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TELEVISION CAMERAS IN COURT

by Mark Sableman

We live in an age of video and electronics. Knowledge workers, the majority of the U.S. workforce, spend most of their days working on computers and computer networks. Video conferences across borders bring business partners together for discussion. People see news from around the globe through television, and millions of videos through cable, satellite, and various video on-demand sources, including Internet services like YouTube. When something important happens in someone's own life, he or she pulls out a camera or smartphone and takes a video of that event. Electronic video, in short, is omnipresent. It is one of our primary means for recording, sharing, learning, and understanding what happens in our world.

Courts long ago joined the electronic and video age. Lawyers file documents, and courts maintain their dockets, electronically. Courtrooms are outfitted with large computer monitors, which are frequently used for visual displays and video playback. Criminal defendants often appear in court through live video links. Day-in-the-life videos, animations, and video witness statements are submitted as evidence at trial, and featured in opening statements and closing arguments. Video depositions are commonplace

and almost routine in most major civil cases. Those depositions are played back in video at trials, either as substitutes for live testimony or as snippets of very effective impeachment when a live witness departs from his or her prior video deposition testimony. Trial judges probably deal more frequently with video and electronic information than most other professionals.

Yet, one aspect of video technology— video news reporting of those important courtroom proceedings— continues to lag. Burdened by history, misunderstanding, suspicions, and, admittedly, a number of legitimate concerns, the courtroom remains surprisingly dark to video news reporting. Judges, lawyers, and journalists are still working to open up this important area of life and government to full video reporting.

The *Estes* and *Sheppard* Cases

Two infamous trials of the 1960s, of Billie Sol Estes and Sam Sheppard, provide the essential background for any understanding of cameras in U.S. courtrooms. Both involved inflammatory allegations against high-profile defendants, and each case would have commanded extensive public attention even without cameras in court.

In both cases, state judges and an eager news media, both feeling their way in the nearly unprecedented situations of televised trials, made the proceedings sensational and carnival-like. In retrospect, it is not surprising that these two cases essentially shut the door on televised trials for several decades.

Even before television, of course, there was radio, and that medium's foray into trial coverage helped to create a hostile environment for its sister medium, television. The 1935 trial of Bruno Hauptmann, accused of kidnapping the baby of Charles and Anne Morrow Lindbergh, attracted scores of radio reporters and commentators, and multiple stations filled their airtime with periodic trial bulletins, reenactments, and interviews of that so-called Trial of the Century. The media's overall lack of objectivity (reflecting that of many others, for Hauptmann had clearly lost in the court of opinion before his judicial trial began), and the carnival atmosphere of the trial, led attorney organizations to work against media coverage of trials.

The American Bar Association's committee on professional ethics condemned "direct radio broadcasting of court proceedings" in 1941, and in 1952 the ABA House of Delegates adopted a resolution concluding that televised court proceedings "detract from the essential dignity of the proceeding, distract participants and witnesses in giving testimony, and create misconceptions" and hence should not be permitted. Most states enacted the ABA-proposed Canon 35 banning televised trials.

In 1963, however, Texas gave its trial judges dis-

cretion over television in court, and the exercise of that discretion led to the landmark case *Estes v. Texas*, 381 U.S. 532 (1965). Billie Sol Estes, the defendant, was accused of an elaborate financial fraud involving sale and financing of fertilizer tanks, many of which never existed. Because of extensive pretrial publicity, his trial was initially moved five hundred miles to a different county. But media entities went to the new venue, and at pretrial hearings, set up multiple cameras, lights, cables, and microphones, and treated the courtroom as an ordinary news venue. By trial, the media presence was better hidden, behind a special booth designed to blend in with the courtroom, and live broadcasting was permitted only of opening and closing statements and the rendering of the jury's verdict.

Estes was convicted, and he claimed on appeal that the television broadcasts of the pretrial hearing, and the videotaping of his trial, prejudiced his rights. In an opinion written by Justice Tom Clark, the Supreme Court agreed, finding multiple disconnects between the purpose of criminal trials and the practices of broadcast journalists in the *Estes* proceeding:

- The televising of the pretrial hearing colored the case in the public's eye and must have affected several of the trial jurors, who saw those broadcasts.
- While trials are public, journalistic tools can be excluded; "the news reporter is not permitted to bring his typewriter or printing press." Reporters can report "whatever occurs in open court" even if cameras are not allowed.
- Trials demand a dignified atmosphere.

- Television may have affected the court and jury in many different ways. Jurors could have been distracted. Witnesses might have been frightened, emboldened, embarrassed, or otherwise affected; their testimony might be changed, or they might not appear. Finally, the judge may have been affected, and where judges are elected, there is the risk that “the telecasting of a trial becomes a political weapon.”
- Even the defendant or his counsel may have been affected, particularly as television focuses on “the inevitable close-ups of his [a defendant’s] gestures and expressions during the ordeal of his trial.”

