "equally plain, speedy, and adequate remedy by appeal." Ariz. R. P. Spec. Actions

[2]The respondent judge characterized her calendar as "incredibly packed," with "over 22 hearings" scheduled between the time of the request and Kreus's trial, including "sentencings, changes of plea, Rule 11 hearings, contested competency hearings with experts testifying, and . . . a three-hour hearing . . . in a death penalty case." Additionally, as we previously noted, the respondent stated the request was received "very late Thursday or early Friday morning," and time was required to notify the parties and give them an opportunity to object.

1(a). The Star acknowledges, however, that Kreus's trial has ended. Accordingly, any issues raised by this special action are moot, and this court "usually w[ill] not consider" moot issues. *Simpson v. Owens*, 207 Ariz. 261, ¶ 13, 85 P.3d 478, 482 (App. 2004). But the exercise of special action jurisdiction over a moot issue is proper when the issue is of great public importance or likely to be repeated in future cases. *Id.*

¶4 We agree with the Star that, in light of the general public's right of access to court proceedings, *see* Ariz. Const. art. II, § 11, and the role of the media in facilitating such access, *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980), the issues the Star raises are potentially of significant public importance. Although the Star has not demonstrated that the majority of issues raised are likely to recur, the respondent judge observed in her ruling that both she and her colleagues had experienced difficulty implementing Rule 122 requests filed shortly before a proceeding was to begin. She noted that the requirement in Rule 122(f) that a court "promptly" hold a hearing to address objections to a request was difficult to implement in light of busy court calendars.[3] Accordingly, in our discretion, we accept jurisdiction of this special action but limit our review to whether the respondent erred in considering the timeliness of the Star's request as a basis to deny that request, and whether she erred in failing to conduct a hearing addressing objections to the request before the beginning of Kreus's trial.

[3]Rule 122 was amended effective January 1, 2009, to modify the timeliness requirement by establishing the two-day minimum discussed below, and to require, inter alia, that a trial court consider the timeliness of a request and make specific findings when denying it. Sup. Ct. Order No. R-07-0016 (Ariz. Sept. 16, 2008).

¶5 The Star asserts its request was timely pursuant to Rule 122(f) because it was made more than two days in advance of Kreus's trial. That subsection states that, if the judicial proceeding has been scheduled for more than three days, the request "must be made no less than two days in advance of the hearing." Ariz. R. Sup. Ct. 122(f). But it also requires that a request must be made "sufficiently in advance of the proceeding or portion thereof as not to delay or interfere with it." *Id.* And, among the factors a court must consider in determining whether to allow access is "[t]he timeliness of the request pursuant to subsection (f)." Ariz. R. Sup. Ct. 122(b)(vi).

¶6 Although we review a trial court's decision whether to grant media access for an abuse of discretion, *see* Ariz. R. Sup. Ct. 122(b), we review de novo its interpretation of a rule, *State v. Harden*, 228 Ariz. 131, ¶ 3, 263 P.3d 680, 681 (App. 2011). "'In interpreting rules, we apply the same principles we use in interpreting statutes.'" *Id.* ¶ 6, *quoting State v. Petty*, 225 Ariz. 369, ¶ 7, 238 P.3d 637, 640 (App. 2010). We endeavor to "'determine and give effect to our supreme court's intent in promulgating the rule . . . keeping in mind that the best reflection of that intent is the plain language of the rule.'" *Id.*, *quoting Osterkamp v. Browning*, 226 Ariz. 485, ¶ 14, 250 P.3d 551, 555 (App. 2011).

¶7 Under the Star's interpretation, when a request is filed at least two days before the beginning of a hearing, there is no basis for a trial court to consider further whether the request was made "sufficiently in advance of the proceeding . . . as not to delay or interfere with it." Ariz. R. Sup. Ct. 122(f). But Rule 122(b)(vi), by reference to subsection (f), expressly requires a court to do so. Because the Star's construction

renders that portion of Rule 122(f) largely superfluous,[4] we cannot agree with it. *See Osterkamp*, 226 Ariz. 485, ¶ 15, 250 P.3d at 555 (court will not adopt interpretation rendering portion of rule superfluous). Had our supreme court intended a request filed within two days before the beginning of a proceeding to be timely as a matter of law, it would have said so. Instead, the plain language of the Rule requires the trial court to consider the timeliness of the request in light of the potential for delay or interference with the proceeding.

¶8 We therefore agree with the respondent judge's interpretation that a request not filed within "the two-day minimum" of a hearing is untimely, that is, it necessarily was not made with sufficient time to prevent delay or interference with the proceedings. But, if a request is made more than two days before the proceeding begins, then a trial court must consider, in addressing whether to grant the request, whether it was made sufficiently in advance. Here, the respondent observed that the trial which the Star wished to photograph had been scheduled for three months. Nothing in the materials the Star has provided this court suggests there was any reasoned basis for it to delay its request for access until only two working days before trial was set to begin. Nor does the Star dispute that the respondent's calendar already was fully scheduled. We therefore find no abuse of discretion in the respondent's determination that a request filed only two

[4]Under the Star's interpretation, the trial court arguably could consider potential delay and interference only if the proceeding had been "scheduled on less than three days notice." Ariz. R. Sup. Ct. 122(f). But that reading of the rule is not consistent with the subsection's plain requirement that all requests be filed sufficiently in advance of the proceedings to avoid any delay or interference.

days before Kreus's jury trial was not sufficiently timely to prevent delay or interference with that trial, given the status of the respondent's calendar.

¶9 We emphasize, however, that timeliness is only one factor a trial court must consider in determining whether to grant access, and that the court must identify reasons the request was not sufficiently timely to avoid delay. *See* Ariz. R. Sup. Ct. 122(b), (c). And nothing in this opinion should be read to suggest that timeliness may, in ordinary circumstances, serve as the sole basis to completely preclude electronic media access from the entirety of the proceeding. A court must instead balance the factors enumerated in Rule 122(b) against "the benefit to the public of camera coverage," and in order to deny the request, it must find "there is a likelihood of harm arising" from such coverage. Ariz. R. Sup. Ct. 122(c).

¶10 The Star also argues the respondent judge erred in declining to hold a hearing before denying its request. A trial court need not always conduct a hearing in order to deny a request; a hearing is required only if "there is any objection to a request for camera coverage or an order allowing electronic or still photographic coverage." Ariz. R. Sup. Ct. 122(f). But, as the respondent acknowledged, once any objections to the Star's request were raised, she was required to "hold a hearing promptly." *Id.* Thus, because respondent's denial of the Star's request was based in part on those objections, she erred by declining to conduct a hearing. However, to the extent the Star asserts such a hearing must be held before the beginning of the proceeding to which the media requests access, it is incorrect. Had our supreme court intended that to be the result, it would have stated the hearing must be conducted before the beginning of the proceeding

in question. It instead required only that the hearing be held "promptly," plainly intending a trial court have discretion to consider its calendar in scheduling a hearing to address objections to the Rule 122 request.

¶11 We recognize that trial courts have busy calendars. But, because media requests for camera or electronic coverage should command reasonable priority, the court nevertheless has a duty to set a hearing on any objections promptly. Ariz. R. Sup. Ct. 122(f). And although it clearly would be preferable for Rule 122 requests to be resolved before a proceeding begins in order to protect the public's right of access to the courts, as this case illustrates, sometimes circumstances make that goal impracticable. In light of the respondent judge's calendar, the filing of the Star's request just two days in advance of trial would have required the respondent to delay the beginning of trial, or to delay some other proceeding, in order to hold the hearing before trial began. Given that subsection (f) of Rule 122 contemplates that a request must not "delay or interfere" with a proceeding, we find no basis in the rule to require a trial court to delay the proceeding in order to accommodate a request, nor that the court delay some other proceeding in which the court or the parties to that proceeding may have an equal or greater interest in avoiding delay.[5] Moreover, the rule clearly contemplates that such a hearing may occur once a proceeding has begun. As we noted above, a trial court is required to hold a hearing only if there is an objection to access. Although the rule requires a party's

[5]We express no opinion whether the hearing on the Star's motion for reconsideration of the respondent's summary denial of its request cured the respondent's failure to have conducted the hearing before denying the request, or whether the hearing was sufficiently prompt or otherwise compliant with Rule 122.

objection to be made "on the record prior to commencement of the proceeding or portion thereof for which coverage is requested," the rule permits objections by a non-party witness to "be made to the judge at any time." Ariz. R. Sup. Ct. 122(g).

¶12 For the reasons stated, we conclude that the respondent judge did not err in considering the timeliness of the Star's request. But, because objections to the request were made and the respondent relied on those objections in denying the Star's request, the respondent erred in failing to conduct a hearing. Finally, because the issues raised by the Star are moot, we deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. SCOTT EDWARD LAWSON, *Defendant-Appellant.*	No. 10-4831
THE UNITED GAMEFOWL BREEDERS ASSOCIATION, *Amicus Supporting Appellant,* THE HUMANE SOCIETY OF THE UNITED STATES, *Amicus Supporting Appellee.*	

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
SHERI M. HUTTO,
Defendant-Appellant.

THE UNITED GAMEFOWL BREEDERS ASSOCIATION,
Amicus Supporting Appellant,
THE HUMANE SOCIETY OF THE UNITED STATES,
Amicus Supporting Appellee.

No. 10-4841

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WAYNE HUGH HUTTO,
Defendant-Appellant.

THE UNITED GAMEFOWL BREEDERS ASSOCIATION,
Amicus Supporting Appellant,
THE HUMANE SOCIETY OF THE UNITED STATES,
Amicus Supporting Appellee.

No. 10-4845

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
LESLIE WAYNE PEELER,
Defendant-Appellant.

THE UNITED GAMEFOWL BREEDERS ASSOCIATION,
Amicus Supporting Appellant,
THE HUMANE SOCIETY OF THE UNITED STATES,
Amicus Supporting Appellee.

No. 10-4846

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
NANCY ELIZABETH DYAL,
Defendant-Appellant.

THE UNITED GAMEFOWL BREEDERS ASSOCIATION,
Amicus Supporting Appellant,
THE HUMANE SOCIETY OF THE UNITED STATES,
Amicus Supporting Appellee.

No. 10-4870

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JAMES MORROW COLLINS, JR.,
Defendant-Appellant.

THE UNITED GAMEFOWL BREEDERS ASSOCIATION,
Amicus Supporting Appellant,
THE HUMANE SOCIETY OF THE UNITED STATES,
Amicus Supporting Appellee.

No. 10-4882

Appeals from the United States District Court
for the District of South Carolina, at Columbia.
Cameron McGowan Currie, District Judge.
(3:09-cr-01174-CMC-9; 3:09-cr-01169-CMC-2;
3:09-cr-01169-CMC-3; 3:09-cr-01174-CMC-3;
3:09-cr-01169-CMC-1; 3:09-cr-01295-CMC-2)

Argued: January 24, 2012

Decided: April 20, 2012

Before GREGORY and KEENAN, Circuit Judges, and
Liam O'GRADY, United States District Judge for the
Eastern District of Virginia, sitting by designation.

Affirmed in part, vacated in part, and remanded by published opinion. Judge Keenan wrote the opinion, in which Judge Gregory and Judge O'Grady joined.

COUNSEL

ARGUED: Clarence Rauch Wise, Greenwood, South Carolina; Jonathan McKey Milling, MILLING LAW FIRM, LLC, Columbia, South Carolina; Douglas Neal Truslow, Columbia, South Carolina, for Appellants. Nathan S. Williams, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, South Carolina, for Appellee. **ON BRIEF:** John Dennis Delgado, BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC, Columbia, South Carolina, for Appellant Sheri M. Hutto; Swepson Harrison Saunders, VI, Columbia, South Carolina, for Appellant Leslie Wayne Peeler; Henry Wesley Kirkland, Jr., KIRKLAND & RUSH, Columbia, South Carolina, for Appellant Nancy Elizabeth Dyal. William N. Nettles, United States Attorney, Columbia, South Carolina, for Appellee. Mark L. Pollot, Boise, Idaho, for The United Gamefowl Breeders Association, Amicus Supporting Appellants. Jonathan R. Lovvorn, Kimberly D. Ockene, Aaron D. Green, THE HUMANE SOCIETY OF THE UNITED STATES, Washington, D.C.; Emily L. Aldrich, HUNTON & WILLIAMS LLP, Los Angeles, California; Gregory N. Stillman, HUNTON & WILLIAMS LLP, Norfolk, Virginia; Joseph P. Esposito, William E. Potts, Jr., Andrew E. Walsh, HUNTON & WILLIAMS LLP, Washington, D.C., for The Humane Society of the United States, Amicus Supporting Appellee.

OPINION

BARBARA MILANO KEENAN, Circuit Judge:

Scott Lawson and certain other defendants (collectively, Lawson) were convicted by a jury of violating, and conspiring to violate, the animal fighting prohibition of the Animal Welfare Act, 7 U.S.C. § 2156(a) (the animal fighting statute), resulting from their participation in "gamefowl derbies," otherwise known as "cockfighting." The animal fighting statute

prohibits, among other things, "sponsor[ing] or exhibit[ing] an animal in an animal fighting venture." *Id.* The term "animal fighting venture" is defined in the statute, in relevant part, as "any event, in or affecting interstate or foreign commerce, that involves a fight conducted or to be conducted between at least 2 animals for purposes of sport, wagering, or entertainment." 7 U.S.C. § 2156(g)(1). Several of the defendants in this case also were convicted of participating in, and conspiring to participate in, an illegal gambling business in violation of 18 U.S.C. § 1955 (the illegal gambling statute), with relation to activities that occurred during the "derbies."

Lawson raises numerous challenges to his convictions, arguing that: (1) the convictions for violating the animal fighting statute should be vacated because Congress lacks power under the Commerce Clause to prohibit the fighting of gamefowl; (2) the animal fighting statute is unconstitutional because the statute provides for different elements of proof in jurisdictions where animal fighting is legal; (3) the district court abused its discretion in consolidating Scott Lawson's trial with the trials of his co-defendants; and (4) a juror's misconduct in performing unauthorized research of the definition of an element of the offense on Wikipedia.org (Wikipedia), an "open access" internet encyclopedia, deprived him of his Sixth Amendment right to a fair trial. Additionally, the defendants convicted of violating the illegal gambling statute raise several challenges to those convictions.[1]

Upon our review of the parties' arguments, we hold that the animal fighting statute is a constitutional exercise of Congress' power under the Commerce Clause; that the provision

[1]Lawson further argues that the district court erred in its rulings with respect to certain evidentiary matters and the instructions given to the jury on the animal fighting statute charges. In light of our holding, we do not reach those issues. We also do not reach the argument made by James Collins, Jr., that the district court erred in its application of the sentencing guidelines.

of different elements of the crime in jurisdictions permitting animal fighting does not violate Lawson's equal protection rights; and that the district court did not err in conducting Scott Lawson's trial jointly with the trials of his co-defendants. However, we hold that the juror's misconduct violated Lawson's right to a fair trial, and we therefore vacate the convictions for violating the animal fighting statute. For this reason, we also vacate the conspiracy convictions with respect to those defendants for which the conspiracy alleged related solely to the animal fighting activities. Additionally, we reject the challenges made by several of the defendants to the illegal gambling convictions, and we affirm the convictions relating to those offenses as well as the conspiracy convictions for which illegal gambling was one of the objects of the conspiracy alleged.

I.

In November 2009, a federal grand jury returned an indictment against Lawson and Leslie Wayne Peeler (the Lawson indictment),[2] alleging one count of participating in a conspiracy to violate the Animal Welfare Act, in violation of 18 U.S.C. § 371, and one count of participating in, and/or aiding and abetting, an unlawful animal fighting venture, in violation of 7 U.S.C. § 2156(a)(1) and 18 U.S.C. § 2. With respect to

[2]The indictment named as Lawson's and Peeler's co-defendants Jeffrey Brian Gibert, Michael Monroe Grooms, Gerald Benfield, John Carlton Thurman Hoover, Michael T. Rodgers, Johnny Junior Harrison, Coy Dale Robinson, Jimmie Jesse Hicks, and George William Kelly, alleging that they committed various acts in connections with the derbies held in Swansea in July 2008 and April 2009. Peeler is a co-party to Lawson's appeal, and, like Lawson, proceeded to a trial by jury. Gibert, Grooms, Benfield, and Hoover (collectively Gibert) entered conditional guilty pleas and have appealed their convictions in a companion case, *United States v. Gibert*, No. 10-4848, ___ F.3d ___ (4th Cir. Apr. 20, 2012). Lawson's appeal and Gibert's appeal proceeded on separate briefing schedules, but this Court consolidated the two cases for purposes of oral argument. Because the two cases raise certain distinct legal issues, we are concurrently issuing separate opinions for the two cases.

the conspiracy charge, the Lawson indictment alleged that Lawson offered gaffs for sale and sharpened gaffs for individuals who entered birds into a cockfighting event held in Swansea, South Carolina in July 2008, and that Peeler served as a referee for a cockfighting event held in Swansea in April 2009. With respect to the violations of the animal fighting statute that did not involve an alleged conspiracy, the indictment alleged generally that Lawson and Peeler sponsored and exhibited an animal, or aided and abetted individuals who sponsored an animal, in an animal fighting venture that occurred in July 2008, and April 2009, respectively.

The grand jury returned a separate indictment in November 2009 against Nancy Elizabeth Dyal, Sheri M. Hutto, and Wayne Hugh Hutto (the Dyal indictment), alleging one count of participating in a conspiracy to violate the Animal Welfare Act and to engage in an illegal gambling business, in violation of 18 U.S.C. § 371, two counts of participating in, and/or aiding and abetting, an unlawful animal fighting venture, in violation of 7 U.S.C. § 2156(a)(1) and 18 U.S.C. § 2, and two counts of participating in, and/or aiding and abetting, an illegal gambling business, in violation of 18 U.S.C. § 1955 and 18 U.S.C. § 2. A similar indictment was returned against James Morrow Collins, Jr. in December 2009,[3] alleging the same five counts as alleged in the Dyal indictment, based on Collins' alleged role in the Swansea derbies held in July 2008 and April 2009.

With respect to the conspiracy charge, these indictments alleged that Dyal, Sheri Hutto, Wayne Hutto, and Collins each helped organize the derbies held in Swansea in July 2008 and April 2009. These indictments were based on Sheri Hutto's alleged acts of announcing the scheduled fighters; Dyal's alleged acts of collecting admission fees, checking identifica-

[3]This indictment named Gene Audry Jeffcoat as Collins' co-defendant. Jeffcoat entered a guilty plea to the charges, and is a party in the *Gibert* companion case.

tions for membership in the South Carolina Gamefowl Breeders Association, and selling such memberships during the derbies; Wayne Hutto's alleged acts of serving as a referee for the fights; and Collins' alleged acts of handling money and ensuring that the rules were followed. With respect to violations of the animal fighting statute that did not involve a conspiracy, these indictments alleged generally that Dyal, Sheri Hutto, and Wayne Hutto sponsored and exhibited an animal, or aided and abetted individuals who sponsored an animal, in an animal fighting venture that occurred in July 2008 and April 2009, respectively. With respect to the illegal gambling statute charges, these indictments alleged that the nature of the derby, in which owners of fighting birds paid an entry fee to enter the birds in the derby and were eligible to win a "purse" if their birds won the most fights, constituted an illegal gambling operation in violation of South Carolina Code sections 16-19-10 and 16-19-130.

The indictments stemmed from an undercover investigation conducted by the South Carolina Department of Natural Resources of a cockfighting organization based in Swansea. Undercover officers attended and made video recordings of two cockfighting derbies, held in July 2008 and April 2009. During these derbies, several individuals**,** including individuals alleged to be part of the conspiracy at issue, entered birds into cockfighting matches. In these matches, the birds were "equipped" with gaffs or other sharp, metal objects attached to their legs. The birds fought their opponent to the death or at least until one of the birds was physically incapable of continuing to fight. After paying an entry fee to enter a bird in the derby, an owner was eligible to win the "purse," the collective money put up by the entrants minus any amount retained by the organizers, if the owner's bird won the most fights.

The district court consolidated the indictments for these defendants and conducted a single trial, over Scott Lawson's objection. During the course of the five-day trial, the parties called twenty-four witnesses, a majority of whom were repre-

sentatives of companies outside South Carolina that manufactured items used in the cockfights. The government presented this testimony to help establish a nexus between the cockfighting activities at issue and interstate commerce, as required by the elements of 7 U.S.C. § 2156.[4] *See* 7 U.S.C. § 2156(g) (defining "animal fighting venture" as "any event, in or affecting interstate or foreign commerce . . . .").

After about nine hours of deliberations conducted over two days, the jury returned a verdict finding all defendants guilty on all counts. As discussed in greater detail in this opinion, the district court was informed several days after the verdict that one of the jurors had conducted unauthorized research on the internet during an overnight recess in the jury deliberations. The district court ordered a hearing, in which it was determined that a juror researched on Wikipedia the definition of "sponsor," one of the elements of the offense under the animal fighting statute. After the hearing, the district court entered a written order, finding that the juror had committed misconduct but that the defendants were not prejudiced by the juror's actions.[5] Accordingly, the district court denied the defendants' motion for a new trial.

The district court sentenced Scott Lawson and Peeler to a term of three years' probation and a monetary fine. The district court sentenced Dyal, Sheri Hutto, and Wayne Hutto each to a term of imprisonment of 12 months and one day. The district court determined that Collins was a leader or organizer of the conspiracy, adjusted his guidelines range accordingly, denied his motion to reduce his guidelines range

[4]The government introduced other categories of evidence to establish an interstate commerce nexus, including bank records showing that money collected at the event was deposited into a bank account, and that checks drawing on those funds were processed outside South Carolina.

[5]In this order, the district court also rejected the defendants' motion for judgment of acquittal, in which they argued that the evidence was insufficient to sustain their convictions.

for acceptance of responsibility, and sentenced him to a term of imprisonment of 21 months, in addition to a monetary fine. All defendants filed timely notices of appeal.

II.

Lawson first argues that his convictions for violating the animal fighting statute should be vacated because Congress lacks power under the Commerce Clause to prohibit the fighting of gamefowl. We addressed this identical argument in *United States v. Gibert*, No. 10-4848, ___ F.3d ___ (4th Cir. Apr. 20, 2012), a companion case that we consolidated with Lawson's appeal, for which we are issuing an opinion concurrently with our decision in this case.[6] In *Gibert*, we hold that the activity of animal fighting substantially affects interstate commerce and, thus, is a subject that Congress has the power to regulate under the Commerce Clause. For the reasons stated in our opinion in *Gibert*, we reject Lawson's argument that 7 U.S.C. § 2156 is an unconstitutional exercise of Congress' powers under the Commerce Clause.

III.

Lawson next argues that the animal fighting statute is unconstitutional because the statute provides for different elements of proof in different jurisdictions. We review this issue of law de novo. *United States v. Cheek*, 94 F.3d 136, 140 (4th Cir. 1996).

As Lawson correctly observes, under the animal fighting statute, if a defendant lives in a jurisdiction where gamefowl fighting is legal under the laws of that jurisdiction, the government must prove as an additional element of the offense that the defendant knew that at least one bird in the fighting

[6]*Gibert* involves the same animal fighting venture at issue in this case. The defendants in *Gibert* each entered guilty pleas, whereas the defendants in this case proceeded to trial and were convicted by a jury.

venture traveled in interstate or foreign commerce. *See* 7 U.S.C. § 2156(a)(2). In contrast, if a defendant lives in a jurisdiction that prohibits gamefowl fighting, the government need only prove that the defendant sponsored or exhibited an animal in an animal fighting venture, irrespective whether the bird traveled in interstate or foreign commerce. *See* 7 U.S.C. § 2156(a)(1). Lawson contends that this variation in the elements of the crime constitutes a violation of his equal protection rights under the Fifth Amendment's Due Process Clause.[7] We disagree with Lawson's argument.

In analyzing whether a statute's classification violates an individual's equal protection rights, we first analyze the nature of the classification and the type of activity regulated. If a statute classifies a person or group by race, alienage, or national origin, or if the activity impinges upon a fundamental right protected by the Constitution, the statute is subject to strict scrutiny review, and will be sustained only if the statute is narrowly tailored to serve a compelling governmental interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). However, if the statute's classification is unrelated to race, alienage, or national origin, and does not affect a fundamental right, the statute generally is subject to rational basis

[7]Although the Fifth Amendment does not contain an explicit equal protection clause as is provided in the Fourteenth Amendment, the Supreme Court has interpreted the Fifth Amendment's due process clause as incorporating an equal protection aspect. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217, 224 (1995) (discussing equal protection aspect of the Fifth Amendment's due process clause). The Supreme Court has held that the method of analyzing equal protection claims brought under the Fifth Amendment is no different than the analysis of such claims under the Fourteenth Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); *see also United States v. Jones*, 735 F.2d 785, 792 n.8 (4th Cir. 1984) (same).

review and will be upheld if the statute is rationally related to a legitimate governmental interest.[8] *Id.*

In this case, the statute relates to animal fighting, which is not a fundamental right. The statute classifies people on the basis of the location where they conduct their animal fighting activities, which is not a suspect classification. Accordingly, as Lawson concedes, if the statute's classification is rationally related to a legitimate governmental interest, his equal protection challenge fails.

We conclude that the challenged classification is rationally related to a legitimate government purpose. The increased evidentiary burden on the government arises only if gamefowl fighting is legal under the laws of the "State" in which the gamefowl fighting occurred. The term "State" in the statute includes not only the 50 states of the United States but also "the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States." 7 U.S.C. § 2156(g)(3). Currently, although cockfighting is illegal in all 50 States and the District of Columbia, cockfighting remains legal in several United States territories such as Guam and Puerto Rico.[9]

It is readily apparent that the statute's additional evidentiary burden, which requires the government to prove actual knowledge of interstate transportation of birds in cases in which the animal fighting occurred in a "state" where animal fighting remains legal, merely reflects the fact that certain

[8]Statutes that classify on the basis of gender are subject to "intermediate scrutiny," and will be upheld if the statutory classification "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 242 (4th Cir. 2010) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

[9]*See* Humane Society, *Cockfighting: State Laws Fact Sheet*, *available at* http://www.humanesociety.org/assets/pdfs/cockfighting_chart_2011.pdf (updated June 2010).

jurisdictions have not proscribed cockfighting within their borders. Thus, we conclude that the disparate treatment complained of by Lawson was occasioned by the decision of Congress to accommodate principles of federalism, a concern that unquestionably is a legitimate governmental interest. *See United States v. Bagheri*, 999 F.2d 80, 86 (4th Cir. 1993) (conducting rational basis review and holding that "[p]rinciples of federalism justify following the distinction drawn under Maryland law between sentences actually expunged and those unexpunged but expungeable"); *see also Benjamin v. Jacobson*, 172 F.3d 144, 165 (2d Cir. 1999) (applying rational basis review and concluding that principles of federalism and judicial restraint underlying congressional statute are legitimate purposes); *Gavin v. Branstad*, 122 F.3d 1081, 1090 (8th Cir. 1997) (principle of federalism is a legitimate governmental interest for purposes of rational basis review); *United States v. Cohen*, 733 F.2d 128, 137 (D.C. Cir. 1984) (en banc) ("It would be enough, for purposes of 'rational basis' analysis, merely that [the substantial concern of federalism] *could have* underlain the congressional reluctance to legislate more broadly.") (emphasis in original); *Eskra v. Morton*, 524 F.2d 9, 18 (7th Cir. 1975) ("there are several possible rational bases for the congressional scheme of incorporation of state law, including congressional considerations of federalism"). Accordingly, we reject Lawson's equal protection challenge to the animal fighting statute.

IV.

We next consider the district court's decision joining Scott Lawson's trial with the trials of his co-defendants. Scott Lawson maintains that the district court erred in refusing to grant him a separate trial under Rule 14 of the Federal Rules of Criminal Procedure, which provides that a district court may grant a severance if it appears that a defendant may be "prejudice[d]" by a joinder of offenses or of defendants. We disagree with Scott Lawson's argument.

A district court "may order that separate cases be tried together as though brought in a single indictment or information if all offenses and all defendants could have been joined in a single indictment or information." Fed. R. Crim. P. 13. A group of defendants "could have been joined in a single indictment" if they "are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." Fed. R. Crim. P. 8(b).

Such is the case here, because the indictments against Scott Lawson and his co-defendants allege that they were all involved in the same acts and transactions with respect to the same animal fighting venture and conspiracy.[10] Accordingly, the district court was permitted to exercise its discretion to join Scott Lawson's trial with the trials of his co-defendants.

Joint trials promote efficiency and "play a vital role in the criminal justice system." *Richardson v. Marsh*, 481 U.S. 200, 209 (1987). Joinder is highly favored in conspiracy trials, such as the present case. *United States v. Chorman*, 910 F.2d 102, 114 (4th Cir. 1990); *see also United States v. Ford*, 88 F.3d 1350, 1361 (4th Cir. 1996) ("For reasons of efficiency and judicial economy, courts prefer to try joint-conspirators together.").

A district court's decision to deny a motion for separate trials will be overturned only for a "clear abuse of discretion." *Chorman*, 910 F.2d at 114. We will find a "clear abuse" of the district court's discretion only in cases in which the district court's denial of such a motion "deprives the defendant of a fair trial and results in a miscarriage of justice." *Id.* (citations and internal quotation marks omitted). Upon our review of the

[10]We observe that Scott Lawson was not charged with any gambling-related offenses, whereas his co-defendants other than Peeler faced such charges. Scott Lawson does not rely in his argument on the fact that his co-defendants faced the additional charges relating to gambling.

record, we conclude that Scott Lawson cannot show that he was deprived of a fair trial or that a miscarriage of justice occurred. Accordingly, we hold that the district court did not abuse its discretion in joining the charges against Scott Lawson for trial with his co-defendants.

V.

We next consider Lawson's argument that he is entitled to a new trial because a juror committed misconduct by researching on Wikipedia the term "sponsor," an element of the crimes charged under the animal fighting statute. According to Lawson, the juror's misconduct violated Lawson's Sixth Amendment right to a fair trial. We review the district court's decision denying Lawson's motion for a new trial pursuant to a "somewhat narrowed, modified abuse of discretion standard," under which we have "more latitude to review the trial court's conclusion in this context than in other situations." *Cheek*, 94 F.3d at 140 (citation and internal quotation marks omitted). However, we review any issues of law relevant to this question de novo. *Id.*

A.

Six days after the jury returned its verdict finding Lawson guilty on all charges, one of the jurors, Juror 1, informed a courtroom security officer of potential juror misconduct. Juror 1 stated that another juror, Juror 177, had consulted certain internet sources the morning before the jury reached its verdict. As later found by the district court, this information included the definition of the term "sponsor" that appeared on Wikipedia.[11]

[11]Juror 177 also researched the definition of the term "exhibit," an alternative element of the offense, on Merriam-Webster.com, the internet version of the Merriam-Webster dictionary. While several members of the jury were aware that Juror 177 had researched the term "sponsor," none of the jurors was aware that Juror 177 also had engaged in research of the term "exhibit." Because the juror's use of Wikipedia for the term "sponsor," standing alone, is determinative of the result we reach on the issue of juror misconduct, we focus our analysis only on the juror's use of Wikipedia.

Juror 177 used a computer printer at his home to reproduce the Wikipedia entry for the term "sponsor," and later brought the printout to the jury room when the deliberations resumed. Juror 177 shared the printout with the jury foreperson, Juror 185, and also attempted to show the material to other jurors, but was stopped when some of them told him it would be inappropriate to view the material. These actions violated the explicit instructions of the district court, which had admonished the jurors not to conduct any outside research about the case, including research on the internet.[12]

After being informed about Juror 177's conduct, the district court held a hearing to determine whether the verdict had been tainted by Juror 177's actions. The district court questioned each of the twelve jurors who had served on the panel for Lawson's trial. During his testimony,[13] Juror 177 admitted that he had conducted internet research, and had brought material obtained on the internet into the jury room during the jury deliberations.

At the time of the hearing, which occurred nineteen days after the jury reached its verdict, Juror 177 no longer was in possession of his original printout of the Wikipedia entry. Nevertheless, Juror 177 provided the district court with documents obtained from Wikipedia a few days before the hearing,

[12]The court's careful oral and written instructions admonished the jury as follows: "I remind you that during your deliberations, you must not communicate with or provide any information to anyone by any means about this case. *You may not use any electronic device or media, such as* a telephone, cell phone, smart phone, iPhone, Blackberry or computer; *the internet, any internet device*, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, YouTube, or Twitter, to communicate to anyone any information about this case or *to conduct any research about this case* until I accept your verdict." (Emphasis added.)

[13]In light of the potential for contempt sanctions, the district court appointed counsel to advise Juror 177 whether he should testify at the hearing.

purportedly after using the same method he had employed in obtaining the original printout brought to the jury room.[14]

Despite Juror 177's efforts to "retrace" his steps, the district court observed that the material Juror 177 brought to the hearing was somewhat different than the material he produced during the jury deliberations:

> Because the documents provided to the court were "recreated" after trial, the court cannot determine with certainty that the documents shown in Court Ex. 1 are in precisely the same form and contain precisely the same content as the documents which Juror 177 brought to the deliberations. The court is, nonetheless, persuaded that the definitions found on Court Ex. 1 are in essentially the same form as those brought in by Juror 177, *although there has been at least some change to the Wikipedia definition of "sponsor."*[15]

(Emphasis added.)

During his testimony, Juror 177 admitted discussing his research with Juror 185, but denied that he had shared the information with any of the other jurors. Additionally, Juror 177 testified that he did not recall any of the other jurors stating that it would be improper to consider outside materials. Juror 177 further testified that the definitions he obtained did not influence him in deciding the case.

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[14]The printed material consisted of two items: a one-page document from the "Free [Merriam] Webster Dictionary" defining the word "exhibit," and a three-page document from Wikipedia that included a definition and explanation of "Sponsor (Commercial)".

[15]The district court provided no explanation for its conclusion that the definitions brought to the hearing were "in essentially the same form" as the definitions obtained during jury deliberations.

Although Juror 177 stated that he shared the information only with Juror 185, at least one other juror testified that Juror 177 also had shared the information with different jurors. Three jurors testified that they saw Juror 177 produce, or attempt to produce, the printed definitions to share with the jury before he was told by the group that using the material would be inappropriate. Additionally, six jurors heard Juror 177 discuss that he had conducted research on the internet about a term at issue in the case.

The district court found that Juror 177 "may have orally shared some portion of the definition with the other jurors." Additionally, the district court found that portions of Juror 177's testimony were discredited by the testimony of other jurors. The district court concluded that Juror 177's actions amounted to misconduct.[16]

Nevertheless, the district court denied Lawson's motion for a new trial. The district court employed the five-factor test announced by the Tenth Circuit in *Mayhue v. St. Francis Hospital of Wichita, Inc.*, 969 F.2d 919 (10th Cir. 1992), which this Court also has applied, to assess whether Juror 177's misconduct prejudiced Lawson. In applying these factors, the district court did not address Lawson's argument that he was entitled to a presumption of prejudice. The district court concluded that there was "no reasonable possibility that the external influence caused actual prejudice," and thus denied Lawson's motion.

B.

Lawson argues that Juror 177's unauthorized use of Wikipedia entitled him to a rebuttable presumption of prejudice under *United States v. Remmer*, 347 U.S. 227 (1954), and

[16]The district court later found Juror 177 in contempt of court, and ordered him to pay a monetary fine and to complete fifty hours of community service.

that the district court erred in not affording him such a presumption.[17] The issue whether the juror's use of Wikipedia created a rebuttable presumption of prejudice is a question of law that we review de novo. *See Cheek*, 94 F.3d at 140.

In *Remmer*, the Supreme Court held that a rebuttable presumption of prejudice arose from a third party's unauthorized communication with a juror during the trial.[18] 347 U.S. at 229. In announcing this rule, the Court stated that "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, *deemed presumptively prejudicial*." *Id.* at 229 (emphasis added). However, the Court cautioned that this "presumption of prejudice" did not establish a per se requirement of a new trial. *Id.* The Court stated that "[t]he presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Id.*

i.

Before we address the question whether the *Remmer* rebuttable presumption is applicable to a juror's unauthorized reference to a Wikipedia entry, we first must consider whether that presumption has been altered by more recent Supreme Court decisions. While the Supreme Court has not departed explicitly from its holding in *Remmer*, there is a split among the circuits regarding the issue whether the *Remmer* presump-

[17]We observe that the government failed to address in its brief Lawson's "presumption of prejudice" argument, despite the fact that Lawson devoted eight pages in his briefs to that argument.

[18]In *Remmer*, a juror reported to the judge that an unknown individual attempted to bribe him. 347 U.S. at 228. The Federal Bureau of Investigation conducted an investigation and concluded that the contact was made in jest. *Id.* The judge consulted with the prosecutors, who agreed that the contact was harmless, but defense counsel apparently was not included in these discussions. *Id.*

tion has survived intact following certain later Court decisions.

At issue in this debate are the Supreme Court's decisions in *Smith v. Phillips*, 455 U.S. 209 (1982), and *United States v. Olano*, 507 U.S. 725 (1993). In *Phillips*, a habeas corpus appeal presenting questions of bias concerning a juror who had applied for a job in the prosecutor's office, the Supreme Court held that due process required that the trial court hold a hearing during which "the *defendant* has the opportunity to prove actual bias." 455 U.S. at 215 (emphasis added). In *Olano*, a direct appeal involving a trial court's decision to allow alternate jurors to be present during jury deliberations, the Supreme Court cited *Remmer* while observing that "[t]here may be cases where an intrusion should be presumed prejudicial, but a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?" 507 U.S. at 739 (internal citations omitted).

Because *Olano* was a case decided on direct appeal, we take particular note of that decision here. From our reading of *Olano*, we conclude that the Supreme Court's discussion, of the "ultimate inquiry" to be performed in cases involving "intrusions" into a jury's deliberations, suggests that this inquiry may be framed either as a rebuttable presumption or as a specific analysis of the intrusion's effect on the verdict. *See id.*

This Court's decisions addressing such external influences on a jury's deliberations reflect that the *Remmer* rebuttable presumption remains live and well in the Fourth Circuit. In *Stockton v. Virginia*, 852 F.2d 740, 742-43 (4th Cir. 1988), we cited *Remmer* and applied the rebuttable presumption in a case involving a restaurant owner's comments to a few members of the jury, eating at the restaurant during a break in sentencing deliberations, that "they ought to fry the son of a bitch."

In applying the *Remmer* analysis, and in granting the defendant a new sentencing hearing because the government failed to rebut the presumption, we expressly held in *Stockton* that the Supreme Court's decision in *Phillips* did not overturn the holding in *Remmer*. We distinguished the facts presented in *Phillips*, and concluded that in cases in which "the danger is not one of juror impairment or predisposition, but rather the effect of an extraneous communication upon the deliberative process of the jury," the *Remmer* presumption is applicable. *Stockton*, 852 F.2d at 744.

Similarly, in *Cheek*, we applied the *Remmer* presumption after the Supreme Court's decision in *Olano* and awarded the defendant a new trial in a case involving a bribe attempt on one of the jurors. 94 F.3d at 138. We stated that once a defendant introduces evidence that there was an extrajudicial communication that was "more than innocuous," the *Remmer* presumption is "triggered automatically," and "[t]he burden then shifts to the [government] to prove that there exists no 'reasonable possibility that the jury's verdict was influenced by an improper communication.'" *Cheek*, 94 F.3d at 141 (quoting *Stephens v. S. Atl. Canners, Inc.*, 848 F.2d 484, 488-89 (4th Cir. 1988)).

We most recently discussed and applied the *Remmer* presumption in *United States v. Basham*, 561 F.3d 302 (4th Cir. 2009). The decision in *Basham* involved a juror who had contacted several news media outlets during the penalty phase of the trial. *Id.* at 316. In holding that Basham was not entitled to a new trial as a result of the juror's misconduct, we applied the *Remmer* presumption using the analysis set forth in *Cheek*, and concluded that the district court did not err in holding that the government had rebutted the presumption. *Id.* at 319-21; *see also United States v. Blauvelt*, 638 F.3d 281, 294-95 (4th Cir. 2011) (discussing the *Remmer* presumption of prejudice but holding it inapplicable to a juror's "innocuous" email exchange, concerning a wholly unrelated subject, with an

assistant federal prosecutor who was not involved in defendant's trial).

We have been joined by several of our sister circuits, including the Second, Seventh, Ninth, Tenth, and Eleventh Circuits, in continuing to apply the *Remmer* presumption in cases involving external influences on jurors. *See United States v. Greer*, 285 F.3d 158, 173 (2d Cir. 2002) (citing *Remmer* for proposition that "[i]t is well-settled that any extra-record information of which a juror becomes aware is presumed prejudicial" and that "[a] government showing that the information is harmless will overcome this presumption"); *United States v. Moore*, 641 F.3d 812, 828 (7th Cir. 2011) (same); *United States v. Dutkel*, 192 F.3d 893, 895-96 (9th Cir. 1999) (applying *Remmer* presumption in jury tampering case and disagreeing that the presumption has been abrogated); *Mayhue*, 969 F.2d at 922 (10th Cir.) ("The law in the Tenth Circuit is clear. A rebuttable presumption of prejudice arises whenever a jury is exposed to external information in contravention of a district court's instructions."); *United States v. Ronda*, 455 F.3d 1273, 1299 (11th Cir. 2006) (if defendant establishes that jury has been exposed to extrinsic evidence or contacts, "prejudice is presumed and the burden shifts to the government to rebut the presumption"); *see also United States v. Bradshaw*, 281 F.3d 278, 287-88 (1st Cir. 2002) (observing that the *Remmer* presumption is still applicable in First Circuit "only where there is an egregious tampering or third party communication which directly injects itself into the jury process") (citation omitted); *United States v. Lloyd*, 269 F.3d 228, 238 (3d Cir. 2001) (applying presumption of prejudice when a jury is exposed to extraneous information "of a considerably serious nature").

We note, however, that in contrast to these decisions applying the *Remmer* presumption, the Fifth, Sixth, Eighth, and District of Columbia Circuits have departed from use of the presumption. These circuits have taken this contrary position based on their view of *Phillips* and *Olano*. *See United States*

v. Sylvester, 143 F.3d 923, 933-35 (5th Cir. 1998) (holding that *Phillips* and *Olano* effectively rejected *Remmer*'s rebuttable presumption, and that "only when the [trial] court determines that prejudice is likely should the government be required to prove its absence"); *United States v. Williams-Davis*, 90 F.3d 490, 495-97 (D.C. Cir. 1996), (holding that *Phillips* and *Olano* narrowed the *Remmer* presumption, and that trial court must determine whether particular intrusion showed "likelihood of prejudice," which would place on the government the burden of proving harmlessness); *United States v. Pennell*, 737 F.2d 521, 532 (6th Cir. 1984) (holding that *Phillips* altered law such that *Remmer* rebuttable presumption is no longer applicable, and that burden to establish prejudice rests with defendant); *see also United States v. Blumeyer*, 62 F.3d 1013, 1017 (8th Cir. 1995) (citing *Olano* for proposition that defendant has burden to prove actual prejudice in cases involving extrinsic juror contact pertaining to issues of law, but not to issues of fact).

ii.

a.

The continued vitality of *Remmer* in this Circuit, however, does not resolve the question whether the presumption is applicable in cases involving a juror's unauthorized use of Wikipedia. Initially, we observe that an allegation of jury tampering or of a juror's contact with a third party, such as the incidents that occurred in *Remmer*, *Stockton*, *Cheek*, and *Basham*, is of a much different character than a juror's unauthorized use of a dictionary during jury deliberations. Although we previously have considered incidents in which a juror committed misconduct by consulting a dictionary, as described below, the question whether a rebuttable presumption of prejudice arises in such a situation is an issue of first impression in this Court in a case presented on direct appeal.

We first encountered a situation involving a juror's unauthorized use of a dictionary in *United States v. Duncan*, 598

F.2d 839 (4th Cir. 1979), a direct appeal involving a juror's reference during jury deliberations to dictionary definitions of the terms "motive" and "intent". *Id.* at 866. In our abbreviated discussion in which we rejected Duncan's argument that he was entitled to a new trial on that basis, we observed that "[w]hile reference to the dictionary was misconduct, it was not prejudicial *per se*," as Duncan had argued. *Id.* (emphasis added). The question whether such misconduct raised a rebuttable presumption of prejudice was not at issue in *Duncan*.

We also addressed jurors' unauthorized use of a dictionary in two habeas corpus appeals, *McNeill v. Polk*, 476 F.3d 206 (4th Cir. 2007), and *Bauberger v. Haynes*, 632 F.3d 100 (4th Cir. 2011). Because those cases involved petitions for habeas corpus relief, the analysis we employed was restricted by the provisions of 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[19] *See Vigil v. Zavaras*, 298 F.3d 935, 941 n.6 (10th Cir. 2002) (explaining that although on direct appeal, rebuttable presumption of prejudice arises when jury is exposed to unauthorized external information, this presumption is inapplicable in habeas context). Although our standard of review in *McNeill* and *Bauberger* was different from the standard we use in the present direct appeal, one particular aspect of those cases is particularly helpful here.

In *McNeill*, separate opinions authored by two of the panel's judges analyzed the issue of prejudice under factors identified by the Tenth Circuit in *Mayhue*, 969 F.2d 919, in considering the effect of a juror's unauthorized reference to a

[19]We routinely resolve petitions for a writ of habeas corpus by analyzing the petitioner's claims for "harmless error" under the demanding standard for such cases announced in *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Under the *Brecht* standard, a habeas petitioner may secure a writ only if he demonstrates that the error "actual[ly] prejudice[d]" him, which requires a showing that the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

dictionary. *McNeill*, 476 F.3d at 226 (King, J., concurring in judgment); *id.* at 229 (Gregory, J., dissenting in judgment) (same). Similarly, in *Bauberger*, although our opinion did not refer directly to *Mayhue*, we cited portions of the opinions in *McNeill* that employed the *Mayhue* factors. *See Bauberger*, 632 F.3d at 106 (discussing factor used in Judge King's and Judge Gregory's separate opinions in *McNeill* that originated in *Mayhue*); *id.* at 108 (same); *id.* at 108-09 (same). We will discuss these *Mayhue* factors, on which the district court relied, later in this opinion.

b.

In resolving the question whether the *Remmer* presumption applies to a juror's use of a dictionary definition during deliberations, we note that our sister circuits also are divided on this question. In examining their holdings, a clear and predictable pattern is evident. Unsurprisingly, the courts that have applied a rebuttable presumption of prejudice in "dictionary" cases, or alternatively have held that the government bears the burden of establishing that no prejudice occurred, are among the courts that have rejected the view that *Remmer* has been abrogated. *See e.g.*, *Marino v. Vasquez*, 812 F.2d 499, 505 (9th Cir. 1987) (holding that unauthorized use of dictionary definitions is reversible error and that government must establish that error is harmless beyond reasonable doubt); *United States v. Aguirre*, 108 F.3d 1284, 1288 (10th Cir. 1997) (citing *Mayhue* for proposition that "jury's exposure to extrinsic information [such as a dictionary definition] gives rise to a rebuttable presumption of prejudice"); *United States v. Martinez*, 14 F.3d 543, 550 (11th Cir. 1994) (in case involving several categories of extrinsic evidence, including unauthorized use of dictionary to define terms discussed during deliberations, holding that "we assume prejudice and thus, we must consider whether the government rebutted that presumption"); *see also United States v. Console*, 13 F.3d 641, 665-66 (3d Cir. 1993) (applying presumption of prejudice in case in which juror discussed definition of RICO with her sister, an

attorney, and shared the attorney's definition with other jurors during deliberations).

In contrast, the courts that have declined to apply a presumption of prejudice in these "dictionary" cases are some of the same courts that have held that the *Remmer* rebuttable presumption of prejudice is no longer applicable.[20] *See e.g.*, *United States v. Gillespie*, 61 F.3d 457, 460 (6th Cir. 1995) ("if members of the jury in fact used the dictionary definition [to reach their verdict], the defendant must prove that he was prejudiced thereby; prejudice is not presumed"); *United States v. Cheyenne*, 855 F.2d 566, 568 (8th Cir. 1988) (if the jury "simply supplements the [trial] court's instructions of law with definitions culled from a dictionary, it remains within the province of the judge to determine" whether the defendant was prejudiced); *Williams-Davis*, 90 F.3d at 502-03 (D.C. Cir.) (holding presumption of prejudice inapplicable to juror's reading of a dictionary definition during deliberations).

Relying on our prior application of the *Remmer* presumption, *see Basham*, 561 F.3d at 319-21; *Cheek*, 94 F.3d at 141; *Stockton*, 852 F.2d at 744, we conclude this presumption likewise is applicable when a juror uses a dictionary or similar resource to research the definition of a material word or term at issue in a pending case. In reaching this conclusion, we observe that many of the concerns that arise when a juror discusses a case with a third party, such as the incident that occurred in *Basham*, are likewise concerns inherent in a juror's unauthorized use of a dictionary during jury deliberations. In both instances, a defendant's Sixth Amendment right to a fair trial is at issue, and the sanctity of the jury and its

[20]Additionally, the First Circuit examined a juror's use of a dictionary without mentioning *Remmer* or otherwise opining who bears the burden of establishing prejudice. *See United States v. Rogers*, 121 F.3d 12, 17 (1st Cir. 1997) (in case involving jurors use of a dictionary definition, for a term on which the district court issued a subsequent legal instruction, holding that "the district court must determine whether any misconduct has occurred and if so, whether it was prejudicial").

deliberations have been threatened. In both instances, an extrinsic influence has been injected into the trial, the content of which is beyond the trial court's ability to control. And, in both instances, the procedural and substantive protections that the law affords to the judicial process are limited.[21]

In the present case, the content of the extrinsic influence is of particularly great concern, because the Wikipedia definition of the term "sponsor" addressed an element of the animal fighting offenses for which the defendants were on trial. Thus, Juror 177's use of a dictionary definition concerning this contested element of the offense was inherently "more than [an] innocuous" incident. *See Basham*, 561 F.3d at 319. Accordingly, we apply the *Remmer* presumption here, and turn now to consider whether the government has rebutted the presumption of prejudice that has arisen in this case.

C.

In determining whether the government has rebutted this presumption of prejudice, we agree with the district court's analysis that the *Mayhue* factors, employed in *McNeill*, provide the proper framework for our consideration of the parties' arguments.[22] These factors include:

> (1) The importance of the word or phrase being defined to the resolution of the case.

[21]We note that these concerns are greater here because the district court only became aware of the juror misconduct after the verdicts and, thus, did not have an opportunity to take remedial action, such as giving a curative instruction to the jury. Accordingly, our analysis in the present case does not purport to be applicable to other situations in which misconduct is discovered before a verdict is reached, and the district court appropriately acts to alleviate the potential for prejudice.

[22]The parties each cite *Mayhue* and rely on the *Mayhue* factors in support of their respective arguments.

> (2) The extent to which the dictionary definition differs from the jury instructions or from the proper legal definition.
>
> (3) The extent to which the jury discussed and emphasized the definition.
>
> (4) The strength of the evidence and whether the jury had difficulty reaching a verdict prior to introduction of the dictionary definition.
>
> (5) Any other factors that relate to a determination of prejudice.

Mayhue, 969 F.2d at 924.

In applying these factors, our consideration of the jurors' testimony is constrained by Rule 606(b) of the Federal Rules of Evidence. This Rule generally prohibits the consideration of post-verdict juror testimony concerning "any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment." Fed. R. Evid. 606(b)(1).

The Rule provides a very limited exception, which allows a juror to testify regarding whether "extraneous prejudicial information was improperly brought to the jury's attention;" or whether "an outside influence was improperly brought to bear on any juror."[23] Fed. R. Evid. 606(b)(2). Thus, "although a juror can testify that she consulted an extraneous influence and related her findings to the panel, neither she nor any other juror can testify about any effect the extraneous influence may have had on the verdict or on the jury deliberations."

[23]The Rule provides a third exception for juror testimony concerning whether "a mistake was made in entering the verdict on the verdict form." Fed. R. Evid. 606(b)(2)(C).

McNeill, 476 F.3d at 226 (King, J., concurring in judgment) (citing Fed. R. Evid. 606(b), and *Mayhue*, 969 F.2d at 921).

i.

The first *Mayhue* factor, the importance of the word or term at issue to the resolution of the case, weighs heavily in Lawson's favor. Juror 177 used Wikipedia to research the term "sponsor," which is an element of the animal fighting offenses for which Lawson was on trial. *See* 7 U.S.C. § 2156 ("it shall be unlawful for any person to knowingly sponsor or exhibit an animal in an animal fighting venture"). Indeed, the district court agreed that the term "sponsor" was important to the case for this reason.

The government's argument with respect to this factor is especially weak. The government concedes that the term "sponsor" "may be crucial to 7 U.S.C. § 2156," but argues that the term was not crucial to the verdict in this case. In essence, despite the absence of a special verdict form with respect to this issue, the government argues that the jury necessarily convicted Lawson under an "aiding and abetting" theory of liability rather than under a theory of principal liability. In advancing this argument, the government relies on the testimony of Juror 185, who stated that any words researched by Juror 177 became "null and void" because the jury "ended up . . . using a different section of the jury instruction . . . for the section that we were deliberating on. . . . [We] didn't need that word."

We must reject the government's argument, because a contrary conclusion would undermine the very purpose of Rule 606(b). As we have explained, Rule 606(b) prohibits testimony concerning jurors' thought processes during deliberations. The government's reliance on Juror 185's testimony, which discusses the basis on which the jury rested its decision, goes far beyond the bounds of the limited exceptions provided in Rule 606(b). *See Cheek*, 94 F.3d at 143 ("Rule

606(b) prohibits all inquiry into a juror's mental process in connection with the verdict."). Accordingly, we resolve the first *Mayhue* factor in Lawson's favor.

ii.

The second *Mayhue* factor, "the extent to which the dictionary definition differs from the jury instructions or from the proper legal definition," presents a unique question in these circumstances.[24] The district court hearing took place nineteen days after Juror 177 conducted his internet research, and Juror 177 no longer retained the printout of his original research. As the district court recognized, "definitions on Wikipedia are subject to change by users, and the definition at issue (of 'sponsor') had, according to Court's Ex. 1, been changed between the time Juror 177 consulted this external source and when he repeated the same steps to produce Court's Ex. 1."[25] Accordingly, the district court properly "assume[d] that the definition of 'sponsor' shown in Court's Ex. 1 is different in at least some respects from what Juror 177 obtained and consulted during deliberations."

Despite these observations, the district court concluded that "the meaning Juror 177 appears to have taken from the lengthy definition and related discussion" in the Wikipedia entry for "sponsor" was "consistent with the definition that the court would have provided had it been asked for a definition." The district court further concluded that "any meaning germane to this action which may be drawn from the definition has remained unchanged." Upon our review of the record, and taking into account the fact that the government bears the bur-

[24]We note that the district court did not provide a jury instruction concerning the definition of "sponsor."

[25]The "date stamp" on the Wikipedia printout provided by Juror 177 indicates that he researched and printed the document on May 20, 2010, 14 days after he first researched the term, and five days before the district court's hearing.

den of rebutting the presumption under *Remmer*, we conclude that the district court's analysis of this second *Mayhue* factor is highly speculative.

We are greatly concerned about the use of Wikipedia in this context. As an initial matter, we observe with near certainty that the Wikipedia entry that Juror 177 researched contained significantly more information than any traditional legal definition of the term "sponsor." The Wikipedia entry for that term reviewed by the district court is three pages long, and contains a thirteen-paragraph "definition" that reads more like a narrative than a definition. This Wikipedia entry also contained a three-paragraph section titled "sponsorship controversies," as well as internal and external "weblinks." Thus, even if some part of the Wikipedia entry is not in direct substantive conflict with traditional legal definitions of the term "sponsor," the expansive nature of that Wikipedia entry suggests that "[t]he extent to which the [Wikipedia] definition differs from the proper legal definition" likely is significant. *See Mayhue*, 969 F.2d at 924.

Most importantly, however, we have no indication in the record regarding the actual content of the Wikipedia entry for the term "sponsor" that Juror 177 obtained. The government has not argued, nor has it provided evidence establishing, that the Wikipedia entry for the term "sponsor" can be retraced to its form when Juror 177 first researched the term. Moreover, even assuming that previous Wikipedia entries can be retrieved,[26] we would be unable to consider this fact on appeal in the absence of a firm basis in the record for concluding that the Wikipedia archives themselves are accurate and trustworthy. Thus, it is apparent that Juror 177's use of Wikipedia, under the circumstances of this case, makes meaningful anal-

[26]We observe that Wikipedia claims that its software "retains a history of all edits and changes." *See* http://en.wikipedia.org/wiki/Wikipedia:About#Strengths.2C_weaknesses.2C_and_article_quality_in_Wikipedia (accessed on April 16, 2012).

ysis of the second *Mayhue* factor impossible. Accordingly, because the *Remmer* rebuttable presumption places the evidentiary burden on the government, we must conclude that this factor weighs in favor of Lawson.

iii.

The third *Mayhue* factor requires us to consider "[t]he extent to which the jury discussed and emphasized the definition." *See Mayhue*, 969 F.2d at 924. We agree with the district court's conclusion that the jurors with whom Juror 177 may have shared his research, or who were aware that Juror 177 conducted such research, placed little emphasis on the Wikipedia definition obtained by Juror 177.

That conclusion, however, does not end our inquiry. We have held previously that "if even a single juror's impartiality is overcome by an improper extraneous influence, the accused has been deprived of the right to an impartial jury." *Fullwood v. Lee*, 290 F.3d 663, 678 (4th Cir. 2002) (citing *Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam)). Thus, the impact that the extrinsic information had on the juror who obtained the information is important in and of itself. The district court noted from Juror 177's testimony that he gave little emphasis to the definition in deciding the case. However, the district court did not consider this aspect of Juror 177's testimony in the context of the government's evidentiary burden on this issue.

When considered in that context, we observe that several other material aspects of Juror 177's testimony were contradicted by the testimony of the other members of the jury. Therefore, in view of the government's burden, we conclude with regard to the third *Mayhue* factor that the extent to which Juror 177 was influenced by Wikipedia remains uncertain.

iv.

We next examine the fourth *Mayhue* factor, namely "[t]he strength of the evidence and whether the jury had difficulty

reaching a verdict prior to introduction of the dictionary definition." With regard to the strength of the evidence, the district court held that "the evidence against each of the Defendants in the consolidated trial was strong." However, we note that the district court appeared to rely on the possibility that the jurors convicted Lawson on the alternative theory of aiding and abetting. For instance, the district court noted that "[a]s to the definition[ ] of 'sponsor' . . . , it is significant that each of the Defendants could be convicted not only for his or her own activities, but (depending on the charge) for conspiring with or aiding and abetting others in exhibiting or sponsoring an animal in an animal fighting venue."

As we already have observed, the issue whether the jury convicted Lawson under an aiding and abetting theory cannot be resolved in this case without inviting improper speculation and violating the general prohibition of Rule 606(b). Additionally, because we are not examining the sufficiency of the evidence under a deferential standard applicable to such inquiries, we are unable to consider that the jury may have relied on one theory of liability over another. *Cf. United States v. Burgos*, 94 F.3d 849, 863 (4th Cir. 1996) (en banc) (in reviewing challenges to the sufficiency of the evidence supporting a conviction, our task is to determine, "viewing the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the Government, whether the evidence adduced at trial could support *any* rational determination of guilty beyond a reasonable doubt.") (internal quotation marks omitted) (emphasis added). Instead, we must examine whether the evidence was strong with regard to the issue whether Lawson "sponsor[ed]" an animal in an animal fighting venture. On this narrow issue, the government does not provide meaningful argument.[27] Thus, we are unable to

[27]The government merely argues in a conclusory manner that "[t]he evidence against all defendants was strong. Each defendant was identified on video, and each defendant was described as either actively participating in the events, or aiding and abetting in their own way (as organizers, referees or gaff makers)." Gov't Br. at 51-52.

state for purposes of applying the *Remmer* presumption that the evidence against Lawson was strong.

We also consider under this *Mayhue* factor whether the jury had difficulty reaching a verdict prior to Juror 177's Wikipedia research. The jury began its deliberations on Thursday, May 6, 2010 at about 4:00 p.m. The jury was excused for the evening after 5:30 p.m. Juror 177 researched and printed the Wikipedia entry defining the term "sponsor" the next morning, shortly before the jury resumed deliberations at about 9:00 a.m. The jury reached its verdict at about 4:30 p.m. that afternoon. Based on this timeline, we cannot say that the jury had difficulty reaching a verdict prior to Juror 177's improper research. Accordingly, although we conclude that this inquiry is of limited import in this case, this aspect of the fourth *Mayhue* factor weighs in favor of the government. When balanced, however, with the "strength of the evidence" inquiry discussed above, the fourth *Mayhue* factor either is in equipoise or weighs in favor of Lawson.

v.

Finally, we consider the fifth *Mayhue* factor, a "catch all" factor that allows us to consider "[a]ny other factors that relate to a determination of prejudice." We observe here another aspect of Wikipedia, namely, its reliability. According to the "Wikipedia:About" entry, at least in its form as of April 16, 2012, Wikipedia describes itself as "a multilingual, web-based, free-content encyclopedia project based on an openly editable model." http://en.wikipedia.org/wiki/Wikipedia:About (the "About Wikipedia" entry). Indeed, the "About Wikipedia" entry notes that:

> Wikipedia is written collaboratively by largely anonymous Internet volunteers who write without pay. Anyone with Internet access can write and make changes to Wikipedia articles (except in certain cases where editing is restricted to prevent disruption

> or vandalism). Users can contribute anonymously, under a pseudonym, or with their real identity, if they choose.

Id. The "About Wikipedia" entry further notes that "[a]nyone with Web access can edit Wikipedia . . . . About 91,000 editors—from expert scholars to casual readers—regularly edit Wikipedia." *Id.*

Given the open-access nature of Wikipedia, the danger in relying on a Wikipedia entry is obvious and real. As the "About Wikipedia" material aptly observes, "[a]llowing anyone to edit Wikipedia means that it is more easily vandalized or susceptible to unchecked information." *Id.* Further, Wikipedia aptly recognizes that it "is written largely by amateurs." *Id.*

We observe that we are not the first federal court to be troubled by Wikipedia's lack of reliability.[28] *See Bing Shun Li v. Holder*, 400 F. App'x 854, 857-58 (5th Cir. 2010) (expressing "disapproval of the [immigration judge's] reliance on Wikipedia and [warning] against any improper reliance on it or similarly unreliable internet sources in the future"); *Badasa v. Mukasey*, 540 F.3d 909, 910–11 (8th Cir. 2008) (criticizing immigration judge's use of Wikipedia and observing that an entry "could be in the middle of a large edit or it could have been recently vandalized"); *Crispin v. Christian Audigier*, Inc., 717 F. Supp. 2d 965, 977 (C.D. Cal. 2010) (criticizing parties' reliance on Wikipedia); *Kole v. Astrue*, No. CV 08-0411, 2010 WL 1338092, at *7 n.3 (D. Idaho Mar. 31, 2010) (admonishing counsel from using Wikipedia as an authority,

[28]We note, however, that this Court has cited Wikipedia as a resource in three cases. *See Brown v. Nucor Corp.*, 576 F.3d 149, 156 n.9 (4th Cir. 2009) (citing Wikipedia entry as a second authority for the term "standard deviation"); *United States v. Smith*, 275 F. App'x 184, 185 n.1 (4th Cir. 2008) (unpublished) (quoting Wikipedia definition of a "peer-to-peer" computer network); *Ordinola v. Hackman*, 478 F.3d 588, 594 n.4 (4th Cir. 2007) (citing Wikipedia entry for definition of "calcium oxide").

observing that "Wikipedia is not a reliable source at this level of discourse"); *Baldanzi v. WFC Holdings Corp.*, No. 07–CV–9551, 2010 WL 125999, at *3 n.1 (S.D.N.Y. Jan. 13, 2010) (observing that Wikipedia "touts its own unreliability"); *Campbell ex rel. Campbell v. Secretary of Health and Human Servs.*, 69 Fed. Cl. 775, 781 (Fed. Cl. 2006) (observing dangers inherent in relying on Wikipedia entry).

vi.

In balancing the *Mayhue* factors discussed above, we conclude as a matter of law that the government has failed to rebut the *Remmer* presumption of prejudice. The first factor, the importance of the term at issue, weighs strongly in favor of Lawson. The second, third, and fourth factors either present close questions or weigh in Lawson's favor due to the evidentiary and analytical uncertainties present in this case. The fifth factor weighs in Lawson's favor.

These conclusions reflect the fact that there remain many unresolved questions in this case due to the unreliability and ever-changing nature of Wikipedia, to Juror 177's failure to retain a copy of the printout containing the entry he examined, to the government's failure to establish whether the entry could be "retraced," to the differences between Juror 177's recollection of the events at issue and the recollections of his fellow jurors, and to the constraints imposed by Fed. R. Evid. 606(b). We do not know what the Wikipedia entry actually said, how it may have differed from a traditional legal definition of the term "sponsor," whether Juror 177 used the entry in arriving at his decision, and under what theory of liability the jury convicted the defendants. In short, there are many uncertainties here, and, under *Remmer*, "it is the prosecution" that "bears the risk of uncertainty." *United States v. Vasquez-Ruiz*, 502 F.3d 700, 705 (7th Cir. 2007). Therefore, because the government has a "heavy obligation" to rebut the presumption of prejudice by showing that "there is no reasonable possibility that the verdict was affected by the" external influ-

ence, *Cheek*, 94 F.3d at 142, the government's showing in this case, as a matter of law, does not satisfy that obligation.

We do not set aside a jury's verdict lightly. However, the Sixth Amendment "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). We have held that "[n]o right touches more the heart of fairness in a trial." *Stockton*, 852 F.2d at 743. In this case, we are unable to say that Juror 177's use of Wikipedia did not violate the fundamental protections afforded by the Sixth Amendment. Accordingly, we vacate the appellants' convictions under the animal fighting statute, and we award them a new trial with respect to those charges.[29]

VI.

We next consider the challenges made by several of Scott Lawson's co-defendants, including Dyal, Sheri Hutto, Wayne Hutto, and Collins (collectively, Dyal), to their convictions for conspiracy to engage in an illegal gambling business, in violation of 18 U.S.C. § 371, and for operating an illegal gambling business, in violation of 18 U.S.C. § 1955 (collectively, the gambling convictions).[30] The language of 18 U.S.C.

[29]We address the conspiracy convictions relating to the animal fighting statute later in this opinion. Additionally, in light of our conclusion regarding the juror's misconduct, we need not address Lawson's other statutory and evidentiary challenges to his convictions relating to the Animal Welfare Act. These additional issues that we do not address include: (1) whether the district court erred in denying the defendants' motion for judgment of acquittal based on the sufficiency of the evidence pertaining to the animal fighting venture's connection to interstate commerce; (2) whether the district court erred in denying the defendants' request to instruct the jury that the government had the burden to prove that the defendants' activities had a *substantial* effect on interstate commerce for a conviction to obtain; and (3) whether the district court erred in admitting certain evidence relating to Lawson's sale of gaffs.

[30]Lawson and Peeler were not charged with participating in any gambling activities relating to the animal fighting venture.

§ 1955 provides, in relevant part, that "[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both." The statute defines an "illegal gambling business" in relevant part as a "gambling business which is a violation of the law of a State or political subdivision in which it is conducted." 18 U.S.C. § 1955(b)(1)(i).

Dyal raises two arguments in seeking to overturn the gambling convictions. First, Dyal contends that the district court erred in failing to charge the jury that Dyal must have known that her conduct constituted gambling under South Carolina law. Second, Dyal argues that the district court erred in instructing the jury that the South Carolina gambling statute, S.C. Code § 16-19-130, is violated when a person pays an entry fee to enter a contest of skill and the winnings depend on the number of entries. Both these arguments address issues of law, and, accordingly, we review these issues de novo. *Cheek*, 94 F.3d at 140.

A.

Dyal argues that the district court erred by failing to instruct the jury that the defendants must know that their conduct constituted illegal gambling under South Carolina law.[31] According to Dyal, the district court's construction of the statute improperly eliminated any mens rea requirement, and allowed the government to obtain a conviction simply by showing that the defendants conducted an enterprise that accepted entry fees for a derby, and that the amount of winnings was dependent on the number of entries. Dyal contends that if she concluded in "good faith" that her conduct was not gambling, then she could not be convicted under 18 U.S.C.

[31]Dyal originally contended that the district court improperly struck from the indictment the words "willfully" and "knowingly," but has abandoned that facet of her argument.

§ 1955, even though that statute may set forth only a general intent crime. We disagree with Dyal's argument.

Initially, we observe that the plain language of 18 U.S.C. § 1955 does not require that a defendant know that her conduct constitutes illegal gambling under state law. Accordingly, numerous courts have rejected the precise argument that Dyal makes here. *See United States v. Ables*, 167 F.3d 1021, 1031 (6th Cir. 1999) (in conviction under § 1955 for operating a "bingo" game, upholding district court's refusal to grant jury instruction that defendant could not be convicted if he had good-faith belief he was not acting in violation of state law); *United States v. Cyprian*, 23 F.3d 1189, 1199 (7th Cir. 1994) (in case also involving conviction under § 1955 for operating a bingo game, holding that because guilt under § 1955 is based on "conduct," defendant did not need to know that his actions were illegal, but only that he performed the acts in question); *United States v. Hawes*, 529 F.2d 472, 481 (5th Cir. 1976) (rejecting argument that government must show accused had knowledge his conduct violated state law in order to obtain conviction under § 1955, and noting that "[i]t is sufficient that appellants intended to do all of the acts prohibited by the statute and proceeded to do them"); *United States v. Thaggard*, 477 F.2d 626, 632 (5th Cir. 1973) (same); *see also United States v. Cross*, 113 F. Supp. 2d 1253, 1256 (S.D. Ind. 2000) (holding that inclusion of term "knowingly" in indictment "over alleges the mens rea of the Section 1955 offense," a general intent crime, and that the inclusion of the term was surplusage and "should and will be disregarded").[32]

[32]Although Dyal cites *United States v. O'Brien*, 131 F.3d 1428, 1430 (10th Cir. 1997) for the proposition that the government must show that a defendant knew that her act was one of participation in gambling, the court specifically stated in *O'Brien* that "Section 1955 is not a specific intent statute," and that "[t]o be convicted under this provision, . . . a defendant need not know that the gambling business . . . was violative of state law." *Id.* Thus, Dyal's reliance on *O'Brien* weakens her argument rather than strengthens it.

We conclude that the reasoning employed in these cases is persuasive, and we hold that Section 1955 is a general intent crime, which does not require the government to establish that the defendants knew that their conduct violated state law. We also agree with the Sixth Circuit's decision in *Ables* that a good-faith instruction, such as the one that Dyal essentially requested in this case, is unavailable under these circumstances. Accordingly, we reject Dyal's argument that the district court erred in failing to instruct the jury that the defendants must know their conduct constituted illegal gambling under South Carolina law.

B.

Alternatively, Dyal argues that the district court erred in instructing the jury on the elements of S.C. Code § 16-19-130.[33] That section of the South Carolina Code provides that it is illegal for any person to:

> record[ ] or register[ ] bets or wagers . . . upon the result of any:
>
> > (a) trial or contest of skill, speed or power of endurance of man or beast;
> >
> > . . . or
> >
> > (c) lot, chance, casualty, unknown or contingent event whatsoever.
>
> [Or] aid[ ], assist[ ] or abet[ ] in any manner any of the aforesaid acts.

S.C. Code § 16-19-130(3), (6). The district court instructed the jury, in relevant part, as follows:

[33]As discussed, a conviction under 18 U.S.C. § 1955 requires as an element of the offense that the defendant have violated a state or local gambling law.

> Section 16-19-130 of the South Carolina Code makes it illegal to record or register bets or wagers, with or without writing, upon the result of any trial or contest of skill, speed or power of endurance of man or beast, or aid, assist or abet in any manner in the aforesaid acts.
>
> For purposes of South Carolina law, a monetary amount awarded to the winner of a contest is not a bet or wager if it is a set amount funded by the sponsor of the event and not dependent on the number of entrants or amounts those entrants have paid to participate in the event. Conversely, payment of a monetary prize is considered a bet or wager if the amount to be awarded is dependent on and funded by fees paid by other contestants or entrants in the event.

Dyal argues that the district court misconstrued the statute. She contends that it is a "distinction without a difference" to determine whether an activity constitutes gambling based on the source of the prize money, and whether that prize money is dependent on the number of entrants and the fee that they have paid. We disagree with Dyal's argument.

We could not locate, nor did the parties direct us to, any South Carolina cases elaborating on the definitions of "bet" or "wager," as those terms are used in S.C. Code § 16-19-130. However, the government relies on a 2003 opinion letter issued by the Office of the South Carolina Attorney General. In that letter, the Attorney General stated that "mere participation in [a] game of skill where a contestant is required to pay an entrance fee, *such fee does not specifically make up the purse or premium contested for*, and the sponsor of such event is not a participant for a prize, does not constitute a violation of statutes similar to § 16-19-130." Letter from Robert D. Cook, Ass't Dep. Att'y Gen., to The Honorable Glenn F. McConnell, President Pro Tempore, South Carolina Senate (Aug. 29, 2003), *available at* 2003 WL 22050876, at *2

(emphasis added). The letter opinion later states that when "participants pay an entry fee" to enter an event, "but the entry fee does *not* determine or make up the prize, purse or premium," the event would likely be held by a court not to violate S.C. Code § 16-19-130. *Id.* at *4 (emphasis added).

In the absence of any South Carolina law to the contrary, we find persuasive the South Carolina Attorney General's interpretation of this South Carolina law. Indeed, that interpretation is supported by the view of the highest court of Nevada, a state with a particular interest in, and familiarity with, gambling. The Supreme Court of Nevada has held that an event involves a wager if the prize or premium is not a fixed amount but rather, as is the case here, depends upon the number of entrants. *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 86 (Nev. 1961) ("A prize or premium differs from a wager in that in the former, the person offering the same has no chance of gaining back the thing offered, but, if he abides by his offer, he must lose; whereas in the latter, each party interested therein has a chance of gain and takes a risk of loss."); *cf. id.* at 87 ("The fact that each contestant is required to pay an entrance where the entrance fee does not specifically make up the purse or premium contested for does not convert the contest into a wager."); *see also Nevada v. GNLV Corp.*, 834 P.2d 411, 412-13 (Nev. 1992) (citing *Las Vegas Hacienda* for proposition that "[a] prize differs from a wager in that the person offering the prize must permanently relinquish the prize upon performance of a specified act[, but] [i]n a wager, each party has a chance of gain and takes a risk of loss") (internal quotation marks removed). Accordingly, based on these distinctions, we conclude that the district court did not err its instructions to the jury concerning the elements of S.C. Code § 16-19-130. For these reasons, we affirm Dyal's convictions for violating the illegal gambling statute, 18 U.S.C. § 1955.

VII.

In view of our holdings vacating the convictions for violating the animal fighting statute but affirming the illegal gam-

bling statute convictions, we find it necessary to determine whether the conspiracy convictions may stand. We first consider the conspiracy convictions relating to Scott Lawson and Peeler, who were not indicted or convicted for engaging in illegal gambling under 18 U.S.C. § 1955.

Scott Lawson and Peeler were charged with "Conspiracy to Violate the Animal Welfare Act." As alleged in the Lawson indictment, the only object of the conspiracy in which they allegedly participated was to "sponsor and exhibit an animal in an animal fighting venture," in violation of 7 U.S.C. § 2156(a)(1). Thus, the term "sponsor" was integral to the conspiracy conviction, and for the reasons discussed above, we are unable to conclude that "there is no reasonable possibility that the verdict was affected by" Juror 177's misconduct in researching the definition of "sponsor" on Wikipedia. *See Cheek*, 94 F.3d at 142. Accordingly, we vacate Scott Lawson's and Peeler's conspiracy convictions, and award them a new trial with respect to that charge.

The conspiracy charges and convictions for defendants Dyal, Sheri Hutto, Wayne Hutto, and Collins (the Dyal defendants) require us to engage in a different analysis. With respect to these defendants, the government framed its indictments as alleging a single conspiracy count for "Conspiracy to Violate the Animal Welfare Act *and* to Engage in an Illegal Gambling Business." (Emphasis added.) The indictment thus alleges a multi-object conspiracy, and does so in the conjunctive.

Ordinarily, when a conviction under a multi-object conspiracy indictment is supported on one ground but is legally inadequate on the other, the conviction will be reversed in accordance with the Supreme Court's decision in *Yates v. United States*, 354 U.S. 298, 304-12 (1957). As we have explained, under *Yates*, "reversal is required when a case is submitted to a jury on two or more alternate theories, one of which is legally (as opposed to factually) inadequate, the jury

returns a general verdict, and it is impossible to discern the basis on which the jury actually rested its verdict."[34] *United States v. Moye*, 454 F.3d 390, 400 n.10 (4th Cir. 2006) (en banc) (citing *Yates*, 354 U.S. at 311-12.).

Here, however, in contrast to the general verdict rendered in *Yates*, the verdict in the present case reveals that the jury had two separate bases for convicting the Dyal defendants of the conspiracy charges. Although the indictment alleged both objects in a single count, the jury's verdict forms with respect to each of the Dyal defendants listed separate guilty verdicts for "Count 1 – Conspiracy (Animal Welfare Act: June 18, 2008 through April 18, 2009)" and "Count 1 – Conspiracy (illegal gambling business: May 2007 through April 18, 2009)." Thus, we are not confronted with a situation in which we are uncertain whether a jury's verdict was solely attributable to an underlying conviction which we have set aside on legal grounds. *Cf. Yates*, 354 U.S. at 311-12. Accordingly, the conspiracy convictions for the Dyal defendants are supported by a valid and independent legal basis that is apparent from the record, and we therefore affirm those convictions.[35]

[34]A different rule is applicable when the conviction concerning one of the objects is set aside on factual, as opposed to legal, grounds. *See Griffin v. United States*, 502 U.S. 46, 56 (1991) (holding that the Due Process Clause does not require a general guilty verdict on a multi-prong conspiracy be set aside if the *evidence is inadequate* to support conviction as to one of the objects); *Turner v. United States*, 396 U.S. 398, 420 (1970) ("when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, as Turner's indictment did, the verdict stands if the *evidence is sufficient* with respect to any one of the acts charged") (emphasis added).

[35]We observe that Collins individually challenges his sentence imposed by the district court, arguing that the district court erred by: (1) adding four levels to his guidelines-recommend sentence, U.S.S.G. § 3B1.1, upon concluding that he was an organizer or leader in the cockfighting venture and the illegal gambling business; and (2) declining to adjust Collins' sentence on the basis that he demonstrated acceptance of responsibility, U.S.S.G. § 3E1.1. In light of our conclusion that Collins' convictions for violating the animal fighting statute cannot stand and that Collins is entitled to a new trial with respect to those charges, we need not reach Collins' arguments concerning the sentence imposed by the district court.

VIII.

In conclusion, we hold that the animal fighting statute is a constitutional exercise of Congress' power under the Commerce Clause, and that the district court did not err in holding joint trials of Scott Lawson and his co-defendants. However, we hold that the government has failed to demonstrate that a juror's misconduct did not affect the verdict with respect to the violations of the animal fighting statute. Accordingly, we vacate all the defendants' convictions for violating the animal fighting statute.

We reject the challenges made by several of the defendants to their convictions for participating in an illegal gambling business, and we affirm the illegal gambling statute convictions of the Dyal defendants. We affirm the conspiracy convictions of the defendants who were charged with engaging in a conspiracy to violate both the Animal Welfare Act and to violate the illegal gambling business statute, but we vacate the conspiracy convictions of Scott Lawson and Peeler, whose conspiracy charges related solely to the Animal Welfare Act. We do not reach the merits of Collins' arguments concerning his sentencing, nor do we address the remaining issues raised by the appellants. We remand this matter to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED

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COMMONWEALTH *vs.* Clare WERNER.

No. 11-P-368.

February 1, 2012. - May 2, 2012.

Practice, Criminal, New trial, Deliberation of jury, Instructions to jury, Voluntariness of statement, Jury and jurors. *Jury and Jurors. Evidence,* Relating to deliberation by jurors, Voluntariness of statement. *Internet.*

INDICTMENTS found and returned in the Superior Court Department on December 22, 2006.

The cases were tried before *Wendie I Gershengorn,* J., and a motion for a new trial was heard by her.

Peter M. Onek, Committee for Public Counsel Services, for the defendant.

Jessica V. Barnett, Assistant Attorney General, for the Commonwealth.

Present: Grasso, Kafker, & Milkey, JJ.

KAFKER, J.

After the defendant, Clare Werner, was convicted at a jury trial of twelve counts of larceny in excess of $250, in violation of G.L. c. 266, § 30(1), her defense counsel visited Facebook, a social networking Web site, and reviewed public postings by two jurors made during and after the trial concerning their jury service, as well as the responses to those postings. The primary argument in this consolidated appeal from the defendant's convictions and from the denial of her new trial motion is that the Facebook postings and responses raised the possibility that the jurors may have been exposed to extraneous influences. In particular, the defendant argues that the judge should have waited for Facebook to provide information pursuant to a subpoena before denying her motion for a new trial. We conclude that the judge did not abuse her discretion in denying the motion for a new trial after an evidentiary hearing. We also conclude that the other issue raised on appeal--whether a jury instruction explaining why Miranda warnings were not given intruded into the jury's voluntariness inquiry pursuant to the humane practice rule--is without merit. We therefore affirm.

Background. The jury were warranted in finding the following facts. During fiscal year 2005, the defendant was a bookkeeper in the student accounts office of Bridgewater State College (the College), [FN1] which handled payments for students' tuition and fees. When tellers received payments in cash or by check, they logged them into a computerized accounting system and placed them in sealed bank deposit bags with deposit slips. The defendant was responsible for processing the deposit bags.

On numerous occasions between July, 2004, and June, 2005, the defendant opened deposit bags, took the cash that was to be deposited, and replaced it with an equivalent amount in checks from incoming student payments that she had previously held back. If the replacement checks did not exactly total the amount of cash she removed, the defendant would include a personal check from her own account in the amount of the difference, typically a relatively small sum. She would then alter or rewrite the deposit slips to match the changed contents of the bags. The total amount of the thefts was approximately $355,000. When questioned by investigators, the defendant admitted to stealing money from the accounts two or three times per week, in totals of between $600 and $700, and once taking $8,000. [FN2]

Posttrial proceedings. The evening after the guilty verdicts were returned, defense counsel, having previously read general media reports about improper use of social media by jurors, attempted to look up the jurors on Facebook. Two of them, Juror A and Juror B, had open profiles, meaning that their profiles were accessible to any Facebook member. Defense counsel discovered that on March 30, 2009, while jury selection was ongoing, Juror A had posted: "[I] had jury duty today and was selected for the jury.... Bleh! Stupid jury duty!" Juror A had received three responses, one of which stated: "Throw the book at 'em." As the trial progressed, Juror A posted about sitting for long hours and her desire to complete the trial. At one point another juror in the trial, Juror C, who had been "friended" by Juror A during the trial, responded to her, saying, "[H]opefully it will end on [M]onday...." [FN3]

Also during jury empanelment on March 30, Juror B posted at 8:05 A.M.: "Waiting to be selected for jury duty. I don't feel impartial." A person responded, "Tell them 'BOY HOWDIE, I KNOW THEM GUILTY ONES!" Later that day at 4:54 P.M., Juror B posted again: "Superior Court in Brockton picks me ... for the trail [*sic*]. The[y] tell us the case could go at least 1 week. OUCH OUCH OUCH." Juror B's wife replied to this at 9:37 P.M., "Nothing like sticking it to the jury confidentiality clause on Facebook.... Anyway, just send her to Framingham quickly so you can be home for dinner on time." Later that evening, another of his friends responded: "I'm with [Juror B's wife] ... tell them that you asked all your F[ace] B[ook] friends and they think GUILTY." [FN4]

After finding these postings, defense counsel filed a motion for a new trial and sought to subpoena records from Facebook concerning postings and messages to and from these two jurors regarding their jury service. The trial judge, who also heard the motion for a new trial, decided to hold an evidentiary hearing at which Juror A and Juror B would testify. The judge also issued a subpoena to Facebook. [FN5] Prior to the hearing, however, Facebook had not responded to the subpoena or telephone calls from the court.

The evidentiary hearing was held on June 29, 2009.

At that hearing, Juror A was asked whether "during the very beginning of the case, that is impanelment, through the receiving of the jury verdict, you may have gone online and posted some information regarding this case." She responded, "I don't believe I did." She was then shown the posting that described her feelings about being selected and she recalled the posting and the responses. She explained that the postings were from people "sympathizing with ... having to spend time sitting on a jury." She acknowledged "friending" Juror C and another juror but said she had not sent any electronic mail messages (e-mails) or instant messages to them during the trial.

Juror B testified that he was the author of the postings. He also testified that he did not recall seeing the "BOY HOWDIE" response to his 8:05 A.M. posting or any other responses to that posting. When asked about his wife's response to the 4:54 P.M. post, he denied that he had told his wife "the details of the case, the name of the defendant, anything that was presented as evidence." He suggested that she may have learned about the case through "public records." He also testified that he did not reply to any of the responses to his 4:54 P.M. posting, although he did see the first three responses. Nor could he specifically recollect going back to Facebook between the 4:54 P.M. posting and the end of the trial. He testified that "after the trial when I became aware of the controversy, I deleted my wall." [FN6]

The trial judge found that none of the responses to any of the postings contained extraneous matters. She further found that "no evidence adduced at the hearing supports the defendant's claim that either Juror A or Juror B was exposed via the Internet to any extraneous matter." In denying the motion for a new trial, the judge rejected the request by the defendant to leave the hearing open until Facebook responded to the subpoena. The judge found: "The credible testimony given at the evidentiary hearing leads the Court to conclude that the records subpoenaed are unnecessary in these circumstances. Put differently, were the Court to have had the benefit of that testimony ex ante, the Court would not have ... exercised its discretion under Mass.R.Crim.P. 30(c)(4) to grant postconviction discovery." [FN7]

Discussion. 1. *Exposure to extraneous influences.* a. *Motion for new trial.* A trial judge "may grant a new trial at any time if it appears that justice may not have been done." Mass.R.Crim.P. 30(b), as appearing in 435 Mass. 1501 (2001). A judge may also order appropriate discovery after the verdict if the defendant makes "a sufficient showing that the discovery is reasonably likely to uncover evidence that might warrant granting a new trial." *Commonwealth v. Daniels,* 445 Mass. 392, 407 (2005). See Mass.R.Crim.P. 30(c)(4).

More specifically, when a defendant claims she was prejudiced by a juror's communications with outside parties during trial, she "bears the burden of demonstrating that the jury were in fact exposed to ... extraneous matter." *Commonwealth v. Fidler,* 377 Mass. 192, 201 (1979). See Mass. G. Evid. § 606(b) & note, at 162-164 (2011). She must satisfy this burden of proof by a preponderance of the evidence. *Commonwealth v.*

Kincaid, 444 Mass. 381, 386- 387 (2005). Defense counsel is also in a sensitive position in satisfying this requirement, as counsel is not permitted to independently contact jurors. *Commonwealth v. Fidler, supra* at 202. If the defendant does establish the existence of extraneous influences, the Commonwealth must demonstrate beyond a reasonable doubt that the extraneous matter did not cause her prejudice. *Id.* at 201.

In the instant matter, the defendant does not contend that, on the record before the judge when she decided the new trial motion, there was sufficient evidence to establish that the jury learned of relevant "information not part of the evidence at trial." *Commonwealth v. Guisti,* 434 Mass. 245, 251 (2001) (*Guisti I*). See *Commonwealth v. Guisti,* 449 Mass. 1018 (2007) (*Guisti II*). The defendant acknowledges that the postings, responses, and testimony of the jurors reveal no extraneous information. The defendant instead argues that she was deprived of the opportunity to develop evidence of an extraneous influence when the judge ruled on the new trial motion prior to receiving the materials subpoenaed from Facebook. [FN8] The defendant suggests that the case law compels the judge to undertake further investigation because the jurors' Facebook postings cast doubt on the truthfulness of their testimony at the evidentiary hearing.

