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Impractically Obscure? Privacy and Courtroom Proceedings in Light of Webcasting and Other New Technologies*

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Author's Note: The United States is hardly alone in recognizing the importance of transparency as a means of encouraging government oversight and public confidence in government functions. In many countries, court records are also open to public scrutiny as a matter of policy.¹ For example, courts in Canada, Great Britain, Sweden, Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Lithuania, and Poland are all required to subject court records to public scrutiny in varying degrees. In other countries, court records are specifically exempted from openness provisions. Examples include Spain, Slovak Republic, Portugal, Netherlands, Malta, Latvia, Italy, Germany, China, and Russia.²

Even in those countries where the presumption is against openness in court records, the importance of judicial transparency is often recognized. Many countries maintain a policy of openness in court proceedings though they may not provide access to the records from those proceedings. In Spain, for example, where there is little access to court records, court proceedings are open to the public; cameras are even widely allowed in court. Several courts in Europe, most prominently perhaps the European Court of Human Rights, make webcasts of proceedings available to the public online.³

For those countries that subscribe to the notion that transparency and public oversight are key to ensuring the integrity of a system of justice, the tensions described in this article—though centered on the experience of the United States—are sure to be instructive.

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** Chancellor Professor of Law and Director, Center for Legal and Court Technology (CLCT), William & Mary School of Law. Professor Lederer presented an earlier version of this essay at the 2007 Privacy and Public Access to Court Records Conference at William & Mary. We would like to thank CLCT colleagues Mary Beth Dalton, Diane Gray, John Calabrese, Joelle, Laszlo, and Heidi Simon, for their help in researching and editing this essay. In the interests of full disclosure, we note that our CLCT Court Record Manager Diane Gray is primarily supported by a grant from the National Court Reporter's Foundation, with some further assistance from the National Verbatim Reporter's Association. We would like to also acknowledge the assistance of the USCRA, the NCRA and NCRA members in obtaining key data used in this essay.

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¹ Nataša Pirc Musar, Information Commissioner, Republic of Slovenia, "Access to court records and FOIA as a legal basis – experience of Slovenia" at http://www.ip-rs.si/fileadmin/user_upload/Pdf/konference/Nova_Zelandija_predavanjel.pdf

² It should be noted that in Europe, although proceedings are commonly open to public view, court records are most often more difficult for the public to obtain, in large part due to European data protection regulations.

³ See <http://www.echr.coe.int/echr/>

The advent of modern information technology has brought with it mounting privacy concerns. As court records, from dockets to electronically filed pleadings, are increasingly digitized, privacy proponents have sounded the alarm that critical personal information must be protected from public view. Over the past decade, courts across the United States have taken important steps to protect personal information captured in court records. Comparatively little concern has been given, however, to increasing online availability of court proceedings themselves, whether in the form of electronically available court transcripts or archived or even live webcasts of the proceedings themselves.

Ironically, modern technology is forcing us to ask a most peculiar question: can a trial be too public? Indeed, some might argue that few legitimate privacy issues exist in the area. After all, most court proceedings are and have always been public. Absent closed sessions and sealed orders, privacy routinely is sacrificed for openness and court accountability.⁴ We suggest that new technology has changed the pragmatic situation greatly, perhaps enough to create substantial issues of policy and law.

William & Mary Law School is only a short distance from Colonial Williamsburg in Virginia, and our colonial city can be a useful source of historical perspective. One of Colonial Williamsburg's defining structures is its Courthouse of 1770. A modest unprepossessing building across from the armory, it is an unexpected symbol of a very modern question of public policy. In an age without television, radio, and the movies, indeed without iPods, the courthouse was often a major center for diversion and entertainment. A trial in the colonial period was a major event, one that could attract a significant number of local citizens. The phenomenon of "Publick Times" grew around colonial Williamsburg's quarterly court sessions during which hundreds of people would come to Williamsburg for several weeks - elected Burgesses (some with their families), an association of merchants that likely met at the same time, farmers who sold produce and livestock at market days, and the like all came to Williamsburg at the same time. Agricultural fairs and horse races were popular pastimes during court sessions, as were balls held at the Governor's Palace, the larger taverns in town—even in the courthouse on Duke of Gloucester Street. So raucous were the occasions that tempering, at least within the courthouse, was required. The United States Supreme Court described the circumstances:

Indeed, when in the mid-1600's the Virginia Assembly felt that the respect due the courts was "by the clamorous unmannerlynes of the people lost, and order, gravity and decoram which should manifest the authority of a court in the court it selfe neglected," the response was not to restrict the openness of the trials to the public, but instead to prescribe rules for the conduct of those attending them.⁵

The American constitutional right to a public trial stems at least in part from that ordinary and culturally expected normative practice. Although trials could be closed, there can be little doubt

⁴ Supreme Court decisions clarifying the right to a public trial and the media's right of attendance are surprisingly recent. *E.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

⁵ *Richmond Newspapers*, 448 U.S. at 567 (citation omitted).

that litigants, defendants, and other trial participants, including witnesses, had no practical expectation of privacy in normal proceedings.

As the population in the United States grew and spread, it became increasingly impractical to attend a local trial or hearing. Although certainly possible, most people came to rely on the media for news of what happened in the courtroom. The media, of course, has tended to cover only newsworthy trials. As a result, few people have any knowledge at all about most hearings. The American legal system established a *de facto* expectation of privacy in most court proceedings. Admittedly, it is only a partial expectation inasmuch as any person can wander into court and attend the average case (at least so long as a vacant chair remains in the gallery). Yet that expectation is reasonable. Few people can expect details of their troubles or testimony to come to the attention of the general public, or even their neighbors. The United States has developed a culture in which trial details are shielded by the functional equivalent of what is known as “the doctrine of practical obscurity.”

The “doctrine of practical obscurity” is the expression that has been used to explain how paper court filings that are legally public in nature became private in practice. Few people realize that most court documents are available to the public and, until the World Wide Web, fewer still knew how to obtain access to them. As such, prior to electronic access, most paper court records remained “practically obscure.” From a privacy perspective, this meant that sensitive information appearing in court files would be, for practical purposes, shielded from public view in dusty court files hidden away in court repositories. All of that is rapidly changing with the ongoing conversion from paper filings to electronic ones and the concurrent expectation that electronic data ought to be easily available to the media and public. A public accustomed to Google, eBay, and Facebook has seen little reason why “public” data should not be available from a home or office computer. If the information is accessible to those who go to the courthouse, why should it not also be accessible remotely if available in electronic form? The debate on public access to court records has largely focused on this conundrum. However, the stage is now set for the same form of expectation—i.e., that sparsely attended courtroom proceedings enjoy practical obscurity—to arise in the area of trial and hearing proceedings. Is it possible that we are on the verge of the rebirth of the Courthouse of 1770 in electronic form?

Traditional Practice

Until the rise of the Internet, there were three principal ways in which a person could become familiar with the actual proceedings of a trial or hearing and evidence presented therein: (1) attend the proceeding; (2) obtain an account from the media or another person; and/or (3) read the contents of the court record, which may or may not include the trial transcript and evidence introduced in court. We turn next to the contours of the pre-Internet right of access to trials, transcripts, and evidence.

Pre-Internet Right of Access to Trials

The United States Supreme Court has held that a criminal defendant has a Sixth Amendment right to a public trial,⁶ and that the media has a First Amendment right to cover trials and hearings.⁷ In *Richmond Newspapers, Inc. v. Virginia*,⁸ Chief Justice Burger observed, “‘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.’”⁹ Although portions of hearings and trials can be closed,¹⁰ it is difficult to do so. Proceedings are closed by petition of one or both of the parties or at the discretion of the trial judge. In *Press Enterprise Co. v. Superior Court*, (*Press Enterprise I*)¹¹ the Court held that closing all but three days of six weeks of voir dire and jury selection in a capital prosecution for murder and rape was unlawful:

The presumption of openness 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.¹²

The Court’s holdings have centered on criminal proceedings. The public’s interest in civil matters is presumably less compelling, but the courts are the public’s and the public’s right to civil justice is real and important. U.S. Federal Rule of Civil Procedure 77 mandates that “All trials upon the merits shall be conducted in open court.” As one court has observed: “The existence of [the public’s right of access to judicial proceedings and records] . . . is beyond dispute. . . . The public’s exercise of its common law access right in civil cases promotes public confidence in the judicial system by enhancing testimonial trustworthiness and the quality of justice dispensed by the court.”¹³ In her article, *Toward a New Public Access Doctrine*,¹⁴ Professor Raleigh Levine declares that, “Most lower courts have held that the qualified First

⁶ *Waller v. Georgia*, 467 U.S. 39 (1984).