For all of these reasons, the Court concluded that, at least in the circumstances of the *Estes* trial, the television coverage prejudiced the trial, even though “one cannot put his finger on its [television’s] specific mischief and prove with particularity wherein he [Estes] was prejudiced.” The ruling came with a 5–4 split, however, and five different opinions, most focused on the particular facts of the case. As two justices noted, it did not rule out televising of trials in other circumstances.

The Sam Sheppard case a few years later presented different circumstances, but hardly benign ones. Sheppard, a prominent Cleveland physician, was accused of the murder of his wife, and the case quickly drew the spotlight of the sensationalized press. The initial coroner’s inquiry, held in a gymnasium, attracted “a swarm of reporters and photographers.” The media, led by the Cleveland Press, hyped the case at every stage. The trial began two weeks

before the November election in which both the chief prosecutor and the trial judge were on the ballot. Most of the seats in the courtroom were given to the media, and one television station was allowed to broadcast from a room next to the jury room. Every juror but one testified at voir dire to having read or heard stories about the case in the media. And some of that pretrial publicity was particularly inflammatory and prejudicial, such as unverified reports of the defendant having had affairs or having admitted guilt.

Sheppard was convicted, but his case reached the Supreme Court on a habeas corpus petition, and in 1966 the Court set aside his conviction, on the grounds that the pretrial media coverage, and the court’s ineffective ways of ensuring impartiality, prejudiced the case. The Court’s unanimous decision was less a condemnation of broadcast coverage of trials than a prescription for courts as to how to ensure the impartiality demanded by the Constitution and the Fifth and Sixth Amendments.

Justice Clark, again writing for the Court, acknowledged the role of the press “as the handmaiden of effective judicial administration.” Its news coverage informs the public, and subjects all participants “to extensive public scrutiny and criticism.” For these reasons, courts are unwilling to constrain the media. But they are nonetheless obligated to ensure that the jury’s verdict is “based on evidence received in open court, not from outside sources.”

The Sheppard trial clearly failed in that respect. Jurors inevitably saw much of the news cover-

age of the case. The judge suggested but did not command that they avoid it. And by failing to insulate jurors from the reporters and photographers, he essentially “thrust” them in to “the role of celebrities.” “Bedlam” reigned at the trial, depriving the defendant of the “calm” he deserved. The media takeover of the courtroom overtook the jurors’ privacy. And evidence showed that jurors heard, and were probably influenced by, highly prejudicial pretrial news reports.

Justice Clark then laid down new guidelines for trial judges—directions they should follow in order to control the courtroom and create the right atmosphere and the right impartiality:

- Judges must control the courtroom and its premises and can reasonably limit attendance and conduct of news reporters.
- Witnesses should be insulated from the media.
- The court should attempt to control prejudicial pretrial publicity from police, prosecutors, witnesses, and others. In particular, the court could have “proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or to take any lie detector tests.”
- The court could have attempted to persuade reporters to restrain themselves, especially with respect to unverified accounts, prejudicial stories, and information not disclosed at trial.

- The court should consider delay, change of venue, and other steps.

Because the judge in the *Sheppard* case “did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom,” Sheppard’s conviction was set aside.

Not surprisingly, after the *Estes* and *Sheppard* decisions, television coverage of trials essentially halted. In 1972, the American Bar Association reaffirmed its opposition to television in courtrooms, then expressed in Canon 3A(7) of the *Canons of Judicial Ethics*. Most states adopted blanket rules against such coverage, giving no room for their trial judges to preside over circus-like proceedings such as occurred in those cases.

Chandler v. Florida

Even in the blackout period of the 1970s, the news and broadcasting industries were changing, too, and by the 1980s, the time came for the Supreme Court to revisit cameras in court. The Conference of State Chief Justices in 1978 opened the door by suggesting that each state promulgate its own rules and guidelines for radio, television, and other photographic coverage of court proceedings.

Florida took the lead, in 1976, with an experimental program for televising trials, initially with the consent of all parties, and later on a pilot basis, with the media “subject to detailed standards with respect to technology and the

conduct of operators.” Early in the pilot period, two Miami Beach police officers, Noel Chandler and Robert Granger, were charged with various crimes arising out of a break-in at a south Miami Beach restaurant. Local broadcast media sought to cover the trial and were allowed to do so. One video camera recorded the events of an afternoon of trial and the closing arguments. Only a few minutes of the trial were broadcast. The defendants were found guilty, and they appealed on the grounds that the television coverage denied them a fair trial.

When the case reached the Supreme Court, Chief Justice Warren Burger began the Court’s decision by noting that *Estes* had announced no *per se* rule classifying the televising of criminal trials as inherently a due process violation. On examination, that ruling “does not stand as an absolute ban on state experimentation with an evolving technology.”