The most instructive cases regarding the defendant's argument that the new trial motion could not be decided without further inquiry are *Guisti I* and *Guisti II.* There, defense counsel learned after the jury verdicts that one of the jurors had sent two e-mails during the trial to an e-mail list with approximately 900 subscribers. *Guisti I,* 434 Mass. at 249-250 & n. 4. The first e-mail stated that the juror was "stuck in a 7 day-long Jury Duty rape/assault case ... missing important time in the gym.... Just say he's guilty and lets [*sic*] get on with our lives!" *Id.* at 249-250. The second e-mail read: "Please understand I was joking ... and do not take my quote 'Just call him guilty so I can get back in the gym' (or something like that) seriously ... I should really watch it next time, I got a 2 page letter from 'Ann' because she took me toooooo seriously." *Id.* at 250.

Guisti's defense counsel filed a motion for a postverdict voir dire, which the judge denied without an evidentiary hearing or other inquiry of the juror. *Ibid.* The court in *Guisti I* held that the trial judge was required to conduct further inquiry because, "due to the large number of persons who would have received the juror's messages and could have responded, the juror left herself vulnerable to receiving information about the case at issue prior to the rendering of the verdict." *Id.* at 253. Concluding that, "[w]here a case is close, as here, a judge should exercise discretion in favor of conducting a judicial inquiry," *ibid.,* quoting from *Commonwealth v. Dixon,* 395 Mass. 149, 153 (1985), the *Guisti I* court remanded the case for a limited voir dire directed at the juror, the responses to the postings, and whether she had communicated with other jurors about the responses. *Ibid.*

On remand, the trial judge conducted a voir dire of the juror and determined that there was no evidence to indicate that the juror had been exposed to extraneous information. *Guisti II,* 449 Mass. at 1018. She then again denied the motion for a new trial. In an unpublished order, the Supreme Judicial Court remanded again out of concern that "the judge might have interpreted our initial remand order more narrowly than we intended."

Ibid. The court ordered that the trial judge "determine the appropriateness" of ordering a forensic examination of the juror's computer and "consider ... whether the contents of any responsive e-mails can be determined through the records of an [I]nternet mail service provider." The remand order reiterated the extent of the judge's discretion to set the scope of the inquiry, stating, "In sum, the judge is free to consider evidence, to the extent necessary and appropriate, from sources other than her questioning of the juror...." *Id.* at 1018-1019.

Pursuant to the second remand order, the trial judge in *Guisti* then took additional evidence, including a forensic examination of a computer, and eventually concluded that the juror had not been exposed to extraneous influences. *Id.* at 1019 & n. 1. In so doing, the judge credited the juror's testimony that she had received no responses other than those of two attorneys warning her to heed her obligations as a juror. *Ibid.* The Supreme Judicial Court affirmed the judgments, concluding that, in the absence of a showing that the jury were exposed to extraneous matters, "the judge was not obligated to go further." *Id.* at 1019, citing *Commonwealth v. Dixon,* 395 Mass. at 151.

We do not read *Guisti I* or *Guisti II* to require that the trial judge go beyond the questioning of jurors in the instant case. Rather, it is our understanding that *Guisti I* and *Guisti II* reinforce the precept that the judge's discretion is "broad," not circumscribed. *Guisti I, supra* at 251. Where there is a colorable showing of extraneous influence, the judge is neither compelled to go beyond juror questioning nor curtailed from doing so. The court in *Guisti II* was concerned that its original remand order left the extent of that discretion unclear. The scope of the judge's postverdict inquiry is determined by the postings and responses themselves, the medium in which the postings appeared, the evidence of extraneous influence uncovered, if any, and the credibility of the testifying juror, as determined by the evaluating judge. The judge retains the discretion to determine what additional evidence "from sources other than her questioning of the juror" is "necessary and appropriate ... to determine fully the facts" relevant to resolving the extraneous influence inquiry. *Guisti II, supra* at 1019.

The judge in the instant matter had the guidance of both *Guisti* decisions and clearly understood the scope of permissible inquiry. Finding that the defendant had made a "colorable showing" of extraneous influence, the judge, citing *Guisti I,* appropriately allowed the defendant's motion for an evidentiary hearing. See *Guisti I, supra* at 251, citing *Commonwealth v. Dixon, supra* at 151-152 ("A trial judge ... is under no duty to conduct [a postverdict] inquiry *unless* the defendant makes a 'colorable showing' that extraneous matters may have affected a juror's impartiality") (emphasis supplied). As with the juror's posting to 900 subscribers in *Guisti,* see *Guisti I* at 250, here, the potential number of Facebook users who could have seen Juror A's and Juror B's postings and responded to them was extensive

> [FN9] and raised sufficient concerns to warrant further inquiry. [FN10]
>
> The judge's initial response was simultaneously to (1) order a hearing to allow court-supervised questioning of Juror A and Juror B, and (2) issue a subpoena to Facebook for its records. As explained below, after hearing from the affected jurors and assessing their credibility, the judge properly concluded that neither

juror had been subjected to an extraneous influence in response to his or her postings and that no further inquiry was required. We discern no error in the judge's ruling and no abuse of discretion in her conclusion that further discovery of Facebook records was not required.

The judge did not err in concluding that the postings contained no evidence of extraneous influence. Instead, the postings involved the type of "attitudinal expositions" on jury service, protracted trials, and guilt or innocence that fall far short of the prohibition against extraneous influence. See *Commonwealth v. Fidler,* 377 Mass. at 199. See also *Guisti I, supra* at 252 (" 'Just say he's guilty and lets [*sic*] get on with our lives' does not involve an extraneous matter"); *Commonwealth v. Scanlan,* 9 Mass.App.Ct. 173, 183 (1980) (fellow juror's statement, "Why doesn't [the defendant] just get up and plead guilty and save us all the time and money?" did not warrant further inquiry). The postings do not in any way reveal "specific facts not mentioned at trial concerning one of the parties or the matter in litigation." *Commonwealth v. Fidler,* 377 Mass. at 200. Moreover, the postings made during the trial contained no case-specific information whatsoever. See *United States v. Fumo,* 655 F.3d 288, 306 (3d Cir.2011) (postings were "so vague as to be virtually meaningless[; juror] raised no specific facts dealing with the trial"). Anyone viewing the jurors' postings on Facebook would have had no idea of the name of the defendant, what crime she was accused of committing, or what the trial was about. Thus, it is not surprising that the responses were equally nonspecific.

Nor can it reasonably be said that the judge erred in her assessment of the credibility of the witnesses' testimony, a matter particularly within her province. She found that "no evidence adduced at the hearing supports the defendant's claim that either [Juror A] or [Juror B] was exposed via the Internet to any extraneous matter." Implicit in that finding was her crediting both witnesses' testimony to that effect. In regard to Juror B, where questions were raised regarding his truthfulness, the judge carefully wrestled with both his statements and his omissions. Where the judge considered Juror B's testimony less than fully forthcoming, she so stated. For example, she recognized in her findings that Juror B had "informed his wife on the first day of trial that he was a juror in a criminal case and that the defendant was female." She did not discredit the remainder of his testimony. In fact, in her discussion of whether Juror B was a biased juror, an issue that has not been pursued on appeal (see note 4, *supra*), the judge expressly found that she "credit[ed] [Juror B]'s evidentiary hearing testimony." We are in no position to substitute our judgment for that of the judge on credibility questions. See *Commonwealth v. Kincaid,* 444 Mass. at 388.

Finally, as the judge noted, there was overwhelming evidence of guilt here, including admissions by the defendant that she had stolen money on numerous occasions. See *Guisti II,* 449 Mass. at 1019 n. 3, quoting from *Commonwealth v. Pillai,* 445 Mass. 175, 185 (2005) (appellate court gives "special deference to the factual findings" of motion judge who was also trial judge). Even if an extraneous influence had been discovered, the Commonwealth likely would have been able to prove the defendant was not prejudiced. See *Commonwealth v. Kincaid,* 444 Mass. at 386.

In sum, (1) review of the Facebook postings and juror testimony revealed no evidence of extraneous influences on the jury; (2) there was overwhelming evidence of guilt; (3) the posts that were made during the trial were general complaints about jury service and silly nonspecific responses to those complaints; (4) although the

posts examined by the judge appeared on open profiles on Facebook, and were thus accessible by any of the millions of Facebook members, there was no identifying information in any of the posts about the particular defendant or crime; and (5) the judge credited the jurors' testimony that they had not been exposed to any extraneous information in any other postings or responses. The defendant, therefore, could offer only unsupported speculation that the desired subpoenaed documents might include previously undisclosed communications of extraneous information to the jurors. It was therefore within the judge's broad discretion to deny the motion for new trial without awaiting Facebook's response to the subpoena. See *Guisti II, supra* at 1019-1020 ("[T]he trial judge's conclusion that the jury were not exposed to extraneous influences was amply supported by the evidence and her findings. Neither a new trial nor further proceedings are warranted").

b. *Additional instruction.* We take this opportunity to comment upon what additional steps may be necessary to address jurors' inappropriate use of social media such as Facebook and Twitter, a growing problem faced by courts around the country. See, e.g., *United States v. Fumo,* 655 F.3d at 298, 304- 306; *id.* at 331-333 (Nygaard, J., concurring in part and dissenting in part); *State v. Goupil,* 154 N.H. 208, 214-222 (2006).

In the instant case, the trial judge had been quite explicit in her instructions. On the first day of trial, she instructed the jurors "not to chat about the case. Don't discuss it with anyone. Don't chat among yourselves.... Each morning I'm to ask you if you have spoken about the case to anyone ... have you read anything or heard anything about the case.... Because if you do read anything, if you do some investigation of your own, if you Google this, ... it results in a mistrial." Before releasing the jurors on the first day, she reiterated these points and inquired at the beginning of each trial day whether the jurors had talked about the case with anyone.

Apparently, even these instructions were not enough to keep jurors from at least alluding to their jury service on social media Web sites. More explicit instructions about the use of social media and the Internet may therefore be required. [FN11] Instructions not to talk or chat about the case should expressly extend to electronic communications and social media, and discussions about the use of the Internet should expressly go beyond prohibitions on research. Jurors should not research, describe, or discuss the case on- or off-line. [FN12] Jurors must separate and insulate their jury service from their digital lives. [FN13] The Jury Commissioner also may wish to consider including in the Trial Juror's Handbook, which is distributed to all prospective jurors, an explicit warning about the use of social media during service as a juror. See The Trial Juror's Handbook, Office of Jury Commissioner for the Commonwealth (6th ed. 1998).

2. *Contested jury instruction relating to voluntariness of statements.* In her direct appeal, the defendant raises one issue concerning the conduct of the trial, arguing that the judge erred in giving a jury instruction regarding Miranda warnings and the voluntariness of the defendant's statements to investigators. As the jury were warranted in finding, on August 30, 2005, a State trooper and a financial investigator working for the Attorney General's office (investigators) drove to the defendant's home. The defendant came out to meet them but declined to speak with them in her house because family members were present. Instead, they agreed to meet at a local coffee shop an hour later. There, the investigators told her that she was the main suspect in an investigation into larceny at the College. The three spoke for about an hour. The defendant initially acknowledged that she had opened deposit

bags, but she stated that she did so only to fix accounting errors. After the investigators expressed skepticism and stated that some of her personal checks were found in the deposit bags, the defendant became nervous. The investigators told her that they had been respectful of her and asked that she show them courtesy by answering their questions honestly.

At this point, the defendant asked what would happen if she admitted to stealing money. The investigators stated that she would not be arrested that day, but would have to answer to charges in court. The defendant then described her system of substituting checks and admitted doing so two or three times per week, regularly taking between $600 and $700, but once as much as $8,000. At the end of the interview, the defendant thanked the investigators for being nice to her. On cross-examination, the State trooper who interviewed the defendant at the coffee shop testified that he had not given Miranda warnings to the defendant at that time. The Commonwealth objected, arguing that the defendant was attempting to raise an unfair inference from the absence of warnings, whereas a pretrial motion to suppress had been denied because the defendant was not in custody when she made the inculpatory statements.

[FN14] At a bench conference, the trial judge stated that voluntariness was an issue for the jury and that she would instruct that Miranda warnings were not required in this case. Thereafter, she instructed the jury:

"Miranda [w]arnings[ ] are only required if a person is in custody. However, and I will tell you in my instructions, you may generally consider whether the statement that is alleged to have been given to the officer by the defendant was a voluntary statement or whether it was coerced.... But [the Miranda warnings were] not required to be given to [the defendant] because she was not in custody."

Defense counsel did not object. In the final charge, pursuant to the humane practice of this Commonwealth, the trial judge instructed the jurors to consider the defendant's statements at the coffee shop only if they found beyond a reasonable doubt that the defendant had made them voluntarily.

[FN15] See *Commonwealth v. Tavares,* 385 Mass. 140, 152, cert. denied, 457 U.S. 1137 (1982). There was no objection. The defendant claims that the instruction regarding Miranda warnings, given during the trooper's testimony, created a substantial risk of a miscarriage of justice.

We begin with the observation that there was no evidence at trial suggesting that the investigators coerced the defendant into making the statements at the coffee shop, other than the fact that she became nervous. See *Commonwealth v. Sneed,* 440 Mass. 216, 222 (2003) (being "stressed by the interrogation" is not sufficient to raise a reasonable doubt as to voluntariness). Nor is there any other evidence of coercion. Indeed, as the defendant herself noted, the investigators were courteous and accommodated her desire to be questioned outside of her home. The defendant therefore received more than she was entitled to when the judge gave the humane practice instruction. See *Commonwealth v. Anderson,* 425 Mass. 685, 691-692 (1997).

Moreover, we discern no merit to the argument that the judge's instruction concerning Miranda warnings prejudiced the jury by removing relevant evidence of

voluntariness from the jury's consideration. The defendant relies on the Supreme Judicial Court's observation that "evidence bearing on whether [Miranda] warnings were given" is relevant to the voluntariness of confessions. See *Commonwealth v. Chung,* 378 Mass. 451, 458 n. 9 (1979). However, in reference to that observation in *Chung,* the court later noted that "such observations were made in cases involving custodial interrogation where Miranda warnings are required" and stated further that, "[w]here statements are made during conversation where Miranda warnings are not required, it is within the judge's discretion to exclude testimony concerning the giving or failure to give Miranda warnings as long as the judge preserves the basic issue of voluntariness for the jury." *Commonwealth v. Nadworny,* 396 Mass. 342, 369-370 (1985), cert. denied, 477 U.S. 904 (1986). Thus, it was within the judge's discretion to give the instructions she gave here. They both preserved the issue of voluntariness and removed an unfair inference that the investigators had acted improperly by failing to give Miranda warnings, where no such warnings were required. [FN16]

Conclusion. The denial of the motion for a new trial without awaiting Facebook's response to the subpoena was within the judge's discretion, as there was only speculation regarding extraneous influences on the jury arising out of juror postings. As for the conduct of the trial itself, there is no merit to the defendant's argument regarding the judge's instruction concerning the voluntariness of the defendant's statements and the lack of Miranda warnings.

Judgments affirmed.

Order denying motion for new trial affirmed.

FN1. After the events at issue in this case, the school was renamed Bridgewater State University. See St.2010, c. 189.

FN2. We reserve the details of the investigators' questioning for our discussion of the voluntariness issue.

FN3. Juror C had a "closed" Facebook profile, which meant that her Facebook page was not open to public view.

FN4. After the jury returned its verdicts, Juror B posted a lengthy note, similar to a Web log or "blog" entry, entitled "Life in the Jury Box." The posting described how he had previously been excused from jury duty when he "told the story of how [he] was held at gun point behind a TJ Maxx by some young robbers in Lawrence MA" and how this time he had "decided to not build any elaborate excuses or even try to get out of" jury service. The posting also said that he had been "a law breaker." Prospective jurors in the case at issue had completed a "Confidential Juror Questionnaire," which asked, inter alia, whether the juror or anyone in the juror's household or family had been "arrested, been sued ... been charged with a crime ... been a witness in a civil or criminal case ... [or] been a crime victim...." He had answered negatively. The blog note also stated that the evidence of guilt was overwhelming

"[d]espite our efforts to try to find at least ONE charge we could say Not Guilty on." The defendant has not argued on appeal that Juror B's statements or omissions on the questionnaire, or his postings during or after the trial, demonstrated bias. This claim was raised and rejected below.

FN5. Defense counsel had discovered that Juror A had "friended" Jurors B, C, and D. His motion also requested that the Facebook records of Jurors C and D be provided, and that they be questioned at the evidentiary hearing. The defendant does not appeal from the judge's denial of the motion as to the records of Jurors C and D, and her decision not to call them for questioning.

FN6. His Facebook "wall" contained his public postings.

FN7. The judge also noted that, given the overwhelming evidence of guilt,

the Commonwealth would likely have been able to meet its burden of showing that any extraneous influence did not prejudice the defendant. See *Commonwealth v. Kincaid,* 444 Mass. 381, 386 (2005) (if defendant establishes existence of extraneous influence, Commonwealth must prove that defendant was not prejudiced beyond a reasonable doubt). The judge based this conclusion on her observations of the evidence at trial and the short time (less than five hours) the jury deliberated before finding the defendant guilty of all twelve charges. See *Commonwealth v. Hunt,* 392 Mass. 28, 42-43 (1984).

FN8. The record gives no indication that Facebook has ever made any response to the subpoena, or that either the defendant or her counsel has attempted to contact Facebook to encourage compliance.

FN9. As "open postings," they were limited only by the number of Facebook members. Facebook reports that, as of December, 2011, it had 845 million monthly active users and an average of 483 million daily active users. See http://newsroom.fb.com/content/default.aspx?NewsAreaID=22 (last visited April 30, 2012).

FN10. The record does not disclose how many Facebook users could have responded to Juror A's and Juror B's postings privately. The judge stated in her ruling allowing the subpoena that "a large number [of] Facebook members could have" done so.

FN11. We note, for example, the model jury instructions regarding "The Use of Electronic Technology to Conduct Research on or Communicate about a Case" prepared by the Judicial Conference Committee on Court Administration and

Case Management, quoted in *United States v. Fumo,* 655 F.3d at 304-305:

"[Instructions] Before Trial:

"...

"Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end.... I know that many of you use cell phones, Blackberries, the [I]nternet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends.

"You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any [I]nternet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

"[Instructions] At the Close of the Case:

"During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the [I]nternet, any [I]nternet service, or any text or instant messaging service; or any [I]nternet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict."

See also Dunn, Federal Judicial Center, Jurors' Use of Social Media During Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management, at 6-10 (2011), at http:// www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/$file/dunn juror.pdf (last viewed April 30, 2012).

FN12. We recognize that personal or work commitments may require exceptions for statements to the effect that a juror has been selected for jury service, or is unavailable due to jury service.

FN13. As jurors now frequently have access to social media on portable

phones and similar devices, making it possible for them to post and receive information from the courthouse during trial and deliberations, this becomes even more of a challenge. See *Commonwealth v. Rodriguez,* 63 Mass.App.Ct. 660, 676 n. 9 (2005) (noting that, "[a]s these wireless devices become increasingly common and sophisticated--with Internet access and video and recording capabilities--and their use taken for granted as an ordinary and even habitual or reflexive part of daily life, careful instruction and monitoring by trial judges is required").

FN14. The defendant does not challenge the denial of the motion to suppress.

FN15. In her final charge to the jury, the judge instructed as follows:

"You have heard in this case that the defendant may have made some incriminating statements to the police.

"Now, the Commonwealth must prove beyond a reasonable doubt that any statement made to the police was voluntary and they have to prove that beyond a reasonable doubt. That is, that [the defendant] was not coerced or tricked.

"...

"Custodial interrogation consists of questioning by law enforcement officers after a person has either been taken into custody or deprived of her freedom in any significant way. And it is entirely up to you to decide from the evidence whether that has happened in this case."

FN16. The defendant further complains that the judge contravened the spirit of *Harris v. Commonwealth,* 371 Mass. 478, 481 n. 3 (1976), which stated that the better practice is for a judge not to reveal that a judicial finding of voluntariness has been made, for fear of prejudicing the jury on that issue. Here, the judge instructed that the defendant was not in custody, which is not the same as stating that her statements had been found to be voluntary.

END OF DOCUMENT

COMMITTEE REPORT

MODEL POLICY ON ACCESS AND USE OF ELECTRONIC PORTABLE DEVICES IN COURTHOUSES AND COURTROOMS

&

MEMORANDUM IN SUPPORT FOR MLRC'S MODEL POLICY ON ELECTRONIC DEVICES

Prepared by the Newsgathering Committee
Defense Counsel Section. Media Law Resource Center

MLRC NEWSGATHERING COMMITTEE:
MODEL POLICY ON ACCESS AND USE OF ELECTRONIC PORTABLE DEVICES IN COURTHOUSES AND COURTROOMS

Introduction

Electronic devices including personal digital assistants, smart phones (with or without audio and/or video recording capability), Blackberry-brand and other similar hand-held text messaging devices, pocket PCs, and laptop computers have increasingly become a necessary tool for people entering the courthouse and participating in various judicial proceedings therein. Reliance on such devices has become the norm for many attorneys of record (*i.e.*, to schedule hearings and other professional commitments), witnesses, jurors, consultants, and members of the press.

The proliferation and nearly ubiquitous use of such devices raises various concerns within the courthouse, including issues related to security, decorum and solemnity of judicial proceedings, and harassment/intimidation of witnesses and jurors. In order to properly balance the competing interests of the public, the press, attorneys of record, judges, jurors, witnesses, and members of the public entering the courthouse and its courtrooms, this policy, adopted this _____ day of _____, 2010, shall govern the accessibility and use of such devices within the courthouse and within individual courtrooms.

This Court recognizes the expanding wireless communications infrastructures have become integral technologies the media and the public it serves depend upon and that their use enhances the quality and timeliness of reporting on judicial matters. For these reasons, a presumption of use of such technology by the press is desirable and

should be the norm.[1] Even if the court is willing to impose limited restrictions on use of such technology by members of the public within the court house, some accommodation must be made for members of the press to make use of laptops, cell phones, and other wireless devices in performing their function as news gatherers when appropriate.[2]

The following policies are the standard operating protocols and are subject, in all cases, to a judge or other judicial authority within this courthouse issuing additional specific orders or guidelines for the use of electronic devices in his or her courtroom:[3]

I. Policy Regarding Access of Electronic Devices to the Courthouse

(1) All persons granted entrance to the courthouse are permitted to possess and use pagers, laptop/notebooks/personal computers, handheld PCs (Personal Digital Assistants, such as Palm Pilots and Pocket PCs, with or without video or audio recording capabilities), digital or tape audio recorders, wireless devices (such as Blackberries), cellular telephones (including cellular telephones with cameras and videostreaming capabilities), electronic calendars, and/or any other electronic device that can broadcast, record, or take photographs (hereinafter "electronic device") while inside the courthouse.[4]

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[1] United States Court of Appeals for the Ninth Circuit, Electronic Devices Policy (Feb. 25, 2010) (recognizing that " a broad ban on such devices is not desirable and may not be feasible."). Copies of each of the court policies cited herein are on file at the Media Law Resources Center, and are available at http://www.medialaw.org/Content/NavigationMenu/Publications1/Articles_and_Reports1/Archive_by_Date1/Articles_and_Reports_Archive_by_Date.htm.

[2] *Considerations in Establishing a Court Policy Regarding the Use of Wireless Communication Devices*, Administrative Office of the U.S. Courts, C(2)(g); *see also* In the Matter of Personal Electronic Devices, General Order M-400 (S.D.N.Y. Bankr. May 19, 2010); In the Matter of Courthouse Security and Safety Measures, Judgment Entry of Jan. 22, 2010 (Erie Cty. Ct. of Common Pleas, Ohio); In the Matter of Courthouse Security and Safety Measures, Mem. Order of Jun. 22, 2009 (Licking Cty. Ct. of Common Pleas, Ohio).

[3] Electronic Devices in Supreme and Appellate Courts, The Use and Possession of Electronic Devices in Superior Court Facilities (Connecticut).

[4] Combination of: the United States District Court, Eastern District of Missouri General Order on Electronic Device Policy; the Electronic Devices in Supreme and Appellate Courts, The Use and Possession of Electronic Devices in Superior Court Facilities (Connecticut); the District Court of Maryland

(2) Persons possessing an electronic device may use that device while in common areas of the courthouse, such as lobbies and corridors subject to further restrictions on the time, place, and manner of such use that are appropriate to maintain safety (pedestrian traffic, ingress and egress), decorum, and order.[5]

II. Policy Regarding Access of Electronic Devices to the Courtroom

(3) Inside courtrooms, persons may use an electronic device to silently take notes and/or transmit and receive data communications in the form of text, only,[6] without need for obtaining prior authorization from the presiding judge or judicial officer.

(4) A judge or other judicial officer may prohibit or further restrict use of electronic devices if they interfere with the administration of justice, pose any threat to safety or security, or compromise the integrity of the proceeding.[7]

(5) It should be anticipated that reporters, bloggers and other observers seated in the courtroom may use electronic devices to prepare and post online news accounts and commentary during the proceedings.[8] Absent any of the circumstances identified above in paragraph (4), such use is presumptively permitted.

5th District Sitting in Prince George's County, 7th Amended Policy Governing Portable Electronic Devices and Controlled Dangerous Substances; and the United States District Court for the Middle District of Pennsylvania Standing Order No. 05-3.

[5] United States District Court, Eastern District of Missouri General Order on Electronic Device Policy.

[6] Anyone wishing to employ the photographic or audio capabilities of such devices inside a courtroom should consult with and abide by the statute and/or court rule governing such uses. *See* [insert appropriate statute or court rule].

[7] United States Court of Appeals for the Ninth Circuit, Electronic Devices Policy (Feb. 25, 2010); *see also*, District Court of the United States for the Middle District of Alabama, Order on Photography, Broadcasting, Recording and Electronic Devices ("Laptop computers may be used in the courtroom.").

[8] United States Court of Appeals for the Ninth Circuit, Electronic Devices Policy (Feb. 25, 2010).

MEMORANDUM IN SUPPORT FOR MLRC'S
MODEL POLICY ON ELECTRONIC DEVICES

Introduction

The proliferation of portable electronic devices has expanded to the point that a vast majority of Americans now use and rely upon them. The courts, in response, are struggling with a variety of issues raised by the pervasive use of these devices. In 2009, three state courts of appeals threw out criminal convictions and entered mistrials as a result of jurors conducting independent research with portable devices during jury deliberations.[1] These instances, and others, have prompted many state courts and the federal judiciary to adopt model jury instructions that expressly and unequivocally order jurors not to use portable electronic devices in ways that would contravene instructions against conducting independent research and/or communicating with parties involved in the case.[2]

Apparently concerned that the new technology is the root cause of the problem, several courts have also enacted broad, sweeping prohibitions against the use of portable electronic

[1] *See* Eric Robinson, *Courts in Colorado, Maryland, New Jersey, Florida Declare Mistrials After Juror Internet Research*, Citizen Media Law Project, Jan. 25, 2010, http://www.citmedialaw.org/blog/2010/courts-colorado-maryland-new-jersey-florida-declare-mistrials-after-juror-internet-researc; Douglas L. Keen & Rita R. Handrich, *Online and Wired for Justice: Why Jurors Turn to the Internet (The "Google Mistrial")*, The Jury Expert – The Art and Science of Litigation Advocacy, Vol. 21 No. 6 (Nov. 2009), http://www.astcweb.org/public/publication/article.cfm/1/21/6/Why-Jurors-Turn-to-the-Internet; Jeffrey T. Federick, *You, The Jury and the Internet*, The Brief, Vol. 39, No. 2 (Winter 2010).); *see also State v. Aguilar*, __P.3d__, 2010 WL 1720613 (Ariz. Ct. App. April 29, 2010) discussed in Susan Brenner, *Jurors Going Online . . . Again*," (May 17, 2010), http://cyb3rcrim3.blogspot.com/2010/05/jurors-going-online-again.html.

[2] *See, e.g.*, Memorandum from Judicial Conference Committee on Court Administration and Case Management to Judges, U.S. District Courts (Jan. 28, 2010), *available at* http://www.wired.com/images_blogs/threatlevel/2010/02/juryinstructions.pdf; Wisconsin – WIS JI-CRIMINAL 50 (2009), *available at* http://www.postcrescent.com/assets/pdf/U014968718.PDF; New York – CJI2d[NY] Required Jury Admonitions (2009), *available at*, http://www.nycourts.gov/cji/1-General/CJI2d.Jury_Admonitions.pdf; *see also Juror Use of Social Media: A State-by-State Guide*, May 2, 2010, http://bloglawonline.blogspot.com/2010/02/juror-use-of-social-media-state-by.html.

devices not only by seated jurors, but by others in the courtroom, and have extended those bans beyond the courtroom in some cases.[3]

Such sweeping prohibitions represent an overbroad reaction to a limited and discrete set of problems. The new restrictions on electronic devices unnecessarily impede the efficient flow of information concerning judicial proceedings and impose unnecessary hardships on jurors (some of whom need to contact family members during recesses), and on other participants in the justice system. To avoid such unnecessary adverse effects, the MLRC has promulgated a Model Policy on Electronic Devices that provides a direct and reasonable response to the emerging set of issues. The Model Policy recognizes the distinct concerns presented by the various groups affected by such policies and treats each group in a reasonable and responsible way. To a large extent, the policy is modeled after the policy governing electronic devices recently adopted by the Judicial Council for the United States Court of Appeals for the Ninth Circuit.[4]

The Model Policy's fundamental presumption is that members of the public, the press, attorneys, and jurors should be allowed to possess and use portable electronic devices within the courthouse unless a restriction is specifically required. It then imposes specific restrictions on use of such devices *in courthouses and in courtrooms – e.g.*, no photography, audio or video recording is permitted inside a courtroom unless authorized in conformity with statutes and/or rules of a particular jurisdiction. Although the Model Policy affords members of the press the same rights and responsibilities as all other members of the public, special accommodations for

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[3] *See, e.g.*, Circuit Court Baltimore City, Addendum to Administrative Order on the Use of Cell Phones and Other Communications Devices (Jan. 5, 2010), *available at* http://www.baltocts.state.md.us/about/publications, then select "admin order addendum_electronic devices 2010jan05.pdf" hyperlink; *see also* United Stated Judicial Conference, Considerations in Establishing Court Policy Regarding the Use of Wireless Communications Devices (2007) (summarizing different types of rules that have been adopted by courts across the nation, including "all devices are banned, and all seeking to enter the building, except judges, clerk's office, and chambers personnel, and probation and pretrial officers, are required to either store the devices with the court security officer or, if storage is not provided, leave the building and store the device elsewhere").

[4] *See* United States Court of Appeals for the Ninth Circuit, Electronic Devices Policy (Feb. 25, 2010).

the role of the press in providing coverage to court proceedings is appropriate, as set forth below. Moreover, additional restrictions may appropriately be imposed upon trial participants – in particular jurors and sequestered witnesses – that go beyond those imposed upon the public and the press.[5]

Although the Model Policy authorizes all members of the public to possess and use portable electronic devices outside of courtrooms but within courthouse corridors, hallways, etc., to the extent that any court chooses to limit or restrict such access or use to the general public, the Model Policy recognizes the unique constitutional role of the news media in providing press coverage of the workings of the judicial branch; special dispensation should therefore be given to members of the press to use the modern tools of their trade to provide timely, contemporaneous reports to the public, in fulfilling their constitutional mission.

Tweeting/Blogging from the Courtroom

The Model Policy also approves, presumptively, the practice of allowing members of the press (and the public) to use portable electronic devices, including laptop computers, to send contemporaneous news reports, via text, from inside courtrooms during the conduct of civil and criminal trials and other judicial proceedings. As has been noted, many state and federal courts have authorized such live press reporting and in no instance has any such reporting been found to interfere with the solemnity, dignity, or decorum of the proceeding, nor has it otherwise interfered with any party's substantive fair trial rights.[6] Allowing the press to contemporaneously report on what is transpiring in a public courtroom does not transgress

[5] The Model Policy does not propose any particular restrictions on sequestered witnesses or seated jurors. Nevertheless, numerous courts have already promulgated such restrictions and accompanying jury admonitions. *See supra* n.2.

[6] *See* Citizen Media Law Project, *Live-Blogging and Tweeting from Court*, http://www.citmedialaw.org/legal-guide/live-blogging-and-tweeting-from-court (last visited May 26, 2010) (providing examples of live blogging and tweeting from inside state and federal courtrooms in California, Colorado, Florida, Iowa, Kansas, Michigan, Pennsylvania, Massachusetts, and Washington, D.C.).

federal or local rules prohibiting "broadcasting" of trial proceedings from the court,[7] and does not create any incremental adverse effects in comparison to press reports sent on frequent intervals throughout a trial proceeding.

LEGAL BASIS FOR THE MODEL POLICY

I. Reporters Should Be Permitted To Use Electronic/Wireless Devices While Covering Court Proceedings

A. News reports on judicial proceedings facilitates justice and fosters better public understanding of, and respect for, government institutions.

"News gathering is an activity protected by the First Amendment." *Journal Publ'g Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986); *see also Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("[W]e do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."). Because of the vital role that public scrutiny of judicial proceedings plays, the Supreme Court has held that the First Amendment requires all criminal trials and related proceedings must be open to both the media and the public, absent compelling and clearly articulated reasons for closing such proceedings. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 & n.17 (1980) (holding media and public possess First Amendment right to observe criminal trials); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596 (1982) (recognizing right to attend testimony at criminal trial of minor victim of sexual offense); *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501 (1984) (right to attend *voir dire* examinations of jury venire in criminal case) ("*Press-Enterprise I*"); *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1 (1986) (right to attend preliminary hearing in criminal case) ("*Press-Enterprise II*"); *El*

[7] For this reason, the Model Policy does not address the use of electronic devices for transmitting photographic or video images or audio signals from inside the courtroom, which *is* subject to state and federal rules addressing such activity. *See infra* n.10.

Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147, 148 (1993) (same). Although the Supreme Court has not yet addressed this issue, numerous lower courts have recognized that the same First Amendment right to attend and observe judicial proceedings applies to trials and hearings in civil cases as well. *See, e.g.*, *NBC Subsidiary (KNBC-TV) v. Super. Ct.*, 980 P.2d 337, 361 (Cal. 1999); *Westmoreland v. CBS, Inc.*, 752 F.2d 16 (2d Cir. 1984); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *In re Cont'l Ill. Sec. Lit.*, 732 F.2d 1302, 1310 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983); *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983); *Newman v. Graddick*, 696 F.2d 796, 801-02 (11th Cir. 1983); *Associated Press v. New Hampshire*, 888 A.2d 1236, 1247 (N.H. 2005).

The Court has identified a variety of interests advanced by having criminal proceedings open to the public and the press: (1) ensuring that proper procedures are being followed; (2) discouraging perjury, misconduct of participants, and biased decisions; (3) providing an outlet for community hostility and emotion; (4) ensuring public confidence in a trial's results through the appearance of fairness; and (5) inspiring confidence in government through public education regarding the methods followed and remedies granted by government. *See Richmond Newspapers*, 448 U.S. at 569-71.[8] Although press' right to *attend* judicial proceedings is co-terminus with that of the public, the Supreme Court has recognized that news reporting, in addition to general public access, helps to further these same objectives. *See, e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) ("The press does not simply publish information about trials

[8] *See also Globe Newspaper Co. v. Super Ct.*, 457 U.S. 596, 606 (1982) ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and the society as a whole[,] permit[ting] the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government.") (footnotes omitted); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 501, 592 (1984) (Brennan, J.) ("public access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.'") (citation omitted).

but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."). A responsible press thus has "always been regarded as the handmaiden of effective judicial administration, especially in the criminal field." *Id.*

Accordingly, the constitutional role played by the press when it provides the public with reports on judicial proceedings is well-established. *See, e.g., Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) ("[I]n a society in which each individual has but limited time and resources with which to observe first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations."); *Richmond Newspapers*, 448 U.S. at 573-74 ("Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. . . . This contributes to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system.") (Burger, C.J.) (internal quotations and citations omitted).[9]

B. Providing *contemporaneous* reports on judicial proceedings lies at the core of the press' constitutional role.

In today's world of "breaking news" occurring around the clock – and instantly available to citizens on their desktops, over broadcast and cable channels, and in the palms of their hands – the role that electronic devices play in enabling the press to provide timely coverage of judicial proceedings cannot be overstated. Part and parcel of the press' role is to

[9] *See also Saxbe v. Wash. Post Co.*, 417 U.S. 843, 863 (1974) ("In seeking out the news the press . . . acts as an agent of the public at large. It is the means by which the people receive the free flow of information and ideas essential to effective self-government.") (Powell, J., dissenting); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials . . . responsible to all the people whom they were selected to serve.").

provide *contemporaneous* coverage, live, of unfolding events. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 560-61 (1976) (recognizing that "[d]elays imposed by governmental authority" are inconsistent with the press' "traditional function of bringing news to the public promptly"); *id.* at 609 (Brennan, J., concurring) (noting that "delay . . . could itself destroy the contemporary news value of the information the press seeks to disseminate"); *Richmond Newspapers*, 448 U.S. at 592 (Brennan, J., concurring) ("contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power") (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)); *Wash. Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (recognizing "the critical importance of contemporaneous access . . . to the public's role as overseer of the criminal justice process"); *Courthouse News Serv. v. Jackson*, No. H-09-1844, 2009 WL 2163609, at *4 (S.D. Tex. July 20, 2009) (finding that a 24 to 72 hour delay in access to civil complaints was unconstitutional "[i]n light of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous . . . [t]he newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.") (internal quotation and citation omitted). Put simply, it is imperative that the modern press be permitted to utilize electronic devices within the courthouse to fulfill their constitutional mission of providing the public with timely reports on the conduct of the judicial system.

C. Restrictions on the news media's ability to provide contemporaneous coverage of judicial proceedings should be narrowly tailored and provide reasonable accommodation of the press' needs.

As indicated above, it is vital to the press' ability to provide timely, contemporaneous reports on judicial proceedings that they be permitted to utilize modern technological means, including cell phones, text messaging devices, handheld PDAs, etc., to transmit such information to their readers/viewers. Any governmentally-imposed restrictions on such constitutionally-protected activity must satisfy the standards applicable to time, place, and manner restrictions: they must be "narrowly tailored to serve a significant government interest" while leaving open "ample alternative channels" for the press to conduct their newsgathering activity. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Courts have found that orders restricting the right to conduct newsgathering activities in the corridors of a public courthouse implicate upon the First Amendment rights of the press and the public. *See Dorfman v. Meiszner*, 430 F.2d 558, 561-62 (7th Cir. 1970) (striking down as overbroad a court rule prohibiting all photography in courthouse corridors: "The achievement of a legitimate governmental object cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.") (internal quotation and citation omitted); *Angelico v. Louisiana*, 593 F.2d 585, 588-89 (5th Cir. 1979) (holding unconstitutionally vague a state court rule prohibiting interviews with witnesses and use of electronic recording devices in "halls" and "hallways" of court building). Accordingly, to justify any restriction on the use of portable electronic devices inside a public court house, such restriction must be "narrowly tailored" to further a significant governmental interest. While concerns such as noise, disruption, and particular security challenges may, in isolated and particular circumstances, justify narrowly tailored restrictions on use of such devices (including

prohibitions on use in certain delimited areas at certain specified times), a blanket ban on use of all such devices at all times does not satisfy the constitutional standard.

II. Existing Court Rules Governing Audio-Visual Recording Devices Do Not Apply to, and Should Not Be Extended to, Wireless Text-Transmitting Devices

A. Rules of court that prohibit or limit the presence of cameras and audio recording devices do not apply to text-transmitting devices.[10]

Several courts (including the United States District Courts in criminal cases) have enacted policies or rules of court that prohibit still camera photography and electronic recording or broadcasting of video and/or audio signals that capture and reproduce the actual proceedings transpiring within the courtroom. For example, Rule 53 of the Federal Rules of Criminal Procedure states that a "court must not permit the taking of photographs in the courtroom during judicial proceedings or the *broadcasting of judicial proceedings* from the courtroom." (emphasis added). In November 2009, United States District Court Judge Clay D. Land, of the Middle District of Georgia, ruled that Rule 53 encompasses text messaging from the courtroom and therefore a reporter from *The Columbus Ledger-Inquirer* newspaper was prohibited thereby from using a handheld electronic device to send live "tweet" posts from the courtroom to the Twitter website. *See United States v. Shelnutt*, Case No. 09-CR-14-CDL, 2009 WL 3681827 (M.D. Ga. Nov. 2, 2009). Judge Land noted that Rule 53 was amended in 2002 to delete the word "radio" as the qualifier on "broadcasting," and that the Advisory Committee that recommended that amendment "did not consider the change to be substantive." *Id.* at *1.

With all due respect, Judge Land's decision is erroneous because treating textual *descriptions*, including opinions, observations and commentary on court proceedings, as the

[10] The Model Policy points to such statutes, codes, and rules for use of electronic devices for photography or video/audio recording or transmitting inside the courtroom. *See also* RTDNA, *Cameras in the Court: A State-by-State Guide*, http://www.rtnda.org/pages/media_items/cameras-in-the-court-a-state-by-state-guide55.php, last visited June 3, 2010.

equivalent of live simultaneous audio or video rendition *of the actual proceedings* would constitute a substantive change, which the Advisory Committee expressly disclaimed. Two law professors have criticized Judge Land's interpretation of Rule 53. *See* Anita Ramasastry, *Should Courtroom Proceedings be Covered via Twitter? Why the Better Answer is "Yes,"* (Dec. 29, 2009), http://writ.news.findlaw.com/ramasastry/20091229.html (stating that "'broadcasting,' in Rule 53, refers to the direct, unmediated audio or video communication of a proceeding's sights and sounds – not of a journalist's own comments, notes, and reflections. Thus, [the author] believe[s] Judge Land's interpretation of Rule 53 is overly broad."); Eric Goldman, *Courtroom Coverage in the Internet Era – A Conference Recap* (Jan. 6, 2010), http://blog.ericgoldman.org/personal/ (describing "the illogic of [the *Shelnutt*] rule is overwhelming"). Moreover, several United States District Court judges have disagreed with Judge Land's interpretation of Rule 53 and have allowed members of the press, and others, to provide live blogging and tweet feeds from federal criminal trials.[11] Indeed, in February 2010, the Judicial Council for the United States Court of Appeals for the Ninth Circuit authorized U.S.

[11] *See, e.g.*, *United States v. Nacchio*, Criminal Action No. 05-cr-00545-MSK (D. Colo.), coverage at http://blogs.rockymountainnews.com/nacchio_trialwire/ (last visited May 26, 2010); *State v. Midyette* Case No. 07-CR-918 (Colo. Dist. Court), coverage at http://coloradoindependent.com/18805/judge-orders-twitter-in-the-court-lets-bloggers-cover-infant-abuse-trial (last visited May 26, 2010); *State v. Reiser* (Ca. Super. Ct.); coverage at http://www.sfgate.com/cgi-bin/blogs/localnews/detail?blogid=37&entry_id=21674 (last visited May 26, 2010); *United States v. McCarty*, (S.D. Fla.), coverage at http://www.palmbeachpost.com/localnews/content/local_news/epaper/2009/03/24/0324fedorder.html (last visited May 26, 2010); *United States v. Miell* (N.D. Iowa), coverage at http://www.abajournal.com/news/article/bloggers_cover_us_trials_of_accused_terrorists_cheney_aide_and_iowa_landlor/ (last visited May 26, 2010); *United States v. Schneider* (D. Kan.), coverage at http://www.cbsnews.com/stories/2009/03/06/tech/main4847895.shtml?source=related_story (last visited May 26, 2010); *State v. Blake* (Mich. Cir. Ct.), coverage at http://www.fox17online.com/news/fox17-troy-brake-trial-blog,0,4058702.story (last visited May 26, 2010); *United States v. Fumo* (E.D. Pa.), coverage at http://www.philly.com/inquirer/special/fumo/ (last visited May 26, 2010); *United States v. Libby* (D.D.C.), coverage at http://www.mediabloggers.org/taxonomy/term/19 (last visited May 26, 2010); *see also Perry vs. Schwarzenegger* (N.D. Cal.) (civil trial challenging the constitutionality of California's Proposition 8), coverage at http://firedoglake.com/prop8trial (last visited May 26, 2010); *Sony BMG Music Entertainment v. Tenenbaum* (D. Mass.) (civil case concerning unauthorized music downloads by college student), coverage at http://arstechnica.com/tech-policy/news/2009/07/tenenbaum-trial-opens-following-last-minute-dismissal-of-fair-use-defense.ars (last visited May 26, 2010).

District Court judges throughout that circuit to permit reporters to provide live blogging and other text transmissions in criminal cases.[12]

Also, on January 20, 2010, the First District Court of Appeals in Florida issued an emergency writ finding that use of a laptop computer, including possible live text transmitting from a trial, was not prohibited by Florida's Rule of Judicial Administration 2.50 (which governs cameras in the courtroom) and vacated a trial court's ruling barring a newspaper reporter from using a laptop computer in the courtroom (whether it was transmitting text outside the courtroom or not).[13] The appellate court did not determine whether live blogging from the courtroom should be permitted, leaving that to the court's discretion on remand, but directed the trial judge "to allow [the *Florida Times-Union* reporter] the use of a laptop in the courtroom unless the court finds a specific factual basis to conclude that such use cannot be accomplished without undue distraction or disruption." *Morris Publ'g Co., LLC v. State of Florida*, No. 1K10-226, 2010 WL 363318, at *1 (Fla. Ct. App. Jan. 20, 2010).

B. Use of live text-transmitting devices in courtrooms does not produce "adverse effects" any greater than those produced by "traditional" news media.

Judges retain the inherent authority and discretion to impose appropriate restrictions on the conduct of all individuals who enter their courtroom, in order to maintain appropriate solemnity, decorum and order to the proceedings. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.") (internal quotation mark and citation omitted).[14] Thus, courts are empowered

[12] *See* Ninth Circuit Judicial Council, Policy on Electronic Devices (Feb. 25, 2010).
[13] *See Morris Publ'g Co., LLC v. State of Florida*, No. 1K10-226, 2010 WL 363318 (Fla. Ct. App. Jan. 20, 2010).
[14] *See also ABA Standards for Criminal Justice: Special Functions of the Trial Judge* (3d ed. 2000): Standard 6-3.5(a) ("A trial judge should maintain order and decorum in judicial proceedings. The trial judge has the obligation

to take corrective measures in response to a spectator who is unduly noisy as a result of an uncontrollable hacking cough, or engaging in disruptive speech or conduct, or a member of the press whose conduct is equally incompatible with accepted standards of courtroom decorum.[15] Barring any such aberrational behavior, however, members of the press (and the public, more generally) have a right under the First Amendment to take notes on what they observe transpiring in the courtroom. *See, e.g., Goldschmidt v. Coco,* 413 F. Supp. 2d 949, 952-53 (N.D. Ill. 2006) (recognizing that a court-imposed limitation on the right to take notes in a courtroom is a "limitation [that] must still withstand scrutiny for its neutrality and reasonableness. . . . A prohibition against note-taking is not supportive of the policy favoring informed public discussion; on the contrary, it may foster errors in public perception."). The MLRC, like Judge Bucklow in *Goldschmidt v. Coco,* is "not aware of any federal district court that has a rule or order limiting the right of the press or anyone else to take notes during a public criminal or civil trial." *Id.*, 413 F. Supp. 2d at 953.

The difference between taking notes by pen and paper and quietly using a laptop or other text-recording device is immaterial for purposes of maintaining courtroom decorum, solemnity, and order. (As indicated above, the court may impose restrictions, or an outright prohibition, on use of laptop computers or other devices that are noisy or otherwise distracting.) Once it is accepted that a laptop computer or other electronic device may be used by the press in the courtroom for purposes of taking notes on the proceedings, the question then becomes "Does it change the analysis if the reporter writes his posts (or news reports) in the courtroom and then

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to use his or her judicial power to prevent distractions from and disruptions of the trial."); Standard 6-3.10 ("Misconduct of spectators and others: (a) Any person who engages in conduct which disturbs the orderly process of the trial may be admonished or excluded, and, if such conduct is intentional, may be punished for contempt.").

[15] *Id.* Standard 6-3.10. ("Misconduct of spectators and others: (a) Any person who engages in conduct which disturbs the orderly process of the trial may be admonished or excluded, and, if such conduct is intentional, may be punished for contempt.").

uploads them at the breaks or the end of the day, as opposed to sending those posts 'live' from inside the courtroom?[16] As one law professor and legal commentator has stated, such a distinction "is silly – it's the exact same content, just posted on a delay."[17]

Thus, in terms of the actual physical/aural/visual impacts upon the courtroom environment, **there is no meaningful distinction between handwritten note-taking, use of a laptop for note-taking, and live text transmitting from a courtroom**.[18] To some extent, allowing reporters to post their blog or other live text-transmitting reports to a newspaper or television station website *reduces the disruption* of having reporters enter and exit the courtroom (during recesses or otherwise) in order to periodically update those websites in the course of a day's proceedings.

Nor are the incremental "adverse impacts" of live text transmissions *outside* the courtroom of any greater significance to other governmental interests than traditional press coverage of trials. To the extent that jurors and/or witnesses who are subject to exclusion orders may come upon such blog postings, they would be doing so in violation of court orders prohibiting their accessing any news media accounts of the trial. There are more narrowly tailored means to address this concern than restricting the stock of information that is available to the rest of the public. *See, e.g.*, *United States v. McMahon*, 104 F.3d 638, 643-44 (4th Cir. 1999) (affirming contempt sanction against witness who was subject to courtroom exclusion order but who reviewed daily transcripts and notes provided by his secretary who attended the trial); *see*

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[16] *See* Eric Goldman, *Courtroom Coverage in the Internet Era – A Conference Recap*, (Jan. 6, 2010), http://blog.ericgoldman.org/personal/.

[17] *Id.*

[18] *See* Ross Reily, *Courtroom tweeting not a distraction*, (Nov. 10, 2009), http://msbusiness.com/reilysramblings/2009/11/10/courtroom-tweeting-not-a-distraction/ (arguing that "[t]he reporter who tweets is doing nothing more than he/she would be permitted to do (under the First Amendment) with pencil or paper"); Susan Brenner, *Courtroom Tweets?*, (Nov. 25, 2009), http://cyb3rcrim3.blogspot.com/2009/11/courtroom-tweets.html ("I don't see why a reporter tweeting during a criminal trial is any more disruptive than letting a reporter take notes by hand or on a laptop during a trial . . . or letting an artist create sketches that will later be broadcast to the public via television.").

also Press-Enterprise II, 478 U.S. at 14 (holding the prior to imposing restrictions on press coverage of criminal trials, the judge must find that no less speech-restrictive means are available to advance compelling governmental objective); *cf. Richmond Newspapers*, 448 U.S. at 557 (including "sequestration" of witnesses among the less restrictive, and therefore constitutionally mandated, alternatives to barring the press and public from being present in courtroom during a criminal trial). Typically, accessing a blog requires greater proactive effort than the occasional banner headline visible in a newspaper vending box or newsstand display; to avoid such exposure, jurors and excluded witnesses should be directed to not seek out such reporting or commentary, and, of course, to unsubscribe from any RSS feeds that may bring such material into their hands automatically.[19]

Conclusion

In today's technological age, information travels at the speed of electrons, and handheld electronic devices have become a an integral [indispensable?] "tool of the trade" for the working press, just as much as note pads and pencils were a century ago. In order to provide the public with timely and informative reports of what is transpiring in public courtrooms, the press must be permitted to utilize these devices both inside the courthouse, and, so long as the do not create adverse effects (*i.e.*, noise or other distraction), inside the courtroom. The Model Policy recognizes that judges have both the authority and the duty to maintain the solemnity, dignity, and decorum of all court proceedings, and to impose appropriate limitations and restrictions on the conduct of all who enter the courtroom; at the same time, the Model Policy recognizes and supports the pivotal role that the news media play in our democracy by providing the public with information about our judicial system, information that is a necessary precondition to meaningful and informed self-governance.

[19] See resources for juror admonitions, *supra* n.2.

Principles and Practices for Electronic Devices

Prepared by Special Subcommittee for Electronic Devices
Approved by the Judicial Council of the Ninth Circuit
February 25, 2010

Electronic Devices Policy

As a preliminary matter, the subcommittee recognizes the inherent authority of a judge presiding over a proceeding to control activities in his or her courtroom, including the use of electronic devices capable of wireless communications.

While keeping this principle in mind, the subcommittee does not endorse any policy that broadly restricts possession and use of electronic devices within a courthouse. Given the expanding wireless communications infrastructure and the extent to which the public now depends on this technology, the subcommittee does not believe a broad ban is desirable and may not be feasible.

The subcommittee recognizes there are legitimate concerns about the potential for misuse of this technology, including by persons summoned for juror service. To address these concerns, the subcommittee believes each district court should develop its own policy on use of electronic devices, and disseminate the policy widely to the bar, public and media. To assist the district courts in developing a policy, the subcommittee offers the following principles/practices for consideration.

General considerations:

1. Anyone should be allowed to bring electronic devices, such as a Blackberry, smart phone, I-phone or the like, a laptop computer or a similar functioning device into the courthouse.

2. Except for courtrooms, persons may use such devices in public areas of the courthouse to make telephone calls or to transmit and receive data communications. For reasons of privacy, safety, and security, use of these devices to take photographs or for audio or video recording or transmission should be prohibited in the courthouse (exceptions for court staff, authorized vendors or for educational or ceremonial events).

3. In courtrooms, persons may use such devices to take notes and to transmit and receive data communications. Persons may not use these devices for telephone calls, photographs or audio or video recording or transmission. The judge may prohibit or further restrict use of such devices if they interfere with the administration of justice, the security of the proceeding or the integrity of the process.

   The subcommittee makes no recommendations associated with allowing designated news media to use cameras in the courtroom. The Judicial Council of the Ninth Circuit recently addressed this issue by way of a Ninth Circuit Judicial Conference resolution, which was forwarded to the JCUS Committee on Court Administration and Case Management.

4. It should be anticipated that reporters, bloggers and other observers seated in the courtroom may use these devices to prepare and post online news accounts and commentary during the proceedings. Judges should instruct counsel to instruct witnesses who have been excluded or subject to exclusion agreements not to receive or view accounts of other witnesses' testimony prior to giving their testimony.

5. Every effort should be made to inform the public about where and how electronic devices may be used in the courthouse. Notices should be posted in the courthouse and on the court's web site.

For jurors:

Considering the difficulty the judiciary has in finding jurors, courts should not make the prospect of jury service even less attractive and more cumbersome by prohibiting use of wireless communications devices. The subcommittee suggests the following:

1. Persons summoned for jury service should be allowed to bring electronic devices, such as a Blackberry, smart phone, I-phone or the like, a laptop computer or a similar functioning device into the the jury assembly area, and to use these devices in the same manner as allowed in other public areas of the courthouse.

2. During voir dire, trial, and deliberations, a juror may use an electronic device only in accordance with the instructions delivered by the judge at the commencement of jury selection.

3. Judges should clearly admonish jurors not to use these devices to read news accounts of the trial, conduct research related to the case, ask legal questions of anyone, discuss the case with anyone, or express their views online via blogs, Twitter accounts, instant messaging systems, text messaging or other means. The admonition should include an explanation of why these prohibitions are necessary, and should be delivered in addition to and not as a substitute for the Model Jury Instructions, 9th Cir. Crim. Jury Instr. 1.9 (2003) and 9th Cir. Civ. Jury Instr. 1.12 (2007).

4. Courts should be aware that jurors may desire to take notes on electronic devices. The subcommittee does not believe this will be feasible in most courthouses without upgraded infrastructure, additional staff support and technological safeguards for the electronic data. Until then, courts should not be obligated to provide jurors with anything more than the means to take notes in writing. Meanwhile, courts should monitor the development of methods by which jurors can utilize electronic devices for taking notes.

5. Courts should be cognizant of Ninth Circuit Model Jury Instruction 2.14 Evidence in Electronic Format, which calls for courts to provide a computer and associated equipment in the jury deliberation room for viewing of electronic exhibits. Courts also should consider permitting deliberating jurors to have electronic access to the final jury instructions in addition to providing each juror with a printed copy of the final instructions.

   As to other use of electronic devices during the course of deliberations -- i.e., while the jurors are discussing among themselves what the verdict should be -- there is an additional concern that courts should take into account. Ongoing jury deliberations must remain not only confidential and private, but devoid of potentially chilling features. For a juror to take notes on an electronic device about what other jurors are saying would create such a risk of intimidation, and if the juror were allowed to remove his electronically-recorded notes from the jury room, it might also enhance the risk that the jury's deliberations would be widely disclosed at the end of the case.

   Accordingly, at the very least courts should take appropriate steps to assure that if such electronic note-taking is not prohibited altogether, then whatever has been placed on an electronic device during the course of deliberations may not be removed from the jury room at any time and will be destroyed at the conclusion of the jurors' service (as the subcommittee understands is the current practice as to handwritten notes).

6. Every effort should be made to instruct properly and inform citizens summoned for jury duty, through summons, questionnaires or the court's website, as to where and how wireless communications devices may be used in the courthouse. This would include information on use in the jury assembly room, while on trial breaks or lunch hours, and before and/or during deliberations.

SLIP OPINION

Cite as 2011 Ark. 317

SUPREME COURT OF ARKANSAS

No.

IN RE ADMINISTRATIVE ORDER NO. 6(c)

Opinion Delivered July 27, 2011

PER CURIAM

On November 18, 2010, we created the Ad Hoc Committee on Broadcasting of Court Proceedings and appointed the following members: Steve Barnes of Little Rock, Honorable Gary Arnold, circuit judge of Benton, Honorable Fred Kirkpatrick, district court judge of Harrison, Gary Nutter, Esq., of Texarkana, Spence Fricke, Esq., of Little Rock, and Thomas Carpenter, Esq., of Little Rock. *See In re Ad Hoc Committee on Broadcasting of Court Proceedings*, 2010 Ark. 460 and 2011 Ark. 18. Mr. Fricke was selected by the members to serve as the chair.

We charged the committee as follows:

> A recent opinion issued by the Arkansas Judicial Ethics Advisory Committee suggested that there might be a conflict between the Code of Judicial Conduct and Administrative Order Number 6. *See* Op. Ark. Jud. Ethics Advisory Comm. No. 01 (2010). We note that there have been many advances in the technology related to broadcasting since this court adopted these provisions in 1993. In addition, the court has become aware that several limited and general jurisdiction courts in our state allow for the broadcasting of some or all of their proceedings. For this reason and others, we believe that Administrative Order Number 6 needs to be reviewed in light of current events and technology.

2010 Ark. 460.

SLIP OPINION

The committee submitted its report on June 8, 2011. As outlined in the report, the committee met on three occasions, including one meeting at which it heard from media representatives, circuit judges, and a representative of the Arkansas Judicial Discipline and Disability Commission. The committee "focused on whether Administrative Order No. 6 should be supplemented to include specific provisions relating to broadcasting drug court proceedings, or whether the proceedings should be excepted from being broadcast, as are juvenile, probate and domestic relations matters, among others." It left for future action any broader revisions to Administrative Order No. 6.

We excerpt the following points from the report:

> The Committee considered and discussed a number of different considerations bearing on the broadcasting of drug court proceedings under Administrative Order No. 6. ... The considerations which tend to support broadcasting drug court proceedings included the following:
>
> - Providing open and public courtroom proceedings. There is a strong public, statutory, and case law policy in Arkansas supporting open courtroom proceedings. . . .
> - Striking a balance between openness and confidentiality. The consideration here is to do whatever is reasonably possible to both protect those involved in drug court proceedings and to provide public access. Rather than limiting public access, perhaps a balance can be struck by crafting specific provisions for drug court proceedings within Administrative Order No. 6.
> - Recognition of the fact that no defendant can have drug court proceedings broadcast over his or her objection. A witness, as well, can object to being broadcast as part of the proceedings.
> - The educational effect on the public of viewing drug court proceedings. . . .

SLIP OPINION

The considerations tending to support a recommendation that there be no broadcasting of drug court proceedings included the following:

- The unique nature of drug court. Drug court is significantly different from other courts. It is a specialty court designed to promote and achieve substance abuse rehabilitation. A defendant who appears in drug court has already forfeited (voluntarily) a number of due process rights, and is hopeful both of becoming rehabilitated and having the drug-related charges in question expunged from his or her record. A real question arises, therefore, of whether any waiver of an objection to being broadcast is a knowing and voluntary one. The defendant could well be driven by a desire to please the court if he or she perceives the court favors broadcasting. Other issues within this topic also arise, such as the difficulty or impossibility of avoiding broadcasting the faces of juveniles or other family members during proceedings. . . .
- The potential misuse of recordings of drug court broadcasts. The Committee believes there is a real risk involved in having individuals or entities use the drug court proceedings for their own purpose and profit. A related topic here is the concern that an individual who has successfully completed drug court and had his or her charges expunged could at some time in the future be faced with the embarrassment of some sort of public airing of the recording.
- The risk to the drug court judge of violating the Arkansas Code of Judicial Conduct. These risks are outlined in detail in Opinion No. 2010-01 of the Judicial Ethics Advisory Committee. They include the potential effect on public confidence in the integrity of the judiciary, as outlined in Canon 1, Rule 1.2, and the risk of violating Canon 1, Rule 1.3 relating to abusing the prestige of judicial office to advance the personal or economic interests of the judge or others.
- The difficulties involved in reviewing and overseeing the broadcasting of drug court proceedings.
- The difficulty of creating a set of procedures which would strike a balance between open court proceedings and those problems associated with the broadcasting of drug court proceedings. No Committee member was able to propose a satisfactory set of procedures which could achieve such a balance.

SLIP OPINION

> The most viable option, then, was to preclude such broadcasts by the appropriate exception within Administrative Order No. 6.

(Report)

Based on its consideration of the foregoing factors, the committee made the following recommendation regarding the broadcasting of drug court proceedings:

> The Committee recommends that Administrative Order No. 6 be amended to except the broadcast of all drug court proceedings from its provisions, thereby effectively disallowing such broadcasts. Although the Committee wishes to emphasize it is acutely aware of the positive effects of broadcasting court proceedings, it has concluded that the negative effects of drug court broadcasts and the potential harm they could bring to individuals must take precedence here. The considerations discussed above for excepting such broadcasts from Administrative Order No. 6 simply outweighed the other considerations. In particular, matters of privacy, the special and unique nature of drug court proceedings, and the potential for the abuse of broadcast recordings have driven this Committee's decision. The risk of violating certain portions of the Code of Judicial Conduct comes into serious play at this point as well, although there is general agreement among the Committee members that the Committee recommendations are directed toward drug courts in general, not a specific drug court.

Id.

We thank the committee members for their work. The members noted that, as a first step, they focused on the more immediate problem of the broadcasting of drug court proceedings particularly because of the concerns expressed in the opinion of the Judicial Ethics Advisory Committee and the cloud over these proceedings that it created. We understand the committee's priorities.

The committee concluded that broadcasting of drug court proceedings should not be permitted. We likewise are persuaded by the factors militating against the broadcasting of drug

SLIP OPINION

court proceedings and agree with the committee's recommendation—at least on an immediate or interim basis.

The broader issues that the committee left for future action include a comprehensive examination of courtroom broadcasting focusing on the current state of broadcast journalism and its technology. When these aspects of the issue are studied and reported to the court, including an examination of how other jurisdictions have addressed them, Administrative Order No. 6 may need to be more comprehensively revised, and the action that we have taken today with respect to drug courts may be revisited.

At this time, we amend Administrative Order No. 6(c)(3)[1] to read as follows:

(3) The following shall not be subject to broadcasting, recording, or photographing:

all juvenile matters in circuit court,

all probate and domestic relations matters in circuit court (*e.g.*, adoptions, guardianships, divorce, custody, support, and paternity), and

all drug court proceedings.

This amendment is effective August 1, 2011. Administrative Order No. 6 (a)–(c) is republished as set out below.

[1]"(3) All juvenile matters in circuit court as well as hearings in probate and domestic relations matters in circuit court, e.g., adoptions, guardianships, divorce, custody, support, and paternity, shall not be subject to broadcasting, recording, or photographing."

SLIP OPINION

Administrative Order Number 6 – Broadcasting, Recording, or Photographing in the Courtroom

(a) *Application – Exception*. This Order shall apply to all courts, circuit, district, and appellate, except as set out below.

(b) *Authorization*. A judge may authorize broadcasting, recording, or photographing in the courtroom and areas immediately adjacent thereto during sessions of court, recesses between sessions, and on other occasions, provided that the participants will not be distracted, nor will the dignity of the proceedings be impaired.

(c) *Exceptions*. The following exceptions shall apply:

(1) An objection timely made by a party or an attorney shall preclude broadcasting, recording, or photographing of the proceedings.

(2) The court shall inform witnesses of their right to refuse to be broadcast, recorded, or photographed, and an objection timely made by a witness shall preclude broadcasting, recording or photographing of that witness.

(3) The following shall not be subject to broadcasting, recording, or photographing:

all juvenile matters in circuit court,

all probate and domestic relations matters in circuit court (*e.g.*, adoptions, guardianships, divorce, custody, support, and paternity), and

all drug court proceedings.

(4) In camera proceedings shall not be broadcast, recorded, or photographed except with consent of the court.

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(5) Jurors, minors without parental or guardian consent, victims in cases involving sexual offenses, and undercover police agents or informants shall not be broadcast, recorded, or photographed. . . .

PRESS RELEASE

A New Castle County Courthouse policy related to the "Prohibition on Cellular Telephones and other Personal Communication Devices in the New Castle County Courthouse" has recently been approved and will become effective in the New Castle County Courthouse on NOVEMBER 1, 2005. This policy recognizes the serious security concerns affecting Courthouse operations in an attempt to reduce security risks associated with cellular telephones and similar type communication devices. Cellular telephones can be tampered with to become stun guns or other weapons, used in activities to intimidate witnesses, and can present additional problems in camera phones' possible use in taking pictures in the courthouse that could assist in escape attempts or other security breaches.

The policy follows:

Security: Prohibition on Cellular Telephones and other Personal Communication Devices in the New Castle County Courthouse

I. GENERAL PROVISIONS: For security reasons, all cellular telephones, camera phones or other personal communication devices (e.g. Blackberries, Sidekicks, pagers, PDA's etc.) are not permitted in the New Castle County Courthouse (NCCCH), with the exception of the persons specifically enumerated in II below, or as otherwise permitted by order of the judicial officer before whom the particular case or proceeding is pending. Any device found in the possession of a person in the NCCCH contrary to this policy may be subject to seizure and forfeiture.

II. EXEMPT PERSONS: The following shall be exempt from the prohibition against carrying a cellular telephone, camera phone, Blackberry or other personal communication device into the NCCCH:

a. Judicial officers
b. Court employees assigned to work at the NCCCH
c. State employees who are entering the NCCCH on official business
d. Other persons who have regular business in the NCCCH and who present a picture identification badge issued by the Capitol Police
e. Attorneys who present a picture identification card and a valid Delaware Supreme Court issued membership card or proof of membership in another state's Bar
f. Persons with specific court function (building and maintenance tradesmen, equipment repairmen, vendors, etc.) may be permitted to retain their personal communication devices, upon a determination by the Capitol Police that they do not pose a security risk and the ability to access such devices is necessary for their work at the NCCCH.
g. Local, State and Federal Law Enforcement Officers on official business and possessing proper credentials.

To minimize the impact on the public, cell phone lockers will be provided in the parking garage connected to the New Castle County Courthouse, and public phone access within the Courthouse will be expanded.

DATE: September 23, 2005

CONTACT: Lt. Lee Clough, Capitol Police
(302) 255-0016

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, v. WIILLIAM BALFOUR, Defendant.	)	Courthouse Decorum Order 09 CR 00762 Hon. Charles P. Burns Judge Presiding

ORDER

In the interest of justice, for the safety of individuals attending the proceedings of the aforementioned case, and to preserve the dignity of the court and the integrity of the proceedings, the Court orders the following:

I. GENERAL RULES

1. All members of the media, including reporters, photographers, videographers, and audio technicians shall be permitted only in designated media areas for this case.
2. All members of the media shall be prohibited from entering all unauthorized areas as well as all other areas within and around the Cook County Circuit Courthouse and the Cook County Department of Corrections as designated by the Sheriff.
3. All media satellite trucks, microwave vans, and other equipment vehicles shall park only in those areas designated by the Sheriff.
4. All still and video photographers shall only be permitted in the designated media area inside the Cook County Criminal Courthouse first floor lobby, adjacent to the Information Desk.
5. All interviews and/or press conferences shall be conducted in designated areas only.

6. Loitering in the area outside of the courtroom shall not be permitted by the media or members of the general public.
7. Members of the media shall not impede the flow of normal court traffic throughout the building for the duration of the trial.
8. All wiring and cabling shall be arranged in a manner that does not prohibit the movement of pedestrian traffic, court personnel with file carts, and individuals in wheelchairs from moving about the courthouse.
9. All members of the media shall display official court or media credentials at all times.
10. Members of the public and the media who do not have a seat in the gallery of the courtroom may read the transcript of the proceedings in the overflow observation room. The room is located on the fourth floor of the Administration Building.

II. COURTROOM RULES

1. All persons who enter the courtroom, including members of the media, shall be subject to security screening. The Cook County Sheriff, or his designee, has discretion as to whether a person may be admitted in the courtroom depending on the results of the screening. Court approved security and court personnel shall be exempted from this rule.
2. All members of the media shall display official court or media credentials at all times.
3. All members of the public and media must be seated before the court is in session and must remain seated in the courtroom until the next recess is called. If a seated person chooses to leave the courtroom, they will not be readmitted until the next court recess.
4. Seats in the gallery of the courtroom reserved for media shall only be assigned to court-approved media agencies.

5. Seating reserved for members of the media may be rescinded, restricted, or otherwise modified as ordered by the Court.
6. No members of the media or public shall be permitted beyond the railing separating the court gallery from the litigation area.
7. Members of the media covering this trial may bring one phone into the courtroom; however, it must be set to silent mode and placed out of sight at all times. Limited and discrete emails will be permitted subject to the Court's discretion. No other devices capable of taking pictures or capturing sound may be operated inside the courtroom. Such devices include, but are not limited to, cellular phones, cameras, tape recorders, video recorders, camcorders, laptop or other computers, personal digital assistants, satellite phones, any other manual or electronic device capable of recording video, audio, or still images, or any device capable of transmitting any visual or audio representation or actual image or sound. Any person who operates a non-approved device will have the device confiscated by court security and may be held in contempt of court.
8. No bags, packages, briefcases, large coats, purses, pocketbooks, boxes, or any other container shall be brought into the courtroom.
9. All members of the media, including sketch artists, are prohibited from drawing any facial features, jewelry, clothing, or other distinguishing features of jurors before, during, and following the conclusion of the trial.
10. No media interviews shall be conducted in the courtroom at any time.

III. JUROR CONTACT

1. No member of the media or public shall attempt to communicate with a member of the jury panel, juror, or alternate, respecting the case prior to return of a final judgment in the trial on the merits, and any attempt by anyone without permission by the Court to communicate with or influence a member of the jury once selected as a juror or alternate in the proceedings, until the return of a final judgment in the trial on the merits, may be punished as a criminal cause of action and as criminal contempt of court and such other actions as deemed by the Court to be necessary for due and proper administration of justice.
2. No member of the media or public may release or publicize the names of prospective jurors or seated jurors unless ordered by the Court.

IV. SANCTIONS

There are no warnings. Any violation of the foregoing or other court orders or plans, and any conduct the Court finds disruptive or interruptive of the proceedings may result in:

1. An order of temporary or permanent exclusion of the offender from the courtroom and security areas.
2. An order of temporary or permanent exclusion of the media organization represented by the offender from the courtroom or security areas.
3. Contempt of Court sanctions.
4. Such other sanctions as deemed necessary by the Court to ensure the due and proper administration of justice.

ENTERED:_____
Hon. Charles P. Burns
Circuit Court of Cook County
Criminal Division

DATED:_____

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
VS.	:	CP-14-CR-2421-2011 CP-14-CR-2422-2011
GERALD A. SANDUSKY	:	

DECORUM ORDER GOVERNING JURY SELECTION AND TRIAL

And now this 30th day of May 2012, upon consultation with the District Court Administrator, Centre County Sheriff, Bellefonte Police Department, the Pennsylvania Association of Broadcasters ("PAB"), the Pennsylvania Newspaper Association ("PNA"), and the Administrative Office of Pennsylvania Courts, the following Order is entered:

The terms of this order apply to jury selection scheduled to begin at 8:30 a.m. June 5, 2012, and to the trial which will not begin before June 11, 2012.

The provisions noted as "Mandatory" shall be applied by the Court and enforced accordingly by its officers and agents. The provisions noted as "Information" are intended to provide meaningful structure and guidance to those reporters and members of the general public who will be attending the proceedings.

Additional information will be made available on the Court's website: www.co.centre.pa.us/media

FILED FOR RECORD
2012 MAY 30 A 11: 13
DEBRA C. IMMEL
PROTHONOTARY
CENTRE COUNTY, PA

MANDATORY

1. Court Access: All summoned jurors, members of the public and credentialed reporters must enter the courthouse from the front steps. Access from other courthouse entrances will not be permitted.

2. Summoned Jurors:
    a. All summoned jurors may begin reporting to the courthouse at 7:30 a.m. and must be present by 8:00 a.m. on June 5, 2012.
    b. While the use of electronic devices during trial is prohibited, summoned jurors may bring such electronic devices with them for their use while awaiting their participation in the jury selection process.
3. Courtrooms: The trial will be conducted in Courtroom 1 of the Centre County Courthouse. A satellite courtroom, restricted to use by credentialed reporters, with a visual and audio feed from Courtroom 1 will be located on the third floor of the County Annex. For all purposes the satellite courtroom will be considered an extension of Courtroom 1 and any rule, policy or procedure applicable to Courtroom 1 will be applied by the Sheriff in the satellite courtroom.
4. Allocation of Seats:
    a. During jury selection:
        i. Allocation of seats in Courtroom 1—Phase 1
            1. Members of the public -- 5
            2. Credentialed pool reporters -- 5
        ii. Allocation of seats during Phase 2 and 3:
            1. Members of the public – 1
            2. Credentialed pool reporters -- 2
    b. During trial
        i. Courtroom 1 –
            1. Members of the public – 85
            2. Credentialed reporters – 85
            3. For the use of the Commonwealth – 20 (as requested)
            4. For the use of the defense – 16 (as requested)
            5. For the use of the Court – 16

ii. Satellite courtroom – 100 for exclusive use of credentialed media.

iii. Of the seats reserved in Courtroom 1 for credentialed reporters, one seat each will be reserved for the Daily Collegian, the Centre Daily Times, the Harrisburg Patriot-News, WJAC-TV, WTAJ-TV and WQWK radio.

c. Actual trial experience regarding how many seats are needed in each category may result in a reallocation of assigned seating .

6. Public Admittance: Members of the public will be admitted to Courtroom 1 on a first come, first served basis. There will be no computerized pre-registration or pre-selection.

a. Each person admitted will be issued a card in the person's name and good only for the day issued. The admission card is not transferrable.

b. When a person leaves the courtroom and does not intend to return, then the card shall be surrendered to the Sheriff.

c. Once an admission card has been surrendered, the Sheriff may admit the next person in line.

a. It will be assumed that a person who has been issued an admittance card in the morning and who is not seated at the start of the afternoon session will not be returning, and the Sheriff may admit the next person in line.

7. Electronic Devices:

a. No member of the public will be permitted to possess in Courtroom 1 any cell phone, laptop computer, smart phone, or similar electronic device. Anyone possessing such a device will not be permitted to pass security and enter the Courthouse.

b. Only reporters with proper credentials, as determined by the Sheriff, will be permitted to possess or use in Courtroom 1 or the satellite courtroom any cell phone, laptop computer, smart phone, or similar electronic device. Such devices may be used during trial

for electronic based communications. **However, the devices may not be used to take or transmit photographs in Courtroom 1 or the satellite courtroom; or to record or broadcast any verbatim account of the proceedings while court is in session.**

8. Sanction for Improper Use of Electronic Device: **Any reporter who violates the provisions of this order regarding the use of electronic devices will be subject to the penalties of contempt (including fines or summary incarceration) under any applicable statute, order, or rule of court. In addition, any reporter who violates this order, the news organization the reporter represents, and any news outlet that intentionally and knowingly rebroadcasts or republishes any account prohibited by this order, in the discretion of the Court, may also lose the privilege of being credentialed to attend the proceeding.**
9. Leaving the Courtrooms: Those seated in the courtrooms are expected to remain in their seats until the Court either calls a recess or the session has ended. Any person who leaves the courtrooms, except during a recess, in the morning session will not be readmitted until the start of the afternoon session; and any person who leaves in the afternoon session, except during a recess, will not be readmitted. Those who leave an area deemed secured by the Sheriff may be required to undergo a security screening before being readmitted to either courtroom.
10. Interviews: No news media interviews whatsoever shall be conducted in Courtroom 1 or anywhere in the Courthouse or Courthouse Annex -- including corridors, hallways, elevators, interior and exterior steps, or courthouse parking lots. Interviews may be conducted in the front yard of the Courthouse, but only in areas designated for that purpose by the Sheriff.
11. Sheriff's Authority: The Sheriff of Centre County, in consultation with the Court, shall have the authority to make such reasonable rules and regulations as may be required to implement this Order and to provide adequate security intended to assure the safety of all those in the

Courthouse and Courthouse Annex, and on the Courthouse grounds, and to assure the orderly conduct of the trial. Such regulations may include, among others:

a. Prohibiting backpacks, large purses or satchels in Courtroom 1 or the satellite courtroom, except as required by credentialed reporters to carry spare batteries or electronic devices.
b. Prohibiting taking food or beverages into the courtrooms.
c. Barring any person, except those immediately involved in the trial, from passing beyond the bar in Courtroom 1.

GENERAL INFORMATION

1. Parking: Parking near the Courthouse is extremely limited. Reporters and members of the public who will be attending the trial should allow ample time to find parking and make their way to the Courthouse.
   a. A map of parking areas in Bellefonte is posted on the Centre County website: www.co.centre.pa.us/media
   b. All those attending the trial are reminded that Pennsylvania law and Bellefonte Borough ordinances prohibit parking within 15 feet of a fire hydrant, or parking in a manner that prevents an emergency vehicle from travelling on borough streets.
2. Interference With Jurors: It is a serious criminal offense under Pennsylvania law for any person to influence, intimidate or impede a juror summoned or selected to serve. Summoned jurors and selected jurors may be asked to report to the Court if any member of the media, any person connected with the trial of the case, or other person has discussed with them the facts of the case, attempted to influence their opinion, or otherwise attempted to influence their participation.

MEDIA SPECIFIC INFORMATION

All credentialed reporters, or other members of the media attending the trial, will be expected to have read this order, be familiar with its requirements, and be aware of updates that may be posted from time to time on the county's media website.

1. Credentialing Process: Press credentials will be issued by the Court using a process developed in cooperation with the PAB and PNA.
    a. To be eligible to receive a court issued press credential, a reporter must first have registered with the Court in accordance with the procedures posted on the court website: www.co.centre.pa.us/media
    b. Broadcast media. Each FCC licensed electronic broadcasting mass media outlet licensed by the Federal Communications Commission, and which as a large part of its mission is engaged in the reporting of news (including radio, television, and cable networks) will receive one credential for a reporter to enter Courtroom 1 to the extent broadcast media reserved seats are available. The six major television networks – ABC, CBS, CNN, Fox, NBC, ESPN – will each receive two credentials.
    c. Print media. Each news organization (that is a newspaper or magazine in the business of gathering, procuring, compiling, editing or publishing news on a daily or weekly basis and bearing a separate masthead) will receive one credential for a reporter to enter Courtroom 1 to the extent print media reserved seats are available.
    d. Digital media. A digital media organization (that is an individual or news organization in the business of gathering, procuring, compiling, editing or publishing news on a daily or weekly basis, and not directly connected to a broadcast or print company) shall receive one credential for a reporter to enter Courtroom 1 to the extent digital media reserved seats are available. Credentials not

issued to digital media organizations may be issued to qualifying individuals.

e. By issuing credentials to media outlets, rather than to individual reporters, it is the intention of the Court that reporters for the media outlet may "swap out" the credential with other reporters employed by the same media outlet.

f. No reporter shall be permitted by the Sheriff to enter either Courtroom 1 or the satellite courtroom without exhibiting both a press credential issued by the reporter's media outlet and a court issued credential issued to the same outlet.

2. Seat Allocation: As noted, during jury selection five media seats will be reserved in Courtroom 1; and after jury selection has been completed 85 media seats will be reserved in Courtroom 1. In the satellite courtroom in the Courthouse Annex 100 seats reserved exclusively for credentialed reporters will be available throughout the trial.

   a. Seats will be allocated as follows:

      i. Broadcast media 45 percent: 38 seats in Courtroom 1 and 45 seats in the satellite courtroom.

      ii. Print media 45 percent: 38 seats in Courtroom 1 and 45 seats in the satellite courtroom.

      iii. Digital media 10 percent: 8 seats in Courtroom 1 and 10 seats in the satellite courtroom.

   b. If the number of those requesting credentials exceeds the number of reserved media seats available, then the allocation of the reserved seats in either Courtroom 1 or the satellite courtroom shall be determined by lottery conducted by the PAB or PNA as the case may be.

   c. If the number of those requesting credentials does not exceed the number of reserved media seats, then the extra seats shall be allocated by lottery conducted by the PAB or PNA as the case may be.

3. Pool Reporters for Jury Selection: Because of limited seating available in sites that will be used for jury selection, only pool reporting will be permitted. Jury selection will be conducted in three phases, with each phase being conducted in a smaller setting than the preceding phase. Therefore, five reporters will be permitted to attend the first phase to be held in Courtroom 1; and two reporters (one pool print media reporter selected by the PNA, and one pool broadcast media reporter selected by the PAB) will be permitted to attend the second and third phases to be held in Courtroom 2 and in chambers. In addition, if space permits, a sketch artist (jointly selected by the PAB and PNA) will be permitted to attend the second and third phases.
    a. The pool reporters will be selected in accordance with a plan developed in cooperation with the PAB and PNA.
    b. The pool reporters selected must agree to provide timely access to the reporter's work product to all other media outlets.
4. Satellite Courtroom Access: During the trial (but not during jury selection), a locked-down closed circuit television camera will be located at the back of Courtroom 1 to carry a wide-angle picture and sound from Courtroom 1 to the satellite courtroom.
5. Pressroom: Because of space limitations, it will not be possible to make a pressroom available in the Courthouse or Courthouse Annex.
6. Power Restrictions: Reporters are advised that there are limited power outlets in Courtroom 1 and the satellite courtroom. The use of those outlets may be restricted by Centre County maintenance staff to assure circuits are not overloaded. Reporters using electronic devices will not be permitted to use extension cords, and should make alternate plans to provide power to their equipment by using back-up devices or battery packs.
7. Court's Authority: While policies and procedures associated with media access to court proceedings have been developed in cooperation with a committee formed by the PAB and PNA, and the Court has delegated the

implementation of those policies and procedures to representatives of those organizations, the ultimate authority to supervise the trial and all associated events, and the application of such policies and procedures, rests exclusively with the Court.

8. Inquiries:
    a. Inquiries regarding press credentialing and media arrangements should be directed to the PAB and PNA.
    b. All other media inquiries should be directed to Jim Koval, Communications Manager, Administrative Office of Pennsylvania Courts (AOPC) –

        jim.koval@pacourts.us.

        (c) 717.319.8341;

        (o) 717.231.3324.

By Authority of the Court:

John M. Cleland, S.J.
Specially Presiding

FINAL REPORT

Judicial Council Study Committee
on Technology Brought into the Courtroom

April 10, 2012

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APPENDIX

COMMITTEE MEMBERSHIP

Justice Jill Parrish
Utah Supreme Court
Study Committee Chair

Rick Davis
Trial Court Executive
Fifth Judicial District

Judge Christine Decker
Juvenile Court Judge
Third Judicial District

Randy Dryer, Esq.
Parsons, Behle & Latimer

Judge Deno Himonas
District Court Judge
Third Judicial District

Jeff Hunt, Esq.
Parr, Brown, Gee & Loveless

Judge Jerry Jensen
Justice Court Judge
Davis County Justice Court

Brent Johnson
General Counsel
Administrative Office of the Courts

Judge David Mortensen
District Court Judge
Fourth Judicial District

Judge Rick Romney
Justice Court Judge
Provo City Justice Court

Judge Randy Skanchy
District Court Judge
Third Judicial District

Nancy Volmer
Public Information Officer
Administrative Office of the Courts

Staff: Diane Abegglen
Appellate Court Administrator

COMMITTEE CHARGE

Conduct a study of the public's access to information on trial court proceedings, the issues surrounding technology being brought into courtrooms and its impact on court operations, security and safety, and issues relating to the possible use of recording equipment in justice courts.

The Committee's principal focus should be on the first issue, namely, the pros and cons of expanding media coverage in trial courtrooms to include the use of video technology. However, the study should also be used to bring together several independent inquiries including: the Board of District Court Judges' inquiry on the use of phones and cameras in courtrooms and jury rooms and the impact of that technology on courtroom security; the Judicial Outreach Committee's study of social media; and the Board of Justice Court Judges' monitoring of the Davis County pilot program on the use of recording technology in the justice courts. These inquiries, along with the issue of video technology in trial courtrooms, should be coordinated and consolidated into a single report covering all trial courtroom technology issues.

The Committee should report back to the Judicial Council by April 2012, their findings and recommendations, including, if any, proposed rule changes.

INTRODUCTION

In February 2011, the Judicial Council established a committee to study issues surrounding technology being brought into courtrooms and its impact on court operations, security and safety. Specifically, the Study Committee on Technology Brought into the Courtroom (the Committee) was asked to study the pros and cons of expanding media coverage in trial courtrooms to include the use of video technology, and to consolidate into a single report the Judicial Outreach Committee's and the Board of District Court Judges' independent inquiries on the use of electronic portable devices in courthouses and courtrooms. The Committee was also asked to report on the Board of Justice Court Judges' monitoring of the Davis County pilot program on the use of recording equipment in justice courts. Finally, the Committee was asked to report its findings and recommendations to the Judicial Council by April 2012, including any proposed rule changes.

CAMERAS IN THE COURTROOM

A. Background and Overview

From the 1970s through the 1990s, many state courts implemented experimental rules allowing electronic media coverage of judicial proceedings. Nearly all of these experimental state rules have now been made permanent. Presently, every state in the nation permits some type of electronic media coverage of its trial or appellate courts. The District of Columbia is the only jurisdiction that prohibits such coverage.

State rules permitting electronic media coverage vary widely in scope and approach. Restrictions on coverage generally fall into three categories: (1) restrictions based upon type of court (i.e., trial court vs. appellate court); (2) prohibitions on coverage of certain types of proceedings, witnesses, or trial participants, such as juveniles, sexual

assault victims, or jurors; and (3) consent-based restrictions (i.e., coverage prohibited unless parties, witnesses, or other trial participants consent).

Some states, including Nevada, Colorado, and Washington, have adopted a presumption that electronic media coverage is permitted in proceedings that are open to the public. A decision to prohibit or limit such coverage requires the judge to make particularized findings on the record after consideration of various factors such as fair trial rights, privacy interests, safety interests, and other factors bearing on the fair administration of justice.

Some states expressly prohibit electronic media coverage of certain types of proceedings, witnesses, or trial participants, such as juveniles, sexual-assault victims, or jurors. Other states do not codify such exceptions, but afford the judge presiding over the proceeding broad discretion to impose limitations on photographic coverage to protect compelling interests, such as privacy interests, personal safety, and fair trial rights.