⁷ See, e.g., *Press-Enterprise Co. v. Superior Court (Press Enterprise II)*, 478 U.S. 1 (1986). If the defendant’s right to a fair trial is the rationale asserted for closing a preliminary hearing:

[T]he preliminary hearing shall be closed only if specific findings are made demonstrating that first, there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot protect the defendant’s rights.

Id. at 14. See also *El Vocero De P.R. v. Puerto Rico*, 508 U.S. 147 (1993).

⁸ 448 U.S. 555 (1980).

⁹ *Id.* at 572.

¹⁰ E.g., *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979).

¹¹ 464 U.S. 501 (1984).

¹² *Id.* at 510.

¹³ *Littlejohn v. BIC Corp.*, 851 F.2d 673, 677-78 (3d Cir. 1988). See also *Publicker Industries v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) (it is “clear that the public and the press possess a First Amendment and common law right of access to civil proceedings”).

¹⁴ Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 *CARDOZO L. REV.* 1739 (2006).

Amendment access right attaches to civil trials.”¹⁵ Administrative hearings have been more problematic, and she reports a mixture of authority with significant cases upholding closed hearings.¹⁶ Depending upon the jurisdiction, specialized proceedings may be closed.¹⁷

The effective result of the Supreme Court’s holdings has been to guarantee the public and the media the right to attend most court hearings and trials. Notably, the Supreme Court has observed that:

The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. 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.¹⁸

Although it so opined with respect to the media’s claim of access to *voir dire* in a criminal case, the Court’s policy perspective in this and other opinions cited herein would appear to bolster arguments for remote access to proceedings.

¹⁵ *Id.* at 1759 n.123 (citing authorities but also citing *Ctr. For Nat’l Sec. Studies v. U.S Dep’t of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003) to the contrary). *See also Publiker Industries*, 733 F.2d at 1061.

¹⁶ Levine, *supra* note 11, at 1770-76.

¹⁷ *See, e.g.*, Cal. Welf. & Inst. Code § 676 (2007) (criminal juvenile proceedings); Cal. Civ. Code § 5118 (2007) (civil mental competency hearings).

¹⁸ *Press-Enterprise Co. v. Superior Court (Press Enterprise I)*, 464 U.S. 501, 508 (1984). *See also Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884). In *Cowley*, Justice Oliver Wendell Holmes, dealing with a defamation case involving a report of a judicial proceeding opined:

‘Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.’ . . .

The chief advantage to the country which we can discern, and that which we understand to be intended by the foregoing passage, is the security which publicity gives for the proper administration of justice. It used to be said sometimes that the privilege was founded on the fact of the court being open to the public. . . . This, no doubt, is too narrow, . . . but the privilege and the access of the public to the courts stand in reason upon common ground. . . . It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

Id. (Citations omitted)

Pre-Internet Right of Access to Transcripts

Courts of record are those which must keep a verbatim record of their proceedings. As a practical matter, nearly all proceedings of potential general public interest are held in courts of record.¹⁹ Traditionally, the court record was a verbatim transcript produced by the court reporter.

For much of the history of the access debate in American courts, the question of access to transcripts has been considered synonymous to the question of access in general.²⁰ If a court proceeding was closed to the public, the transcript should be similarly sealed. Noted one judge in the United States Court of Appeals for the Third Circuit.

[I]t would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door.²¹

If the public has the right to attend a court proceeding, the transcript should likewise be available.²² However, in the age of the electronic transcript, as will be explored below, it is not at all clear that the degree of access to transcripts falls in line with access to the paper version.