Unburdened by any *per se* rule from *Estes*, the Court went on to examine afresh television coverage of trials. It noted that the dangers of television coverage “are not unlike the dangers of newspaper coverage.” In both cases, it is a court’s obligation to ensure the impartiality of the trial. The Florida rule had been portrayed as an appropriate modern reexamination of television coverage in light of new technology (and perhaps an evolving of journalistic responsibility). Chief Justice Burger accepted those changes as important new developments; he noted both the changes in television technology since the time of the *Estes* trial and the safeguards built into the Florida program.

Among other things, the Florida program provided that the court must hear and consider on the record objections of the accused to coverage and encouraged the court to define steps necessary to minimize or eliminate the risk of prejudice to the defendant. In *Chandler*, the defendants did not even request such a hearing. Similarly, the defendants in *Chandler* presented no empirical data sufficient “to establish that the mere presence of the broadcast media inherently has an adverse effect” on the trial impartiality. For those reasons, the Supreme Court found no constitutional violation in the Florida cameras-in-court rule as applied in the *Chandler* case.

While a landmark case in opening up the field of cameras in court, the *Chandler* decision was an inherently narrow one. Just as *Estes*, as interpreted in *Chandler*, had laid down no *per se* rule against camera coverage, and ruled solely on the facts of that situation, so also *Chandler* addressed solely the situation presented in that Florida case. The Court issued no *per se* endorsement of cameras in court and even specifically noted that no one had asserted a constitutional right to televise criminal trials live or even on tape. The decision, in short, was a simple but limited go-ahead to the experimentation that Florida had started.

State Cameras-in-Court Rules after Chandler

By the end of 1980, twenty-two states had experimented with cameras in court and others were studying the issue. Shortly after the *Chandler* decision, moreover, the ABA modified its ban

on cameras in court, recognizing that they can be permitted when approved by an appropriate authority, under circumstances where the cameras are “unobtrusive, will not distract trial participants, and will not otherwise interfere with the administration of justice.”

By the mid-1990s, most states allowed television coverage of some kind—some in experimental form, some on a permanent basis; some in trial courts, some in appellate courts, and some in both. Most of the state rules, to some extent, followed those of the Florida leader. They required express requests from the media, and express decisions by judges or court officials, as to whether cameras will be permitted and under what circumstances. The rules generally took pains to prohibit the kind of unlimited access that led to so many problems in the *Estes* and *Sheppard* cases. Most rules limited cameras to one pool video camera and one pool still camera, with the media having the obligation to arrange for and share the pool photography. Often the rules required a certain level of silence, dignity, and even disguise in the cameras (for example, cameras may be hidden behind walls or in special cabinets). Most rules prohibited photography of jurors, and some gave witnesses and other trial participants either an automatic or a potential opt-out of the view of the camera lens.

Practices in State Courts after Chandler

As perhaps might be expected, the presence of cameras in state appellate courts has been relatively uncontroversial. No jurors or other lay participants are involved, and the key issue in

the *Estes* and *Sheppard* cases—potential prejudice of jurors—simply does not exist. As a result, it has been relatively uneventful where cameras or other electronic means have recorded, broadcast, and reported on appellate proceedings. If anything, the difficulty has been in persuading news readers, listeners, and viewers to pay attention to legalistic and often arcane appellate proceedings.

As an illustration of the benign nature of such broadcasts, after Missouri began permitting cameras and electronic recording equipment in its courts, a Missouri radio network began routinely recording all state Supreme Court arguments and making them available live over its statewide network. Lawyers, judges, and litigants began to accept and rely on these broadcasts as a means of keeping abreast of the court’s proceedings. When the network’s funding ran out at one point, and it announced its intention to close down the recording and broadcasts, the court itself stepped in and set up its own recording equipment and broadcast network, in order to ensure that broadcasts of its arguments would continue to be available.

Trial courts, of course, are where the rubber hits the road. At least in jury-tried cases, the risk of prejudice is the greatest. And, even in judge-tried cases, the presence of cameras in a trial court is so unusual that some significant effect on the judge and other participants is at least possible. Given the unusual nature of those trials and proceedings that the media chooses to cover, it is difficult to generalize about the effects, detriments, and benefits of television coverage in state trial courts. While a few highly

publicized gavel-to-gavel cases command most of the attention and discussion, hundreds if not thousands of less visible cases have been subject to television coverage, most often with little if any effect or discussion.

The O.J. Simpson Trial and Backlash against Cameras in Court

The murder trial of O.J. Simpson in 1994 was perhaps the most notable televised trial ever, eclipsing even the notorious *Estes* and *Sheppard* cases. Though conducted under post-*Chandler* cameras-in-court rules, it nonetheless stands out for many as an example of how trials can be adversely affected by television. The trial participants, including the trial judge, have been accused of grandstanding—of playing to the cameras rather than focusing on the proper presentation of evidence in the courtroom. The public fascination with the case has been painted as unseemly, in that a serious trial became a kind of substitute for daytime soap-opera drama. The frenzy of national attention and commentary that the trial evoked, though fully protected by the First Amendment, has been criticized as sensationalism, pandering to viewers' lowest instincts. Even the sharply divided public feelings about the defendant's acquittal—with outrage from most whites and approval from most African Americans—has at times been blamed on the cameras in the courtroom.