The Radio Television Digital News Association, which maintains a state-by-state guide to cameras in state courts, divides state rules concerning electronic media coverage of the courts into the following three tiers:

Tier 1: States that allow the most electronic media coverage of their courts: (19 states) California, Colorado, Florida, Georgia, Idaho, Kentucky, Michigan, Montana, Nevada, New Hampshire, New Mexico, North Dakota, South Carolina, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

Tier 2: States with restrictions prohibiting coverage of certain types of cases or proceedings or prohibiting coverage of all or large categories of witnesses who object to coverage: (16 states) Alaska, Arizona, Connecticut, Hawaii, Indiana, Iowa, Kansas,

Massachusetts, Missouri, North Carolina, New Jersey, Ohio, Oregon, Rhode Island, Texas, and Virginia.

Tier 3: States that allow appellate coverage only or that have such restrictive trial coverage rules that coverage is essentially prohibited: (15 states) Alabama, Arkansas, Delaware, Illinois, Louisiana, Maine, Maryland, Minnesota, Mississippi, Nebraska, New York, Oklahoma, Pennsylvania, South Dakota, and Utah.[1]

The arguments for and against cameras in the courtroom have remained constant over the years. Camera proponents base their arguments on First and Sixth Amendment guarantees of freedom of the press and public trials, and on the belief that televised court proceedings serve to educate the public and inspire confidence in the justice system. Opponents raise concerns about the adverse impact cameras can have on trial participants and argue that broadcast coverage may, in fact, diminish the public's confidence in the justice system.

The concern most often raised about electronic media coverage is that such coverage may harm the decorum of the proceedings and negatively impact trial participants. The extensive empirical research and broad-based experience of other states, however, suggest that these concerns are unfounded. For example, several states, including Arizona, California, Florida, Hawaii, Kansas, Louisiana, Maine, Massachusetts, Minnesota, New Jersey, New York, Ohio, Virginia, and Washington, have studied the impact of electronic media coverage on courtroom proceedings, focusing particularly on the effect that cameras have upon courtroom decorum and

[1] Under existing Rule 4-401, Utah Code of Judicial Administration, video recording and audio recording of appellate proceedings is permitted to preserve the record and as permitted by procedures of those courts, but is prohibited in trial proceedings except to preserve the record. Still photography of trial and appellate proceedings is permitted at the discretion of the judge presiding over the proceeding.

upon witnesses, jurors, attorneys, and judges. *See* Kelli L. Sager & Karen N. Fredericksen, *Televising the Judicial Branch: In Furtherance of the Public's First Amendment Rights*, 69 S. CAL. L. REV. 1519, 1543 (1996) ("*Televising the Judicial Branch*").

The results from the state studies were unanimous: electronic media coverage of courtroom proceedings—whether civil or criminal—has no detrimental impact on the parties, jurors, counsel, or courtroom decorum. *Televising the Judicial Branch*, 69 S. CAL. L. REV. at 1544, 1547. For example, the state studies revealed that fears about witness distraction, nervousness, distortion, fear of harm, and reluctance to testify were unfounded. *Id.* at 1543-44. A three-year pilot program permitting electronic media coverage of civil proceedings in six federal district courts and two federal circuit courts reported similar results, as well a favorable view of such coverage by the judges who participated in the program. *See* Federal Judicial Center, ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS (1994); *see also Televising the Judicial Branch*, 69 S. CAL. L. REV. at 1545; Alex Kozinski & Robert Johnson, *Of Cameras and Courtrooms*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1107, 1114 (2010) (summarizing state and federal studies on electronic media coverage of judicial proceedings and concluding that the empirical research demonstrates no detrimental impact on trial participants or on courtroom decorum).

The United States Supreme Court weighed in on the debate in 1965 and again in 1981, ultimately recognizing the right of states to allow such coverage. In *Estes v. Texas*, 381 U.S. 532 (1965), the Supreme Court overturned the conviction of Billy Sol Estes, holding that coverage of the trial, which included some use of cameras, violated Estes' due process rights. Four justices of the five member majority found that televising trials, at least under then-existing technology, was inherently unconstitutional. The fifth justice took a narrower view based on the specific

circumstances of the *Estes* case and suggested that technological advancements might one day lead to a different result.

In *Chandler v. Florida,* 449 U.S. 560 (1981), the Supreme Court revisited the issue of cameras in the courtroom and unanimously upheld the Chandler defendants' burglary convictions even though a brief part of the trial was televised over their objections. Chief Justice Warren Burger, writing for the Court, held that states should be free to develop their own procedures for broadcasting trials, and that such television coverage was not an inherent violation of due process. After *Chandler*, states rapidly began to open their doors to television cameras on a permanent or experimental basis.

Federal courts, by comparison, expressly prohibit electronic media coverage of criminal proceedings under Rule 53 of the *Federal Rules of Criminal Procedure*. In 1988, the federal judiciary appointed a committee to study the issue, and that committee recommended a three-year pilot program, for civil cases only, in several federal district and circuit courts of appeals. The pilot program was in effect from 1991 through 1994. Notwithstanding the Federal Judicial Center's ultimate recommendation that federal trial courts allow cameras in civil proceedings, the federal judiciary declined to continue the program when the study period expired.

In 1996, the U.S. Judicial Conference rescinded its camera-coverage prohibition for courts of appeals and allowed each appellate court the discretion to permit broadcasting of oral arguments. Presently, two courts of appeals—the Second and the Ninth—allow such coverage. In September 2010, the U.S. Judicial Conference approved a new pilot project to evaluate the effect of cameras in federal district courtrooms and of the public release of digital video recordings of some civil proceedings. The pilot project is national in scope and is expected to last for approximately three years.

B. Findings and Recommendations

Every state in the nation permits some type of electronic media coverage of its trial or appellate courts. Presently, Utah is one of the most restrictive states in the country. If adopted as recommended, proposed Rule 4-401, set forth in its entirety behind Tab 7, will place Utah in the ranks of states that allow the most electronic media coverage of their courts. The Committee concluded that the potential public benefits flowing from electronic media coverage of open judicial proceedings are substantial. While relatively few judicial proceedings are likely to attract electronic media coverage, those that do are likely to be of significant public interest and concern. Permitting electronic media coverage will allow the public to actually see and hear what transpires in the courtroom, and to become better educated and informed about the work of the courts. At the same time, electronic media coverage of trial court proceedings raises concerns about fair trial rights, personal privacy, safety, security interests, and other legitimate interests. Accordingly, the proposed revision of Rule 4-401 balances those interests by permitting electronic media coverage of open judicial proceedings while allowing a judge to prohibit or restrict such coverage to protect fair trial rights, privacy, security, and other important interests.

C. Summary of Revised Rule 4-401:

Section 1 of revised Rule 4-401 defines the terms "judge," "proceeding," "electronic media coverage," and "news reporter." The definition of "news reporter" under the proposed rule is consistent with the definition of "news reporter" under Utah's reporter's shield rule, which is codified in Rule 509 of the *Utah Rules of Evidence*.

Section 2 creates the presumption that electronic media coverage by a news reporter is permitted in courtroom proceedings that are open to the public, subject to the limitations set forth in the rule. Limitations on electronic media coverage must be

supported by reasons found by the judge who is presiding over the proceeding to be sufficiently compelling to outweigh the presumption. Section (2)(B) identifies nine factors that may guide judges in exercising their discretion. Section (2)(C) requires the judge to make particularized findings on the record supporting a prohibition of electronic media coverage or restricting such coverage beyond the limitations provided by the proposed rule. Such findings can be made orally or in a written order.

Section 3(A) requires news reporters who desire permission to provide electronic media coverage to file a written request with the court at least 24 hours prior to the proceeding (the current rule), but allows the judge to grant such a request on shorter notice or to waive the requirement for a written request upon a showing of good cause. Section 3(B) allows the judge to terminate or suspend electronic media coverage at any time without prior notice under certain circumstances.

Section 4 regulates conduct in the courtroom. It also places responsibility for pooling arrangements on the shoulders of news reporters rather than the judge who is presiding over the proceeding or court staff. Section 5 addresses sanctions for violations of the rule.

Section 6 sets forth several categorical restrictions on electronic media coverage under the rule, including prohibitions against photography of minors, of jurors unless dismissed, in camera hearings, confidential communications, and of documents not part of the official public record. Subparts (6)(A), (6)(B), and (6)(C) exist under the current rule. Subparts (6)(D), (6)(E), and (6)(F) are new under the proposed rule.

ELECTRONIC PORTABLE DEVICES IN COURTHOUSES AND COURTROOMS

A. Background and Overview

The near universal use of electronic portable devices presents challenges for the judiciary: security and personal safety; maintaining dignity and decorum in the courtroom; and conducting fair and impartial hearings. But the judiciary has faced these challenges for centuries. The challenges are, perhaps, heightened by the proliferation of evolving technologies, but they are, in concept, nothing new.

1. Social Media Subcommittee of the Judicial Outreach Committee's Report and Recommendations

The Social Media Subcommittee of the Judicial Outreach Committee, whose membership consisted of judges from each court level, court executives and practicing attorneys, studied the issue of electronic portable devices in courtrooms for several months. The Subcommittee reviewed studies and recommendations by the National Center for State Courts, the American Trial Lawyers Association, various media advocacy groups and policies already in place in other judicial systems. The Subcommittee also reviewed emerging case law before it unanimously recommended to the Judicial Outreach Committee a policy that it believed fairly balanced the interests of the public with the interests of the judiciary. The Subcommittee's proposed policy, set forth in its entirety behind Tab 9:

1. Recognized the growing need for lawyers to use mobile devices in court and acknowledged that the silent use of mobile devices by members of the media was not disruptive and enabled the media to better report on judicial proceedings;

2. Distinguished between the possession and use of mobile devices in court facilities and the possession and use in courtrooms, with there being greater restrictions on the latter;
3. Generally allowed the use of portable devices by lawyers and members of the public in both facilities and courtrooms, subject to certain restrictions enumerated in the policy, including a ban on using the devices to record proceedings;
4. Allowed an individual judge to further restrict or totally prohibit the possession or use of mobile devices in his/her courtroom based on certain articulated circumstances related to safety, security, the fair administration of justice, privacy and other factors;
5. Prohibited juror use in courtrooms and possession while deliberating; and
6. Allowed for the screening of mobile devices upon entry to court facilities and confiscation where appropriate.

The Subcommittee's proposed policy, with minor non-substantive changes, was approved by the Judicial Outreach Committee on a vote of 6-4 and subsequently sent to this Committee for debate and consideration.

2. Board of District Court Judges' Report

A subcommittee of the Board of District Court Judges undertook a study of the issue of cell phones in the courts and provided a report to the Board in early 2011. The subcommittee report, located behind Tab 10, was adopted by the Board and submitted to this Committee for consideration. As the report indicates, the Board reviewed a number of reported circumstances where the administration of justice was significantly undermined by the presence of cell phones in the courtroom. The Board concluded that the potential damage caused by electronic devices in the courtroom

and jury room could not be ignored and that a policy prohibiting their use should be implemented. Ultimately, the Board proposed that:

1. No electronic devices of any kind may be brought into the courthouse except by:

    a. Attorneys appearing before the court;

    b. Court employees;

    c. Law enforcement or Department of Corrections employees;

    d. Electronic dictionaries for interpreters; or

    e. A device for which the patron has obtained written approval from the judge whose court the patron will be attending.

2. Members of the press may apply for an exception to this rule using the same procedure to request permission to take photographs in the courtroom.

3. Court security will not hold or store any electronic devices. Patrons who bring such devices to the courthouse will be required to return them to their vehicles or store them elsewhere. Notice should be posted to this effect along with the notices regarding weapons.

4. Jury instructions should be drafted to inform the jury of the restrictions regarding electronic media, including the ban of such media in the courthouse and the prohibition against utilizing any form of electronic media to research or communicate about the case.

5. The judiciary should recommend that the legislature enact a statute making a juror's violation of these instructions a Class B misdemeanor. Jurors should be instructed of the possible penalty for failure to abide by the court's instructions.

B. Findings and Recommendations

The Committee recommends a policy which attempts to balance the interests of the public and the judiciary. The proposed policy is built on the philosophy that the judiciary should focus on regulating conduct that is injurious to the judicial process and not on regulating the types of electronic devices that may or may not be allowed in the courthouse or individual courtrooms.

The majority of the members of the Committee concluded that electronic portable devices such as personal digital assistants (PDAs), smart phones, and tablet and laptop computers have become a common and necessary tool for people observing or participating in judicial proceedings. They are the everyday tools of lawyers and the clients they represent: as necessary today as pen and paper and books have always been. Jurors, witnesses, consultants, parties and the public at large have come to expect that their ability to communicate - and to continue the business of their everyday lives - will not automatically cease when entering a courthouse. Members of the press are increasingly using these technologies to report on judicial proceedings in a more effective and timely manner.

The Committee's recommended policy on the possession and use of electronic devices in court facilities, set forth in its entirety behind Tab 11, acknowledges the realities of today's technologically sophisticated and dependent society; reflects a reasoned approach and a fair accommodation of the needs of all participants in the judicial process; and preserves the fair and impartial administration of justice.

The Committee considered input from various stakeholders, including the Court Security Director, and modified the Social Media Subcommittee's proposed policy to reflect that input. However, three members of the Committee, all trial judges, voted against the recommendation to allow cell phones in the courthouse. These dissenting members favored adopting the recommendations of the Board of District Court Judges. These votes were premised on the idea that there should be some places in society where decorum and undivided attention are expected. These votes also represent the view that if cell phones are allowed in the courthouse, it is not unreasonable to ask that they only be used in the halls and waiting areas of the courthouse and not in the courtroom.

AUDIO RECORDING IN JUSTICE COURTS

When the Committee charge was drafted in January 2011, it was an open question whether audio recording of justice court proceedings was a good idea. To test the idea, Judge Jerald Jensen volunteered to conduct a yearlong pilot project in the Davis County Justice Court to test the use of digital audio recordings. That pilot program began in April 2011 and Judge Jensen reports that it has been a very positive experience.

During the 2011 legislative session, the Utah legislature preempted the debate by passing legislation requiring verbatim audio recording of all justice court proceedings, effective July 1, 2012. In preparation for that deadline, the Judicial Council amended the Rules of Judicial Administration to establish technical standards for each level of justice court. Also, some funding for implementation has been provided to each justice court through a grant from the Security, Education and Technology fund.

In light of Judge Jensen's experience with digital audio recording in Davis County, the Committee concluded that it would be helpful to identify for the Judicial Council

significant issues and challenges the courts can expect to face as justice courts implement the digital audio recording mandate statewide. These issues include:

1. Funding - Financing for audio equipment, particularly in Class I and Class II justice courts, will be largely funded by local government. In many cases, that cost will be significant. Technical standards for Class III and Class IV justice courts are much less costly and should be fully funded through the Security, Education and Technology grants.

2. Records - It is critical that individual justice courts maintain control and dissemination of the audio records. The records are clearly a public record; however, questions such as how the recordings can be used and who may have ready access to them are yet to be clarified.

The issues and challenges that have surfaced to date, and those issues which will likely arise when full implementation takes place, are beyond the scope of this committee's assignment. Therefore, the Committee recommends that these issues be assigned to another committee or perhaps to the Justice Court Board itself for further monitoring and follow up.

CONCLUSION

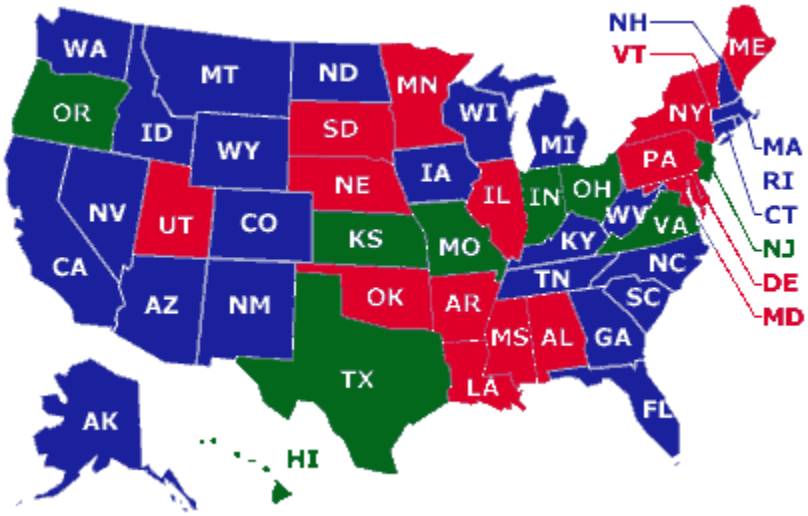
The Committee recommends the adoption of proposed Rule 4-401 and the proposed policy on the possession and use of electronic devices in court facilities.

Tab 1

Freedom of Information

Cameras in the Court: A State-By-State Guide

Click on your state to read the current law regarding cameras and microphones in the courtroom.



[The District of Columbia is the only jurisdiction that prohibits trial and appellate coverage entirely.]

Legend:

TIER I: States that allow the most coverage

California - broad discretion in presiding judge
Colorado - broad discretion is presiding judge
Florida - "qualitative difference" test
Georgia - broad discretion in presiding judge
Idaho - broad discretion in presiding judge
Kentucky - broad discretion in presiding judge
Michigan - judge may prohibit coverage of certain witnesses
Montana - broad discretion in presiding judge
Nevada - broad discretion in presiding judge
New Hampshire - broad discretion in presiding judge
New Mexico - judge may prohibit coverage of certain witnesses
North Dakota - broad discretion in presiding judge

South Carolina - broad discretion in presiding judge
Tennessee - broad discretion in presiding judge/coverage of minors is restricted
Vermont - broad discretion in presiding judge
Washington - broad discretion in presiding judge
West Virginia - broad discretion in presiding judge
Wisconsin - broad discretion in presiding judge
Wyoming - broad discretion in presiding judge

TIER II: States with restrictions prohibiting coverage of important types of cases, or prohibiting coverage of all or large categories of witnesses who object to coverage of their testimony.

Alaska - requires sex offense victim consent
Arizona - coverage of juvenile/adoption proceedings prohibited
Connecticut - coverage of certain types of cases prohibited
Hawaii - coverage of certain cases and witnesses prohibited
Indiana - appellate coverage only; pilot program for coverage of trials in designated courtrooms.
Iowa - need victim/witness consent in sexual abuse cases; regularly scheduled Supreme Court hearings are *not* subject to witness or party objections.
Kansas - consent of parties/attorneys not required, but coverage of many types of witness may be prohibited
Massachusetts - coverage of certain types of hearings prohibited
Missouri - coverage of certain cases and witnesses prohibited
North Carolina - coverage of certain cases/witnesses prohibited
New Jersey - coverage of various types of cases prohibited
Ohio - victims and witnesses have right to object to coverage
Oregon - witnesses discretion to object to coverage of certain cases
Rhode Island - coverage of certain proceedings, including criminal trials prohibited
Texas - no rules for criminal trial coverage, but such coverage allowed increasingly on a case by case basis
Virginia - coverage of sex offense cases prohibited

TIER III: States that allow appellate coverage only, or that have such restricting trial coverage rules essentially preventing coverage.

Alabama - consent of all parties/attorneys required
Arkansas - coverage ceases with objection by a party, attorney or witness
Delaware - appellate coverage only/currently experimenting with trial-level coverage of civil, non-jury cases in before certain courts
Illinois - appellate coverage only
Louisiana - appellate coverage only
Maine - coverage only permitted in appellate proceedings, civil trials, criminal arraignments, sentencing and other non-testimonial criminal proceedings
Maryland - consent of all parties/attorneys required; coverage of criminal trials is prohibited.
Minnesota - consent of all parties required at trial level
Mississippi - coverage of certain types of cases and witnesses prohibited.
Nebraska - appellate coverage/audio trial coverage only
New York - appellate coverage only
Oklahoma - consent of criminal parties/attorneys
Pennsylvania - any witness who objects may not be covered, coverage of non-jury civil trials permitted
South Dakota - Supreme Court coverage only
Utah - appellate coverage/trial coverage - still photography only

Alabama

Trial and appellate courtroom coverage is permissible if the Supreme Court of Alabama has approved a plan for the courtroom in which coverage will occur. The plan must contain certain safeguards to assure that coverage will not detract from or degrade court proceedings, or otherwise interfere with a fair trial. If such a plan has been approved, a trial judge may, in the exercise of "sound discretion" permit coverage if: (1) in a criminal proceeding, all accused persons and the prosecutor give their written consent and (2) in a civil proceeding, all litigants and their attorneys give their written consent. Following approval of their coverage plans, appellate courts may authorize coverage if the parties and their attorneys give their written consents. In both trial and appellate contexts, the court must halt coverage during any time that a witness, party, juror, or attorney expressly objects. In an appellate setting, it must also halt coverage during any time that a judge expressly objects to coverage.

Authority: Canon 3A(7), 3A(7A), and 3A(7B), Alabama Canons of Judicial Ethics, Ala. Code, Vol. 23A (Rules of Alabama Supreme Court).

Alaska

The news media, which includes the electronic media, still photographers and sketch artists, may cover court proceedings in all state trial and appellate courts. Administrative Rule 50 permits media coverage anywhere in the state court facility and is not limited to courtrooms. Under the permanent rule, the media must apply for and receive the consent of the presiding judge prior to commencing coverage. Requests for coverage must be made 24 hours prior to the proceeding, and applications that are timely filed are deemed to have been approved, unless otherwise prohibited. The consent of all parties is required for coverage of divorce, domestic violence, child custody and visitation, paternity or other family proceedings. Jurors may not be photographed, filed or videotaped in the courtroom at any time.

Victims of a sexual offense may not be photographed, filmed, videotaped or sketched without the consent of the court and the victim. A procedure is prescribed for suspension of an individual's or an organization's media coverage privileges for a period of up to one year for violation of the media coverage plan.

Authority: Rule 50, Rules Governing the Administration of All Courts, Alaska Rules of Court (West).

Arizona

Electronic and still photographic coverage of proceedings in all state courts and "areas immediately adjacent thereto" is permitted, provided the media follow certain guidelines that set forth rules for coverage. Audio recording by media is also generally permitted, provided that the audio recording does not create a distraction in the courtroom and is only used as personal notes of the proceedings. Coverage of juvenile proceedings is prohibited, and the judge has sole authority to decide whether to permit coverage of all other matters. The photographing of jurors in a way that permits them to be recognized is strictly forbidden. Requests for coverage should be made to the judge of the particular proceeding "sufficiently in advance" of the sought-after coverage event. Only one television and one still camera is allowed in the courtroom at one time, and the media are responsible for arranging pooling agreements. No flash bulbs or additional

artificial lights of any kind are allowed in the courtroom without the notification and approval of the presiding judge.

Authority: Rule 122, Rules of the Arizona Supreme Court, Ariz. Rev. Stat., Vol. 17A.

Arkansas

A judge may authorize broadcasting, recording, or photographing in the courtroom and adjacent areas provided that "the participants will not be distracted, [n]or will the dignity of the proceedings be impaired." An objection to the coverage by a party or attorney precludes media coverage of the proceedings and an objection by a witness precludes coverage of that witness. Coverage of juvenile, domestic relations, adoption, guardianship, divorce, custody, support and paternity proceedings is expressly prohibited. Similarly, coverage of jurors, minors without parental or guardian consent, sex crime victims, undercover police agents and informants is also prohibited. Only one television and one still camera is allowed in the courtroom at one time and the media are responsible for arranging pooling agreements.

Authority: Administrative Order Number 6, Rules of Civil Procedure - Appendix, Arkansas Code of 1987 Annotated (Court Rules).

California

Media coverage of State Court proceedings is governed by Rule 980 of the California Rules of Court. Personal recording devices may be used with advance permission of the judge for personal note-taking only. Media coverage is permitted by written order of the judge following a media request for coverage filed at least five court days before the proceeding to be covered. Any such requests must be made on the official form provided by courts. Coverage of jury selection, jurors, spectators, proceedings held in chambers, proceedings closed to the public or conferences between an attorney and a client, witness or aide, between attorneys or between counsel and the judge is prohibited.

Effective January 1, 1998, Rule 4.1 restricting media coverage within the courthouse unless specifically authorized by the presiding judge was added to the Los Angeles County Superior Court Rules. This rule also prohibits the filming or photographing of any person wearing a juror badge in the court.

Authority: Rule 1.150, California Rules of Court; Rule 4.1 Los Angeles County Superior Court Rules (West).

Colorado

Canon 3A(7) of the Colorado Code of Judicial Conduct gives judges the power, implemented in Canon 3A(8), to authorize media coverage of court proceedings, subject to several guidelines. Judges also have the power to prohibit or limit coverage upon a finding of substantial likelihood of interference with a fair trial, disruption or degradation of the proceedings, or harm which is distinct from that caused by coverage by other types of media. Those wishing to cover a particular

proceeding must submit a written request to do so to the presiding judge at least one day in advance of the proceeding desired to be covered and must give a copy of the request to the counsel for each party participating in the proceeding. Coverage of jury selection, in camera hearings and most pre-trial hearings is prohibited. No close-up photography of the jury, bench conferences or attorney-client communication is permitted. Consent of the participants is not required. The judge may also terminate coverage if the terms of the canon or any additional rules imposed by the Court have been violated. Only one television and one still camera are allowed in the courtroom at one time and the media are responsible for arranging pooling agreements.

Authority: Canon 3(A)(8), Colorado Code of Judicial Conduct, Colo. Rev. Stat., Vol. 7A (Court Rules), Appendix to Chapter 24; Form.

Connecticut

Sections 70-9 and 70-10 of the Rules of Appellate Procedure (governing media coverage in the Appellate and Supreme Courts) and Sections 1-10 and 1-11 of the Rules for the Superior Court (governing coverage in trial courts) permit the coverage of judicial proceedings under specific circumstances.

In appellate courts, those wishing to cover a particular proceeding must submit a written request to do so to the appellate clerk "not later than the Wednesday which is thirteen days before the day in which that proceeding is scheduled to occur." In trial courts, those wishing to cover a particular proceeding must submit a written request to do so at least three days prior to the commencement of the trial to the administrative judge of the judicial district where the case is to be tried. In both courts, coverage of family relations matters, trade secrets cases, sexual offense cases, and cases otherwise closed to the public are prohibited. In jury trials, no coverage of proceedings held in the jury's absence is permitted. Additionally, in criminal cases, sentencing hearings may only be covered if the trials are covered. Photographing or televising individual jurors is prohibited, and where coverage of the jury is unavoidable, no close-ups may be taken.

Authority: §§ 70-9, 70-10, Rules of Appellate Procedure; §§ 1-10, 1-11, Rules for the Superior Court, Connecticut Rules of Court (West).

Delaware

Rule 53 of the Delaware Superior Court Criminal Rules, Rule 53 of the Delaware Family Court Criminal Rules, and Rule 53 of the Criminal Rules of Delaware Courts of Justices of the Peace forbid coverage. By order dated April 29, 1982, the Delaware Supreme Court issued guidelines for its one year appellate experiment. Under those guidelines, coverage is permissible so long as it does not impair or interrupt the orderly procedures of the Court. Consents of the parties are not required. This experiment was extended indefinitely by order of the Delaware Supreme Court, dated and effective May 2, 1983.

On April 5, 2004, the Delaware Supreme Court issued its Administrative Directive No. 155, which established a six-month trial court experiment, which was originally scheduled to end on October 15, 2004. In this experiment, media coverage was permitted in the Sussex Court of Chancery, and courtrooms in New Castle, Kent and Sussex Counties. Broadcast of non-confidential, non-jury, civil proceedings was permitted.

Administrative Directive No. 155 was amended on October 25, 2004, and the experiment was extended until May 16, 2005. As of this writing, no further action has been taken.

Authority: Canon 3A(7), Delaware Judges' Code of Judicial Conduct, adopted by Rule 84, Rules of the Delaware Supreme Court, Del. Code, Vol. 16; Rule 53, Delaware Family Court, Criminal Rules, Del. Code, Vol. 16; Rule 53, Delaware Superior Court Criminal Rules, Del. Code, Vol. 17; Rule 31, Delaware Courts of Justices of the Peace, Criminal Rules, Del. Code, Vol. 16. See also Rule 169, Rules of the Delaware Court of Chancery, Del. Code, Vol. 17 (as modified by above-referenced orders).

Authority: Court Rules; Administrative Directive 155; Administrative Directive 155, amended

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District of Columbia

Rule 53(b) of the Superior Court Rules of Criminal Procedure, Rule 203(b) of the Superior Court Rules of Civil Procedure, Superior Court Juvenile Proceedings Rule 53(b), and Superior Court Domestic Relations Rule 203(b) forbid "[t]he taking of photographs, or radio or television broadcasting" coverage of trial proceedings. That said, in certain circumstances, photography may be permitted under Juvenile Court Rule 53(b)(2) or Criminal Court Rule 53(b)(2), which permits photography "in any office or other room of the division" upon the consent of the person in charge of the office or room and the person or people being photographed.

Coverage is also prohibited in Appellate proceedings.

Authority: All rules cited in the foregoing paragraph are contained in D.C. Code Ann. (Court Rules-D.C. Courts).

Webcast: D.C. Court of Appeals (no archives)

Florida

Electronic media and still photography coverage of proceedings is allowed in both the appellate and trial courts. Coverage is subject only to the authority of the presiding judge who may prohibit coverage to control court proceedings, prevent distractions, maintain decorum, and assure fairness of the trial. Exclusion of the media is permissible only where it is shown that the proceedings will be adversely affected because of a "qualitative difference" between electronic and other forms of coverage. Florida v. Palm Beach Newspapers, 395 So. 2d 544 (1981). Two still cameras operated by one photographer are allowed in trial and appellate courtrooms at one time. In trial proceedings only one television camera is allowed, while in appellate proceedings, two television cameras operated by one camera person is allowed. The media are responsible for arranging pooling agreements.

Authority: Rule 2.170, Rules of Judicial Administration, Florida Rules of Court (West) (2007).

Georgia

Rule 18 of the Probate Court Rules, Rule 11 of the Magistrate Court Rules and Rules 26.1 and 26.2 of the Juvenile Court Rules provide guidelines for extended media coverage of those judicial proceedings. If the court elects to grant approval for expanded media coverage of a proceeding must be “without partiality or preference to any person, news agency, or type of electronic or photographic coverage.” Those requesting coverage in these proceedings must file a “timely written request” on a form provided by the court with the judge involved in the specific proceeding prior to the hearing or trial. The judge, at his or her discretion, may allow only one television or still photographer in the courtroom at any one time, thereby requiring a pooling arrangement. Any additional lights or flashbulbs must be approved by the judge beforehand. Lastly, under the Juvenile Court Rules, pictures of the child in juvenile proceedings are expressly prohibited.

The Superior Court’s Rule 22, in additional to the above requirements, prohibits photographing or televising members of the jury, unless “the jury happens to be in the background of the topics being photographed.”

In the Court of Appeals, written requests for coverage must be submitted at least seven days in advance. Further, radio and television media are required to supply the Court with a video or audio tape, respectively, of all proceedings covered. Only one “pooled” television camera with one operator and one still photographer, with not more than two cameras, is allowed in the courtroom at any one time.

In the Supreme Court, coverage is allowed without prior approval from the Court and the Supreme Court retains exclusive authority to limit, restrict, prohibit and terminate coverage. No more than four still photographers and four television cameras will be permitted in the courtroom at any time. All television cameras are restricted to the alcove of the courtroom, while still photographers may sit anywhere in the courtroom designated for use by the public.

Authority: Rules 75-91, Supreme Court Rules; Rules 26.1 and 26.2, Juvenile Court Rules; Rule 18, Probate Court Rules; Rule 11, Magistrate Court Rules; Rule 22, Superior Court Rules, Georgia Rules of Court Annotated (West).

Hawaii

Electronic media and still photography coverage of proceedings is allowed in both the appellate and trial courts. Consent of the judge prior to coverage of a trial proceeding is required, but prior consent of the judge is not required for coverage of appellate proceedings. The judge may rule on the request orally and on the record or by written order if requested by any party. A request for coverage will be granted unless good cause is found to prohibit it. Good cause for denying coverage is presumed to exist when the proceeding is for the purpose of determining the admissibility of evidence, when child witnesses or complaining witnesses in a criminal sexual offense case are testifying, when testimony regarding trade secrets is being given, when a witness would be put in substantial jeopardy of bodily harm, or when testimony of undercover law enforcement agents involved in other ongoing undercover investigations is being received. Coverage of proceedings, which are closed to the public is prohibited. These proceedings include juvenile cases, child abuse and neglect cases, paternity and adoption cases, and grand jury proceedings. Coverage of jurors or prospective jurors is prohibited. Only one television camera and one still photographer, with not more than two still cameras are allowed in the courtroom at one time (although the judge may allow more at his/her discretion) and the media are responsible for arranging pooling agreements.

Authority: Rules 5.1, 5.2, Rules of the Supreme Court, Hawaii Court Rules (West).

Idaho

Rule 45 of the Idaho Court Administrative Rules (ICAR) allows extended coverage of all public proceedings, provided permission to cover a proceeding is obtained in advance from the presiding judge, and ICAR Rule 46 provides guidelines for the use of cameras in appellate proceedings.

In trial courts, the presiding judge may prohibit coverage or order that the identity of a participant be concealed when such coverage would have a substantial adverse effect upon that participant. Coverage of the jury, adoptions, mental health proceedings and other proceedings closed to the public is prohibited. Permission to photograph or broadcast a proceeding must be sought, in advance, from the presiding judge. Electronic flash or artificial lighting is prohibited, and the television camera may not "give any indication of whether it is operating". Only one still photographer and one camera operator is permitted in the courtroom, and any pooling arrangements must be made by the media. Still photographers must keep "the number of exposures . . . to a minimum."

Pursuant to ICAR Rule 46(a), photography is limited to designated areas of the Supreme Court Courtroom. While video cameras are permitted on a first-come basis, no more than two (2) still photographers are permitted at any one time. Live coverage of proceedings in the Supreme Court Courtroom may be prohibited in the interest of justice. Flash photography or the use of additional lighting for video photography is prohibited. No separate microphones may be used.

In all other appellate proceedings, ICAR Rule 46(b) imposes many of the same requirements as 46(a); however, microphone and video pooling is required.

Authority: Rules 45 & 46, Idaho Court Administrative Rules (2007).

Illinois

Illinois Revised Statutes, Chapter 735, § 8-701 specifies that no witness will be compelled to testify in any court in the State if any portion of his testimony is to be covered. Rule 63(A)(7) allows coverage pursuant to an order of the Illinois Supreme Court, while coverage of trial court proceedings is prohibited. For coverage of appellate proceedings, consents are not required, although the judge or presiding officer, with good cause, may prohibit or terminate coverage at any time. Those wishing to cover a particular proceeding must notify the appropriate clerk of the court not less than five "court" days prior to the date the proceeding is scheduled to begin. Only one television camera and one still camera, each operated by one camera-person, is permitted in the courtroom at any one time. No equipment or clothing of media personnel can have marks that identify any individual medium or network affiliation. Artificial lighting of any kind is not allowed, and the media are responsible for any pooling arrangements.

Authority: Rule 63(A)(7), Rules of the Illinois Supreme Court(2000); Chapter 735, §8-701, Illinois Compiled Statutes Annotated(2000); Supreme Court Orders of November 29, 1983 and January 22, 1985.

Indiana

Extended media coverage of oral arguments before the Indiana Supreme Court is allowed. Requests for coverage are to be made at least 24 hours prior to the start of the proceeding.

Beginning September 1, 1997 and continuing indefinitely, the Indiana Court of Appeals will allow extended media coverage of its proceedings. Requests for coverage are to be made at least 48 prior to the start of the oral argument.

The Indiana Supreme Court authorized a pilot project for video and audio coverage of proceedings in certain Indiana courtrooms. The project, which lasts from June 6, 2006 through December 31, 2007, permits certain trial judges to consent to media coverage, subject to certain restrictions. Specifically, judges must prohibit coverage of police informants, undercover agents, minors, victims of sexual offenses, jurors, witnesses at sentencing hearings, bench conferences, attorney-client communications, and conversations among counsel. Equipment is limited to no more than one still camera, one video camera, and three audio recording devices, and coverage may not intrude upon the proceedings. Journalists should consult the implementing order for additional details and a list of eligible courtrooms.

All appellate oral arguments are webcast live, and the courts maintain an archive of webcast arguments from 2001 to date.

Authority: Order Nos. 94S00-9901-MS-59 and 94S00-0605-MS-166.

Supreme Court Media Guidelines

Iowa

Extended media coverage, defined as “broadcasting, televising, electronic recording, or photographing of judicial proceedings for the purpose of gathering and disseminating news to the public,” is generally permitted upon application to the presiding judge. Iowa’s rules require that permission for extended media coverage be granted, unless the coverage will interfere with the rights of the parties or a witness or party provides a good cause why coverage should not be permitted. In certain types of proceedings, such as sexual abuse or criminal trials, witness or party consent is required.

Extended media coverage is not permitted, however, during jury selection or if a private proceeding is required by law. Prolonged or unnecessary coverage of jurors should be prevented to the extent practicable.

Written requests to use photographic equipment, television cameras, etc. must be made, in advance to the Media Coordinator, and equipment must meet certain specifications. Flash photography and other supplemental light sources are prohibited. Pooling arrangements must be made by the media.

All regularly scheduled Supreme Court oral arguments taking place in the Supreme Court’s courtroom are subject to expanded media coverage and are *not* subject to objections by witnesses or parties. Additionally, all Supreme Court oral arguments are streamed over the internet.

Authority: Ch. 25, Iowa Court Rules (2007).

Webcast: Supreme Court Oral Arguments

Kansas

Rule 1001 of the Kansas Supreme Court authorizes extended media coverage of appellate and trial court proceedings and extends coverage to state municipal court proceedings. Under this rule, coverage is permissible only by the news media and educational television stations and only for news or educational purposes.

The media must give at least one week's notice of its intention to cover a proceeding. However, this requirement may be waived upon a showing of good cause. Photographing of individual jurors is prohibited, and where coverage of the jury is unavoidable, no close-ups may be taken. Consents of the participants are not required. The presiding judge may prohibit coverage of individual participants at his discretion; however, if a participant is a police informant, undercover agent, relocated or juvenile witness, or victim/witness and requests not to be covered, the judge must prohibit coverage of that person. Coverage of a participant in proceedings involving motions to suppress evidence, divorce, or trade secrets will also be prohibited, if the participant so requests. Coverage of materials on counsel tables, photographing through the windows or open doors of the courtroom also is prohibited. Moreover, criminal defendants may not be photographed in restraints as they are being escorted to or from court proceedings prior to rendition of the verdict. Only one television camera, operated by one person, and one still photographer, using not more than two cameras, are authorized in any one court proceeding.

Authority: Rule 1001, Rules of the Kansas Supreme Court, Kansas Court Rules and Procedures - State and Federal (1999).

Kentucky

Electronic coverage is permitted in all appellate and trial court proceedings. Consents of the parties are not required, but coverage is subject to the authority of the presiding judge. Requests for coverage should be made to the judge presiding over the proceeding for which coverage is desired. Coverage of attorney-client conferences or conferences at the bench are prohibited. Only one television camera and one still photographer, with not more than two still cameras are allowed in the courtroom at any one time, and the media are responsible for any pooling arrangements. Juvenile proceedings are closed to the public. KRS 610.070

Authority: Standards of Conduct and Technology Governing Electronic Media and Still Photography Coverage of Judicial Proceedings, Rules of the Kentucky Supreme Court, Ky. Rev. Stat. Ann. (2007).

Reporters Handbook on Covering Kentucky Courts

Louisiana

Electronic coverage of appellate proceedings is allowed, while coverage at the trial level is generally prohibited. Those wishing to cover trial-level proceedings should consult with the courts of that district or parish concerning coverage. At the appellate level, obtaining the consent of the involved parties is not required, although the Court may prohibit coverage upon its own motion or if an objection is made by a party. Notice of intent to cover a proceeding must be made at least 20 days in advance or, in expedited proceedings, within a reasonable time before the proceeding is schedule to occur. No more than two television cameras, each operated by no more than one camera person, and one still photographer, using not more than two still cameras with not more than two lenses for each camera, will be permitted in the courtroom during proceedings. In addition, the media are responsible for any pooling arrangements.

Authority: Canon 3A(7), Louisiana Code of Judicial Conduct & Appendix (1999).

Maine

Extended media coverage is authorized in all civil matters but coverage in criminal matters is limited to arraignments, sentencing and other non-testimonial proceedings. Coverage of divorce, annulment, support, domestic abuse and violence, child custody and protection, adoption, paternity, parental rights, sexual assault, trade secrets, and juvenile proceedings is prohibited. Coverage of the jury and any proceeding in which a living child is a principal subject is also prohibited. Requests for coverage should be made to the clerk of the court at which coverage is desired. Only one television camera, operated by one person and two still photographers, each with only one camera may be in the courtroom at any one time. The cameras may not have any "insignia or other indication of organizational affiliation". Pooling arrangements are the sole responsibility of the media.

Authority: Administrative Order--Cameras in the Courtroom (July 11, 1994) (West, 2000).

Maryland

In the absence of a statutory provision requiring close proceedings or permitting closed proceedings, coverage is permitted at civil trials, upon written consent of all the parties. Consent is not required, however, from a party that represents the government, or from an individual being sued in his or her governmental capacity. At the appellate level, consent is not required, but a party may move to limit or terminate coverage at any time. Requests for coverage must be submitted to the clerk of the court where the proceedings will be held at least five days before the trial begins. Coverage of jury selection, jurors or courtroom spectators, private conferences between an attorney and a client or conferences at the bench is prohibited. Not more than one television camera is permitted in any trial court proceeding, and not more than two are allowed in appellate proceedings. Only one still photographer, with not more than two cameras with not more than two lenses each, is allowed in both trial and appellate proceedings. Pooling arrangements are the sole responsibility of the media.

Coverage is prohibited in criminal trials.

Authority: Rule 16-109, Maryland Rules Annotated, (2007); MD Code, Criminal Proc. § 1-201 (2007).

Massachusetts

Rule 1:19 of the Supreme Judicial Court of Massachusetts permits extended coverage of all proceedings open to the public except hearings on motions to suppress or to dismiss, or of probable cause or jury selection hearings. Close-up short of bench conferences, conferences between attorneys, or attorney-client conferences is prohibited. Frontal and close-up photography of the jury "should not usually be permitted." The media must submit requests for coverage to the presiding judge "reasonably" in advance of the proceeding to be covered, or risk denial. Before a party or a witness may move to limit media coverage, it must first notify the Bureau Chief, Newspaper Editor, or Broadcast Editor of the Associated Press. Oral arguments before the Supreme Judicial Court are available by webcast.

Authority: Rule 1:19, Rules of Massachusetts Supreme Judicial Court, (2004).

Guidelines on the Public's Right of Access to Judicial Proceedings and Records (2000).

Webcast: Supreme Judicial Court

Michigan

Extended coverage of judicial proceedings is permitted, but requests for coverage must be made in writing not less than three business days before the proceeding is scheduled to begin. A judge may terminate, suspend or exclude coverage at any time upon a finding, made and articulated on the record that the rules for coverage have been violated or that the fair administration of justice requires such action. Such decisions are not appealable. Coverage of jurors or the jury selection process is not permitted. The judge has sole discretion to exclude coverage of certain witnesses, including but not limited to, the victims of sex crimes and their families, police informants, undercover agents and relocated witnesses.

Authority: Canon 3A(7), Michigan Code of Judicial Conduct, Michigan Rules of Court 1986; Administrative Order No.1989-1, Film or Electronic Media Coverage of Court Proceedings

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Minnesota

Expanded coverage is permitted at both the trial and appellate level, but at the trial level, the judge and all parties must consent to coverage prior to commencement of the trial. All courtroom coverage must occur in the presence of the presiding judge. Coverage of witnesses who object prior to testifying and coverage of jurors is prohibited, as is coverage of hearings that take place outside of the presence of the jury. Coverage is prohibited in cases involving child custody, divorce, juvenile proceedings, hearings on suppression of evidence, police informants, relocated witnesses, sex crimes, trade secrets, and undercover agents. Judges and media representatives must inform the Supreme Court of denials of coverage requests and the reason for such denials.

At the appellate level, consents of the parties and witnesses are not required, but the Clerk of the Appellate Courts must be notified of an intent to cover the proceedings at least 24 hours in advance of the coverage. Only one television camera and one still photographer, using not more

than two cameras with two lenses each are permitted in the courtroom during proceedings. The media are responsible for arranging pooling agreements.

Authority: Canon 3A(10), Minnesota Code of Judicial Conduct, Minn. Stat. Ann. vol. 52 (West); Rule 4, General Rules of Practice for the District Courts, Minn. Stat. Ann. vol. 51 (1999).

Policy Guidelines

Mississippi

Electronic media coverage of judicial proceedings (trial, pre-trial hearings, post-trial hearings and appellate arguments) is permitted in Mississippi's Supreme Court, Court of Appeals, chancery courts, circuit courts and county courts. Mississippi's Rules for Electronic and Photographic Coverage of Judicial Proceedings ("MREPC"), effective July 1, 2003, prohibit electronic media coverage in justice and municipal courts.

Electronic coverage is subject to the authority of the presiding judge who may limit or terminate coverage at any time if there is a need to protect (1) the rights of the parties or witnesses, (2) the dignity of the court or, (3) to assure orderly conduct of the proceedings. Any party may object by written motion, filed no later than 15 days prior to the proceeding, unless good cause allows for a shorter filing period. Under MREPC the media is required to notify the clerk and the court of any plans to cover a proceeding at least 48 hours prior to the proceeding.

The media must comply with certain coverage restrictions. Electronic coverage of police informants; minors; undercover agents; relocated witnesses; victims and families of victims of sex crimes; victims of domestic abuse, and members or potential members of the jury (before their final dismissal) is expressly prohibited. In addition, audio recordings of off-the-record conferences and coverage of closed proceedings are also prohibited. Similarly, coverage of divorce; child custody; support; guardianship; conservatorship; commitment; waiver of parental consent to abortion; adoption; delinquency and neglect of minors; paternity proceedings; termination of parental rights; domestic abuse; motions to suppress evidence; proceedings involving trade secrets; and in camera proceedings are prohibited unless authorized by the presiding judge.

Only one television camera, one video recorder, one audio system, and one still camera are allowed in the courtroom at one time and the media are responsible for pooling arrangements. If the media cannot agree to a pooling arrangement, all contesting media personnel shall be excluded from the proceeding. Electronic media coverage may not distract from the courtroom proceedings, and in accordance with this principle, no artificial, flash or strobe lighting is allowed in the courtroom without the notification and approval of the presiding judge. All wires must be taped to the floor and equipment may only be moved before or after a proceeding or during a recess. The presiding judge may "relax" the technical restrictions so long as no distractions are created.

Authority: Rules for Electronic and Photographic Coverage of Judicial Proceedings ("MREPC"); Cannon 3B(12), Code of Judicial Conduct of Mississippi Judges; Rule 1.04, Uniform Rules of Circuit and County Courts, Mississippi Rules of Court.

Missouri

Media coverage at both the trial and appellate levels are permitted, but coverage of jury selection, juvenile, adoption, domestic relations, and child custody cases is not permitted. Requests for coverage must be made to the media coordinator, in writing, at least five days in advance of the scheduled proceeding, and the media coordinator must then give written notice of the request to counsel for all parties, parties appearing without counsel and the judge at least four days in advance of the proceeding. Coverage of objecting participants who are victims of crimes, police informants, undercover agents, relocated witnesses, or juveniles is prohibited. Further, the judge may prohibit coverage of any or all of a participant's testimony, either upon the objection of the participant, party, or the court's own motion. Only one television camera and one still photographer, using not more than two cameras with two lenses each, are allowed in the courtroom at any one time. The media are responsible for all pooling arrangements.

Authority: Administrative Rule 16, Missouri Supreme Court Rules, (2005).

Montana

Coverage of trial and appellate courts is permitted, though judges may restrict coverage of proceedings upon a finding that media coverage will "substantially and materially interfere with the primary function of the court to resolve disputes fairly under the law."

Authority: Canon 35, Montana Canons of Judicial Ethics, 176 Mont. xxiii, 6 Media L. Rep. (BNA) 1543 (1980).

Nebraska

Media coverage in the Supreme Court and Court of Appeals is explicitly permitted, but this right is only afforded to "persons or organizations which are part of the news media." Party consent is not required, although a party may file an objection to media coverage before commencement of the proceeding in question.

Authority: Rules 17, 18; Rules of the Supreme Court/Court of Appeals; Nebraska Court Rules and Procedure (West).

Reporters' Guide to Media Law and Nebraska Courts

Nevada

Extended media coverage is permitted, at the judge's discretion except for certain proceedings which are made confidential by law. Obtaining the consent of the participants is not required, but the judge may prohibit coverage of any participant who does not consent to being filmed or photographed. Requests for coverage must be made in writing at least 72 hours in advance of the proceeding, but the judge may grant a request on shorter notice for "good cause." Deliberate coverage of jurors or of conferences of counsel is not allowed. No more than one television camera and one still photographer are allowed in a proceeding at any one time, and the media are responsible for any pooling arrangements.

Authority: Nevada Supreme Court Rules, Part IV, Rules on Cameras and Electronic Media Coverage in the Courts, (2006).

New Hampshire

Rule 19 of the Rules of the Supreme Court of New Hampshire permits coverage of that court's proceedings subject to the Court's consent.

Rule 78 of the Rules of the New Hampshire Superior Court exhorts judges to permit the media coverage of all proceedings open to the general public, unless the coverage creates a substantial likelihood of harm to a person or party. While those wishing to cover a proceeding must obtain the court's permission, in Petition of WMUR Channel 9, 148 N.H. 644 (2002), the New Hampshire Supreme Court stated that permission *should* be granted unless four requirements are met: "(1) closure advances an overriding interest that is likely to be prejudiced; (2) the closure ordered is no broader than necessary to protect that interest; (3) the judge considers reasonable alternatives to closing the proceedings; and (4) the judge makes particularized findings to support the closure on the record." Id. Photography of jurors is prohibited.

The media rule of the New Hampshire District Courts is substantially similar to that of the Superior Court. The differences between the two courts' media rule arise provide that upon the petition of any party the court may, in its discretion, permit coverage of its judicial proceedings.

Authority: Rule 19, New Hampshire Supreme Court Rules; Rule 78, New Hampshire Superior Court Rules and Directory; Rule 1.4, New Hampshire District and Municipal Court Rules, (2000).

New Jersey

Canon 3A(9) of the New Jersey Code of Judicial Conduct exhorts judges to allow "bona fide media" to cover proceedings. To this end, the Supreme Court has issued a set of guidelines for media coverage, which grants judges some latitude in limiting coverage, especially where the coverage may result in a substantial likelihood of harm to a witness or party. Unlike other jurisdictions, the media are granted the right to appeal any order excluding or varying coverage. Photography of the jury is prohibited, and photography and audio recording is prohibited in certain types of proceedings, such as juvenile proceedings, proceedings to terminate parental rights, child abuse/neglect proceedings, custody proceedings, and "proceedings involving charges of sexual contact or charges of sexual penetration or attempts thereof when the victim is alive." Photography and audio recordings of crime victims under the age of 18 or witnesses under the age of 14 may be permitted at the trial judge's discretion. Additionally, while coverage of juvenile proceedings is usually forbidden, courts, in their discretion, may allow coverage of 17-year old defendants in proceedings involving motor vehicle violations. The media are responsible for pooling arrangements.

Authority: Canon 3A(9), Code of Judicial Conduct; Supreme Court Guidelines for Still and Television Camera and Audio Coverage of Proceedings in the Courts of New Jersey (2003).

Webcast: Archive of Supreme Court Oral Arguments (Webcasts)

New Mexico

Electronic coverage of proceedings in the state's appellate and trial courts is permitted, although the judge may limit or deny coverage for good cause. The judge also has wide discretion to exclude coverage of certain types of witnesses, including, but not limited to, the victims of sex crimes and their families, police informants, undercover agents, relocated witnesses and juveniles. Filming of the jury or any juror is prohibited, as is filming of jury selection. Coverage of any attorney-client or attorney-court conferences is prohibited. Those wishing to cover a proceeding must notify the clerk of the particular court at least 24 hours in advance of the proceeding. Only one television camera and two still photographers, each with one camera are allowed in the courtroom at any one time, and any pooling arrangements are the responsibility of the media.

Authority: Rule 23-107, New Mexico Supreme Court General Rules, (2000).

New York

Appellate Courts

Electronic photographic recording of proceedings in appellate courts is permitted, subject to the approval of the respective appellate court. Consent to coverage by parties or the attorneys is not required and any objections by attorneys or parties are limited to those showing good cause. Only two television cameras and two still photographers are allowed in the courtroom at any one time, and coverage is subject to various other technical conditions concerning media equipment.

Trial Courts

Section 52 of the Civil Rights Law ("Section 52") imposes a per se ban on all televising of trial court proceedings, no matter what the circumstances of the case or the assessment of the presiding judge. The statute became effective on July 1, 1997, when Section 218 of the Judiciary Law ("Section 218") expired by operation of law. For all but one of the prior ten years, Section 218 had allowed, subject to specific limits in certain types of cases and with respect to certain trial participants, the televising of trials in New York State. In 1997, the Legislature failed to renew Section 218, resulting in the reimposition of Section 52, and thus barring extended coverage of trial proceedings. In response to the per se ban, a number of trial judges ruled Section 52 unconstitutional and permitted camera coverage. On June 16, 2005, however, the New York Court of Appeals effectively ended the debate by affirming a lower court's holding that Section 52 is constitutional. Unless the Legislature enacts a statute overruling the Court of Appeals, cameras will not be allowed in trial court proceedings for the foreseeable future.

Authority: Courtroom Tel. Network, LLC v. New York; New York Civil Rights Law § 52 (trial court); 22 NYCRR §§ 29.1-29.2 (appellate court); NY CLS Standards & Administrative Policies § 131 (2000).

North Carolina

The rules for coverage require that the equipment and personnel used in coverage be neither seen nor heard by anyone inside the courtroom and that all personnel and equipment be located in an area set apart by a booth or partition with appropriate openings to allow photographic coverage. The presiding trial judge may permit coverage without booths, however, if coverage would not disrupt the proceedings or distract the jurors. The Chief Justice of the Supreme Court and the Chief Judge of the Court of Appeals may waive the booth requirements in proceedings in these courts. Hand-held audio tape recorders may be used upon prior notification to, and with the approval of, the presiding judge.

The rules do not require the consents of participants, but prohibit coverage of jurors. In addition, coverage of certain types of proceedings, such as adoption, divorce, juvenile proceedings, and trade secrets cases, is prohibited. Coverage of certain types of witnesses, such as police informants, undercover agents, victims of sex crimes and their families, and minor witnesses is also not permitted. Only two television cameras and one still photographer are allowed in the courtroom at any one time, and the media are responsible for any pooling arrangements.

Authority: Rule 15, General Rules of Practice for the Superior and District Courts of North Carolina, North Carolina Rules of Court (2000).

North Dakota

Extended media coverage is authorized in all courts. The judge may deny media coverage of any proceeding or portion of a proceeding in which the judge determines that media coverage would materially interfere with a party's right to a fair trial or when a witness or party objects and shows good cause why expanded coverage should not be permitted. The judge may also deny coverage if: the coverage would include testimony of an adult victim or witness in sex offense prosecutions; or would include a juvenile victim or witness in proceedings in which illegal sexual activity is an element of the evidence; or coverage would include undercover or relocated witnesses.

Coverage of proceedings held in chambers, proceedings closed to the public, and jury selection is prohibited. Conferences between an attorney and client, witness or aide, between attorneys, or between counsel and the bench may not be recorded or received by sound equipment. Further, close up photography of jurors is also prohibited.

Requests for expanded media coverage of the Supreme Court must be made at least seventy-two hours before the proceeding and must be made by regular mail and, if possible, by facsimile with copies to counsel of record.

Requests for expanded media coverage of trial court proceedings must be made to the presiding judge at least seven days before the proceeding. Notice of the request must be given to all counsel of record and any pro se parties. The notice must be in writing and filed with proof of service with the clerk of the appropriate court.

Authority: Administrative Rule 21; (North Dakota Court Rules).

Ohio

Rule 12 of the Rules of Superintendence for the Courts of Ohio requires judges to permit coverage of proceedings that are open to the public, subject to certain exceptions.

At the trial level, coverage of objecting witnesses and victims is prohibited. The judge is also required to inform victims and witnesses of their right to object to coverage. Requests for coverage must be submitted to the presiding judge, as the consent of the judge is required for coverage to take place. Only one still photographer and one television camera are permitted in the courtroom, unless the judge grants permission to use additional cameras. Coverage of attorney-client conferences and any bench conferences is prohibited. In addition to these rules, local courts may impose additional obligations and requirement for extended coverage.

Rule 12 may be modified by local rules. For example, the Hamilton County Court of Common Pleas requires broadcasters to use the court's audio system and permits coverage requests to be made up to thirty (30) minutes before the start of the proceeding.

Authority: Rule 12, Rules of Superintendence for the Courts of Ohio (2005); Hamilton County Common Pleas Rule 30.

Oklahoma

Trial and appellate coverage is permitted, but express permission of the judge is required. Coverage of objecting witnesses, jurors, or parties is not permitted in either criminal or civil proceedings. Moreover, no coverage is allowed in criminal trials without the express consent of all accused persons.

Authority: Title 5, Oklahoma Statutes, Chapter 1, Appendix 4, Canon 3B(9).

Oregon

In the appellate courts, broad discretion to permit or deny coverage is vested in the judge, who may deny coverage to "control the conduct of the proceedings before the court, insure decorum and prevent distractions, and insure the fair administration of justice in proceedings before the court." Only one television camera and one still photographer are allowed in the courtroom at any one time, and any pooling arrangements are the responsibility of the media.

At the trial court level, coverage is allowed, but a judge may deny coverage if there is a "reasonable likelihood" that the coverage would interfere with the rights of the parties to a fair trial, would affect the presentation of evidence or the outcome of the trial, or if "any cost or increased burden resulting" from the coverage would interfere with the "efficient administration of justice." Coverage of dissolution, juvenile, paternity, adoption, custody, visitation, support, mental commitment, trade secrets, and abuse, restraining and stalking order proceedings is prohibited. Also, coverage of sex offense proceedings will be prohibited at the victim's request. Upon request, those covering a proceeding must provide a copy of the coverage to the court and "any other person, if the requestor pays actual copying expense."

Courts may adopt local rules to establish procedural requirements governing media access.

Authority: Rule 8.35, Rules of Appellate Procedure; Rule 3.180 Uniform Trial Court Rules, Oregon Rules of Court-State (2006).

Pennsylvania

Photography or broadcasting of judicial proceedings is generally prohibited in both civil and criminal trials.Canon 3A(7) does, however, permit judges to authorize media coverage of non-jury civil proceedings. Coverage of support, custody, and divorce proceedings is prohibited. A judge may only authorize coverage with the consent of the parties. Additionally, coverage of objecting witnesses is prohibited. Media wishing to seek permission to cover a proceeding should speak in advance with the courtroom tipstaff, as the presiding judge must expressly authorize coverage.

Coverage is prohibited in proceedings before District Justices.

Local rules may vary.

Authority: Canon 3A(7), Code of Judicial Conduct; Rule 112, Pennsylvania Rules of Criminal Procedure; Rule 223, Pennsylvania Rules of Civil Procedure (Official Note); Rule 7, Rules of Conduct, Offices Standards and Civil Procedure for District Justices (2005).

Rhode Island

Extended coverage is prohibited in all trial-level criminal proceedings. At the appellate level and in civil proceedings, the judges have “sole discretion” to “entirely exclude media coverage of any proceeding or trial over which he or she presides.” Exclusion by the trial court may also be based on a party’s request for non-coverage. Coverage of juvenile, adoption or any other matters in the Family Court “in which juveniles are significant participants” is prohibited. Coverage of hearings which take place outside of the jury’s presence (e.g., hearings regarding motion to suppress evidence) is not permitted. After the jury has been impaneled, individual jurors may be photographed, with their consent. Where photographing of the jury is unavoidable, close-ups that clearly identify individual jurors are not permitted.

Only one television camera and one still photographer, using not more than two cameras, are allowed in the courtroom, and the media must arrange for any pooling arrangements.

Authority: Article VII, Rhode Island Supreme Court Rules, Rhode Island Court Rules Annotated; Rule 53, Rhode Island Superior Court Rules of Criminal Procedure (2005).

South Carolina

Extended media coverage is permitted, but presiding judges are given significant discretion to limit coverage. Those wishing to cover a proceeding must give the presiding judge “reasonable notice” of the request for coverage, and the judge may request a written notice. The judge may also refuse, limit or terminate media coverage of an entire case, portions thereof, or testimony of particular witnesses. Coverage of prospective jurors is prohibited and members of the jury may not be photographed except when they happen to be in the background of other subjects being

photographed. Two television cameras and two still-photographers are allowed in the courtroom at one time, and the media are responsible for any pooling arrangements. Media personnel's equipment and clothing must not "bear the insignia or marking of any media agency," and the cameraperson must wear "appropriate business attire."

Authority: Rule 605 and Part 6, Appendix B, Form 1, South Carolina Appellate Court Rules, South Carolina Rules of Court (2007).

South Dakota

Extended coverage of trial and intermediate appellate court proceedings is prohibited. Expanded media coverage of Supreme Court proceedings is permitted. Under Rule 15-24-6, public appellate proceedings are presumed open, but parties may file an objection to such coverage 10 days prior. The rule provides that media coverage may not be limited unless it is shown that such coverage would materially interfere with the rights of the parties or the administration of justice.

Authority: Canon 3B(12), South Dakota Code of Judicial Conduct, S.D. Codified Laws, § 15-24-6.

Webcasts: South Dakota Supreme Court Oral Arguments

Tennessee

Extended coverage is permitted in all courts. Requests for coverage must be made in writing to the presiding judge not less than two business days before the proceeding. Coverage of a witness, party or victim who is a minor is prohibited except when a minor is being tried for a criminal offense as an adult. Coverage of the jury selection and the jurors during the proceeding is also prohibited.

In juvenile court proceedings, the court will notify parties and their counsel that a request for coverage has been made and prior to the beginning of the proceedings, the court will advise the accused, the parties and the witnesses of their right to object. Objections by a witness in a juvenile case will limit coverage of that witness. Objections to coverage by the accused in a juvenile criminal case or any party in a juvenile civil action will prohibit coverage of the entire proceeding.

Only two television cameras and two still photographers, using not more than two cameras each, are allowed in the courtroom at one time. The media are responsible for any pooling arrangements.

Appellate review of a presiding judge's decision to terminate, suspend, limit, or exclude media coverage shall be in accordance with Rule 10 of the Tennessee Rules of Appellate Procedure.

Authority: Rule 30, Rules of the Tennessee Supreme Court, Tenn. Code Ann., Vol. 5A (2007).

Texas

Rule 18c, Texas Rules of Civil Procedure, and Rule 14, Texas Rules of Appellate Procedure, provide for the recording and broadcasting of civil court proceedings.

Rule 18c allows television, radio and photographic coverage with the consent of the trial judge, the parties and each witness to be covered. Coverage also may not "unduly distract participants or impair the dignity of the proceedings."

Rule 14 technically permits coverage of civil and criminal appellate proceedings. Requests for coverage at the appellate level must be filed five days prior to the proceeding, and coverage may be subject to other limitations imposed by the presiding judge(s). Those seeking coverage at the trial level should check with the local court, as the Supreme Court has approved local rules submitted by counties and cities in the state to allow coverage of trial proceedings and will continue to do so.

Authority: Rule 18c, Rules of Civil Procedure; Rule 14, Rules of Appellate Procedure (2007).

Utah

Under Rule 4-401, filming, video recording and audio recording of appellate proceedings is permitted to preserve the record and as permitted by procedures of those courts, but is prohibited in trial proceedings except to preserve the record. Still photography of trial and appellate proceedings is permitted at the discretion of the presiding judge. Requests for still photography coverage should be made at least 24 hours prior to the proceeding but will be considered less than 24 hours ahead for good cause.

Authority: Rule 4-401, Utah Code of Judicial Administration (2000).

Vermont

Extended media coverage of Supreme Court proceedings is permitted without the consent of the full court, but the Chief Justice has discretion to prohibit coverage. Audio recording of conferences between members of the Court, between co-counsel or between counsel and client is prohibited. Only two television cameras, each operated by one cameraperson, and one still photographer, using not more than two cameras, are permitted in the Supreme Court at any one time.

At the trial level, coverage is permitted in the courtroom and in immediately adjacent areas that are generally open to the public. Consent of parties and witnesses is not required, but the trial judge has discretion to prohibit, terminate, limit or postpone coverage on the judge's own motion or on a motion of a party or request of a witness.

Coverage of jurors is prohibited, except in the background when courtroom coverage would be otherwise impossible. While the rules do not ban coverage of specific types of cases, the reporter's note accompanying the rule suggests that coverage of sex offense, domestic relations, trade secret cases or offenses in which the victim is a minor may be inappropriate. This issue is left to the discretion of the trial judge to evaluate on a case-by-case basis. No proceeding that is closed to the public, by statute, may be covered. Only one television camera, operated by one cameraperson, and one still photographer, using not more than two cameras, are permitted in the

courtroom at any one time. The media are responsible for any pooling arrangements. There is no right to an interlocutory appeal of a decision to prohibit or limit coverage.

Authority: Rule 35, Vermont Rules of Appellate Procedure; Rule 53, Vermont Rules of Criminal Procedure; Rules 79.2 & 79.3, Vermont Rules of Civil Procedure; 79.2, Rules of Probate Procedure (2000).

Vermont Rules

Virginia

Extended media coverage of both trial and appellate proceedings is permitted in the sole discretion of the trial judge. Coverage of jurors as well as certain kinds of witnesses (police informants, minors, undercover agents and victims and families of victims of sexual offenses) is prohibited. Media coverage of adoption, juvenile, child custody, divorce, spousal support, sexual offense, trade secret and in camera proceedings and hearings on motions to suppress evidence is prohibited as well. Not more than two television cameras and one still photographer (using no more than two cameras) are allowed in the courtroom at any one time, and the media are responsible for any pooling arrangements.

Authority: Va. Code Ann. § 19.2-266 (1992).

Washington

The Courts of Washington permit extended media coverage of trial and appellate courtroom proceedings. The presiding judge may place conditions on the coverage, and the judge must expressly grant permission and ensure that the media personnel will not distract participants or impair the dignity of the proceedings. If a judge finds that media coverage should be limited, he or she must make, on the record, particularized findings that relate to specific circumstances of the proceeding. Judges may not rely on “generalized views” to limit media coverage.

The Bench-Bar-Press Committee, established in 1963, seeks to “foster better understanding and working relationships between judges, lawyers and journalists who cover legal issues and courtroom stories.” In addition to moderating disputes between the bench and the press, the Committee promulgates a nonbinding Statement of Principles as well as an annual report of its “Fire Brigade” (also known as its Liaison Committee).

Authority: Rule 16, General Rules, Washington Court Rules - State (West).

Bench-Bar-Press Committee
Fire Brigade's 2006 Report on Activities.

West Virginia

West Virginia’s rules permit coverage of both trial and appellate proceedings but also permits a presiding judge to terminate coverage if he or she “determines that coverage will impede justice

or create unfairness for any party." Requests for media coverage must be made at least one day in advance of the proceeding. The presiding judge may sustain or deny objections made by parties, witnesses and counsel to the coverage of any portion of a proceeding. Audio coverage of attorney-client meeting or any other conferences conducted between and among attorneys, clients, or the presiding judge is prohibited. Coverage that shows the face of any juror or makes the identity of any juror discernible is prohibited without juror approval. Only one television camera and one still photographer are allowed in the courtroom at any one time, and the media are responsible for any pooling arrangements.

Authority: Canon 3B(12), West Virginia Code of Judicial Conduct; Rules Governing Camera Coverage of Courtroom Proceedings, West Virginia Code Annotated; Rule 8, West Virginia Trial Court Rules (2007); Media Coverage of Courtroom Proceedings in the Supreme Court of Appeals, Rule 1 (2007)

Wisconsin

Extended coverage is permitted, but the presiding judge retains the authority to determine whether coverage should occur and, upon a finding of cause, to prohibit coverage. The trial judge retains the power, authority and responsibility to control the conduct of proceedings, including the authority over the inclusion or exclusion of the media and the public at particular proceedings or during the testimony of particular witnesses under the experimental and permanent guidelines. A presumption of validity attends objections to coverage of participants in cases involving the victims of crimes (including sex crimes), police informants, undercover agents, juveniles, relocated witnesses, divorce, trade secrets, and motions to suppress evidence. An individual juror may be photographed only after his or her consent has been obtained. Photographs of the jury are permitted in courtrooms where the jury is part of the unavoidable background, but close-ups, which enable jurors to be clearly identified, are prohibited. Audio coverage of conferences between an attorney and a client, co-counsel, or attorneys and the trial judge is also prohibited. Three television cameras and three still photographers, using not more than 2 cameras each, are allowed in the courtroom to cover a proceeding. Disputes regarding a court's application of Chapter 61 are treated as administrative matters, which may not be appealed.

Authority: Chapter 61, Wisconsin Supreme Court Rules (1999).

Wyoming

Extended media coverage is allowed in at both the appellate and trial court levels. A request for media coverage must be submitted 24 hours or more prior to the proceedings. The media may not make any close-up photography or visual recording of the members of the jury, nor may it make an audio recording of conferences between attorney and client or between counsel and the presiding judge. Additionally, equipment may not be moved during a proceeding. The trial judge has broad discretion in deciding whether there is cause for prohibition of coverage. Requests to limit media coverage enjoy a presumption of validity in cases involving the victims of crimes, confidential informants, and undercover agents, as well as in evidentiary suppression hearings.

Authority: Rule 804, Uniform Rules of the District Courts of the State of Wyoming; Rule 53, Wyoming Rules of Criminal Procedure, (2007).

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Tab 2

TELEVISING THE JUDICIAL BRANCH: IN FURTHERANCE OF THE PUBLIC'S FIRST AMENDMENT RIGHTS

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I. INTRODUCTION

The recent double murder trial of sports celebrity O.J. Simpson[1] resulted in a cacophony of voices raised in criticism of virtually everyone and everything associated with the proceedings, including the trial judge, the lawyers for the respective parties, various witnesses, and the jurors. The harshest criticism, however, has been reserved for the media's coverage of those proceedings, and in particular, for the courtroom camera, which has been singled out as the purported cause of every imaginable evil associated with the trial. Opportunistic politicians were quick to jump on the media-bashing bandwagon, calling for a reevaluation of the wisdom of allowing television cameras to record and broadcast court proceedings.[2]

When this movement is viewed in light of the history of the American court system and the entirety of empirical experience with

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1. People v. Simpson, No. BA097211 (L.A. Super. Ct. Oct. 3, 1995). The jury returned a "not guilty" verdict on October 3, 1995. Mr. Simpson is still defending civil suits brought against him by the families of Nicole Brown Simpson and Ronald Goldman, and by Nicole Brown Simpson's estate.

2. For example, California Governor Pete Wilson requested that the California Judicial Council revise California Rule of Court 980, which presently provides a mechanism through which judges can permit electronic coverage of judicial proceedings. Under Governor Wilson's proposal, the Rule would have been amended to forbid any electronic coverage of criminal court proceedings. Maura Oslan, *Key State Panel to Consider Major Changes for Trials*, L.A. TIMES, Oct. 31, 1995, at A1. This proposal was ultimately rejected by the Judicial Council. Mike Lewis, *Camera Ban Rejected by Council, 13-6*, L.A. DAILY J., May 20, 1996, at 3.

electronic coverage of the courts, it is apparent that while a reevaluation of such coverage is appropriate, it should proceed from a different perspective than that suggested by the chorus of *Simpson* critics. In this modern age, when most Americans rely on the broadcast media as their primary source of information,[3] and where advances in technology have eliminated any unique problems associated with electronic coverage, the real issue to be addressed is whether there remains any principled basis upon which broadcasters can be barred from covering the nation's courts. Moreover, when one considers this country's historical commitment to public access to judicial proceedings, the United States Supreme Court's substantial expansion of the constitutional right of access over the last two decades, and constitutional restrictions on government's ability to arbitrarily discriminate between different members of the media, a serious question arises as to whether excluding broadcasters from court proceedings is consistent with the First Amendment.[4]

As discussed in the following sections, the expansive constitutional right of public access to court proceedings, coupled with more than two decades of experimentation and experience with electronic coverage of judicial proceedings, mandates a presumption in favor of allowing such coverage. Furthermore, in an era where the Supreme Court has recognized that disparate treatment of different media is highly suspect, restricting the rights of the electronic media to report on judicial proceedings cannot be justified absent a compelling showing that such coverage would inherently have a unique, adverse effect on the pursuit of justice. Not surprisingly, the overwhelming weight of experience and evidence is to the contrary. Thus, the time has come

3. As of 1985, television was the principal source of news for 64 percent of the American public and the sole source of news for nearly half of this country's population. *See* Note, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 TEX. L. REV. 1053, 1083 & nn.169-70 (1993) [hereinafter, *Demystifying the Court*] (citing a 1985 Roper study related to public attitudes toward television).

4. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ." U.S. CONST. amend. I. In addition to the right to speak, the First Amendment includes the right to "receive information and ideas." Stanley v. Georgia, 394 U.S. 557, 564 (1969) (citations omitted); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972) (citations omitted). Thus, as the Supreme Court has stated:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged. . . .

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

for the courts to recognize a presumptive right of the electronic media to have access to judicial proceedings.

II. HISTORICAL OVERVIEW OF ELECTRONIC COVERAGE OF THE COURTS

As the law exists today in most states, electronic coverage of court proceedings is permitted. The United States Supreme Court made clear in 1981 that the Federal Constitution does not inherently prohibit such coverage,[5] and forty-seven states currently permit television coverage of at least some court proceedings.[6] For many years, however, courts were highly skeptical about—or even hostile to—the notion of televised judicial proceedings, in large part for reasons that are either irrelevant today or have nothing to do with the intrinsic nature of the broadcast medium. Indeed, over the years, many on the bench, including several Supreme Court justices, have anticipated that their aversion to television cameras in courtrooms will change as technological advances are made and the public's reliance on that medium becomes more commonplace.

The first suggested prohibition on the use of cameras in the courtroom came about before television was even invented, as a reaction to the frenzied media coverage of the 1935 trial of Bruno Richard Hauptmann. Hauptmann was charged with kidnapping national hero Charles Lindbergh's child. As a consequence of the media circus that ensued at his trial,[7] the American Bar Association began evaluating the propriety of allowing cameras in the courtroom, eventually adopting a rule that recommended prohibiting their use.[8]

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

6. *See* RADIO-TELEVISION NEWS DIRECTORS ASS'N, NEWS MEDIA COVERAGE OF JUDICIAL PROCEEDINGS WITH CAMERAS AND MICROPHONES: A SURVEY OF THE STATES i-iii (1994) [hereinafter STATE SURVEY].

7. *See* State v. Hauptmann, 180 A. 809 (N.J.), *cert. denied*, 296 U.S. 649 (1935). The Hauptmann trial was covered by approximately 700 news reporters, including 120 camera persons. Among other disruptions, the unruly photographers resorted to climbing over counsel tables and using blinding flash bulbs. *See* R.A. Strickland, *Cameras in State Courts: A Historical Perspective*, 78 JUDICATURE 128, 129 (1994). Notwithstanding this atmosphere, however, the appellate court rejected Hauptmann's claim that he was denied a fair trial because of the chaos in the courtroom and the massive publicity the murder trial received. *Hauptmann*, 180 A. at 827-29.

8. Adopted in 1937, Canon 35 of the A.B.A. Canons of Judicial Ethics recommended a prohibition on the use of cameras in the courtroom. 62 A.B.A. REP. 1123, 1134-35 (1937). In 1952, this Canon was amended to forbid television coverage of federal courts, as well as to bar photographic and broadcast coverage of state court trials. 77 A.B.A. REP. 610, 611 (1952). In 1972, the Canons of Judicial Ethics were replaced with the Model Code of Judicial Conduct, and

Thirty years later, when the United States Supreme Court was first called upon to evaluate the effect of televised proceedings on a criminal defendant's right to a fair trial, the presence of television cameras in the courtroom was still considered a novel concept that many viewed as inconsistent with the parties' fundamental rights to effective and impartial justice, and dignified and solemn proceedings. All but two states prohibited electronic media coverage of their trials, and the American Bar Association still maintained its position that no cameras should be permitted in courts. Many simply assumed—albeit without any empirical data or other evidence—that the presence of television cameras in the courts was intrinsically harmful. This negative assumption was undoubtedly furthered by the fact that, at that point in time, television coverage of important national events was still in a stage of relative infancy, and its significant influence upon the public was becoming the subject of extensive discussion and concern.[9]

It was against this backdrop that the United States Supreme Court considered the claim of criminal defendant Billie Sol Estes, an associate of President Lyndon Johnson, that the televising of pretrial and trial proceedings in 1962 had interfered with his ability to get a fair trial on swindling charges.[10] The majority of the Justices in *Estes* refused to adopt a per se rule that camera coverage is inherently unconstitutional as an interference with a defendant's Sixth Amendment rights.[11] However, based upon the particularly chaotic circumstances of this case, the Court held in a 5-4 decision that Estes' fair trial rights had been violated, and his conviction was reversed.

Canon 35 became Canon 3A(7). This new provision included a limited exception that permitted photographic or electronic recording and reproduction of court proceedings under certain circumstances, but only for instruction in educational facilities. The ABA's recommended ban on courtroom cameras was finally eased in 1978.

9. For example, the televised presidential debates between John F. Kennedy and Richard M. Nixon were believed by many to have meant the difference between victory and defeat for Kennedy. The unforgettable visual images of Kennedy's subsequent assassination, and the early coverage of the Vietnam War, combined to make television the topic of many commentators' analyses.

10. Estes v. Texas, 381 U.S. 532 (1965). Over Estes' objection, the trial judge had exercised his discretion to allow coverage under a Texas rule that permitted television coverage of pretrial and trial proceedings.

11. There were six separate opinions written by the Justices in *Estes*. Justice Clark, writing for the Court, and Chief Justice Warren, Justice Douglas and Justice Goldberg, who joined the majority opinion, believed that televising the *Estes* criminal trial was a per se violation of the defendant's due process rights. Justice Harlan, however, who provided the fifth vote in support of the judgment, did not join in the finding of per se unconstitutionality. *See* Chandler v. Florida, 449 U.S. 560, 570-71 (1981) (analyzing the separate opinions in *Estes*).

Of primary importance to the majority of the Justices was the highly disruptive atmosphere during pretrial hearings. Justice Clark, writing for the Court, described the courtroom during those hearings as follows:

> [A]t least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's desk and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings.[12]

Although the presence of cameras at the actual *Estes* trial was more confined in compliance with new orders by the trial judge,[13] the Supreme Court concluded that the highly disruptive atmosphere at the important and widely followed pretrial hearings (some of which were conducted in the jury's presence) was amply sufficient to interfere with the defendant's due process rights.[14]

The Court clearly felt misgivings regarding the use of this relatively new medium in the novel setting of a courtroom. Justice Clark's opinion for the Court repeatedly emphasized his concern that the mere presence of television cameras would signal to a jury that a case is "notorious."[15] In today's society, however, where security cameras are noticeable in every public building, most courtrooms and even convenience stores, the "presence" of a camera is hardly meaningful at all. Justice Harlan—who cast the swing vote in favor of defendant Estes—presciently cautioned that the decision was not the definitive answer on electronic coverage, explaining that

> the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. *If and when that day arrives the constitutional*

12. *Estes*, 381 U.S. at 536 (citations omitted). Chief Justice Warren's concurring opinion provided further description, noting that two of the cameras were set up inside the bar, that "photographers [were] roaming at will throughout the courtroom," and at one point a "cameraman wandered behind the judge's bench and snapped his picture." *Id.* at 553 (Warren, C.J., concurring).

13. For example, for the trial, a booth painted the color of the interior of the courtroom was installed in the back of the room to house the photographers and their equipment. *Id.* at 537; *see also id.* at 606-09 (Stewart, J., dissenting). Even then, as Chief Justice Warren noted, there were four television cameras and several still photographers present, all of whom were "clearly visible to all in the courtroom." *Id.* at 556 (Warren, C.J., concurring).

14. *Id.* at 551.

15. *Id.* at 545.

> *judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause.* At the present juncture . . . televised trials, at least in cases like this one, possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned.[16]

Even Justice Clark recognized the temporal nature of the majority's ruling, noting that "*at this time* those safeguards [necessary to ensure solemn court proceedings] do not permit the televising and photographing of a criminal trial."[17] However, "*[w]hen the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case.*"[18] Yet, based upon the disruptive scene in the courtroom, and the fact that television was a relatively new medium, a majority of justices in *Estes* were willing to assume that cameras were inherently harmful to the pursuit of justice.[19] Having made this assumption, the *Estes* majority also stated, in *dicta*, that there was no First Amendment right of electronic media access to court proceedings because such a right would interfere with "the maintenance of absolute fairness in the judicial process."[20]

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16. *Id.* at 595-96 (Harlan, J., concurring) (emphasis added). Justice Harlan further limited his concurrence in *Estes*, stating that his holding was based in large part on the unusual facts presented by that case, including the fact that it was a "criminal trial of great notoriety." *Id.* at 587. Subsequent decisions by the Supreme Court have recognized the extremely limited nature of Justice Harlan's opinion. *See, e.g.*, Chandler v. Florida, 449 U.S. 560, 573 (1981); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 552 (1976).

17. *Estes*, 381 U.S. at 540 (emphasis added).

18. *Id.* (emphasis added). Similarly, a dissenting Justice Stewart—writing for four members of the Court—had the foresight to state that he was "wary" of imposing a "*per se* rule" against televising court proceedings that may "serve to stifle or abridge true First Amendment rights . . . in the light of future technology." *Id.* at 604 (Stewart, J., dissenting); *cf. id.* at 615-16 (White, J., dissenting) (commenting that because of the "very limited amount of experience in this country with television coverage of trials," the materials available to evaluate this coverage are too sparse to make a pronouncement about a constitutional rule).

19. Indeed, many of the concerns expressed by members of the Court in *Estes*—including worries about the possible impact upon witness testimony, the burden placed on the trial judge and the possible harassment of the defendant—were not supported by any empirical evidence, and have since been debunked by the states' extensive experience with courtroom cameras and the numerous empirical studies of those experiences. *See infra* notes 78-88.

20. *Estes*, 381 U.S. at 539; *id.* at 585 (Warren, C.J., concurring); *id.* at 587-88 (Harlan, J., concurring). Justice Stewart, writing for four dissenting justices in *Estes*, not only pointed out that this conclusion is purely *dicta*, but also took strong exception to it:

> While no First Amendment claim is made in this case, there are intimations in this opinion filed by my Brethren in the majority which strike me as disturbingly alien to the First and Fourteenth Amendments' guarantees against federal or state interference with the free communication of information and ideas. The suggestion that there are

In 1966, one year after deciding *Estes*, the Court reversed another murder conviction on grounds of prejudicial media coverage, holding that adverse pretrial publicity and media dominance during the trial had denied Sam Sheppard his right to a fair trial.[21] As in the *Estes* case, the problems in *Sheppard* clearly were not the result of a single, unobtrusive courtroom camera—indeed, the actual proceedings were not broadcast at all—but rather with the overwhelming amount of media coverage and the complete paucity of any measures that could have safeguarded Sheppard's rights.[22]

For more than a decade, these two cases were the foundation of many opponents' arguments against electronic coverage of judicial proceedings, even though both cases involved unique circumstances unrelated to the presence of a single video camera—or even a video camera at all, in the *Sheppard* case—recording the proceedings in the courtroom. By the time the United States Supreme Court again considered the impact of televised coverage of judicial proceedings,[23] fifteen years after *Estes* and *Sheppard*, the circumstances both inside and outside the courtroom had changed dramatically.

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limits upon the public's right to know what goes on in the court causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms. And the proposition that non participants in the trial might get the "wrong impression" from unfettered reporting and commentary contains an invitation to censorship which I cannot accept. Where there is no disruption of the "essential requirement of the fair and orderly administration of justice," "[f]reedom of discussion should be given the widest range."

Id. at 614-15 (Stewart, J., concurring) (citations omitted). Five years after *Estes* one circuit court took a somewhat more liberal view of cameras in the courtroom than the majority of Justices in *Estes*, but still held that such access is within the trial judge's discretion. Dorfman v. Meiszner, 430 F.2d 558, 562 (7th Cir. 1970) (holding that a trial court properly acted within its discretion in prohibiting photographs and broadcasting inside, and adjacent to, the courtrooms).

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

22. In addition to the prejudicial manner in which the Coroner's inquest was conducted, the Supreme Court pointed to the prejudicial and disruptive atmosphere at the trial itself, including the crowds of reporters and photographers in the courtroom whose movements in and out of the courtroom made it "difficult for witnesses and counsel to be heard"; the inability of counsel to confer privately with the defendant or the judge; the identification and photographing of jurors (who were not sequestered) during the trial, "all" of whom received calls about the case; and the refusal of the trial judge to take any ameliorative steps, such as moving or continuing the trial, sequestering the jury, or subjecting them to voir dire about their exposure to publicity and other outside influences. *Id.* at 340-45.

23. The access rights of the electronic media were raised in a different context in Nixon v. Warner Communications, 435 U.S. 589 (1978). As discussed below, although this case has frequently been relied upon by lower courts in holding that there is no First Amendment right of access for broadcasters, the unique circumstances of that case make it questionable authority, at best.

In 1981, when the Court decided *Chandler v. Florida*,[24] twenty-eight states had adopted rules permitting televised coverage of at least some court proceedings, and twelve more states were experimenting with such coverage.[25] The ABA Committee on Fair Trial-Free Press had recommended relaxing its prohibition on electronic coverage, and the Conference of State Chief Justices had almost unanimously approved a resolution in 1978 to promulgate standards permitting electronic coverage in state courts.[26] Preliminary empirical data concerning the potential impact of televised coverage upon trial participants was positive, in contrast to the speculative fears expressed by several Justices in *Estes* when television "was in its relative infancy."[27] Furthermore, technological advances had substantially reduced or eliminated many of the negative factors that had contributed to the distracting atmosphere in *Estes*, such as cumbersome equipment, blinding lights and multiple camera technicians.[28]

The combination of all of these circumstances led a unanimous Court in *Chandler* to hold that televised criminal proceedings do not inherently interfere with a criminal defendant's constitutional right to a fair trial, and that there was no empirical evidence to support such a claim.[29] Thus, according to the Court, the Constitution does not prohibit electronic coverage of criminal trials, absent a showing of actual

24. 449 U.S. 560 (1981).

25. *Id.* at 566 n.6.

26. *Id.* at 562-65 & n.6.

27. *Id.* at 574.

28. *Id.* at 576. A year before *Chandler* was decided, the Florida Supreme Court had extensively examined the impact of televised court proceedings and reached a conclusion contrary to *Estes* about the constitutionality of electronic coverage. That court was "persuaded that on balance there is more to be gained than lost" by permitting such coverage. *In re* Petition of Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 780 (Fla. 1979). Noting that Florida's new camera access rule was a reflection of the state's commitment to open government, the Florida Supreme Court stated:

> The court system is no less an institution of democratic government in our society. Because of the court's dispute resolution and decision-making role, its judgments and decrees have an equally significant effect on the day-to-day lives of the citizenry as the other branches of government. It is essential that the populace have confidence in the process, for public acceptance of judicial judgments and decisions is manifestly necessary to their observance.

Id. (citations omitted).