It is worthy of note that U.S. state practices in transcript production varies markedly and is often customary. Even today, it is by no means clear that transcripts of proceedings are widely available for public inspection. Pete Wacht, Senior Director, Communication & Public Affairs, of the National Court Reporters Association indicates that even when a copy of the transcript is filed with the court, most courts at least discourage copying of that transcript by the public. In Virginia, there are no "official reporters;" all reporters are free-lancers who take cases on a contract or case-by-case basis. In Norfolk, Virginia, we have been told by one reporter that the original transcript is filed with the court only if there is a criminal appeal or if the ordering party directs the reporter to file a copy with the court. Any member of the public may read transcripts placed in the court file at the courthouse, but the court prohibits copying of the transcript. Reporters in Louisiana apparently do not file transcripts; rather an attorney is the custodian. In Missouri, reporters file transcripts, and the public may copy the official copy. In Ohio, the state supreme court has held that the court reporter's statutory right to compensation takes priority over the public document statute. Accordingly, although the public may read the transcript in the clerk's office, the transcript cannot be copied there.²³ The details of state court proceedings

¹⁹ Experiments with live webcasts of traffic court proceedings conducted by the 9th Judicial Circuit in Orlando, Florida, showed that the largest number of "hits," (access to the webcast) were for traffic court proceedings, discussed below comments by Matt Benefiel, Clerk of Court, 9th Judicial Circuit of Florida, at the 2005 Courtroom 21 National Conference on Privacy and Public Access to Court Records, suggesting that members of the public may have a different priority in choosing what cases to view.

²⁰ In *Gannett Co.*, 443 U.S. at 370, the Supreme Court considered a transcript as an alternative form of access by the media to a closed pretrial suppression hearing.

²¹ *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994).

²² See e.g., *Press Enterprises II*, 478 U.S. at 13.

²³ *State ex rel Slagle v. Rogers*, 814 N.E.2d 55 (Ohio 2004), modified on reconsideration by 89 N.E.2d 1215 (Ohio 2005).

provided by transcripts have thus been pragmatically governed by the doctrine of practical obscurity, and it is that obscurity that largely protected against extensive disclosure of personal identifier information and other intimate details transcripts contain.

In American federal court, access to transcripts is more uniform. Federal court reporters, acting as quasi-independent contractors, transcribe each session of the court and any other proceeding as designated by rule. Federal law requires that federal court reporters file the original shorthand notes or other original records taken during each proceeding and file them “promptly” with the clerk who preserves these records for public access purposes for not less than 10 years.²⁴ If a rule of court requires, or if so requested by one of the parties or a judge, the court reporter uses the shorthand notes to prepare, again “promptly,” an official transcript, delivered to the requestor and filed with the court for public access purposes.²⁵ These original notes or other original records plus the official transcript filed at the office of the clerk must be “open during office hours to inspection by any person without charge.”²⁶ The clerks of court have the legal authority to sell transcripts, but apparently many district courts historically chose not to do so, although this may now be changing.²⁷

Critically, we have verified that depositions and court transcripts at both the federal and state level regularly contain social security numbers, bank account numbers and other personal identity information.²⁸ Center for Legal and Court Technology Court Record Manager Diane Gray e-mailed court reporters inquiring as to the frequency of such occurrences and received significant replies in hours. We do not supply the identifying case information or reporter identity to protect the information and the reporter. However, replies included the following:

From Norfolk, Virginia:

I had a criminal bench trial this week that was bank fraud and aggravated identity theft. It entailed putting SS #s as well as tax ID numbers and addresses in the record.

²⁴ 28 U.S.C. § 753(b) (2006).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Recently, transcripts of federal court proceedings have become available on Public Access to Court Electronic Records (PACER), see *infra* note 82 and accompanying text.

²⁸ Section 4 of the Court Reporters Code of Professional Ethics requires court reporters to preserve the confidentiality of information entrusted to the court reporter by the parties of the proceeding. See the *Code of Professional Ethics* published by the National Court Reporters Association. Section 4 reads: “A member shall . . . [p]reserve the confidentiality and ensure the security of information, oral or written, entrusted to the Member by any of the parties in a proceeding.” Code of Professional Ethics §4, available at <http://www.ncraonline.org/AboutNCRA/cope>. Court reporters are forbidden to sell or otherwise release transcripts to third parties unless the transcript of the proceeding they record is made part of the official record of the proceeding. *Transcripts and Online Repositories*, NCRA News, Feb. 23, 2006, <http://ncraonline.org/NewsInfo/NCRANews/2006/060223/060223b.htm>.

From Northern Virginia:

Had a depo in a personal injury case recently. Plaintiff atty, examining his own client following def atty's exam, wanted his client to state her Visa card number and expiration date to show she paid for her insurance coverage by Visa. Def atty objected. Plaintiff atty then introduced a photocopy of her Visa card for the transcript. Go figure.