On sober analysis, many aspects of the *Simpson* trial cannot be fairly blamed on cameras. The trial of a prominent African-American former football star accused of a gruesome murder of

his white ex-wife and her friend would have caught public attention even without cameras inside the courtroom. Indeed, an initial police highway chase of the defendant riveted national attention even before any indictment was handed down. Many of the criticized events of the trial, from a pivotal glove-trying-on demonstration to defense counsel's closing mantra ("If it doesn't fit, you must acquit!"), were clearly designed for the jury, and most probably would have occurred even if cameras had not been present. And if cameras influenced the split public opinion, they did so because the many news accounts and commentaries publicized the facts and circumstances of the trial, therefore making it possible for citizens, black and white, drawing from their own experiences and beliefs, to knowledgeably interpret and form an opinion about the result.

Nonetheless, as a practical matter the *Simpson* case clearly led to greater caution by courts in allowing cameras in court. Trial judges became more concerned, even under post-*Chandler* rules, about lawyer grandstanding, influence of publicity on jurors, and even subtle influences of a televised trial on judges themselves. Broadcasters, fairly or unfairly, had to dispel the notion that they would sensationalize the trials they sought to cover. Given that camera coverage decisions almost always ultimately rest on the discretion of the trial judge, it is likely that many fewer coverage requests were granted in the aftermath of the *Simpson* trial. As just one example, when the relatives of one of the victims subsequently brought a civil case against Simpson, the trial judge in that case closed the courtroom to cameras.

While the post-*Simpson* backlash against televised trials is real, there were probably also real benefits from the *Simpson* coverage, which are not often recognized. The use of DNA analysis in that trial spurred at least some other defendants and prisoners to seek out experts in that field, and it may have also contributed to an overall increased use of DNA evidence, which in turn led to the release of a number of wrongly convicted prisoners. The intense publicity of the *Simpson* trial prompted new thinking and discussions about the criminal justice system and about the racial divide in perception of law enforcement. Dry print news accounts of the trial are unlikely to have had similar effects.

Continuing Concerns after Chandler

Because *Chandler* simply opened the door to cameras in court, it essentially left the difficult implementation issues to state court rule makers and trial judges. State supreme courts, in prescribing cameras-in-court rules and guidelines, and trial judges, in deciding particular issues as a camera-covered trial proceeds, have had to grapple with a multitude of issues. How are the various fair trial tools set forth in *Sheppard* to be applied? Does the modern news environment, so different than what existed when *Sheppard* was decided, create new problems or require new solutions? What particular rules should be applied to cameras in court, and should different rules apply to civil and criminal cases, or to the pretrial and trial aspects of criminal cases? Even when fair trial issues are settled, how, if at all, must journalistic and free press issues inform decisions about cameras

in court—including, for example, whether the right to bring cameras into court belongs only to journalists or to others as well? Finally, in today’s electronic media world, where almost everyone has a video camera and a device for transmitting messages to the public, how, if at all, should cameras-in-court rules be extended to other electronic devices?

Preserving Fair Trial Rights

As the *Sheppard* decision established, it is the obligation of the trial judge to ensure the impartiality of the trial, including such steps as are necessary to minimize or negate prejudicial effects from juror exposure to pretrial and during-trial publicity. While it is commonplace to speak of the “conflict” between free press and fair trial rights, Hans Linde, then justice of the Oregon Supreme Court, noted in a 1977 article that such a “conflict” metaphor is inconsistent with the structure of the Constitution and the Bill of Rights. Each of the rights of the Bill of Rights, including First Amendment rights of the press and Fifth and Sixth Amendment rights of criminal defendants, are rights that those parties have against the government. It is the government’s obligation to protect and honor all of those rights, not to pit one against another. Thus, the trial judge’s obligation to ensure a fair trial does not necessarily involve or assume any kind of restriction on press rights, but only a careful and appropriate focus on the objective of ensuring an impartial trial. Thus, judges routinely consider the time-honored techniques of change of venue, change of venire, continuances, severances, voir dire, sequestration, judicial admonition, and where necessary new

trials in order to prevent, minimize, or negate the effects of pretrial publicity.

To some extent, judgments about how much pretrial publicity is harmful, and how effective the various steps are to combat it, become highly subjective. Judges' own views of the media, how jurors are influenced, and the overall importance of trials all come into play, meaning that different judges make different evaluations. Some judges are so concerned about any pretrial publicity that they take extraordinary steps to shield jurors from that publicity. More often, judges rely primarily on voir dire screening, and their regular admonitions to jurors that they must disregard outside sources of information and rely solely on the evidence presented in court, and thus rarely take the extraordinary steps of change of venue or venire or jury sequestration.