29. *Chandler*, 449 U.S. at 570-74. Unlike the *Estes* trial, in *Chandler* the portions of the trial that were broadcast were captured by a single camera. The Court noted that the specific issue of whether there is a First Amendment right to televise court proceedings was not before the court in *Chandler*. *Id.* at 569-70.

prejudice.[30] In addition, the *Chandler* Court limited the *Estes* holding to its facts, and to those cases "utterly corrupted by press coverage."[31]

Following the green light provided by the Court in *Chandler*, today forty-seven states permit electronic coverage of at least some portion of judicial proceedings,[32] and courts across the country have found that permitting such coverage does not violate a criminal defendant's Sixth Amendment rights.[33] Nonetheless, in the absence of any express directive from the United States Supreme Court, a number of lower courts have held that there is no First Amendment right to electronically broadcast court proceedings.[34] These decisions improperly rely on the Supreme Court's decision in *Estes*—which, as explained above, should no longer be considered authoritative law in light of *Chandler*—and on the Court's decision in *Nixon v. Warner Communications*,[35] which involved entirely different circumstances.

30. *Id.* at 578-79, 582; *id.* at 588 (White, J., concurring). In *Chandler*, the defendants failed to offer any evidence that they were injured by the electronic coverage.

31. *Id.* at 573 n.8. The majority decision appeared to go to great pains to avoid the need to overrule *Estes*, finding that *Estes* did not establish a per se constitutional violation for electronic coverage. Justices Stewart and White, however, wrote concurring opinions in which they set forth their respective beliefs that *Estes* should be expressly overruled. *Id.* at 583-86 (Stewart, J., concurring); *id.* at 586-89 (White, J. concurring). Even without expressly overruling *Estes*, however, the Court's decision in *Chandler* makes clear that *Estes* provides no support for a broad ban on electronic coverage of judicial proceedings.

32. *See* STATE SURVEY, *supra* note 6.

33. *See infra* part IV.

34. *See, e.g.*, Westmoreland v. Columbia Broadcasting Sys., Inc., 752 F.2d 16, 21-24 (2d Cir. 1984) (rejecting Cable News Network's ("CNN") First Amendment arguments, the Second Circuit affirmed a New York district court order prohibiting live television coverage of the trial of General William Westmoreland's libel suit against CBS, and upheld the local rule prohibiting such coverage of trials), *cert. denied*, 472 U.S. 1017 (1985); United States v. Hastings, 695 F.2d 1278 (11th Cir.) (holding in the context of the trial of federal district court judge Alcee Hastings, who was charged with conspiracy and obstruction of justice, that there was no First Amendment right to televise the trial), *cert. denied*, 461 U.S. 931 (1983); United States v. Edwards, 785 F.2d 1293 (5th Cir. 1986) (holding that there was no right to televise the trial of Louisiana governor Edwin Edwards, who was charged with fraud and racketeering); Conway v. United States, 852 F.2d 187 (6th Cir.), *cert. denied*, 488 U.S. 943 (1988) (no First Amendment right to televise judicial proceedings); United States v. Kerley, 753 F.2d 617, 620-22 (7th Cir. 1985) (criminal defendant had no constitutional right to insist that his trial be videotaped); *see also* United States v. Yonkers Bd. of Educ., 747 F.2d 111, 113-14 (2d Cir. 1984); Combined Communications Corp. v. Finesilver, 672 F.2d 818, 821 (10th Cir. 1982) (addressing district court ruling prohibiting televising settlement negotiations in a federal courthouse, the Tenth Circuit stated that "[t]he First Amendment does not guarantee the media a constitutional right to televise inside a courthouse"); Associated Press v. Bost, 656 So. 2d 113, 117 (Miss. 1995).

Several commentators have written that the First Amendment analysis in these opinions is flawed in light of recent Supreme Court precedent in the area of access to court proceedings, and advances in broadcasting technology. *See, e.g.*, R.H. Frank, *Cameras in the Courtroom: A First Amendment Right of Access*, 9 HASTINGS COMM. & ENT. L.J. 748, 765-72 (1987).

35. 435 U.S. 589 (1978).

In *Nixon*, the Supreme Court was faced with a request by several news organizations for permission to copy and sell audiotapes made by former President Richard Nixon. The audiotapes had been introduced into evidence in a criminal trial involving the Watergate conspirators. The Court did not squarely address the question of whether electronic coverage of court proceedings is permitted or required by the First Amendment; the sole issue was whether third party news organizations had the right to *copy* items that had been subpoenaed from the former President and introduced into evidence. As Justice Powell wrote for the majority:

> [T]he issue presented in this case is not whether the press must be permitted access to public information to which the public generally is guaranteed access, but whether these copies of the White House tapes—to which the public has never had *physical* access—must be made available for copying.[36]

In a split decision, the Court held that under these circumstances, there is no constitutional right to have physical access to the tapes for broadcast.

The application of *Nixon* to the current electronic coverage debate is questionable, at best. First, the majority's reference to the right to record and broadcast court proceedings relied on *Estes*,[37] which is hardly authoritative in light of the Court's later decision in *Chandler*. Second, and more importantly, the Court made clear that its decision was strongly influenced by the "additional, unique element" of the *Nixon* case; namely, that the records in question fell within the recently enacted Presidential Recordings Act, which sets forth specific limitations and procedures for public access to presidential documents.[38] Finally, none of the arguments advanced in support of a constitutional right of access for electronic media were considered by the Court in *Nixon*. Consequently, the reliance by some lower courts on *Nixon* as somehow resolving the First Amendment issues surrounding a right to televise judicial proceedings is misplaced.

As the following section of this Article demonstrates, there are two separate strands of cases which strongly support a constitutional right for electronic coverage under the First Amendment. The first strand of cases involves the well-established rights of the public and

36. *Id.* at 609. The audiotapes had been played in open court, and copies of transcripts were made available to the public and press. *Id.*

37. *Id.* at 610.

38. *Id.* at 603.

press to have access to judicial proceedings, and the need for electronic coverage if those rights are to be meaningful in today's society. The second strand of cases involves the constitutional limitations on the government's ability to arbitrarily discriminate between different mediums of communication, particularly where, as here, there is no compelling justification for such differential treatment. Arguably, either or both of these lines of precedent establish a constitutional right of access to the courts for electronic media. At a minimum, it is clear from these cases that electronic coverage substantially furthers the public's interests under the First Amendment, and for this reason alone is entitled to a presumption favoring such access absent a compelling justification to the contrary.

III. ELECTRONIC COVERAGE OF JUDICIAL PROCEEDINGS FURTHERS, AND IS ARGUABLY REQUIRED BY, THE PUBLIC'S RIGHTS UNDER THE FIRST AMENDMENT.

A presumption in favor of allowing electronic coverage of judicial proceedings is not only consistent with, but is arguably required by, two important constitutional doctrines: the public's well-established constitutional right of access to the courts and the prohibition against discriminatory treatment of different members of the media.

A. The History of Open Judicial Proceedings in this Country Favors Permitting Electronic Coverage of the Courts

The origins of proceedings that evolved into the modern criminal and civil trials date back to the days before the Norman Conquest, when disputes were brought before local courts called "moots."[39] Attendance at the "moots" was required of all freemen, who were "called upon to render judgment."[40] Although the requirement of attendance was relaxed as the jury system evolved, the concept that all members of a community should observe the proceedings was not lost. As explained by one general court decision in 1313 and recited more than 600 years later by the United States Supreme Court:

> [T]he King's will was that all evil doers should be punished after their deserts, and that justice should be ministered indifferently to

39. This historical evolution is traced in detail in the United States Supreme Court's decision in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-65 (1980).

40. *Id.* at 565.

> rich as to poor, *and for the better accomplishing of this*, he prayed the community of the county *by their attendance* there to lend him their aid in the establishing of a happy and certain peace that should be both for the honour of the realm and for their own welfare.[41]

This tradition of attendance did not change over the course of time, as the Supreme Court recognized in its historical analysis. Quoting from a treatise by Sir Thomas Smith published in 1565, the Court noted the "constant" public nature of criminal proceedings:

> All the rest [after the written indictment] is doone openlie in the presence of the Judges, the Justices, the enquest, the prisoner, *and so manie as will or can come so neare as to heare it*, and all depositions and witnesses given aloude, *that all men may heare from the mouth of the depositors and witnesses what is saide.*[42]

This tradition was carried over into the American colonies, where trials were held "in open Court, *before as many of the people as chuse to attend.*"[43]

The Supreme Court relied on this clear tradition in reaching its decision in *Richmond Newspapers* that the right of a "public" trial belongs not only to the accused, but to the public and press as well. After reviewing the historical analogs to the modern open trial, the Court concluded:

> [T]he historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial. Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.[44]

Recognizing that modern society prevents most people from physically attending trials, the Court went on to specifically address the need for access by members of the media:

> Instead of acquiring information about trials by first hand observation or by word of mouth from those who attended, people now

41. *Id.* at 566 (quoting 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 268 (1927)).

42. *Id.* (quoting THOMAS SMITH, DE REPUBLICA ANGLORUM 101 (Alston ed., 1972)).

43. *Id.* at 568-69 (quoting 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 107 (1904)).

44. *Id.* at 569 (citations omitted).

> acquire it chiefly through the print *and electronic media.* In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This "contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system. . . ."[45]

The Court also recognized the intrinsic value of having court proceedings be as open as possible to public scrutiny:

> When a shocking crime occurs, a community reaction of outrage and public protest often follows. . . . Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers. . . . It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," and *the appearance of justice can best be provided by allowing people to observe it.*[46]

In keeping with the recognition of the importance of public access to and observation of court proceedings, the United States Supreme Court has repeatedly emphasized and expanded this constitutional right since *Richmond Newspapers.* Two years after *Richmond Newspapers*, in *Globe Newspaper Co. v. Superior Court*,[47] the Court struck down a state law closing courtrooms during the testimony of minors who were victims of sex crimes. Furthermore, the Court strengthened its holding in *Richmond Newspapers* by requiring that a trial judge make specific findings on the record to justify the closure of

45. *Id.* at 572-73 (emphasis added) (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976)). Courts have frequently found that the media is entitled to greater First Amendment protection than individuals when the media fulfills its role as a surrogate for the public. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 16-17 (1978) (Stewart, J., concurring).

46. *Richmond Newspapers*, 448 U.S. at 571-72 (emphasis added) (citations omitted).

47. 457 U.S. 596 (1982).

a criminal trial. The Court also held that closure of judicial proceedings is subject to strict scrutiny: Closure is permissible only in the limited circumstances where denial of such access is justified by a "compelling governmental interest" and such closure order is "narrowly tailored to serve that interest."[48]

The Supreme Court subsequently extended this constitutional right of access to judicial proceedings to several contexts beyond actual trial. For example, in *Press-Enterprise Co. v. Superior Court*[49] ("*Press-Enterprise I*") the Court upheld the First Amendment right of access to jury voir dire. Shortly thereafter, the Court held in *Press-Enterprise Co. v. Superior Court*[50] ("*Press-Enterprise II*") that the First Amendment right of access applies to preliminary hearings. In these cases, as in the earlier decisions, the Supreme Court emphasized the importance of indirect public scrutiny of the judicial process based upon the direct observations of interested individuals and organizations:

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.[51]

The Court further noted that "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[52]

In recognizing the importance of public scrutiny, the Court rejected the notion that a post-trial review of transcripts is sufficient to satisfy this important interest. As Justices Marshall and Brennan observed in *Richmond Newspapers*:

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48. *Id.* at 606-07.

49. 464 U.S. 501 (1984). Echoing the Court's earlier holding in *Richmond Newspapers* and *Globe*, the *Press-Enterprise I* Court stated:

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

Id. at 510.

50. 478 U.S. 1 (1986).

51. *Id.* at 13 (quoting *Press-Enterprise I*, 464 U.S. at 508).

52. *Id.* (quoting *Richmond Newspapers*, 448 U.S. at 572).

> In advancing these purposes [of open judicial proceedings], the availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the "cold" record is a very imperfect reproduction of events that transpire in the courtroom. Indeed, to the extent that publicity serves as a check upon trial officials, "[r]ecordation . . . would be found to operate rather as cloa[k] than chec[k]; as cloa[k] in reality, as chec[k] only in appearance."[53]

The reason is clear: Critical components of any trial include the demeanor, tone, credibility and contentiousness—and perhaps even the competency and veracity—of trial participants. Even a complete transcript, which is rarely available to the public, cannot provide such critical, nonverbal information.

Thus, the history of this country's jurisprudence demonstrates that maximum public access is the accepted ideal, and the United States Supreme Court has repeatedly reaffirmed this principle in the past fifteen years. Moreover, although the Court has not directly addressed this need for maximum public access in terms of allowing electronic coverage, it cannot be seriously disputed that, in today's society, only electronic coverage can provide realistic access for most segments of the public to most judicial proceedings.

In part, this is a function of the importance television now plays in individuals' daily lives. Television has become a primary source of information for the public worldwide. In the United States, for example, " '[t]elevision is our . . . most common and constant learning environment, the mainstream of our culture. In a typical American home, the set is on for more than 7 hours each day, engaging its audience in a

53. *Richmond Newspapers*, 448 U.S. at 597 n.22 (Brennan, J., and Marshall, J., concurring) (alteration in original) (quoting *In re* Oliver, 333 U.S. 257, 271 (1978)). In Kleindienst v. Mandel, 408 U.S. 753 (1972), the Court rejected the government's proposition that access to a lecturer's ideas through books and speeches—and through " 'technological developments,' such as tapes or telephone hook-ups"—satisfied the First Amendment rights of professors who wished to hear the lecturer in person. "This argument [by the government] overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning." *Id.* at 765. In Cable News Network, Inc. v. American Broadcasting Cos., 518 F. Supp. 1238 (N.D. Ga. 1981), while discussing the differences between television and other forms of media, the district court commented that "visual impressions can and sometimes do add a material dimension to one's impression of particular news events. Television film coverage of the news provides a comprehensive visual element and an immediacy, or simultaneous aspect, not found in print media." *Id.* at 1245.

ritual most people perform with great regularity.' "[54] In large part because of the pervasiveness of television, electronic coverage of the government—the legislative branch, as well as the courts—has become commonplace.

Furthermore, as the Supreme Court has long recognized, the physical space limitations of a particular courtroom and geographic and other limitations on the public's ability to personally attend judicial proceedings validate the media's claim that it acts as a "surrogate" for the public in providing access to those proceedings.[55] While Chief Justice Burger has specifically referred to both the print and electronic media as fulfilling that important surrogate role, only television has the ability to provide the public with a close visual and aural approximation of actually witnessing a trial without physical attendance. Thus, in today's society, a ban on television coverage of a given court proceeding means that only a handful of individuals can have meaningful access to that proceeding. As Chief Justice Burger noted in *Richmond Newspapers*, such a limited view of the First Amendment's right to attend court proceedings is unacceptable:

> [I]n the context of trials . . . the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors. . . . "For the First Amendment does not speak equivocally. . . . It must be taken as a command of the

54. *See Demystifying the Court*, *supra* note 3, at 1083 & n.172 (citation omitted); *see also Cable News Network*, 518 F. Supp. at 1245 ("[I]t cannot be denied that television news coverage plays an increasingly prominent part in informing the public at large of the workings of government. Many citizens likely rely on television as their sole source of news.") Frank, *supra* note 34, at 774-75; Thomas R. Julin, *The Inevitability of Electronic Media Access to Federal Courts*, 1983 DET. C. L. REV. 1303, 1310 (1983) ("Television provides the most accurate and effective tool to report that has ever been devised and the public today relies on the medium more than any other for complete, honest, and objective information about virtually all news events."); E.E. Stolnick, *Television News and the Supreme Court: A Case Study*, 77 JUDICATURE 21, 22 (1993) (stating that most of the public reports that its main or only source of news is television); Diane L. Zimmerman, *Overcoming Future Shock:* Estes *Revisited, or a Modest Proposal for the Constitutional Protection of the News-Gathering Process*, 1980 DUKE L.J. 641, 659 (1980) ("When the first amendment was adopted, the mass communicators were the publishers of eighteenth century broadsheets and pamphlets; now they are the national television and radio networks. The Supreme Court firmly recognizes that speech can occur in a variety of forms, many of which were unknown or arguably unpalatable to the framers.") (footnotes omitted).

55. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980). A good example of this is the O.J. Simpson criminal trial where there were only approximately 6 to 10 seats assigned to the "public," and approximately 27 seats available for the dozens of national and international media representatives. *See, e.g.*, *Life Imitates Art, But This is Los Angeles*, BOSTON HERALD, Jan. 25, 1995, at 20; Steven Brill, *Cameras in the Court and Original Intent*, CONN. L. TRIB., Jan. 29, 1996, at 43.

> broadest scope that explicit language, read in the context of a liberty-loving society, will allow."[56]

Thus, true public "access," consistent with the Federal Constitution and this nation's history, requires courts to permit televised coverage of their proceedings.

B. Forbidding Electronic Coverage Absent a Compelling Justification Also Constitutes Impermissible Discrimination in Contravention of Important First Amendment Principles.

Following *Chandler v. Florida*, a second line of cases developed in support of a presumption favoring electronic coverage. This second line of cases involves restrictions on the government's ability to arbitrarily discriminate among different media. In recent years, the Supreme Court and lower courts have repeatedly held that differential treatment of different media is impermissible under the First Amendment,[57] absent an overriding governmental interest.[58] For example, the Court has invalidated discriminatory tax schemes only imposed upon certain types of media.[59] As the Court explained, "[t]his is [unconstitutional] because selective taxation of the press—either singling

56. *Richmond Newspapers*, 448 U.S. at 576 (emphasis added) (quoting Bridges v. California, 314 U.S. 252, 263 (1941)).

57. It was established long ago that the First Amendment applies to all media. *See, e.g.*, Superior Films, Inc. v. Department of Educ., 346 U.S. 587, 589 (1954) (Douglas, J., concurring) (stating that although motion pictures are different than "public speech, the radio, the stage, the novel, or the magazine," the First Amendment draws no distinction between the various methods of communicating ideas"); United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948) ("[M]oving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.").

58. The charge that the denial of television coverage of trials violates the equal protection clause of the Fourteenth Amendment was rejected by the fragmented Supreme Court in *Estes*; however, for the reasons set forth in Part II, *supra*, that decision should no longer be viewed as reliable precedent. *See generally* Estes v. Texas, 381 U.S. 532, 540 (1965) ("[C]ourts [cannot] be said to discriminate where they permit the newspaper reporter access to the courtroom. . . . The television and radio reporter has the same privilege. . . . The news reporter is not permitted to bring his typewriter or printing press."); *id.* at 589-90 (Harlan, J., concurring). Indeed, *Estes*' dated approach has been roundly criticized by commentators. *See, e.g.*, Zimmerman, *supra* note 54, at 653 (recasting the equal protection argument by arguing that if print reporters are permitted to bring writing instruments and papers into a courtroom, the broadcast media should be permitted to bring the tools relevant to them: "If this kind of evenhanded treatment is denied, reporters are not treated in a functionally equal way: none but the traditional print journalists may exploit the full potential of their medium of communication."); Charles E. Ares, Chandler v. Florida: *Television, Criminal Trials, And Due Process*, 1981 Sup. Ct. Rev. 157, 177 (arguing that electronic broadcasters cannot constitutionally be treated differently from print media, and thus the broadcast media should be given access to the courtroom).

59. *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 590 (1983) (holding that a special use tax accessed against a publication for the use of ink and

out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State."[60]

In addition to limits imposed by the First Amendment against discrimination against particular members of the media, the Supreme Court has held that the Fifth Amendment's Equal Protection and Due Process Clauses also bar such discrimination. As the Court noted in *Police Department v. Mosley*[61]:

> [U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard.[62]

Thus, discrimination in the area of First Amendment rights cannot be content-based, and any differential treatment must be tailored to serve a substantial government interest. Since eliminating television coverage significantly impacts upon the *content* of the information conveyed about a particular trial, this scrutiny is required in any analysis of whether precluding the electronic media from court proceedings while permitting access to others violates the Equal Protection Clause and the First Amendment.

In cases that deal more directly with access-related issues, lower courts have held that the Federal Constitution does not permit government officials to discriminate between members of the media. For example, in *Cable News Network, Inc. v. American Broadcasting*

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paper violated the First Amendment both by singling out newspapers for the special tax, and by only targeting a small group of newspapers through the use of an exception for the first $100,000 in costs for any calendar year; the effect was to eliminate all but a handful of newspapers from being subject to the tax); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 232-33 (1987) (holding that a tax imposed upon magazines and newspapers was discriminatory and violated the First Amendment, where some specialty magazines were exempt under the statutory scheme; because Arkansas' selection application was discriminatory in that it treated different magazines differently, the Court expressly declined to address the argument that the tax was also unconstitutional to the extent newspapers and magazines were treated differently).

60. *Ragland*, 481 U.S. at 228.

61. 408 U.S. 92, 96 (1972).

62. *Id.* at 96 (citation omitted).

Cos.,[63] a Georgia court held that discriminatory treatment of television media in coverage of the White House is unconstitutional. Specifically, the court recognized the First Amendment right of the electronic media to be included in a White House media pool that was open to other types of media. In reaching this conclusion, the court noted that only television coverage "provides a comprehensive visual element and an immediacy, or simultaneous aspect, not found in print media."[64]

Reaching a similar conclusion, the First Circuit in *Anderson v. Cryovac, Inc.*[65] reviewed a protective order entered by the trial court that prohibited the parties from divulging information obtained during discovery, but exempted disclosures to one public media organization that was preparing a documentary film about the case. A newspaper challenged the order as discriminatory. Although the First Circuit acknowledged that an order barring all disclosure of discovery materials would have been within the trial court's discretion, it held that the disparate treatment of different types of the media rendered the protective order unconstitutional:

> A court may not selectively exclude news media from access to information otherwise made available for public dissemination. . . . The danger in granting favored treatment to certain members of the media is obvious: it allows the government to influence the type of substantive media coverage that public events will receive. Such a practice is unquestionably at odds with the first amendment. Neither the courts nor any other branch of the government can be allowed to affect the content or tenor of the news by choreographing which news organizations have access to relevant information.[66]

The Second Circuit engaged in a similar analysis in *American Broadcasting Cos. v. Cuomo*,[67] where the court held that there would be irreparable harm to the public and ABC television if the network was not given immediate access to the campaign headquarters of the two New York City mayoral candidates, Mario Cuomo and Edward

63. 518 F. Supp. 1238 (N.D. Ga. 1981).

64. *Id.* at 1245 ("[T]he Court finds that the total exclusion of television representatives from White House pool coverage denies the public and the press their limited right of access, guaranteed by the First Amendment.").

65. 805 F.2d 1 (1st Cir. 1986).

66. *Id.* at 9. The First Circuit also objected to granting only one "privileged" member of the media access to the discovery materials, reasoning that the chosen outlet would then "shape the form and content of the initial presentation of the material to the public." *Id.*

67. 570 F.2d 1080 (2d Cir. 1977).

Koch.[68] The Second Circuit rejected the candidates' contentions that they could selectively exclude some members of the media through providing access by invitation only:

> [O]nce the press is invited, including the media operating by means of instantaneous picture broadcast, there is a dedication of those premises to public communications use.... The issue is not whether the public is or is not generally excluded, but whether the members of the broadcast media are generally excluded.
>
> ... [O]nce there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable.[69]

Thus, in the fifteen years since *Chandler* was decided, courts have consistently held that public officials cannot arbitrarily discriminate

68. ABC television crews were on strike and management personnel were operating the network's cameras. The candidates had threatened to have any nonunion ABC crews arrested for trespassing. No other television news organizations were similarly threatened because none of them had striking employees. *Id.* at 1082.

69. *Id.* at 1083; *see also* Times-Picayune Publishing Corp. v. Lee, 15 MEDIA L. REP. (BNA) 1713, 1719 (E.D. La. 1988) (holding that a sheriff violated the First Amendment by directing his staff not to respond to questions of reporters from plaintiff newspaper unless they were submitted in writing); United States v. Peters, 754 F.2d 753, 763 (7th Cir. 1985) (holding that a court order barring one reporter's access to trial exhibits, while permitting other reporters to have access, is unconstitutional; "Arbitrary exclusion jeopardizes the first amendment's 'core purpose' of insuring informed debate of issues crucial to our democratic government"); Cable News Network, Inc. v. American Broadcasting Cos., 518 F. Supp. 1238 (N.D. Ga. 1981) (temporary restraining order was granted to a television network which claimed its First and Fifth Amendment rights were violated by defendants, who unreasonably interfered with the rights of the press to cover the White House and who treated the television media in a different manner than other forms of news media); Southwestern Newspapers Corp. v. Curtis, 584 S.W.2d 362, 364-54 (Tex. Civ. App. 1979) (finding a First Amendment violation when the district attorney required reporters of a disfavored newspaper to obtain advance appointments not required of other reporters); Sherrill v. Knight, 569 F.2d 124, 129 (D.C. Cir. 1977) (holding that access to White House press conferences via press passes could not be denied to one reporter "arbitrarily or for less than compelling reasons"); Borreca v. Fasi, 369 F. Supp. 906, 909-10 (D. Haw. 1974) (holding that a mayor could not bar a newspaper reporter from access to his press conferences without violating the First Amendment and Equal Protection Clause, even though he believed the reporter was biased against him; the court rejected the mayor's argument that there was no constitutional violation because the newspaper could send another reporter to cover the conferences and the reporter in question could have access to news releases and other written material); Quad-City Community News Serv., Inc. v. Jebens, 334 F. Supp. 8, 15 (S.D. Iowa 1971) (finding a violation of the First Amendment and Equal Protection Clauses where city officials denied reporters for an underground newspaper access to police files available to other reporters: "Any classification which serves to penalize or restrain the exercise of a First Amendment right, unless shown to be necessary to promote a compelling governmental interest is unconstitutional."); McCoy v. Providence Journal Co., 190 F.2d 760, 764-66 (1st Cir.), *cert. denied*, 342 U.S. 894 (1951) (finding that a city's refusal to permit a newspaper to inspect municipal tax resolutions, while providing competing newspaper access to that material, violated the Fifth Amendment).

regarding access to official proceedings and records without running afoul of the Fifth and Fourteenth Amendments. During the same period, the Supreme Court has broadly interpreted the public's right of access to the courts. Thus, although lower courts have so far refused to extend constitutional rights of access to cameras, it is impossible to reconcile these two lines of cases with the view that courts can arbitrarily restrict the public's access to judicial proceedings and discriminate against the electronic media absent a compelling justification for doing so.[70]

C. Electronic Coverage is Also Consistent with the Well-Recognized Purposes of the First Amendment, Namely, to Make Information Available to the Public.

As the Supreme Court has recognized, one of the primary purposes of the First Amendment is to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged."[71] It is here that the value of allowing electronic coverage of court proceedings is most obvious: Such coverage not only provides the public with information that is vital to the public's role in a functioning democracy, but also helps

70. *See generally* Zimmerman, *supra* note 54, at 647 (discussing the differing treatment of the various media and arguing that "all news-gathering techniques should enjoy a first amendment right of access to any governmental function otherwise open to the public"; thus, bans on the use of the different medias' technology—including television cameras—violate the Equal Protection Clause of the Fourteenth Amendment). *See also* Associated Press v. Bost, 656 So. 2d 113, 119 (Miss. 1995) (Hawkins, C.J., specially concurring) ("I cannot, however, [concur with] the argument that a television reporter denied the right to bring his camera in the courtroom is not being discriminated against because the newspaper reporter cannot bring his typewriter into the courtroom, either. That is about like saying to the newspaper reporter that he cannot bring a pad and pencil into the courtroom. Or, if the reporter could take shorthand or stenotype, he could not do that, either . . . ."). *But see id.* at 115-18 (majority holding that state law providing trial judges with discretion as to whether to permit trials to be televised does not discriminate against photojournalists or broadcasters; court held that equal protection's strict scrutiny standard does not apply because there is no recognized First Amendment right to televise court proceedings; rational basis scrutiny is satisfied by the state's "interest in preserving order and decorum, preserving the truth-seeking function of a trial, and the protection of a defendant's rights"). *See generally* Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 Stan. L. Rev. 927, 944-47 (1992) ("[T]he courts have invalidated discriminatory bans on camera access as between different television news organizations, but have been less sympathetic to claims of discrimination between print press organizations and television news organizations.") (footnote omitted).

71. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

ensure that the information disseminated is more complete and accurate.

As to the first point, it is axiomatic that only an informed public can monitor and, when necessary, change the laws and procedures that provide the structure of democracy. Only an informed public can work to ensure that those laws and procedures are fairly and lawfully implemented by government officials, including judges, law enforcement officers, prosecutors, and others. Justice Frankfurter longed for the day when "the news media would cover the Supreme Court as thoroughly as it did the World Series," believing that "the public confidence in the judiciary hinges on the public's perception of it, and that perception necessarily hinges on the media's portrayal of the legal system."[72] Writing for the plurality in *Richmond Newspapers*, Chief Justice Burger endorsed a similar belief: " 'It is not unrealistic even in this day to believe that public inclusion affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice.' "[73] According to some studies, the public has a great need for such education. As one commentator has noted, television access to trials is essential to "educate a public largely ignorant about the conduct of state and federal trials," as " '[t]here is no field of governmental activity about which the people are so poorly informed as the judicial branch.' "[74]

Television coverage may currently be the only mass medium that can make these visions of public confidence a reality and ensure that the maximum number of citizens are educated about the workings of one of the most essential aspects of government—the courts. Furthermore, students, educators and lawyers additionally benefit by being able to observe "firsthand," via the broadcast and videotape, a trial

72. *Demystifying the Court*, *supra* note 3, at 1087 & nn.186-87 (citations omitted).

73. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572-73 (1980) (quoting State v. Schmit, 139 N.W.2d 800, 807 (Minn. 1966)). *See generally Demystifying the Court*, *supra* note 3, at 1085 & n.117 (" 'The reaction of the people to judicially declared law has been an especially important factor in the development of the country; for while the Judges' decision makes the law, it is often the people's view of the decision which makes history.' ") (citation omitted); Nancy T. Gardner, *Cameras In the Courtroom: Guidelines for State Criminal Trials*, 84 MICH. L. REV. 475, 492-93 (1985) (noting that not only do televised court proceedings promote the public's education about the judicial process, they also advance the press' "fourth estate" function of serving as a watchdog over the other three branches and facilitate a " 'community therapeutic value' " by providing an outlet for community hostility over a particular crime or trial) (citation omitted); David R. Fine, *Lex, Lies, and Audiotape*, 96 W. VA. L. REV. 449, 468 (1993) (arguing that court proceedings should be televised because "the justice system in this country—police, lawyers, judges—has become too far removed from the everyday lives of Americans").

74. Frank, *supra* note 34, at 796 & n.289 (1987).

and its participants. Indeed, as early as 1965, in his concurring opinion in *Estes*, Justice Harlan recognized that "television is capable of performing an educational function by acquainting the public with the judicial process in action."[75] The plurality opinion in *Richmond Newspapers* later elaborated on this idea:

> When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case:
>
> > "The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy."[76]

Because of the public scrutiny and media attention given to pretrial and trial proceedings, televised coverage frequently provides a highly unique, and perhaps unprecedented, opportunity to educate a huge domestic and international audience about how our courts administer justice and the essential roles of the judge, jury, prosecutors and defense counsel. In addition, television coverage of court proceedings provides an essential source of information to the public about important social issues of the day. As the Georgia district court explained in *Cable News Network*:

> [I]t cannot be denied that television news coverage plays an increasingly prominent part in informing the public at large of the workings of government. Many citizens likely rely on television as their sole source of news. Further, visual impressions can and sometimes do add a material dimension to one's impression of particular news events. Television film coverage of the news provides a comprehensive visual element and an immediacy, or simultaneous aspect, not found in print media.[77]

In addition to directly benefiting the public, simultaneous television coverage of a trial also improves the media's overall ability to accurately report on the proceedings. Limited space availability in most courtrooms has meant that only a few can be physically present in court. Television, however, expands this potential audience so that

75. Estes v. Texas, 381 U.S. 532, 589 (1965) (Harlan, J., concurring).

76. *Richmond Newspapers*, 448 U.S. at 572 (quoting 6 J. WIGMORE, EVIDENCE § 1834, at 435 (J. Chadbourn rev. ed. 1976)).

77. Cable News Network, Inc. v. American Broadcasting Cos., 518 F. Supp. 1238, 1245 (N.D. Ga. 1981).

all reporters can have instantaneous access to virtually all of the proceedings. Thus, for reporters who are not able to be present in court, electronic media coverage—at least to the extent that it is broadcast simultaneously with the proceedings—provides the most accurate possible information about the proceedings—an audio and video record of the proceedings themselves. Articles and analyses can be prepared as the proceedings unfold, and reporters need not face the inherent time pressure of waiting to receive information from the "pool" reporters. Furthermore, in-court events, including quotations, can be verified simply by playing back a videotape of the day's proceedings. Visually oriented information that is critical to a complete and accurate portrayal of the proceedings, including the atmosphere of the courtroom and the demeanor, gestures, and emotions of the trial participants, is readily available to all.

Thus, because electronic coverage of judicial proceedings furthers not only the constitutional justifications set forth previously, but also the central purpose of the First Amendment (informing citizens), there should be a presumption in favor of allowing such coverage in the absence of a compelling justification for preventing it. As discussed below, no such justification exists as a general matter; consequently, absent unique, compelling circumstances, electronic coverage should be permitted.

IV. NO JUSTIFICATION, LET ALONE A COMPELLING ONE, EXISTS FOR BARRING ELECTRONIC COVERAGE OF JUDICIAL PROCEEDINGS.

The concerns raised most often about television coverage of courtroom proceedings regard the potential harm to the integrity of the court or the negative effects upon the trial participants. These concerns have been refuted by extensive studies and broad-based state experiences with courtroom cameras. As the Supreme Court noted in *Chandler*, the remarkable technological breakthroughs that have taken place in the last few decades—and, indeed, even in the last fifteen years—have eliminated many of the problems with electronic coverage that existed during the *Estes* era. Today, court proceedings are televised by the use of one small, noiseless, generally stationary camera located inconspicuously in a court-approved location. Indeed, these cameras are no more intrusive or distracting than the standard security camera with which we have all become highly familiar.

Furthermore, pooling arrangements, which are typically required, allow use of only one video operator and camera in the courtroom, and arrangements can be made to have a fixed camera, operated by remote control, mounted on the wall so that it is even less visible to trial participants. No special lighting is necessary, and existing microphone systems can typically be utilized so that the wires, cables and lights that filled the courtroom in *Estes* are completely absent in the modern courtroom. Indeed, some have observed that the use of a single, "pooled" television camera in a courtroom and the concomitant availability of a video feed to interested journalists can—and has—reduced congestion and disruption that otherwise might be caused by the physical presence of many reporters in the courtroom.

The speculative concerns raised in *Estes* about the potential impact on trial participants also have been repeatedly refuted by empirical studies and experiences across the nation. Researchers in various states including California, as well as the federal courts, have reached virtually identical conclusions concerning the impact—or lack of impact—on trial participants from the presence of cameras.

For example, several states—including Arizona, California, Florida, Hawaii, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New York, Ohio, Virginia and Washington—have studied the impact of electronic media coverage on courtroom proceedings, particularly focusing on the effect cameras have upon courtroom decorum and upon witnesses, jurors, attorneys, and judges.[78] In all of these states, electronic media coverage was permitted in both civil and criminal proceedings, although the majority of coverage was in criminal cases.

78. These state studies are contained or summarized in the following materials: MATTHEW T. CROSSON, REPORT OF THE CHIEF ADMINISTRATOR TO THE NEW YORK STATE LEGISLATURE THE GOVERNOR AND THE CHIEF JUDGE ON THE EFFECT OF AUDIO-VISUAL COVERAGE ON THE CONDUCT OF JUDICIAL PROCEEDINGS (1991) (New York); ERNEST H. SHORT & ASSOC., INC., EVALUATION OF CALIFORNIA'S EXPERIMENT WITH EXTENDED MEDIA COVERAGE OF COURTS (1981) [hereinafter CALIFORNIA STUDY]; INFORMATION SERVICE MEMORANDUM IS 88.002, TV CAMERAS IN THE COURTS, EVALUATION OF EXPERIMENTS 10 (Washington), 18 (Nevada), 39 (Arizona study), 62 (Florida), 79 (Minnesota), 101 (Louisiana); HON. BURTON B. ROBERTS, CHAIR, REPORT OF THE COMMITTEE ON AUDIO-VISUAL COVERAGE OF COURT PROCEEDINGS (1994) (New York). Most of these state studies, and studies from Hawaii, Kansas, Maine, Massachusetts, New Jersey, Ohio and Virginia, are described in FEDERAL JUDICIAL CENTER, ELECTRONIC MEDIA COVERAGE OF COURTROOM PROCEEDINGS: EFFECTS ON WITNESSES AND JURORS, SUPPLEMENT REPORT OF THE FEDERAL JUDICIAL CENTER TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT (1994) [hereinafter SUPPLEMENTAL REPORT].

The results from the state studies were unanimous: The impact of electronic media coverage of courtroom proceedings—whether civil or criminal—is virtually nil. For example, the state studies revealed that fears about witness distraction, nervousness, distortion, fear of harm and reluctance or unwillingness to testify were unfounded.[79]

A typical example of study findings relates to the states' inquiry into witness nervousness. The 1991 New York study, for example, revealed that when jurors were asked whether credibility of the witness was affected by their "relative insecurity or tension" due to camera coverage, most responded "not at all."[80] Similarly, more than ninety percent of the respondents in the Florida study on electronic media coverage of the courtroom said the presence of electronic media had "no effect" whatsoever on their ability to judge the truthfulness of witnesses.[81]

Similarly, when these states evaluated the impact of cameras in the courtroom upon jurors—including potential juror distraction, effect on deliberations or case outcome, making a case or witness importance and reluctance to serve with electronic media present—almost no such effects were noted.[82] Indeed, during the evaluation of the recent federal experiment regarding electronic media coverage of court proceedings, the Federal Judicial Center specifically found that

79. See generally the state studies described in the previous footnote, and SUPPLEMENTAL REPORT, *supra* note 78, at 1-25, which provides a comprehensive overview of several states' evaluations of camera presence in civil and criminal trial proceedings.

80. FEDERAL JUDICIAL CENTER, ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS 39 (1994) [hereinafter FEDERAL EVALUATION].

81. *Id.*

82. *See, e.g.*, SUPPLEMENTAL REPORT, *supra* note 78, at 1-25. Indeed, the impact upon jurors is now minimized by rules in most states requiring exclusion of jurors from coverage. Jurors are frequently ordered to avoid all press coverage about the case with which they are involved, and in some cases courts have sequestered juries to prevent their exposure to extensive pretrial and trial publicity. At least to the extent that televised judicial proceedings reveal only what takes place while a jury is present, sequestration may be unnecessary; certainly there can be little prejudice to a defendant if a juror disobeys a judge's order and watches on the television court events that the juror already has seen personally. Moreover, the Supreme Court has long held that a juror need not be ignorant of the facts surrounding a case prior to trial; the relevant inquiry is whether the juror can put aside that information, and his or her own personal biases, and follow the court's instructions in rendering an impartial verdict. *See, e.g.*, Murphy v. Florida, 421 U.S. 794, 799 (1975) (holding that a jury's exposure to information about the plaintiff or the defendant prior to trial does not necessarily deprive the plaintiff of due process); Mu'Min v. Virginia, 500 U.S. 415 (1991) (holding that defendant could obtain a fair trial because jurors were asked whether they could remain impartial, despite the pretrial publicity to which they were exposed).

"[r]esults from state court evaluations of the effects of electronic media on jurors and witnesses indicate that most participants believe electronic media presence has minimal or no detrimental effects on jurors or witnesses."[83]

California also conducted its own study on the effect of electronic coverage, resulting in a report that is probably the most comprehensive of the state evaluations that have been completed. In addition to surveying the impact of cameras on jurors and witnesses, as many other states have done, the researchers involved in the California evaluation also observed the jurors' behavior. The California study also included observations and comparisons of proceedings that were covered by the electronic media versus proceedings that were not.[84]

Not only did California's survey results mirror those of other states and the federal courts—namely, finding that there was virtually no impact upon jurors, witnesses, judges, counsel or courtroom decorum when cameras were present during judicial proceedings—but the "observational" evaluations completed in California further buttressed these results.[85] For example, after systematically observing proceedings where cameras were and were not present, the consultants who conducted California's study concluded that witnesses were equally effective at communicating in both sets of circumstances.[86] Furthermore, the behavioral observations in California also reinforced survey results from California and other state and federal courts, which found that jurors in proceedings where electronic media were present were equally attentive to testimony as jurors in proceedings without such coverage.[87] Not surprisingly, the California study

83. FEDERAL EVALUATION, *supra* note 80, at 7, 38-42; *see also* SUPPLEMENTAL REPORT, *supra* note 78, at 2 (noting that several state studies and the federal study found that "[m]ost participants believe electronic media presence has no or minimal detrimental effects on jurors or witnesses"). Although the federal study only examined judges and attorneys in its evaluations, the Federal Judicial Center also reviewed and considered the many state surveys in which witnesses and jurors were questioned along with judges and attorneys. The results were the same regardless of whom was being polled: The majority who experienced such coverage did not report any negative consequences or concerns. *See, e.g.*, SUPPLEMENTAL REPORT, *supra* note 78, at 4.

84. *See generally* CALIFORNIA STUDY, *supra* note 78, at 20, 55-67, 82-98.

85. *Id.* at 220-27, 243-45.

86. *Id.* at 103-04.

87. *Id.* at 86-87, 106-07, 111. In fact, several studies and commentators have noted that televising court proceedings is likely to enhance the performance of trial participants: judges may be more attentive, attorneys better-prepared, some witnesses able to remember more details and others alerted to the need to come forward and testify. *See generally* Frank, *supra* note 34.

also revealed that there was no, or only minimal, impact upon courtroom decorum from the presence of cameras.[88]

The overwhelmingly positive results from the California study cannot be distinguished on the ground that the case at hand is a "high-profile" case. To the contrary, as noted in the California study, it is precisely the "sensational heinous crime case type" that constitutes a large portion of the proceedings that are covered by electronic media, and such cases were included in the State's study.[89]

Finally, in September 1990, the Judicial Conference of the United States implemented a three-year pilot program that permitted electronic media coverage in civil proceedings in six federal district courts and two circuit courts.[90] Not surprisingly, in light of the uniformly positive results from similar state court evaluations of electronic media coverage of trials, the Federal evaluation revealed, among other things, that federal judges who experimented with allowing electronic coverage developed a favorable view of it:

- Overall, attitudes of judges toward electronic media coverage of civil proceedings were initially neutral and became more favorable after experience under the pilot program;
- Judges and attorneys who had experience with electronic media coverage under the program reported observing small or no effects of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice;
- Overall, judges and court staff report[ed] that members of the media were very cooperative and complied with the program guidelines and any other restrictions imposed.[91]

Indeed, the Federal Judicial Center's "Summary of Findings" concluded that little or *no* negative impact resulted from having cameras in the courtroom.[92]

Notwithstanding these positive results, the U.S. Judicial Conference—made up almost entirely of judges who did *not* participate in the experiment—voted to ignore its own study's findings, and rejected a permanent program allowing electronic media coverage of federal court proceedings. This decision was reconsidered by the Judicial

88. CALIFORNIA STUDY, *supra* note 78, at 78-79.

89. *Id.* at 67-69.

90. The results of that pilot program from July 1, 1991 to June 30, 1993 were monitored and evaluated by the Federal Judicial Center via judge and attorney evaluations and are reported in FEDERAL EVALUATION, *supra*, note 80.

91. *Id.* at 7; *see also id.* at 12-18.

92. *Id.* at 7.

Conference earlier this year; the conference voted to allow each of the eleven circuit courts to set its own rules regarding cameras.[93]

In sum, the extensive empirical evidence that has been collected on the impact of electronic coverage has established that such coverage is not detrimental to the parties, jurors, counsel, or courtroom decorum. Consequently, it is not surprising that, despite the frequently raised objection that electronic coverage will somehow interfere with a criminal defendant's right to a fair trial, courts evaluating such claims—even in high profile cases—have repeatedly found that television coverage did not negatively impact upon the defendant's Sixth Amendment rights.[94]

Fears regarding possible undermining of fair trial rights in televised cases are, at best, misplaced, as is demonstrated by recent experiences in California with cameras in the courtroom. Even in instances where a defendant opposed such coverage, it has been proven over and over that television coverage of criminal trials does not negatively impact the defendant's fair trial rights,[95] or the jury's ability to render a verdict based upon the evidence, and participants are not hindered from successfully performing their trial responsibilities by the presence of a camera in the courtroom.[96] Moreover, problems of prejudicial publicity from all media can be effectively dealt with through careful voir dire, admonition and sequestration.

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93. *See* Philip Carrizosa, *9th Circuit to Allow Cameras Back into Courtroom for Oral Arguments*, L.A. DAILY J., Mar. 25, 1996, at 3. Responding to the Judicial Conference's new position, the Ninth Circuit Court of Appeals announced that it would allow camera coverage during oral argument. *Id.*

94. In addition, any purported Sixth Amendment concerns raised by cameras in trial courtrooms are irrelevant to the question of whether the public and press have a First Amendment right to have state and federal *appellate* proceedings televised live. *See generally*, J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 486-87 (1994) (advocating televised appellate proceedings, which often raise questions of interest to the entire community).

95. Indeed, many of the notable "high-profile" trials televised during the last fifteen years resulted in acquittals for the criminal defendant, including not only O.J. Simpson, but also District of Columbia Mayor Marion Barry and William Kennedy Smith.

96. Thus, in the high-profile case of People v. Keating, 19 Cal. Rptr. 2d. 899 (Ct. App. 1993), portions of the trial were televised with no apparent negative effect. In fact, the Court of Appeal denied Keating's claim that he was denied a fair trial because television coverage had been permitted. *See also* People v. Spring, 200 Cal. Rptr. 849 (Ct. App. 1984) (holding that the presence of a television camera during trial did not violate criminal defendant's Sixth Amendment right to a fair trial); State v. Smart, 622 A.2d 1197 (N.H. 1993) (holding that televised coverage of high-profile murder trial did not prejudice defendant); Stewart v. Commonwealth, 427 S.E.2d 394 (Va. 1993) (holding that the presence of video cameras during a criminal trial did not violate defendant's due process rights); Florida v. Garcia, 12 MEDIA L. REP. (BNA) 1750 (Fla. Cir. Ct. 1986) (holding that criminal defendants did not have right to bar broadcast coverage of criminal proceedings).

Indeed, television coverage of what actually took place in the courtroom should actually improve a defendant's opportunity to receive a fair trial, particularly in a high-profile situation. The best antidote to lawyers' "spin control," legal commentators' opinions or any type of biased, subjective publicity is to let the public view via their television sets what actually occurs in the courtroom.

In any event, the First Amendment right of access is not absolute in other instances, and would not be absolute in the case of electronic coverage. Where a compelling justification exists for restricting electronic coverage—and certainly scenarios can be hypothesized where there would be justification for shutting down some or all electronic coverage during a particular proceeding—courts may do so, just as they may close the courtroom or seal files where a "compelling" justification for doing so exists. However, the concern that electronic coverage of court proceedings might in some circumstances subject trial participants, possibly including the judge, to public scrutiny and even criticism does not justify keeping cameras out. To the contrary, the need for such scrutiny is one of the very reasons that such access must be established as a matter of First Amendment right.[97]

V. CONCLUSION

It has been fifteen years since the United States Supreme Court held that electronic coverage of trials is not prohibited by the Federal Constitution.[98] During that time hundreds—if not thousands—of judicial proceedings across the country have been covered by the electronic media. Yet, it appears that there has not been a single case since 1981 where the presence of a courtroom camera has resulted in a verdict being overturned, or where a camera was found to have had any effect whatsoever on the ultimate result. This fact alone should

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Electronic media coverage of a trial was first challenged by a defendant in People v. Stroble, 226 P.2d 330 (Cal. 1951) (en banc), *aff'd*, 343 U.S. 181 (1952). The California Supreme Court found that although the broadcast and other coverage of the trial, which included televised photographs of the jurors, was sensationalistic, it did not constitute reversible error because there was no proof of jury prejudice. *Id.* The United States Supreme Court agreed that Stroble failed to prove that the extensive media coverage surrounding his trial resulted in jury prejudice. *Stroble*, 343 U.S. at 193-95.

97. *See Demystifying the Courts*, *supra* note 3, at 647; *see also* Craig v. Harney, 331 U.S. 367, 376 (1947) ("[A] judge may not hold in contempt one 'who ventures to publish anything that tends to make him unpopular or to belittle him'. . . . [T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.") (citations omitted).

98. Chandler v. Florida, 449 U.S. 560, 582 (1981).

give pause to those who would "pull the plug" on electronic coverage of the courts. At the same time, those fortunate enough to live in—or receive broadcast footage from—states where electronic coverage is permitted have been able to "see for themselves" what transpires in their courts, in keeping with the historical requirement that trials be open to all who choose to attend.[99] As one commentator summarizes: "Advocates of electronic media coverage of judicial proceedings argue that courts belong to the people, that the people have a right to know exactly what goes on in their courts, and that the public should be able to get that information through whatever medium they wish."[100]

Thus, absent a showing in a given case that televised coverage will demonstrably prejudice the parties or interfere with the conduct of justice, televised coverage should be permitted as a matter of constitutional right. Moreover, even when it is demonstrated that a compelling interest exists for restricting electronic coverage, any restriction should be narrowly tailored to address only that specific interest. Any other standard would severely and needlessly limit the public's First Amendment right of court access to only a chosen few.

99. *See* JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 43.

100. S. Shepard Tate, *Cameras In The Courtroom: Here To Stay*, 10 U. TOL. L. REV. 925, 926 (1979).

Tab 3

Electronic Media Coverage of Federal Civil Proceedings

An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals

Federal Judicial Center
1994

Electronic Media Coverage of Federal Civil Proceedings

An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals

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Federal Judicial Center
1994

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Contents

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Introduction

In September 1990, the Judicial Conference of the United States adopted the report of its Ad Hoc Committee on Cameras in the Courtroom, which recommended a pilot program permitting electronic media coverage[1] of civil proceedings in six federal district courts and two federal courts of appeals. Under the pilot program, media representatives interested in using electronic media to cover all or part of a civil proceeding in one of the eight pilot courts submitted an application to the court, and the judge presiding over the proceeding determined whether to permit coverage. Guidelines promulgated by the Judicial Conference set forth the conditions under which coverage could take place (see Appendix).

In adopting the committee's recommendation, the Judicial Conference approved the Federal Judicial Center's proposal to evaluate the pilot program, and this report presents the results of the Center's evaluation. The evaluation covers the period from July 1, 1991, to June 30, 1993.

The research project staff used the following resources to evaluate the program: (1) information about application and coverage activity in each court; (2) questionnaire responses from participating and nonparticipating judges in the pilot courts; (3) questionnaire responses from attorneys who participated in proceedings in which there was electronic media coverage; (4) telephone interviews with (a) judges who had the most experience with electronic media coverage, (b) media representatives whose organizations participated in the program, and (c) court personnel responsible for day-to-day administration of the program in each pilot court; (5) a content analysis of evening news broadcasts incorporating courtroom footage obtained under the program; (6) information about coverage provided by extended-coverage networks; and (7) reviews of studies exploring effects of electronic media coverage on witnesses and jurors in state court proceedings.

1. In this report the phrase "electronic media coverage" refers to the broadcasting, televising, electronic recording, or photographing of courtroom proceedings by the media.

History and Description of the Pilot Program

Electronic media coverage of criminal proceedings has been expressly prohibited under Federal Rule of Criminal Procedure 53 since the Criminal Rules were adopted in 1946.[2] In 1972, the Judicial Conference of the United States adopted a prohibition against "broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto . . ." (Canon 3A(7) of the Code of Conduct for United States Judges). The broad prohibition applied to both civil and criminal cases. At that time the American Bar Association's Model Code of Judicial Conduct contained a similar provision, and cameras were prohibited in most state courts.

In the mid-1970s, state courts began authorizing broadcast coverage of judicial proceedings, on either an experimental or permanent basis. In 1981, the Supreme Court ruled in *Chandler v. Florida*, 449 U.S. 560 (1981), that the presence of television cameras at a criminal trial was not a denial of due process. In 1983, a group of interested media and other organizations petitioned the Judicial Conference to adopt rules permitting electronic media coverage of federal judicial proceedings, and the Conference appointed an ad hoc committee to consider the issue. In its September 1984 report, that ad hoc committee recommended denial of the requested change; on September 20, 1984, the Conference adopted the committee's report.

Shortly after the *Chandler* decision, the American Bar Association revised Canon 3A(7) of its Model Code of Conduct to permit judges to authorize broadcasting, televising, recording, or photographing civil and criminal proceedings subject to appropriate guidelines. The canon was ultimately removed from the ABA's Code of Conduct based on a determination that the subject of electronic media coverage in courtrooms was not directly related to judicial ethics and was more appropriately addressed by administrative rules adopted within each jurisdiction.[3]

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2. In June 1994, the Judicial Conference's Standing Committee on Rules of Practice and Procedure voted to publish for comment a revision of Rule 53 that would remove from that rule the prohibition on electronic media coverage.

3. *See* ABA Standing Committee on Ethics and Professional Responsibility, Final Draft of Recommended Revisions to ABA Code of Judicial Conduct (December 1989).

Throughout the 1980s, several cases challenged the federal courts' prohibition on electronic media coverage.[4] In 1988, the Judicial Conference appointed a second Ad Hoc Committee on Cameras in the Courtroom "to review recommendations from other Conference committees on the introduction of cameras in the courtroom, and to take into account the American Bar Association's ongoing review of Canon 3A(7) of its Code of Judicial Conduct, dealing with the subject."[5] In September 1990, after receiving input from news organizations and a letter from U.S. Representative Robert Kastenmeier, then Chair of the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and Administration of Justice, the ad hoc committee recommended that the Judicial Conference (1) strike Canon 3A(7) from the Code of Conduct for United States Judges, and include policy on cameras in the courtroom in the *Guide to Judiciary Policies and Procedures*; (2) adopt a policy statement expanding permissible uses of cameras in the courtroom; and (3) authorize a three-year experiment permitting camera coverage of certain proceedings in selected federal courts.[6]

In September 1990, the Judicial Conference adopted these recommendations[7] and authorized the three-year pilot program allowing electronic media coverage of civil proceedings in selected federal trial and appellate courts, subject to guidelines approved by the Judicial Conference. The Federal Judicial Center (FJC) agreed to monitor and evaluate the pilot program. In its final report to the Conference in March 1991, the ad hoc committee recommended pilot courts for the experiment: the U.S. District Courts for the Southern District of Indiana, District of Massachusetts, Eastern District of Michigan, Southern District of New York, Eastern District of Pennsylvania, and Western District of Washington; and the U.S. Courts of Appeals for the Second and Ninth Circuits. The pilot courts were selected from courts that had volunteered to participate in the experiment. Selection criteria included size, civil caseload, proximity to major metropolitan markets, and regional and circuit representation. The use of size, civil caseload, and location in metropolitan areas as criteria reflected a concern

4. For a summary of these mostly constitutionally based challenges, see Radio–Television News Directors Association, News Media Coverage of Judicial Proceedings with Cameras and Microphones: A Survey of the States (1993).

5. *See* Report of the Judicial Conference Ad Hoc Committee on Cameras in the Courtroom (September 1990).

6. *See* Report of the Proceedings of the Judicial Conference of the United States (September 1990).

7. *Id*.

that smaller and less metropolitan courts would not have enough cases with high media interest to support evaluation of the program.

After the ad hoc committee selected the pilot courts and approved the FJC's proposed evaluation methods, the Conference discharged the ad hoc committee and assigned oversight of the pilot program to the Judicial Conference Committee on Court Administration and Case Management.

Pilot Program Guidelines

The pilot program began on July 1, 1991, and runs through December 31, 1994.[8] The program authorizes coverage only of civil proceedings and only in the courts selected for participation in the pilot program. The guidelines adopted by the Judicial Conference require reasonable advance notice of a request to cover a proceeding; prohibit photographing of jurors in the courtroom, in the jury deliberation room, or during recesses; allow only one television camera and one still camera in trial courts (except for the Southern District of New York, which was permitted to allow two cameras in the courtroom for coverage of civil proceedings) and two television cameras and one still camera in appellate courts; and require the media to establish "pooling" arrangements when more than one media organization wants to cover a proceeding.[9] In addition, discretion rests with the presiding judicial officer to refuse, terminate, or limit media coverage.

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8. The program was originally scheduled to terminate on June 30, 1994. In March 1994, the Judicial Conference adopted a recommendation of the Committee on Court Administration and Case Management to continue the program in the pilot courts through the end of 1994 to avoid a lapse in the program while a final Judicial Conference decision is pending.

9. Pooling involves running an electronic feed from a television camera inside the courtroom to a monitor located outside the courtroom, from which other interested media organizations can obtain footage. This procedure enables a number of media organizations to cover proceedings while limiting the number of cameras in the courtroom.

The Federal Judicial Center Evaluation

So that we could report research results to the Conference prior to the termination of the pilot program, our evaluation covered the period from July 1, 1991, through June 30, 1993.

Summary of Findings

Our overall findings were the following:

- During the two-year period from July 1, 1991, through June 30, 1993, the media filed applications for coverage in 257 cases; 82% of the applications were approved.
- The most common type of coverage was television coverage of trials.
- Overall, attitudes of judges toward electronic media coverage of civil proceedings were initially neutral and became more favorable after experience under the pilot program.
- Judges and attorneys who had experience with electronic media coverage under the program generally reported observing small or no effects of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice.
- Judges, media representatives, and court staff found the guidelines governing the program to be generally workable.
- Overall, judges and court staff report that members of the media were very cooperative and complied with the program guidelines and any other restrictions imposed.
- Most television evening news footage submitted for content analysis (1) employed courtroom footage to illustrate a reporter's narration rather than to tell the story through the words and actions of participants; (2) provided basic verbal information to the viewer about the nature and facts of the cases covered; and (3) provided little verbal information to viewers about the legal process.
- Results from state court evaluations of the effects of electronic media on jurors and witnesses indicate that most participants believe electronic media presence has minimal or no detrimental effects on jurors or witnesses.

Limits of the Evaluation

Several potentially relevant issues were not examined in the evaluation and therefore cannot be addressed in this report. First, the evaluation design as approved by the Ad Hoc Committee on Cameras in the Courtroom did not include a measure of the *actual* (as opposed to *perceived*) effects of electronic media on jurors, witnesses, counsel, and judges. The only way to measure objectively the actual effects of electronic media on jurors and witnesses would be to compare the behavior and perceptions of jurors and witnesses in two different groups of cases: those covered by electronic media and those not covered. The Federal Judicial Center suggested—and the Ad Hoc Committee on Cameras in the Courtroom concurred—that this approach was not feasible because, among other reasons, there would be too few cases in the pilot courts with high media interest to support such an evaluation.

Second, we did not directly measure the attitudes of jurors, witnesses, and parties because most have had little courtroom experience and could not, we believed, make judgments (as judges and attorneys could) about the effects of electronic media on themselves. (A witness who has never been in a courtroom might be nervous for many reasons but might attribute that state—inappropriately—to the presence of cameras.) We did obtain some information on these issues through other methods, such as judge and attorney questionnaires. Also, we reviewed results from state court studies exploring these questions.

Finally, because the pilot program limited coverage to civil proceedings, the impact of electronic media coverage on federal criminal proceedings was not addressable in this evaluation. Opinions on the issue of criminal coverage were obtained through questionnaires and interviews.

Another consideration relevant to interpreting the findings in this report is that the pilot courts were chosen from among courts that had volunteered to participate, and most of the analyses in our study focused on judges who actually had experience with electronic media coverage. Thus, it could be expected that judges whose responses we report would on average be more favorable toward electronic media coverage than would a randomly-selected sample of judges throughout the country.

Research Approaches and Results

Information About Media Activity

From July 1, 1991, through June 30, 1993, media organizations applied to cover a total of 257 cases across all of the pilot courts. Of these, 186 applications were approved, 42 were disapproved, and 29 were not acted on

(usually because the case was settled or otherwise terminated, or the application was withdrawn before the judge ruled on the application). Table 1 shows the breakdown, by court, of the outcomes of applications for electronic media coverage.

Table 1. Outcome of Applications, by Court

	Number of applications	Number approved	Number disapproved	No ruling	% approved in cases with a ruling
Second Circuit	16	12	4	0	75
Ninth Circuit	18	13	4	1	76
S.D. Indiana	23	16	1	6	94
D. Massachusetts	19	17	2	0	89
E.D. Michigan	34	21	8	5	72
S.D. New York	40	26	7	7	79
E.D. Pennsylvania	78	54	15	9	78
W.D. Washington	29	27	1	1	96
TOTAL	**257**	**186**	**42**	**29**	**82**

As can be seen from this table, most application activity was in the district courts, but there was also variation among the district courts with respect to activity. These variations in application activity are generally—but not perfectly—related to the size of the court. In telephone interviews, other factors were suggested that may have influenced the extent of application activity: the number of non-participating judges in a court;[10] differences in local television and radio station resources across cities of various sizes; and, most importantly, the involvement of a media coordinator, an agent of media organizations in a particular market.[11] There was a very active media coordinator in the Eastern District of Pennsylvania, which had the greatest volume of application and coverage activity (it was the second-largest district court in the pilot).

10. Some judges in the pilot courts declined to participate in the pilot program.

11. Media coordinators kept media organizations in a market apprised of interesting cases, coordinated pooling arrangements, and in some instances served as a media liaison to the court.

Use of cases as the unit of analysis in reporting activity, as in the numbers reported above, provides a very conservative measure of the extent of coverage activity. For example, many cases were covered by more than one media organization; our data do not reflect the number of media organizations interested in covering each proceeding. In addition, several cases involved coverage of more than one proceeding (e.g., a pretrial hearing and the trial) or multiple days of coverage for one proceeding (e.g., a trial). The data we collected reflect a total of 324 coverage days over the two-year data collection period, for an average of 2.2 coverage days for each proceeding covered. The longest coverage of a proceeding was 15 days, for a jury trial in which the plaintiff alleged sexual harassment and discrimination by an employer.

Reasons for Disapproval of Applications

The guidelines do not require judges in the pilot courts to explain their reasons for denying coverage of a case; however, a number of them did indicate reasons in their written orders denying coverage. In the forty-two denials, thirteen did not state a reason and seven were because a judge was not participating in the pilot program.[12] Five of the stated reasons were general statements that coverage would not be in the interests of justice or would prejudice the parties, without explaining in detail why this was so. Specific reasons given for the remaining seventeen denials included the sensitive nature of a case, witness or party objection to coverage, and untimely media applications.

Non-Coverage of Approved Cases

Of the 186 cases approved for coverage, 147 were actually recorded or photographed. Nineteen of the 39 approved cases that were not covered had settled or otherwise terminated. Nine applications were withdrawn, and in 11 instances the media failed to appear to cover an approved case.[13]

Proceedings Covered

Not surprisingly, trials were the type of proceeding most frequently covered by electronic media; fifty-six trials were covered over the two-year period. Other proceedings covered included pretrial proceedings (twenty-

12. Three of these cases involved appellate panels on which retired Supreme Court Justice Thurgood Marshall was sitting.

13. According to telephone interviews, media "no shows" usually happened when an event occurred to which a station chose to devote resources that were originally scheduled to cover the court proceeding.

seven); bankruptcy proceedings (four); appellate proceedings (twenty-four); and other proceedings (forty-three), including hearings for injunctive relief, show cause hearings, motions for stay, conferences, and proceedings not related to a particular case, such as a judge's swearing in ceremony or court activities filmed or photographed for a special television program or news article.

Type of Coverage

Television was by far the most common type of coverage under the program, with 124 proceedings covered. The majority of television coverage was done by local stations for use in evening news broadcasts, although 32 proceedings were filmed and broadcast by networks such as Court-TV and C-SPAN, which provide more extensive coverage of proceedings. Still photographers covered 56 proceedings, while radio covered 27. Approximately one-third of the covered proceedings were covered by more than one type of electronic media (e.g., television and still photographers).

Types of Cases for Which Coverage Requests Were Made

The types of civil cases in which coverage applications were most frequently made were civil rights cases and personal injury tort cases.[14]

Judge Questionnaires

Method

Prior to the start of the pilot program, we sent a questionnaire to all judges (including district, appellate, senior, magistrate, and bankruptcy judges) in the pilot courts asking about their expectations and opinions of electronic media coverage of civil proceedings. Judges were asked to rate the likelihood of certain potential effects of electronic media coverage as compared to conventional coverage. These effects included potential positive and negative effects of electronic media on witnesses (e.g., "motivates witnesses to be truthful," "makes witnesses more nervous than they otherwise would be"); jurors (e.g., "increases juror attentiveness," "signals to jurors that a witness or argument is particularly important"); attorneys (e.g.,

14. Applications were made to cover 107 civil rights cases and 27 personal injury tort cases. Other types of cases in which applications were frequently filed include the following: contracts (15); intellectual property (including patent, trademark, and copyright) (14); labor litigation (9); bankruptcy and bankruptcy appeals (9); environmental matters (8); habeas corpus (8); ERISA (4); and constitutionality of state statutes (4).

"causes attorneys to be more theatrical in their presentation," "prompts attorneys to be more courteous"); judges (e.g., "increases judge attentiveness," "causes judges to avoid unpopular decisions or positions"); and overall effects of electronic media presence (e.g., "disrupts courtroom proceedings," "educates the public about courtroom proceedings"). The response categories ranged from 1 (effect expected "to little or no extent") to 5 (effect expected "to a very great extent").[15] As a baseline, judges were asked to rate their views of the same effects for conventional media coverage as compared to the absence of coverage. Finally, judges were asked about their overall attitudes toward electronic media coverage of civil and criminal proceedings;[16] their previous experience with electronic media coverage (e.g., as a litigator or state court judge); and their expectations as to whether they would participate in the pilot program.

After the program had been in operation for one year, we sent follow-up questionnaires asking pilot court judges about the following: their beliefs about the same specific potential effects of electronic media coverage as had appeared in the initial questionnaire; the same specific effects of conventional coverage; whether they had experienced electronic media coverage under the pilot program; and their overall attitudes toward electronic media coverage of civil and criminal proceedings. Judges who did not respond to the one-year follow-up received the same follow-up questionnaire after the program had been in operation for two years.[17] Overall, 114 out of 163 district judges (70%) and 34 out of 51 appellate judges (67%) responded to both the initial and follow-up questionnaires.

Results

District judges

Our analysis of responses about the effects of electronic media coverage focused on judges who had experienced electronic media coverage under the program. In general, district judges who had experience with electronic media coverage under the pilot program believed electronic coverage had only minor effects on the participants or proceedings; in the follow-up question-

15. Judges were also given the option of indicating they had no opinion.

16. Though criminal case coverage was not allowed in the pilot program, media representatives are urging the federal courts to allow criminal coverage, and therefore we thought opinions of pilot court judges on this issue might be of interest to policy makers.

17. Copies of the initial and follow-up questionnaires are on file with the Research Division of the Federal Judicial Center.

naire, their median ratings indicated that all but one potential effect occurred "to little or no extent" or "to some extent."[18] Table 2 shows these judges' responses to the follow-up survey about specific effects of coverage.

When we compared the results in Table 2 to results from the initial questionnaire (not displayed here), our analysis showed that district judges who had experience with electronic media coverage rated nine of seventeen potential effects significantly lower (i.e., as occurring to a lesser extent) on the follow-up questionnaire than on the initial questionnaire.[19] These effects included the following items relating to electronic media coverage: "violates witnesses' privacy"; "distracts witnesses"; "makes witnesses more nervous than they otherwise would be"; "signals to jurors that a witness or argument is particularly important"; "causes attorneys to be more theatrical in their presentation"; "disrupts courtroom proceedings"; "motivates attorneys to come to court better-prepared"; "increases judge attentiveness"; and "prompts judges to be more courteous." Thus, judges apparently experienced these potential effects to a lesser extent than they had expected.

In contrast, when we compared ratings of conventional coverage effects between the initial and follow-up surveys we found no significant differences. This suggests that the differences in ratings of effects of electronic media coverage between the initial and follow-up questionnaires were attributable to experience with electronic media coverage and not to some more general shift in judges' attitudes toward the media.

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18. The median represents the midpoint of all responses. The median rating on the item "educates the public about courtroom procedures" indicated this effect occurred "to a great extent."

19. Ratings of each potential effect by judges who completed both questionnaires were compared using a Wilcoxon Signed Rank test. This analysis examined the number of judges who changed their response in each direction and enabled a determination of whether the direction and magnitude of changes in ratings between the initial and follow-up questionnaires were statistically significant.

Table 2. Ratings of Effects by District Judges Who Experienced Electronic Media Coverage Under the Program, by Percentage*

Effect	To little or no extent	To some extent	To a moderate extent	To a great extent	To a very great extent	No opinion
Motivates witnesses to be truthful	61	7	7	2	0	22
Violates witnesses' privacy	37	34	10	7	5	7
Makes witnesses less willing to appear in court	32	27	15	2	2	22
Distracts witnesses	51	22	15	2	2	7
Makes witnesses more nervous than they otherwise would be	24	37	22	5	0	12
Increases juror attentiveness	46	22	7	7	2	15
Signals to jurors that a witness or argument is particularly important	51	15	10	5	7	12
Increases jurors' sense of responsibility for their verdict	49	15	15	10	0	12
Prompts people who see the coverage to try to influence juror-friends	54	10	7	0	0	27

(continued)

Table 2 (continued)

Effect	To little or no extent	To some extent	To a moderate extent	To a great extent	To a very great extent	No opinion
Motivates attorneys to come to court better prepared	32	32	15	10	7	5
Causes attorneys to be more theatrical in their presentation	29	37	20	2	5	7
Prompts attorneys to be more courteous	44	20	15	17	2	2
Increases judge attentiveness	63	10	15	10	2	0
Causes judges to avoid unpopular decisions or positions	88	2	5	2	0	2
Prompts judges to be more courteous	56	22	15	7	0	0
Disrupts courtroom proceedings	83	15	0	2	0	0
Educates the public about courtroom procedure	12	20	12	24	30	2

**Note:* The figure in each cell represents the percentage of responding judges ($N = 41$) who selected that answer.

With respect to overall attitudes toward electronic media coverage of civil and criminal proceedings, district judges (including those who personally experienced coverage and those who did not experience coverage but presumably observed the effects of coverage on their colleagues and on the court as a whole) exhibited significantly more favorable attitudes toward electronic media coverage of civil proceedings in the follow-up questionnaire than they had in the initial questionnaire. The median response to this question in the initial questionnaire was a 3, indicating "I have no opinion on coverage," while the median response in the follow-up questionnaire was a 2, representing "I somewhat favor coverage." After the program had been in place, thirty-six judges had more favorable attitudes toward electronic coverage of civil proceedings than they had reported in the initial questionnaire, fifteen had less favorable attitudes, and sixty-one reported the same attitude that they had in the initial questionnaire.

District judges also indicated less opposition to coverage of criminal proceedings in the follow-up questionnaire, moving from a median of 4 in the initial questionnaire (indicating "I somewhat oppose coverage") to a median of 3 (indicating "I have no opinion on coverage"). In the follow-up questionnaire, thirty-five judges reported more favorable attitudes toward criminal coverage than they had in the initial questionnaire, seventeen reported less favorable attitudes, and sixty-one reported the same attitude they had initially.

Appellate Judges

Experience with electronic media coverage appears not to have changed the appellate judges' ratings of the effects of cameras. In both the initial and follow-up questionnaires, appellate judges' median ratings of effects were generally 1 (indicating the effect occurs "to little or no extent") or 2 (indicating the effect occurs "to some extent"). The following table shows responses of appellate judges with electronic media experience to the question in the follow-up survey about the effects of coverage.

Table 3. Ratings of Effects by Appellate Judges with Experience in the Program, by Percentage*

Effect	To little or no extent	To some extent	To a moderate extent	To a great extent	To a very great extent	No opinion
Prompts attorneys to come to oral argument better prepared	52	26	0	17	0	4
Causes attorneys to be more theatrical in their presentation	48	30	9	4	4	4
Causes attorneys to change the emphasis or content of their oral argument	39	43	9	0	4	4
Increases judges' attentiveness at oral argument	70	26	4	0	0	0
Prompts judges to be more courteous in questioning attorneys	57	35	9	0	0	0
Causes judges to change the emphasis or content of their questions at oral argument	65	30	4	0	0	0
Disrupts courtroom proceedings	74	22	0	4	0	0
Educates the public about the work of the court of appeals	17	30	30	9	9	4

**Note:* The figure in each cell represents the percentage of responding judges ($N = 23$) who selected that answer.

The responses shown in Table 3 do not differ significantly from responses to the same questions in the initial questionnaire. Similarly, appellate judges' overall attitudes toward coverage, both before and after experience with the pilot program, were favorable. In both the initial and follow-up questionnaire their median response to a question about overall attitudes toward civil appellate coverage corresponded with "I somewhat favor coverage." Altogether, of the appellate judges responding to this question on both questionnaires, nine were more favorable to civil appellate coverage after the program, four were less favorable, and sixteen held the same attitude toward civil coverage as they had prior to the program.

With respect to coverage of criminal appellate proceedings, appellate judges' median rating on the initial questionnaire was "I have no opinion on coverage," while their median rating for the follow-up questionnaire was "I somewhat favor coverage." In particular, eleven appellate judges were more favorable to coverage of criminal cases after the program, four were less favorable, and fourteen held the same attitudes as previously.

The overall questionnaire results (district and appellate) suggest judges' attitudes toward electronic media coverage of civil and criminal proceedings generally stayed the same or became more favorable after experience with the program. In addition, judges who dealt with electronic media coverage experienced potential effects to either the same or a lesser extent than they had expected. In overall before–after comparisons for judges in each type of court, there were no potential negative effects that were rated significantly higher (i.e., as occurring to a greater extent) after experience with cameras than before.

It should be noted that not all judges held favorable attitudes toward electronic media coverage, and some had strong objections. The written questionnaire comments of judges, some of which express negative views, are on file with the Federal Judicial Center.

Attorney Questionnaires

Method

After the pilot program had been in operation for over two years, questionnaires were sent to lead plaintiff and defense attorneys from 100 cases covered by electronic media during the first two years of the program. All 32 cases reported to have been covered by extended-coverage networks were included in the sample, and the remaining 68 cases were selected randomly from among other cases covered under the program. Questionnaires were

returned from 110 out of 191[20] attorneys surveyed (58%), with respondents divided fairly equally between plaintiff and defense (or appellee and appellant) attorneys.[21]

We asked attorneys about the following issues: (1) if the court adequately considered their views and those of their clients in deciding whether to approve coverage requests; (2) whether potential witnesses refused to testify because of the prospect of camera coverage; (3) what effects of electronic media coverage they observed; (4) whether electronic media coverage affected the fairness of the proceedings; (5) whether, overall, they favor electronic media coverage of civil proceedings; and (6) whether their views toward electronic media coverage have changed as a result of participation in the program.

Results

Overall, 72 out of 109 attorneys responding (66%) indicated they somewhat or greatly favor electronic media coverage of civil proceedings. Fourteen (13%) said they had no opinion on coverage, while the remaining 23 (21%) were somewhat or greatly opposed to electronic media coverage. In response to a separate question about whether experience with coverage had changed their views, twenty-nine out of 104[22] attorneys responding (28%) reported they were more favorable toward electronic coverage now than they had been prior to having experience with it, 4 (4%) said they were less favorable after experience, and 71 (68%) said their opinions had not changed.

Sixty-three percent of attorneys responding to the survey reported that they had been given adequate time to notify their clients after learning of the prospect of camera coverage, and most (76%) indicated they had been given an opportunity to object to coverage, although few (8%) had actually registered an objection. The majority of both district and appellate court attorneys responding thought the court had given adequate consideration to the views of counsel and of the parties in deciding whether to allow

20. No information was available for nine attorneys in the sampled cases.

21. In particular, of those attorneys responding to this item on the district court questionnaire, forty-six identified themselves as representing a plaintiff in the case, thirty-six identified themselves as representing a defendant, and two identified themselves as "other" (e.g., representing a respondent to a subpoena). Of attorneys responding to the appellate questionnaire, eleven identified themselves as representing the appellant, eleven as representing the appellee, and one as "other."

22. Not all attorneys answered every question.

Table 4. Attorney Ratings of Electronic Media Effects in Proceedings in Which They Were Involved, by Percentage*

Effect	To little or no extent	To some extent	To a moderate extent	To a great extent	To a very great extent	No opinion
Motivate witnesses to be more truthful than they otherwise would be (*N* = 70)*	58	3	2	0	0	38
Distract witnesses (*N* = 66)*	52	18	9	5	0	17
Make witnesses more nervous than they otherwise would be (*N* = 66)*	46	21	12	5	2	15
Increase juror attentiveness (*N* = 53)*	26	6	8	6	0	55
Distract jurors (*N* = 54)*	30	9	6	4	0	52
Motivate attorneys to come to court better-prepared (*N* = 97)	71	11	7	4	1	6
Cause attorneys to be more theatrical in their presentations (*N* = 103)	78	7	9	2	3	2

(continued)

Table 4 (continued)

Effect	To little or no extent	To some extent	To a moderate extent	To a great extent	To a very great extent	No opinion
Distract attorneys (*N* = 103)	73	20	6	1	0	1
Prompt attorneys to be more courteous (*N* = 103)	80	12	3	1	0	5
Increase judge attentiveness (*N* = 101)	54	17	10	6	1	12
Prompt judges to be more courteous (*N* = 101)	62	12	8	4	3	11
Disrupt the courtroom proceedings (*N* = 103)	77	10	8	3	0	3

**Note:* The figure in each cell represents the percentage of responding attorneys selecting that answer. Items marked with an asterisk were presented only to attorneys in district court cases; other items were presented to attorneys in both district and appellate court cases.

electronic media coverage. Fifty-eight percent of attorneys in the district courts and 83% of attorneys in the appellate courts did not believe their clients would have chosen to refuse coverage if given an absolute right to do so. Only one attorney reported having a witness or witnesses who declined to testify because of the prospect of camera coverage.

When asked whether the presence of cameras affected the overall fairness of the proceeding in which they had been involved, ninety-seven said camera presence had no effect on fairness, three said camera presence increased the fairness of the proceeding, and four said it decreased the fairness of the proceeding.

Table 4 shows the number of attorneys selecting each answer in response to questions about effects of electronic media coverage in the case in which they participated.

The table shows that attorneys with experience under the program who expressed an opinion generally indicated that various effects occurred "to little or no extent." These results are consistent with questionnaire results of judges who experienced electronic media coverage under the program.

Telephone Interviews

Method

In September and October 1993, we conducted telephone interviews with three groups of participants in the pilot program: (1) judges with the greatest amount of experience with electronic media coverage under the pilot program; (2) representatives of media organizations that covered cases under the pilot program; and (3) court staff responsible for the day-to-day administration of the program in each of the pilot courts. Members of each of these groups were asked specific questions about their experiences with electronic media coverage under the pilot program.[23]

The overall results from the interviews suggest that judges, media representatives, and court staff thought the Judicial Conference guidelines were very workable and that the pooling arrangements worked particularly smoothly. A number of interviewees said that the issue of whether habeas proceedings were eligible for coverage had been raised in their court. This issue—which was not addressed by the program guidelines—was resolved by the Committee on Court Administration and Case Management, which determined that post-conviction habeas corpus hearings (including death

23. Questions used in each set of interviews are on file in the Research Division of the Federal Judicial Center.

penalty habeas hearings) were eligible for coverage but preconviction habeas hearings were not.[24]

Judges with Greatest Experience Under the Pilot Program

Twenty judges with the greatest experience with electronic media under the pilot program (as measured by the number of cases covered in which they presided on an appellate panel or were the presiding district court judge) were interviewed. This group comprised judges from each of the pilot courts and included four appellate judges, fifteen district judges, and one bankruptcy judge. Our database showed that these twenty judges were involved in sixty-seven proceedings covered under the program. The greatest number of covered cases in which any one judge was involved was five for district judges and five for appellate judges.

Experienced judges were asked a number of questions about their practices in allowing electronic media coverage under the pilot program; their perceptions regarding the effects of electronic media on attorneys, jurors, witnesses, themselves, and on courtroom decorum and the administration of justice; and their overall attitudes toward electronic media coverage.

Representatives of Media Organizations That Covered Cases Under the Program

We interviewed representatives of media organizations that most frequently covered cases under the program. This included representatives from nine local news stations in the pilot court markets, two extended-coverage networks, two legal newspapers, and one national organization for radio and television news directors. Media representatives were asked how they learned about cases to cover and made decisions about what to cover; how electronic media access to the courtroom had affected the quantity of their coverage; about their experiences with and views of the program, including the guidelines; and how they used courtroom footage to enhance coverage.

Court Administrative Liaisons

Each pilot court designated an administrative liaison—generally a member of the clerk's office staff—to monitor activity under the pilot program, provide information to the FJC, and oversee the day-to-day administration of the program. Issues addressed in interviews with these individuals included the amount of time spent administering and overseeing the program,

24. The committee also determined that extradition hearings were ineligible for coverage.

what functions they performed in administering the program, whether any problems were encountered, and whether the guidelines were workable.

Results

Judges with Greatest Experience Under the Pilot Program

1. *Benefits and disadvantages of electronic media coverage*. Judges were asked what they saw as potential benefits and potential disadvantages of electronic media coverage of court proceedings, and whether they thought these effects were realized under the pilot program. Nearly all judges thought that educating the public about how the federal courts work was the greatest potential benefit of coverage, and most thought this benefit could be more fully realized with electronic media rather than traditional media. However, most judges said the educational benefit had been realized only to a moderate extent or not at all under the program. Several judges expressed the view that the education function was best served through extended coverage of proceedings rather than brief "snippets" of coverage. The potential disadvantage of electronic media coverage most frequently mentioned by judges was the possibility of distorting or misrepresenting what goes on in court, although generally they did not feel this problem had occurred under the program.

2. *Practices in ruling on applications.* Most of the judges interviewed had never denied coverage; those who had did so because the nature of the proceeding was particularly sensitive or the proceeding was being held in chambers. In reaching decisions on applications, about half of the judges either solicited the views of counsel and/or parties, or at least notified counsel of the prospect of camera coverage. Most judges also reported giving attorneys an opportunity to object to coverage, with several mentioning they have overruled objections on this issue on one or more occasions. Judges who heard attorney objections on the issue generally reported that this took only a small amount of their time. When asked, most judges expressed the view that coverage would be reduced considerably if parties or witnesses had an absolute right to refuse coverage in a case.

3. *Witness privacy issues.* District judges were asked whether they thought witness privacy concerns presented a problem for electronic media coverage in civil cases. Most said this was not a big problem in civil cases and that the presiding judge in a particular case would be able to address the problem if it arose. One judge thought that even though witness privacy could be an issue in some instances, "the public's right to know outweighs the privacy issue."

4. *Effects of electronic media on trial participants.* When asked about the effects of electronic media coverage on various trial participants, most judges

who had experienced electronic media in their courts reported no major or detrimental effects. Nearly all such district judges said they saw no significant effect of electronic media presence on jurors, with two indicating that jurors noticed the cameras for the first few moments of the trial but then ignored their presence. One district judge said that he had closely observed the result of a jury trial over which he presided and had spoken with jurors after the trial to determine whether the presence of a camera had had an effect; his conclusion was that the jurors were not concerned about the camera "nor was the result out of line." Most district judges explained the presence of cameras to jurors at the beginning of a trial, informing them that they would not be photographed, that the presence of cameras for a particular portion of a trial should not be considered significant, and that jurors should not watch coverage of the trial on television. All district judges indicated they were not aware of any instances in which jurors had viewed televised coverage of trials in which they were sitting as jurors.

Most district judges also did not observe an effect of cameras on witnesses, with one judge pointing out that because of the increasing use of video depositions, many witnesses are already "used to having cameras poked in their faces." Two judges said they thought witnesses were more affected than other trial participants, but they did not think the effect was strong.

Most district and appellate judges found electric media to have no effect or a positive effect on the performance and behavior of counsel. As one judge said, "[counsel] shouldn't do anything for cameras they wouldn't do for me or the jury." Similarly, most judges thought they themselves were not affected by the presence of cameras, or that they were affected in a positive way (e.g., by being more courteous to counsel or more vigilant regarding proper courtroom procedures).

5. *Courtroom decorum and the administration of justice.* District and appellate judges were also asked whether the presence of electronic media negatively affected courtroom decorum, and whether it interfered with the administration of justice in any cases in which they had been involved. All but one judge who responded to the decorum question said that the presence of electronic media did not negatively affect courtroom decorum; the judge who did report a negative effect described a case involving "a lot of politicians" in which counsel "played to the TV" and their "arguments were overly zealous and exaggerated." Two judges said that courtroom decorum could be even better preserved if cameras could be installed permanently in courtrooms in concealed locations.

With respect to effects on administration of justice, all but one judge thought the presence of electronic media had no effect. One judge was concerned that the click of a still camera at certain points in a proceeding "puts an exclamation point on certain testimony," but thought this was usually not a problem in civil cases.

6. *Effects on settlement.* District judges were asked whether, to the best of their knowledge, the prospect of camera coverage affected settlement in any cases before them. Although the majority of judges said they had not seen this, four said this had happened in one or more of their own cases, one reported having seen it happen in other judges' cases, and one said that in settlement discussions with the parties in a case "there might have been a time or two when a party was being outlandish . . . and I might have suggested [that] would look interesting on TV."

7. *Experiences with the media.* Judges were also asked about their working relationship with representatives from the electronic media. All judges who had experience with cases in which camera coverage was pooled were satisfied with this arrangement, and most said that issues concerning pooling were not brought to the attention of the court. Two judges pointed out that the camera pooling resulted in fewer media representatives being present in the courtroom, because members of the press who would normally be in the courtroom would choose to watch the proceedings from a room down the hall where the electronic feed from the pool camera was sent and where they could continue other activities without disturbing the court (e.g., chat, make phone calls). Judges in courts for which a media coordinator had been hired were also pleased with how that system worked. All experienced judges also said—often very enthusiastically—that members of the media generally complied with the Judicial Conference guidelines and with any additional restrictions imposed by presiding judges, although one appellate judge related a concern about the "noisy shutters" of still cameras in a quiet courtroom, and another appellate judge mentioned an episode where a still photographer used a "bright flash" that he found distracting.[25]

8. *Administrative requirements.* Judges reported that involvement in the pilot program had very little effect on their administrative responsibilities except for the necessity of dealing with some additional paperwork and additional people in the cases covered by electronic media. Two judges who had served as media liaison judges for their courts reported a slightly greater time involvement than those who were not liaison judges, particularly when

25. Use of a flash attachment is prohibited by the guidelines.

the program was first starting. In general, however, judges said that court staff absorbed most of the administrative burdens of the program.

9. *Use of footage*. Judges were asked whether they thought the audio and video material obtained as a result of the program enhanced news coverage of the cases; they were also asked how electronic coverage compares to conventional coverage in terms of informing the public about the court's work. The majority thought that audio and video access enhanced news coverage and that electronic coverage was somewhat more beneficial and realistic than conventional coverage. Several judges pointed out that many people obtain their information these days through television rather than through the print press.

10. *Media knowledge*. Judges were asked whether they thought members of the media were generally well informed about cases that might be considered for coverage. About half thought the media were not well informed, with one judge lamenting that "they're poorly informed and I don't know how to get them informed without denigrating our impartiality." Others thought the media were reasonably well informed, particularly in courts where the media received information about upcoming cases from the court or a media coordinator. Several judges added that they thought some electronic media representatives were not well informed about court procedures. For example, one judge cited an instance in which a news story indicated that the judge had decided a case when in fact it had been decided by a jury; it appears, however, that misinformation such as this was an anomaly.