From Northern Virginia:

I am horrified to report that at least half of the general dist. Court cases I take, the judge asks the defendant -- loud and clear and in open court -- to state his social security number for the record...I cringe every time I hear someone have to do that....

From Richmond, Virginia:

In Chesapeake Circuit Court when taking pleas, many of the judges will verify the defendant's Social Security number in open court as part of the proceedings. I'm trying to think of a specific case, but I know I've reported commissioner's hearings in the past where various bank accounts have been referred to and statements from those accounts entered as exhibits.

From Maryland and the District of Columbia:

absolutely, people are asked in deposition . . . their SS number and/or bank account number. It still goes on today. I'd have to really pull up old cases to cite them.

Again, I'm talking depositions, which are also filed in the court as public documents. I'm always amazed questions such as this are allowed in depositions and that lawyers don't object.²⁹

From Indiana

I take down this type of info nearly every day in open court. Mostly social security numbers, not so much bank account numbers. We do a wide range of cases in our court, but we do a lot of family law and protective order hearings that requires that type of info....Okay, here's one. Heck, it just happened this morning. I had to think about it because, like you said, it happens so often we don't really pay that close attention. We just had one this afternoon as well, but it's a juvenile paternity proceeding which of course is not open to the public. A new criminal case where the defendant appeared for his initial hearing this morning [citing the criminal case in which a social security number was placed on the record]

²⁹ Filing practice varies. Depositions are not necessarily filed with the court.

From California:

[apparently responding positively to whether the reporter had taken cases with personal data and trying to retrieve case names] I've done some identity theft cases and some burglaries where they have stolen people's checks. I'll think on this one. I've done so many that I can't remember the names.

On the positive side, we also received:

From Norfolk, Virginia:

I just had two instances in the past week, one today, where in a deposition they went off the record while the witness recited his SSN. In the one last week, they instructed me to put Xs for the SSN

From Alexandria, Virginia

Years ago, I used to run into that all the time. However, in recent years the [federal] judges and the lawyers, because of the contemplated e-filing issues with transcripts, have gotten so they stop such questions before the lawyers even finish their question. The questions are now even stopped when asking for a street addresses. The judge's usually interrupt and say to just give the city and state.

A North Carolina court reporter indicated that a state statute mandated redaction of personal identifiers and that she considered that to "be an onerous responsibility for a court reporter."

What is clear from this review of pre-Internet access to transcripts is that access was not the problem. The biggest barrier to accessing transcripts has traditionally been courthouse norms in which, at least at the state level, completed transcripts never even made it to the file. Perhaps this history explains somewhat the laxity (from a privacy perspective) in including personal identifier information in the texts of transcripts and depositions. Relying on the practical obscurity of traditional transcript production processes, privacy concerns associated with transcripts simply had not come to the fore.

Pre-Internet Right of Access to Evidence

Public access to evidence in the courtroom has historically been limited to whatever the craning public could view from the gallery. Evidence presentation technology has changed that.

According to Professor Lederer³⁰, whose Center for Legal and Court Technology regularly designs courtrooms throughout the nation and who, through the Courtroom 21 Court Affiliates, has contact with numerous judges and courtrooms, in nearly every permanent courtroom technology project the court insists that the public must be able to view the evidence on appropriate screens or monitors. Consequently, the courtroom gallery today often has the ability to read the smallest evidentiary detail as it is presented to the fact-finder. Without such technology, those interested in viewing evidence *after* its presentation in court have been typically able to do so: evidence introduced at trial is considered part of the court record for purposes of public access.³¹ A recent expression of this standard comes from the *Sedona Guidelines for Managing Information and Records in the Electronic Age*, a compilation of policy recommendations put forth by jurists, lawyers, academics, and others. The *Guidelines* advise that,

It follows from the right of public access to trial proceedings that there is similarly a right of public access to evidence admitted during trial, including not only testimony that is memorialized in the transcript, but also exhibits that are offered or admitted into evidence.³²

The right of access to exhibits applies to evidence offered at hearings or trials even when it is not admitted into evidence.³³ Typical court practice dictates that trial exhibits offered at trial, and especially those not admitted into evidence, be returned to the parties when the proceedings end, thereby limiting practical access to much evidence introduced at trial.³⁴

The Impact of Technology on Access to Trials, Transcripts, and Evidence

The First Wave of Technologically-Enhanced Access to Trials: Cameras and Television

The first cameras to attempt to film trials for the purpose of broadcast outside the courtroom caused an uproar from the first. In 1937, after the camera-cluttered trial of the man charged with kidnapping and murdering the baby of aviator Charles A. Lindbergh, the American Bar Association House of Delegates adopted Judicial Canon 35. Canon 35 declared that all

³⁰ Professor Lederer is a co-author of this article.