Many of the provisions of state cameras-in-court rules promote protection of fair trial rights. Most importantly, most such rules allow the trial judge to determine at the outset whether cameras will be allowed, to set reasonable restrictions on cameras if they are allowed, and to deal in his or her discretion with particular problems as they arise. The rules also usually limit the number and visibility of cameras, requiring that they be operated in a quiet and nonobtrusive manner.

Additionally, court rules often impose limitations on camera use. Specifically, most cameras-in-court rules prohibit any photography of jurors. These rules assure jurors that they will not become "celebrities" like the jurors in the

Sheppard case, and hence allow them to focus on their trial duties rather than fears of public reprisal. Similarly, cameras-in-court rules and/or trial judge prescriptions for particular cases often put off-limits certain sensitive witnesses, like juvenile witnesses, rape victims, and undercover police officers.

These rules, and similar guidelines and specific case descriptions by trial judges, are intended to prevent anything like the carnival- or circus-like proceedings in the *Estes* and *Sheppard* cases. Indeed much of the problem with those cases was the atmosphere in the courtroom, which caused jurors and other trial participants to focus on the intense public and media interest in the case, and get distracted from their task to attend solely to the evidence in the courtroom. Thus, to the extent that court rules and procedures prevent the media coverage from becoming too apparent or prominent in the courtroom, that alone avoids many of the fair trial problems that occurred in those two landmark cases.

The New News Environment

One of the key issues that developed long after *Chandler v. Florida* is the prevalence of Internet and social media methods of communication. The jurors of the *Chandler* era got their news primarily from newspapers, television, and radio. The jurors of the Internet era, by contrast, not only receive those sources but also get news and information from multiple Internet sources, from e-mails, YouTube videos, Facebook posts, tweets, and other electronic messages. From another viewpoint, jurors of the 1980s had to take affirmative steps to read a newspaper, or

turn on a television or radio at the time of a scheduled news report. Jurors today can hardly avoid news, which is broadcast on a 24/7 basis on cable television, transmitted to their pockets or purses every moment through e-mails, tweets, posts, and news updates, and available at all times on the Internet.

The blossoming of so many new sources of news can negate the overwhelming power of local television stations that existed at the time of the *Estes* and *Sheppard* cases. But the pervasiveness of today's electronic technologies and the interactivity enabled by those technologies troubles many courts. One of the key concerns, for example, is not so much what information is pushed to jurors through the normal news media, but what information jurors may by their own requests and searches pull out of the electronic world.

Other Electronic Reporting Tools

Radio was the new technology of the 1930s at the time of the *Hauptmann* case. Television was the new technology in the 1960s at the time of the *Estes* and *Sheppard* cases. In 1980, when *Chandler v. Florida* was decided, television was improved, quieter, less obtrusive, and more ubiquitous, but it was still the sole dominant communications technology of the day.

In the three decades following *Chandler*, the communications technology landscape changed dramatically. There are now many new electronic communications devices, and mobile technologies, that allow a wide array of electronic communications devices to be brought

into courtrooms. These include laptops, tablets, smart-phones, personal digital assistants, handheld messaging devices, still cameras, and video cameras. Moreover, because of cost and portability, these devices are accessible to, and can be competently used by, ordinary citizens as well as professional journalists. Thus, television and still cameras are no longer the only devices that can be used to photograph courtroom proceedings and instantly, or nearly instantly, connect courtroom proceedings with the outside world.

Accordingly, courts are examining these portable electronic devices and whether and how they should be regulated or controlled. These new electronic devices raise many issues for courts, including security, decorum, and harassment issues. Often these issues are discussed or treated together with court rules on cameras in court, in part because most modern electronic devices include camera lenses and recording capabilities.

Some courts have reacted to the existence of these new technologies by imposing blanket or near-blanket prohibitions on their use or even presence in the courthouse. In some cases, exceptions are made for lawyers and others who need to use the electronic devices in their courtroom preparation or presentations, but the devices are nonetheless prohibited for journalists and ordinary observers. While such blanket prohibitions allow courts to deal with the issue in one fell swoop, such rules may impose unnecessary hardships on participants and observers in the judicial process and unnecessarily restrict communications. A more appropriate response would be to permit the use and possession of

such devices within courthouses, as in other public and private buildings, but regulate specific uses of concern.

For example, it may be reasonable for courts to subject the use of any electronic device that has photography capabilities to regulation in the same way that television and other journalistic cameras are regulated. If a particular state's cameras-in-court rule commands that only one video camera may be used to record proceedings in a particular courtroom, then handheld and other video cameras of other participants should not be allowed to take video, absent special permission or circumstances. Even such a rule may present difficulties, however. The basis for having a single media camera per courtroom has been the assumption that media entities can readily share the work product of a pool camera. But if different media entities use different technologies, or if media technologies are incompatible with technologies used by ordinary citizens, then the traditional allowance of a single pool camera may no longer work. Given that modern cameras are smaller and less obtrusive than those that formed the basis for the *Chandler* ruling, some multiple camera accommodations should be feasible.