11. *Potential direct costs associated with electronic media coverage*. Judges were asked to comment on potential costs of electronic media coverage identified by the Judicial Conference in 1984, including the need for increased sequestration of jurors, increased difficulty impaneling an impartial jury in the event a retrial was necessary, and the need for larger jury panels. All judges responding to this question said they had not seen any evidence of these potential costs, although five mentioned they thought the potential costs would be of greater concern in criminal cases.

12. *Changes in the guidelines*. Though we asked, most judges did not suggest changes in the guidelines governing the program. Three said it would be helpful for the guidelines to suggest how to handle and weigh litigant or witness objections to coverage. Another interviewee suggested that the guidelines cover where cameras can be placed in a courtroom. One appellate judge mentioned a preference for presumptive coverage (i.e., not requiring judge consent), at least for appellate proceedings. Finally, one judge suggested the media should be required to notify judges when their plans for coverage change.

13. *Overall attitudes toward coverage in civil cases*. Consistent with the judge questionnaire results, when asked whether their attitudes toward electronic media coverage had changed after experience in the program, ten district judges indicated their attitudes had remained relatively stable, four said they are now more favorable toward electronic coverage, and one reported being less favorable. The judge who reported being less favorable explained that, "Originally [I] thought cameras would be a good thing; now, [I'm] not so sure. TV destroys the dignity of the courtroom . . . it does not give a true picture and more often than not distorts reality." In contrast, two judges who reported being more favorable now indicated that concerns they had about electronic media coverage were alleviated after experience. The three appellate judges who answered this question indicated that their attitudes had remained stable.

14. *Extension of electronic media coverage to criminal proceedings.* Finally, judges were asked whether, based on their experiences, they would recommend extending camera coverage to criminal proceedings. Seven district judges answered yes to this question, two said no, and three said they would favor expansion with some hesitancy (e.g., proceeding on a pilot basis, giving parties the option of not being photographed). Of the remaining two judges,[26] one said he had not thought about the issue and did not know what his view would be, and the other said he would not favor extending coverage if it would affect a defendant's decision regarding whether to testify. Of three appellate judges who answered this question, all said they would favor expanding coverage to criminal appellate proceedings, with two specifying they would not recommend allowing electronic media access to trial-level criminal proceedings.

Media Representatives

1. *Overall experiences with the program*. Overall, the media representatives interviewed were pleased with their experiences in the pilot program, and thought that federal court personnel and judges were very cooperative with the media. The pooling procedures worked smoothly, as most media organizations were already familiar with pooling arrangements from state court coverage or other contexts. Last-minute changes in court schedules generally did not pose a problem for media organizations, as they normally found out about these changes before sending a crew to the courthouse.

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26. Some judges did not complete the full interview, either because of time constraints or because they did not think they had enough experience to answer specific questions.

2. *Information about proceedings to consider for coverage*. Most media representatives learned about proceedings that might be considered for coverage through a media coordinator (if there was one for the court they covered) or by their own tracking of a case once they had learned about it at the time of filing (i.e., prior to when schedules were set for case events). Representatives from legal newspapers said they have reporters who are constantly tracking cases in the local federal courts. Most media representatives also said that the media coordinators played an important function in keeping the media abreast of interesting cases—indeed, several suggested that media coverage would undoubtedly be increased through the presence of this type of coordinator for each court. In addition, media representatives said court staff or judges occasionally alerted them to upcoming cases that might be considered for coverage. Most media representatives thought they had generally been informed about cases with enough time to make coverage decisions, with some saying they would like the courts to provide more information to the media.

3. *Judgments about which cases to cover*. Media representatives reported they used the following criteria in deciding whether to cover cases with electronic media (in descending order of frequency of mention): whether the subject matter of the case had universal relevance or broad applicability; whether it was "newsworthy"; whether the story was relevant to local interests; and whether the case involved "high profile" litigants.

4. *Extent of coverage*. Most representatives from local news stations said their organizations did not generally cover cases electronically from start to finish, because of limitations on station resources. Aspects of proceedings most frequently mentioned as being covered included opening arguments, key testimony, closing arguments, and the verdict, all of which suggest an emphasis on trial proceedings. This is in contrast to extended-coverage networks, representatives of which reported they cover proceedings from beginning to end ("gavel-to-gavel").

5. *Amount of coverage*. The majority of media interviewees from television stations said their organizations report on more cases now in the federal courts than they did before camera and audio access was allowed. Descriptions of this increase in coverage ranged from "maybe a tad bit more now" to "much more frequent [now]." Most local media representatives said that since the pilot program started they had reported on some cases in the pilot courts without including camera footage. When this occurred, it was most frequently because camera access was denied or the station or newspaper did not have a photographer available to cover the proceeding.

6. *Denial of access*. About half of the media representatives interviewed said their organization had been denied access to one or more proceedings. In addition, one extended-coverage network representative reported that the network declined coverage of one approved case because additional conditions were imposed that made coverage impractical. In particular, the presiding judge indicated that witnesses could not be covered if they objected to coverage, but this would not be known until each witness appeared to testify. This condition made it impossible for the network to plan coverage.

7. *Adequacy of lighting and sound systems*. Media representatives generally thought the lighting and sound systems in the federal courtrooms were technically adequate, although there were problems in some situations. One media representative said his organization did not rely on the court's sound system.

8. *Use of courtroom footage*. Local news media representatives were asked in what way audio and video material obtained through the pilot program enhanced news coverage of cases. The two most common responses to this question were that use of courtroom footage produced a more realistic depiction of the proceedings and that it allowed viewers to see the expressions and emotions of the courtroom participants. As one respondent described, "Video tells a much better story than a sketch artist's rendition—one can see when a judge gets angry and the facial and body expressions of the parties."

9. *Experiences with the program guidelines*. The majority of media interviewees said the program guidelines were applied consistently. When asked whether they would recommend changes in the program guidelines, they most frequently suggested extension of the program to criminal proceedings and shortening of the deadlines for media applications for coverage, or at least allowing for extenuating circumstances. Three interviewees, including representatives from two extended-coverage networks, suggested permitting two cameras in trial courtrooms. When respondents were explicitly asked how often their organizations would take advantage of the opportunity to use two cameras in trial courtrooms, the majority of local news station representatives said they would use this opportunity in half or fewer of the cases they covered, while extended-coverage network representatives indicated they would make use of two cameras in nearly every case. As one representative of an extended-coverage network pointed out, if only one camera is permitted and an attorney steps in front of that camera for half an hour, this causes serious problems for a network trying to broadcast an entire proceeding.

10. *Predictions about coverage of criminal cases*. Media representatives were asked if they could give a guess as to the level of coverage their organizations

would provide if it were possible to cover criminal cases in the federal courts. Most predicted a substantial increase in the amount of coverage, although some—including representatives from two legal newspapers and one extended-coverage network—said their coverage would not increase much over what is being done for civil proceedings. Overall, the responses to this question ranged from a prediction of no increase in coverage to a prediction that coverage would increase "by a factor of ten."

Court Administrative Liaisons

1. *Amount of time spent administering program*. Court personnel responsible for the day-to-day administration of the electronic media program in the pilot courts were asked what percentage of their time was spent administering and overseeing the program. These estimates ranged from 1% to 25% of their time, with most interviewees indicating that the time they spent on the program was greatest when it was first starting up and that the amount of time demanded of them fluctuated.

2. *Functions performed*. Court personnel performed the following functions in administering the program: received applications from the media and forwarded them to presiding judges; notified media of judges' decisions on coverage applications; generally served as liaison between the court and the media (e.g., informed media of problems that arose); notified security personnel when representatives of electronic media were coming to the courthouse; dealt with the media on days when they came for coverage, escorted them to courtrooms, and showed them where to set up; generally ensured that media representatives complied with the guidelines; and kept records to document application and coverage activity.

3. *Experiences with the media and pooling arrangements*. Court administrators were very satisfied with the operation of pooling arrangements. Two interviewees said that in their courts the first media organization to file an application was automatically designated as the pool camera (i.e., the one located inside the courtroom). In all courts, it was up to the media to work out pooling arrangements, as required by the guidelines. The court administrators said that the media were very cooperative, although one mentioned that compliance with the dress code was occasionally a problem.

4. *Providing case information to the media*. Court administrators were asked whether they ever provided information to media organizations about cases that might be considered for coverage. Three interviewees said they did not do this, three said they provided general information about cases pending in the court (e.g., a listing of scheduled cases or a copy of the court's calendar),

and three said that in some instances they apprised the media of specific pending cases that might be interesting to cover.

5. *Time periods for applications*. Most of the administrators said that the advance notification periods set by their courts for coverage applications, which ranged from one hour to seven days, were not strictly enforced. Most also thought the time periods could be shortened without a great deal of additional burden, although they generally said that deadlines were good to have so that not all requests would be made at the last minute. As one administrator said, "If [there is a] late-breaking news story, we can't argue against a last-minute request—but this shouldn't become a habit."

6. *Media "no shows."* Administrators were asked whether they found it problematic when media representatives did not show up to cover an approved proceeding. Most did not think this was a problem, with four reporting it had never happened in their court.

7. *Problems in the administration of the program*. Administrators were asked whether they had encountered any problems in the overall administration of the program or in particular cases. Most reported no problems, with two reporting minor disruptions in particular proceedings.

8. *Issues not covered by the guidelines*. Court administrators were asked whether any situations had arisen in their courts that were not covered by the guidelines. Four responded that the issue of whether habeas proceedings could be covered under the program had been raised in their court.

9. *Changes in program guidelines*. Administrators were asked if they would recommend any changes in the program guidelines. Three said they did not have specific suggestions, four recommended expanding coverage to criminal proceedings, one suggested that courtrooms have cameras installed permanently (at media expense), and one suggested that interviews be allowed inside the courtroom after proceedings have adjourned.

Content Analysis of Evening News Broadcasts

Method

Part of the Center's evaluation, as approved by the Judicial Conference, involved an analysis of how courtroom footage obtained under the pilot program was used and what information about the recorded proceedings was made available to the public. Our main approach to this issue depended on a content analysis[27] of evening news broadcasts using footage obtained during

27. Content analysis is the objective and systematic description of communicative material. The content analysis performed for this study proceeded in two phases. First, a qualitative analysis was used to identify the symbols, stylistic devices, and nar-

the pilot program; this analysis was conducted by the Center for Media and Public Affairs under a contract with the FJC.[28]

Initially, the Ad Hoc Committee on Cameras in the Courtroom, at the request of the Center, required media organizations to provide any footage and photographs that were used on the air or published. At the request of media representatives who pointed out many practical problems, the requirement was modified to require only television footage to be submitted. The requirement was also changed from mandatory to voluntary after a test period that determined that an adequate number of tapes would be submitted voluntarily. The relaxation of the mandatory submission requirement means that the cases analyzed in the content analysis do not represent all stories produced under the program, or even a random sample of the stories produced; thus, conclusions based on this analysis must be viewed with caution.[29]

At three points (November/December 1991, April 1992, and May 1993) the Center requested footage obtained under the program. Stations responded to our requests for footage 58% of the time, either by provision of a tape or an explanation of why it could not be provided.[30] A total of ninety news stories were obtained for use in the content analysis. These stories, which covered thirty-six different cases, were broadcast on twenty television stations located in nine media markets.

The content analysis technique was used to examine how courtroom footage was used in the news stories; the type and quality of information provided to viewers about the particular cases covered; and the quality of information that news stories conveyed about the legal process.

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rative techniques shaping the form and substance of the news stories; this allowed the researchers to develop analytic categories based on the actual content of the stories rather than imposing *a priori* categories. Second, the analytic categories that were developed and pre-tested formed the basis of a quantitative analysis, which involved the systematic coding of story content into discrete categories.

28. The contractor's report and code book are on file with the Research Division of the FJC.

29. For example, it is conceivable—though we have no reason to believe this—that stations refrained from sending broadcast tapes containing uses of courtroom footage that they thought would be considered lacking in educational value.

30. Some requested footage could not be provided because the tapes were no longer available.

Results

Use of Courtroom Footage in News Reports

The content analysis revealed that in news stories on covered proceedings footage from the courtroom occupied 59% of the total air time. The ninety stories analyzed presented a total of one hour and twenty-five minutes of courtroom footage, with an average of fifty-six seconds of courtroom footage per story. Across stations, the total amount of courtroom footage used ranged from a low of 20% of a story to a high of 97%. Stories that aired on the first day of the pilot program and that were generally aimed at explaining the media access available under the program used the least amount of courtroom footage, averaging 47% of air time. Stories covering cases over several days did not use a significantly higher proportion of courtroom footage than did stories covered on a single day.

The analysis also examined the extent to which courtroom footage was voiced over by a reporter's narration. On average, reporters narrated 63% of all courtroom footage.[31] The percentage of the story narrated by a reporter varied widely across stations and across cases covered, but did not appear to be related to either the length of the story or the nature of the case.

Overall, participants in the federal proceedings (witnesses, parties, attorneys) spoke on camera during or outside the proceedings for just under forty-seven minutes, or 31% of the total air time. Most stations used a mixture of participant statements from inside and outside the courtroom. Overall, plaintiffs were given 42% of the total air time that was devoted to participant statements, while defendants spoke for 27%.[32] Other participants who spoke in broadcast coverage included judges, outside experts or analysts, witnesses, and court personnel.

In addition to verbal coverage, visual patterns of courtroom coverage were also examined. For this analysis, each camera shot that appeared on screen was separated out. The results were similar to the analysis of speaking time, with plaintiffs (and their attorneys) shown in 30% of the shots that were devoted to participants, and defendants (and their attorneys) shown in 20% of these shots.

Information Provided in Stories About the Cases Covered

A second aspect of the content analysis examined how well the stories conveyed the facts or details of the cases presented. Four variables were developed to assess the information provided in the stories: (1) identification of

31. With "first day" stories removed from the analysis, this drops to 61%.

32. These figures include the parties and their attorneys.

the participants; (2) descriptions of the nature of the matter before the court; (3) statements of the facts of the case; and (4) mentions of what the plaintiff sought in the case.

Overall, 91% of the stories identified the plaintiff and 86% identified the defendant; with first day stories removed from the analysis, all but one story identified the plaintiff and all but two identified the defendant. In addition, 100% of the non-first day stories mentioned the nature of the case (e.g., that it was a civil rights suit) before the court. In half of these stories, information on the nature of the case was provided by reporters or anchors without relying on the participants, while in 44% of the stories this information was provided by a combination of reporters and participants in the courtroom. The remaining 6% of stories conveyed information about the nature of the case through a combination of reporters and participants outside the courtroom.

The stories were also analyzed for information about the facts of the case, including who was involved in the proceedings, what happened to start the dispute between the parties, and when and where the events in question occurred. Ninety-nine percent of the non-first day stories provided at least two of these four elements. Most stories identified the parties involved and mentioned the reason the case was in court; the location and time of the events at issue were less frequently mentioned.

Finally, the stories were examined for a mention or explanation of what the plaintiff in the case was seeking or what would happen if the plaintiff prevailed. Sixty-two percent of the non-first day stories mentioned the plaintiff's goals, and 34% of the stories explained in more detail what the plaintiff sought. Virtually all (94%) statements of plaintiffs' goals were made by reporters.

An overall analysis of these measures reveals that most stories contained an explanation of the basic details of the case. Multiple-day coverage of a case slightly improved the depth of coverage. Interestingly, there was no correlation between the percentage of courtroom footage used in the story and the performance on the above measures. The contractors conclude that "it would appear from viewing the tapes that the participants' comments frequently added color or emotion rather than substance to the discussion."

Information Provided in Stories About the Legal Process

To determine the extent to which the stories provided basic educational information about the legal system, the content analysis of news stories also examined the information available to viewers about the legal process. The analysis examined whether five pieces of information were conveyed to the viewer: (1) identification of the case as a civil matter; (2) identification of the

type of proceeding (e.g., hearing, trial); (3) statements about whether a jury was present; (4) descriptions of the proceedings on a given day; and (5) discussion of the next step in the legal process.

The vast majority of stories (95% of non-first day stories) did not identify the proceeding covered as a civil matter. In addition, 77% of the stories failed to identify the type of proceeding involved. Almost three-quarters (74%) of all stories did not provide information about whether a jury was present, including half of the stories that identified the covered proceeding as a trial.

Most stories (74%) did explain what transpired in court on a particular day, such as who testified or what evidence was presented. In multiple-day cases, 90% of the stories explained the daily proceedings, compared to 63% in single-day stories. Seventy-six percent of the daily proceedings in a story were explained by a combination of reporter narration and participant discussion. Only 29% of stories mentioned the next step in the litigation process in the case.

Thus, the stories did not provide a high level of detail about the legal process in the cases covered. In addition, the analysis revealed that increasing the proportion of courtroom footage used in a story did not significantly increase the information given about the legal process.

Overall, the content analysis revealed considerable variation—across both stations and cases—of the following: amount of courtroom footage used and its integration with other elements of the story; the information conveyed about the facts of the case and the legal processes involved; and the degree to which both sides of the case were presented. There were, however, certain patterns identified in the analysis.

First, most footage was accompanied by a reporter's narration rather than the story being told through the words and actions of the participants; thus, the visual information was typically used to reinforce a verbal presentation, rather than to add new and different material to the report. Second, plaintiffs and their attorneys received more air time than defendants and their attorneys. Third, the stories did a fairly good job of providing information to the viewer about the specific cases covered; however, the amount of courtroom footage was not related to the amount of information communicated. Fourth, the coverage did a poor job of providing information to viewers about the legal process.

Collection of Information About Extended Coverage of Civil Proceedings

Because the content analysis was limited to televised evening news broadcasts, we also obtained information about more extended coverage provided by Court-TV and C-SPAN, which were the two national networks most active in the program. Each of these networks provided information to the Center—in the form of printed material and interview responses by network representatives—about the cases they had covered under the program and the content of their coverage.

Thirty-two cases in the pilot program received extended coverage between July 1, 1991, and June 30, 1993. FJC records indicate that most of these cases were in district or appellate courtrooms where two cameras operated. Network representatives said that working with a single camera causes problems for "gavel-to-gavel" coverage, because participants will occasionally block the camera for extended periods of time. As a result, they said that if two-camera access were allowed, they would take advantage of this opportunity in nearly every case covered.

Court-TV Network, which covered and broadcast twenty-eight cases under the program during the evaluation period, covers cases in their entirety when they are broadcast live. When taped proceedings are broadcast they are sometimes edited to take out moments of inactivity, such as sidebar conferences. Recaps of events that have occurred in the proceeding are provided at regular intervals, and experts in relevant areas of law provide commentary and analysis of the legal proceedings covered.

Similarly, C-SPAN, which covered and broadcast seven cases between July 1, 1991, and June 30, 1993, covers gavel-to-gavel and provides supplementary information to viewers about each case, including interviews with counsel, parties, and relevant interest groups concerning the proceeding being covered. In addition, C-SPAN representatives say they have conducted and broadcast interviews with judges in the cases being covered. In the interviews, judges were asked to talk about how the federal courts function and what being a federal judge involves, not about the specific case at hand.

Thus, according to network representatives, these networks provide extended coverage of proceedings as well as educational information about individual cases, substantive law, and court processes.

Review of State Studies of Electronic Media Effects on Jurors and Witnesses

In response to an inquiry from the Committee on Court Administration and Case Management, we reviewed the results of studies others have done on the effects of electronic media on jurors and witnesses. The studies report that the majority of jurors and witnesses who experience electronic media coverage do not report negative consequences or concerns. These findings are consistent with what judges and lawyers in the pilot courts observed about jurors and witnesses in those courts.

Below we summarize results from studies conducted in state courts (Arizona, California, Florida, Hawaii, Kansas, Maine, Massachusetts, Nevada, New Jersey, New York, Ohio, and Virginia) of the potential effects of electronic media on witnesses and jurors.[33] For witnesses, researchers have looked at such effects as distraction, nervousness, distortion or modification of testimony, fear of harm, and reluctance or unwillingness to testify with electronic media present. For jurors, researchers examined such effects as distraction, effect on deliberations or case outcome, making a case or witness seem "more important," and reluctance to serve with electronic media present. Most state evaluations have studied jurors and witnesses through surveys, although California researchers also observed the behaviors of jurors and witnesses in proceedings covered and not covered by electronic media.

We should note that in all of the state courts whose evaluations are discussed here, electronic media coverage was allowed in criminal as well as civil cases, and the majority of coverage was in fact in criminal cases. As pointed out by several judges interviewed in our study, certain effects could be expected to occur to a greater extent in criminal cases than in civil cases (e.g., a witness' fear of harm from being seen on television). Thus, it might

33. Studies of the effects of electronic media in state courts have generally been conducted by state court administrators, special advisory committees appointed by the court, bar associations, or outside consultants. A handful of state studies other than those mentioned here address juror and witness issues; we did not include all of them, however, because some reports do not provide enough detail about methods to determine what questions were asked and how, and others used methods we did not consider sufficiently rigorous to rely on for this evaluation (e.g., a judge polling one jury after a trial about whether cameras affected them). But even the less rigorous studies tend to report results that are similar to our findings and other state court findings. A more detailed description of the studies summarized in this report is on file with the Research Division of the FJC.

be expected that the findings of these studies would be more negative than findings from studies focused solely on experiences in civil cases.

Effects on Witnesses

- *Distraction.* One concern is that witnesses in cases covered by electronic media will be distracted and unable to focus on their testimony. A number of state evaluations addressed this issue in surveys and found that, although a small number of witnesses reported being distracted, the vast majority reported no distraction at all or only initial distraction.

- *Nervousness.* Another concern is that witnesses will be made nervous by the presence of electronic media, that this nervousness will make them uncomfortable, and thus that jurors will find it difficult to judge the veracity of their testimony. In state studies that asked witnesses about nervousness, the great majority said they were not at all or were only slightly nervous due to the presence of electronic media during their testimony. In addition, jurors in a 1991 New York survey were asked whether the credibility of witnesses was affected by their relative insecurity or tenseness caused by audio or visual coverage. The majority of jurors indicated this did "not at all" affect the credibility of witnesses, and most indicated that the presence of audio and visual media did not in fact tend to make witnesses appear tense or insecure. Similarly, over 90% of responding jurors in Florida and New Jersey surveys said the presence of electronic media had "no effect" on their ability to judge the truthfulness of witnesses.

  Finally, in addition to surveying witnesses, the consultants who conducted the California study systematically observed proceedings in which electronic media were and were not present. They concluded that witnesses were equally effective at communicating in both sets of circumstances.[34]

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34. In an experimental study comparing the effects of conventional and electronic media coverage on mock witnesses and jurors, researchers at the University of Minnesota found that witnesses who were covered by electronic media reported being more distracted and more nervous about media presence than witnesses who were covered by conventional media. There was no difference between the two conditions, however, in mock juror perceptions of the quality of witness testimony, including ratings of the extent to which the testimony was believable. *See* Eugene

- *Distortion or modification of testimony.* One of the more serious concerns is that witnesses who testify will distort or modify their testimony because of the presence of electronic media. In state evaluations in which this issue was addressed, most witnesses reported that the presence of electronic media had no effect on their testimony and did not make it more difficult for them to testify. A small number of witnesses indicated an inhibitory effect.

- *Fear of harm.* Several surveys in state studies asked witnesses—most of whom had testified in criminal trials—whether the presence of electronic media caused them to fear they would be harmed. Most witnesses surveyed said they had no fear of harm stemming from electronic media coverage of a proceeding in which they testified, although a minority said they did fear harm to some extent.

- *Reluctance to testify with electronic media.* Surveys in several states asked witnesses if they were reluctant to testify at all because of electronic media or if they would be reluctant to testify again in a proceeding covered by electronic media. In general, about 80% to 90% of witnesses said the presence of electronic media did not affect their desire to participate or would not affect their willingness to serve as a witness in a future proceeding, a finding closely parallel to the attorney survey responses on this issue in our study.[35]

Effects on Jurors

As in the federal pilot program, most state programs discussed here did not allow electronic media coverage of jurors. In some programs, the jury could be shown in the background of a shot, but no individual juror could be shown in an identifiable way. Other kinds of problems have, however, been posited.

Borgida et al., *Cameras in the Courtroom: The Effects of Media Coverage on Witness Testimony and Juror Perceptions*, 14 Law & Hum. Behav. 489 (1990).

35. In our attorney survey, we asked attorneys who participated in proceedings covered by electronic media whether they had any witnesses who declined to testify because of the prospect of electronic media coverage. Out of sixty-eight district court attorneys responding to this question, sixty-three (93%) reported they had no witnesses who declined to testify, one reported he had, and four reported they couldn't say.

- *Distraction.* If the presence of cameras were distracting to jurors, this could decrease their ability to concentrate on testimony, potentially affecting the outcome of the proceedings. The state court results, however, suggest that this is not a problem for the majority of jurors. In California, results of the observational portion of the study indicated that jurors in proceedings covered by electronic media were slightly more attentive to testimony than jurors in proceedings not covered by electronic media. In addition, when asked about their level of distraction from the electronic media presence, most jurors responding to surveys in state court evaluations indicated they were not distracted or were distracted only at first.

- *Effect on deliberations or outcome.* Some commentators on electronic media in the courtroom fear that coverage will influence jurors' decisions—for example, by creating more public pressure to decide the case in a particular way. At least four state studies have surveyed jurors about this issue; all found that the vast majority said there was no influence of electronic media coverage on their deliberations or that they did not feel pressured by the media to decide the case in a particular way. In addition, the California researchers found that jurors who had experience with electronic media coverage were less likely to think it would affect the outcome of trials than did jurors who did not have experience with electronic media coverage.

- *Highlighting importance of a case or witness.* Another concern about cameras in the courtroom is their potential to distort the importance of a case or, if present only for a portion of the proceedings, that they will make jurors think certain witnesses or testimony are more important than others. The state court results on this issue indicate that the majority of jurors do not think the presence of electronic media signals that a case or witness is more important, although a minority do think it lends importance to the *case* (very few think it makes a witness more important).

- *Reluctance to serve as a juror.* There is some concern that allowing camera access to proceedings will make it more difficult to impanel juries because some prospective jurors will try to avoid jury duty in a particular case if they think it will be covered by electronic media. Again, the state court results suggest that this is not

likely to be a problem, with the vast majority of jurors reporting that the presence of electronic media would not affect their willingness to serve in a future proceeding.

The results summarized above are consistent with our findings from the judge and attorney surveys; that is, for each of several potential negative effects of electronic media on jurors and witnesses, the majority of respondents indicated the effect does not occur or occurs only to a slight extent, while a minority indicated the effects occur to more than a slight extent. The state court findings, to the extent they are credible, lend support to our findings and the recommendations made in our initial report.

Although indications from even a small number of participants that cameras have negative effects can be cause for concern, perhaps these concerns are addressed adequately by the federal court guidelines. These guidelines give the judge trying the case discretion to limit or prohibit, if necessary, coverage of any proceeding or of a particular witness or witnesses. In addition, coverage of jurors is proscribed (see Appendix).

Recommendations

Note that these are recommendations of the research project staff, not of the Federal Judicial Center or its Board.

On Access Generally

Recommendation 1: The research project staff recommends that the Judicial Conference authorize federal courts of appeals and district courts nationwide to provide camera access to civil proceedings in their courtrooms, subject to Conference guidelines (as discussed below). This recommendation is based on information obtained in response to questions presented by the Judicial Conference and addressed in this report and does not imply any position on legal or constitutional issues.

> **Explanation:** The converging results from each of our inquiries suggest that members of the electronic media generally complied with program guidelines and that their presence did not disrupt court proceedings, affect participants in the proceedings, or interfere with the administration of justice. To the extent decisions about expanding access would rest on these considerations, our results support expansion.

On Guidelines

Recommendation 2: The research project staff recommends that if the committee and Conference decide to continue or expand the program, the guidelines in effect for the pilot program remain in effect, subject to the modifications recommended in the Center's initial report (and set forth as Recommendations 3, 4, and 5 below).

> **Explanation:** As we reported, judges, court staff, and media representatives all indicated that the guidelines are very workable and provide judges with the discretion needed to deny or limit electronic media coverage based on the circumstances of a particular case.

Recommendation 3: The research project staff recommends that the guidelines be modified to call for a standard practice of informing counsel or a party appearing *pro se* that an application for media coverage has been re-

ceived. We do not recommend that there be guidelines for ruling on these applications.

Explanation: Some attorneys responding to our survey complained that they were not informed about electronic media coverage prior to appearing for a hearing or trial. Because most judges are willing to entertain attorney and party objections, a notice requirement seems reasonable. However, experience in the pilot program suggests that conditions that might warrant denial of an application are so specific that guidelines would have to be so general as to provide little help. The inevitably general guidelines would then be likely to produce unnecessary motion activity. The basic questions arising from the assertion of personal right to privacy and the public right to know should be left for decision in the normal course of litigation.

Recommendation 4: The research project staff recommends that the guidelines be modified to reflect the committee's determinations regarding the eligibility of extradition and habeas proceedings for electronic media coverage.

Explanation: We learned in telephone interviews that the issue of whether habeas proceedings could be covered was raised in several of the pilot courts. If the program is continued or expanded, we recommend the committee's determinations on these issues be incorporated into the guidelines so they will not be raised anew by media representatives unaware of the committee's determinations.

On Facilities

Recommendation 5: The research project staff recommends that the guidelines be revised to permit two television cameras in trial courtrooms and appellate courtrooms.

Explanation: The absence of problems reported from the Southern District of New York suggests that permitting two cameras in trial courtrooms does not cause additional disruptions. In addition, permitting two television cameras in the trial courtroom encourages coverage by extended-coverage networks, which provide the type of coverage that most judges favor. The majority of cases covered under the program by extended-coverage networks were in courts (both trial and appellate) that allow two television cameras, and represen-

tatives from extended coverage networks indicated in interviews that the ability to use two cameras is important when providing "gavel-to-gavel" coverage of proceedings. In comparing the type of coverage provided by extended-coverage networks to the type of coverage analyzed in the content analysis, it would appear that extended coverage likely serves a greater educational function, which is a function judge interviewees identified as the greatest potential benefit of allowing electronic media access to the courts. Judges would retain discretion under the guidelines to limit the number of cameras in a particular case.

Recommendation 6: The research project staff recommends that media organizations be invited to submit to the Committee on Court Administration and Case Management proposals for constructing and regulating use of permanent camera facilities in federal courthouses.[36]

Explanation: Several interview and questionnaire respondents (including judges, court administrators, attorneys, and media representatives) expressed the view that electronic media coverage of proceedings would be least intrusive if cameras were installed permanently in federal courtrooms. Most who raised the issue suggested this be done at media expense.

The Issue of Judge Opt-Out

In our initial report, we brought the following issue to the attention of the Committee on Court Administration and Case Management without making a recommendation:

Another policy issue the committee and Conference may want to consider is the extent to which individual judges in a court should be able to opt out completely from allowing electronic media coverage in their courtrooms. Media representatives argue that the question of coverage should not depend on the fortuity of the judge to whom a case is assigned, and several judges in the pilot program expressed disappointment at the less-than-full participation of their court. On the other hand, judges who chose not to

36. Subject to numerous assumptions set forth in more detail in our Supplemental Report to the Committee on Court Administration and Case Management (January 18, 1994), we estimate the cost of permanently equipping one federal courtroom for electronic media coverage of cases would be $70,000–$120,000. The *Supplemental Report* is on file with the Research Division of the FJC.

participate in the program have strong objections to coverage, as indicated by their questionnaire responses and comments.

Explanation: This issue is entirely one of policy and is not addressed by the research project. Research staff has no empirical basis on which to make a recommendation on the relative values of uniform practice and individual judge control.

Appendix

Guidelines for the Pilot Program on Photographing, Recording, and Broadcasting in the Courtroom

(Approved by the Judicial Conference of the United States, September 1990. Revised June 1991.)

1. General Provisions.

(a) Media coverage of federal court proceedings under the pilot program on cameras in the courtroom is permissible only in accordance with these guidelines.

(b) Reasonable advance notice is required from the media of a request to be present to broadcast, televise, record electronically, or take photographs at a particular session. In the absence of such notice, the presiding judicial officer may refuse to permit media coverage.

(c) A presiding judicial officer may refuse, limit, or terminate media coverage of an entire case, portions thereof, or testimony of particular witnesses, in the interests of justice to protect the rights of the parties, witnesses, and the dignity of the court; to assure the orderly conduct of the proceedings; or for any other reason considered necessary or appropriate by the presiding judicial officer.

(d) No direct public expense is to be incurred for equipment, wiring, or personnel needed to provide media coverage.

(e) Nothing in these guidelines shall prevent a court from placing additional restrictions, or prohibiting altogether, photographing, recording, or broadcasting in designated areas of the courthouse.

(f) These guidelines take effect July 1, 1991, and expire June 30, 1994.

2. Limitations.

(a) Coverage of criminal proceedings, both at the trial and appellate levels, is prohibited.

(b) There shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judicial officer, whether held in the courtroom or in chambers.

(c) No coverage of the jury, or of any juror or alternate juror, while in the jury box, in the courtroom, in the jury deliberation room, or during recess, or while going to or from the deliberation room at any time, shall be permitted. Coverage of the prospective jury during voir dire is also prohibited.

3. Equipment and Personnel.

(a) Not more than one television camera, operated by not more than one camera person and one stationary sound operator, shall be permitted in any trial court proceeding. Not more than two television cameras, operated by not more than one camera person each and one stationary sound person, shall be permitted in any appellate court proceeding.

(b) Not more than one still photographer, utilizing not more than one camera and related equipment, shall be permitted in any proceeding in a trial or appellate court.

(c) If two or more media representatives apply to cover a proceeding, no such coverage may begin until all such representatives have agreed upon a pooling arrangement for their respective news media. Such pooling arrangements shall include the designation of pool operators, procedures for cost sharing, access to and dissemination of material, and selection of a pool representative if appropriate. The presiding judicial officer may not be called upon to mediate or resolve any dispute as to such arrangements.

(d) Equipment or clothing shall not bear the insignia or marking of a media agency. Camera operators shall wear appropriate business attire.

4. Sound and Light Criteria.

(a) Equipment shall not produce distracting sound or light. Signal lights or devices to show when equipment is operating shall not be visible. Moving lights, flash attachments, or sudden light changes shall not be used.

(b) Except as otherwise approved by the presiding judicial officer, existing courtroom sound and light systems shall be used without modification. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court facility, or from a television camera's built-in microphone. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the presiding judicial officer.

5. Location of Equipment and Personnel.

(a) The presiding judicial officer shall designate the location in the courtroom for the camera equipment and operators.

(b) During the proceedings, operating personnel shall not move about nor shall there be placement, movement, or removal of equipment, or the changing of film, film magazines, or lenses. All such activities shall take place each day before the proceeding begins, after it ends, or during a recess.

6. Compliance.

Any media representative who fails to comply with these guidelines shall be subject to appropriate sanction, as determined by the presiding judicial officer.

7. Review.

It is not intended that a grant or denial of media coverage be subject to appellate review insofar as it pertains to and arises under these guidelines, except as otherwise provided by law.

Guidelines Addendum:

The Judicial Conference Committee on Court Administration and Case Management made a number of recommendations in a June 1991 report to the Judicial Conference Executive Committee. The recommendations, subsequently approved, include:

(1) That the Executive Committee endorse the [CACM] Committee's interpretation that the ban on the changing of film included in guideline 5(b), does not include the changing of video cassettes.

(2) That the Executive Committee approve an expansion of the experiment to permit the Southern District of New York to allow the use of two cameras during court proceedings.

(3) That the Executive Committee direct the Committee on Court Administration and Case Management to notify courts that strict adherence to the guidelines approved by the Conference is a condition for participation as a pilot.

Tab 4

Of Cameras and Courtrooms

Alex Kozinski & Robert Johnson*

INTRODUCTION

You can't talk about cameras in the courtroom without talking about The Juice. And we'll get there. But this tale actually begins earlier, with a 1935 trial described by H.L. Mencken as "the greatest story since the Resurrection."[1] The defendant, Bruno

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* Alex Kozinski is Chief Judge of the United States Court of Appeals for the Ninth Circuit. Robert Johnson was his law clerk.

[1] David A. Sellers, *The Circus Comes to Town: The Media and High-Profile Trials*, 71 LAW & CONTEMP. PROBS. 181, 182 (2008). The quote may be apocryphal, but it shows up in so many sources, always attributed to Mencken, that it seems irrelevant at this point whether he actually said it. He ought to have.

The story of broadcasting from the courtroom actually begins earlier, with the radio broadcast of the infamous Scopes monkey trial. *See* L. SPRAGUE DE CAMP, THE GREAT MONKEY TRIAL 160 (1968). Mencken was present for that trial, too. *See, e.g.*, H.L. MENCKEN, A RELIGIOUS ORGY IN TENNESSEE: A REPORTER'S ACCOUNT OF THE SCOPES MONKEY TRIAL (2006). As Mencken tells it, the local residents didn't react kindly to the publicity in that case:

> [W]hen the main guard of Eastern and Northern journalists swarmed down . . . then the yokels began to sweat coldly, and in a few days they were full of terror and indignation. . . . When the last of [the journalists] departs Daytonians will disinfect the town with sulphur candles . . . .

Hauptmann, was charged with kidnapping and murdering the one-year-old child of Charles Lindbergh, famous transatlantic aviator.[2] An estimated 700 reporters came to town for the trial, and over 130 cameramen jockeyed for pictures.[3] The gallery was unruly and vocal.[4] Messengers ran back-and-forth, updating journalists outside the room.[5] Spectators "posed for pictures in the witness chair and the jury box, carved their initials in the woodwork, and carried off spittoons and pieces of tables and chairs as souvenirs."[6] Ginger Rogers and Jack Benny came to watch.[7] And footage of the spectacle played in movie theaters nationwide.[8]

Why should we care about any of this today? The first answer is that the Hauptmann trial inaugurated a profound distrust of cameras in the courtroom.[9] Just a few years later, the American Bar Association incorporated a ban on cameras into its canon of judicial ethics, opining that cameras "are calculated to detract from the essential dignity of the proceedings" and that they "create misconceptions with respect [to the court] in the mind of the public."[10] With some variations, critics of courtroom cameras have been making the same arguments ever since: Cameras poison

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Id. at 96.

2 *See generally* State v. Hauptmann, 180 A. 809 (N.J. 1935). For descriptions of the resulting trial, see David A. Anderson, *Democracy and the Demystification of Courts: An Essay*, 14 REV. LITIG. 627, 627–31 (1995); Richard B. Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14, 17–18 (1979); 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).

3 Kielbowicz, *supra* note 2, at 18.

4 *See Hauptmann*, 180 A. at 827.

5 *See id.*

6 Anderson, *supra* note 2, at 629.

7 *Id.*

8 Kielbowicz, *supra* note 2, at 18–19.

9 *See id.* at 20–21. Interestingly, Kielbowicz concludes that the presence of cameras in the Hauptmann trial was not generally disruptive, and that accounts of photographers "clamber[ing] on counsel's table and shov[ing] flashbulbs into the faces of witnesses" have been exaggerated. *Id.* at 17. Most film footage of the trial was actually taken after-the-fact, as witnesses would restate the highlights of their testimony after court had adjourned. *Id.* at 18. Kielbowicz concludes that the real problem was sensational media coverage more generally, and that banning cameras "was an inappropriate remedy for the problems made evident by the Hauptmann trial." *Id.* at 23.

10 *Canons of Judicial Ethics*, 62 ABA ANN. REP. 1123, 1134–35 (1937).

the atmosphere inside the courtroom, and they distort the public's view outside it.

The second possible answer to the question of why we should care about the Hauptmann trial today is that, truth be told, we shouldn't. Opponents of cameras in the courtroom posit a pre-Hauptmann Garden of Eden to which we should aspire to return: a small, rural courtroom, presided over by a stern but kindly judge vaguely reminiscent of Fred Gwynne in *My Cousin Vinny*.[11] The lawyers, the judges, the witnesses and the litigants are the only ones in the room, except, perhaps, a local journalist and a few spectators from the neighborhood. Everyone knows everyone. The room is open to the public, but this is effectively a quasi-secret proceeding. For the vast majority of the population—those lacking the time or resources to travel to this out-of-the-way destination—the trial will be experienced, if at all, via second-hand accounts in the press.

The Hauptmann proceedings shattered this world, if it ever existed, and many felt the change was for the worse. But a lot has happened in the seventy-five years since Bruno Hauptmann stood trial: We invented the ballpoint pen, the microwave and Velcro; swing music came and went; you (probably) were born. We live in the twenty-first century. After so long, the time has come to rethink our aversion to cameras in the courtroom. In fact, cameras have become an essential tool to give the public a full and fair picture of what goes on inside the courtrooms that they pay for.

I. IN THE COURTROOM

The first criticism of cameras sounded by the ABA after the Hauptmann trial had to do with their effects inside the courtroom. Let's start there.

There was a time when cameras could legitimately be expected to disrupt the pre-Hauptmann ideal by creating chaos in the courtroom. As late as 1965, in an opinion that temporarily put the constitutional kibosh on courtroom cameras, the Supreme Court

[11] MY COUSIN VINNY (Palo Vista Productions, Peter V. Miller Investment Corporation, Twentieth Century Fox Film Corporation 1992).

described a courtroom with "at least 12 cameramen," "[c]ables and wires . . . snaked across the courtroom floor, three microphones . . . on the judge's bench and others . . . beamed at the jury box and the counsel table."[12] Not exactly a low profile operation; the parties conceded that "the activities of the television crews . . . led to considerable disruption."[13] But a mere sixteen years later, in an opinion lifting the prohibition, the Court noted evidence that those concerns were "less substantial factors" in 1981.[14] Today's cameras are small, easily concealed and capable of operating without obtrusive lighting or microphones. Even during the O.J. Simpson trial, widely considered a low point for cameras in the courtroom, nobody criticized the equipment or its operators as a physical distraction.[15]

Critics also worry that cameras disrupt the status quo and cause lawyers, judges, witnesses and jurors to alter their behavior.[16] And that's undoubtedly true. Cameras in the courtrooms mean change, and if there's one thing you can say about change, it's that it changes things. Critics tend to focus on the negative aspects: Some lawyers will ham it up for the camera. Some jurors won't be able to forget the camera is in the room. Some witnesses will feel extra nervous. And some judges won't be able to resist the

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12 Estes v. Texas, 381 U.S. 532, 536 (1965).

13 *Id.*

14 Chandler v. Florida, 449 U.S. 560, 576 (1981).

15 Judge Lance Ito carefully restricted the physical presence of the camera by limiting the press to a single shared camera, operated by Court TV, and by requiring that the camera be unobtrusive and remote-controlled. *See* M.L. Stein, *Camera Will Stay in O.J. Trial Courtroom*, EDITOR & PUBLISHER MAG., Nov. 12, 1994, at 18.

16 *See, e.g.*, *Estes*, 381 U.S. at 546 ("[N]ot only will the juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting . . . ."); *id.* at 547 ("The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable."); *id.* at 548 ("Judges are human beings also and are subject to the same psychological reactions as laymen."); *id.* at 570 (Warren, C.J., concurring) ("[T]he evil of televised trials . . . lies not in the noise and appearance of the cameras, but in the trial participants' awareness that they are being televised."); Andrew G.T. Moore II, *The O.J. Simpson Trial—Triumph of Justice or Debacle?*, 41 ST. LOUIS U. L.J. 9, 10 (1996) ("Unfortunately, the [O.J. Simpson] trial became a stage for the jury, lawyers and judge to pursue their own self-serving purposes. With the defense attorneys claiming their client was the real 'victim,' the prosecution losing sight of its duty to present evidence fairly, a judge totally smitten with his own self-generated celebrity status, and jurors being discharged for a variety of problems, including misconduct, the whole proceeding became an embarrassing reflection of the American legal system.").

temptation to make themselves the central character in their own reality TV show. Take Judge Larry Seidlin (a.k.a. "Judge Larry"), a former Bronx cab driver who presided over the Anna Nicole Smith body custody hearing.[17] That judge's antics—including lengthy and personal monologues,[18] crying while delivering the judgment[19] and making an appearance on *Larry King Live*[20]—inspired ridicule[21] and led some to speculate that he was hoping to launch his own "Judge Judy"-esque show.[22] Judges, it turns out, are sometimes human too.

It's natural to focus on what can go wrong when things change, and to ignore what could go right. It's much easier to anticipate problems than imagine improvements. But when it comes to cameras in the courtrooms, there may be significant benefits. The first of these is mentioned by no less of an authority than Judge Judy: "[C]itizens of this country pay for a very expensive judicial

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[17] *Anna Nicole Smith Judge Is a Former New York City Cabbie*, FOXNEWS.COM, Feb. 16, 2007, http://www.foxnews.com/story/0,2933,252428,00.html.

[18] *Judge from the Anna Nicole Case*, YOUTUBE, http://www.youtube.com/watch?v=5zYa1p0jJco&feature=related (last visited Apr. 9, 2010).

[19] *Anna Nicole Smith Judge Breaks Down*, YOUTUBE, http://www.youtube.com/watch?v=IknVuCKX9SI (last visited Apr. 9, 2010).

[20] *Judge Larry Seidlin Meets Dannielyn*, YOUTUBE, http://www.youtube.com/watch?v=nE5HX8Btnd4 (last visited Mar. 21, 2010).

[21] *See, e.g.*, *Buzz Fleischman Parodies Judge Larry Seidlin*, YOUTUBE, http://www.youtube.com/watch?v=OM9mepY4BmE (last visited Mar. 21, 2010) ("There's no business like law business. Like no business I know. Everybody in my court will hear me. Every word I speak is made of gold."); Seth, *'Blubbering' Judge Seidlin Dumps the Anna Nicole Problem on Her Daughter's Guardian*, DEFAMER, GAWKER'S COLUMN FROM HOLLYWOOD (Feb. 22, 2007, 5:54 PM), http://defamer.gawker.com/238993/blubbering-judge-seidlin-dumps-the-anna-nicole-problem-on-her-daughters-guardian (referring to the "weepy-yet-wise" ruling of "a seemingly pre-menstrual Circuit Judge Larry Seidlin").

[22] *See, e.g.*, *All Rise!!! Judge Seidlin Says He's Ready for TV*, TMZ.COM (Feb. 20, 2007), http://www.tmz.com/2007/02/20/all-rise-judge-seidlin-says-hes-ready-for-tv. Judge Larry did reportedly tape a pilot episode after resigning from the bench. *See* Wanda J. DeMarzo, *Allegations Cloud Exit of Anna Nicole Judge*, MIAMI HERALD, June 30, 2007, at A1. But nothing ever came of it; last we heard of him, Judge Larry was embroiled in a nasty civil lawsuit brought by an elderly widow who claimed he bilked her out of her money. Bob Norman, *Witness: Judge Larry Seidlin Schemed for Widow's Cash*, NEW TIMES BROWARD-PALM BEACH, Mar. 18, 2010, http://www.browardpalmbeach.com/2010-03-18/news/witness-judge-larry-seidlin-is-lazy-and-a-schemer. For more on the good judge's antics, see generally TMZ.COM, http://www.tmz.com (last visited Apr. 24, 2010).

system and they are entitled to see how it's functioning."[23] The public can better monitor the judiciary—to ensure that its processes are fair, that its results are (generally) just and that its proceedings are carried out with an appropriate amount of dignity and seriousness—if it has an accurate perception of what happens in the courtroom.

Increased public scrutiny, in turn, may ultimately improve the trial process. Judges may avoid falling asleep on the bench or take more care explaining their decisions and avoiding arbitrary rulings or excessively lax courtroom management. Some lawyers will act with greater decorum and do a better job for their clients when they think that colleagues, classmates and potential clients may be watching. Some witnesses may feel too nervous to lie; others may hesitate to make up a story when they know that someone able to spot the falsehood may hear them talk. Conscience, after all, is that little voice in your head that tells you someone may be listening after all. And that someone might be the guy who was walking his dog on the golf course and knows for certain that you, the witness, couldn't possibly have been across town at eleven o'clock Wednesday morning. And some jurors may pay greater attention, and approach their task with greater seriousness, when they know their friends and family will be following the trial on TV and will be ready to second-guess the verdict after the trial is over.

There was a time when we had no idea how these changes would add up, and it may have been reasonable to assume that the risks outweigh the potential benefits.[24] But that time is long gone. In 1991, the Federal Judicial Center launched a three-year pilot program in the trial courts of six districts, and the appellate courts

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[23] *Larry King Live* (CNN television broadcast Feb. 17, 2010), *available at* http://transcripts.cnn.com/TRANSCRIPTS/1002/17/lkl.01.html.

[24] *See* Chandler v. Florida, 449 U.S. 560, 578–79 (1981) ("[A]t present no one has been able to present empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect on [the judicial] process."). Prior to *Chandler*, the Court in *Estes* rejected the notion that its concerns were "purely hypothetical" based on the fact that the federal courts and all but two states banned cameras in the courtroom. Estes v. Texas, 381 U.S. 532, 550 (1965). As explained *infra*, that's no longer the case.

of two circuits, that studied the question.[25] The study concluded that judges and attorneys reported "small or no effects of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice."[26] In fact, the study concluded, the "attitudes of judges towards electronic media coverage of civil proceedings were initially neutral and became more favorable after experience under the pilot program."[27]

You can peruse the data from the pilot program in this article's appendix, but here are a few of the highlights: Only 19% of lawyers thought cameras made witnesses even moderately more nervous (only 2% thought they had this effect to a very great extent);[28] only 10% of lawyers thought cameras even moderately distracted jurors (and none thought they had this effect to a very

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[25] *See* FED. JUDICIAL CTR., ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS (1994) [hereinafter FJC REPORT]. Specifically, the study involved courts in the Southern District of Indiana, District of Massachusetts, Eastern District of Michigan, Southern District of New York, Eastern District of Pennsylvania and Western District of Washington, as well as the Second and Ninth Circuits. *Id.* at 4. The districts were selected for size, caseload and proximity to major media markets, as well as to provide a cross-section of regions and circuits. *Id.*

[26] *Id.* at 7. The program didn't directly survey witnesses and jurors, as they lack the experience needed to meaningfully compare their experience to a courtroom without cameras, but it did survey the opinions of lawyers and judges regarding the effect on other participants. *Id.* at 8. For instance, only 19% of judges thought cameras made witnesses less willing to appear in court to even "a moderate extent;" and the same percentage thought cameras even moderately distracted witnesses. *Id.* at 14. The Federal Judicial Center explained these findings, in part, by noting that "increasing use of video depositions" meant that "many witnesses are already 'used to having cameras poked in their faces.'" *Id.* at 25.

Judges also reported that cameras had "no effect or a positive effect on the performance and behavior of counsel." *Id.* The most negative finding appears to be that 27% of judges thought cameras made counsel at least moderately more theatrical, but significantly only 7% saw this effect to a "great" or "very great" extent. *Id.* at 15. A significant majority, 66%, saw this effect only to "little or no" or "some" extent. *Id.* And judges also reported some positive effects: For instance, 34% thought cameras made attorneys at least moderately more courteous. *Id.*

The impact on judges was also minimal or positive. At least some judges reported positive effects: 27% thought cameras made them at least moderately more attentive, and 22% thought cameras made them at least moderately more courteous. *Id.* Judges also resoundingly rejected the idea that the presence of cameras had any impact on their own decisionmaking. *Id.*

[27] *Id.* at 7.

[28] *Id.* at 20.

great extent);[29] 25% of judges thought cameras at least moderately increased jurors' sense of responsibility for their verdict (although none saw this to a very great extent);[30] and 32% of judges thought cameras made attorneys at least moderately better prepared (7% thought they had this effect to a very great extent).[31] Anyone who thinks that allowing cameras in the courtroom will bring the end of civilization as we know it should give those numbers (and the other numbers in the appendix) a second look.

Ever since a study by the Florida judiciary concluded that "on balance there is more to be gained than lost by permitting electronic media coverage of judicial proceedings,"[32] we've also seen a growing presence of cameras in state courts.[33] In fact, perhaps the most telling statistic about cameras in the courtroom is this one: After decades of experience, forty-four states now allow at least some camera access to trial courts.[34] Many of those states,

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[29] *Id.*

[30] *Id.* at 14.

[31] *Id.* at 15.

[32] *In re* Petition of Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 780 (Fla. 1979); *see also* Chandler v. Florida, 449 U.S. 560, 565 (1981).

[33] In 1981, the Supreme Court decided a case relaxing constitutional restrictions on cameras in the courtroom. *Chandler*, 449 U.S. at 582–83. The case arose after Florida, following a limited pilot program, approved television coverage of court proceedings by a single, fixed camera, without artificial lighting, using the court's own audio equipment. *Id.* at 566. The Supreme Court expressed some concerns with cameras, but stated that the defendants in *Chandler* had "offered nothing to demonstrate that their trial was subtly tainted by broadcast coverage." *Id.* at 579.

The ABA revised its model code of judicial ethics to relax the prohibition on cameras one year later, ABA CODE OF JUDICIAL CONDUCT Canon 3A(7) (1982), and in 1989, it removed the ethical provisions relating to electronic media altogether. *See* ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, REPORT TO THE HOUSE OF DELEGATES § III (1990). Around the same time, in federal courts, the Judicial Council of the United States relaxed its position on cameras—particularly with respect to appellate arguments. *See* JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 17 (1996) [hereinafter JUDICIAL CONFERENCE REPORT].

[34] *See Cameras in the Court: A State-by-State Guide*, RADIO TELEVISION DIGITAL NEWS ASS'N, http://www.rtdna.org/pages/media_items/cameras-in-the-court-a-state-by-state-guide55.php (last visited Feb. 18, 2010). All fifty states allow some form of camera access, but Illinois, Louisiana, Nebraska, New York and South Dakota generally limit access to appellate courts, while Utah limits access to still cameras. *Id.*; *see also* LORRAINE H. TONG, CONG. RESEARCH SERV., TELEVISING SUPREME COURT AND OTHER FEDERAL COURT PROCEEDINGS: LEGISLATION AND ISSUES 17 (2006). At least, that's where

including California, leave the question of access largely to the discretion of the presiding judge.[35] The decisions of so many states, over so many years, tell us more than any survey data ever could.

And, if that's not enough for you, empirical evidence from the states is also positive. After reviewing multiple studies of state judiciaries, the Federal Judicial Center concluded that "for each of several potential negative effects of electronic media on jurors and witnesses, the majority of respondents indicated the effect does not occur or occurs only to a slight extent."[36] For instance, 90% of surveyed jurors in Florida and New Jersey thought cameras "had 'no effect' on their ability to judge the truthfulness of witnesses;"[37] "most witnesses reported that the presence of electronic media had no effect on their testimony;"[38] and "most jurors . . . indicated they were not distracted or were distracted only at first" by the presence of cameras.[39] Anecdotally, witnesses, judges, jurors and attorneys report that once a trial gets under way they tend to forget the cameras are there.[40]

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things stood in 2007, when the RTDNA conducted its survey. Since then, Nebraska has launched a pilot program experimenting with cameras in its trial courts. *See* Press Release, Neb. Supreme Court, Supreme Court Authorizes Television News Cameras in Trial Courts (Mar. 13, 2008), *available at* http://www.supremecourt.ne. gov/press/2008-releases/tvs-trial-courts-first-dist.pdf.

35 *Cameras in the Court: A State-by-State Guide*, *supra* note 34. At least one court has found that bans on cameras in the courtroom violate the freedom of the press. *See* People v. Boss, 701 N.Y.S.2d 891, 895 (N.Y. Sup. Ct. 2000). Another court has indicated that they might someday, but don't just yet. *See* Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 23–24 (2d Cir. 1984). Of course, that was twenty-six years ago.

36 FJC REPORT, *supra* note 25, at 42. The report summarized data from Arizona, California, Florida, Hawaii, Kansas, Maine, Massachusetts, Nevada, New Jersey, New York, Ohio and Virginia. *Id.* at 38; *see also* MARJORIE COHN & DAVID DOW, CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE 62–64 (1998) (surveying studies and concluding that "all the studies arrived at the same conclusion: that camera coverage generally did not affect the proceedings negatively").

37 FJC REPORT, *supra* note 25, at 39.

38 *Id.* at 40.

39 *Id.* at 41.

40 *See* COHN & DOW, *supra* note 36, at 67 ("The authors asked dozens of judges, lawyers, witnesses and jurors who had participated in televised proceedings a central question: did the camera make a difference? . . . [M]any who did admit a difference had a common response: they felt the camera's impact initially and soon forgot about it.").

Nobody seriously believes that cameras should be allowed for every moment of every trial. Where there are legitimate concerns with witness safety, or other special circumstances, cameras can be turned off or witnesses' faces can be blurred. As with any question of courtroom management, judges may be trusted to use their good sense and judgment to ensure a fair trial and balance competing concerns. But decades of experience in state courts, and ample empirical evidence, simply does not support a blanket prohibition on cameras in the courtroom.

Those who say that cameras will change the atmosphere of the courtroom must do more than blindly oppose the new and the different. The pre-Hauptmann ideal isn't enshrined in any rule book as The Way Things Ought to Be. Things change, and that's not a bad thing. Otherwise, why not reach back further, to a time when every juror was also a neighbor and close acquaintance of the defendant? I'm sure that system had its advantages. Or why not even earlier, to a time when we tried defendants by ordeal? Was it really so bad? There's no reason to think that allowing cameras in the courtroom will prove any worse than all the changes that have come before, and there's plenty of reasons to think it will be a good thing. The premise that transparency and accountability are good for institutions has animated our traditional preference for open courtrooms, and there's no reason to turn our back on it today.

But, you're probably thinking: What about O.J.? The case against cameras in the courtroom may begin with Hauptmann, but it ends with O.J. And so does the very brief story of cameras in the federal courts. The Judicial Conference of the United States, the main policymaking body for the federal judiciary, appeared in the early 1990s to be on the verge of approving cameras in both the circuit and district courts.[41] And then Judge Lance Ito, after some initial hesitation, decided to allow a single pool camera operated by Court TV into the O.J. Simpson courtroom.[42] An estimated 150

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[41] *See, e.g.*, JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 103–04 (1990); FJC REPORT, *supra* note 25, at 43.

[42] Stein, *supra* note 15, at 18. For a description of the limits Judge Ito placed upon the camera, see *supra* note 15. Judge Ito also prohibited the camera from filming the jury,

million people watched the verdict on live TV; smaller, but still significant, numbers watched the rest of the trial.[43] The spectacle was widely thought to be a disaster and a circus, many blamed the camera, and plans for cameras in the federal district courts were put on ice, and largely remain there today[44]—with the notable exception of two districts in New York.[45]

A lot of people have called the post-O.J. backlash an overreaction.[46] But I won't deny that the camera in the O.J. courtroom changed that proceeding in a host of ways. Every person in that courtroom, for better or worse, undoubtedly believed

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and Court TV had the feed on a seven-second delay so that an employee could monitor to see that no errors occurred. Kim Cobb, *Ito Furious over Snafu with Video*, HOUSTON CHRON., Jan. 25, 1995, at A6. That system wasn't always successful, and one juror who leaned forward in her seat entered the camera's eye for eight-tenths of a second. *Id.* Judge Ito was furious. *Id.*

[43] Jefferson Graham, *O.J. Verdict Watched by 150 Million*, USA TODAY, Oct. 5, 1995, at 1D. This was more people than watched either the JFK funeral or the Apollo 13 moon landing. *Id.* The most-watched Super Bowl ever, in 2010, drew a paltry 106.5 million viewers. Neil Best, *Super Bowl New King of TV*, NEWSDAY, Feb. 9, 2010, at A05.

[44] *Compare* FJC REPORT, *supra* note 25, at 43, *with* JUDICIAL CONFERENCE REPORT, *supra* note 33, at 17. Dean Erwin Chemerinsky is on record with a telling anecdote: "There was . . . a panel discussion after the O.J. Simpson case. I was standing in the back of the room, and a judge said, 'Good thing the O.J. case happened, we'll never now have to deal with cameras in our Federal Courts.'" Symposium, *Justice in the Spotlight*, 21 T.M. COOLEY L. REV. 337, 349 (2004); *see also* Henry J. Reske, *Courtroom Cameras Face New Scrutiny*, 81 ABA J. 48D (1995).

[45] CIV. R. 1.8 (S.D.N.Y. 2009); CIV. R. 1.8 (E.D.N.Y. 2009).

[46] As Dalia Lithwick has put it, "Ultimately, the way in which the O.J. Simpson case differed from the celebrity trials that came before and after has little to do with the fact that the television cameras invited us in the courtroom, and everything to do with the fact that we showed up. And stayed." Dahlia Lithwick, *We Won't Get O.J.-ed Again*, SLATE (June 9, 2004), http://www.slate.com/id/2102084/; *see also* Symposium, *Justice in the Spotlight*, *supra* note 44, at 349 (statement of Dean Chemerinsky) ("I truly believe that when the jury was in the courtroom, the lawyers did not try the case any differently than if there had not been a camera in the courtroom."); Kelli L. Sager & Karen N. Frederiksen, *Televising the Judicial Branch: In Furtherance of the Public's First Amendment Rights*, 69 S. CAL. L. REV. 1519, 1519 (1996) ("[T]he courtroom camera . . . has been singled out as the purported cause of every imaginable evil associated with the trial."); Jane Kirtley, *Forget O.J.: Cameras Belong in Court*, AM. JOURNALISM REV., Oct. 1995, at 66 ("[C]ameras in the court [are] unfairly labeled as the perpetrator, when the fault, if there is one, rests with reporting practices that are as old as journalism itself."); Scott Libin, *OJ Simpson and the Backlash Against Cameras in Court*, POYNTER ONLINE (Oct. 1, 1999), http://www.poynter.org/content/content_view.asp?id=5477&sid=14 ("[W]hat disgusted so many people about the OJ Simpson case would have happened with or without cameras in court. In fact, it might well have been worse.").

he was part of the biggest television event of all time. Not being omniscient, I won't try to imagine exactly how the trial would have looked without the dynamic created by that belief. Maybe Judge Ito would have kept firmer control of the proceedings, or maybe he would have felt less reason to exert any control at all. Maybe some lawyers would have acted with greater dignity; maybe some would have felt even greater license to engage in bad behavior.

But one thing is certain: However all the changes added up, it's dollars to doughnuts the jury would still have voted to acquit, although the public wouldn't be in nearly as good a position to judge the rightness or wrongness of that verdict or to evaluate the process that led the jury to reach it. We'd all assume the jury had its reasons; after all, we weren't there to see the whites of Kato Kaelin's eyes. We'd assume the judge, lawyers and other trial participants did their level best; the defense attorneys were latter-day Perry Masons, the prosecutors were Robert Jackson personified and the jurors were twelve little Solomons.[47] O.J. would be a celebrity in good standing, acquitted by an impartial jury of his peers and rewarded with his own reality TV show and a sponsorship deal for the Ford Bronco. Some might well prefer this model of the trial-as-black-box over the knowledge that somebody they believe committed murder is (or at least was) walking free, writing memoirs and pawning off his sports memorabilia. It's the "ignorance is bliss" school of justice.

So of course we blame the camera, just like generations before us have always shot the messenger. We blame the camera for letting us see the evidence, so that we could know we disagree with the way the case was decided. We blame the camera for exposing us to the lawyers, the judge and the witnesses—all of whom have been accused of falling short. We blame the camera for making the entire trial less legitimate, when in fact the only thing that tainted the trial was the trial itself. Better for the whole thing to have proceeded in sleepy obscurity, we say. At least then,

[47] In fact, perhaps they were. *See* United States *ex rel.* Balzer Pac. Equip. Co. v. Fid. & Deposit Co. of Md., 895 F.2d 546, 555 n.5 (9th Cir. 1990) (Kozinski, J., dissenting in part).

if the defense decided to ask for nullification, and the jury decided to oblige, we wouldn't have to see it in such vivid detail.

The problem with this response to the O.J. trial is that the public has a right and even an obligation to know the truth. We can't bury our heads in the sand when it comes to matters as important as the administration of justice; that's the very reason trials are public. If the jury acquits a guilty man, the public absolutely should be upset; nothing says a man found not guilty by a jury has a right to be considered innocent by the world at large. If prosecutors misbehave, or judges fail to do their job, the public should express its disapproval and demand change. And if defense attorneys cross an ethical line, they should pay the price in diminished reputation. As Justice Brandeis put it, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[48] If we don't like the way courtrooms look on camera, the solution is to change the courtrooms, not toss out the cameras. At least that's how a free and open society ought to work.

II. OUTSIDE THE COURTROOM

Which brings me to the second concern advanced by the ABA after the Hauptmann trial: that cameras "create misconceptions with respect [to the court] in the mind of the public."[49] Cameras in the courtroom have been accused of sensationalizing courtroom proceedings and of giving the public a less accurate description than might be gleaned from a written report. If the goal of camera access is increased transparency and public access, this argument goes, cameras are actually counterproductive.

Once again, we have to be careful to avoid turning cameras into scapegoats. We know that a trial can be transformed into a

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[48] Buckley v. Valeo, 424 U.S. 1, 67 (1976) (quoting L. BRANDEIS, OTHER PEOPLE'S MONEY 62 (Nat'l Home Library Found. ed. 1933)) (internal quotation marks omitted); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 578 (1980) (Burger, C.J.) ("[A] trial courtroom also is a public place where the people generally . . . have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.").

[49] *Canons of Judicial Ethics*, *supra* note 10, at 1135.

spectacle, and the rights of a defendant unfairly prejudiced, without any help from cameras in the courtroom. Consider *Sheppard v. Maxwell*,[50] the trial of a Cleveland surgeon for the murder of his wife (and the inspiration for *The Fugitive*).[51] In that case, newspapers did the job—publishing articles that "emphasized evidence that tended to incriminate Sheppard" and "portray[ing] Sheppard as a Lothario" based on evidence that was never introduced in court.[52] The Supreme Court concluded that Sheppard's trial compared unfavorably to a proceeding that *had* been filmed and broadcast: "The press coverage of the *Estes* trial was not nearly as massive and pervasive as the attention given . . . to Sheppard's prosecution."[53] Likewise, in the O.J. Simpson trial, many of the worst media practices—including sensationalist coverage and excessive pretrial publicity—had nothing to do with cameras.[54] Sensational reporting, and its effect on the public, is the inevitable price we pay for public trials.

Sensational press coverage may be unfair to individuals caught in the justice system, and it may complicate the job of the court, but it's also essential that the public have a full and fair understanding of what goes on in court.[55] If the public instead

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[50] 384 U.S. 333 (1966). There, a coroner's inquest into the murder was filmed and broadcast, but the trial wasn't. *Id.* at 339, 343–44. During the trial, cameramen did wait to catch people entering and leaving the courtroom. *Id.* at 344.

[51] THE FUGITIVE (Warner Brothers 1993).

[52] *Sheppard*, 384 U.S. at 340.

[53] *Id.* at 353–54. The Court also noted that "[t]he *Estes* jury saw none of the television broadcasts from the courtroom," because it was sequestered, whereas "the *Sheppard* jurors were subjected to newspaper, radio and television coverage of the trial" even though there were no cameras in the courtroom. *Id.* at 353.

[54] When Judge Ito approved the presence of cameras, he noted that he had concerns about the media's coverage, but that the cameras were innocent of wrongdoing. *See* Michael Fleeman, *Ito Allows Cameras in Simpson Trial*, ASSOCIATED PRESS, Nov. 7, 1994; Sally Ann Stewart, *Ito Allows Televised Trial*, USA TODAY, Nov. 8, 1994, at 1A.

For a detailed description of the excesses of the O.J. Simpson trial, see Moore, *supra* note 16. Moore concludes that the Los Angeles D.A. gave out so many sensational details about the crime before trial, including false information, that he "fail[ed] in his professional responsibilities," *id.* at 12, and that defense lawyers improperly engaged in a "publicity blitz to influence potential jurors" before the beginning of trial, *id.* at 19.

[55] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 578 (1980); Symposium, *Justice in the Spotlight*, *supra* note 44, at 351 (statement of Dean Chemerinsky) ("[F]ree press is quite complementary to a fair trial. The opposite of a free press, closed

lacks the tools to understand why cases are decided as they are, those outcomes will come to seem arbitrary and capricious, and the public will lose respect for our system of justice. My former boss, Chief Justice Burger, put it nicely: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[56]

What the guarantee of an open trial means has changed over the years. There was a time, back in the pre-Hauptmann Garden of Eden, when the cost and time required to travel to see a distant proceeding was so great that few, if any, would ever undertake it. Today, even if a trial is held in California, residents of New York are able to exercise their right to see it, at least so long as they are willing to shell out the cost of a cross-country flight. Trials have opened in other ways, as well, as observers have begun twittering and live blogging from the gallery. Outside the federal courts—in Congress, state courts and most other public institutions—the definition of a "public" proceeding has also come to include cameras. If courts fail to provide forms of access that accord with those changing expectations,[57] limits on access that once seemed perfectly reasonable will appear increasingly secretive, and judicial proceedings will lose a measure of the public's respect as a result. At a time when we've had gavel-to-gavel coverage of both houses of Congress for over two decades,[58] it's hard to explain why the

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proceedings, leads to the star-chamber type abuses that occurred during the Middle Ages.").

[56] *Richmond Newspapers*, 448 U.S. at 572.

[57] *See, e.g.*, Editorial, *Cameras in Our Federal Courts—The Time Has Come*, 93 JUDICATURE 136, 172 (2010); Editorial, *A Step Forward for Cameras in Court*, STAR TRIB. (Minneapolis, Minn.), Feb. 21, 2009, at 14A; Editorial, *Cameras in the Courtroom: It's Time to Shine More Light into the Federal Courthouse*, ROANOKE TIMES, Mar. 17, 2010, at A16; Editorial, *Cameras in the Courtroom*, ST. PETERSBURG TIMES, Oct. 4, 2005, at 12A; Editorial, *Cameras in the Courts*, N.Y. TIMES, May 15, 2007, at A18; Editorial, *Cameras Open Courts to Public*, NEW HAVEN REG., Apr. 16, 2007, at A6; Editorial, *Case Made for Cameras in the Courts*, DAILY HERALD (Chi., Ill.), Mar. 12, 2008, at 14; Editorial, *Expand Court Access by Allowing Cameras*, DES MOINES REG., Nov. 8, 2007, at A14; Editorial, *Seeing for Ourselves*, N.Y. DAILY NEWS, Feb. 3, 2010, at 24; Editorial, *The Case for Cameras*, L.A. TIMES, May 26, 2009, at A20; Editorial, *Trial Shows Value of Cameras in Court*, LINCOLN J. STAR, May 24, 2008, at B5.

[58] *Marking 30 Years Covering Washington Like No Other*, C-SPAN.ORG, http://www.c-span.org/30Years/default.aspx (last visited Apr. 21, 2010) (noting that C-

prospect of broadcasting a judicial trial to a courtroom across the country merits the emergency intervention of the Supreme Court.[59]

At the same time, change doesn't have to be a suicide march. Trials would be more open and transparent if they were held in Madison Square Garden, and that would certainly be technologically feasible. Yet the Supreme Court has said that a defendant "is entitled to his day in court, not in a stadium."[60] If cameras in the courtroom rob criminal defendants and civil litigants of their dignity, and promote a public perception of trials as more about sensational entertainment than a sober search for truth, courts may be justified in parting ways with other public institutions, and public expectations, to exclude cameras in favor of forms of reporting that better advance respect for the rule of law and the guarantee of a fair trial.

Unlike concern with the effect of cameras inside the courtroom, this argument retains real bite after the O.J. experience. Consider footage of the verdict (available now on YouTube).[61] It's high drama: As the courtroom waited, the camera zoomed in for an intense close-up of O.J.'s face, and remained there for the agonizing moments before—and during—the verdict. Because the camera was positioned above the jury, O.J. appeared to gaze ominously into the camera's eye. Ron Goldman's sister began to cry, and the camera pivoted for a close-up of her face. From there, to the stunned faces of the prosecution. And back to Ron Goldman's sister. As the Supreme Court has said, "[t]he television camera is a powerful weapon" and "inevitable close-ups of [the accused's] gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities [and] his dignity."[62] That's to say nothing of the impact on the victim's family, or the public perception of a trial depicted in such a manner.

SPAN has televised 28,603 hours of live U.S. House debate since March 19, 1979 and that C-SPAN2 has televised 26,954 hours of live U.S. Senate debate since June 2, 1986).

59 *See* Hollingsworth v. Perry, 130 S. Ct. 705, 709, 715 (2010) (per curiam).

60 Estes v. Texas, 381 U.S. 532, 549 (1965).

61 *See The O.J. Simpson Trial Verdict Is Revealed (Oct. 3, 1995)*, YOUTUBE, http://www.youtube.com/watch?v=jED_PB5YQgk (last visited Feb. 16, 2010).

62 *Estes*, 381 U.S. at 549.

No doubt many would prefer to return to the pre-Hauptmann ideal of the stalwart beat reporter, alone in the courtroom with his pad and pencil. I'm thinking of journalists like the Supreme Court's Linda Greenhouse and Nina Totenberg, but at the trial level; repeat-players in the courtroom who have incentives to maintain a sterling reputation, who know and understand what they're seeing and who earn their living making courtroom drama intelligible to a lay audience. The trusty beat reporter doesn't sensationalize, if only because it will sour his relationship with the court. And he knows how to give an account of judicial proceedings for a lay audience that is in some ways superior to a seat inside the courtroom. When the public sees a trial for itself, or through the lens of the camera, there's always a risk of misunderstanding: The public may mistake zealous advocacy for obstruction of justice, or vice versa. A judge's impartial ruling, based on binding law, may seem arbitrary or even biased; when a defendant prevails on an obscure legal ground like immunity or jurisdiction, some will see injustice. On the other hand, the trusty beat reporter can fairly and accurately explain the trial so as to educate the public while avoiding misunderstanding.

Sounds good, and if the choice were between that and the O.J. media circus, we would have a hard choice indeed. But, in truth, we may never have had the ability to restrict media coverage to these super-journalists. Such reporters have occasionally walked the earth, but print media isn't uniformly composed of the best of the best. The *Sheppard* case, for example, illustrates what can happen when newspaper journalism goes bad. And even if print media were all goodness and light, banning cameras from the courtroom wouldn't prevent TV coverage. Many people, disappointed at not being able to watch the recent trial of Michael Jackson, watched a daily reenactment on the E! network instead.[63] And the TV media also can't be stopped from capturing

[63] Tom Shales, *Holding E! in Contempt for Trial Reenactment*, WASH. POST, Mar. 2, 2005, at C1 (describing "a bargain-basement reenactment" that "does have a sticky irresistibility, like a glazed doughnut that's gone all gooey"); *see also* Geoffrey A. Fowler, *Prop 8 Trial Testimony Gets a Marisa Tomei Makeover*, WALL ST. J. L. BLOG (May 13, 2010, 3:43 PM), http://blogs.wsj.com/law/2010/05/13/prop-8-trial-testimony-gets-a-marisa-tomei-makeover/; *Prop 8 Trial Re-enactment, Day 1 Chapter 1*, YOUTUBE, http://www.youtube.com/watch?v=tDmA_n5ygS4&NR=1 (last visited Mar. 29, 2010).

sensationalist footage of the defendant or the victims outside the courtroom.[64]

The trusty beat reporter is also proving increasingly elusive, and will only become more so in the future. We've seen a long, slow decline in the newspaper industry, and it recently got a lot worse: In 2009, over one hundred newspapers closed, and over 10,000 newspaper jobs were lost.[65] There's no reason to think those papers and jobs will come back; if anything, the state of the print industry is only going to decline further. Craig killed the classifieds; newspaper.com cannibalized The Newspaper; JDate wooed away the personals; Monster devoured help wanted; and the fastest way to get the news is through the blogosphere (or, better yet, the Twitterverse).[66] The old business model is no longer sustainable, and as newspapers decline the beat reporter will disappear along with them.

Instead, we're witnessing the rise of a much more diffuse style of reporting. Consider the recent criminal prosecution of the chemical company W.R. Grace (of *A Civil Action*[67] fame) for mining practices that allegedly caused a lung cancer outbreak in

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[64] One court, fearing that a ban on photographing the defendant in court would be circumvented by photographing the defendant *out* of court, tried to ban all photography of the defendant in the judicial complex; the New Mexico Supreme Court found that didn't fly. State *ex rel.* N.M. Press Ass'n v. Kaufman, 648 P.2d 300 (N.M. 1982). Another court, frustrated with bright lights and pandemonium in the corridors of the courthouse, tried to ban cameras there; the Florida Supreme Court thought that violated the First Amendment too. *In re* Adoption of Proposed Local Rule 17, 339 So. 2d 181 (Fla. 1976); *see also* Dorfman v. Meiszner, 430 F.2d 558 (7th Cir. 1970) (per curiam) (striking down a ban on all photography within federal building containing a courtroom).

[65] Preethi Dumpala, *The Year the Newspaper Died*, BUS. INSIDER (July 4, 2009), http://www.businessinsider.com/the-death-of-the-american-newspaper-2009-7; *see also* Stephanie Chen, *Newspapers Fold as Readers Defect and Economy Sours*, CNN.COM, Mar. 19, 2009, http://www.cnn.com/2009/US/03/19/newspaper.decline.layoff/index.html.

[66] *See* Megan McArdle, *Old Media Blues*, ATLANTIC, July 1, 2009, http://megan mcardle.theatlantic.com/archives/2009/07/old_media_blues.php (adding that "Google took those tiny ads for weird products. And Macy's can email its own damn customers to announce a sale.").

[67] A CIVIL ACTION (Touchstone Pictures, Paramount Pictures, Wildwood Enterprises, Scott Rudin Productions 1998).

Libby, Montana.[68] The trial was in Missoula, but the prosecution requested the creation of an overflow room in Libby—a four-hour drive away.[69] The court denied the request in light of the ban on cameras in federal criminal trials.[70] But the result wasn't that members of the Libby community had to wait patiently for a trusted beat reporter to file an evening dispatch. The trial was covered in real-time via Twitter, at feeds such as mslngracetrial (a local print journalist),[71] UMGraceCase (a group of students from the University of Montana),[72] wrgracetrial (a local TV station)[73] and asinvestigates (an investigative reporter).[74]

Some of this coverage may have been provided by impartial journalists, but much of it wasn't. Tweets from asinvestigates, for instance, were stridently pro-prosecution. When the defense seemed to score points, asinvestigates suggested that "Grace lawyers team[ed] up to stifle government expert witness."[75] Or, in another tweet: "Second week of Grace trial ends with defense using usual tricks to discredit physicians."[76] On the other hand, when the prosecution scored points it was a triumph of justice: "Defense fails to prove that EPA's top emergency response wizard was a cowboy who made bad decisions."[77] Asinvestigates also

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[68] *See generally* Indictment, United States v. W.R. Grace, No. CR 05-07-M-DWM (D. Mont. Feb. 7, 2005).

[69] Order at 1–2, United States v. W.R. Grace, No. CR 05-07-M-DWM (D. Mont. May 12, 2006).

[70] *Id.* at 2. The prosecution argued that this was necessary to comply with a federal statue affording victims "[t]he right not to be excluded from any public proceeding." *Id.* (citing 18 U.S.C. § 3771(a) (2006)). The district court reasoned, however, that the "right accorded crime victims is the right to be physically present at court proceedings, not the right to have court proceedings broadcast." *Id.* at 3.

[71] Profile of mslngracetrial, TWITTER, http://www.twitter.com/mslngracetrial (last visited Apr. 5, 2010).

[72] Profile of UMGraceCase, TWITTER, http://www.twitter.com/UMGraceCase (last visited Apr. 5, 2010). For an assessment of the University of Montana students' coverage, see Nadia White, *UM's Grace Case Project*, MONT. LAW., Apr. 2010, at 6.

[73] Profile of wrgracetrial, TWITTER, http://www.twitter.com/Wrgracetrial (last visited Apr. 14, 2010).

[74] Profile of asinvestigates, TWITTER, http://www.twitter.com/asinvestigates (last visited Apr. 14, 2010).

[75] Tweet of asinvestigates, TWITTER (Mar. 9, 2009, 9:20 PM), http://www.twitter.com/asinvestigates.

[76] *Id.* (Mar. 4, 2009, 10:54 PM).

[77] *Id.* (May 5, 2009, 7:59 PM).

made his feelings about the judge quite clear: "A statue of Lady Justice in Judge Molloy's courtroom would need earplugs along with her blindfold."[78] Without the context of a video recording, the public had no way to evaluate the truth of these observations.

Because the internet gives a platform to everybody who cares enough to make his voice heard, it's often inevitable that the loudest voices will be those who care the most. During a recent medical malpractice trial in Massachusetts, a blogger named "Dr. Flea" provided a strongly pro-defense account.[79] The blog attracted a sympathetic following[80] and even won an award as one of the best medical blogs on the internet.[81] Surprise: It turned out that Dr. Flea was none other than the defendant.[82] It may not usually be litigants themselves who take to the blogs, but members of the public who feel some sort of a personal stake in a trial—because they know a litigant or victim, because they have had some similar experience or simply because they feel passionately about the issue—will frequently use the internet to disseminate their views. And they won't always make their biases explicit.

Let's be clear: There's absolutely nothing wrong with opinionated people making their opinions known; it is every citizen's right and privilege to express discontent with the way a trial has been handled, or to declare a firm belief that a defendant is guilty as sin (or innocent as virtue) and deserves to be convicted (or not). The problem arises when such coverage becomes the public's primary means of experiencing a trial and—in particular—when the public lacks the tools to evaluate those

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[78] *Id.* (Apr. 22, 2009, 8:20 AM).

[79] *See* Sellers, *supra* note 1, at 193; Jonathan Saltzman, *Blogger Unmasked, Court Case Upended*, BOSTON GLOBE, May 31, 2007, at A1.

[80] *See, e.g., Dr. Flea Disappears*, DOCTOR ANONYMOUS (May 16, 2007, 1:01 AM), http://doctoranonymous.blogspot.com/2007/05/dr-flea-disappears.html ("I'm going to very much miss Dr. Flea and his witty rantings. Dr. Flea, if you're still out there, you have an open invitation to guest post on my blog any time. Best of luck in your court case. We're all pulling for you.").

[81] *See 2006 Medical Weblog Awards: Meet the Winners!*, MEDGADGET (Jan. 19, 2007), http://medgadget.com/archives/2007/01/2006_medical_we.html.

[82] Saltzman, *supra* note 79. In the end, the doctor's approach wasn't the most successful; Dr. Flea ridiculed the jury for dozing off during trial, and when Dr. Flea's identity was revealed in court the defendant quickly settled the case for a substantial sum. *Id.*

opinions. If partisans dominate the public's understanding of what goes on inside the courtroom, the public will become more likely to mistake a correct verdict for a miscarriage of justice, or to miss a genuinely unjust verdict because the wrongly prevailing party made a lot of (metaphorical) noise online. That can only erode the public's respect for the business of the courts and, ultimately, the public's regard for the rule of law.

The trusty beat reporter can't help us out of this new paradigm; even if he weren't disappearing, no single voice could rise out of the online din to establish itself as sufficiently authoritative to serve that function today. Nor is the solution to keep new forms of media out of the courtroom. If judges banish laptops and smart phones, bloggers will simply wait to post until after court is out, and tweeters will run across the hall to tweet where the tweeting's good. If judges forbid tweeting in the hallway, they'll just tweet on the courthouse steps. Judges obviously can't ban the public from using the internet altogether, and the reality today is that the internet gives every member of the public a platform to make his opinion known. When a high-profile case attracts attention, the people who care the most will seize that platform and make every effort to skew the public's perception of the trial. What we urgently need is an impartial voice, capable of truthfully and authoritatively recounting the events of trial for the absent public in order to set the record straight.

Luckily, the courtroom camera is ready, willing and able to step into that role. It's no longer the case that the courtroom camera must be operated by the media, as it was during the O.J. trial. Video cameras have become cheap and ubiquitous, and many courtrooms already have cameras installed for internal court use: to create video records,[83] to allow participants to make remote appearances[84] and to provide overflow facilities in nearby rooms.[85] The internet has also made it possible to cheaply disseminate video worldwide. It's only a small step—both in terms of expense and technical knowhow—for courts to make footage from a court-

[83] Fredric I. Lederer, *Technology Comes to the Courtroom, and . . .*, 43 EMORY L.J. 1095, 1111–12 (1994).

[84] *Id.* at 1118–19.

[85] Sellers, *supra* note 1, at 189.

operated camera available online. In fact, a number of jurisdictions, including the Ninth Circuit, have already taken or considered such measures.[86] Combined with a delay before posting, this approach gives judges and litigants an opportunity to prevent dissemination of video if the need arises. And such video can be presented in as boring and straightforward a fashion as you please: no close-ups, no moving camera and no filming of the defense table or the gallery.

Perhaps most significantly, footage of the trial can also be posted online in full, without editing or interruption. This matters because, although the camera doesn't lie, editors sometimes do: Choice selection of footage can pull words out of context and warp the meaning of statements by lawyers, witnesses and judges. Editing will also often focus public attention on the sensational aspects of the trial, at the expense of the proceedings' bread and butter. This, in turn, distorts public perceptions and diminishes public respect for the seriousness of the judicial process. In fact, when the Federal Judicial Center ran its pilot program of cameras in federal courts, the lack of gavel-to-gavel coverage was one of its few negative findings,[87] although the study nevertheless found that judges overwhelmingly believed that cameras in the courtroom helped to educate the public about the courts.[88] If courts control the cameras, those already considerable benefits will be magnified, and the public will be provided with the impartial and authoritative account of proceedings that is required in our present internet age.

While the choice between the court-operated camera and the trusty beat reporter might be a tough one, the choice between the camera and the Twitterverse isn't. The days when a trial could

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[86] The Judicial Conference of the Ninth Circuit voted in 2007 to reconsider its prohibition on all cameras in district courts, and lawyers and judges (voting separately) approved the resolution by resounding margins. In 2009, the Ninth Circuit approved a limited pilot program for non-jury civil cases; the experience from that will guide the circuit's consideration of a permanent rule change. *See also* Stepniak, *supra* note 2, at 821–22.

[87] FJC REPORT, *supra* note 25, at 36.

[88] After the three-year program, 30% of judges felt that the presence of cameras educated the public about court procedures to a "very great extent," 24% thought it did so to a "great extent" and 12% saw this effect to a "moderate extent." *Id.* at 15. Only 12% of judges thought cameras educated the public to "little or no extent." *Id.*

proceed in sleepy obscurity, unless reported by "reputable" and trustworthy journalists, are gone—if they ever existed. The spectators have arrived, and they're armed with laptops, Blackberries and iPhones. If the public is going to judge the resulting cascade of information, it must be given the tools and information necessary to decide for itself whom to believe. We must let cameras into the courtroom for the same reason that we kicked them out 75 years ago: to advance the public's understanding of the justice system.

CONCLUSION

And yet, in the federal district courts, the pre-Hauptmann status quo remains remarkably unchanged, at least when it comes to cameras. So far, Congress has been patient with that glacial pace of change, but such forbearance cannot last forever. Legislation is currently pending that would authorize district judges to allow media recording and broadcast of court proceedings.[89] If the federal courts don't change with the times, others will institute change for us.

Rightly so. If the public is to appreciate our justice system, and the legal regime that it upholds, the public must have full and fair information about proceedings in the courts. That means something different today than it did in 1935, when courts and members of the bar first considered the issue of cameras in the courtroom. We must consider the issue again, in light of the world today.

[89] *See* Sunshine in the Courtroom Act of 2009, S. 657, 111th Cong. (2009), *available at* http://www.govtrack.us/congress/bill.xpd?bill=s111-657; Sunshine in the Courtroom Act of 2009, H.R. 3054, 111th Cong. (2009), *available at* http://www.govtrack.us/congress/bill.xpd?bill=h111-3054.

APPENDIX

Table 1. Ratings of Effects by District Judges Who Experienced Electronic Media Coverage Under the Federal Judicial Center Pilot Program, by Percentage[90]

Effect	To Little or No Extent	To Some Extent	To a Moderate Extent	To a Great Extent	To a Very Great Extent	No Opinion
Motivates witnesses to be truthful	61	7	7	2	0	22
Violates witnesses' privacy	37	34	10	7	5	7
Makes witnesses less willing to appear in court	32	27	15	2	2	22
Distracts witnesses	51	22	15	2	2	7
Makes witnesses more nervous than they would otherwise be	24	37	22	5	0	12
Increases juror attentiveness	46	22	7	7	2	15

[90] FJC REPORT, *supra* note 25, at 14–15.