The use of communication technologies to make nonphotographic records and reports from courtrooms generally seems less troublesome. In the days of manual typewriters, courts did not permit reporters to type in a courtroom's spectator section, because of the resulting noise and distraction. But modern laptops, tablets, and other devices allow almost imperceptible note-taking, writing, and transmissions, and

thus an outright or presumptive ban on such uses of electronic equipment seems unjustified. At the very least, courts should consider uses of such materials on a case-by-case basis. In the case of journalists, full consideration should be given to journalistic newsgathering rights and the public benefit in allowing reporters to witness proceedings firsthand and promptly prepare and send news reports to the outside world.

Some observers have raised issues with real-time reporting from the courtroom, as reporters utilize mobile communications capabilities, and real-time dissemination channels, such as news websites, Twitter, and blogs. Because such real-time reporting has the immediacy of real-time television coverage, some courts are skeptical of it and have sought to ban it or restrict it. Journalists, however, believe that these developments are an improvement over older techniques, which might involve, for example, reporters rushing in and out of the courtroom in shifts to send their stories back to their newsrooms by telephone dictation. A single reporter quietly tapping a keyboard in the back of the courtroom should be less distracting than a series of reporters coming in and out of the courtroom, and in addition, the reporter who stays in the courtroom is likely to do a better job.

Some courts have prohibited text-transmitting devices or use of such devices to provide real-time reporting, on the basis of rules that prohibit *broadcasting* of judicial proceedings from the courtroom (see *United States v. Shelnut*, 2009 WL 3681827 [M.D. Ga. Nov. 2, 2009]). This interpretation seems improper given the significant

distinction between broadcasting as it is normally understood and the transmission of a journalist's own comments, notes, reflections, and conclusions. Other courts, confronting the same situation, have explicitly permitted reporters to provide liveblogging and other text transmissions from the courtroom (See Ninth Circuit Judicial Counsel, Policy and Electronic Devices [February 22, 2010]). In *Morris Publishing Company LLC v. Florida*, 2010 WL 363318 (Fla. App. January 20, 2010), for example, the trial court was directed to allow a reporter to use a laptop in courtroom "unless the court finds a specific factual basis to conclude that such use cannot be accomplished without undue distraction or disruption."

Rules, procedures, guidelines, and expectations designed to maintain courtroom decorum can adapt to journalistic needs. In cases with high interest in media coverage, a live feed from the cameras in the courtroom is often provided in a separate room, allowing reporters to see the trial and do their work without distracting jurors or other trial participants. This arrangement allows reporters to file immediate stories without the distraction of typing in the courtroom or frequently running outside of the courtroom to file news reports. It serves both interests in (a) allowing reporters to write and file timely reports and (b) maintaining the dignity and calm of the courtroom that many judges feel is essential to a fair trial.

Notably, the only difference between real-time reporting and reporting on a delayed basis may be whether the reporter leaves the courtroom in order to file his or her reports. Regulation

should not be based on so simplistic distinction as to whether a reporter sits in one place as he or she files a story or moves out of the courtroom in order to file a story. In some cases, opponents of real-time reporting claim that the immediate reporting will more likely influence judicial proceedings, jurors, or witnesses more than traditional delayed-basis press coverage of trials. However, courts are required to use the various techniques outlined in *Sheppard* to ensure that jurors and witnesses are not influenced by outside considerations, and those protective measures should apply regardless of the time basis on which the media reports of a trial are made. Put simply, jurors must obey their admonition to avoid media accounts of the trial whether those media accounts are in the next day's newspaper, the evening's newscast, or a near-instantaneous Internet feed.

The explosion of modern recording technologies makes it difficult to formulate a simple, clear rule for all new technologies. The miniaturization and versatility of new digital devices, in particular, raise many new issues for courts. Most portable electronic devices, for example, allow recording of audio. Thus audio recording as well as photography must be addressed, and, as with media cameras and communications devices, different rules may need to be set for media and non-media users. Multifunction devices such as smartphones and Google Glass complicate the analysis. Electronic device rules may need to distinguish between allowable functions (e.g., phone calls from courthouse lobbies or hallways) and non-allowable functions (e.g., trial photography) for the same device—and that distinction will naturally raise difficult

enforcement problems. As devices become more integrated into daily personal use—for example, smart glasses like Google Glass and smart wristwatches—these thorny questions will proliferate.

The Media Law Resource Center, an organization supported by most major media companies in the United States, has proposed a “Model Policy on Accessing and Use of Electronic Portable Devices in Courthouses and Courtrooms.” That policy is based in part upon the electronic devices policy adopted by the U.S. Court of Appeals for the Ninth Circuit in 2010 and several other federal court rules. The model policy recognizes that portable electronic devices are ubiquitous and that reliance on such devices has become the norm not only for trial participants but for journalists as well. It suggests, drawing on the Ninth Circuit’s policy, that “a presumption of use of such technology by the press is desirable and should be the norm.” Moreover, it states that even if limitations on technology used by members of the public are imposed, “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 newsgatherers when appropriate.”

Based on those general guidelines, the model policy sets forth five proposed rules that are summarized below:

1. Portable electronic devices should be presumptively allowed into courthouses.
2. Use of electronic devices within common areas of the courthouse should be generally permitted, subject to time, place, and man-

ner restrictions for safety, order, and decorum reasons.

3. Electronic devices may be used silently within courtrooms to “take notes and/or transmit and receive data communications in the form of text” without prior authorization from anyone.
4. Judges may prohibit or restrict further 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.”
5. Reporters, bloggers, and other observers in the courtroom “may use electronic devices to prepare and post online news accounts and commentary during the proceedings.”

Whatever general rules are imposed on electronic devices, the application of those rules will always be subject to the trial court’s discretion, because of the trial judge’s broad inherent authority and discretion to impose appropriate restrictions on the conduct of all individuals in the courtroom. As the Supreme Court noted in *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.” Nonetheless, restrictions on journalists must be imposed with sensitivity to the constitutional basis for journalistic reporting. As one court noted, any court-imposed limitation of the right of journalists to take notes in a courtroom must “withstand scrutiny for its neutrality and reasonableness” (*Goldschmidt v. Coco*, 413 F.Supp. 2d 949, 952–53 [N.D. Ill. 2006]).

Rules for Journalists, or All Citizens?

Should camera and electronic device rules be the same or different for journalists and others? And if a distinction is desirable, how does one distinguish, in these days of open communications technologies, between journalists and non-journalists?

Generally speaking, First Amendment rights inure to all citizens, journalists and non-journalists alike. But in practice, journalists get access rights of all kinds that are not available to ordinary citizens— press passes, access to accident scenes, access to legislative press galleries, and special travel with public officials and candidates. As a practical matter, it seems essential that some distinction be made between journalists and ordinary citizens in the context of trial reporting and photographic coverage. The courts have long recognized that because of the role of journalists as intermediaries, conveying judicial developments to the public, they must be given some presumptive right of access to trials. Reporters have long been reserved places in the limited public seating areas, on the logical basis that each reporter acts as a “proxy” for his or her many readers, listeners, or viewers.

Trust and professionalism reasons also lead to giving professional journalists some privileges beyond those afforded ordinary citizens. Journalists cover newsworthy trials regularly and are trained or experienced (or should be) in gathering news in a professional, nondisruptive, and non-advocacy manner. The citizens who attend trials, by contrast, are likely to have

little or no professional training or experience, and may have personal interests in the trials. Journalistic photography is likely to focus on newsworthy aspects of the trial. Citizen photography may not. For example, some judges have expressed particular concerns with impromptu cell phone and other small-camera photography by ordinary citizens in courtrooms, citing instances in which observers have used such photography in apparent attempts to intimidate witnesses. Because journalistic cameras are unlikely to have any special intimidating effect of that nature and because they serve the purpose of providing a photographic record for the broader community, it seems fair to allow journalistic cameras even if citizen cameras are banned or more severely regulated.

Deciding who qualifies as a journalist is becoming an increasingly difficult issue. In the days when the means of communication were limited to those companies that owned printing presses or broadcast licenses, one was either a journalist or a non-journalist. Today’s more readily available distribution systems, by contrast, have created a broad range, from the CNN reporter who is seen on TV screens worldwide, to the lone blogger whose mother is his only regular reader. In the middle of this spectrum—and arguably even at its lower end—many nontraditional journalists have respectable claims for some journalistic rights. Even a small-circulation newsletter devoted to criminal justice issues, for example, may deserve consideration for trial seating at a newsworthy trial and for access to the camera feed for its website. Not every self-styled journalist, however, should qualify for journalistic privileges. If a friend of a defen-

dant publishes a newsletter about the injustices practiced against his friend, that “publisher” should have no privilege to overcome the rules normally imposed on ordinary trial observers, such as, for example, the prohibition against citizen camera use (a rule designed to prohibit taking intimidating photos of witnesses).

In short, court rules permitting camera and other electronic coverage of court proceedings will necessarily have to distinguish at times between what privileges are afforded journalists and non-journalists. And while identification of mass media professional journalists has always been, and continues to be, relatively easy, today’s more expansive media world will require courts (or their delegated decision makers, such as media coordinators) to make careful fact-based determinations as to who else deserves these journalistic privileges.