Effect	To Little or No Extent	To Some Extent	To a Moderate Extent	To a Great Extent	To a Very Great Extent	No Opinion
Signals to jurors that a witness or argument is particularly important	51	15	10	5	7	12
Increases jurors' sense of responsibility for their verdict	49	15	15	10	0	12
Prompts people who see the coverage to try to influence juror-friends	54	10	7	0	0	27
Motivates attorneys to come to court better prepared	32	32	15	10	7	5
Causes attorneys to be more theatrical in their presentation	29	37	20	2	5	7

Effect	**To Little or No Extent**	**To Some Extent**	**To a Moderate Extent**	**To a Great Extent**	**To a Very Great Extent**	**No Opinion**
Prompts attorneys to be more courteous	44	20	15	17	2	2
Increases judge attentiveness	63	10	15	10	2	0
Causes judges to avoid unpopular decisions or positions	88	2	5	2	0	2
Prompts judges to be more courteous	56	22	15	7	0	0
Disrupts courtroom proceedings	83	15	0	2	0	0
Educates the public about courtroom procedure	12	20	12	24	30	2

Table 2. Attorney Ratings of Electronic Media Effects in Proceedings in Which They Were Involved During the Federal Judicial Center Pilot Program, by Percentage[91]

Effect	To Little or No Extent	To Some Extent	To a Moderate Extent	To a Great Extent	To a Very Great Extent	No Opinion
Motivate witnesses to be more truthful than they otherwise would	58	3	2	0	0	38
Distract witnesses	52	18	9	5	0	17
Make witnesses more nervous than they otherwise would be	46	21	12	5	2	15
Increase juror attentiveness	26	6	8	6	0	55
Distract jurors	30	9	6	4	0	52

[91] *Id.* at 20–21.

Effect	**To Little or No Extent**	**To Some Extent**	**To a Moderate Extent**	**To a Great Extent**	**To a Very Great Extent**	**No Opinion**
Motivate attorneys to come to court better prepared	71	11	7	4	1	6
Cause attorneys to be more theatrical in their presentation	78	7	9	2	3	2
Distract attorneys	73	20	6	1	0	1
Prompt attorneys to be more courteous	80	12	3	1	0	5
Increase judge attentiveness	54	17	10	6	1	12
Prompt judges to be more courteous	62	12	8	4	3	11
Disrupt the courtroom proceedings	77	10	8	3	0	3

Tab 5

Supreme Court of the United States
Billie Sol ESTES, Petitioner,
v.
STATE OF TEXAS.

No. 256.
Argued April 1, 1965.
Decided June 7, 1965.
Rehearing Denied Oct. 11, 1965.

See 86 S.Ct. 18.

The defendant was convicted in the District Court for the Seventh Judicial District of Texas at Tyler for swindling. The conviction was affirmed by the Texas Court of Criminal Appeals. Certiorari was granted. The Supreme Court held that defendant was deprived of his right under the Fourteenth Amendment to due process by the televising of his notorious, heavily publicized and highly sensational criminal trial.

Reversed.

Mr. Chief Justice Warren filed concurring opinion in which Mr. Justice Douglas and Mr. Justice Goldberg joined.

Mr. Justice Harlan filed limited concurring opinion.

Mr. Justice Stewart filed dissenting opinion in which Mr. Justice Black, Mr. Justice Brennan, and Mr. Justice White joined.

Mr. Justice White filed dissenting opinion in which Mr. Justice Brennan joined.

Mr. Justice Brennan filed dissenting opinion.

West Headnotes

[1] Constitutional Law 92 4605

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4603 Public Trial
92k4605 k. Publicity. Most Cited Cases
(Formerly 92k268(7), 92k268)

Criminal Law 110 633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1), 92k268(7), 92k268)

Defendant was deprived of his right under the Fourteenth Amendment to due process by the televising of his notorious, heavily publicized and highly sensational criminal trial. U.S.C.A.Const. Amend. 14.

[2] Criminal Law 110 635.2

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.2 k. Purpose of Public Trial. Most Cited Cases
(Formerly 110k635)

The purpose of requirement of public trial is to guarantee that the accused will be fairly dealt with and not unjustly condemned. U.S.C.A.Const. Amend. 6.

[3] Criminal Law 110 633.16

110 Criminal Law

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110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k635)

The refusal to permit televising of trial does not discriminate in favor of the press.

[4] Constitutional Law 92 ⚿4605

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4603 Public Trial
92k4605 k. Publicity. Most Cited Cases
(Formerly 92k268(7), 92k268)

Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1), 92k268(7), 92k268)

Isolatable prejudice did not have to be shown to reach conclusion that defendant was deprived of due process by the televising of his highly publicized criminal trial. U.S.C.A.Const. Amend. 14.

****1628 *534** John D. Cofer and Hume Cofer, Austin, Tex., for petitioner.

Waggoner Carr, Austin, Tex., and Leon Jaworski, Houston, Tex., for respondent.

Mr. Justice CLARK delivered the opinion of the Court.[FN*]

FN* Mr. Justice HARLAN concurs in this opinion subject to the reservations and to the extent indicated in his concurring opinion, post, p. 1662.

[1] The question presented here is whether the petitioner, who stands convicted in the District Court for the Seventh Judicial District of Texas at Tyler for swindling,[FN1] was ***535** deprived of his ****1629** right under the Fourteenth Amendment to due process by the televising and broadcasting of his trial. Both the trial court and the Texas Court of Criminal Appeals found against the petitioner. We hold to the contrary and reverse his conviction.

FN1. The evidence indicated that petitioner, through false pretenses and fraudulent representations, induced certain farmers to purchase fertilizer tanks and accompanying equipment, which in fact did not exist, and to sign and deliver to him chattel mortgages on the fictitious property.

I.

While petitioner recites his claim in the framework of Canon 35 of the Judicial Canons of the American Bar Association he does not contend that we should enshrine Canon 35 in the Fourteenth Amendment, but only that the time honored principles of a fair trial were not followed in his case and that he was thus convicted without due process of law. Canon 35, of course, has of itself no binding effect on the courts but merely expresses the view of the Association in opposition to the broadcasting, televising and photographing of court proceedings. Likewise, Judicial Canon 28 of the Integrated State Bar of Texas, 27 Tex.B.J. 102 (1964), which leaves to the trial judge's sound discretion the telecasting and photographing of court proceedings, is of itself not law. In short, the question here is not the validity of either Canon 35 of the American Bar Association or Canon 28 of the State Bar of Texas, but only whether petitioner was tried in a manner which comports with the due process requirement of the Fourteenth Amendment.

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Petitioner's case was originally called for trial on September 24, 1962, in Smith County after a change of venue from Reeves County, some 500 miles west. Massive pretrial publicity totaling 11 volumes of press clippings, which are on file with the Clerk, had given it national notoriety. All available seats in the courtroom were taken and some 30 persons stood in the aisles. However, at that time a defense motion to prevent telecasting, broadcasting by radio and news photography and a defense motion for continuance were presented, and after a two-day hearing the former was denied and the latter granted.

536** These initial hearings were carried live by both radio and television, and news photography was permitted throughout. The videotapes of these hearings clearly illustrate that the picture presented was not one of that judicial serenity and calm to which petitioner was entitled. Cf. Wood v. Georgia, 370 U.S. 375, 383, 82 S.Ct. 1364, 1369, 8 L.Ed.2d 569 (1962); Turner v. State of Louisiana, 379 U.S. 466, 472, 85 S.Ct. 546, 549, 13 L.Ed.2d 424 (1965); Cox v. State of Louisiana, 379 U.S. 559, 562, 85 S.Ct. 476, 479, 13 L.Ed.2d 487 (1965). Indeed, at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings. Moreover, veniremen had been summoned and were present in the courtroom during the entire hearing but were later released after petitioner's motion for continuance had been granted. The court also had the names of the witnesses called; some answered but the absence of others led to a continuance of the case until October 22, 1962. It is contended that this two-day pretrial hearing cannot be considered in determining the question before us. We cannot agree. Pretrial can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence. Though the September hearings dealt with motions to prohibit television coverage and to postpone the trial, they are unquestionably relevant to the issue before us. All of this two-day affair was highly publicized and could only have impressed those present, and also the community*1630** at large, with the notorious character of the petitioner as well as the proceeding. The trial witnesses present at the hearing, as well as the original jury panel, were undoubtedly***537** made aware of the peculiar public importance of the case by the press and television coverage being provided, and by the fact that they themselves were televised live and their pictures rebroadcast on the evening show.

When the case was called for trial on October 22 the scene had been altered. A booth had been constructed at the back of the courtroom which was painted to blend with the permanent structure of the room. It had an aperture to allow the lens of the cameras an unrestricted view of the courtroom. All television cameras and newsreel photographers were restricted to the area of the booth when shooting film or telecasting.

Because of continual objection, the rules governing live telecasting, as well as radio and still photos, were changed as the exigencies of the situation seemed to require. As a result, live telecasting was prohibited during a great portion of the actual trial. Only the opening[FN2] and closing arguments of the State, the return of the jury's verdict and its receipt by the trial judge were carried live with sound. Although the order allowed videotapes of the entire proceeding without sound, the cameras operated only intermittently, recording various portions of the trial for broadcast on regularly scheduled newscasts later in the day and evening. At the request of the petitioner, the trial judge prohibited coverage of any kind, still or television, of the defense counsel during their summations to the jury.

FN2. Due to mechanical difficulty there was no picture during the opening argu-

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ment.

Because of the varying restrictions placed on sound and live telecasting the telecasts of the trial were confined largely to film clips shown on the stations' regularly scheduled news programs. The news commentators would use the film of a particular part of the day's trial activities as a backdrop for their reports. Their commentary***538** included excerpts from testimony and the usual reportorial remarks. On one occasion the videotapes of the September hearings were rebroadcast in place of the 'late movie.'

II.

In Rideau v. State of Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), this Court constructed a rule that the televising of a defendant in the act of confessing to a crime was inherently invalid under the Due Process Clause of the Fourteenth Amendment even without a showing of prejudice or a demonstration of the nexus between the televised confession and the trial. See id., at 729, 83 S.Ct. 1421 (dissenting opinion of Clark, J.). Here, although there was nothing so dramatic as a home-viewed confession, there had been a bombardment of the community with the sights and sounds of a two-day hearing during which the original jury panel, the petitioner, the lawyers and the judge were highly publicized. The petitioner was subjected to characterization and minute electronic scrutiny to such an extent that at one point the photographers were found attempting to picture the page of the paper from which he was reading while sitting at the counsel table. The two-day hearing and the order permitting television at the actual trial were widely known throughout the community. This emphasized the notorious character that the trial would take and, therefore, set it apart in the public mind as an extraordinary case or, as Shaw would say, something 'not conventionally unconventional.' When the new jury was empaneled at the trial four of the jurors selected had seen and heard all or part of the broadcasts of the earlier proceedings.

****1631** III.

[2][3] We start with the proposition that it is a 'public trial' that the Sixth Amendment guarantees to the 'accused.' The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and ***539** not unjustly condemned. History had proven that secret tribunals were effective instruments of oppression. As our Brother Black so well said in In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948):

'The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet. * * * Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.' At 268-270, 68 S.Ct. at 505-506. (Footnotes omitted.)

It is said however, that the freedoms granted in the First Amendment extend a right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between the newspapers and television. This is a misconception of the rights of the press.

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. While the state and federal courts have differed over what spectators may be excluded from a criminal trial, 6 Wigmore, Evidence s 1834 (3d ed. 1940), the amici curiae brief of the National Association of Broadcasters and the Radio Television News Directors Association, says, as indeed it must, that 'neither of these

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two amendments (First and Sixth) speaks of an unlimited***540** right of access to the courtroom on the part of the broadcasting media. * * *' At 7. Moreover, they recognize that the 'primary concern of all must be the proper administration of justice'; that 'the life or liberty of any individual in this land should not be put in jeopardy because of actions of any news media'; and that 'the due process requirements in both the Fifth and Fourteenth Amendments and the provisions of the Sixth Amendment require a procedure that will assure a fair trial. * * *' At 3-4.

Nor can the courts be said to discriminate where they permit the newspaper reporter access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public. The news reporter is not permitted to bring his typewriter or printing press. When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case.

IV.

Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the sine qua non of a fair trial. Over the centuries Anglo-American courts have devised careful safeguards by rule and otherwise to protect and facilitate the performance of this high function. As a result, at this time those safeguards do not permit the televising and photographing of a criminal trial, save in two States and there only under restrictions. The federal courts prohibit it by specific rule. This is weighty evidence that our concepts of a ****1632** fair trial do not tolerate such an indulgence. We have always held that the atmosphere essential to the preservation of a fair trial-the most fundamental of all freedoms-must be maintained at all costs. Our approach has been through rules, contempt proceedings and reversal of convictions obtained under unfair conditions. Here the remedy is ***541** clear and certain of application and it is our duty to continue to enforce the principles that from time immemorial have proven efficacious and necessary to a fair trial.

V.

The State contends that the televising of portions of a criminal trial does not constitute a denial of due process. Its position is that because no prejudice has been shown by the petitioner as resulting from the televising, it is permissible; that claims of 'distractions' during the trial due to the physical presence of television are wholly unfounded; and that psychological considerations are for psychologists, not courts, because they are purely hypothetical. It argues further that the public has a right to know what goes on in the courts; that the court has no power to 'suppress, edit, or censor events, which transpire in proceedings before it,' citing Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546 (1947); and that the televising of criminal trials would be enlightening to the public and would promote greater respect for the courts.

At the outset the motion should be dispelled that telecasting is dangerous because it is new. It is true that our empirical knowledge of its full effect on the public, the jury or the participants in a trial, including the judge, witnesses and lawyers, is limited. However, the nub of the question is not its newness but, as Mr. Justice Douglas says, 'the insidious influences which it puts to work in the administration of justice.' Douglas, The Public Trial and the Free Press, 33 Rocky Mt. L.Rev. 1 (1960). These influences will be detailed below, but before turning to them the State's argument that the public has a right to know what goes on in the courtroom should be dealt with.

It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be ***542** and are plainly free to report whatever occurs in open court through their respective media. This was settled in Bridges v. State of California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941), and Pennekamp v. State of Florida, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed.

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1295 (1946), which we reaffirm. These reportorial privileges of the press were stated years ago:

'The law, however, favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned. The public are permitted to attend nearly all judicial inquiries, and there appears to be no sufficient reason why they should not also be allowed to see in print the reports of trials, if they can thus have them presented as fully as they are exhibited in court, or at least all the material portion of the proceedings impartially stated, so that one shall not, by means of them, derive erroneous impressions, which he would not have been likely to receive from hearing the trial itself.' 2 Cooley's Constitutional Limitations 931-932 (Carrington ed. 1927).

[4] The State, however, says that the use of television in the instant case was 'without injustice to the person immediately concerned,' basing its position on the fact that the petitioner has established no isolatable prejudice and that this must be shown in order to invalidate a conviction in these circumstances. The State paints too broadly in this contention, for this Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. This is such a case. It is true that in ****1633** most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due ***543** process. Such a case was In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), where Mr. Justice Black for the Court pointed up with his usual clarity and force:

'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. * * * (T)o perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (99 L.Ed. 11).' At 136, 75 S.Ct. at 625. (Emphasis supplied.)

And, as Chief Justice Taft said in Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, almost 30 years before:

'the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man * * * to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.' At 532, 47 S.Ct. at 444. (Emphasis supplied.)

This rule was followed in Rideau, supra, and in Turner v. State of Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965). In each of these cases the Court departed from the approach it charted in Stroble v. State of California, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872, (1952), and in Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In Rideau and Turner the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it. Likewise in Gideon v. Wainwright, ***544** 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and White v. State of Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963), we applied the same rule, although in different contexts.

In this case it is even clearer that such a rule must be applied. In Rideau, Irvin and Stroble, the pretrial publicity occurred outside the courtroom and could not be effectively curtailed. The only recourse other than reversal was by contempt proceedings. In Turner the probability of prejudice was present through the use of deputy sheriffs, who were also witnesses in the case, as shepherds for the jury. No prejudice was shown but the circumstances

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were held to be inherently suspect, and therefore, such a showing was not held to be a requisite to reversal. Likewise in this case the application of this principle is especially appropriate. Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced. This was found true in Murchison, Tumey, Rideau and Turner. Such untoward circumstances as were found in those cases are inherently bad and prejudice to the accused was presumed. Forty-eight of our States and the Federal Rules have deemed the use of television improper in the courtroom. This fact is most telling in buttressing our conclusion that any change in procedure which would permit its use would ****1634** be inconsistent with our concepts of due process in this field.

VI.

As has been said, the chief function of our judicial machinery is to ascertain the truth. The use of television, however, cannot be said to contribute materially to this objective. Rather its use amounts to the injection of an irrelevant factor into court proceedings. In addition experience teaches that there are numerous situations ***545** in which it might cause actual unfairness-some so subtle as to defy detection by the accused or control by the judge. We enumerate some in summary:

1. The potential impact of television on the jurors is perhaps of the greatest significance. They are the nerve center of the fact-finding process. It is true that in States like Texas where they are required to be sequestered in trials of this nature the jurors will probably not see any of the proceedings as televised from the courtroom. But the inquiry cannot end there. From the moment the trial judge announces that a case will be televised it becomes a cause ce le bre. The whole community, including prospective jurors, becomes interested in all the morbid details surrounding it. The approaching trial immediately assumes an important status in the public press and the accused is highly publicized along with the offense with which he is charged. Every juror carries with him into the jury box these solemn facts and thus increases the change of prejudice that is present in every criminal case. And we must remember that realistically it is only the notorious trial which will be broadcast, because of the necessity for paid sponsorship. The conscious or unconscious effect that this may have on the juror's judgment cannot be evaluated, but experience indicates that it is not only possible but highly probable that it will have a direct bearing on his vote as to guilt or innocence. Where pretrial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them. If the community be hostile to an accused a televised juror, realizing that he must return to neighbors who saw the trial themselves, may well be led 'not to hold the balance nice, clear and true between the State and the accused. * * *'

***546** Moreover, while it is practically impossible to assess the effect of television on jury attentiveness, those of us who know juries realize the problem of jury 'distraction.' The State argues this is de minimis since the physical disturbances have been eliminated. But we know that distractions are not caused solely by the physical presence of the camera and its telltale red lights. It is the awareness of the fact of telecasting that is felt by the juror throughout the trial. We are all self-conscious and uneasy when being televised. Human nature being what it is, not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony.

Furthermore, in many States the jurors serving in the trial may see the broadcasts of the trial proceedings. Admittedly, the Texas sequestration rule would prevent this occurring there.[FN3] In other States following no such practice jurors would return home and turn on the TV if only to see how

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they appeared upon it. They would also be subjected to reenactment and emphasis of the selected parts of the proceedings which the requirements of the broadcasters determined would be telecast and would be subconsciously influenced the more by ****1635** that testimony. Moreover, they would be subjected to the broadest commentary and criticism and perhaps the well-meant advice of friends, relatives and inquiring strangers who recognized them on the streets.

> FN3. Only six States, in addition to Texas, require sequestration of the jury prior to its deliberations in a non-capital felony trial. The great majority of jurisdictions leave the matter to the trial judge's discretion, while in at least one State the jury will be kept together in such circumstances only upon a showing of cause by the defendant.

Finally, new trials plainly would be jeopardized in that potential jurors will often have seen and heard the original trial when it was telecast. Yet viewers may later ***547** be called upon to sit in the jury box during the new trial. These very dangers are illustrated in this case where the court, due to the defendant's objections, permitted only the State's opening and closing arguments to be broadcast with sound to the public.

2. The quality of the testimony in criminal trials will often be impaired. The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization. Furthermore, inquisitive strangers and ‘cranks' might approach witnesses on the street with jibes, advice or demands for explanation of testimony. There is little wonder that the defendant cannot ‘prove’ the existence of such factors. Yet we all know from experience that they exist.

In addition the invocation of the rule against witnesses is frustrated. In most instances witnesses would be able to go to their homes and view broadcasts of the day's trial proceedings, notwithstanding the fact that they had been admonished not to do so. They could view and hear the testimony of preceding witnesses, and so shape their own testimony as to make its impact crucial. And even in the absence of sound, the influences of such viewing on the attitude of the witness toward testifying, his frame of mind upon taking the stand or his apprehension of withering cross-examination defy objective assessment. Indeed, the mere fact that the trial is to be televised might render witnesses reluctant to appear and thereby impede the trial as well as the discovery of the truth.

***548** While some of the dangers mentioned above are present as well in newspaper coverage of any important trial, the circumstances and extraneous influences intruding upon the solemn decorum of court procedure in the televised trial are far more serious than in cases involving only newspaper coverage.

3. A major aspect of the problem is the additional responsibilities the presence of television places on the trial judge. His job is to make certain that the accused receives a fair trial. This most difficult task requires his undivided attention. Still when television comes into the courtroom he must also supervise it. In this trial, for example, the judge on several different occasions-aside from the two days of pretrial-was obliged to have a hearing or enter an order made necessary solely because of the presence of television. Thus, where telecasting is restricted as it was here, and as even the State concedes it must be, his task is made much more difficult and exacting. And, as happened here, such rulings may unfortunately militate against the fairness of the trial. In addition, laying physical interruptions aside, there is the ever-present distraction that the mere awareness of television's presence prompts. Judges are human beings also and are subject to the same psychological reactions as laymen.

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Telecasting is particularly bad where the judge is elected, as is the case in all save a half dozen of our States. The telecasting of a trial becomes a political weapon, which, along with other distractions inherent in broadcasting, diverts his attention from the task at hand-the fair trial of the accused.

But this is not all. There is the initial decision that must be made as to whether the use of television will be permitted. ****1636** This is perhaps an even more crucial consideration. Our judges are highminded men and women. But it is difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly ***549** and through the shaping of public opinion. Moreover, where one judge in a district or even in a State permits telecasting, the requirement that the others do the same is almost mandatory. Especially is this true where the judge is selected at the ballot box.

4. Finally, we cannot ignore the impact of courtroom television on the defendant. Its presence is a form of mental-if not physical-harassment, resembling a police line-up or the third degree. The inevitable close-ups of his gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before him-sometimes the difference between life and death-dispassionately, freely and without the distraction of wide public surveillance. A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nationwide arena. The heightened public clamor resulting from radio and television coverage will inevitably result in prejudice. Trial by television is, therefore, foreign to our system. Furthermore, telecasting may also deprive an accused of effective counsel. The distractions, intrusions into confidential attorney-client relationships and the temptation offered by television to play to the public audience might often have a direct effect not only upon the lawyers, but the judge, the jury and the witnesses. See Pye, The Lessons of Dallas-Threats to Fair Trial and Free Press, National Civil Liberties Clearing House, 16th Annual Conference.

The television camera is a powerful weapon. Intentionally or inadvertently it can destroy an accused and his case in the eyes of the public. While our telecasters are honorable men, they too are human. The necessity for sponsorship weighs heavily in favor of the televising of only notorious cases, such as this one, and invariably focuses the lens upon the unpopular or infamous ***550** accused. Such a selection is necessary in order to obtain a sponsor willing to pay a sufficient fee to cover the costs and return a profit. We have already examined the ways in which public sentiment can affect the trial participants. To the extent that television shapes that sentiment, it can strip the accused of a fair trial.

The State would dispose of all these observations with the simple statement that they are for psychologists because they are purely hypothetical. But we cannot afford the luxury of saying that, because these factors are difficult of ascertainment in particular cases, they must be ignored. Nor are they 'purely hypothetical.' They are no more hypothetical than were the considerations deemed controlling in Tumey, Murchison, Rideau and Turner. They are real enough to have convinced the Judicial Conference of the United States, this Court and the Congress that television should be barred in federal trials by the Federal Rules of Criminal Procedure; in addition they have persuaded all but two of our States to prohibit television in the courtroom. They are effects that may, and in some combination almost certainly will, exist in any case in which television is injected into the trial process.

VII.

The facts in this case demonstrate clearly the necessity for the application of the rule announced in Rideau. The sole issue before the court for two days of pretrial hearing was the question now before us. The hearing was televised live and repeated on tape in the same evening, reaching approximately 100,000 viewers. In addition, the courtroom

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was a mass of wires, television cameras, microphones and photographers. The petitioner, the panel of prospective jurors, who were sworn the second day, the witnesses****1637** and the lawyers were all exposed to this untoward situation. The judge decided that the trial ***551** proceedings would be telecast. He announced no restrictions at the time. This emphasized the notorious nature of the coming trial, increased the intensity of the publicity on the petitioner and together with the subsequent televising of the trial beginning 30 days later inherently prevented a sober search for the truth. This is underscored by the fact that the selection of the jury took an entire week. As might be expected, a substantial amount of that time was devoted to ascertaining the impact of the pretrial televising on the prospective jurors. As we have noted, four of the jurors selected had seen all or part of those broadcasts. The trial, on the other hand, lasted only three days.

Moreover, the trial judge was himself harassed. After the initial decision to permit telecasting he apparently decided that a booth should be built at the broadcasters' expense to confine its operations; he then decided to limit the parts of the trial that might be televised live; then he decided to film the testimony of the witnesses without sound in an attempt to protect those under the rule; and finally he ordered that defense counsel and their argument not be televised, in the light of their objection. Plagued by his original error-recurring each day of the trial-his day-to-day orders made the trial more confusing to the jury, the participants and to the viewers. Indeed, it resulted in a public presentation of only the State's side of the case.

As Mr. Justice Holmes said in Patterson v. People of State of Colorado, ex rel. Attorney General, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907):

'The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.'

It is said that the ever-advancing techniques of public communication and the adjustment of the public to its ***552** presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today.

The judgment is therefore reversed.

Reversed.

Mr. Chief Justice WARREN, whom Mr. Justice DOUGLAS and Mr. Justice GOLDBERG join, concurring.

While I join the Court's opinion and agree that the televising of criminal trials is inherently a denial of due process, I desire to express additional views on why this is so. In doing this, I wish to emphasize that our condemnation of televised criminal trials is not based on generalities or abstract fears. The record in this case presents a vivid illustration of the inherent prejudice of televised criminal trials and supports our conclusion that this is the appropriate time to make a definitive appraisal of television in the courtroom.

I.

Petitioner, a much-publicized financier, was indicted by a Reeves County, Texas, grand jury for obtaining property through false pretenses. The case was transferred to the City of Tyler, in Smith County, Texas, and was set for trial on September 24, 1962. Prior to that date petitioner's counsel informed the trial judge that he would make a motion on September 24 to exclude all cameras from the courtroom during the trial.

On September 24, a hearing was held to consider petitioner's motion to prohibit television, motion pictures, and still photography at the trial. The courtroom was filled with newspaper reporters and ****1638** cameramen, television cameramen, and spectators. At least 12 cameramen with ***553** their

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equipment were seen by one observer, and there were 30 or more people standing in the aisles. An article appearing in the New York Times the next day stated:

'A television motor van, big as an intercontinental bus, was parked outside the courthouse and the second-floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four more marked cameras were aligned just outside the gates. * * *

(Cables and wires snaked over the floor.'[FN1]

FN1. N.Y. Times, Sept. 25, 1962, p. 46, col. 4. See Appendix Photographs 1, 2, 3.

With photographers roaming at will through the courtroom, petitioner's counsel made his motion that all cameras be excluded. As he spoke, a cameraman wandered behind the judge's bench and snapped his picture. Counsel argued that the presence of cameras would make it difficult for him to consult with his client, make his client ill at ease, and make it impossible to obtain a fair trial since the cameras would distract the jury, witnesses and lawyers. He also expressed the view that televising selected cases tends to give the jury an impression that the particular trial is different from ordinary criminal trials. The court, however, ruled that the taking of pictures and televising would be allowed so long as the cameramen stood outside the railing that separates the trial participants from the spectators. The court also ruled that if a complaint was made that any camera was too noisy, the cameramen would have to stop taking pictures; that no pictures could be taken in the corridors outside the courtroom; and that those with microphones were not to pick up conversations between petitioner and his lawyers. Subsequent to the court's ruling petitioner arrived in the courtroom,[FN2] and the defense introduced testimony***554** concerning the atmosphere in the court on that day. At the conclusion of the day's hearing the judge reasserted his earlier ruling. He then ordered a roll call of the prosecution witnesses, at least some of whom had been in the courtroom during the proceedings.

FN2. Counsel explained to the trial court that he desired to protect petitioner from the cameras until the court had made its ruling.

The entire hearing on September 24 was televised live by station KLTV of Tyler, Texas, and station WFAA-TV of Dallas, Texas. Commercials were inserted when there was a pause in the proceedings. On the evening of Monday, September 24, both stations ran an edited tape of the day's proceedings and interrupted the tape to play the commercials ordinarily seen in the particular time slot. In addition to the live television coverage there was also a live radio pickup of the proceedings by at least one station.

The proceedings continued on September 25. There was again a significant number of cameramen taking motion pictures, still pictures and television pictures. The judge once more ordered cameramen to stay on the other side of the railing and stated that this order was to be observed even during court recesses. The panel from which the petit jury was to be selected was then sworn in the presence of the cameramen. The panel was excused to permit counsel to renew his motion to prohibit photography in the courtroom. The court denied the motion, but granted a continuance of trial until October 22 and dismissed the jury panel. At the suggestion of petitioner's counsel the trial judge warned the prosecution witnesses who were present not to discuss the case during the continuance. The proceedings were televised live and portions of the television tape were shown on the regularly scheduled evening news programs. Live radio transmission apparently occurred as on the day before.

****1639** On October 1, 1962, the trial judge is sued an order explaining what coverage he would permit during the trial. The judge delivered the order in his chambers for the ***555** benefit of television cameramen so that they could film him. The

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judge ruled that although he would permit television cameras to be present during the trial, they would not be permitted to present live coverage of the interrogation of prospective jurors or the testimony of witnesses. He ruled that each of the three major television networks, NBC, CBS, ABC, and the local television station KLTV could install one camera not equipped to pick up sound and the film would be available to other television stations on a pooled basis. In addition, he ruled that with respect to news photographers only cameramen for the local press, Associated Press, and United Press would be permitted in the courtroom. Photographs taken were also to be made available to others on a pooled basis. The judge did not explain how he decided which television cameramen and which still photographers were to be permitted in the courtroom and which were to be excluded.

For the proceedings beginning on October 22, station KLTV, at its own expense, and with the permission of the court, had constructed a booth in the rear of the courtroom painted the same or near the same color as the courtroom. An opening running lengthwise across the booth permitted the four television cameras to photograph the proceedings. The courtroom was small and the cameras were clearly visible to all in the courtroom.[FN3] The cameras were equipped with 'electronic sound on camera' which permitted them to take both film and sound. Upon entering the courtroom the judge told all those with television cameras to go back to the booth; asked the press photographers not to move around any more than necessary; ordered that no flashbulbs or floodlights be used; and again told cameramen that they could not go inside the railing. Defense counsel renewed his motion ***556** to ban all 'sound equipment * * * still cameras, movie cameras and television; and all radio facilities' from the courtroom. Witnesses were again called on this issue, but at the conclusion of the hearing the trial judge reaffirmed his prior ruling to permit cameramen in the courtroom. In response to petitioner's argument that his rights under the Constitution of the United States were being violated, the judge remarked that the 'case (was) not being tried under the Federal Constitution.'

FN3. See Appendix, Photograph 6.

None of the proceedings on October 22 was televised live. Television cameras, however, recorded the day's entire proceedings with sound for later showings. Apparently none of the October 22 proceedings was carried live on radio, although the proceedings were recorded on tape. The still photographers admitted by the court were free to take photographs from outside the railing.

On October 23 the selection of the jury began. Overnight an additional strip had been placed across the television booth so that the opening for the television cameras was reduced, but the cameras and their operators were still quite visible.[FN4] A panel of 86 prospective jurors was ready for the voir dire. The judge excused the jurors from the courtroom and made still another ruling on news coverage at the trial. He ordered the television recording to proceed from that point on without an audio pickup, and, in addition, forbade radio tapes of any further proceedings until all the evidence had been introduced. During the course of the trial the television cameras recorded without sound whatever matters appeared interesting to them for use on later newscasts; radio broadcasts in the form of spot reports were made from a room next to the courtroom. There was no live television or radio coverage until November 7 when the trial judge permitted live ****1640** coverage of the prosecution's ***557** arguments to the jury, the return of the jury's verdict and its acceptance by the court. Since the defense objected to being photographed during the summation, the judge prohibited television cameramen or still photographers from taking any pictures of the defense during its argument. But the show went on, and while the defense was speaking the cameras were directed at the judge and the arguments were monitored by audio equipment and relayed to the television audience by an announcer. On November 7 the judge, for the first time, directed news photographers desiring to take pictures to

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take them only from the back of the room. Up until this time the trial judge's orders merely limited news photographers to the spectator section.

FN4. See Appendix, Photograph 7.

II.

The decision below affirming petitioner's conviction runs counter to the evolution of Anglo-American criminal procedure over a period of centuries. During that time the criminal trial has developed from a ritual practically devoid of rational justification[FN5] to a fact-finding process, the acknowledged purpose of which is to provide a fair and reliable determination of guilt.[FN6]

FN5. Jenks, A Short History of English Law 46-47 (6th ed. 1949); I Stephen, A History of the Criminal Law of England 51-74 (1883).

FN6. See, e.g., Craig v. Harney, 331 U.S. 367, 378, 67 S.Ct. 1249, 1256, 91 L.Ed. 1546; Irvin v. Dowd, 366 U.S. 717, 728, 81 S.Ct. 1639, 1645, 6 L.Ed.2d 751; Brady v. State of Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215; Jackson v. Denno, 378 U.S. 368, 391, 84 S.Ct. 1774, 1788, 12 L.Ed.2d 908.

An element of rationality was introduced in the guilt-determining process in England over 600 years ago when a rudimentary trial by jury became 'the principal institution for criminal cases.'[FN7] Initially members of the jury were expected to make their own examinations of the cases they were to try and come to court already familiar ***558** with the facts,[FN8] which made it impossible to limit the jury's determination to legally relevant evidence. Gradually, however, the jury was transformed from a panel of witnesses to a panel of triers passing on evidence given by others in the courtroom.[FN9] The next step was to insure the independence of the jury, and this was accomplished by the decision in the case of Edward Bushell, 6 How.St.Tr. 999 (1670), which put an end to the practice of fining or otherwise punishing jury members who failed to reach the decision directed by the court. As the purpose of trial as a vehicle for discovering the truth became clearer, it was recognized that the defendant should have the right to call witnesses and to place them under oath,[FN10] to be informed of the charges against him before the trial,[FN11] and to have counsel assist him with his defense.[FN12] All these protections, and others which could be cited, were part of a development by which 'the administration of criminal justice was set upon a firm and dignified basis.'[FN13]

FN7. See Singer v. United States, 380 U.S. 24, 27, 85 S.Ct. 783, 786, 13 L.Ed.2d 630.

FN8. II Pollock and Maitland, The History of English Law 621-622 (2d ed. 1906).

FN9. I Stephen, supra, note 5, at 260.

FN10. See 7 Will. 3, c. 3 (1695).

FN11. Ibid.

FN12. Ibid; 6 & 7 Will. 4, c. 114 (1836).

FN13. I Stephen, supra, note 5, at 427.

When the colonists undertook the responsibility of governing themselves, one of their prime concerns was the establishment of trial procedures which would be consistent with the purpose of trial. The Continental Congress passed measures designed to safeguard the right to a fair trial,[FN14] and the various States adopted constitutional provisions ***559** directed to the ****1641** same end.[FN15] Eventually the Sixth Amendment incorporated into the Constitution certain provisions dealing with the conduct of trials:

FN14. I Journals of the Continental Congress 1774-1789, 69 (Ford ed. 1904).

FN15. Radin, The Right to a Public Trial, 6 Temple L.Q. 381, 383, n. 5a (1932).

'In all criminal prosecutions, the accused shall

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enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.'

Significantly, in the Sixth Amendment the words 'speedy and public' qualify the term trial and the rest of the Amendment defines specific protections the accused is to have at his trial. Thus, the Sixth Amendment, by its own terms, not only requires that the accused have certain specific rights but also that he enjoy them at a trial-a word with a meaning of its own, see Bridges v. State of California, 314 U.S. 252, 271, 62 S.Ct. 190, 197, 86 L.Ed. 192.

The Fourteenth Amendment which places limitations on the States' administration of their criminal laws also gives content to the term trial. Whether the Sixth Amendment as a whole applies to the States through the Fourteenth,[FN16] or the Fourteenth Amendment embraces only those portions of the Sixth Amendment that are 'fundamental,'[FN17] or the Fourteenth Amendment incorporates a standard of 'ordered liberty' apart from the ***560** specific guarantees of the Bill of Rights,[FN18] it has been recognized that state prosecutions must, at the least, comport with 'the fundamental conception' of a fair trial.[FN19]

FN16. Adamson v. People of State of California, 332 U.S. 46, 71-72, 67 S.Ct. 1672, 1686, 91 L.Ed. 1903 (dissenting opinion of Mr. Justice Black).

FN17. Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 795, 9 L.Ed.2d 799.

FN18. Pointer v. State of Texas, 380 U.S. 400, 408, 85 S.Ct. 1065 (opinion of Mr. Justice Harlam, concurring in the result).

FN19. Cox v. State of Louisiana, 379 U.S. 559, 562, 85 S.Ct. 476, 479, 13 L.Ed.2d 487; Frank v. Mangum, 237 U.S. 309, 347, 35 S.Ct. 582, 595, 59 L.Ed. 969 (dissenting opinion of Justice Holmes). See Adamson v. State of California, 332 U.S. 46, 53, 67 S.Ct. 1672, 1676; In re Murchison, 349 U.S. 133, 136; Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642; Jackson v. Denno, 378 U.S. 368, 377, 84 S.Ct. 1774, 1781 (Court opinion), 424, 84 S.Ct. 1805 (dissenting opinion of Mr. Justice Clark), 428, 84 S.Ct. 1807 (dissenting opinion of Mr. Justice Harlan).

It has been held on one or another of these theories that the fundamental conception of a fair trial includes many of the specific provisions of the Sixth Amendment, such as the right to have the proceedings open to the public, In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682, the right to notice of specific charges, Cole v. State of Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644; the right to confrontation, Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923; Douglas v. State of Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934, and the right to counsel, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792. But it also has been agreed that neither the Sixth nor the Fourteenth Amendment is to be read formalistically, for the clear intent of the amendments is that these specific rights be enjoyed at a constitutional trial. In the words of Justice Holmes, even though 'every form (be) preserved,' the forms may amount to no 'more than an empty shell' when considered in the context or setting in which they were actually applied.[FN20]

FN20. Frank v. Mangum, 237 U.S. 309, 346, 35 S.Ct. 582, 594 (dissenting opinion).

****1642** In cases arising from state prosecutions this Court has acted to prevent the right to a constitutional trial from being reduced to a formality by the intrusion of factors into the trial process that

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tend to subvert its purpose. The Court recognized in Pennekamp v. State of Florida, 328 U.S. ***561** 331, 334, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295, that the 'orderly operation of courts' is 'the primary and dominant requirement in the administration of justice.' And, in Moore v. Dempsey, 261 U.S. 86, 90-91, 43 S.Ct. 265, 266-267, 67 L.Ed. 543, it was held that the atmosphere in and around the courtroom might be so hostile as to interfere with the trial process, even though an examination of the record disclosed that all the forms of trial conformed to the requirements of law: the defendant had counsel, the jury members stated they were impartial, the jury was correctly charged, and the evidence was legally sufficient to convict. Moreover, in Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, a conviction was reversed where extensive pretrial publicity rendered a fair trial unlikely despite the observance of the formal requisites of a legal trial. We commented in that case:

'No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father.' Id., at 728, 81 S.Ct., at 1645.

To recognize that disorder can convert a trial into a ritual without meaning is not to pay homage to order as an end in itself. Rather, it recognizes that the courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to 'the integrity of the trial' process. Craig v. Harney, 331 U.S. 367, 377, 67 S.Ct. 1249, 1255. As Mr. Justice Black said, in another context: 'The very purpose of a court system is to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.'[FN21] In light of this fundamental conception of what the term trial ***562** means, this Court has recognized that often, despite widespread, hostile publicity about a case, it is possible to conduct a trial meeting constitutional standards. Significantly, in each of these cases, the basic premise behind the Court's conclusion has been the notion that judicial proceedings can be conducted with dignity and integrity so as to shield the trial process itself from these irrelevant external factors, rather than to aggravate them as here. Thus, in reversing contempt convictions for out-of-court statements, this Court referred to 'the power of courts to protect themselves from disturbances and disorder in the court room,' Bridges v. State of California, 314 U.S. 252, 266, 62 S.Ct. 190, 195. (emphasis added); 'the necessity for fair adjudication, free from interruption of its processes,' Pennekamp v. State of Florida, 328 U.S. 331, 336, 66 S.Ct. 1029, 1032, 'the integrity of the trial,' Craig v. Harney, 331 U.S. 367, 377, 67 S.Ct. 1249, 1255. And, in upholding a conviction against a claim of unfavorable publicity, this Court commented 'that petitioner's trial was conducted in a calm judicial manner,' United States ex rel. Darcy v. Handy, 351 U.S. 454, 463, 76 S.Ct. 965, 970, 100 L.Ed. 1331.

FN21. Cox v. State of Louisiana, 379 U.S. 559, 583, 85 S.Ct. 476, 471 (dissenting opinion).

Similarly, when state procedures have been found to thwart the purpose of trial this Court has declared those procedures to be unconstitutional. In Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, the Court considered a state procedure under which judges were paid for presiding over a case only if the defendant was found guilty and costs assessed against him. An argument was ****1643** made that the practice should not be condemned broadly, since some judges undoubtedly would not let their judgment be affected by such an arrangement. However, the Court found the procedure so inconsistent with the conception of what a trial should be and so likely to produce prejudice that it declared the practice unconstitutional even though no specific prejudice was shown.

In Lyons v. State of Oklahoma, 322 U.S. 596,

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64 S.Ct. 1208, 88 L.Ed. 1481, this Court stated that if an involuntary confession is introduced into evidence***563** at a state trial the conviction must be reversed, even though there is other evidence in the record to justify a verdict of guilty. We explained the rationale behind this judgment in Payne v. State of Arkansas, 356 U.S. 560, 568, 78 S.Ct. 844, 850, 2 L.Ed.2d 975:

'(W)here * * * a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession.'

Similar reasoning led to the decision last Term in Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774. We held there that when the voluntariness of a confession is at issue there must be a procedure adopted which provides 'a reliable and clearcut determination of * * * voluntariness.' Id., at 391, 84 S.Ct., at 1788. We found insufficient a procedure whereby the jury heard the confession but was instructed to disregard it if the jury found the confession involuntary:

'(T)he New York procedure poses substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and have the coercion issue fairly and reliably determined. These hazards we cannot ignore.' Id., at 389, 84 S.Ct., at 1787.

Earlier this Term, in Turner v. State of Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424, we considered a case in which deputy sheriffs, who were the prosecution's principal witnesses, were in charge of a sequestered jury during the trial. The Supreme Court of Louisiana criticized the practice but said that in the absence of a showing of prejudice there was no ground for reversal. We reversed because the 'extreme prejudice inherent' in the practice required its condemnation on constitutional grounds.

Finally, the Court has on numerous other occasions reversed convictions, where the formalities of trial were ***564** observed, because of practices that negate the fundamental conception of trial.[FN22]

FN22. See Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791; Alcorta v. State of Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9; Napue v People of State of Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217; and Brady v. State of Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.

This line of cases does not indicate a disregard for the position of the States in our federal system. Rather, it stands for the proposition that the criminal trial under our Constitution has a clearly defined purpose, to provide a fair and reliable determination of guilt, and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated.

III.

For the Constitution to have vitality, this Court must be able to apply its principles to situations that may not have been foreseen at the time those principles were adopted. As was said in Weems v. United States, 217 U.S. 349, 373, 30 S.Ct. 544, 551, 54 L.Ed. 793, and reaffirmed in Brown v. Board of Education, 347 U.S. 483, 492-493, 74 S.Ct. 686, 690-691, 98 L.Ed. 873:

'Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. ****1644** Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. * * * In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent***565** into impotent and lifeless formulas. Rights declared in words might be lost in reality.'

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I believe that it violates the Sixth Amendment for federal courts and the Fourteenth Amendment for state courts to allow criminal trials to be televised to the public at large. I base this conclusion on three grounds: (1) that the televising of trials diverts the trial from its proper purpose in that it has an inevitable impact on all the trial participants; (2) that it gives the public the wrong impression about the purpose of trials, thereby detracting from the dignity of court proceedings and lessening the reliability of trials; and (3) that it singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others.

I have attempted to show that our common-law heritage, our Constitution, and our experience in applying that Constitution have committed us irrevocably to the position that the criminal trial has one well-defined purpose-to provide a fair and reliable determination of guilt. In Tumey v. State of Ohio, supra, 273 U.S., at 532, 47 S.Ct., at 444, this Court condemned the procedure there employed for compensating judges because it offered a 'possible temptation' to judges 'not to hold the balance nice, clear, and true between the state and the accused.' How much more harmful is a procedure which not only offers the temptation to judges to use the bench as a vehicle for their own ends, but offers the same temptation to every participant in the trial, be he defense counsel, prosecutor, witness or juror! It is not necessary to speak in the abstract on this point. In the present case, on October 1, the trial judge invited the television cameras into his chambers so they could take films of him reading one of his pretrial orders. On this occasion, at least, the trial judge clearly took the initiative in placing himself before the television audience and in giving his order, and himself, the maximum possible publicity. Moreover, on October 22, when trial counsel renewed***566** his motion to exclude television from the courtroom on the ground that it violated petitioner's rights under the Federal Constitution, the trial judge made the following speech:

'This case is not being tried under the Federal Constitution. This Defendant has been brought into this Court under the state laws, under the State Constitution.

'I took an oath to uphold this Constitution; not the Federal Constitution but the State Constitution; and I am going to do my best to do that as long as I preside on this Court, and if it is distasteful in following my oath and upholding the constitution, it will just have to be distasteful.'

One is entitled to wonder if such a statement would be made in a court of justice by any state trial judge except as an appeal calculated to gain the favor of his viewing audience. I find it difficult to believe that this trial judge, with over 20 years' experience on the bench, was unfamiliar with the fundamental duty imposed on him by Article VI of the Constitution of the United States:

'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be ****1645** made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'

This is not to say that all participants in the trial would distort it by deliberately playing to the television audience, but some undoubtedly would. The even more serious danger is that neither the judge, prosecutor, defense counsel, jurors or witnesses would be able to go ***567** through trial without considering the effect of their conduct on the viewing public. It is admitted in dissent that 'if the scene at the September hearing had been repeated in the courtroom during this jury trial, it is difficult to conceive how a fair trial in the constitutional sense could have been afforded the defendant.' Post, p. 1675. But it is contended that what went on at the September hearing is irrelevant to the issue before us. With this I cannot agree. We granted certiorari to consider whether petitioner was denied due process when he was required to submit to a televised trial. In this, as in other cases

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involving rights under the Due Process Clause, we have an obligation to make an independent examination of the record, e.g., Watts v. State of Indiana, 338 U.S. 49, 51, 69 S.Ct. 1347, 1348, 93 L.Ed. 1801; Norris v. State of Alabama, 294 U.S. 587, 590, 55 S.Ct. 579, 580, 79 L.Ed. 1074; and the limited grant of certiorari does not prohibit us from considering all the facts in this record relevant to the question before us. The parties to this case, and those who filed briefs as amici curiae, recognize this, since they treat the televising of the September proceedings as a factor relevant to our consideration. Our decisions in White v. State of Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193, and Hamilton v. State of Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114, clearly hold that an accused is entitled to procedural protections at pretrial hearings as well as at actual trial and his conviction will be reversed if he is not accorded these protections. In addition, in Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, we held that a pretrial hearing can have a profound effect on the trial itself and effectively prevent an accused from having a fair trial. Petitioner clearly did not have a fair determination of his motion to exclude cameras from the courtroom. The very presence of the cameras at the September hearing tended to impress upon the trial judge the power of the communications media and the criticism to which he would have been subjected if he had ruled that the presence of the cameras was inconsistent with petitioner's right to a fair trial. The prejudice to petitioner***568** did not end here. Most of the trial participants were present at the September hearing-the judge, defense counsel, prosecutor, prosecution witnesses and defendant himself-and they saw for themselves the desecration of the courtroom. After undergoing this experience it is unrealistic to suppose that they would come to the October trial unaware that court procedures were being sacrificed in this case for the convenience of television. The manner in which the October proceedings were conducted only intensified this awareness. It was impossible for any of the trial participants ever to be unaware of the presence of television cameras in court for the actual trial.[FN23] The snouts of the four television cameras protruded through the opening in the booth, and the cameras and their operators were not only readily visible but were impossible to ignore by all who were surveying the activities in this small courtroom. No one could forget that he was constantly in the focus of the 'all-seeing eye.' Although the law of Texas purportedly permits witnesses to object to being televised, it is ludicrous to place this burden on them. They would naturally accept the conditions of the ****1646** courtroom as the judge establishes them, and feel that it would be as presumptuous for them to object to the court's permitting television as to object to the court reporter's recording their testimony. Yet, it is argued that no witnesses objected to being televised. This is indeed a slender reed to rely on, particularly in view of the trial judge's failure, in the course of his self-exculpating statements justifying his decision to allow television, to advise the witnesses or the jurors that they had the right to object to being televised. Defense counsel, however, stated forcefully that he could not concentrate on the case because of the distraction caused by the cameras. And the trial judge's attention***569** was distracted from the trial since he was compelled to make seven extensive rulings concerning television coverage during the October proceedings alone, when he should, instead, have been concentrating on the trial itself.

FN23. See Appendix, Photograph 7.

It is common knowledge that 'television * * * can * * * work profound changes in the behavior of the people it focuses on.'[FN24] The present record provides ample support for scholars who have claimed that awareness that a trial is being televised to a vast, but unseen audience, is bound to increase nervousness and tension,[FN25] cause an increased ***570** concern about appearances,[FN26] and bring to the surface latent opportunism that the traditional dignity of the courtroom would discourage. Whether they do so consciously or subconsciously, all trial participants act differently in the presence of

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television cameras. And, even if all participants make a conscientious and studied effort to be unaffected by the presence of television, this effort in itself prevents them from giving their ****1647** full attention to their proper functions at trial. Thus, the evil of televised trials, as demonstrated by this case, lies not in the noise and appearance of the cameras, but in the trial participants' awareness that they are being televised. To the extent that television has such an inevitable impact it undercuts the reliability of the trial process.

FN24. Keating, 'Not 'Bonanza,' Not 'Peyton Place,' But the U.S. Senate,' N.Y. Times Magazine, April 25, 1965, 67, 72. See, e.g., N.Y. Times, April 22, 1965, p. 43, col. 2 (in describing a televised stockholders' meeting the Times reported, 'Some stockholders seemed very much aware they were on camera'); Tinkham, Should Canon 35 Be Amended? A Question of Proper Judicial Administration, 42 A.B.A.J. 843, 845 (1956) (in giving examples of how people react when they know they are on television, the author describes the reactions of a television audience when the camera was turned on it as 'contorted, grimacing'); Gould, N. Y. Times, March 11, 1956, s 2, p. X 11, col. 2 ('The most experienced performers in show business know the horrors of stage fright before they go on TV. This psychological and emotional burden must not be placed on a layman whose testimony may have a bearing on whether, in a murder trial, another human being is to live or die.').

FN25. See, e.g., Douglas, The Public Trial and the Free Press, 46 A.B.A.J. 840, 842 (1960). In United States v. Kleinman, 107 F.Supp. 407 (D.C.D.C.1952), the court refused to hold in contempt witnesses in a congressional hearing who refused to answer questions while television cameras were focused on them. The court stated:

'The only reason for having a witness on the stand, either before a committee of Congress or before a court, is to get a thoughtful, calm, considered and, it is to be hoped, truthful disclosure of facts. That is not always accomplished, even under the best of circumstances. But at least the atmosphere of the forum should lend itself to that end.

'In the cases now to be decided, the stipulation of facts discloses that there were, in close proximity to the witness, television cameras, newsreel cameras, news photographers with their concomitant flashbulbs, radio microphones, a large and crowded hearing room with spectators standing along the walls, etc. The obdurate stand taken by these two defendants must be viewed in the context of all these conditions. The concentration of all of these elements seems to me necessarily so to disturb and distract any witness to the point that he might say today something that next week he will realize was erroneous. And the mistake could get him in trouble all over again.' Id., at 408.

FN26. See, e.g., Douglas, supra, note 25, at 842; Yesawich, Televising and Broadcasting Trials, 37 Cornell L.Q. 701, 717 (1952).

In the early days of this country's development, the entertainment a trial might provide often tended to obfuscate its proper role.

'The people thought holding court one of the greatest performances in the range of their experience. * * * The country folks would crowd in for ten miles to hear these 'great lawyers' plead; and it was a secondary matter with the client whether he won or lost his case, so the 'pleading' was loud and long.' FN27

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FN27. Wigmore, A Kaleidoscope of Justice 487 (1941).

'In early frontier America, when no motion pictures, no television, and no radio provided entertainment,***571** trial day in the county was like fair day, and from near and far citizens young and old converged on the county seat. The criminal trial was the theater and spectaculum of old rural America. Applause and cat calls were not infrequent. All too easily lawyers and judges became part-time actors at the bar. * * *'[FN28]

FN28. Mueller, Problems Posed by Publicity to Crime and Criminal Proceedings, 110 U.Pa.L.Rev. 1, 6 (1961).

I had thought that these days of frontier justice were long behind us, but the courts below would return the theater to the courtroom.

The televising of trials would cause the public to equate the trial process with the forms of entertainment regularly seen on television and with the commercial objectives of the television industry. In the present case, tapes of the September 24 hearing were run in place of the 'Tonight Show' by one station and in place of the late night movie by another. Commercials for soft drinks, soups, eyedrops and seatcovers were inserted when there was a pause in the proceedings. In addition, if trials were televised there would be a natural tendency on the part of broadcasters to develop the personalities of the trial participants, so as to give the proceedings more of an element of drama. This tendency was noticeable in the present case. Television commentators gave the viewing audience a homey, flattering sketch about the trial judge, obviously to add an extra element of viewer appeal to the trial:

'Tomorrow morning at 9:55 the WFAA T.V. cameras will be in Tyler to telecast live (the trial judge's) decision whether or not he will permit live coverage of the Billie Sol Estes trial. If so, this will be the first such famous national criminal proceeding to be televised in its entirety live. (The trial judge) ***572** was appointed to the bench here in Tyler in 1942 by (the Governor). The judge has served every two years since then. This very beautiful Smith County Courthouse was built and dedicated in 1954, but before that (the trial judge) had made a reputation for himself that reached not only throughout Texas, but throughout the United States as well. It is said that (the trial judge), who is now 53 years old, has tried more cases than any other judge during his time in office.'

The television industry might also decide that the bareboned trial itself does not contain sufficient drama to sustain an audience. It might provide expert commentary on the proceedings and hire persons with legal backgrounds to anticipate possible trial strategy, as the football expert anticipates plays for his audience. The trial judge himself stated at the September hearing that if he wanted ****1648** to see a ball game he would turn on his television set, so why not the same for a trial.

Moreover, should television become an accepted part of the courtroom, greater sacrifices would be made for the benefit of broadcasters. In the present case construction of a television booth in the courtroom made it necessary to alter the physical layout of the courtroom and to move from their accustomed position two benches reserved for spectators.[FN29] If this can be done in order better to accommodate the television industry, I see no reason why another court might not move a trial to a theater, if such a move would provide improved television coverage. Our memories are short indeed if we have already forgotten the wave of horror that swept over this country when Premier Fidel Castro conducted his prosecutions before 18,000 people in Havana Stadium.[FN30] But in the decision ***573** below, which completely ignores the importance of the courtroom in the trial process, we have the beginnings of a similar approach toward criminal 'justice.' This is not an abstract fear I am expressing because this very situation confronted the Nebraska Supreme Court in Roberts v. State, 100 Neb. 199, 203, 158 , n.W. 930, 931-932 (1916):

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FN29. Compare Appendix, Photograph 5, with Appendix, Photograph 6.

FN30. N.Y. Times, Jan. 23, 1959, p. 1, col. 1.

'The court removed the trial from the courtroom to the theater, and stated as a reason therefor: 'By reason of the insufficiency of the courtroom to seat and accommodate the people applying for admission * * * it is by the court ordered that the further trial of this cause be had at the Keith Theater, and thereupon the court was adjourned to Keith Theater, where trial proceeded.' The stage was occupied by court, counsel, jury, witnesses, and officers connected with the trial. The theater proper was crowded with curious spectators. Before the trial was completed it was returned to the courtroom and concluded there. At the adjournment of court on one occasion the bailiff announced from the stage: 'The regular show will be to-morrow; matine e in the afternoon and another performance at 8:30. Court is now adjourned until 7:30.''

There would be a real threat to the integrity of the trial process if the television industry and trial judges were allowed to become partners in the staging of criminal proceedings. The trial judge in the case before us had several 'conferences (with) representatives of the news media.' Post, p. 1672. He then entered into a joint enterprise with a television station for the construction of a booth in his courtroom. The next logical step in this partnership might be to schedule the trial for a time that would permit the maximum number of viewers to watch and to schedule recesses to coincide with the need for station breaks. Should the television industry become an ***574** integral part of our system of criminal justice, it would not be unnatural for the public to attribute the shortcomings of the industry to the trial process itself. The public is aware of the television industry's consuming interest in ratings, and it is also aware of the steps that have been taken in the past to maintain viewer interest in television programs. Memories still recall vividly the scandal caused by the disclosure that quiz programs had been corrupted in order to heighten their dramatic appeal. Can we be sure that similar efforts would not be made to heighten the dramatic appeal of televised trials? Can we be sure that the public would not inherently distrust our system of justice because of its intimate association with a commercial enterprise?

Broadcasting in the courtroom would give the television industry an awesome ****1649** power to condition the public mind either for or against an accused. By showing only those parts of its films or tapes which depict the defendant or his witnesses in an awkward or unattractive position, television directors could give the community, state or country a false and unfavorable impression of the man on trial. Moreover, if the case should end in a mistrial, the showing of selected portions of the trial, or even of the whole trial, would make it almost impossible to select an impartial jury for a second trial. Cf. Rideau v. State of Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663. To permit this powerful medium to use the trial process itself to influence the opinions of vast numbers of people, before a verdict of guilt or innocence has been rendered, would be entirely foreign to our system of justice.

The sense of fairness, dignity and integrity that all associate with the court-room would become lost with its commercialization. Thus, the televising of trials would not only have an effect on those participating in the trials that are being televised, but also on those who observe the trials and later become trial participants.

***575** It is argued that television not only entertains but also educates the public. But the function of a trial is not to provide an educational experience; and there is a serious danger that any attempt to use a trial as an educational tool will both divert it from its proper purpose and lead to suspicions concerning the intergrity of the trial process. The Soviet Union's trial of Francis Gary Powers provides an example in point. The integrity of the trial was suspect because it was concerned not only with determining the guilt of the individual on trial

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but also with providing an object lesson to the public. This divided effort undercut confidence in the guilt-determining aspect of the procedure and by so doing rendered the educational aspect self-defeating.

'Was it prejudicial to (Powers) that the trial took place in a special hall with over 2,000 spectators, that it was televised, that prominent representatives of many organizations in various countries were invited to attend, that simultaneous oral translations of the proceedings * * * were provided, and that detailed * * * reports of the case in various languages were distributed to the press before, during and after the trial?'

'* * * (T)he Soviet legal system * * * consciously and explicitly uses the trial, and indeed the very safeguards of justice themselves, as instruments of the social and political objectives of the state. * * *

'* * * A Soviet trial is supposed to be correct, impartial, just, reasonable, and at the same time it is supposed to serve as an object-lesson to society, a means of teaching the participants, the spectators and the public generally to be loyal, obedient, disciplined fighters for Communist ideals. * * *

'* * * (T)he tension between the demands of justice and the demands of politics can never be entirely ***576** eliminated. The fate of the accused is bound to be influenced in one way or another when the trial is lifted above its individual facts and deliberately made an object-lesson to the public.'

'* * * (T)he deliberate use of a trial as a means of political education threatens the integrity of the judicial process.'[FN31]

FN31. Berman, Introduction to the Trial of the U 2 xiii, xii-xiii, xxix (1960).

Finally, if the televising of criminal proceedings were approved, trials would be selected for television coverage for reasons having nothing to do with the purpose of trial. A trial might be televised because a particular judge has gained the fancy of the public by his unorthodox****1650** approach; or because the district attorney has decided to run for another office and it is believed his appearance would attract a large audience; or simply because a particular courtroom has a layout that best accommodates television coverage.[FN32] For the most part, however, the most important factor that would draw television to the courtroom would be the nature of the case. The alleged perpetrator of the sensational murder, the fallen idol, or some other person who, like petitioner, has attracted the public interest would find his trial turned into ***577** a vehicle for television. Yet, these are the very persons who encounter the greatest difficulty in securing an impartial trial, even without the presence of television. This Court would no longer be able to point to the dignity and calmness of the courtroom as a protection from outside influences. For the television camera penetrates this protection and brings into the courtroom tangible evidence of the widespread interest in a case-an interest which has often been fanned by exhaustive reports in the newspapers, television and radio for weeks before trial. The present case presents a clear example of this danger. In the words of petitioner's counsel:

FN32. A revealing dialogue took place in the present case between defense counsel and one of the television executives present in the courtroom during the September 24 hearing.

'Q. The camera on the other side of the room has to look over a corner of the jury box and past the jurors to be aimed at the witness box, does it not?

'A. I think that is pretty clear, sir. I don't think the jurors would be in the way there.

'Q. You don't think the jurors would get in the way of your operations?

'A. I don't mean that exactly, sir.'

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'The Saturday Evening Post, The Readers Digest, Time, Life all had feature stories upon (petitioner's) story giving in detail his life history and the details of * * * alleged fraudulent transactions. * * *

'The metropolitan papers throughout the country featured the story daily. Each day for weeks the broadcasts carried some features of the story.' FN33

FN33. Petition for writ of certiorari, 35a.

After living in the glare of this publicity for weeks, petitioner came to court for a legal adjudication of the charges against him. As he approached the courthouse he was confronted by an army of photographers, reporters and television commentators shoving microphones in his face.FN34 When he finally made his way into the courthouse it was reasonable for him to expect that he could have a respite from this merciless badgering and have his case adjudicated in a calm atmosphere. Instead, the carnival atmosphere of the September hearing served only to increase the publicity surrounding petitioner and to condition further the public's mind against him. Then, upon his entrance into the courtroom for his actual trial he was ***578** confronted with the sight of the television camera zeroed in on him and the ever-present still photographers snapping pictures of interest. As he opened a newspaper waiting for the proceedings to begin, the close-up lens of a television camera zoomed over his shoulder in an effort to find out what he was reading. In no sense did the dignity and integrity of the trial process shield this petitioner from the prejudicial publicity to which he had been exposed, because that publicity marched right through the courtroom door and made itself at home in heretofore unfamiliar surroundings. We stated in Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799, 'From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.' This ****1651** principle was not applied by the courts below.

FN34. See Appendix, Photograph 4.

I believe petitioner in this case has shown that he was actually prejudiced by the conduct of these proceedings, but I cannot agree with those who say that a televised trial deprives a defendant of a fair trial only if 'actual prejudice' can be shown. The prejudice of television may be so subtle that it escapes the ordinary methods of proof,FN35 but it would gradually erode our fundamental conception of trial.FN36 A defendant may be unable to prove that he was actually prejudiced by a televised trial, just as he may be unable to prove that the introduction of a coerced confession at his trial influenced the jury to convict him when there was substantial evidence to support his conviction aside from the confession, Payne v. State of Arkansas, supra; that the jury refrained from making a ***579** clearcut determination on the voluntariness question, Jackson v. Denno, supra; that a particular judge was swayed by a direct financial interest in his conviction, Tumey v. State of Ohio, supra; or that the jury gave additional weight to the testimony of certain prosecution witnesses because of the jury's repeated contacts with those witnesses during the trial, Turner v. State of Louisiana, supra. How is the defendant to prove that the prosecutor acted differently than he ordinarily would have, that defense counsel was more concerned with impressing prospective clients than with the interests of the defendant, that a juror was so concerned with how he appeared on television that his mind continually wandered from the proceedings, that an important defense witness made a bad impression on the jury because he was 'playing' to the television audience or that the judge was a little more lenient or a little more strict than he usually might be? And then, how is petitioner to show that this combination of changed attitudes diverted the trial sufficiently from its purpose to deprive him of a fair trial? It is no answer to say that an appellate court can review for itself

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tapes or films of the proceedings. In the first place, it is not clear that the court would be able to obtain unedited tapes or films to review. Even with the cooperation of counsel on both sides, this Court was unable to obtain films of this trial which were in any sense complete. In addition time limitations might restrict the television companies to taking pictures only of those portions of the trial that are most newsworthy and most likely to attract the attention of the viewing audience. More importantly, the tapes or films, even if unedited, could give a wrong impression of the proceedings. The camera which takes pictures cannot take a picture of itself. In addition, the camera cannot possibly cover the actions of all trial participants during the trial. While the camera is focused on the ***580** judge who is apparently acting properly, a juror may be glancing up to see where the camera is pointing and counsel may be looking around to see whether he can confer with his client without the close-up lens of the camera focusing on them. Needless to say, the camera cannot penetrate the minds of the trial participants and show their awareness that they may at that moment be the subject of the camera's focus. The most the camera can show is that a formally correct trial took place, but our Constitution requires more than form.

FN35. See, e.g., Douglas, supra, note 25, at 844.

FN36. Cf. Fay v. People of State of New York, 332 U.S. 261, 300, 67 S.Ct. 1613, 1633, 91 L.Ed. 2043 (dissenting opinion of Mr. Justice Murphy).

I recognize that the television industry has shown in the past that it can be an enlightening and informing institution, but like other institutions it must respect the rights of others and cannot demand that we alter fundamental constitutional conceptions for its benefit. We must take notice of the inherent unfairness of television****1652** in the courtroom and rule that its presence is inconsistent with the 'fundamental conception' of what a trial should be. My conviction that this is the proper holding in this case is buttressed by the almost unanimous condemnation of televised court proceedings by the judiciary in this country and by the strong opposition to the practice by the organized bar in this country. Canon 35 of the American Bar Association's Canons of Judicial Ethics prohibits the televising of court trials.[FN37] With only two, or possibly three exceptions,[FN38] The highest court of each ***581** State which has considered the question has declared that televised criminal trials are inconsistent with the Anglo-American conception of 'trial.'[FN39] Similarly, ****1653** Rule 53 of the Federal Rules of Criminal Procedure prohibits ***582** the 'broadcasting' of trials,[FN40] and the Judicial Conference of the United States has unanimously condemned televised trials.[FN41] This condemnation rests on more than notions of policy; it arises from an understanding of the ***583** constitutional conception of the term 'trial. Such a general consensus is certainly relevant to this Court's determination of the question. See Mapp v. Ohio, 367 U.S. 643, 651, 81 S.Ct. 1684, 1689, 6 L.Ed.2d 1081.

FN37. The Canon provides in pertinent part:

'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 or televising of court proceedings detract from the essential dignity of the proceedings, district participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.'

FN38. Colorado, In re Hearings Concerning Canon 35 of Canons of Judicial Ethics, 296 P.2d 465 (Colo.Sup.Ct.1956), and Texas permit televising of trials in the discretion of the trial judge. The current situation in Oklahoma is unclear. In Lyles v. State, 330 P.2d 734 (1958), the Criminal

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Court of Appeals of Oklahoma stated that the televising of proceedings was in the discretion of the trial judge. In 1959, however, the Supreme Court adopted a rule prohibiting television during actual proceedings. Okl.Stat.Ann., Tit. 5, at 65-66 (1963 Supp.). Nevertheless, in 1961 the court again stated that the televising of trials is a matter for the trial judge's discretion. Cody v. State, 361 P.2d 307, 84 A.L.R.2d 997 (Ct.Crim.App.Okl.1961).

FN39. With the exceptions stated in note 38, supra, no State affirmatively permits televised trials. It has been stated that Canon 35 is in effect in 30 States. 48 J.Am.Jud.Soc. 80 (1964); Brief for Petitioner, p. 39. It is difficult to verify this figure because of the lack of uniformity among the States in reporting their court rules. However, the following States have clearly adopted Canon 35, or its equivalent: Alaska, Alaska Rules Crim.Proc. 48; Arizona, Ariz.Sup.Ct.Rule 45, 17 Ariz.Rev.Stat.Ann., at 40; Connecticut, Conn. Practice Book 27 (1963); Delaware, Del.Sup.Ct.Rule 33, 13 Del.Code Ann., at 23 (1964 Supp.) (adopted Canon 35 in its pre-1952 form, which does not explicitly prohibit television, but does prohibit 'the taking of photographs' and 'broadcasting of court proceedings'); Florida, Code of Ethics, Rule A35, 31 Fla.Stat.Ann., at 285 (1964 Supp.), see Brumfield v. State, 108 So.2d 33 (Fla.Sup.Ct.1958); Hawaii, Hawaii Sup.Ct.Rule 16, 43 Haw. 450; Illinois, 1964 Ann.Rep. of the Ill.Judicial Conference 168-169, see People v. Ulrich, 376 Ill. 461, 34 N.E.2d 393 (1941), People v. Munday, 280 Ill. 32, 117 N.E. 286 (1917); Iowa, Iowa Sup.Ct.Rule 119, 40 Iowa Code Ann., c. 610 (1964 Supp.); Kansas, Kansas Sup.Ct. Rule 117, 191 Kan. xxiv (1963) (does not refer specifically to television); Kentucky, Ky.Ct.App.Rule 3.170, Russell's Kentucky Practice and Service 21 (1964); Louisiana, Canon of Judicial Ethics XXIII, 242 La. LI (1960); Michigan, Canon of Judicial Ethics 35, Callaghan's Michigan Pleading and Practice, Rules at 422-423 (2d ed. 1962). New Jersey, Canon of Judicial Ethics 35, 1 Waltzinger, New Jersey Practice 299 (Rev. ed. 1954); New Mexico, N.M.Sup.Ct.Rule 27, 4 N.M.Stat.Ann., at 95 (1963 Supp.); New York, N.Y.Rules of the Administrative Board of the Judicial Conference, Rule 5, N.Y.Judiciary Law, at 320 (1964 Supp.); Ohio, 176 Ohio St. lxiv (1964), see State v. Clifford, 162 Ohio St. 370, 123 N.E.2d 8 (1954), cert. denied, 349 U.S. 929, 75 S.Ct. 771, 99 L.Ed. 1259; Tennessee, Tenn.Sup.Ct.Rule 38, 209 Tenn. 818 (1961); Virginia, 201 Va. cvii (1960) (prohibits taking of photographs and broadcasting, although it does not refer specifically to television); Washington, 61 Wash.2d xxviii (1963); West Virginia, 141 W.Va. viii (1955).

In addition, Brand, Bar Associations, Attorneys and Judges (1956 and 1959 Supp.) reports that the Idaho Supreme Court adopted Canon 35 in its present form and the Supreme Courts of Oregon, South Dakota and Utah adopted the Canon when it merely prohibited 'photographing and 'broadcasting' without specifically mentioning television. It has also been reported that the Supreme Court of Arkansas adopted Canon 35. 44 J.Am.Jud.Soc. 120 (1960).

Moreover, the Supreme Court of California assumed it was 'improper' to televise criminal proceedings in People v. Stroble, 36 Cal.2d 615, 226 P.2d 330 (1951), affirmed 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872, rehearing denied 343 U.S. 952, 72 S.Ct. 1039, 96 L.Ed. 1353; see the rule adopted

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by the Conference of California Judges, 24 Cal.State Bar J. 299 (1949); the Court of Appeals of Maryland in Ex parte Sturm, 152 Md. 114, 122, 136 A. 312, 315, 51 A.L.R. 356 (1927), used language indicating that Maryland would probably bar television from the courtroom if faced with the problem; and the Supreme Court of Pennsylvania cited with approval Canon 35 in Mack Appeal, 386 Pa. 251, 257, n. 5, 126 A.2d 679, 681-682, n. 4 (1956), cert. denied Mack v. Com. of Pa., 352 U.S. 1002, 77 S.Ct. 559, 1 L.Ed.2d 547, see 48 J.Am.Jud.Soc. 200 (1965).

FN40. Rule 53 provides:

'The taking of photographis in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court.'

FN41. 'Resolved, That the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceedings, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court.' Annual Report of the Proceedings of the Judicial Conference of the United States, March 8-9, 1962, p. 10.

IV.

Nothing in this opinion is inconsistent with the constitutional guarantees of a public trial and the freedoms of speech and the press.

This Court explained in In re Oliver, 333 U.S. 257, 266, 270, 68 S.Ct. 499, 506, 92 L.Ed.2d 682, that the public trial provision of the Sixth Amendment is a 'guarantee to an accused' designed to 'safeguard against any attempt to employ our courts as instruments of persecution.' Clearly the openness of the proceedings provides other benefits as well: it arguably improves the quality of testimony, it may induce unknown witnesses to come forward with relevant testimony, it may move all trial participants to perform their duties conscientiously, and it gives the public the opportunity to observe the courts in the performance of their duties and to determine whether they are performing adequately. FN42 But the guarantee of a public trial confers no special benefit on the press, the radio industry or the television industry. A public trial is a necessary component of an accused's right to a fair trial and the concept of public trial cannot be used to defend conditions which prevent the trial process from providing a fair and reliable determination of guilt.

FN42. See, e.g., 3 Blackstone, Commentaries on the Laws of England 372-373 (15th ed. 1809); 6 Wigmore, Evidence 332-335 (3d ed. 1940).

To satisfy the constitutional requirement that trials be public it is not necessary to provide facilities large enough ***584** for all who might like to attend a particular trial, since to do so would interfere with the integrity of the trial process and make the publicity of trial proceedings an end in itself. Nor does the requirement that trials be public mean that observers are free to act as they please in the courtroom, for persons who attend trials cannot act in such a way as to interfere with the trial ****1654** process, see Moore v. Dempsey, supra. When representatives of the communications media attend trials they have no greater rights than other members of the public. Just as an ordinary citizen might be prohibited from using field glasses or a motion picture camera in the courthouse because by so doing he would interfere with the conduct of the trial, representatives of the press and broadcasting industries are subject to similar limitations when they attend court. Since the televising of criminal trials diverts the trial process from its proper end, it must be prohibited. This prohibition does not conflict with the constitutional guarantee of a public trial,

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because a trial is public, in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, which facilities are not so small as to render the openness negligible and not so large as to distract the trial participants from their proper function, when the public is free to use those facilities, and when all those who attend the trial are free to report what they observed at the proceedings.

Nor does the exclusion of television cameras from the courtroom in any way impinge upon the freedoms of speech and the press. Court proceedings, as well as other public matters, are proper subjects for press coverage.

'A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose ***585** none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys of the jury, or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.'FN43

FN43. Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546. See Bridges v. State of California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192; Pennekamp v. State of Florida, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295.

So long as the television industry, like the other communications media, is free to send representatives to trials and to report on those trials to its viewers, there is no abridgment of the freedom of press. The right of the communications media to comment on court proceedings does not bring with it the right to inject themselves into the fabric of the trial process to alter the purpose of that process.

In summary, television is one of the great inventions of all time and can perform a large and useful role in society. But the television camera, like other technological innovations, is not entitled to pervade the lives of everyone in disregard of constitutionally protected rights.FN44 The television industry, like other institutions, has a proper area of activities and limitations beyond which it cannot go with its cameras. That area does not extend into an American courtroom. On entering that ***586** hallowed sanctuary, where the lives, liberty and property of people are in jeopardy, television representatives have only the rights of the general public, namely, to be present, to observe the proceedings, and thereafter, if they choose, to report them.

FN44. Compare Olmstead v. United States, 277 U.S. 438, 471, 48 S.Ct. 564, 570, 72 L.Ed. 944 (dissenting opinion of Mr. Justice Brandeis); On Lee v. United States, 343 U.S. 747, 762, 72 S.Ct. 967, 976, 96 L.Ed. 1270 (dissenting opinion of Mr. Justice Douglas); Silverman v. United States, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734; Lopez v. United States, 373 U.S. 427, 445-446, 83 S.Ct. 1381, 1391-1392, 10 L.Ed.2d 462 (opinion concurring in the result), 373 U.S. 465, 83 S.Ct. 1402 (dissenting opinion of Mr. Justice Brennan).

(For opinion of HARLAN, J., concurring, see post, p. 1662.)

****1655** APPENDIX TO OPINION OF MR. CHIEF JUSTICE WARREN.

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****1662 *587** Mr. Justice HARLAN, concurring.

I concur in the opinion of the Court, subject, however, to the reservations and only to the extent indicated in this opinion.

The constitutional issue presented by this case is far-reaching in its implications for the administration of justice in this country. The precise question is whether the Fourteenth Amendment prohibits a State, over the objection of a defendant, from employing television in the courtroom to televise contemporaneously, or subsequently by means of videotape, the courtroom proceedings of a criminal trial of widespread public interest. The issue is no narrower than this because petitioner has not asserted any isolatable prejudice resulting from the presence of television apparatus within the courtroom or from the contemporaneous or subsequent broadcasting of the trial proceedings. On the other hand, the issue is no broader, for we are concerned here only with a criminal trial of great notoriety, and not with criminal proceedings of a more or less routine nature.

The question is fraught with unusual difficulties. Permitting television in the courtroom undeniably has mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process. Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation. My conclusion is that there is no constitutional requirement that television be allowed in the courtroom, and, at least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment.

***588** Some preliminary observations are in order: All would agree, I am sure, that at its worst, television is capable of distorting the trial process so as to deprive it of fundamental fairness. Cables, kleig lights, interviews with the principal participants, commentary on their performances, ‘commercials' at frequent intervals, special wearing apparel and makeup for the trial participants-certainly such things would not conduce to the sound administration of justice by any acceptable standard. But that is not the case before us. We must judge television as we find it in this trial-relatively unobtrusive, with the cameras contained in a booth at the back of the courtroom.

I.

No constitutional provision guarantees a right to televise trials. The ‘public trial’ guarantee of the Sixth Amendment, which reflects a concept fundamental to the administration of justice in this Country, In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682, certainly does not require that television be admitted to the courtroom. See United Press Assns. v. Valente, 308 N.Y. 71, 123 N.E.2d 777. Essentially, the publictrial guarantee embodies a view of human nature, true as a general rule, that

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judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings. In re Oliver, supra, 333 U.S. at 266-273, 68 S.Ct., at 504-507. A fair trial is the objective, and 'public trial' is an institutional safeguard for attaining it.

Thus the right of 'public trial' is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered. Obviously, the publictrial 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 ****1663** persons***589** 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, although to be sure, the guarantee of public trial does not of itself prohibit such activity.

The free speech and press guarantees of the First and Fourteenth Amendments are also asserted as embodying a positive right to televise trials, but the argument is greatly overdrawn. Unquestionably, television has become a very effective medium for transmitting news. Many trials are newsworthy, and televising them might well provide the most accurate and comprehensive means of conveying their content to the public. Furthermore, television is capable of performing an educational function by acquainting the public with the judicial process in action. Albeit these are credible policy arguments in favor of television, they are not arguments of constitutional proportions. The rights to print and speak, over television as elsewhere, do not embody an independent right to bring the mechanical facilities of the broadcasting and printing industries into the courtroom. Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public. Within the courthouse the only relevant constitutional consideration is that the accused be accorded a fair trial. If the presence of television substantially detracts from that goal, due process requires that its use be forbidden.

***590** I see no force in the argument that to exclude television apparatus from the courtroom, while at the same time permitting newspaper reporters to bring in their pencils and notebooks, would discriminate in favor of the press as against the broadcasting services. The distinctions to be drawn between the accouterments of the press and the television media turn not on differences of size and shape but of function and effect. The presence of the press at trials may have a distorting effect, but it is not caused by their pencils and note books. If it were, I would not hesitate to say that such physical paraphernalia should be barred.

II.

The probable impact of courtroom television on the fairness of a trial may vary according to the particular kind of case involved. The impact of television on a trial exciting wide popular interest may be one thing; the impact on a run-of-the-mill case may be quite another. Furthermore, the propriety of closed circuit television for the purpose of making a court recording or for limited use in educational institutions obviously presents markedly different considerations. The Estes trial was a heavily publicized and highly sensational affair. I therefore put aside all other types of cases; in so doing, however, I wish to make it perfectly clear that I am by no means prepared to say that the constitutional issue should ultimately turn upon the nature of the particular case involved. When the issue of television in a non-notorious trial is presented it may appear that

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no workable distinction can be drawn based on the type of case involved, or that the possibilities for prejudice, though less severe, are nonetheless of constitutional proportions. Compare Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158; Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799. The resolution of those further questions should await an appropriate ****1664** case; the ***591** Court should proceed only step by step in this unplowed field. The opinion of the Court necessarily goes no farther, for only the four members of the majority who unreservedly join the Court's opinion would resolve those questions now.

I do not deem the constitutional inquiry in this case ended by the finding in effect conceded by petitioner's counsel, that no isolatable prejudice was occasioned by the manner in which television was employed in this case. FN1 Courtroom television introduces into the conduct of a criminal trial the element of professional 'showmanship,' an extraneous influence whose subtle capacities for serious mischief in a case of this sort will not be underestimated by any lawyer experienced in the elusive imponderables of the trial arena. In the context of a trial of intense public interest, there is certainly a strong possibility that the timid or reluctant witness, for whom a court appearance even at its traditional best is a harrowing affair, will become more timid or reluctant when he finds that he will also be appearing before a 'hidden audience' of unknown but large dimensions. There is certainly a strong possibility that the 'cocky' witness having a thirst for the limelight will become more 'cocky' under the influence of television. And who can say that the juror who is gratified by having been chosen for a front-line case, an ambitious prosecutor, a publicity-minded defense counsel, and even a conscientious judge will not stray, albeit unconsciously, from doing what 'comes naturally' into pluming themselves for a satisfactory television 'performance'?

FN1. The trial judge ordered that there was to be no audio transmission of the witnesses' testimony. The witnesses, however, were present at the September hearing when everything was broadcast, and the record does not show affirmatively that they were aware that the microphone which confronted them during the actual trial was not being used for the same purpose.

***592** Surely possibilities of this kind carry grave potentialities for distorting the integrity of the judicial process bearing on the determination of the guilt or innocence of the accused, and, more particularly, for casting doubt on the reliability of the fact-finding process carried on under such conditions. See Douglas, The Public Trial and the Free Press, 46 A.B.A.J. 840 (1960). To be sure, such distortions may produce no telltale signs, but in a highly publicized trial the danger of their presence is substantial, and their effects may be far more pervasive and deleterious than the physical disruptions which all concede would vitiate a conviction. A lively public interest could increase the size of the viewing audience immensely, and the masses of spectators to whom the trial is telecast would have become emotionally involved with the case through the dissemination of pretrial publicity, the usual concomitant of such a case. The presence of television would certainly emphasize to the trial participants that the case is something 'special.' Particularly treacherous situations are presented in cases where pretrial publicity has been massive FN2 even when jurors positively state they will not be influenced by it; see Rideau v. State of Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663; Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751. To increase the possibility of influence and the danger of a 'popular verdict' by subjecting the jurors to the view of a mass audience whose approach to the case has been conditioned by pretrial publicity can only make a bad situation worse. The entire thrust of rules of evidence and the other protections attendant upon the modern trial is to keep extraneous influences out of the courtroom. Turner v.

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State of Louisiana, 379 U.S. 466, 472-473, 85 ****1665** S.Ct. 546, 549-550, 13 L.Ed.2d 424. As we recently observed in Turner, 'Mr. Justice Holmes stated no more than a truism when he observed that 'Any judge who has sat with juries knows that, in spite of forms they ***593** are extremely likely to be impregnated by the environing atmosphere.' Frank v. Mangum, 237 U.S. 309, at 349, 35 S.Ct. 582, at 595, 59 L.Ed. 969 (dissenting opinion).' Id., at 472, 85 S.Ct., at 549.[FN3] The knowledge on the part of the jury and other trial participants that they are being televised to an emotionally involved audience can only aggravate the atmosphere created by pretrial publicity.

FN2. Petitioner in this case amassed 11 volumes of pretrial press clippings.

FN3. The Court had occasion to recognize in Cox v. State of Louisiana, 379 U.S. 559, 565, 85 S.Ct. 476, 481, 13 L.Ed.2d 487, that even 'judges are human' and not immune from outside environmental influences.

The State argues that specific prejudice must be shown for the Due Process Clause to apply. I do not believe that the Fourteenth Amendment is so impotent when the trial practices in question are instinct with dangers to constitutional guarantees. I am at a loss to understand how the Fourteenth Amendment can be thought not to encompass protection of a state criminal trial from the dangers created by the intrusion of collateral and wholly irrelevant influences into the courtroom. The Court has not hesitated in the past to condemn such practices, even without any positive showing of isolatable prejudice. In Turner v. State of Louisiana, supra, decided just this Term, we held that the 'potentialities' for distortion of the trial created by a key witness serving as bailiff to a sequestered jury were sufficient to violate the Due Process Clause of the Fourteenth Amendment. In Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, the Court made the judgment that a trial judge's determination of a coerced-confession issue is more likely to avoid prejudice than a jury determination, a judgment which indeed overrode a long-standing contrary state practice. And in Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751, we held that flamboyant pretrial publicity cast sufficient doubt on the impartiality of the jury to vitiate a conviction, even in the face of statements by all the jurors that they were not subject to its influence. See 366 U.S., at 729, 81 S.Ct., at 1646 (Frankfurter, J., concurring). Other examples of ***594** instances in which the Court has exercised its judgment as to the effects of one thing or another on human behavior are plentiful. See, e.g., Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106; Tancil v. Woolls, 379 U.S. 19, 85 S.Ct. 157, 13 L.Ed.2d 91; Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (compare People v. Defore, 242 N.Y. 13, 150 N.E. 585); Avery v. State of Georgia, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244; Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749.

The judgment that the presence of television in the courtroom represents a serious danger to the trial process is supported by a vast segment of the Bar of this country, as evidenced by Canon 35 of the Canons of Judicial Ethics of the American Bar Association, counseling against such practices,[FN4] the views of the Judicial Conference of the United States (infra, p. 1669), Rule 53 of the Federal Rules of Criminal Procedure, and even the 'personal views' (post, p. 1669) of the Justices on the dissenting side of the present case.

FN4. The consistent position of the American Bar Association is set out in the Appendix.

The arguments advanced against the constitutional banning of televised trials seem to me peculiarly unpersuasive. It is said that the pictorial broadcasting of trials will serve to educate the public as to the nature of the judicial process. Whatever force such arguments might ****1666** have in run-of-the-mill cases, they carry little weight in cases of

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the sort before us, where the public's interest in viewing the trial is likely to be engendered more by curiosity about the personality of the well-known figure who is the defendant (as here), or about famous witnesses or lawyers who will appear on the television screen, or about the details of the particular crime involved, than by innate curiosity to learn about the workings of the judicial process itself. Indeed it would be naive not to suppose that it would be largely such factors that would qualify a trial for commercial television ***595** 'billing,' and it is precisely that kind of case where the risks of permitting television coverage of the proceedings are at their greatest.