Federal Court Experiment

While state courts have been the main ground for cameras in court in the first thirty years after *Chandler*, beginning in 2013 federal courts began experimenting with camera coverage. This experiment is likely to generate new sets of rules, procedures, and advice, and may rejuvenate the cameras-in-court movement, which even twenty years after the *Simpson* trial continues to suffer from the *Simpson* backlash.

Benefits of Access

In considering all requests for journalistic access to judicial proceedings, including requests to utilize cameras and portable electronic devices,

courts should consider the benefits of journalistic access and reporting. Journalistic scrutiny can ensure that courts and participants act carefully and follow proper procedures. The scrutiny may discourage perjury, other misconduct, and biased rulings. Having the public informed helps ensure public confidence in a trial’s results or, alternatively, provides an outlet for expression of dissatisfaction if that occurs. As the Supreme Court noted in *Sheppard*, “the press does not simply publish information on trials, but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.”

There is also a strong public benefit for having contemporaneous “breaking news” coverage of judicial proceedings. Indeed, in prior restraint cases such as *Nebraska Press Association v. Stuart*, 427 U.S. 539, 560–61 (1976), the Supreme Court has noted that the delays on journalistic reporting are inconsistent with the media’s “traditional function of bringing news to the public promptly.” As one court noted, “The newsworthiness of a particular story is often is fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression” (*Courthouse News Service v. Jackson*, 2009 WL 2163609 at *4 ([S.D. Tex. July 20, 2009])).

Television coverage of trials also brings trials and the information contained in trials into the public consciousness. Even in the Internet age, television remains the strongest and most effective source of news for most Americans. Information that is not carried on television does

not reach most of the population. Just as use of DNA evidence was affected after the television coverage of the *Simpson* trial, trial information of all kinds can be beneficial, and deserves to reach everyone, not only those who get their news from print sources or who can afford to attend trials personally.

Finally, of course, it is clear in modern society that the media form an essential link between government proceedings and citizens. As noted by the Supreme Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975), “In a society in which each individual has but limited time and resources with which to observe firsthand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations.” And as Justice John Paul Stephens noted in *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573–74, “Instead of acquiring information about trials by firsthand observation, or by word of mouth from those attended, people now acquire it chiefly through the print and electronic media.”

Journalists’ Responsibility

The long-term success of cameras-in-court rules depends not only on judicial openness to cameras but also journalistic good conduct in using the opportunities presented by these rules in a useful and responsible manner. The rowdy and disrespectful behavior of the Cleveland press in connection with the *Sheppard* trial clearly influenced the Supreme Court and the long skepticism of camera coverage that followed that trial.

Reporters need to understand courts and how

they function. In some respects this may be as simple as dressing appropriately in the courtroom and taking into account trial participants’ desires even in such seemingly trivial matters as unobtrusively entering and leaving the courtroom. Reporters, editors, and news directors who live by frequent deadlines need to understand the different schedule on which courts operate and time their requests for camera coverage, and negotiations about that coverage, sufficiently in advance of trials. Journalists must be willing to adapt their practices to meet legitimate concerns of courts, even ones that they do not fully understand. For example, courts have been appreciative of news organizations that made specially unobtrusive cameras for courtroom purposes (for example, cameras contained within wood cabinet structures that blend with courtroom fixtures). Journalists must take care to understand and scrupulously follow cameras-in-court rules, including, for example, prohibitions on photography of jurors or certain sensitive witnesses—restrictions that may puzzle journalists, but that courts view as very important.

Finally, and not least, journalists need to make their illustrated court reporting live up to the potential that the advocates of cameras in court have long trumpeted. Many charges of sensationalism or hype in trial coverage are unfounded or overstated. But journalists have a higher duty than rebutting their harshest critics. They also need to fulfill the claims made by their advocates and satisfy their profession’s potential. Photographic coverage of trials should not just relay incidents and results, but also discuss and explain the judicial process. Cameras should

go into courtrooms not only for daily reporting on high-interest trials, but also for in-depth and investigative reporting about the many areas of life affected by court proceedings.

Ultimately, cameras' access to courtrooms is not just an opportunity that courts have made available to journalists. It is also a tool that responsible journalists can and should effectively use in fulfilling their professional task of illuminating the world we live in to their readers, listeners, and viewers.

Further Reading

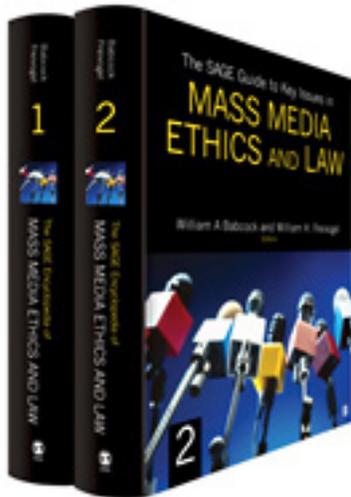
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