It is also asserted that televised trials will cause witnesses to be more truthful, and jurors, judges, and lawyers more diligent. To say the least this argument is sophistic, for it is impossible to believe that the reliability of a trial as a method of finding facts and determining guilt or innocence increases in relation to the size of the crowd which is watching it. Attendance by interested spectators in the courtroom will fully satisfy the safeguards of 'public trial.' Once openness is thus assured, the addition of masses of spectators would, I venture to say, detract rather than add to the reliability of the process. See Cox v. State of Louisiana, 379 U.S. 559, 562, 85 S.Ct. 476, 479, 13 L.Ed.2d 487. A trial in Yankee Stadium, even if the crowd sat in stony silence, would be a substantially different affair from a trial in a traditional courtroom under traditional conditions, and the difference would not, I think, be that the witnesses, lawyers, judges, and jurors in the stadium would be more truthful, diligent, and capable of reliably finding facts and determining guilt or innocence.[FN5] There will be no disagreement, I am sure, among those competent to judge that precisely the opposite would likely be the case.

> FN5. There may, of course, be a difference in impact upon the atmosphere and trial participants between the physical presence of masses of people and the presence of a camera lens which permits masses of people to observe the process remotely. However, the critical element is the knowledge of the trial participants that they are subject to such visual observation, an element which is, of course, present in this case.

Finally, we should not be deterred from making the constitutional judgment which this case demands by the prospect that the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional ***596** judgment called for now would of course be subject to re- examination in accordance with the traditional workings of the Due Process Clause. At the present juncture I can only conclude that televised trials, at least in cases like this one, possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned. On these premises I concur in the opinion of the Court.

APPENDIX TO OPINION OF MR. JUSTICE HARLAN, CONCURRING.

The development of Canon 35 is set out at length in the amicus curiae brief of the American Bar Association, pp. 3-8, as follows:

'It (Canon 35) was originally adopted on September 30, 1937 by the House of Delegates[FN1] in the following form:

> FN1. 'The House of Delegates is not only the governing body of the American Bar Association; because of the presence of representatives of all State Bar Associations, the largest and most important local bar associations, and of other important national professional groups, it is in fact a broadly representative policy forum for the profession as a whole.'

"Proceedings in court should be conducted

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with fitting dignity and decorum. The taking of photographs****1667** 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.' 62 A.B.A.Rep. 1134-35 (1937).

'A Special Committee on Cooperation Between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings had reported to the Association its grave concern with the dangers attendent upon the use of radio in connection with trials, particularly***597** in light of the spectacular publicity and broadcast of the trial of Bruno Hauptmann.[FN2] The Committee specifically referred to the evil of 'trial in the air'.[FN3] 62 A.B.A.Rep. 860 (1937).

FN2. 'See State v. Hauptmann, 115 N.J.L. 412, 180 Atl. 809 (Ct.Err. & App.), cert. denied, 296 U.S. 649, (56 S.Ct. 310, 80 L.Ed. 461) (1935).'

FN3. 'Prior to the adoption of Judicial Canon 35, the impropriety of permitting radio broadcasts of court proceedings was recognized by the Committee on Professional Ethics and Grievances of the Association in its Opinion No. 67, March 21, 1932. The Committee had recourse to Judicial Canon 34 which provides that a judge should not administer his office 'for the purpose of advancing his personal ambitions or increasing his popularity.' The Committee found that radio broadcasting of a trial changes 'what should be the most serious of human institutions either into an enterprise for the entertainment of the public or of one for promoting publicity for the judge.' American Bar Association, Opinions of the Committee on Professional Ethics and Grievances 163 (1957).'

'After the adoption of Judicial Canon 35, the direct radio broadcasting of court proceedings was disapproved by the Association's Committee on Professional Ethics and Grievances in its Opinion No. 212, March 15, 1941, as being specifically condemned. The Committee quoted with approval the following statement of the Michigan and Detroit Bar Associations:

"Such broadcasts are unfair to the defendant and to the witnesses. The natural embarrassment and confusion of a citizen on trial should not be increased by a realization that his voice and his difficulties are being used as entertainment for a vast radio audience. The fear expressed by most persons when facing an audience or microphone is a matter of common knowledge, and but few defendants or witnesses can properly concentrate on facts and testify fully and fairly when so handicapped. * * * Such broadcasts are unfair to the Judge, who should be permitted to devote his undivided attention to the case, unmindful of the effect which his comments or decision may ***598** have upon the radio audience.' American Bar Association, Opinions of the Committee on Professional Ethics and Grievances 426 (1957).

'In 1952, the growing prominence of television as a medium of mass communication was dealt with in a report of the Special Committee on Televising and Broadcasting Legislative and Judicial Proceedings (headed by the late John W. Davis). 77 A.B.A.Rep. 607 (1952). In condemning the practice of televising judicial proceedings, the Committee called attention to the fact that:

"The attention of the court, the jury, lawyers and witnesses should be concentrated upon the trial itself and ought not to be divided with the television or broadcast audience who for the most part have merely the interest of curiosity in the proceedings. It is not difficult to conceive that all participants may become over-concerned with the impression their actions,****1668** rulings or testimony will make on the absent multitude.' Id. at 610.

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'As a result of this report, and the recommendation of the Committee on Professional Ethics and Grievances, Judicial Canon 35 was amended by inserting a ban on the 'televising' of court proceedings and inserting the descriptive phrase 'distract the witness in giving his testimony' before the phrase 'degrade the court.' In addition, a second paragraph was added providing for the televising and broadcasting of certain ceremonial proceedings. Id. at 110-11.

'In October, 1954, the Board of Governors authorized the appointment of a Special Bar-Media Conference Committee on Fair Trial-Free Press to meet with representatives of the press, radio, and television. The views of both sides were thoroughly explored and were presented in detail in the September, 1956 issue of the American Bar Association Journal.[FN4] After extensive joint debate, ***599** no solutions or agreements were reached. 83 A.B.A.Rep. 790-91 (1958). The Committee did report that it was convinced that

FN4. '42 A.B.A.J. 834, 838, 843 (1956).'

"courtroom photographing or broadcasting or both would impose undue police duties upon the trial judge(,) * * * that the broadcasting and the photographing in the courtroom might have an adverse psychological effect upon trial participants, judges, lawyers, witnesses and juries(,) * * * (and) that partial broadcasts of trials, particularly on television, might influence public opinion which in turn might influence trial results. * * *' Id. at 645.

'Following the presentation of the Bar-Media Conference Committee report and in connection with the consideration of a report and recommendation of a Special Committee of the American Bar Foundation created in July, 1955 (83 A.B.A.Rep. 643-45 (1958)), the House of Delegates conducted a hearing as a 'Committee of the Whole' during its February, 1958 session at which proponents and opponents of Judicial Canon 35 were fully heard. 83 A.B.A.Rep. 648-69 (1958). Thereafter, at the August, 1958 meeting of the House of Delegates, it was decided to have a Special Committee study Canon 35 and

"conduct further studies of the problem, including the obtaining of a body of reliable factual data on the experience of judges and lawyers in those courts were either photography, televising or broadcasting, or all of them, are permitted. * * * The fundamental objective of the Committee and of all others interested must be to consider and make recommendations which will preserve the right of fair trial.' 83 A.B.A.Rep. 284 (1958).

'The Special Committee filed an Interim Report and Recommendations with the House of Delegates in August, ***600** 1962 setting forth the 'Area and Perspective' of its survey and studies. The report included portions of testimony by media representatives taken at a hearing held in Chicago on February 18, 1962, as well as a summary of the Committee's informal conference with certain representatives from Colorado and Texas. In addition, the report included written comments by officers of State Bar Associations responding to a Committee survey, and certain general correspondence received by the Committee regarding Judicial Canon 35. The report also listed significant publications favoring either revision or retention of the Canon. * * * (Hereinafter cited Int. Rep.)

'The Special Committee thereafter submitted its final report and recommendations, concluding that the substantive provisions of Judicial Canon 35 remain valid and 'should be retained as essential safeguards of the individual's inviolate ****1669** and personal right of fair trial.' * * * The Committee did recommend certain minor deletions * * * and changes * * * which were adopted by the House of Delegates, after full debate, on February 5, 1963:

"The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings (are calculated to) detract from the essential dignity of the proceedings, distract (the) participants and witnesses in giving (his) testimony,

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(degrade the court) and create misconceptions with respect thereto in the mind of the public and should not be permitted.'[FN5]

FN5. 'The full text of Judicial Canon 35, as amended, is as follows:

"IMPROPER PUBLICIZING OF COURT PROCEEDINGS

"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 or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

"Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization."

***601** 'A vast majority of the states have voluntarily adopted Judicial Canon 35 in one form or another, and it has been embodied in principle in Rule 53 of the Federal Rules of Criminal Procedure. In a recent Resolution of the Judicial Conference of the United States, the philosophy of Canon 35 was unanimously reaffirmed:

"Resolved, That the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceeding, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court. Int. Rep. p. 97.'

(Footnotes numbered and partially omitted.)

Mr. Justice STEWART, whom Mr. Justice BLACK, Mr. Justice BRENNAN, and Mr. Justice WHITE join, dissenting.

I cannot agree with the Court's decision that the circumstances of this trial led to a denial of the petitioner's Fourteenth Amendment rights. I think that the introduction of television into a courtroom, is, at least in the present state of the art, an extremely unwise policy. It invites many constitutional risks, and it detracts from the inherent dignity of a courtroom. But I am unable to escalate this personal view into a per se constitutional ***602** rule. And I am unable to find, on the specific record of this case, that the circumstances attending the limited televising of the petitioner's trial resulted in the denial of any right guaranteed to him by the United States Constitution.

On October 22, 1962, the petitioner went to trial in the Seventh Judicial District Court of Smith County, Texas, upon an indictment charging him with the offenses of (1) swindling, (2) theft by false pretenses, and (3) theft by a bailee. After a week spent in selecting a jury, the trial itself lasted some three and a half days. At its conclusion the jury found the petitioner guilty of the offense of swindling under the first count of the indictment. The trial judge permitted portions of the trial proceedings ****1670** to be televised, under the limitations described below. He also gave news photographers permission to take still pictures in the courtroom under specified conditions.

The Texas Court of Criminal Appeals affirmed the petitioner's conviction, and we granted certiorari, limited to a single question. The question, as phrased by the petitioner, is this:

'Whether the action of the trial court, over peti-

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tioner's continued objection, denied him due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, in requiring petitioner to submit to live television of his trial, and in refusing to adopt in this all out publicity case, as a rule of trial procedure, Canon 35 of the Canons of Judicial Ethics of the American Bar Association, and instead adopting and following, over defendant's objection, Canon 28 of the Canons of Judicial Ethics, since approved by the Judicial Section of the integrated (State agency) State Bar of Texas.'

The two Canons of Judicial Ethics referred to in the petitioner's statement of the question presented are set ***603** out in the margin.[FN1] But, as the Court rightly says, the problem before us is not one of choosing between the conflicting guidelines reflected in these Canons of Judicial Ethics. It is a problem rooted in the Due Process Clause of the Fourteenth Amendment. We deal here with matters subject to continuous and unforeseeable change-the ***604** techniques of public communication. In an area where all the ****1671** variables may be modified tomorrow, I cannot at this time rest my determination on hypothetical possibilities not present in the record of this case. There is no claim here based upon any right guaranteed by the First Amendment. But it is important to remember that we move in an area touching the realm of free communication, and for that reason, if for no other, I would be wary of imposing any per se rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights.

FN1. Canons of Judicial Ethics. American Bar Association: Judicial Canon 35. Improper publicizing of Court proceedings.

'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 or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

'Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.'

Canons of Judicial Ethics, Integrated State Bar of Texas: Judicial Canon 28. Improper Publicizing of Court Proceedings.

'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 or televising of court proceedings unless properly supervised and controlled, may detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public. The supervision and control of such trial coverage shall be left to the trial judge who has the inherent power to exclude or control coverage in the proper case in the interest of justice.

'In connection with the control of such coverage the following declaration of principles is adopted:

'(1) There should be no use of flash bulbs or other artificial lighting.

'(2) No witness, over his expressed objection, should be photographed, his voice

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broadcast or be televised.

'(3) The representatives of news media must obtain permission of the trial judge to cover by photograph, broadcasting or televising, and shall comply with the rules prescribed by the judge for the exercise of the privilege.

'(4) Any violation of the Court's Rules shall be punished as a contempt.

'(5) Where a judge has refused to allow coverage or has regulated it, any attempt, other than argument by representatives of the news media directly with the Court, to bring pressure of any kind on the judge, pending final disposition of the cause in trial, shall be punished as a contempt.'

I.

The indictment was originally returned by a grand jury in Reeves County, Texas, and it engendered widespread publicity. After some preliminary proceedings there, the case was transferred for trial to Smith County, more than 500 miles away. The trial was set for September 24, 1962, but it did not commence on that date. Instead, that day and the next were spent in hearings on two motions filed by defense counsel: a motion to bar television and news cameras from the trial, and a motion to continue the trial to a later date. Those proceedings were themselves telecast 'live,' and news photographers were permitted to take pictures in the courtroom. The activities of the television crews and news photographers led to considerable disruption of the hearings. FN2 At the conclusion***605** of the hearings the motion for a continuance was granted, and the case reset for trial on October 22. The motion to bar television and news photographers from the trial was denied. FN3

FN2. A contemporary newspaper account described the scene as follows:

'A television motor van, big as an intercontinental bus, was parked outside the courthouse and the second-floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four more marked cameras were aligned just outside the gates.

'A microphone stuck its 12-inch snout inside the jury box, now occupied by an overflow of reporters from the press table, and three microphones confronted Judge Dunagan on his bench. (C)ables and wires snaked over the floor.' The New York Times, September 25, 1962, p. 46, col. 4.

FN3. In ruling on the motion, the trial judge stated:

'In the past, it has been the policy of this Court to permit televising in the court room under the rules and supervision of the Court. Heretofore, I have not encountered any difficulty with it. I was unable to observe any detraction from the witnesses or the attorneys in those cases. We have watched television, of course, grow up from its infancy and now into its maturity; and it is a news media. So I really do not see any justified reason why it should not be permitted to take its proper seat in the family circle. However, it will be under the strict supervision of the Court. I know there has been pro and con about televising in the court room. I have heard some say that it makes a circus out of the Court. I had the privilege yesterday morning of sitting in my home and viewing a sermon by the First Baptist Church over in Dallas and certainly it wasn't any circus in that church; and I feel that if it is a proper instrument in the house of the Lord, it is not out of place in the court room, if properly supervised.

'Now, television is going to be televising whatever the scene is here. If you want to

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watch a ball game and that is what they televise, you are going to see a ball game. If you want to see a preacher and hear a sermon, you tune in on that and that is what you are going to get. If the Court permits a circus in this court room, it will be televised, that is true, but they will not be creating a circus.

'Now, the most important point is whether or not it would interfere with a fair and impartial trial of this Defendant. That is the most important point, and that is the purpose, or will be the primary purpose of the Court, to insure that he gets that fair trial.

'There is not anything the Court can do about the interest in this case, but I can control your activites and your conduct here; and I can assure you now that this Court is not going to be turned into a circus with TV or without it. Whatever action is necessary for the Court to take to insure that, the Court will take it.

'There has been one consideration that the Court has given and it is that this is a small court room and there will be hundreds of people trying to get into this court room to witness this trial. I believe we would have less confusion if they would stay at home and stay out of the court room and look in on the trial. With all of those people trying to crowd in and push into this court room, that is another consideration I have given to it.'

****1672 *606** On October 1, the trial judge issued an order delineating what coverage he would permit during the trial.[FN4] As a result of that order and ensuing conferences between the judge and representatives of the news media, the environment for the trial, which began on October 22, was in sharp contrast to that of the September hearings. The actual extent of television and news photography in the ***607** courtroom was described by the judge, after the trial had ended, in certifying the petitioner's bill of exceptions. This description is confirmed by my understanding of the entire record and was agreed to and accepted by defense counsel:

FN4. 'In my statement of September 24, 1962, admitting television and other cameras in the court room during the trial of Billie Sol Estes, I said cameras would be allowed under the control and direction of the Court so long as they did not violate the legal rights of the Defendant or the State of Texas.

'In line with my statement of September 24, 1962, I am at this time informing both television and radio that live broadcasting or telecasting by either news media cannot and will not be permitted during the interrogation of jurors in testing their qualifications, or of the testimony given by the witnesses, as to do so would be in violation of Art. 644 of the Code of Criminal Procedure of Texas, which provides as follows: 'At the request of either party, the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the court room to some place where they can not hear the testimony as delivered by any other witness in the case. This is termed placing witnesses under rule.'

'* * * (E)ach television network and the local television station will be allowed one film camera without sound in the court room and the film will be made available to other television stations on a pool basis. Marshall Pengra, manager of Television Station KLTV, Tyler, will be in charge of the independent pool and independent stations may contact him. The same will be true of cameras for the press, which will be limited to the local press, Associated Press and United Press.

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> 'I am making this statement at this time in order that the two news media affected may have sufficient notice before the case is called on October 22nd.
>
> 'The rules I have set forth above concerning the use of cameras are subject to change if I find that they are too restrictive or not workable, for any reason.'

'Prior to the trial of October 22, 1962, there was a booth constructed and placed in the rear of the courtroom painted the same or near the same color as the courtroom with a small opening across the top for the use of cameras. * * *

'Live telecasting and radio broadcasting were not permitted and the only telecasting was on film without sound, and there was not any broadcasting of the trial by radio permitted. Each network, ABC, NBC, CBS and KRLD (KLTV) Television in Tyler was allowed a camera in the courtroom. * * * The telecasting on film of this case was not a continuous camera operation and only pictures being taken at intervals during the day to be used on their regular news casts later in the day. There were some days during the trial that cameras of only one or two stations were in operation, the others not being in attendance upon the Court each and every day. The Court did not permit any cameras other than those that were noiseless nor were flood lights and ****1673** flash bulbs allowed to be used in the courtroom. The Court permitted one news photographer with ***608** Associated Press, United Press International and Tyler Morning Telegraph and Courier Times. However, they were not permitted inside the Bar; and the Court did not permit any telecasting or photographing in the hallways leading into the courtroom or on the second floor of the courthouse where the courtroom is situated, in order that the Defendant and his attorneys would not be hindered, molested or harassed in approaching or leaving the courtroom. The Court did permit live telecasting of the arguments of State's counsel and the returning of the verdict by the Jury and its acceptance by the Court. The opening argument of the District Attorney of Smith County was carried by sound and because of transmission difficulty, there was not any picture. The closing argument for the State by the District Attorney of Reeves County was carried live by both picture and sound. The arguments of attorneys for Defendant, John D. Cofer and Hume Cofer, were not telecast or broadcast as the Court granted their Motion that same not be permitted.

'There was not any televising at any time during the trial except from the booth in the rear of the courtroom, and during the argument of counsel to the jury, news photography was required to operate from the booth so that they would not interfere or detract from the attention of either the jurors or the attorneys.

'During the trial that began October 22nd, there was never at any time any radio broadcasting equipment in the courtroom. There was some equipment in a room off of the courtroom where there were periodic news reports given; and throughout the trial that began October 22nd, not any witness requested not to be televised or photographed while they were testifying. Neither did any juror, while being interrogated***609** on voir dire or at any other time, make any request of the Court not to be televised.'

Thus, except for the closing arguments for the prosecution and the return of the jury's verdict, there was no 'live' telecasting of the trial. And, even for purposes of delayed telecasting on later news programs, no words or other sounds were permitted to be recorded while the members of the jury were being selected or while any witness was testifying. No witnesses and no jurors were televised or photographed over their objection.[FN5]

> FN5. There were nine witnesses for the prosecution and no witnesses for the defense.

Finally, the members of the jury saw no telecasts and no pictures of anything that went on dur-

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ing the trial. In accord with Texas law, the jurors were sequestered, day and night, from the beginning of the trial until it ended. FN6 The jurors were lodged each night in quarters provided for that purpose in the courthouse itself. On the evening of November 6, by agreement of counsel and special permission of the court, the members of the jury were permitted to watch the election returns on television for a short period. For this purpose a portable television was brought into the jury's quarters by a court officer, and operated by him. Otherwise the jurors were not permitted to watch television at any time during the trial. The only newspapers permitted the jury were ones from which all coverage of the trial had been physically removed.

FN6. Arts. 668, 745 and 725, Tex.Code Crim.Proc.

II.

It is important to bear in mind the precise limits of the question before us in this case. The petition for a writ of ****1674** certiorari asked us to review four separate constitutional claims. We declined to review three of them, among which was the claim that the members of the jury 'had received through the news media damaging and prejudicial***610** evidence * * *.' FN7 We thus left undisturbed the determination of the Texas Court of Criminal Appeals that the members of the jury were not prejudiced by the widespread publicity which preceded the petitioner's trial. One ingredient of this pretrial publicity was the telecast of the September hearings. Despite the confusion in the courtroom during those hearings, all that a potential juror could have possibly learned from watching them on television was that the petitioner's case had been called for trial, and that motions had been made and acted upon for a continuance, and to exclude cameras and television. At those hearings, there was no discussion whatever of anything bearing on the petitioner's guilt or innocence. This was conceded by the petitioner's counsel at the trial. FN8

FN7. Petition for Writ of Certiorari, Question 3, p. 3.

FN8. 'A. (Mr. Hume Cofer, counsel for petitioner). * * * The publicity that was given this trial on the last occasion and the number of cameras here, I think was sufficient to spread the news of this case throughout the county, to every available juror; and it is my opinion that on that occasion, there were so many cameras and so much paraphernalia here that it gave an opportunity for every prospective juror in Smith County to know about this case.

'Q. Not about the facts of the case?

'A. No, sir; not about the facts, nor any of the evidence.'

Because of our refusal to review the petitioner's claim that pretrial publicity had a prejudicial effect upon the jurors in this case, and because, insofar as the September hearings were an element of that publicity, the claim is patently without merit, that issue is simply not here. Our decision in Rideau v. State of Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663, therefore, has no bearing at all in this case. There the record showed that the inhabitants of the small Louisiana parish where the trial was held had repeatedly been exposed to a television film showing 'Rideau, in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder, in response to leading questions by the sheriff.' 373 U.S., ***611** at 725, 83 S.Ct., at 1419. We found that '(a)ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.' Id., at 726, 83 S.Ct., at 1419. See also Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751.

The Rideau case was no more than a contemporary application of enduring principles of procedural due process, principles reflected in such earlier cases as Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543; Brown v. State of Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682; and Chambers v. State of Florida, 309 U.S. 227,

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235-241, 60 S.Ct. 472, 476-479, 84 L.Ed. 716. 'Under our Constitution's guarantee of due process,' we said, 'a person accused of committing a crime is vouchsafed basic minimal rights. Among these are the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom presided over by a judge.' 373 U.S., at 726-727, 83 S.Ct., at 1419. We had occasion to apply the same basic concepts of procedural due process earlier this Term in Turner v. State of Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424. 'In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.' 379 U.S., at 472-473, 85 S.Ct., at 550.

****1675** But we do not deal here with mob domination of a courtroom, with a kangaroo trial, with a prejudiced judge or a jury inflamed with bias. Under the limited grant of certiorari in this case, the sole question before us is an entirely different one. It concerns only the regulated presence of television and still photography at the trial itself, which began on October 22, 1962. Any discussion of pretrial events can do no more than obscure the important question which is actually before us.

III.

It is obvious that the introduction of television and news cameras into a criminal trial invites many serious constitutional hazards. The very presence of photographers***612** and television cameramen plying their trade in a courtroom might be so completely and thoroughly disruptive and distracting as to make a fair trial impossible. Thus, if the scene at the September hearing had been repeated in the courtroom during this jury trial, it is difficult to conceive how a fair trial in the constitutional sense could have been afforded the defendant.[FN9] And even if, as was true here, the television cameras are so controlled and concealed as to be hardly perceptible in the courtroom itself, there are risks of constitutional dimensions that lurk in the very process of televising court proceedings at all.

FN9. See note 2.

Some of those risks are catalogued in the amicus curiae brief filed in this case by the American Bar Association: '(P)otential or actual jurors, in the absence of enforceable and effective safeguards, may arrive at certain misconceptions regarding the defendant and his trial by viewing televised pretrial hearings and motions from which the jury is ordinarily excluded. Evidence otherwise inadmissible may leave an indelible mark. * * * Once the trial begins, exposure to nightly rebroadcasts of selected portions of the day's proceedings will be difficult to guard against, as jurors spend frequent evenings before the television set. The obvious impact of witnessing repeated trial episodes and hearing accompanying commentary, episodes admittedly chosen for their news value and not for evidentiary purposes, can serve only to distort the jurors' perspective. * * * Despite the court's injunction not to discuss the case, it seems undeniable that jurors will be subject to the pressure of television-watching family, friends and, indeed, strangers. * * * It is not too much to imagine a juror being confronted with his wife's television-oriented viewpoint. * * * Additionally, the jurors' daily television appearances may make them recognizable celebrities, likely to be stopped by passing ***613** strangers, or perhaps harried by intruding telephone calls. * * *' Constitutional problems of another kind might arise if a witness or juror were subjected to being televised over his objection.

The plain fact of the matter, however, is that none of these things happened or could have happened in this case. The jurors themselves were prevented from seeing any telecasts of the trial, and completely insulated from association with any members of the public who did see such telecasts. This case, therefore, does not remotely resemble Turner v. State of Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424, where, during the trial, the jurors were subjected outside the courtroom to un-

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measured and unmeasurable influences by key witnesses for the prosecution.

In the courtroom itself, there is nothing to show that the trial proceeded in any way other than it would have proceeded if cameras and television had not been present. In appearance, the courtroom was practically unaltered. There was no obtrusiveness and no distraction, no noise and no special lighting. There is no indication anywhere in the record of ****1676** any disturbance whatever of the judicial proceedings. There is no claim that the conduct of the judge, or that any deed or word of counsel, or of any witness, or of any juror, was influenced in any way by the presence of photographers or by television.

Furthermore, from a reading of the record it is crystal clear that this was not a trial where the judge was harassed or confused or lacking in command of the proceedings before the jury. Nor once, after the first witness was called, was there any interruption at all of the trial proper to secure a ruling concerning the presence of cameramen in the courtroom. There was no occasion, during the entire trial-until after the jury adjourned to reach its verdict-for any cautionary word to members of the press in the courtroom. The only time a motion was made, the jury was not in the courtroom. The trial itself was a ***614** most mundane affair, totally lacking in the lurid and completely emotionless. The evidence related solely to the circumstances in which various documents had been signed and negotiated. It was highly technical, if not downright dull. The petitioner called no witnesses, and counsel for petitioner made only a brief closing argument to the jury. There is nothing to indicate that the issues involved were of the kind where emotion could hold sway. The transcript of the trial belies any notion that frequent interruptions and inconsistent rulings communicated to the jury any sense that the judge was unable to concentrate on protecting the defendant and conducting the trial in a fair manner, in accordance with the State and Federal Constitutions.

IV.

What ultimately emerges from this record, therefore, is one bald question-whether the Fourteenth Amendment of the United States Constitution prohibits all television cameras from a state courtroom whenever a criminal trial is in progress. In the light of this record and what we now know about the impact of television on a criminal trial, I can find no such prohibition in the Fourteenth Amendment or in any other provision of the Constitution. If what occurred did not deprive the petitioner of his constitutional right to a fair trial, then the fact that the public could view the proceeding on television has no constitutional significance. The Constitution does not make us arbiters of the image that a televised state criminal trial projects to the public.

While no First Amendment claim is made in this case, there are intimations in the opinions filed by my Brethren in the majority which strike me as disturbingly alien to the First and Fourteenth Amendments' guarantees against federal or state interference with the free communication of information and ideas. The suggestion that there are limits upon the public's right to know what goes on in ***615** the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms. See Speiser v. Randall, 357 U.S. 513, 525, 78 S.Ct. 1332, 1341, 2 L.Ed.2d 1460. And the proposition that nonparticipants in a trial might get the 'wrong impression' from unfettered reporting and commentary contains an invitation to censorship which I cannot accept. Where there is no disruption of the 'essential requirement of the fair and orderly administration of justice,' '(f)reedom of discussion should be given the widest range.' Pennekamp v. State of Florida, 328 U.S. 331, 347, 66 S.Ct. 1029, 1037, 90 L.Ed. 1295; Bridges v. State of California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192. Cf. Cox v. State of Louisiana, 379 U.S. 559, 563, 85 S.Ct. 476, 480, 13 L.Ed.2d 487.

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I do not think that the Constitution denies to the State or to individual trial judges all discretion to conduct criminal trials with television cameras present, no ****1677** matter how unobtrusive the cameras may be. I cannot say at this time that it is impossible to have a constitutional trial whenever any part of the proceedings is televised or recorded on television film. I cannot now hold that the Constitution absolutely bars television cameras from every criminal courtroom, even if they have no impact upon the jury, no effect upon any witness, and no influence upon the conduct of the judge.

For these reasons I would affirm the judgment.
Mr. Justice WHITE, with whom Mr. Justice BRENNAN joins, dissenting.

I agree with Mr. Justice STEWART that a finding of constitutional prejudice on this record entails erecting a flat ban on the use of cameras in the courtroom and believe that it is premature to promulgate such a broad constitutional principle at the present time. This is the first case in this Court dealing with the subject of television ***616** coverage of criminal trials; our cases dealing with analogous subjects are not really controlling, cf. Rideau v. State of Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663; and there is, on the whole, a very limited amount of experience in this country with television coverage of trials. In my view, the currently available materials assessing the effect of cameras in the courtroom are too sparse and fragmentary to constitute the basis for a constitutional judgment permanently barring any and all forms of television coverage. As was said in another context, 'we know too little of the actual impact * * * to reach a conclusion on the bare bones of the * * * evidence before us.' White Motor Co. v. United States, 372 U.S. 253, 261, 83 S.Ct. 696, 701, 9 L.Ed.2d 738. It may well be, however, that as further experience and informed judgment do become available, the use of cameras in the courtroom, as in this trial, will prove to pose such a serious hazard to a defendant's rights that a violation of the Fourteenth Amendment will be found without a showing on the record of specific demonstrable prejudice to the defendant. Compare Wolf v. People of State of Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782, with Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081; Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595, with Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; Stein v. People of State of New York, 346 U.S. 156, 73 S.Ct. 1077, 97 L.Ed. 1522, with Jackson v. Denno, 378 U.S. 368, 389-390, 84 S.Ct. 1774, 1787-1788, 12 L.Ed.2d 908.

The opinion of the Court in effect precludes further opportunity for intelligent assessment of the probable hazards imposed by the use of cameras at criminal trials. Serious threats to constitutional rights in some instances justify a prophylactic rule dispensing with the necessity of showing specific prejudice in a particular case. Rideau v. State of Louisiana, 373 U.S. 723, 727, 83 S.Ct. 1417, 1419, 10 L.Ed.2d 663; Jackson v. Denno, 378 U.S. 368, 389, 84 S.Ct. 1774, 1787, 12 L.Ed.2d 908. But these are instances in which there has been ample experience on which to base an informed judgment. Here, although our experience is inadequate and our judgment correspondingly infirm, the Court discourages further meaningful study of the use of television at criminal trials. Accordingly, I dissent.

***617** Mr. Justice BRENNAN.

I write merely to emphasize that only four of the five Justices voting to reverse rest on the proposition that televised criminal trials are constitutionally infirm, whatever the circumstances. Although the opinion announced by my Brother CLARK purports to be an 'opinion of the Court,' my Brother HARLAN subscribes to a significantly less sweeping proposition. He states:

'The Estes trial was a heavily publicized and highly sentational affair. I therefore put aside all other types of cases * * *. The resolution of ****1678** those further questions should await an appropriate case; the Court should proceed only step by step in this unplowed field. The opinion of the Court necessarily goes no farther, for only the four members

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of the majority who unreservedly join the Court's opinion would resolve those questions now.' Ante, p. 1663. (Emphasis supplied.)

Thus today's decision is not a blanket constitutional prohibition against the televising of state criminal trials.

While I join the dissents of my Brothers STEWART and WHITE, I do so on the understanding that their use of the expressions 'the Court's opinion' or 'the opinion of the Court' refers only to those views of our four Brethren which my Brother HARLAN explicitly states he shares.

U.S.Tex. 1965.
Estes v. State of Tex.
381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543, 1 Media L. Rep. 1187

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Tab 6

Supreme Court of the United States
Noel CHANDLER and Robert Granger, Appellants,
v.
State of FLORIDA.

No. 79-1260.
Argued Nov. 12, 1980.
Decided Jan. 26, 1981.

Defendant's convictions of conspiracy to commit burglary, grand larceny and possession of burglary tools were affirmed by the Florida District Court of Appeal, 366 So.2d 64, and the Florida Supreme Court, 376 So.2d 1157, denied certiorari. Defendants appealed. The Supreme Court, Chief Justice Burger, held that, consistent with constitutional guarantees, a state could provide for radio, television and still photographic coverage of a criminal trial for public broadcast, notwithstanding the objection of the defendants.

Affirmed.

Justice Stewart filed an opinion concurring in the result.

Justice White filed an opinion concurring in the judgment.

West Headnotes

[1] Federal Courts 170B 501

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk501 k. In General. Most Cited Cases

United States Supreme Court has no supervisory jurisdiction over state courts and, in reviewing state court judgment, is confined to evaluating it in relation to Federal Constitution.

[2] Criminal Law 110 633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))

Consistent with constitutional guarantees, state could provide for radio, television, and still photographic coverage of criminal trial for public broadcast, notwithstanding objection of defendants. U.S.C.A.Const. Amend. 14.

[3] Criminal Law 110 633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))

Criminal Law 110 633.32

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.32 k. Publicity, Media Coverage, and Occurrences Extraneous to Trial. Most Cited Cases
(Formerly 110k633(1))

Risk of juror prejudice is present in any publication of trial, but appropriate safeguard against such prejudice is defendant's right to demonstrate that media's coverage of case, be it printed or broadcast,

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compromised ability of the particular jury that heard the case to adjudicate fairly. U.S.C.A.Const. Amend. 14.

[4] Constitutional Law 92 ⚿4605

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4603 Public Trial
92k4605 k. Publicity. Most Cited Cases
(Formerly 92k268(2.1), 92k268(2))

Criminal Law 110 ⚿633.32

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.32 k. Publicity, Media Coverage, and Occurrences Extraneous to Trial. Most Cited Cases
(Formerly 110k633(1))

Defendant has right on review to show that media's coverage of case, printed or broadcast, compromised ability of jury to judge him fairly and, alternatively, defendant might show that broadcast coverage of his particular case had adverse impact on trial participants sufficient to constitute denial of due process. U.S.C.A.Const. Amend. 14.

****802** *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***560** The Florida Supreme Court, following a pilot program for televising judicial proceedings in the State, promulgated a revised Canon 3A(7) of the Florida Code of Judicial Conduct. The Canon permits electronic media and still photography coverage of judicial proceedings, subject to the control of the presiding judge and to implementing guidelines placing on trial judges obligations to protect the fundamental right of the accused in a criminal case to a fair trial. Appellants, who were charged with a crime that attracted media attention, were convicted after a jury trial in a Florida trial court over objections that the televising and broadcast of parts of their trial denied them a fair and impartial trial. The Florida District Court of Appeal affirmed, finding no evidence that the presence of a television camera hampered appellants in presenting their case, deprived them of an impartial jury, or impaired the fairness of the trial. The Florida Supreme Court denied review. The Florida courts did not construe *Estes v. Texas*, 381 U.S. ****803** 532, 85 S.Ct. 1628, 14 L.Ed.2d 543, as laying down a *per se* constitutional rule barring broadcast coverage under all circumstances.

Held : The Constitution does not prohibit a state from experimenting with a program such as is authorized by Florida's Canon 3A(7). Pp. 807-814.

(a) This Court has no supervisory jurisdiction over state courts, and, in reviewing a state-court judgment, is confined to evaluating it in relation to the Federal Constitution. P. 807.

(b) *Estes v. Texas*, *supra*, did not announce a constitutional rule that all photographic, radio, and television coverage of criminal trials is inherently a denial of due process. It does not stand as an absolute ban on state experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964 when *Estes* was decided, and is, even now, in a state of continuing change. Pp. 807-809.

(c) An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, conduct of the broadcasting process or prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or inno-

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cence uninfluenced by extraneous matter. The appropriate safeguard against juror prejudice is the defendant's right ***561** to demonstrate that the media's coverage of his case-be it printed or broadcast-compromised the ability of the particular jury that heard the case to adjudicate fairly. Pp. 809-810.

(d) Whatever may be the "mischievous potentialities [of broadcast coverage] for intruding upon the detached atmosphere which should always surround the judicial process," *Estes v. Texas, supra*, 381 U.S. at 587, 85 S.Ct. at 1662, at present no one has presented empirical data sufficient to establish that the mere presence of the broadcast media in the courtroom inherently has an adverse effect on that process under all circumstances. Here, appellants have offered nothing to demonstrate that their trial was subtly tainted by broadcast coverage-let alone that all broadcast trials would be so tainted. Pp. 810-812.

(e) Nor have appellants shown either that the media's coverage of their trial-printed or broadcast-compromised the jury's ability to judge them fairly or that the broadcast coverage of their particular trial had an adverse impact on the trial participants sufficient to constitute a denial of due process. Pp. 812-813.

(f) Absent a showing of prejudice of constitutional dimensions to these appellants, there is no reason for this Court either to endorse or to invalidate Florida's experiment. P. 813.

376 So.2d 1157, affirmed.

Joel Hirschhorn, Miami, Fla., for appellants.

Calvin L. Fox, Asst. Atty. Gen., and Jim Smith, Atty. Gen., State of Fla., for appellee.

***562** Chief Justice BURGER delivered the opinion of the Court.

The question presented on this appeal is whether, consistent with constitutional guarantees, a state may provide for radio, television, and still photographic coverage of a criminal trial for public broadcast, notwithstanding the objection of the accused.

I

A

Background. Over the past 50 years, some criminal cases characterized as "sensational" have been subjected to extensive coverage by news media, sometimes seriously interfering with the conduct of the proceedings and creating a setting wholly inappropriate for the administration of justice. Judges, lawyers, and others soon became concerned, and in 1937, after study, the American Bar Association House of Delegates ***563** adopted Judicial Canon 35, declaring that all photographic and broadcast coverage of courtroom proceedings should be prohibited.****804** [FN1] In 1952, the House of Delegates amended Canon 35 to proscribe television coverage as well. 77 A.B.A.Rep. 610-611 (1952). The Canon's proscription was reaffirmed in 1972 when the Code of Judicial Conduct replaced the Canons of Judicial Ethics and Canon 3A(7) superseded Canon 35. E. Thode, Reporter's Notes to Code of Judicial Conduct 56-59 (1973). Cf. Fed.Rules Crim.Proc. 53. A majority of the states, including Florida, adopted the substance of the ABA provision and its amendments. In Florida, the rule was embodied in Canon 3A(7) of the Florida Code of Judicial Conduct.[FN2]

FN1. 62 A.B.A.Rep. 1134-1135 (1937). As adopted on September 30, 1937, Judicial Canon 35 read:

> "Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, 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."

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FN2. As originally adopted in Florida, Canon 3A(7) provided:

> "A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:
>
> "(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;
>
> "(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;
>
> "(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions;
>
> "(i) the means of recording will not distract participants or impair the dignity of the proceedings;
>
> "(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;
>
> "(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and
>
> "(iv) the reproduction will be exhibited only for instructional purposes in educational institutions."

In February 1978, the American Bar Association Committee on Fair Trial-Free Press proposed revised standards. These ***564** included a provision permitting courtroom coverage by the electronic media under conditions to be established by local rule and under the control of the trial judge, but only if such coverage was carried out unobtrusively and without affecting the conduct of the trial.[FN3] The revision was endorsed by the ABA's Standing Committee on Standards for Criminal Justice and by its Committee on Criminal Justice and the Media, but it was rejected by the House of Delegates on February 12, 1979. 65 A.B.A.J. 304 (1979).

FN3. Proposed Standard 8-3.6(a) of the ABA Project on Standards for Criminal Justice, Fair Trial and Free Press (Tent. Draft 1978).

In 1978, based upon its own study of the matter, the Conference of State Chief Justices, by a vote of 44 to 1, approved a resolution to allow the highest court of each state to promulgate standards and guidelines regulating radio, television, and other photographic coverage of court proceedings.[FN4]

FN4. Resolution I, Television, Radio, Photographic Coverage of Judicial Proceedings, adopted at the Thirtieth Annual Meeting of the Conference of Chief Justices, Burlington, Vt., Aug. 2, 1978.

The Florida Program. In January 1975, while these developments were unfolding, the Post-Newsweek Stations of Florida petitioned the Supreme Court of Florida urging a change in Florida's Canon 3A(7). In April 1975, the court invited presentations in the nature of a rulemaking proceeding, and, in January 1976, announced an experimental program for televising one civil and one criminal trial under specific guidelines. *Petition of Post-Newsweek Stations, Florida, Inc.*, 327 So.2d 1. These initial guidelines required the consent of all parties. It developed, however, that in practice such consent could not be obtained. The Florida Supreme Court then supplemented its order and established a new 1-year pilot program***565 **805** during which the electronic media were permitted to cover all judicial proceedings in Florida without reference to the consent of participants, subject to

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detailed standards with respect to technology and the conduct of operators. *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 347 So.2d 402 (1977). The experiment began in July 1977 and continued through June 1978.

When the pilot program ended, the Florida Supreme Court received and reviewed briefs, reports, letters of comment, and studies. It conducted its own survey of attorneys, witnesses, jurors, and court personnel through the Office of the State Court Coordinator. A separate survey was taken of judges by the Florida Conference of Circuit Judges. The court also studied the experience of 6 States FN5 that had, by 1979, adopted rules relating to electronic coverage of trials, as well as that of the 10 other States that, like Florida, were experimenting with such coverage.FN6

FN5. Alabama, Colorado, Georgia, New Hampshire, Texas, and Washington.

FN6. The number of states permitting electronic coverage of judicial proceedings has grown larger since 1979. As of October 1980, 19 States permitted coverage of trial and appellate courts, 3 permitted coverage of trial courts only, 6 permitted appellate court coverage only, and the court systems of 12 other States were studying the issue. Brief for the Radio Television News Directors Association et al. as *Amici Curiae*. On November 10, 1980, the Maryland Court of Appeals authorized an 18-month experiment with broadcast coverage of both trial and appellate court proceedings. 49 U.S.L.W. 2335 (1980).

Following its review of this material, the Florida Supreme Court concluded "that on balance there [was] more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage." *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764, 780 (1979). The Florida court was of the view that because of the significant effect of the courts on the day-to-day lives of the citizenry, it was essential that the people have confidence in the process. It felt that broadcast coverage***566** of trials would contribute to wider public acceptance and understanding of decisions. *Ibid.* Consequently, after revising the 1977 guidelines to reflect its evaluation of the pilot program, the Florida Supreme Court promulgated a revised Canon 3A(7). *Id.*, at 781. The Canon provides:

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

The implementing guidelines specify in detail the kind of electronic equipment to be used and the manner of its use. *Id.*, at 778-779, 783-784. For example, no more than one television camera and only one camera technician are allowed. Existing recording systems used by court reporters are used by broadcasters for audio pickup. Where more than one broadcast news organization seeks to cover a trial, the media must pool coverage. No artificial lighting is allowed. The equipment is positioned in a fixed location, and it may not be moved during trial. Videotaping equipment must be remote from the courtroom. Film, videotape, and lenses may not be changed while the court is in session. No audio recording of conferences between lawyers, between parties and counsel, or at the bench is permitted. The judge has sole and plenary discretion to exclude coverage of certain witnesses, and the jury may not be filmed. The judge has discretionary power to forbid coverage whenever satisfied that coverage may have a deleterious effect on the paramount right of the defendant to a fair trial. The Florida Supreme Court has the right to revise these

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rules as experience dictates, or indeed to bar all broadcast coverage or photography in courtrooms.

***567 **806** B

In July 1977, appellants were charged with conspiracy to commit burglary, grand larceny, and possession of burglary tools. The counts covered breaking and entering a well-known Miami Beach restaurant.

The details of the alleged criminal conduct are not relevant to the issue before us, but several aspects of the case distinguish it from a routine burglary. At the time of their arrest, appellants were Miami Beach policemen. The State's principal witness was John Sion, an amateur radio operator who, by sheer chance, had overheard and recorded conversations between the appellants over their police walkie-talkie radios during the burglary. Not surprisingly, these novel factors attracted the attention of the media.

By pretrial motion, counsel for the appellants sought to have experimental Canon 3A(7) declared unconstitutional on its face and as applied. The trial court denied relief but certified the issue to the Florida Supreme Court. However, the Supreme Court declined to rule on the question, on the ground that it was not directly relevant to the criminal charges against the appellants. *State v. Granger* , 352 So.2d 175 (1977).

After several additional fruitless attempts by the appellants to prevent electronic coverage of the trial, the jury was selected. At *voir dire*, the appellants' counsel asked each prospective juror whether he or she would be able to be "fair and impartial" despite the presence of a television camera during some, or all, of the trial. Each juror selected responded that such coverage would not affect his or her consideration in any way. A television camera recorded the *voir dire*.

A defense motion to sequester the jury because of the television coverage was denied by the trial judge. However, the court instructed the jury not to watch or read anything about the case in the media and suggested that jurors "avoid the local news and watch only the national news on television." ***568** App. 13. Subsequently, defense counsel requested that the witnesses be instructed not to watch any television accounts of testimony presented at trial. The trial court declined to give such an instruction, for "no witness' testimony was [being] reported or televised [on the evening news] in any way." *Id.*, at 14.

A television camera was in place for one entire afternoon, during which the State presented the testimony of Sion, its chief witness.[FN7] No camera was present for the presentation of any part of the case for the defense. The camera returned to cover closing arguments. Only 2 minutes and 55 seconds of the trial below were broadcast-and those depicted only the prosecution's side of the case.

> FN7. At one point during Sion's testimony, the judge interrupted the examination and admonished a cameraman to discontinue a movement that the judge apparently found distracting. App. 15. Otherwise, the prescribed procedures appear to have been followed, and no other untoward events occurred.

The jury returned a guilty verdict on all counts. Appellants moved for a new trial, claiming that because of the television coverage, they had been denied a fair and impartial trial. No evidence of specific prejudice was tendered.

The Florida District Court of Appeal affirmed the convictions. It declined to discuss the facial validity of Canon 3A(7); it reasoned that the Florida Supreme Court, having decided to permit television coverage of criminal trials on an experimental basis, had implicitly determined that such coverage did not violate the Federal or State Constitutions. Nonetheless, the District Court of Appeal did agree to certify the question of the facial constitutionality of Canon 3A(7) to the Florida Supreme Court. The District Court of Appeal found no evidence in the

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trial record to indicate that the presence of a television camera had hampered appellants in presenting their case or had deprived them of an impartial jury.

****807** The Florida Supreme Court denied review, holding that the appeal, which was limited to a challenge to Canon 3A(7), ***569** was moot by reason of its decision in *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (1979), rendered shortly after the decision of the District Court of Appeal.

II

At the outset, it is important to note that in promulgating the revised Canon 3A(7), the Florida Supreme Court pointedly rejected any state or federal constitutional right of access on the part of photographers or the broadcast media to televise or electronically record and thereafter disseminate court proceedings. It carefully framed its holding as follows:

> "While we have concluded that the due process clause does not prohibit electronic media coverage of judicial proceedings per se, by the same token we reject the argument of the [Post-Newsweek stations] that the first and sixth amendments to the United States Constitution mandate entry of the electronic media into judicial proceedings." *Id.*, at 774.

The Florida court relied on our holding in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978), where we said:

> "In the first place, ... there is no constitutional right to have [live witness] testimony recorded and broadcast. Second, while the guarantee of a public trial, in the words of Mr. Justice Black, is 'a safeguard against any attempt to employ our courts as instruments of persecution,' it confers no special benefit on the press. Nor does the Sixth Amendment require that the trial-or any part of it-be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed." *Id.*, at 610, 98 S.Ct., at 1318 (citations omitted).

The Florida Supreme Court predicated the revised Canon 3A(7) upon its supervisory authority over the Florida courts, ***570** and not upon any constitutional imperative. Hence, we have before us only the limited question of the Florida Supreme Court's authority to promulgate the Canon for the trial of cases in Florida courts.

[1] This Court has no supervisory jurisdiction over state courts, and, in reviewing a state-court judgment, we are confined to evaluating it in relation to the Federal Constitution.

III

[2] Appellants rely chiefly on *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), and Chief Justice Warren's separate concurring opinion in that case. They argue that the televising of criminal trials is inherently a denial of due process, and they read *Estes* as announcing a *per se* constitutional rule to that effect.

Chief Justice Warren's concurring opinion, in which he was joined by Justices Douglas and Goldberg, indeed provides some support for the appellants' position:

> "While I join the Court's opinion and agree that the televising of criminal trials is inherently a denial of due process, I desire to express additional views on why this is so. In doing this, I wish to emphasize that our condemnation of televised criminal trials is not based on generalities or abstract fears. The record in this case presents a vivid illustration of the inherent prejudice of televised criminal trials and supports our conclusion that this is the appropriate time to make a definitive appraisal of television in the courtroom." *Id.*, at 552, 85 S.Ct., at 1637.

If appellants' reading of *Estes* were correct, we

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would be obliged to apply that holding and reverse the judgment under review.

The six separate opinions in *Estes* must be examined carefully to evaluate the claim that it represents a *per se* constitutional rule forbidding all electronic coverage. Chief Justice Warren and Justices Douglas ****808** and Goldberg joined Justice Clark's opinion announcing the judgment, thereby creating ***571** only a plurality. Justice Harlan provided the fifth vote necessary in support of the judgment. In a separate opinion, he pointedly limited his concurrence:

> "I concur in the opinion of the Court, subject, however, to the reservations and only to the extent indicated in this opinion." *Id.*, at 587, 85 S.Ct., at 1662.

A careful analysis of Justice Harlan's opinion is therefore fundamental to an understanding of the ultimate holding of *Estes*.

Justice Harlan began by observing that the question of the constitutional permissibility of televised trials was one fraught with unusual difficulty:

> "Permitting television in the courtroom undeniably has mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process. Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the states from pursuing a novel course of procedural experimentation. My conclusion is that there is no constitutional requirement that television be allowed in the courtroom, *and, at least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial* assured by the Due Process Clause of the Fourteenth Amendment." *Ibid.* (emphasis added).

He then proceeded to catalog what he perceived as the inherent dangers of televised trials.

> "In the context of a trial of intense public interest, there is certainly a strong possibility that the timid or reluctant witness, for whom a court appearance even at its traditional best is a harrowing affair, will become more timid or reluctant when he finds that he will also be ***572** appearing before a 'hidden audience' of unknown but large dimensions. There is certainly a strong possibility that the 'cocky' witness having a thirst for the limelight will become more 'cocky' under the influence of television. And who can say that the juror who is gratified by having been chosen for a front-line case, an ambitious prosecutor, a publicity-minded defense attorney, and even a conscientious judge will not stray, albeit unconsciously, from doing what 'comes naturally' into pluming themselves for a satisfactory television 'performance'?" *Id.*, at 591, 85 S.Ct., at 1664.

Justice Harlan faced squarely the reality that these possibilities carry "grave potentialities for distorting the integrity of the judicial process," and that, although such distortions may produce no telltale signs, "their effects may be far more pervasive and deleterious than the physical disruptions which all would concede would vitiate a conviction." *Id.*, at 592, 85 S.Ct. at 1664. The "countervailing factors" alluded to by Justice Harlan were, as here, the educational and informational value to the public.

Justice STEWART, joined by Justices BLACK, BRENNAN, and WHITE in dissent, concluded that no prejudice had been shown and that Estes' Fourteenth Amendment rights had not been violated. While expressing reservations not unlike those of Justice Harlan and those of Chief Justice Warren, the dissent expressed unwillingness to "escalate this personal view into a *per se* constitutional rule." *Id.*, at 601, 85 S.Ct. at 1669. The four dissenters disagreed both with the *per se* rule embodied in the plurality opinion of Justice Clark and with the judgment of the Court that "the *circumstances of [that]*

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trial led to a denial of [Estes'] Fourteenth Amendment rights." *Ibid.* (emphasis added).

Parsing the six opinions in *Estes*, one is left with a sense of doubt as to precisely how much of Justice Clark's opinion was joined in, and supported by, Justice Harlan. In an area ***573** charged with constitutional nuances, perhaps more should not be expected. Nonetheless, it is fair to say that ****809** Justice Harlan viewed the holding as limited to the proposition that "*what was done in this case* infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment," *id.*, 587, 85 S.Ct., at 1662 (emphasis added), he went on:

> "*At the present juncture* I can only conclude that televised trials, *at least in cases like this one*, possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned." *Id.*, at 596, 85 S.Ct., at 1666 (emphasis added).

Justice Harlan's opinion, upon which analysis of the constitutional holding of *Estes* turns, must be read as defining the scope of that holding; we conclude that *Estes* is not to be read as announcing a constitutional rule barring still photographic, radio, and television coverage in all cases and under all circumstances.[FN8] It does not stand as an absolute ban on ***574** state experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964, and is, even now, in a state of continuing change.

> FN8. Our subsequent cases have so read *Estes*. In *Sheppard v. Maxwell*, 384 U.S. 333, 352, 86 S.Ct. 1507, 1516, 16 L.Ed.2d 600 (1966), the Court noted *Estes* as an instance where the "totality of circumstances" led to a denial of due process. In *Murphy v. Florida*, 421 U.S. 794, 798, 95 S.Ct. 2031, 2035, 44 L.Ed.2d 589 (1975), we described it as "a state-court conviction obtained in a trial atmosphere that had been utterly corrupted by press coverage." And, in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 552, 96 S.Ct. 2791, 2799, 49 L.Ed.2d 683 (1976), we depicted *Estes* as a trial lacking in due process where "the volume of trial publicity, the judge's failure to control the proceedings, and the telecast of a hearing and of the trial itself" prevented a sober search for the truth.
>
> In his opinion concurring in the result in the instant case, Justice STEWART restates his dissenting view in *Estes* that the *Estes* Court announced a *per se* rule banning all broadcast coverage of trials as a denial of due process. This view overlooks the critical importance of Justice Harlan's opinion in relation to the ultimate holding of *Estes*. It is true that Justice Harlan's opinion "sounded a note" that is central to the proposition that broadcast coverage inherently violates the Due Process Clause. *Post*, at 815. But the presence of that "note" in no sense alters Justice Harlan's explicit reservations in his concurrence. Not all of the dissenting Justices in *Estes* read the Court as announcing a *per se* rule; Justice BRENNAN, for example, was explicit in emphasizing "that only four of the five Justices [in the majority] rest[ed] on the proposition that televised criminal trials are constitutionally infirm, whatever the circumstances." *Id.*, at 617, 85 S.Ct., at 1677. Today, Justice STEWART concedes, *post*, at 815, and n. 3, that Justice Harlan purported to limit his conclusion to a subclass of cases. And, as he concluded his opinion, Justice Harlan took pains to emphasize his view that "*the day may come* when television will have become so commonplace an affair in the daily life of the average person as to dissipate *all* reasonable likelihood that its use in courtrooms *may* disparage the judicial process." *Id.*,

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at 595, 85 S.Ct., at 1666 (emphasis added). That statement makes clear that there was not a Court holding of a *per se* rule in *Estes*. As noted in text, Justice Harlan pointedly limited his conclusion to cases like the one then before the Court, those "utterly corrupted" by press coverage. There is no need to "overrule" a "holding" never made by the Court.

IV

Since we are satisfied that *Estes* did not announce a constitutional rule that all photographic or broadcast coverage of criminal trials is inherently a denial of due process, we turn to consideration, as a matter of first impression, of the appellants' suggestion that we now promulgate such a *per se* rule.

A

[3] Any criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial. Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law. Over the years, courts have developed a range of curative devices to prevent publicity about a trial from infecting jury deliberations. See, *e. g., Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 563-565, 96 S.Ct. 2791, 2804, 2805, 49 L.Ed.2d 683 (1976).

****810** An absolute constitutional ban on broadcast coverage of ***575** trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The 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. A case attracts a high level of public attention because of its intrinsic interest to the public and the manner of reporting the event. The risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case-be it printed or broadcast-compromised the ability of the particular jury that heard the case to adjudicate fairly. See Part IV-D, *infra*.

B

As we noted earlier, the concurring opinions in *Estes* expressed concern that the very presence of media cameras and recording devices at a trial inescapably gives rise to an adverse psychological impact on the participants in the trial. This kind of general psychological prejudice, allegedly present whenever there is broadcast coverage of a trial, is different from the more particularized problem of prejudicial impact discussed earlier. If it could be demonstrated that the mere presence of photographic and recording equipment and the knowledge that the event would be broadcast invariably and uniformly affected the conduct of participants so as to impair fundamental fairness, our task would be simple; prohibition of broadcast coverage of trials would be required.

In confronting the difficult and sensitive question of the potential psychological prejudice associated with broadcast coverage of trials, we have been aided by *amici* briefs submitted by various state officers involved in law enforcement, the Conference of Chief Justices, and the Attorneys General ***576** of 17 States [FN9] in support of continuing experimentation such as that embarked upon by Florida, and by the American College of Trial Lawyers, and various members of the defense bar [FN10] representing essentially the views expressed by the concurring Justices in *Estes*.

FN9. Brief for the Attorneys General of Alabama, Alaska, Arizona, Iowa, Kentucky, Louisiana, Maryland, Montana, Nevada, New Mexico, New York, Ohio, Rhode Island, Tennessee, Vermont, West Virginia, and Wisconsin as *Amici Curiae*.

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FN10. Brief for the California State Public Defenders Association, the California Attorneys for Criminal Justice, the Office of the California State Public Defender, the Los Angeles County Public Defenders Association, the Los Angeles Criminal Courts Bar Association, and the Office of the Los Angeles County Public Defender as *Amici Curiae*.

Not unimportant to the position asserted by Florida and other states is the change in television technology since 1962, when Estes was tried. It is urged, and some empirical data are presented,[FN11] that many of the negative factors found in *Estes*-cumbersome ****811** equipment, cables, distracting lighting, numerous camera technicians-are less substantial factors today than they were at that time.

FN11. Considerable attention is devoted by the parties to experiments and surveys dealing with the impact of electronic coverage on the participants in a trial other than the defendant himself. The Florida pilot program itself was a type of study, and its results were collected in a postprogram survey of participants. While the data thus far assembled are cause for some optimism about the ability of states to minimize the problems that potentially inhere in electronic coverage of trials, even the Florida Supreme Court conceded the data were "limited," *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764, 781 (1979), and "non-scientific," *id.*, at 768. Still, it is noteworthy that the data now available do not support the proposition that, in every case and in all circumstances, electronic coverage creates a significant adverse effect upon the participants in trials-at least not one uniquely associated with electronic coverage as opposed to more traditional forms of coverage. Further research may change the picture. At the moment, however, there is no unimpeachable empirical support for the thesis that the presence of the electronic media, *ipso facto*, interferes with trial proceedings.

It is also significant that safeguards have been built into the ***577** experimental programs in state courts, and into the Florida program, to avoid some of the most egregious problems envisioned by the six opinions in the *Estes* case. Florida admonishes its courts to take special pains to protect certain witnesses-for example, children, victims of sex crimes, some informants, and even the very timid witness or party-from the glare of publicity and the tensions of being "on camera." *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d, at 779.

The Florida guidelines place on trial judges positive obligations to be on guard to protect the fundamental right of the accused to a fair trial. The Florida Canon, being one of the few permitting broadcast coverage of criminal trials over the objection of the accused, raises problems not present in the rules of other states. Inherent in electronic coverage of a trial is a risk that the very awareness by the accused of the coverage and the contemplated broadcast may adversely affect the conduct of the participants and the fairness of the trial, yet leave no evidence of how the conduct or the trial's fairness was affected. Given this danger, it is significant that Florida requires that objections of the accused to coverage be heard and considered on the record by the trial court. See, *e. g.*, *Green v. State*, 377 So.2d 193, 201 (Fla.App.1979). In addition to providing a record for appellate review, a pretrial hearing enables a defendant to advance the basis of his objection to broadcast coverage and allows the trial court to define the steps necessary to minimize or eliminate the risks of prejudice to the accused. Experiments such as the one presented here may well increase the number of appeals by adding a new basis for claims to reverse, but this is a risk Florida has chosen to take after preliminary experimentation. Here, the record does not indicate that appellants requested an evidentiary hearing to show

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adverse impact or injury. Nor does the record reveal anything more than generalized allegations of prejudice.

***578** Nonetheless, it is clear that the general issue of the psychological impact of broadcast coverage upon the participants in a trial, and particularly upon the defendant, is still a subject of sharp debate-as the *amici* briefs of the American College of Trial Lawyers and others of the trial bar in opposition to Florida's experiment demonstrate. These *amici* state the view that the concerns expressed by the concurring opinions in *Estes*, see Part III, *supra*, have been borne out by actual experience. Comprehensive empirical data are still not available-at least on some aspects of the problem. For example, the *amici* brief of the Attorneys General concedes:

> "The defendant's interests in not being harassed and in being able to concentrate on the proceedings and confer effectively with his attorney are crucial aspects of a fair trial. There is not much data on defendant's reactions to televised trials available now, but what there is indicates that it is possible to regulate the media so that their presence does not weigh heavily on the defendant. *Particular attention should be paid to this area of concern as study of televised trials continues.* " Brief for the Attorney General of Alabama et al. as *Amici Curiae* 40 (emphasis added).

The experimental status of electronic coverage of trials is also emphasized by the *amicus* brief of the Conference of Chief Justices:

> "Examination and reexamination, by state courts, of the in-court presence of the electronic news media, *vel non*, is an exercise of authority reserved to the states under our federalism." Brief for Conference of Chief Justices as *Amicus Curiae* 2.

Whatever may be the "mischievous potentialities [of broadcast coverage] for intruding upon the detached atmosphere ****812** which should always surround the judicial process," *Estes v. Texas*, 381 U.S., at 587, 85 S.Ct., at 1662, at present no one has been able to present empirical data sufficient to establish that the mere ***579** presence of the broadcast media inherently has an adverse effect on that process. See n. 11, *supra*. The appellants have offered nothing to demonstrate that their trial was subtly tainted by broadcast coverage-let alone that all broadcast trials would be so tainted. See Part IV-D, *infra*.[FN12]

> FN12. Other courts that have been asked to examine the impact of television coverage on the participants in particular trials have concluded that such coverage did not have an adverse impact on the trial participants sufficient to constitute a denial of due process. See, *e. g., Bradley v. Texas*, 470 F.2d 785 (CA5 1972); *Bell v. Patterson*, 279 F.Supp. 760 (Colo.), aff'd, 402 F.2d 394 (CA10 1968), cert. denied, 403 U.S. 955, 91 S.Ct. 2279, 29 L.Ed.2d 865 (1971); *Gonzales v. People*, 165 Colo. 322, 438 P.2d 686 (1968). On the other hand, even the *amici* supporting Florida's position concede that further experimentation is necessary to evaluate the potential psychological prejudice associated with broadcast coverage of trials. Further developments and more data are required before this issue can be finally resolved.

Where, as here, we cannot say that a denial of due process automatically results from activity authorized by a state, the admonition of Justice Brandeis, dissenting in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 386, 76 L.Ed. 747 (1932), is relevant:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the coun-

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try. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable.... But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." (Footnote omitted.)

***580** This concept of federalism, echoed by the states favoring Florida's experiment, must guide our decision.

C

Amici members of the defense bar, see n. 10, *supra*, vigorously contend that displaying the accused on television is in itself a denial of due process. Brief for the California State Public Defenders Association et al. as *Amici Curiae* 5-10. This was a source of concern to Chief Justice Warren and Justice Harlan in *Estes* : that coverage of select cases "singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others." 381 U.S., at 565, 85 S.Ct. at 1644 (Warren, C. J., concurring). Selection of which trials, or parts of trials, to broadcast will inevitably be made not by judges but by the media, and will be governed by such factors as the nature of the crime and the status and position of the accused-or of the victim; the effect may be to titillate rather than to educate and inform. The unanswered question is whether electronic coverage will bring public humiliation upon the accused with such randomness that it will evoke due process concerns by being "unusual in the same way that being struck by lightning" is "unusual." *Furman v. Georgia*, 408 U.S. 238, 309, 92 S.Ct. 2726, 2762, 33 L.Ed.2d 346 (1972) (STEWART, J., concurring). Societies and political systems, that, from time to time, have put on "Yankee Stadium" "show trials" tell more about the power of the state than about its concern for the decent administration of justice-with every citizen receiving the same kind of justice.

The concurring opinion of Chief Justice Warren joined by Justices Douglas and Goldberg in *Estes* can fairly be read as viewing the very broadcast of some trials as potentially a form of punishment in itself****813** -a punishment before guilt. This concern is far from trivial. But, whether coverage of a few trials will, in practice, be the equivalent of a "Yankee Stadium" setting-which Justice Harlan likened to the public ***581** pillory long abandoned as a barbaric perversion of decent justice-must also await the continuing experimentation.

D

[4] To say that the appellants have not demonstrated that broadcast coverage is inherently a denial of due process is not to say that the appellants were in fact accorded all of the protections of due process in their trial. As noted earlier, a defendant has the right on review to show that the media's coverage of his case-printed or broadcast-compromised the ability of the jury to judge him fairly. Alternatively, a defendant might show that broadcast coverage of his particular case had an adverse impact on the trial participants sufficient to constitute a denial of due process. Neither showing was made in this case.

To demonstrate prejudice in a specific case a defendant must show something more than juror awareness that the trial is such as to attract the attention of broadcasters. *Murphy v. Florida*, 421 U.S. 794, 800, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975). No doubt the very presence of a camera in the courtroom made the jurors aware that the trial was thought to be of sufficient interest to the public to warrant coverage. Jurors, forbidden to watch all broadcasts, would have had no way of knowing that only fleeting seconds of the proceeding would be reproduced. But the appellants have not attempted to show with any specificity that the presence of cameras impaired the ability of the jurors to decide the case on only the evidence before them or that their trial was affected adversely by the impact on any of the participants of the presence of cameras and the prospect of broadcast.

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Although not essential to our holding, we note that at *voir dire*, the jurors were asked if the presence of the camera would in any way compromise their ability to consider the case. Each answered that the camera would not prevent him or her from considering the case solely on the merits. App. ***582** 8-12. The trial court instructed the jurors not to watch television accounts of the trial, *id.*, at 13-14, and the appellants do not contend that any juror violated this instruction. The appellants have offered no evidence that any participant in this case was affected by the presence of cameras. In short, there is no showing that the trial was compromised by television coverage, as was the case in *Estes*.

V

It is not necessary either to ignore or to discount the potential danger to the fairness of a trial in a particular case in order to conclude that Florida may permit the electronic media to cover trials in its state courts. Dangers lurk in this, as in most experiments, but unless we were to conclude that television coverage under all conditions is prohibited by the Constitution, the states must be free to experiment. We are not empowered by the Constitution to oversee or harness state procedural experimentation; only when the state action infringes fundamental guarantees are we authorized to intervene. We must assume state courts will be alert to any factors that impair the fundamental rights of the accused.

The Florida program is inherently evolutional in nature; the initial project has provided guidance for the new canons which can be changed at will, and application of which is subject to control by the trial judge. The risk of prejudice to particular defendants is ever present and must be examined carefully as cases arise. Nothing of the "Roman circus" or "Yankee Stadium" atmosphere, as in *Estes*, prevailed here, however, nor have appellants attempted to show that the unsequestered jury was exposed to "sensational" coverage, in the sense of *Estes* or of *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). Absent a showing of prejudice of constitutional dimensions to these defendants,****814** there is no reason for this Court either to endorse or to invalidate Florida's experiment.

In this setting, because this Court has no supervisory authority over state courts, our review is confined to whether ***583** there is a constitutional violation. We hold that the Constitution does not prohibit a state from experimenting with the program authorized by revised Canon 3A(7).

Affirmed.

Justice STEVENS took no part in the decision of this case.

Justice STEWART, concurring in the result.

Although concurring in the judgment, I cannot join the opinion of the Court because I do not think the convictions in this case can be affirmed without overruling *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543.

I believe now, as I believed in dissent then, that *Estes* announced a *per se* rule that the Fourteenth Amendment "prohibits all television cameras from a state courtroom whenever a criminal trial is in progress." *Id.*, at 614, 85 S.Ct., at 1676; see also, *id.*, at 615, 85 S.Ct., at 1676 (WHITE, J., dissenting). Accordingly, rather than join what seems to me a wholly unsuccessful effort to distinguish that decision, I would now flatly overrule it.

While much was made in the various opinions in *Estes* of the technological improvements that might some day render television coverage of criminal trials less obtrusive, the restrictions on television in the *Estes* trial were not significantly different from those in the trial of these appellants. The opinion of the Court in *Estes* set out the limitations placed on cameras during that trial:

"A booth had been constructed at the back of the courtroom which was painted to blend with the permanent structure of the room. It had an aperture to allow the lens of the cameras an unrestric-

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ted view of the courtroom. All television cameras and newsreel photographers were restricted to the area of the booth when shooting film or telecasting.

"[L]ive telecasting was prohibited during a great portion of the actual trial. Only the opening and closing arguments of the State, the return of the jury's verdict ***584** and its receipt by the trial judge were carried live with sound. Although the order allowed videotapes of the entire proceeding without sound, the cameras operated only intermittently, recording various portions of the trial for broadcast on regularly scheduled newscasts later in the day and evening. At the request of the petitioner, the trial judge prohibited coverage of any kind, still or television, of the defense counsel during their summations to the jury." *Id.*, at 537, 85 S.Ct., at 1630 (footnote omitted).

In his concurring opinion, Justice Harlan also remarked upon the physical setting:

"Some preliminary observations are in order: All would agree, I am sure, that at its worst, television is capable of distorting the trial process so as to deprive it of fundamental fairness. Cables, kleig lights, interviews with the principal participants, commentary on their performances, 'commercials' at frequent intervals, special wearing apparel and makeup for the trial participants-certainly such things would not conduce to the sound administration of justice by any acceptable standard. *But that is not the case before us. We must judge television as we find it in this trial-relatively unobtrustive, with the cameras contained in a booth at the back of the courtroom*." *Id.*, at 588, 85 S.Ct., at 1662 (emphasis added).

The constitutional violation perceived by the *Estes* Court did not, therefore, stem from physical disruption that might one day disappear with technological advances in television equipment. The violation inhered, rather, in the hypothesis that the mere presence of cameras and recording devices might have an effect on the trial ****815** participants prejudicial to the accused.[FN1] See *id.*, at 542-550, 85 S.Ct., at 1632-1636 (opinion of the Court). ***585** And Justice Harlan sounded a note in his concurring opinion that is the central theme of the appellants here: "Courtroom television introduces into the conduct of a criminal trial the element of professional 'showmanship,' an extraneous influence whose subtle capacities for serious mischief in a case of this sort will not be underestimated by any lawyer experienced in the elusive imponderables of the trial arena." *Id.*, at 591, 85 S.Ct., at 1664.

FN1. Certain aspects of the *Estes* trial made that case an even easier one than this one in which to find no substantial threat to a fair trial. For example, the jurors in *Estes* were sequestered day and night, from the first day of the trial until it ended. The jurors in the present case were not sequestered at all. Aside from a court-monitored opportunity for the jurors to watch election returns, the *Estes* jurors were not permitted to watch television at any time during the trial. In contrast, the jurors in the present case were left free to watch the evening news programs-and to look for a glimpse of themselves while watching replays of the prosecution's most critical evidence.

It can accurately be asserted that television technology has advanced in the past 15 years, and that Americans are now much more familiar with that medium of communication. It does not follow, however, that the "subtle capacities for serious mischief" are today diminished, or that the "imponderables of the trial arena" are now less elusive.

The Court necessarily [FN2] relies on the concurring opinion of Justice Harlan in its attempt to distinguish this case from *Estes*. It begins by noting that Justice Harlan limited his opinion "*to a notorious criminal trial such as* [*the one in Estes*]...." *Ante*, at 808 (emphasis of the Court). But the Court disregards Justice Harlan's concession that such a

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limitation may not be meaningful.[FN3] Justice Harlan admitted ***586** that "it may appear that no workable distinction can be drawn based on the type of case involved, or that the possibilities for prejudice [in a 'run-of-the-mill' case], though less severe, are nonetheless of constitutional proportions." 381 U.S., at 590, 85 S.Ct., at 1663. Finally, Justice Harlan stated unambiguously that he was "by no means prepared to say that the constitutional issue should ultimately turn upon the nature of the particular case involved." *Ibid.*[FN4]

FN2. The Court today concedes that Justice Clark's opinion for the Court in *Estes* announced a *per se* rule; that the concurring opinion of Chief Justice Warren, joined by Justices Douglas and Goldberg, pointed to "the inherent prejudice of televised criminal trials"; and that the dissenting Justices objected to the announcement of a *per se* rule, *ante*, at 807, 808.

FN3. The Court also seems to disregard its own description of the trial of the appellants, a description that suggests that the trial was a "notorious" one, at least in the local community. The Court's description notes that "several aspects of the case distinguish it from a routine burglary ... [and] [n]ot surprisingly, these novel factors attracted the attention of the media." *Ante*, at 806. Indeed, the Court's account confirms the wisdom of Justice Harlan's concession that a *per se* rule limited only to cases with high public interest may not be workable.

FN4. The fact is, of course, that a run-of-the-mill trial-of a civil suit to quiet title, or upon a "routine burglary" charge for example-would hardly attract the cameras of public television. By the same token, the very televising of a trial serves to make that trial a "notorious" or "heavily publicized" one.

The Court in *Estes* found the admittedly unobtrusive presence of television cameras in a criminal trial to be inherently prejudicial, and thus violative of due process of law. Today the Court reaches precisely the opposite conclusion. I have no great trouble in agreeing with the Court today, but I would acknowledge our square departure from precedent.

Justice WHITE, concurring in the judgment.

The Florida rule, which permits the televising of criminal trials under controlled conditions, is challenged here on its face and as applied. Appellants contend that the rule is facially invalid because the televising of *any* criminal trial over the objection****816** of the defendant inherently results in a constitutionally unfair trial; they contend that the rule is unconstitutional as applied to them because their case attracted substantial publicity and, therefore, falls within the rule established in *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965).[FN*] The Florida court rejected both of these claims.

FN* In their motion in the Florida Circuit Court to declare Florida's rule unconstitutional, appellants claimed that their case had "received a substantial amount of publicity" and then argued that "[a]s ... in *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), the presence of television cameras ... will substantially harm and impair the Defendant's right to a fair and impartial trial...." App. 4. In their brief on the merits, appellants described their case as "not 'notorious' [but] at least 'more than routine' " and asked the Court to extend the *Estes* rule to it. Brief for Appellants 10.

***587** For the reasons stated by Justice STEWART in his concurrence today, I think *Estes* is fairly read as establishing a *per se* constitutional rule against televising any criminal trial if the defendant objects. So understood, *Estes* must be overruled to affirm the judgment below.

It is arguable, however, that *Estes* should be

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read more narrowly, in light of Justice Harlan's concurring opinion, as forbidding the televising of only widely publicized and sensational criminal trials. Justice Harlan, the fifth vote in *Estes*, characterized *Estes* as such a case and concurred in the opinion of the Court only to the extent that it applied to a "criminal trial of great notoriety." *Id.*, at 587, 85 S.Ct., at 1662. He recognized that there had been no showing of specific prejudice to the defense, *id.*, at 591, 85 S.Ct., at 1664, but argued that no such showing was required "in cases like this one."

Whether the decision in *Estes* is read broadly or narrowly, I agree with Justice STEWART that it should be overruled. I was in dissent in that case, and I remain unwilling to assume or conclude without more proof than has been marshaled to date that televising criminal trials is inherently prejudicial even when carried out under properly controlled conditions. A defendant should, of course, have ample opportunity to convince a judge that televising his trial would be unfair to him, and the judge should have the authority to exclude cameras from all or part of the criminal trial. But absent some showing of prejudice to the defense, I remain convinced that a conviction obtained in a state court should not be overturned simply because a trial judge refused to exclude television cameras and all or part of the trial was ***588** televised to the public. The experience of those States which have, since *Estes*, permitted televised trials supports this position, and I believe that the accumulated experience of those States has further undermined the assumptions on which the majority rested its judgment in *Estes*.

Although the Court's opinion today contends that it is consistent with *Estes*, I believe that it effectively eviscerates *Estes*. The Florida rule has no exception for the sensational or widely publicized case. Absent a showing of specific prejudice, *any* kind of case may be televised as long as the rule is otherwise complied with. *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764, 774 (Fla.1979). Thus, even if the present case is precisely the kind of case referred to in Justice Harlan's concurrence in *Estes*, the Florida rule overrides the defendant's objections. The majority opinion does not find it necessary to deal with appellants' contention that because their case attracted substantial publicity, specific prejudice need not be shown. By affirming the judgment below, which sustained the rule, the majority indicates that not even the narrower reading of *Estes* will any longer be authoritative.

Moreover, the Court now reads *Estes* as merely announcing that on the facts of that case there had been an unfair trial-*i. e.*, it established no *per se* rule at all. Justice Clark's plurality opinion, however, expressly recognized that no "isolatable" or "actual" prejudice had been or need be shown, 381 U.S., at 542-543, 85 S.Ct., at 1632, 1633, ****817** and Justice Harlan expressly rejected the necessity of showing "specific" prejudice in cases "like this one." *Id.*, at 593, 85 S.Ct., at 1665. It is thus with telling effect that the Court now rules that "[a]bsent a showing of prejudice of constitutional dimensions to these defendants," there is no reason to overturn the Florida rule, to reverse the judgment of the Florida Supreme Court, or to set aside the conviction of the appellants. *Ante*, at 813.

By reducing *Estes* to an admonition to proceed with some caution, the majority does not underestimate or minimize the ***589** risks of televising criminal trials over a defendant's objections. I agree that those risks are real and should not be permitted to develop into the reality of an unfair trial. Nor does the decision today, as I understand it, suggest that any State is any less free than it was to avoid this hazard by not permitting a trial to be televised over the objection of the defendant or by forbidding cameras in its courtrooms in any criminal case.

Accordingly, I concur in the judgment.

U.S.Fla.,1981.
Chandler v. Florida

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449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740, 7 Media L. Rep. 1041

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Tab 7

Proposed Rule 4-401:

Rule 4-401. Electronic Media Coverage of Court Proceedings.

Intent:

To establish uniform standards and procedures for electronic media coverage of proceedings in the courts of the state.

To permit electronic media coverage of courtroom proceedings while protecting the rights of parties to a fair trial, legitimate personal privacy and safety interests, the decorum and dignity of judicial proceedings, and the fair administration of justice.

Applicability:

This rule applies to the courts of record and not of record.

This rule governs electronic media coverage and conduct of courtroom proceedings that are open to the public.

This rule does not govern coverage of courtroom proceedings by a news reporter who is not using a camera or electronic equipment to photograph or create audio or video recordings or transmissions of judicial proceedings.

Except as provided by this rule, the use of cameras, cellular phones, personal computers or other portable electronic devices to photograph or create audio or video recordings or transmissions of courtroom proceedings without the express permission of the judge is prohibited.

This rule shall not diminish the authority conferred by statute, rule, or common law of the judge or court to control the conduct of proceedings in the courtroom or areas immediately adjacent to the courtroom.

Statement of the Rule:

(1) *Definitions.*

(A) "Judge" as used in this rule means the particular judge, justice, or judicial officer who is presiding over the public proceeding.

(B) "Proceeding" as used in this rule means any trial, hearing, motion, or any other matter held in open court which the public is entitled to attend.

(C) "Electronic media coverage" as used in this rule means a news reporter taking photographs or broadcasting, televising, recording, streaming, or transmitting images or sounds by electronic means, including but not limited to video cameras, still cameras, cellular phones, audio recorders, computers, or other portable electronic devices.

(D) "News reporter" as used in this rule means any person who gathers, records, photographs, reports, or publishes information for the primary purpose of disseminating news and information to the public, and any newspaper, magazine, or other periodical publication, press association or wire service, radio station, television station, satellite broadcast, cable system or other organization with whom that person is connected.

(2) *Presumption of electronic media coverage; restrictions on coverage.*

(A) There is a presumption that electronic media coverage shall be permitted in courtroom proceedings that are open to the public. Limitations on electronic media coverage must be supported by reasons found by the judge to be sufficiently compelling to outweigh the presumption.

(B) When determining whether the presumption of electronic media coverage has been overcome and whether such coverage should be prohibited or restricted beyond the limitations provided in this rule, a judge shall consider some or all of the following factors:

(i) whether there is a reasonable likelihood that electronic media coverage would prejudice the rights of the parties to a fair proceeding;
(ii) whether there is a reasonable likelihood that electronic media coverage would jeopardize the safety or well-being of any individual;
(iii) whether there is a reasonable likelihood that electronic media coverage would jeopardize the interests or well-being of a minor;
(iv) whether there is a reasonable likelihood that electronic media coverage would constitute an unwarranted invasion of personal privacy of any party or witness;
(v) whether electronic media coverage would create adverse effects that would be greater than those caused by traditional media coverage;
(vi) the adequacy of the physical facilities of the court for electronic media coverage;
(vii) the public interest in and newsworthiness of the proceeding;
(viii) potentially beneficial effects of allowing public observation of the proceeding through electronic media coverage; and

(ix) any other factor affecting the fair administration of justice.

(C) The judge shall make particularized findings on the record supporting a prohibition of electronic media coverage or restrictions on such coverage beyond the limitations provided by this rule. Such findings may be made orally or in a written order. Any written order granting or denying a request for electronic media coverage shall be made part of the record of the proceedings.

(D) Any reasons found sufficient to support restrictions on electronic media coverage beyond the limitations provided in this rule shall relate to the specific circumstances of the case before the court rather than reflecting merely generalized views or preferences.

(3) *Duty of news reporters to obtain permission; termination or suspension of coverage.*

(A) News reporters desiring permission to provide electronic media coverage of a proceeding shall file a written request with the court at least 24 hours prior to the proceeding; however, the judge may grant such a request on shorter notice or waive the requirement for a written request upon a showing of good cause.

(B) A judge may terminate or suspend electronic media coverage at any time without prior notice when it is determined that a news reporter has violated the limitations set forth in this rule or ordered by the court, or that continued electronic media coverage is no longer appropriate based upon a consideration of one or more of the factors set forth in Rule 4-401(2)(B). If permission to provide electronic media coverage is terminated or revoked, the judge shall make oral or written particularized findings on the record.

(4) *Conduct in the courtroom; pool coverage.*

(A) A judge may position news reporters and equipment in the courtroom to permit reasonable news coverage. No more than one video camera person and one still photographer shall be permitted in the courtroom. The camera operator and still photographer may use tripods, but shall not change location when court is in session.

(B) If more than one news reporter has requested permission to provide electronic media coverage, it is the responsibility of news reporters to determine who will participate at any given time or, in the alternative, how they will pool their coverage. The pooling arrangement shall be reached outside the courtroom and before court session, and without imposing on the judge or court staff.

(C) News reporters shall designate a representative with whom the court may consult regarding pool coverage, and shall provide the court with the name and contact information for such representative.

(D) To be eligible to participate in a camera pool, a news reporter must apply for permission to provide electronic media coverage pursuant to Rule 4-401(3)(A). The pool photographer shall use equipment that is capable of disseminating photographs, video or audio to pool recipients in a generally accepted format.

(E) It shall be the responsibility of news reporters to make arrangements for the sharing and dissemination of photographs, video or audio produced by pool coverage. Neither judges nor court personnel shall be called upon to resolve disputes concerning pooling arrangements.

(F) Photographers shall not use flash or strobe lights. News reporters shall use normally available courtroom equipment unless the judge and court administrator approve modifications, which shall be installed and maintained without public expense. Any such modifications, including microphones and related wiring, shall be as unobtrusive as possible, shall be installed in advance of the proceeding or during adjournment, and shall not interfere with the movement of those in the courtroom.

(G) Proceedings in the courtroom shall not be disrupted. Photographers and news reporters in the courtroom shall:

(i) not use equipment that produces loud or distracting sounds;

(ii) not place equipment in or remove equipment from the courtroom while court is in session;

(iii) conceal on all cameras any identifying business names, marks, call letters, logos or symbols;

(iv) not make comments in the courtroom during the court proceedings;

(v) not comment to or within the hearing of the jury or any member thereof at any time before the jury is dismissed;

(vi) present a neat appearance and conduct themselves in a manner consistent with the dignity of the proceedings;

(vii) not conduct interviews in the courtroom except as permitted by the judge; and

(viii) comply with the orders and directives of the court.

(5) *Violations.*

In addition to contempt and any other sanctions allowed by law, a judge may remove anyone violating these rules from the courtroom and revoke permission to provide electronic media coverage.

(6) *Limitations on electronic media coverage.*

Notwithstanding an authorization to conduct electronic media coverage of a proceeding, and unless otherwise authorized by the judge, there shall be no:

(A) electronic media coverage of a juror or prospective juror until the person is dismissed;

(B) electronic media coverage of the face of a person known to be a minor;

(C) electronic media coverage of an exhibit or a document that is not part of the official public record;

(D) audio recording or transmission of the content of bench conferences or in camera hearings; or

(E) audio recording or transmission of the content of confidential communications between counsel and client, between clients, or between co-counsel.

(F) A judge may order further limitations on electronic media coverage as deemed appropriate in consideration of the factors set forth in Rule 4-401(2)(B).

Tab 8

Existing Rule 4-401:

Rule 4-401. Media in the courtroom.

Intent:

To establish uniform standards and procedures for conduct and the use of photographic equipment in the courts of the state.

To permit access to the courtroom by the news media while preserving the participants' rights to privacy and a fair proceeding.

Applicability:

This rule applies to the courts of record and not of record.

This rule governs photography and conduct during sessions of court and recesses between sessions.

This rule shall not diminish the authority conferred by statute, rule or common law of the judge to control the conduct of proceedings in the courtroom.

As used in this rule, the term "courtroom" includes the courtroom and areas immediately adjacent to the courtroom.

Statement of the Rule:

(1)(A) Filming, video recording, and audio recording in a trial courtroom are prohibited except to preserve the official record of proceedings. With the permission of the judge presiding at the proceeding, an audio or video signal of proceedings may be transmitted and copied.

(1)(B) Filming, video recording, and audio recording in an appellate courtroom are permitted to preserve the official record of proceedings and as permitted by procedures of those courts. With the permission of the judge presiding at the proceeding, an audio or video signal of proceedings may be transmitted and copied.

(2) Still photography, filming and audio and video recording in the courtroom for ceremonial or court approved public information programs are permitted when arranged through the presiding judge of the court.

(3) No one may photograph a juror or prospective juror before the person is dismissed.

(4) Still photography in a courtroom is prohibited, but it may be permitted in the discretion of the judge presiding at the proceeding. Except on such terms as the judge presiding at the proceeding may prescribe, no one may photograph in the courtroom an exhibit or a document that is not part of the official public record or the face of a person known to the photographer to be a minor. A request to photograph in a courtroom shall be filed with the judge presiding at the proceeding at least 24 hours prior to the proceeding. A judge may permit photography with less than 24 hours notice upon a showing of good cause. In determining whether to permit still photography and, if so, how to regulate it, the judge presiding at the proceeding should consider whether:

(4)(A) photography can be accommodated without distracting the participants;

(4)(B) there is a substantial likelihood photography would jeopardize the right to a fair proceeding; or

(4)(C) the privacy interests of the victim of a crime, a party in a civil case or a witness outweigh the interest of the public in access to a photograph of the person.

(5) Conduct in the courtroom.

(5)(A) The judge presiding at the proceeding may position reporters and equipment in the courtroom to permit reasonable news coverage. Media representatives must share a single photographer.

(5)(B) Photographers shall not use flash or strobe lights. Media representatives shall use normally available courtroom equipment unless the presiding judge and the judge presiding at the proceeding approve modifications, which shall be installed and maintained without public expense.

(5)(C) Proceedings in the courtroom shall not be disrupted. Members of the media in the courtroom shall:

(5)(C)(i) avoid calling attention to themselves;

(5)(C)(ii) not place equipment in or remove equipment from the courtroom while court is in session;

(5)(C)(iii) not make comments in the courtroom during the court proceedings;

(5)(C)(iv) not comment to or within the hearing of the jury or any member thereof at any time before the jury is dismissed;

(5)(C)(v) present a neat appearance in keeping with the dignity of the proceedings;

(5)(C)(vi) not conduct interviews in the courtroom until the proceeding is concluded and the court is recessed;

(5)(c)(vii) not use a camera or tape recorder to conduct interviews in the courtroom; and

(5)(C)(viii) comply with the orders and directives of the court.

(6) In addition to contempt and any other sanctions allowed by law, the court may remove anyone violating these rules from the courtroom and revoke the privileges contained in this rule.

Tab 9

Utah State Courts

Social Media Subcommittee of the Judicial Outreach Committee

Report and Recommendations on the Possession and Use of Electronic Devices in Court Facilities

July 14, 2011

Report and Recommendations of the Social Media Subcommittee of the Judicial Outreach Committee on the Possession and Use of Electronic Devices in Court Facilities

Contents

Report and Recommendations of the Social Media Subcommittee of the Judicial Outreach Committee on the Possession and Use of Electronic Devices in Court Facilities

(1) Introduction

Electronic devices such as PDA's, smartphones, and tablet and laptop computers have become a common and necessary tool for people observing or participating in judicial proceedings. They are the everyday tools of lawyers and the clients they represent: as necessary today as pen and paper and books have always been. Jurors, witnesses, consultants, parties and public have come to expect that their ability to communicate—and to continue the business of their everyday lives—will not automatically cease when entering a courthouse. The press are increasingly using these technologies to report on judicial proceedings in a more effective and timely manner.

We believe that banning electronic devices from courthouses or significantly restricting their use is a policy bound to fail. Consider that an electronic device—small enough to fit into a briefcase, purse or even in the palm of one's hand—accesses television, radio, newspapers, movies, whole libraries of books, the West National Reporter series, law reviews and treatises, dictionaries, mail, bank accounts, and business inventory. Plus any number of computer programs run by businesses small and large around the world. The list is nearly endless. Modern life revolves around electronic devices. The notion that the judiciary can create an island that limits their influence is naïve. Rather, the judiciary should view electronic devices as an unequaled opportunity to welcome the public into our courthouses; to make transparency and public access real, not just ideals.

The near universal use of electronic devices presents challenges for the judiciary: security and personal safety; maintaining dignity and decorum in the courtroom; and conducting fair and impartial hearings. But the judiciary has faced these challenges for centuries. The challenges are, perhaps, heightened by the proliferation of evolving technologies, but they are, in concept, nothing new.

Our recommended policy attempts to properly balance the interests of the public and the judiciary. It is built on the philosophy that the judiciary should focus not on regulating the types of electronic devices that may or may not be allowed in the courthouse, but on regulating conduct that is injurious to the judicial process. The policy regulates using electronic devices if the judiciary has an interest in controlling particular conduct, but permits free reign—or at least loose reign—while using electronic devices for other conduct, conduct which the judiciary has never attempted to control the analogue equivalent.

In formulating the proposed policy, the subcommittee has surveyed policies already in place in other judicial systems, reviewed studies and recommendations by the National Center for State Courts, the American Trial Lawyers Association and various media advocacy groups. We have reviewed the emerging case law addressing these issues.

We believe that this policy acknowledges the realities of today's technologically sophisticated and dependent society; reflects a reasoned approach and a fair accommodation of the needs of all participants in the judicial process; and preserves the fair and impartial administration of justice.

Respectfully submitted,

Social Media Subcommittee of the Judicial Outreach Committee

Randy L. Dryer, Chair
Brock Beattie
Duane Betournay
Ron Bowmaster
Judge Michele Christiansen
Megan Crowley
Judge Jeffrey Noland
Rob Parkes
Tim Shea
Judge Andrew Stone
Jessica Van Buren
Nancy Volmer

(2) Possession and use of electronic devices in courthouses

(A) Subject to the limitations herein, all persons granted entrance to the courthouse are permitted to possess and use, while inside the courthouse, any pager, laptop/notebook/personal computer, handheld PC, PDA, audio or video recorder, wireless device, cellular telephone, electronic calendar, and/or any other electronic device that can transmit, broadcast, record, take photographs or access the internet (hereinafter “electronic device”) .

(B) Persons possessing an electronic device may use that device while in common areas of the courthouse, such as lobbies and corridors subject to further restrictions on the time, place, and manner of such use that are appropriate to maintain safety, decorum, and order.

(C) All electronic devices are subject screening or inspection by court security officers at the time of entry to the courthouse and at any time within the environs of the courthouse in accordance with Rule 3-414.

(3) Possession and use of electronic devices in courtrooms.

(A) Inside courtrooms, persons may silently use an electronic device for any purpose consistent with this policy without obtaining prior authorization.

(B) Persons may not use electronic devices to take photographs or for audio or video recording or transmission except that photographs may be taken by the media in accordance with Rule 4-401 of the Rules of Judicial Administration.

(C) A judge presiding over a proceeding may prohibit or further restrict use of electronic devices if they interfere with the administration of justice, disrupt the proceedings, pose any threat to safety or security, compromise the integrity of the proceeding, or is necessary to reasonably protect the privacy of a minor.

(D) It should be anticipated that reporters, bloggers and other observers seated in the courtroom may use electronic devices to prepare and post online news accounts and commentary during the proceedings. Judges should instruct counsel to instruct witnesses who have been excluded from the courtroom to not receive or view accounts of other witnesses’ testimony prior to giving their testimony.

(E) This policy is applicable to attorneys, but may be expanded or restricted in the discretion of the judge presiding over the relevant proceeding. As officers of the court, attorneys may be subject to additional sanctions for violating this policy.

(4) Additional limitations on juror possession and use of electronic devices

During trial and juror selection, prospective, seated, and alternate jurors are prohibited from researching and discussing the case they are or will be trying. Jurors may not use an electronic device while in the courtroom and may not possess an electronic device while deliberating.

(5) Possessions and use of electronic devices in court chambers

Persons may possess electronic devices in court chambers without obtaining prior approval, but may not use them in chambers without prior approval from the judge.

(6) Miscellaneous

(A) Nothing herein shall restrict in any way:

(i) the possession or use of electronic devices by judges, commissioners or courtroom personnel with prior approval of the judge presiding over the proceeding; or

(ii) the authority of judges or commissioners to permit others to possess or use electronic devices in chambers or administrative offices or during judicial ceremonial proceedings.

(B) All electronic devices are subject to confiscation and search by court personnel if the judge presiding over the proceeding has a reasonable basis to believe that a device is or will be used in violation of this policy. Violations may be subject to contempt of court.

(C) A person may use an electronic device to make an audio or video recording of a non judicial public meeting taking place in a court facility.

(D) Notices setting forth the permitted and prohibited uses of electronic devices should be posted in the courthouse, on the judicial website, contained in the summons to prospective jurors, reflected in the Court's instructions to impaneled jurors, posted in the jury room and contained in a courtroom announcement to the public, parties and lawyers. Suggested notices, instructions and announcements are attached as Appendix A.

(7) Appendix A: Jurors' use of social media in judicial proceedings. Suggested notices, instructions and announcements.

(a) Notice in summons to prospective jurors

You may be unfamiliar with the court system, and you may have many questions about what to expect from your jury service. To answer some common questions, see the court's webpage http://www.utcourts.gov/juryroom/.

A fair trial requires that jurors make decisions based on evidence presented at trial, rather than on information that has not been examined in the courtroom. It is important that you do not conduct any research about the case or about the parties or lawyers. Even research on sites such as Google, Bing, Yahoo, Wikipedia, Facebook or blogs—which may seem completely harmless—may lead you to information that is incomplete or inaccurate.

(b) Instruction to impaneled jurors

Model Utah Jury Instruction CV 101. General admonitions.

Now that you have been chosen as jurors, you are required to decide this case based only on the evidence that you see and hear in this courtroom and the law that I will instruct you about. For your verdict to be fair, you must not be exposed to any other information about the case. This is very important, and so I need to give you some very detailed explanations about what you should do and not do during your time as jurors.

First, you must not try to get information from any source other than what you see and hear in this courtroom. It's natural to want to investigate a case, but you may not use any printed or electronic sources to get information about this case or the issues involved. This includes the internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, Blackberries, iPhones, Smartphones, PDAs, or any social media or electronic device. You may not do any personal investigation. This includes visiting any of the places involved in this case, using Internet maps or Google Earth, talking to possible witnesses, or creating your own experiments or reenactments.

Second, you must not communicate with anyone about this case or your jury service, and you must not allow anyone to communicate with you. This also is a natural thing to want to do, but you may not communicate about the case via emails, text messages, tweets, blogs, chat rooms, comments or other postings, Facebook, MySpace, LinkedIn, or any other social media.

You may notify your family and your employer that you have been selected as a juror and you may let them know your schedule. But do not talk with anyone about the case, including your family and employer. You must not even talk with your fellow jurors until I give you the case for deliberation. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been

ordered not to discuss the matter. And then please report the contact to the clerk or the bailiff, and they will notify me.

Also, do not talk with the lawyers, parties or witnesses about anything, not even to pass the time of day.

I know that these restrictions affect activities that you consider to be normal and harmless and very important in your daily lives. However, these restrictions ensure that the parties have a fair trial based only on the evidence and not on outside information. Information from an outside source might be inaccurate or incomplete, or it might simply not apply to this case, and the parties would not have a chance to explain or contradict that information because they wouldn't know about it. That's why it is so important that you base your verdict only on information you receive in this courtroom.

Courts used to sequester jurors to keep them away from information that might affect the fairness of the trial, but we seldom do that anymore. But this means that we must rely upon your honor to obey these restrictions, especially during recesses when no one is watching.

Any juror who violates these restrictions jeopardizes the fairness of the proceedings, and the entire trial may need to start over. That is a tremendous expense and inconvenience to the parties, the court and the taxpayers. Violations may also result in substantial penalties for the juror.

If any of you have any difficulty whatsoever in following these instructions, please let me know now. If any of you becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that as well. If anyone tries to contact you about the case, either directly or indirectly, or sends you any information about the case, please report this promptly as well. Notify the bailiff or the clerk, who will notify me.

These restrictions must remain in effect throughout this trial. Once the trial is over, you may resume your normal activities. At that point, you will be free to read or research anything you wish. You will be able to speak—or choose not to speak—about the trial to anyone you wish. You may write, or post, or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.

So, keep an open mind throughout the trial. The evidence that will form the basis of your verdict can be presented only one piece at a time, and it is only fair that you do not form an opinion until all of the evidence is in.

(c) Courtroom announcement (to jurors, public, parties and lawyers)

(Conform to final policy adopted by the Judicial Council)

While court is in session, lawyers are permitted to use their electronic devices, such as computers and smart phones, because so much of a lawyer's job depends on those devices.

Also, parties and the public can use electronic devices, but they cannot record these proceedings by audio or video and they cannot take pictures inside the courtroom. Further, the devices must be used silently, so they do not disrupt the proceedings. If these rules are violated, I will tell the person to leave the courtroom or I will tell the bailiff to confiscate the device.

Jurors, however, are not allowed to use electronic devices in the courtroom. Jurors must decide the facts based only on the evidence presented in this courtroom, and they must not discuss the case with anyone. But electronic devices and the social media they access are made primarily for those two purposes: research and communication. Experience has shown that the risk of a mistrial is simply too great to allow jurors to use electronic devices. Consequently, Utah law allows jurors to possess but not to use electronic devices while you are in the courtroom. Later, when you deliberate among yourselves to reach a verdict, you will not even be allowed to possess these devices. I realize this is contrary to what many of you do every day, but it is required because of the special needs of a trial, and I thank you for your understanding.

(d) Summary of restrictions for placement in the jury room

A fair trial means:

- Jurors must decide the facts based on the evidence presented in the courtroom.
- Jurors must not be influenced by information from sources outside the courtroom.
- Jurors must not communicate with anyone about the trial until the trial is over, and must not allow anyone to communicate with them, including by electronic devices and social media.
- Jurors must not research the case until the trial is over, including by electronic devices, social media, television, radio and newspapers.

Tab 10

ELECTRONIC MEDIA REPORT

Judge Thomas L. Kay
Judge David N. Mortensen
Judge Douglas B. Thomas
Judge Robert P. Faust
Commissioner Catherine S. Conklin

ISSUES PRESENTED BY ELECTRONIC MEDIA IN THE COURTROOM AND IN THE JURY ROOM

Reuters Legal, using data from Westlaw, found that at least 90 verdicts have been subject to legal challenge because of alleged internet juror misconduct since 1999. Half of those challenges have come in the last two years. That same research has indicated that 21 mistrials have been reported since January 2009 resulting from Internet or cell phone related juror misconduct. More concerning than these statistics is the fact that, in all probability the majority of juror misconduct is unreported and never brought to the attention of judges.

While it has been widely reported that many jurisdictions are confronting the issue, it should also be recognized that this is a relatively new phenomenon, one which will likely grow as a concern for the justice system, and an issue to be addressed in the future by judges in particular. American Law Reports has a section at 48 A.L.R. 6th 135 entitled: "Prejudicial Effect of Juror Misconduct Arising from Internet Usage." Accordingly, as the legal community becomes more attentive to the prejudicial effect of inappropriate electronic media usage by jurors, the issue will likely be presented to the courts with more frequency.

Courts are just beginning to tackle the issue in appellate decisions which are somewhat split. The problem in any event is significant. Jurors have communicated overt bias during the jury selection process through e-mail and twitter, only to fail to disclose such bias to the attorneys and the court. Comedian Steve Martin tweeted: "REPORT FROM JURY DUTY: Defendant looks like a murderer. GUILTY. Waiting for opening remarks." Later he tweeted: "REPORT FROM JURY DUTY: The guy I thought was up for murder turns out to be defense attorney. I bet he murdered someone anyway." While this is a joke, researchers found that many jurors express similar comments not meant at all as a joke. The fundamental principle of an impartial fact-finder is being undermined.

Reports have included frequent circumstances of potential jurors expressing opinions about the case during jury selection, specifically on the issues of a criminal defendant's guilt or which civil litigant should prevail. One juror during deliberations established a poll on Facebook as to a criminal defendant's guilt. Numerous jurors have communicated with persons outside the courthouse as to the status of juror deliberations.

At the same time general electronic media increasingly finds its way into the courtroom through attorneys, the public and the press. Most cell phones, iPods, MP3 devices, and laptops have audio and video recording capability. As those devices are present in the courtroom judges will increasingly need to be cognizant of their presence and their possible disruption of the administration of justice. The Board of District Court Judges has surveyed the situation throughout the country and makes the following recommendations to the bench.

EMPIRICAL STRATEGIES TO ADDRESS SOCIAL MEDIA AND TECHNOLOGY IN THE COURTROOM

I. General Overview of the Issues Facing Courts

The emergence of social media and handheld internet devices has caused courts to reexamine their jury instructions and courtroom media policies. A number of concerns arise as courts try to formulate uniform rules and policies that will eliminate the threat not only of juror misconduct, but also misuse by other courtroom and courthouse patrons. While a complete ban on electronic devices inside courthouse walls (as well as sequestering all juries) would solve these issues, such a far-reaching proposal may not be practical.

This memorandum will discuss the varying approaches that other jurisdictions have taken regarding these issues, as well as provide a list of proposals that Utah courts may consider.

II. Jury

A. While in Court (voir dire, jury box, deliberations)

Indiana: Rule 26(b) Final Jury Instructions[1]

"The court shall instruct the bailiff to collect and store all computers, cell phones or other electronic communication devices from jurors upon commencing deliberations. The court may authorize appropriate communications (i.e. arranging for transportation, childcare, etc.) that are not related to the case and may require such communications to be monitored by the bailiff. Such devices shall be returned upon completion of deliberations or when the court permits separation during deliberations. Courts that prohibit such devices in the courthouse are not required to provide this instruction. All courts shall still admonish jurors regarding the limitations associated with the use of such devices if jurors are permitted to separate during deliberations."

Maryland: Administrative Judge Marcella A. Holland issued an order banning the "use of any device used to transmit information on Twitter, Facebook, LinkedIn or any other current or future form of social networking from any of the courthouses within the Circuit Court for Baltimore City."[2]

Minnesota recently enacted a policy prohibiting jurors from bringing any wireless communication device to court.[3]

[1] Indiana Court Rule 26(b). (Amended July 1, 2010)
[2] In the Circuit Court fro Baltimore City Addendum to Administrative Order on Use of Cell Phones and Other Communication Devices, dated Feb. 14, 2006.
[3] Anita Ramasastry, FindLaw.com Legal Commentary, *Why Courts Need to BanJurors' Electronic Communications Devices* (Aug. 11, 2009). See http://writ.news.findlaw.com/ramasastry/20090811.html.

Pennsylvania: a judge held a juror in contempt for making a phone call during deliberations.[4]

Some states confiscate jurors' electronic devices during trial and deliberation, but allow their use at other times.[5]

B. While Outside Court (during recess, at home)

Oregon: Courts give the following instruction: "Do not discuss this case during the trial with anyone, including any of the attorneys, parties, witnesses, friends or members of your family. 'No Discussion' also means no emailing, text messaging, tweeting, blogging or any other form of communication." It further adds, "In our daily lives we may be used to looking for information online and to Google something as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision. You must resist that temptation for our system of justice to work as it should."[6]

Michigan Supreme Court: This was the first state court of last resort to promulgate a rule requiring judges to instruct jurors that they are prohibited from using computers or cell phones at trial or during deliberation, and are prohibited from using a computer or other electronic device or any other method to obtain or disclose information about the case when they are not in the courtroom. The jury is read standard jury instructions, then they are given added instructions:[7]

- The court shall instruct the jurors that until their service is concluded, they shall not
    - Discuss the case with others, including other jurors, except as otherwise authorized by the court;
    - Read or listen to any news reports about the case;
    - Use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation. These devices may be used during breaks or recesses but may not be used to obtain or disclose prohibited information
    - Use a computer, cellular phone, or other electronic device with communication capabilities, or any other method, to obtain or disclose information about the case when they are not in court. As used in this subsection, information about the case includes, but is not limited to, the following:

[4] "What Part of 'No Cell Phones' Was Unclear?", Jur-E Bulletin, Sept. 17, 2004. http://www.ncsconline.org/WC/Publications/KIS_JurInnJurE9-17-04.
[5] Talia Buford, *New Juror Policy Accounts for New Technology*, Providence J. Bull.,May 17, 2009 at A. Available at 2009 WLRN 9405485.
[6] Gregory S. Hurley, National Center for State Courts Jur-E Bulletin, *CellPhone Policies, Instructions/Instructions for Jurors* (May 1, 2009).
[7] Michigan Court Rule 2.511 (amended Sept. 1, 2009).

- Information about a party, witness, attorney, or court officer
- News accounts of the case
- Information collected through juror research on any topic the juror might think would be helpful in deciding the case

In Florida, many judges provide brief reminders throughout the course of the trial.[8] For example, the judge might ask: "Have you been able to follow all of my instructions, including not discussing the case and not doing any research? Has anyone contacted you or have you contacted anyone or done any writing (including Facebook, Twitter, etc.) or research (Google) about the case?"[9]

Texas: U.S. District Court Judge Barbara M.G. Lynn requires jurors in her court to swear a second oath , with the newly added one including limitations on such practices as electronic research.[10]

The Judicial Conference's Committee on Court Administration and Case Management (CACM) in 2010 endorsed a set of jury instructions[11] detailing prohibitions on using technology to conduct research on or communicate about the case. CACM suggests giving certain instructions before trial and a different instruction at the close of trial.

Before Trial: The instruction makes specific reference to cell phones and other devices, as well as web-based communication tools such as Twitter and to "other social networking websites, including Facebook, MySpace, LinkedIn, and YouTube."

At the Close of the Case: elaborates the jury's duty not to discuss the case with anyone, and makes specific reference to technology such as cell phone, smart phone, iPhone, Blackberry, the internet, any internet service, or any text or instant messaging service, or any internet chat room, blog, or website of any kind including Facebook, MySpace, LinkedIn, YouTube and Twitter.

Some courts provide telephones and computer terminals at the courthouse for jurors to use during their service. Courts can control web access by installing filters or other software that prevents the user from accessing forbidden web sites or applications.[12]

[8] Artigliere, supra note 1.
[9] Id.
[10] *Smart Phones Left at Courtroom Door Quiver with Volume of Calls*, American Bar Association Judicial Division: Annual Meeting 2010, Aug. 8, 2010.
[11] Memorandum from Judge Julie A. Robinson, Chair, Judicial Conference Committee on Court Administration and Case Management regarding Juror Use of Electronic Communications Technologies (Jan. 28, 2010).
[12] Superior Court of the District of Columbia, Special Operations Division, Juror's Office, http://www.dccourts.gov/dccourts/superior/special_ops/jurors.jsp.

Some states confiscate jurors' electronic devices during trial and deliberation, but allow their use at other times.[13]

C. General Proposals Regarding Juries

- Instruct the bailiff to collect all electronic devices from jurors at the start of deliberations.
  - Alternatively, the court might instruct the bailiff to collect all devices during both trial and deliberations.
- Inform jurors in their jury summons that they are not to bring any electronic devices to the courthouse when they report for jury duty. This will provide jurors with advanced notice and allow each of them to make arrangements with employers, family members, and daycare providers.[14]
- Provide more extensive jury instructions[15] in which the jurors are specifically told not to use certain electronic devices[16] as well as visit certain websites[17] during the time they are serving on the jury. Jurors should be reminded of these instructions throughout the proceedings.[18]
- Instruct all jurors to report any violation of the court's instructions, including any communication of any juror with the outside about the case or any attempt to bring into court information from outside the trial.[19]
- After the traditional oath is taken by jurors, ask that the jury swear a second oath which addresses issues relating to social media, handheld electronic devices, and websites providing information about the trial.[20]
- During voir dire, inquire as to jurors' usage of the Internet generally, and social media specifically. Inquire as to what websites jurors frequent, how often they

[13] Buford, supra note 8.
[14] The court might provide jurors with a courthouse telephone number where others can call in case of an emergency.

[15]. The best option is to give instructions to the chosen jury during empanelling. At this point, jurors have a better idea of what is off-limits, as they have been through voir dire and probably understand the general contours of the case they are about to hear. Also, now that they have been placed on the jury, they are more likely to pay close attention and understand that the rules given truly apply to them. (Conn. Public Service and Trust Comm'n, Jury Committee Report and Recommendation 18 (2009), http://www.jud.ct.gov/ committees/pst/jury/juryreport.pdf).
[16] PDA, Blackberry, iPhone, iPod Touch, iPad, Smart Phone, or any other device capable of sending or receiving data of any kind.
[17] Facebook, Twitter, MySpace, YouTube, LinkedIn, or any other social media website. Additionally, jurors should understand that they are not to "google" or otherwise research anything related to the case for which they are serving as juror.
[18] Where there has been extensive media coverage about a particular case, the trial judge may wish to consider asking the jurors at the start of each day of trial whether any of them has seen or heard anything in the media about the case. If so, the judge and counsel should discuss the matter outside the presence of the other jurors to determine the nature of the information. The juror should be admonished not to share that information with fellow jurors.
[19] Artigliere, supra note 1.
[20] Remind jurors of the penalties for conducting outside research, or ask jurors to sign declarations stating that they will not research the case in any way,

access those sites, and if they post[21] to those websites. Ask whether the jurors blog.

- Explain to the empanelled jury the possibility that questions might arise during the trial that could prompt a juror to look elsewhere (online) for answers, and urge them to resist the temptation to do so.[22]

III. Technology and Electronics in the Courtroom (media and public)

Federal judge Mark Bennett, a tech-savvy judge who allows reporters to blog during court proceedings said, "I thought that the public's right to know what goes on in federal court and the transparency that would be given the proceedings by live-blogging outweighed any potential prejudice to the defendant."[23]

Delaware: Some counties ban personal electronic devices. Exempt are judicial officers, state and court employees, attorneys showing an ID, law enforcement, and maintenance.[24]

Iowa's 3rd District: "It is therefore ordered that cell phones that are brought into the courthouses may be used as telephones in the public areas only. The use of the camera/video function on these devices is prohibited in the same floor as the courtrooms or in the courtroom. Special conditions for the usage of the camera/video function may exist which requires the express permission of the presiding judge. All cell phones are to be turned off before entering a courtroom and shall remain off while in the courtroom. Court employees who are not in the courtroom may use cell phones, provided that such use does not become disruptive or negatively affect the employee's performance."[25]

New Mexico, Eddy and Roswell counties: "Employees of the courthouse can bring phones into the building for use in their offices...but members of the public will be required to leave their phones at home or in their vehicles."[26]

North Carolina: "All cell phones, including those belonging to or in the possession of the public, county, or state employees, must be turned off in court. The bailiff will confiscate any phones that ring while court is in session."[27]

[21] Update Facebook status, Tweet, Instant Message, post comments at the end of news stories, etc.
[22] Denise Zamore, *Can Social Media Be Banned from Playing a Role in Our Judicial System?*, Minority Trial Lawyer Q. (American Bar Association), Spring 2010.
[23] Debra Cassens Weiss, *Judge Explains Why He Allowed Reporter to Live Blog During Federal Criminal Trial*, ABA Journal, Jan. 16, 2009.
[24] *Prohibition on Cellular Telephones and other Personal Communication Devices in the New Castle County Courthouse*, Sept. 23, 2005.
[25] Iowa Third Judicial District, http://blog.justiceserved.com/wp-content/uploads/2008/09/ncsc-cellphonepoliciesbystate.pdf.
[26] See:http://www.ncsconline.org/d_kis/courtsecurity/view_cs_cont.asp?NCSC_CMS_CONTENT _ID=2029.
[27]Hon. Graham C. Mullen, Chief U.S. District Court Judge, Order: *In Re: Electronic Devices in the Courtroom*, http://www.ncwd.uscourts.gov/documents/ElectronicDevices.pdf, Nov. 21, 2005.

EXAMPLES OF ELECTRONIC MEDIA PROBLEMS

IN UTAH COURTROOMS

3RD DISTRICT – A person sitting in the gallery texted information regarding witness testimony to another witness who was in the hall pursuant to the exclusionary rule.

3RD DISTRICT – A person in the courtroom texted his wife to warn her that the judge had issued a warrant for her arrest.

6TH DISTRICT – A defendant was caught streaming the trial's audio to the Internet from his laptop.

8TH DISTRICT – A bailiff noticed a person recording the proceedings. The person said it was for personal use because he had poor hearing.

NATIONAL JURY ISSUES

Since 1999, at least 90 verdicts have been challenged because of Internet-related jury misconduct. More than half of those occurred in the last two years.

INTERNET RESEARCH

FLORIDA – After the verdict was read in a rape trial, the clerk found printouts from Wikipedia regarding sexual assault and "rape trauma syndrome" in the jury room. The information was not part of the evidence at trial and had been printed by one of the jurors and provided to the rest of the panel.

OHIO – A juror used his home computer to look up the defendant's criminal background on the court docket. The judge had to declare a mistrial.

KENTUCKY – A juror went to YouTube during the trial and looked up an episode of a TV show that focused on the case.

FLORIDA – After eight weeks of trial, the judge discovered that a juror had been doing outside research on the Internet and had found information that was specifically excluded from evidence. In questioning the panel, the judge discovered that eight other jurors had been doing the same thing. With three-fourths of the panel tainted, the judge was forced to declare a mistrial.

JUROR COMMUNICATIONS

NEW YORK – A juror posted reports on his blog about what was happening in the jury room. A law professor in Texas stumbled on the blog postings and notified the judge.

NEW JERSEY – A potential juror was removed from the pool after trying to "friend request" the defendant on Facebook.

ARKANSAS – During a civil trial involving a buildings products company, a juror used Twitter to send messages about the proceedings, including warning people not to buy products from the defendant and giving advance notice of the verdict.

PENNSYLVANIA – A juror in a federal corruption trial posted on Facebook and Twitter that a "big announcement" was forthcoming, referring to the verdict.

UNITED KINGDOM – A juror in a child abduction and sexual assault trial posted confidential trial details on her Facebook page. She then held an online poll, inviting her friends to help her decide whether the defendants were innocent or guilty.

CALIFORNIA – A juror was chastised for writing blog posts that exposed details of a gang murder trial while the trial was pending.

CONCLUSION AND RECOMMENDATIONS

The potential damage caused by electronic media in the courtroom and jury room cannot be ignored. A policy should be implemented that is clear and easy to enforce. A complex policy that would require court security to try to distinguish between different types and purposes of electronic devices would quickly lose efficacy. The policy should be consistent with the U.S. District Court so that attorneys know what is expected regardless of which court is hearing a case. The policy must balance the legitimate need for attorneys to use electronic devices (such as a cell phone for scheduling or a laptop for file storage or presentations) with the mere convenience that electronic devices offer most users. The policy should also allow some flexibility in the event that a patron has need that this committee cannot foresee.

We proposed the following policy be adopted:

1. No electronic devices of any kind may be brought into the courthouse except:

    a. Attorneys appearing before the court;
    b. Court employees;
    c. Law enforcement or Department of Corrections employees;
    d. Electronic dictionaries for interpreters; or
    e. A device for which the patron has obtained written approval from the judge whose court the patron will be attending.

2. Members of the press may apply for an exception to this rule using the same procedure to request permission to take photographs in the courtroom. Consistent with the federal court, in the event that a high profile case is being heard, at the court's discretion a separate room may be arranged for the media in which electronic devices may be used.

3. Court security will not hold or store any electronic devices. Patrons who bring such devices to the courthouse will be required to return them to their vehicles or store them elsewhere. Notice should be posted to this effect along with the notices regarding weapons.

4. Jury instructions should be drafted to inform the jury of the restrictions regarding electronic media, including the ban of such media in the courthouse and the prohibition against utilizing any form of electronic media to research or communicate about the case. (There is an instruction in the civil section of MUJI II, #CV101B.)

5. The judiciary should recommend that the Legislature enact a statute making a juror's violation of these instructions a Class B misdemeanor. Jurors should be instructed of the possible penalty for failure to abide by the court's instructions.

Tab 11

Proposed Policy:

Possession and Use of Electronic Portable Devices in Court Facilities

(1) *Possession and use of electronic portable devices in courthouses.*

(A) Subject to the limitations herein, all persons granted entrance to the courthouse are permitted to possess and use, while inside the courthouse, any pager, laptop/notebook/personal computer, handheld PC, PDA, audio or video recorder, wireless device, cellular telephone, electronic calendar, and/or any other electronic device that can transmit, broadcast, record, take photographs or access the internet (hereinafter "electronic device").

(B) Persons possessing an electronic device may use that device while in common areas of the courthouse, such as lobbies and corridors, subject to further restrictions imposed by the Presiding Judge(s) as to the time, place, and manner of such use that are appropriate to maintain safety, decorum, and order.

(C) All electronic devices are subject to screening or inspection by court security officers at the time of entry to the courthouse and at any time within the environs of the courthouse in accordance with Rule 3-414.

(2) *Possession and use of electronic portable devices in courtrooms.*

(A) Inside courtrooms, persons may silently use an electronic device for any purpose consistent with this policy without obtaining prior authorization, subject to subsection (C), below.

(B) Persons may not use electronic devices to take photographs or for audio or video recording or transmission except as allowed in accordance with Rule 4-401 of the Rules of Judicial Administration.

(C) A judge may prohibit or further restrict use of electronic devices in his or her courtroom if they interfere with the administration of justice, disrupt the proceedings, pose any threat to safety or security, compromise the integrity of the proceeding, or threaten the interests of a minor.

(D) It should be anticipated that reporters, bloggers and other observers seated in the courtroom may use electronic devices to prepare and post online news accounts and commentary during the proceedings. Judges should instruct counsel

to instruct witnesses who have been excluded from the courtroom to not receive or view accounts of other witnesses' testimony prior to giving their testimony.

(E) This policy is applicable to attorneys, but may be expanded or restricted in the discretion of the judge presiding over the relevant proceeding. As officers of the court, attorneys may be subject to additional sanctions for violating this policy.

(3) *Additional limitations on juror possession and use of electronic portable devices.*

During trial and juror selection, prospective, seated, and alternate jurors are prohibited from researching and discussing the case they are or will be trying. Once selected, jurors shall not use an electronic device while in the courtroom and shall not possess an electronic device while deliberating.

(4) *Possession and use of electronic portable devices in court chambers.*

Persons may possess electronic devices in court chambers without obtaining prior approval, but may not use them in chambers without prior approval from the judge.

(5) *Miscellaneous*

(A) Nothing herein shall restrict in any way:

(i) the possession or use of electronic devices by judges, commissioners or courtroom personnel with prior approval of the judge presiding over the proceeding; or

(ii) the authority of judges or commissioners to permit others to possess or use electronic devices in chambers or administrative offices or during judicial ceremonial proceedings.

(B) All electronic devices are subject to confiscation and search by court personnel if the judge presiding over the proceeding has a reasonable basis to believe that a device is or will be used in violation of this policy. Violations may be subject to contempt of court.

Order 6. Broadcasting, Recording, or Photographing in the Courtroom

(a) Application - Exception. This Order shall apply to all courts, circuit, district, and appellate, except as set out below.

(b) Authorization. A judge may authorize broadcasting, recording, or photographing in the courtroom and areas immediately adjacent thereto during sessions of court, recesses between sessions, and on other occasions, provided that the participants will not be distracted, nor will the dignity of the proceedings be impaired.

(c) Exceptions. The following exceptions shall apply:

(1) An objection timely made by a party or an attorney shall preclude broadcasting, recording, or photographing of the proceedings;
(2) The court shall inform witnesses of their right to refuse to be broadcast, recorded, or photographed, and an objection timely made by a witness shall preclude broadcasting, recording or photographing of that witness;
(3) The following shall not be subject to broadcasting, recording, or photographing:

all juvenile matters in circuit court,

all probate and domestic relations matters in circuit court (e.g., adoptions, guardianships, divorce, custody, support, and paternity), and

all drug court proceedings.

(4) In camera proceedings shall not be broadcast, recorded, or photographed except with consent of the court;
(5) Jurors, minors without parental or guardian consent, victims in cases involving sexual offenses, and undercover police agents or informants shall not be broadcast, recorded, or photographed.

(d) Procedure. The broadcasting, recording, or photographing of any court proceeding shall comply with the following rules:

(1) The court shall direct that the news media representatives enter into a pooling arrangement for the broadcasting, recording, or photographing of a trial. Any representative of a news medium wanting to broadcast, record, or photograph court proceedings shall present to the court a written statement agreeing to share with other media representatives. The media pool shall select one of its members to serve as pool coordinator. The media pool shall establish its own procedures, not inconsistent with these rules or with the wishes of the court, and the pool coordinator shall arbitrate any problems that arise. If a problem arises that requires the assistance of the court, the pool coordinator alone shall be responsible for coordinating with the court. A plan for the placement of the broadcast equipment shall be prepared and filed by the pool coordinator, subject to the final approval of the court.

(2) The court shall retain ultimate control of the application of these rules over the broadcasting, recording, or photographing of a trial. Decisions made as to the details are final and are not subject to appeal. The court may in its discretion terminate the broadcasting, recording, or photographing at any time. Such a decision should not be made in an effort to edit the proceedings but only as one necessary in the interest of justice.

(3) The media pool may have two cameras in the courtroom during the course of a trial. One camera shall be used for still photography, and one camera shall be used for television photography. Both cameras shall remain in stationary positions outside the bar of the courtroom. Videotape recording and other electronic equipment not a component part of the cameras shall be located in an area remote from the courtroom to be designated by the court.

(4) One additional audio system for radio broadcasting shall be permitted provided that all microphones and related essential wiring will be unobtrusive and located in places designated in advance by the basic courtroom plan. The pool coordinator shall permit the installation of a pickup distribution box to be located outside the courtroom area to allow additional agencies access to the audio feed.

(5) Only television or photographic equipment that does not require distracting sound or light shall be employed to cover court proceedings. No artificial lighting device shall be employed in connection with television cameras. Any court approved alterations in existing lighting or wiring shall be accomplished by and at the expense of the media pool.

(6) Camera and audio equipment shall be installed or removed only when the court is not in session. Film changes shall not be made while court is in session. No audio equipment shall be used to record conversations between attorneys and clients or conversations between attorneys and the court held outside the hearing of the jury.

(7) Electronic devices shall not be used in the courtroom to broadcast, record, photograph, e-mail, blog, tweet, text, post, or transmit by any other means except as may be allowed by the court.

(8) If a court has its own broadcasting, recording, or photography system, the court's system shall be used, subject to the provisions of this Order, unless different or additional arrangements are necessary in the court's discretion.

(9) The Supreme Court and Court of Appeals may make audio and video recordings of oral arguments and other proceedings.

- A. Oral arguments and other appellate proceedings may be recorded, broadcasted or webcasted through a live or tape-delayed format as the Supreme Court shall direct. Commercial and educational broadcasters may be allowed to connect to the court's systems for recording or broadcasting proceedings subject to the court's requirements.
- B. Recordings will be maintained by the Clerk of the Supreme Court and the Court of Appeals and shall be retained until such time as the Supreme Court shall order their destruction. Copies of audio and video recordings may be made available to the public at a price representing the cost of copying as shall from time to time be established by the Supreme Court.
- C. An objection under subsection (c)(1) of this Order to the broadcasting, recording, or photographing of an oral argument or other appellate proceeding shall be made to the court, and the court in its discretion shall decide whether broadcasting, recording, or photographing will be permitted.

(e) Contempt. Failure to abide by any provision of this Order can result in a citation for contempt against the news representative and his or her agency.

History

History. Adopted July 5, 1993; amended May 24, 2001, effective July 1, 2001; amended and effective May 27, 2010, subsections (d)(7)-(9) added; amended July 27, 2011, effective August 1, 2011, subsection (c)(3).

Proposed New Pa.Rs.Crim.P. 626 and 627
Proposed Amendments to Pa.Rs.Crim.P.112, 631, and 647
Proposed Renumbering of Pa.R.Crim.P.630

INTRODUCTION

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania adopt new Rules 626 and 627, amend Rules 631, and 647, and renumber Rule 630 to provide for instructions to prospective and selected jurors concerning the use of personal communications devices during their service. The proposal also amends Rule 112 to clarify that the prohibition against broadcasting from the courtroom includes the use of cellphones and other similar electronic communications devices. This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The following explanatory Report highlights the Committee's considerations in formulating this proposal. Please note that the Committee's Reports should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the explanatory Reports.

The text of the proposed amendments to the rule precedes the Report. Additions are shown in bold and are underlined; deletions are in bold and brackets.

We request that interested persons submit suggestions, comments, or objections concerning this proposal in writing to the Committee through counsel,

Jeffrey M. Wasileski, Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
601 Commonwealth Avenue, Suite 6200
Harrisburg, PA 17106-2635
fax: (717) 231-9521
e-mail: criminalrules@pacourts.us

no later than Friday, April 6, 2012.

January 10, 2012 *BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:*

Philip D. Lauer, Chair

Anne T. Panfil
Counsel

Jeffrey M. Wasileski

Counsel

RULE 112. PUBLICITY, BROADCASTING, AND RECORDING OF PROCEEDINGS.

(A) The court or issuing authority shall:

(1) prohibit the taking of photographs, video, or motion pictures of any judicial proceedings or in the hearing room or courtroom or its environs during the judicial proceedings; and

(2) prohibit the transmission of communications by telephone, radio, television, or advanced communication technology **including but not limited to cellular telephones, or other electronic devices with communication capabilities,** from the hearing room or the courtroom or its environs during the progress of or in connection with any judicial proceedings, whether or not the court is actually in session.

The environs of the hearing room or courtroom is defined as the area immediately surrounding the entrances and exits to the hearing room or courtroom.

(B) **A court or issuing authority may permit the attorneys in a proceeding, their employees and agents, to make reasonable and lawful use of an electronic device in connection with the proceeding.**

(C) The court or issuing authority may permit the taking of photographs, or radio or television broadcasting, or broadcasting by advanced communication technology, of judicial proceedings, such as naturalization ceremonies or the swearing in of public officials, which may be conducted in the hearing room or courtroom.

[(C)] (D) Except as provided in paragraph (D), the stenographic, mechanical, or electronic recording, or the recording using any advanced communication technology, of any judicial proceedings by anyone other than the official court stenographer in a court case, for any purpose, is prohibited.

[(D)] (E) In a judicial proceeding before an issuing authority, the issuing authority, the attorney for the Commonwealth, the affiant, or the defendant may cause a recording to be made of the judicial proceeding as an aid to the preparation of the written record for subsequent use in a case, but such recordings shall not be publicly played or disseminated in any manner unless in a court during a trial or hearing.

[(E)] (F) If it appears to the court or issuing authority that a violation of this rule has resulted in substantial prejudice to the defendant, the court or issuing authority, upon application by the attorney for the Commonwealth or the defendant, may:

(1) quash the proceedings at the preliminary hearing and order another preliminary hearing to be held before the same issuing authority at a subsequent time without additional costs being taxed;

(2) discharge the defendant on nominal bail if in custody, or continue the bail if at liberty, pending further proceedings;

(3) order all costs of the issuing authority forfeited in the original proceedings; or

(4) adopt any, all, or combination of these remedies as the nature of the case requires in the interests of justice.

COMMENT: This rule combines and replaces former Rules 27 and 328.

"Recording" as used in this rule is not intended to preclude the use of recording devices for the preservation of testimony as permitted by Rules 500 and 501.

The prohibitions under this rule are not intended to preclude the use of advanced communication technology for purposes of conducting court proceedings.

Paragraph (A) was amended in 2011 to clarify that the prohibition against transmitting from the courtroom or environs includes transmission by cellular phone, personal communications device, computer, or any other electronic device that has communications capabilities or internet connectivity.

New paragraph (B) was added in 2011 to recognize that the court may allow use of electronic technology by the attorneys during the proceedings when such use is lawful and practicable.

Nothing in this rule is intended to preclude the use of cameras or other equipment operated by court personnel for the purpose of ensuring security in the courtroom.

NOTE: Former Rule 27, previously Rule 143, adopted January 31, 1970, effective May 1, 1970; renumbered Rule

27 September 18, 1973, effective January 1, 1974; amended February 15, 1974, effective immediately; *Comment* revised March 22, 1989, effective July 1, 1989; amended June 19, 1996, effective July 1, 1996; rescinded March 1, 2000, effective April 1, 2001, and replaced by Rule 112. Former Rule 328 adopted January 25, 1971, effective February 1, 1971; amended June 29, 1977 and November 22, 1977, effective as to cases in which the indictment or information is filed on or after January 1, 1978; *Comment* revised March 22, 1989, effective July 1, 1989; rescinded March 1, 2000, effective April 1, 2001, and replaced by Rule 112. New Rule 112 adopted March 1, 2000, effective April 1, 2001; amended May 10, 2002, effective September 1, 2002 **[.] ; amended , 2012, effective , 2012.**

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COMMITTEE EXPLANATORY REPORTS:

FORMER RULE 27:

Final Report explaining the June 19, 1996 amendments to former Rule 27 published with the Court's Order at 26 Pa.B. 3128 (July 6, 1996).

NEW RULE 112:

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules, and the provisions of Rule 112, published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the May 10, 2002 amendments published with the Court's Order at 32 Pa.B. ( ).

Report explaining the proposed amendments regarding the use of electronic devices for transmitting from the courtroom published for comment at 42 Pa.B. (2012).

RULE **[630] 625**. JUROR QUALIFICATION FORM, LISTS OF TRIAL JURORS, AND CHALLENGE TO THE ARRAY.

(A) JUROR QUALIFICATION FORM AND LISTS OF TRIAL JURORS.

(1) The officials designated by law to select persons for jury service shall:

(a) devise, distribute, and maintain juror qualification forms as provided by law;

(b) prepare, publish, and post lists of the names of persons to serve as jurors as provided by law;

(c) upon the request of the attorney for the Commonwealth or the defendant's attorney, furnish the list containing the names of prospective jurors prepared pursuant to paragraph (A)(1)(b); and

(d) make available for review and copying copies of the juror qualification forms returned by the prospective jurors.

(2) The information provided on the juror qualification form shall be confidential and limited to questions of the jurors' qualifications.

(3) The original and any copies of the juror qualification form shall not constitute a public record.

(B) CHALLENGE TO THE ARRAY.

(1) Unless opportunity did not exist prior thereto, a challenge to the array shall be made not later than 5 days before the first day of the week the case is listed for trial of criminal cases for which the jurors have been summoned and not thereafter, and shall be in writing, specifying the facts constituting the ground for the challenge.

(2) A challenge to the array may be made only on the ground that the jurors were not selected, drawn, or summoned substantially in accordance with law.

COMMENT: The qualification, selection, and summoning of prospective jurors, as well as related matters, are generally dealt with in Chapter 45, Subchapters A-C, of the Judicial Code, 42 Pa.C.S. §§ 4501-4503, 4521-4526, 4531-4532. "Law" as used in paragraph (B)(2) of this rule is intended to include these Judicial Code provisions. However,

paragraphs (B)(1) and (2) of this rule are intended to supersede the procedures set forth in Section 4526(a) of the Judicial Code and that provision is suspended as being inconsistent with this rule. *See* PA. CONST. art. V., § 10; 42 Pa.C.S. § 4526(c). Sections 4526(b) and (d)-(f) of the Judicial Code are not affected by this rule.

Paragraph (A) was amended in 1998 to require that the counties use the juror qualification forms provided for in Section 4521 of the Judicial Code, 42 Pa.C.S. § 4521. It is intended that the attorneys in a case may inspect and copy or photograph the jury lists and the qualification forms for the prospective jurors summoned for their case. The information on the qualification forms is not to be disclosed except as provided by this rule or by statute. This rule is different from Rule 632, which requires that jurors complete the standard, confidential information questionnaire for use during *voir dire*.

NOTE: Adopted January 24, 1968, effective August 1, 1968; *Comment* revised January 28, 1983, effective July 1, 1983; amended September 15, 1993, effective January 1, 1994; September 15, 1993 amendments suspended December 17, 1993 until further Order of the Court; the September 15, 1993 Order amending Rule 1104 is superseded by the September 18, 1998 Order, and Rule 1104 is amended September 18, 1998, effective July 1, 1999; amended May 14, 1999, effective July 1, 1999; renumbered Rule 630 March 1, 2000, effective April 1, 2000; amended March 28, 2000, effective July 1, 2000 **[.] ; renumbered Rule 625 , 2012, effective , 2012.**

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the September 15, 1993 amendments published at 21 Pa.B. 150 (January 12, 1991). Order suspending, until further Order of the Court, the September 15, 1993 amendments concerning juror information questionnaires published at 24 Pa.B. 333 (January 15, 1994).

Final Report explaining the September 18, 1998 amendments concerning juror information questionnaires published with the Court's Order at 28 Pa.B. 4887 (October 3, 1998).

Final Report explaining the May 14, 1999 amendments placing titles in paragraphs (A) and (B) published with the Court's Order at 29 Pa.B. 2778 (May 29, 1999).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the March 28, 2000 amendments concerning availability and confidentiality of the juror qualification forms published with the Court's Order at 30 Pa.B. (, 2000).

Report explaining the proposed renumbering of Rule 630 to Rule 625 published for comment at 42 Pa.B. (, 2011).

(This is an entirely new rule.)

RULE 626. PRELIMINARY INSTRUCTIONS TO PROSPECTIVE JURORS.

(A) For purposes of this rule, the term “prospective jurors” means those persons who have been chosen to be part of the panel from which the trial jurors and alternate jurors will be selected. The term “selected jurors” means those members of the panel who have been selected to serve as trial jurors or alternate jurors.

(B) Persons selected for jury service, upon their arrival for this service, shall be instructed in their duties while serving as prospective jurors and selected jurors.

(C) At a minimum, the persons selected for jury service shall be instructed that until their service as prospective or selected jurors is concluded, they shall not:

(1) discuss any case in which they have been chosen as prospective jurors or selected jurors with others, including other jurors, except as instructed by the court;

(2) read or listen to any news reports about any such case;

(3) use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation. These devices may be used during breaks or recesses but may never be used to obtain or disclose information prohibited in paragraph (C)(4);

(4) use a computer, cellular phone, or other electronic device with communication capabilities, or any other method, to obtain or disclose any information about any case in which they have been chosen as prospective or selected jurors. Information about the case includes, but is not limited to, the following:

(i) information about a party, witness, attorney, judge, or court officer;

(ii) news accounts of the case;

(iii) information on any topics raised or testimony offered by any witness;

(iv) information on any other topic the juror might think would be helpful in deciding the case.

(D) These instructions shall be repeated:

(1) to the prospective jurors at the beginning of *voir dire*;

(2) to the selected jurors at the commencement of the trial;

(3) to the selected jurors prior to deliberations; and

(4) to the selected jurors during trial as the trial judge deems appropriate.

COMMENT: This rule was adopted in 2011 in recognition of the fact that the proliferation of personal communications devices has provided individuals with an unprecedented level of access to information. This access has the potential for abuse by prospective jurors who might be tempted to perform research about a case for which they may be selected. Therefore, the rule requires that prospective jurors be instructed at the earliest possible stage as to their duty to rely solely on information presented in a case and to refrain from discussion about the case, either in person or electronically.

It is recommended that the juror summons also contain the language.

It also is recommended, as an additional means of ensuring adherence, that the judge explain to the prospective jurors the reason for these restrictions. This explanation should include a statement that, in order for the jury system to work as intended, absolute impartiality on the part of the jurors is necessary. Such impartiality is achieved by restricting the information upon which the jurors will base their decision to that which is presented in court.

NOTE: Adopted , 2012, effective , 2012.

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COMMITTEE EXPLANATORY <u>REPORTS</u>:

<u>Report</u> explaining new Rule 626 regarding instructions to prospective jurors published for comment at 42 Pa.B. (, 2012).

(This is an entirely new rule.)

RULE 627. SANCTIONS FOR USE OF PROHIBITED COMMUNICATIONS DEVICES.

Any individual who violates the provisions of Rule 112(A) prohibiting recording or broadcasting during a judicial proceeding or who violates the provisions of Rule 626 regarding the use of electronic devices by jurors or who violates any reasonable limitation imposed by a local rule or by the trial judge regarding the prohibited use of electronic devices during court proceedings:

(1) may be found in contempt of court and sanctioned in accordance with 42 Pa.C.S. §4132 *et seq*.; and

(2) may be subject to sanctions deemed appropriate by the trial judge, including, but not limited to, the confiscation of the electronic device that is used in violation of these rules.

COMMENT: This rule was adopted in 2011 to make clear that in addition to the penalties for contempt that may be imposed upon an individual who violates these rules or a court-imposed restriction on the use of electronic devices during court proceedings, such devices may be temporarily or permanently confiscated by the court.

NOTE: Adopted , 2012, effective , 2012.

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COMMITTEE EXPLANATORY <u>REPORTS</u>:

<u>Report</u> explaining new Rule 627 regarding sanctions for use of prohibited communications devices published for comment at 42 Pa.B. (, 2012).

RULE 631. EXAMINATION AND CHALLENGES OF TRIAL JURORS.

(A) *Voir dire* of prospective trial jurors and prospective alternate jurors shall be conducted, and the jurors shall be selected, in the presence of a judge, unless the judge's presence is waived by the attorney for the Commonwealth, the defense attorney, and the defendant, with the judge's consent.

(B) This oath shall be administered **by the judge** individually or collectively to the prospective jurors:

> "You do solemnly swear by Almighty God (or do declare and affirm) that you will answer truthfully all questions that may be put to you concerning your qualifications for service as a juror."

(C) Upon completion of the oath, the judge shall instruct the prospective jurors upon their duties and restrictions while serving as jurors, including those provided in Rule 626(C).

[(C)] (D) *Voir dire*, including the judge's ruling on all proposed questions, shall be recorded in full unless the recording is waived. The record will be transcribed only upon written request of either party or order of the judge.

[(D)] (E) Prior to *voir dire*, each prospective juror shall complete the standard, confidential juror information questionnaire as provided in Rule 632. The judge may require the parties to submit in writing a list of proposed questions to be asked of the jurors regarding their qualifications. The judge may permit the defense and the prosecution to conduct the examination of prospective jurors or the judge may conduct the examination. In the latter event, the judge shall permit the defense and the prosecution to supplement the examination by such further inquiry as the judge deems proper.

[(E)] (F) In capital cases, the individual *voir dire* method must be used, unless the defendant waives that alternative. In non-capital cases, the trial judge shall select one of the following alternative methods of *voir dire*, which shall apply to the selection of both jurors and alternates:

(1) INDIVIDUAL *VOIR DIRE* AND CHALLENGE SYSTEM.

(a) *Voir dire* of prospective jurors shall be conducted individually and may be conducted beyond the hearing and presence of other jurors.

(b) Challenges, both peremptory and for cause, shall be exercised alternately, beginning with the attorney for the Commonwealth, until all jurors are chosen. Challenges shall be exercised immediately after the

prospective juror is examined. Once accepted by all parties, a prospective juror shall not be removed by peremptory challenge. Without declaring a mistrial, a judge may allow a challenge for cause at any time before the jury begins to deliberate, provided sufficient alternates have been selected, or the defendant consents to be tried by a jury of fewer than 12, pursuant to Rule 641.

(2) LIST SYSTEM OF CHALLENGES.

(a) A list of prospective jurors shall be prepared. The list shall contain a sufficient number of prospective jurors to total at least 12, plus the number of alternates to be selected, plus the total number of peremptory challenges (including alternates).

(b) Prospective jurors may be examined collectively or individually regarding their qualifications. If the jurors are examined individually, the examination may be conducted beyond the hearing and presence of other jurors.

(c) Challenges for cause shall be exercised orally as soon as the cause is determined.

(d) When a challenge for cause has been sustained, which brings the total number on the list below the number of 12 plus alternates, plus peremptory challenges (including alternates), additional prospective jurors shall be added to the list.

(e) Each prospective juror subsequently added to the list may be examined as set forth in paragraph **[(E)(2)(b)]** **(F)(2)(b)**.

(f) When the examination has been completed and all challenges for cause have been exercised, peremptory challenges shall then be exercised by passing the list between prosecution and defense, with the prosecution first striking the name of a prospective juror, followed by the defense, and alternating thereafter until all peremptory challenges have been exhausted. If either party fails to exhaust all peremptory challenges, the jurors last listed shall be stricken. The remaining jurors and alternates shall be seated. No one shall disclose which party peremptorily struck any juror.

COMMENT: This rule applies to all cases, regardless of potential sentence. Formerly there were separate rules for capital and non-capital cases.

If Alternative **[(E)(1)]** **(F)(1)** is used, examination continues until all peremptory challenges are exhausted or until 12 jurors and 2 alternates are accepted. Challenges must be exercised immediately after the prospective juror is questioned. In capital cases, only Alternative **[(E)(1)]** **(F)(1)** may be used unless affirmatively waived by all defendants and the Commonwealth, with the approval of the trial judge.

If Alternative **[(E)(2)]** **(F)(2)**is used, sufficient jurors are assembled to total 12, plus the number of alternates, plus at least the permitted number of peremptory challenges (including alternates). It may be advisable to assemble additional jurors to encompass challenges for cause. Prospective jurors may be questioned individually, out of the presence of other prospective jurors, as in Alternative **[(E)(1)]** **(F)(1)**; or prospective jurors may be questioned in the presence of each other. Jurors may be challenged only for cause, as the cause arises. If the challenges for cause reduce the number of prospective jurors below 12, plus alternates, plus peremptory challenges (including alternates), new prospective jurors are called and they are similarly examined. When the examination is completed, the list is reduced, leaving only 12 jurors to be selected, plus the number of peremptories to be exercised; and sufficient additional names to total the number of alternates, plus the peremptories to be exercised in selecting alternates. The parties then exercise the peremptory challenges by passing the list back and forth and by striking names from the list alternately, beginning with counsel for the prosecution. Under this system, all peremptory challenges must be utilized. Alternates are selected from the remaining names in the same manner. Jurors are not advised by whom each peremptory challenge was exercised. Also, under Alternative **[(E)(2)]** **(F)(2)**, prospective jurors will not know whether they have been chosen until the challenging process is complete and the roll is called.

This rule requires that prospective jurors be sworn before questioning under either Alternative.

The words in parentheses in the oath shall be inserted when any of the prospective jurors chooses to affirm rather than swear to the oath.

Unless the judge's presence during *voir dire* and the jury selection process is waived pursuant to paragraph (A), the judge must be present in the jury selection room during *voir dire* and the jury selection process.

Pursuant to paragraph **[(D)] (E)**, which was amended in 1998, and Rule 632, prospective jurors are required to complete the standard, confidential juror information questionnaire prior to *voir dire*. This questionnaire, which facilitates and expedites *voir dire*, provides the judge and attorneys with basic background information about the jurors, and is intended to be used as an aid in the oral examination of the jurors.

The point in time prior to *voir dire* that the questionnaires are to be completed is left to the discretion of the local officials. Nothing in this rule is intended to require that the information questionnaires be mailed to jurors before they appear in court pursuant to a jury summons.

See Rule 103 for definitions of "capital case" and "*voir dire*."

NOTE: Adopted January 24, 1968, effective August 1, 1968; amended May 1, 1970, effective May 4, 1970; amended June 30, 1975, effective September 28, 1975. The 1975 amendment combined former Rules 1106 and 1107. *Comment* revised January 28, 1983, effective July 1, 1983; amended September 15, 1993, effective January 1, 1994. The September 15, 1993 amendments suspended December 17, 1993 until further Order of the Court; amended February 27, 1995, effective July 1, 1995; the September 15, 1993 Order amending Rule 1106 is superseded by the September 18, 1998 Order, and Rule 1106 is amended September 18, 1998, effective July 1, 1999; renumbered Rule 631 and amended March 1, 2000, effective April 1, 2001**[.] ; amended , 2012, effective , 2012.**

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

Report explaining the September 15, 1993 amendments published at 21 Pa.B. 150 (January 12, 1991). Order suspending, until further Order of the Court, the September 15, 1993 amendments concerning juror information questionnaires published at 24 Pa.B. 333 (January 15, 1994).

Final Report explaining the February 27, 1995 amendments published with the Court's Order at 25 Pa.B. 948 (March 18, 1995).

Final Report explaining the September 18, 1998 amendments concerning juror information questionnaires published with the Court's Order at 28 Pa.B. 4887 (October 3, 1998).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Report explaining the proposed amendment regarding instructions to the prospective jurors published for comment at 42 Pa.B. (, 2012).

RULE 647. REQUEST FOR INSTRUCTIONS, CHARGE TO THE JURY, AND PRELIMINARY INSTRUCTIONS.

(A) Any party may submit to the trial judge written requests for instructions to the jury. Such requests shall be submitted within a reasonable time before the closing arguments, and at the same time copies thereof shall be furnished to the other parties. Before closing arguments, the trial judge shall inform the parties on the record of the judge's rulings on all written requests and which instructions shall be submitted to the jury in writing. The trial judge shall charge the jury after the arguments are completed.

(B) No portions of the charge nor omissions from the charge may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate. All such objections shall be made beyond the hearing of the jury.

(C) After the jury has retired to consider its verdict, additional or correctional instructions may be given by the trial judge in the presence of all parties, except that the defendant's absence without cause shall not preclude proceeding, as provided in Rule 602.

(D) **The trial judge shall give instructions to the jurors as provided in Rule 626 before the taking of evidence.**

(E) The trial judge may give any **other** instructions to the jury before the taking of evidence or at anytime during the trial as the judge deems necessary and appropriate for the jury's guidance in hearing the case.

COMMENT: Paragraph (A), amended in 1985, parallels the procedures in many other jurisdictions which require that the trial judge rule on the parties' written requests for instructions before closing arguments, that the rulings are on the record, and that the judge charge the jury after the closing arguments. *See*, *e.g.*, Fed.R.Crim.P. 30; ABA Standards on Trial by Jury, Standard 15-3.6(a); Uniform Rule of Criminal Procedure 523(b).

Pursuant to Rule 646 (Material Permitted in Possession of the Jury), the judge must determine whether to provide the members of the jury with written copies of the portion of the judge’s charge on the elements of the offenses, lesser included offenses, and any defense upon which the jury has been instructed for use during deliberations.

Paragraph (D) was added in 2011 to require trial judges to instruct jurors that they are prohibited from using computers or cell phones at trial or during deliberation, and are prohibited from using a computer or other electronic device or any other method to obtain or disclose information about the case when they are not in the courtroom. The amendment prohibits jurors from reading about or listening to news reports about the case and prohibits discussion among jurors until deliberation.

Paragraph **[(D)] (E)**, added in 1985, recognizes the value of jury instructions to juror comprehension of the trial process. It is intended that the trial judge determine on a case by case basis whether instructions before the taking of evidence or at anytime during trial are appropriate or necessary to assist the jury in hearing the case. The judge should determine what instructions to give based on the particular case, but at a minimum the preliminary instructions should orient the jurors to the trial procedures and to their duties and function as jurors. In addition, it is suggested that the instructions may include such points as note taking, the elements of the crime charged, presumption of innocence, burden of proof, and credibility. Furthermore, if a specific defense is raised by evidence presented during trial, the judge may want to instruct on the elements of the defense immediately after it is presented to enable the jury to properly evaluate the specific defense. *See also* Pennsylvania Suggested Standard Criminal Jury Instructions, Chapter II.

It is also strongly recommended that the trial judge include general instructions on the appropriate procedures to be followed during deliberations.

NOTE: Rule 1119 adopted January 24, 1968, effective August 1, 1968; amended April 23, 1985, effective July 1, 1985; renumbered Rule 647 and amended March 1, 2000, effective April 1, 2001; *Comment* revised June 30, 2005, effective August 1, 2005; amended October 16, 2009,

effective February 1, 2010**[.]** **amended , 2012, effective , 2012.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the June 30, 2005 Comment revision concerning the note taking instruction published with the Court's Order at 35 Pa.B. 3917 (July 16, 2005).

Final Report explaining the October 16, 2009 changes adding to the Comment a cross-reference to Rule 646 published with the Court's Order at 39 Pa.B. (, 2009).

Report explaining the proposed amendment regarding the use of personal communications devices and computers by the jurors published for comment at 42 Pa.B. (, 2012).

REPORT

Proposed New Pa.Rs.Crim.P. 626, and 627
Proposed Amendments to Pa.Rs.Crim.P. 112, 631, and 647
Proposed Renumbering of Pa.R.Crim.P.630

PERSONAL COMMUNICATIONS DEVICES IN THE COURTROOM

I. INTRODUCTION

The Committee, in conjunction with the Civil Procedural Rules Committee, is planning to recommend that the Supreme Court of Pennsylvania adopt new Rules 626 (Preliminary Instructions to Prospective Jurors) and 627 (Sanctions for Use of Prohibited Communications Devices), amend Rules 631 (Examination and Challenges of Trial Jurors), and 647 (Request for Instructions, Charge to the Jury, and Preliminary Instructions), and renumber Rule 630 (Juror Qualification Form, Lists of Trial Jurors, and Challenge to the Array) to provide for instructions to prospective and selected jurors concerning the use of personal communications devices during their service. The proposal also amends Rule 112 (Publicity, Broadcasting, and Recording of Proceedings) to clarify that the prohibition against broadcasting from the courtroom includes the use of cellphones and other similar electronic communications devices.[1]

II. BACKGROUND

The increased use of personal communications devices, often with internet access, such as the iPhone and iPad, has raised new issues regarding their use in the courtroom. In July 2010, the Chief Justice wrote to the chairs of the Civil Procedural Rules Committee and the Criminal Procedural Rules Committee, noting a complaint received from a common pleas court judge of the problems arising from jurors' inappropriate use of electronic devices during their service as jurors. The Chief Justice requested both Committees consider whether any rule changes are warranted to address these problems.

Additionally, the Committees received reports of other problems arising from the use of these devices during trial. The most challenging of these arose from the

[1] The Civil Procedural Rules Committee proposal would create new Civil Rules 220.1 and 220.2, amend and renumber current Civil Rule 220.1, and amend current Civil Rule 223.1.

proliferation in the use of the devices accessing social media, such as microblogs like Twitter, that encourage the posting of "real-time" commentary, by audience members including members of the press and even trial participants.

Finally, recent cases have raised issues of the use of these devices by audience members for purposes of witness intimidation, such as the taking of witness photographs or posting of witness information on the internet to encourage fear of retaliation.

As a result, a Joint Subcommittee of the Civil and Criminal Rules Committees was formed to examine the issues that have arisen and determine if any procedural rules changes are needed to address these issues.[2] The Joint Subcommittee examined two aspects of this issue: (1) use of this technology by jurors; and (2) use by others. As described in more detail below, the Subcommittee recommended certain rules changes to address both of these areas. Both Committees approved the recommendations of the Joint Subcommittee for this joint publication.

III. USE OF PERSONAL COMMUNICATIONS DEVICES BY JURORS

The problems that arise with juror use of these devices are two-fold. The first danger is that a juror will use the device to conduct independent research during a trial. The second problem is the use of these devices to communicate with parties outside the courtroom, either by revealing the nature of the deliberations or other information that a juror should not divulge.

The Committees concluded that the best way to approach to this problem is through specially tailored jury instructions. Specific warnings should be provided to the prospective and selected jurors at the earliest possible stage of their interaction with the court with frequent repetitions. These warnings would prohibit conducting independent research and discussion of the case outside the deliberation room generally but also would contain specific warnings against the use of the Internet by means of cell phone or other electronic device for these prohibited activities.

[2] The Joint Subcommittee was comprised of representatives from both Committees and included a common pleas judge, two prosecutors, and several private practitioners.

Originally, the Subcommittee considered a simple elaboration in the juror instruction rules. However, given the ease of access to information that these devices provide, waiting until a juror is actually seated may be too late in the process. This conclusion was coupled with anecdotal reports that some jurors found to have misused these devices, when confronted, expressed surprise that a ban on outside information included "looking things up on the Internet." The Subcommittee therefore concluded that intervention, in the form of clear instructions, should be at the earliest stage possible.

The Committees agreed with this approach and are proposing rules to provide that prospective jurors be advised upon their first interaction with the courts with frequent repetition concerning the prohibited activity. This would include initial instructions when they first arrive as prospective jurors together with instructions on the juror summons itself. These instructions would be reiterated when they are selected as part of a jury "pool" and finally when they are impaneled jurors. There would also be encouragement to the trial judge to issue warnings at recesses to reinforce the restrictions.

The restriction on jurors would include a ban on the use of communications devices during court proceedings and in the deliberation room as well as specific instructions not to conduct research on the Internet.

Under this proposal, the most logical placement for new criminal rules would be in Chapter 6, Part C, Jury Procedures. In order to provide for sufficient room for the new rules, existing Rule 630 would be renumbered as Rule 625 and the new rules placed after it.

The major substantive provisions of this proposal would be included in a new criminal rule, Rule 626, that would describe the type of initial instructions to be given upon a prospective juror's first interaction with the courts and thereafter. Correlative amendments to Criminal Rule 631 would require that these warning would be repeated at the beginning of *voir dire* and amendments to Criminal Rule 647 would require the warnings to be repeated at the start of trial.[3]

[3] As described in more detail in the companion publication report from the Civil Rules Committee, there would also be changes to the Civil Rules that require similar (continued…)

IV. USE OF PERSONAL COMMUNICATIONS DEVICES BY OTHERS

The other aspect of this proposal is intended to address the use of personal communications devices by other participants in the trial or by members of the audience including members of the press.

As noted above, the Committees have received reports of the use of personal communications devices to broadcast messages from the courtroom during proceedings. The press has increasingly sought to use these new technologies, especially for microblogs such as "Twitter," to provide continuous, simultaneous reports while a court proceeding is in progress.

Even though this type of activity would seem to fall within the Rule 112 prohibition on broadcasting, there has been considered confusion and a divergence among several counties. For example, Westmoreland County forbids "tweeting" from the courtroom in criminal cases as a violation of Criminal Rule 112's prohibition of broadcasting during judicial proceedings while a Dauphin County trial judge permitted reporters' "tweeting" during a public corruption trial. Most recently, two orders from Centre and Dauphin County permitted texting and "tweeting" from the preliminary hearings arising a child sexual abuse case.

There have been cases in other jurisdictions in which judges had "tweeted" during certain proceedings that resulted in challenges being raised because of the alleged prejudice demonstrated by the "tweets." There also are reports of parties to cases "tweeting" during the trial.

Far less benign is the use of these devices by audience members for the purpose of intimidating witnesses. Reported use of cameras on cell phones to record a witness as well as the posting of other identifying information has become a problem. While this occurs most frequently in criminal cases, there is a potential for it to occur in the civil context such as in a domestic relations case.

The Criminal Rules Committee understands, appreciates, and is supportive of the constitutional imperative of having court proceedings open to the public. However,

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(…continued)
instructions to be provided civil jurors and are meant to mirror the proposed Criminal Rules.

a balance must be struck between the public's right to observe and be informed of court proceedings and the equally important rights of the participants in the proceedings as well as the orderly administration of justice.

The original ban on broadcasting from court proceedings, presently contained in Rule 112, was established in then-Rules 27 and 328 as part of the original promulgation of the Rules of Criminal Procedure. Among the concerns that prompted the development of this restriction were the disruptive effect that broadcasting would have on the proceedings, the potential for biasing jurors, the potential to influence witness testimony, the possibility of "grandstanding" by the trial judge and/or other participants, and the threat to dignity and decorum of the process of justice in which individuals' liberty and even life are in the balance.[4]

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[4] This is consistent with Canon 3.7 of the Pennsylvania Code of Judicial Conduct that states:

(7) Unless otherwise provided by the Supreme Court of Pennsylvania, judges should prohibit broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings; and

(ii) the parties have consented; and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproductions; and

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

(d) the use of electronic broadcasting, televising, recording and taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions of any trial court nonjury civil proceeding, however, for the purposes of this subsection 'civil proceedings' shall not be construed to mean a support, custody or divorce proceeding. Subsection

(continued…)

The Committee is aware that the trend in the United States has been to allow a wide scope of broadcasting of court proceedings. Observation of recent experiences from jurisdictions where broadcasting, in a variety of forms, was permitted has not diminished the concerns that led to Rule 112 and its predecessors.

The Committee examined with particularity whether the use of the new technology falls within the existing language of Rule 112. Rule 112 currently prohibits "the transmission of communications by telephone, radio, television, or advanced communications technology." The term "advance communications technology"[5] was added to Rule 112 in 2002 in an attempt to anticipate new developments in technology and is defined in Rule 103 as:

> …any communication equipment that is used as a link between parties in physically separate locations, and includes, but is not limited to: systems providing for two-way simultaneous communication of image and sound; closed-circuit television; telephone and facsimile equipment; and electronic mail.

The Committee concluded that there is no other interpretation than that the use of personal communications devices during court proceedings falls within the existing language of Rule 112. The Committee believes that any interpretation that excludes technology such as "tweeting" or other microblogging or other similar technology from Rule 112's prohibition of broadcasting is a misinterpretation.

The Joint Subcommittee and the Criminal Rules Committee also examined the arguments that have been raised in favor of the allowing the use of this new form of

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(…continued)

> (iii) and (iv) shall not apply to nonjury civil proceedings as heretofore defined. No witness or party who expresses any prior objection to the judge shall be photographed nor shall the testimony of such witness or party be broadcast or telecast. Permission for the broadcasting, televising, recording and photographing of any civil nonjury proceeding shall have first been expressly granted by the judge, and under such conditions as the judge may prescribe in accordance with the guidelines contained in this Order.

[5] It should be noted that the Criminal Rules make a distinction between "advanced communication technology" and "two-way audio-visual communication." The first term is a much broader in scope while the latter term is used more specifically and usually in the context of a defendant's participation in court proceedings from a remote location.

technology as an exception to the general ban on broadcasting. It has been argued that this technology is qualitatively different from traditional broadcasting, being less disruptive or intrusive in effect.

The Committee rejected this argument, noting that there are other reasons for the ban on broadcasting, including fair trial and privacy concerns. Furthermore, an exception for this particular form of technology would undermine the clear delineation currently existing in Rule 112 while being difficult to police against abuse.

Therefore, the Committee is proposing that an amendment should be added to Criminal Rule 112 clarifying that "broadcasting" includes the use of personal communications devices and activities such as texting and "tweeting" would fall within its prohibition.[6]

As stated in the *Comment*, Rule 112 is not intended to prohibit the use of advanced communications technology for purposes of conducting court proceedings. The Committee did not want to restrict the use of this technology by attorneys who were trying cases in courtrooms that accommodated these technologies, for example to obtain information while examining witnesses or during the *voir dire* of jurors. This concept would be added as new paragraph (B) to Rule 112.

Finally, included in the Rule 112 *Comment* would be a clarification that the prohibition on broadcasting would not include the use of cameras or other devices for security purposes.

V. SANCTIONS

Another area that the Committees considered was what types of sanctions would be available against those who violate this rule, both jurors and others. It was concluded that the most likely enforcement mechanism would be the contempt of court process with the associated sanctions. However, the Committees wanted to make it clear that the judge has power to confiscate a device that was used to violate the

[6] In the companion publication report from the Civil Rules Committee, there is no equivalent to the proposed amendments to Criminal Rule 112. That is because the Civil Rules were amended in 1975 to remove the civil equivalent of Rule 112. The reason for its removal at that time was the conclusion that the prohibition was already covered in the Judicial Canon 3.7 and the Civil Rule unnecessary.

restrictions. Accordingly, the Criminal Rules Committee is proposing new Criminal Rule 627 to authorize the judge to hold someone in contempt for violation of the rules and to confiscate a device that is used to violate the rules.[7]

[7] As contained in the companion publication report from the Civil Rules Committee is proposing new Civil Rule 220.2 that would allow for any person who violates Rule 220.1 to be found in contempt of court and sanctioned in accordance with Section 4132 of the Judicial Code. In addition, the trial judge may also sanction a violator as appropriate including confiscation of the electronic device.

PENNSYLVANIANS
FOR MODERN COURTS

April 4, 2012

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Jeffrey M. Wasileski, Counsel
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Criminal Procedural Rules Committee
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Dear Mr. Wasileski:

We appreciate the efforts of the Rules Committees to deal with the difficult challenges that new technologies and media create for courtroom and jury management, and we appreciate the opportunity to submit these comments.

Pennsylvanians for Modern Courts ("PMC") is statewide nonpartisan court reform organization.[1] Part of our work is focused on the jury system, with the goals of encouraging more citizens to serve when called, ensuring our jury pools reflect the diversity of the communities from which they are drawn, and helping to make jury service a more positive and satisfactory experience.

On January 10, 2012, Pennsylvania's Criminal Procedural Rules Committee published a report recommending that the state Supreme Court implement new or clarify existing rules prohibiting the use of personal communications devices in courtrooms during criminal proceedings. The Committee proposed this "smartphone" ban in order to regulate the courtroom activities of two distinct groups: jurors and courtroom spectators.

In recent years, the use of personal communication devices by each group has led to some challenges with the practical administration of justice. For jurors, the ban is meant to guard against the "danger that a juror will use the device to conduct independent research during a trial" or to "[reveal] the nature of the deliberations or other information that a juror should not divulge." For spectators, the Committee mainly hopes to prevent future instances of the use of smartphones to intimidate

[1] PMC is a nonprofit, nonpartisan court reform organization working to ensure that all Pennsylvanians can come to our state courts for justice with confidence that the most qualified, fair and impartial judges will preside over their cases. PMC functions as a court watchdog, identifying and speaking out on issues that impact the public's confidence in our courts.

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witnesses, by using camera phones to take pictures of a witness or send out other sensitive identifying information.

Jurors

We believe the proposed rules regarding jurors are a reasonable solution to the problems posed when jurors seek to communicate about the trial electronically or seek to use electronic devices to do outside research about subjects raised during the trial. The proposed rules specifically combat problems cited in the report where jurors expressed surprise that a judge's general admonitions included "looking things up on the internet".

We believe it is critical, however, that jurors understand why these restrictions are being imposed. The rules do recommend that the judge explain this, and we urge that model instructions be developed that would explain to jurors the history of the sanctity of the jury room, the sometimes confusing principle that not all relevant information is always admissible at trial, and a reiteration of the rule that the only information that constitutes evidence for the jury to consider is the testimony and exhibits admitted at trial. When jurors understand the reason for the restrictions, they are likely to be more willing to adhere to the restrictions. We further believe it would also be helpful for the judge to explain that jurors are not the only ones restricted in their electronic communications; there are limits on what the judge, court personnel, lawyers and parties may do as well.

PMC agrees that juror impartiality is paramount and that these restrictions on jurors' use of electronic devices are not overly burdensome. We also agree that specific and early jury instructions, as well as frank explanations of their purpose, are the best way to educate members of the public who have become accustomed to frequently using social media, lack basic knowledge of the legal system, but nonetheless would be good jurors.

We suggest that sequestered witnesses be given the same early, specific instructions against the improper uses of smartphone technology during a trial.

Trial Spectators

PMC appreciates that the Rules Committees proposed a "smartphone ban" in an effort to "balance . . . the public's right to observe and be informed of court proceedings and the equally important rights of the participants in the proceedings as well as the orderly administration of justice." However, we believe that an absolute ban on smartphones in the courtroom is not the solution and needlessly burdens the overwhelming majority of individuals using these devices legitimately, responsibly, with no disruptive effects on the court and in service to the goal of keeping our courts open.

We believe that the blanket ban against broadcasting trial proceedings, whether through microblogging like Twitter or other services, deprives the public of important avenues for following trials and other courtroom proceedings. At a minimum, we recommend that an exception should be made in the rules for credentialed members of the press. Reporters should be permitted to blog, tweet, or merely communicate with their colleagues from the courtroom as a public service, and reasonable rules could be devised to delineate certain areas of the courtroom where such activity would be permitted. In addition, noncredentialed "reporters" and spectators should be permitted to blog and tweet, provided they are willing to identify themselves and the website/twitter feed their work will appear on and adhere to courtroom rules.

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People get their news from many sources today; blogs and twitter feeds break very important news, often related to court proceedings. Depriving Pennsylvanians of this resource is hindering access to the courts.

We discuss in turn why we believe the Committee's various justifications for imposing the blanket ban are not sufficiently compelling.

Witness intimidation

Witnesses are an indispensable element of any criminal justice system. They sacrifice their own time and energy, sometimes enduring accusatory cross-examination and even physical intimidation. They generally receive nothing in return except the satisfaction of trying to see justice be done and the community made a little bit safer. Given the heavy burden we already place on witnesses who do their part, and the need to encourage others to do so, we commend the Rules Committee for its deep concern for the interests of witnesses in this matter.

Although witness intimidation is a serious problem, this blanket ban on smartphone use is not the solution. The solution is better protection for witnesses and more serious prosecution of those who seek to intimidate witnesses. Judges have the ability to control conduct in the courtrooms, and posting an extra staff person to supervise the trial spectators for inappropriate behavior during the testimony of known vulnerable witnesses does not seem unreasonable or excessive.

Use of smartphones should be prohibited at the discretion of the judge at the request of particular witnesses or the attorneys, agreement of the parties, or in certain categories of cases.

Disruptiveness

The report also relies on the fact that, except for certain programs for televising appellate court arguments, there is already a ban on broadcasting from the courtroom. Most of these broadcasting rules, however, envisioned actual televising and audiocasting of court proceedings when broadcasting technology was inherently disruptive to the functioning of the court. The report recognizes the argument that modern smartphone technology is "qualitatively different from traditional broadcasting, being less disruptive or intrusive in effect". It fails, however, to explain its dismissal of this argument. It is difficult to understand how spectators looking down and silently messaging on their smartphones could disrupt the courtroom proceedings.

In practice, we think that banning smartphones may actually be more disruptive, leading to more reporters leaving and re-entering the courtroom to relay the more dramatic moments of a trial.

Other rationales for blanket ban on broadcasting

The report argues that "[a]mong the concerns that prompted the development of [the ban on broadcasting] were... the potential for biasing jurors, the potential to influence witness testimony, the possibility of "grandstanding" by the trial judge and /or other participants, and the threat to the dignity and decorum of the process of justice..."

We do not believe that the use of personal communication devices increases the threat of these dangers. The same rationale was used for years to ban televising of appellate court arguments. Pennsylvania has been a leader in having its appellate court arguments televised and has recently made Pennsylvania Supreme Court arguments publicly accessible through the Pennsylvania Cable Network.

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Trial judges have always had the authority and discretion to control their courtrooms; rather than a blanket rule banning smartphone use, the better course is to start with a presumption of openness and public access and allow individual judges to address problems as they arise.

In conclusion, we recognize that modern communications technology has some potential to be abused in courtrooms. We worry, however, that this report's blanket ban on broadcasting needlessly restricts the public's meaningful access to observe courtrooms in action.

Thank you again for the opportunity to submit these comments.

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Executive Director

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Deputy Director

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Massachusetts Supreme Judicial Court Rule 1:19: Cameras in the Courts

[Disclaimer]

Text of Rule effective until July 1, 2012. For rule effective July 1, 2012, see below.

A judge shall permit broadcasting, televising, electronic recording, or taking photographs of proceedings open to the public in the courtroom by the news media for news gathering purposes and dissemination of information to the public, subject, however, to the following limitations:

(a) A judge may limit or temporarily suspend such news media coverage, if it appears that such coverage will create a substantial likelihood of harm to any person or other serious harmful consequence.

(b) A judge should not permit broadcasting, televising, electronic recording, or taking photographs of hearings of motions to suppress or to dismiss or of probable cause or voir dire hearings.

(c) During the conduct of a jury trial, a judge should not permit recording or close-up photographing or televising of bench conferences, conferences between counsel, or conferences between counsel and client. Frontal and close-up photography of the jury panel should not usually be permitted.

(d) A judge should require that all equipment is of a type and positioned and operated in a manner which does not detract from the dignity and decorum of the proceeding. Only one stationary, mechanically silent, video or motion picture camera, and, in addition, one silent still camera should be permitted in the courtroom at one time. The equipment and its operator usually should be in place and remain so as long as the court is in session, and movement should be kept to a minimum, particularly, in jury trials.

(e) A judge should require reasonable advance notice from the news media of their request to be present to broadcast, to televise, to record electronically, or to take photographs at a particular session. In the absence of such notice, the judge may refuse to admit them.

(f) A judge may permit, when authorized by rules of court, the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, for other purposes of judicial administration, or for the preparation of materials for educational

purposes.

(g) A judge should not make an exclusive arrangement with any person or organization for news media coverage of proceedings in the courtroom.

(h) Any party seeking to prevent any of the coverage which is the subject of this Rule may move the court for an appropriate order, but shall first deliver written or electronic notice of the motion to the Bureau Chief or Newspaper Editor or Broadcast Editor of the Associated Press, Boston, as seasonably as the matter permits. The judge shall not hear the motion unless the movant has certified compliance with this paragraph; but compliance shall relieve the movant and the court of any need to postpone hearing the motion and acting on it, unless the judge, as a matter of discretion, continues the hearing.

(i) A judge entertaining a request from any news medium pursuant to paragraph (e) may defer acting on it until the medium making the request has seasonably notified the parties and the Bureau Chief or Newspaper Editor or Broadcast Editor of the Associated Press, Boston.

(j) A judge hearing any motion under this rule may reasonably limit the number of counsel arguing on behalf of the several interested media.

Text of Rule effective July 1, 2012. For rule effective until July 1, 2012, see above.

Massachusetts Supreme Judicial Court Rule 1:19: Electronic Access to the Courts

1. Covert photography, recording or transmission prohibited. No person shall take any photographs, or make any recording or transmission by electronic means, in any courtroom, hearing room, office, chambers or lobby of a judge or magistrate without prior authorization from the judge or magistrate then having immediate supervision over such place.

2. Electronic access by the news media. A judge shall permit photographing or electronic recording or transmitting of courtroom proceedings open to the public by the news media for news gathering purposes and dissemination of information to the public, subject to the limitations of this rule. Subject to the provisions of paragraph (d), the news media shall be permitted to possess and to operate in the courtroom all devices and equipment necessary to such activities. Such devices and equipment include, without limitation, still and video cameras, audio recording or transmitting devices, and portable computers or other electronic devices with communication capabilities.

The "news media" shall include any authorized representative of a news organization that has

registered with the Public Information Officer of the Supreme Judicial Court or any individual who is so registered. Registration shall be afforded to organizations that regularly gather, prepare, photograph, record, write, edit, report or publish news or information about matters of public interest for dissemination to the public in any medium, whether print or electronic, and to individuals who regularly perform a similar function, upon certification by the organizations or individuals that they perform such a role and that they will familiarize themselves or their representatives, as the case may be, with the provisions of this rule and will comply with them.

In his or her discretion, a judge may entertain a request to permit electronic access as authorized by this rule to a particular matter over which the judge is presiding by news media that have not registered with the Public Information Officer.

(a) Substantial likelihood of harm. A judge may limit or temporarily suspend such access by the news media if it appears that such coverage will create a substantial likelihood of harm to any person or other serious harmful consequence.

(b) Limitations. A judge shall not permit:

(i) photography or electronic recording or transmission of voir dire hearings concerning jurors or prospective jurors.

(ii) electronic recording or transmission of bench and side-bar conferences, conferences between counsel, and conferences between counsel and client; or

(iii) frontal or close-up photography of jurors and prospective jurors.

A judge may impose other limitations necessary to protect the right of any party to a fair trial or the safety and well-being of any party, witness or juror, or to avoid unduly distracting participants or detracting from the dignity and decorum of the proceedings.

If the request is to record multiple cases in a session on the same day, a judge, in his or her discretion, may reasonably restrict the number of cases that are recorded to prevent undue administrative burdens on the court.

(c) Minors and sexual assault victims may not be photographed without the consent of the judge.

(d) Positioning of equipment. All equipment and devices shall be of a type and positioned and operated in a manner which does not detract from the dignity and decorum of the proceeding. Unless the judge permits otherwise for good reason, only one stationary, mechanically silent video camera shall be used in the courtroom for broadcast television, a second mechanically silent video camera shall be used for other media, and, in addition, one silent still camera shall be used in the courtroom at one time. Unless the judge otherwise permits, photographic equipment and its operator shall be in place in a fixed position within the area designated by the judge and remain there so long as the

court is in session, and movement shall be kept to a minimum, particularly in jury trials. The operator shall not interrupt a court proceeding with a technical problem.

(e) Advance notice. A judge may require reasonable advance notice from the news media of their request to be present to photograph or electronically record or transmit at a particular session. In the absence of such notice, the judge may refuse to admit them. A judge may defer acting on such a request until the requester has seasonably notified the parties and, during regular business hours, the Bureau Chief or News Editor of the Associated Press, Boston, using the email address of apboston@ap.org A judge hearing any motion under this rule may reasonably limit the number of counsel arguing on behalf of the several interested media.

(f) Non-exclusive access. A judge shall not make an exclusive arrangement with any person or organization for news media coverage of proceedings in the courtroom. If there are multiple requests to photograph or electronically record the same proceeding, the persons making such requests must make arrangements among themselves for pooling or cooperative use and must do so outside of the courtroom and before the court session without judicial intervention.

(g) Objection by a party. Any party seeking to prevent any of the coverage which is the subject of this rule may move the court for an appropriate order, but shall first deliver electronic notice of the motion during regular business hours to the Bureau Chief or News Editor of the. Associated Press, Boston, using the email address of apboston@ap.org as seasonably as the matter permits. The judge shall not hear the motion unless the movant has certified compliance with this paragraph, but compliance shall relieve the movant and the court of any need to postpone hearing the motion and acting on it, unless the judge, as a matter of discretion, continues the hearing.

3. Other recordings. A judge may permit the use of electronic or photographic means for the presentation of evidence or the perpetuation of a record when authorized by law, for other purposes of judicial administration, or for the preparation of materials for educational or ceremonial purposes.

4. Definitions. For purposes of this rule, the term "judge" shall include a magistrate presiding over a proceeding open to the public. The term "minor" shall be defined as a person who has not attained the age of eighteen.

As amended February 28, 2012, effective July 1, 2012.

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