³¹ *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986).

³² "The Sedona Guidelines for Managing Information and Records in the Electronic Age," Public Comment Draft 2005 at p. 29 at http://www.thesedonaconference.org/publications_html. See also *In re Application of National Broadcasting Co.*, 635 F.2d 945 (2d Cir. 1980) (common law right of access to inspect and copy judicial records extends to evidence introduced at trial).

³³ Martha Wade Steketee & Alan Carlson, *Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts* 13 (Oct. 18, 2002) [hereinafter *COSCA Guidelines*], available at *COSCA Guidelines*. But see *United States v. McVeigh*, 119 F.3d 806 (10th Cir. 1997) (First Amendment right of access does not extend to suppressed evidence or evidence inadmissible at trial).

³⁴ See *Little John v. BIC Corp.*, 851 F.2d 673 (3d Cir. 1988) (common law access applies to documents initially produced in discovery and later admitted into evidence at trial, but exhibits returned to party after trial are no longer judicial records for public access purposes). See also *COSCA Guidelines* at 13.

photographic and broadcast coverage of courtroom proceedings should be prohibited.³⁵ In 1952, the House of Delegates amended Canon 35 to prohibit television coverage as well.³⁶ All but two states, Texas and Colorado, adopted Canon 35.

The Texas refusal to ban cameras turned out to be instructive for the rest of the country: a Texas trial judge first propelled the issue to the United States Supreme Court in 1965. In *Estes v. Texas*, the trial judge had allowed cameras at the trial of then-well-known swindler Billie Sol Estes. A *New York Times* reporter described the trial 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...Cables and wires snaked the floor."³⁷ The defendant petitioned to ban cameras from the trial on the grounds that his due process rights³⁸ would be violated. The case rose to the Supreme Court, which was clearly swayed by the intrusiveness of the equipment on the administration of justice. The Court held that the chaotic scene did in fact prejudice the defendant's Fourteenth Amendment due process rights. The justices, in the majority and the dissent, noted that advances in technology might merit a different result. Wrote Justice Clark for the majority, "All are permitted the same rights as the general public. The news reporter is not permitted to bring his typewriter or printing press [into the courtroom]. 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."³⁹ The ruling boded well for access if technology found a way to be less intrusive—which of course, it has.

By the 1970s, TV cameras and other electronic methods of recording trials had indeed become far less disruptive. Cameras and other forms of recording were smaller, made less noise, and required fewer wires. Perhaps taking its cue from *Estes* for such advancements, the ABA's Committee on Fair Trial-Free Press recommended a change in the standards on cameras in court in 1978. Also in 1978 the Conference of State Chief Justices voted 44-1 to approve a resolution allowing the highest court of each state to set its own guidelines for radio, TV, and other photographic coverage.⁴⁰ States began to experiment with different access programs for electronic media. By 1979, 11 states permitted trial and appellate coverage (five permanently, the rest on an experimental basis); three states permitted trial coverage only (all on an experimental basis); and seven states permitted appellate coverage only (four experimentally, three permanently). Fifteen states were considering proposals for appellate or trial proceedings.⁴¹

³⁵ 62 A.B.A. Rep. 1134-1135 (1937).

³⁶ 77 A.B.A. Rep. 610-611 (1952). The proscription was reaffirmed when the ABA replaced the Canons of Judicial Ethics with the Code of Judicial Conduct in 1972. Canon 3A(7) superseded Canon 35. E. Thode, Reporter's Notes to Code of Judicial Conduct 56-59 (1973).

³⁷ Homer Bigart, *Estes Goes on Trial in Texas With TV in Courtroom; Estes Brought to Trial in Texas; Judge Allows TV in Courtroom*, N. Y. Times, Sept. 25, 1962, at A1.

³⁸ Due Process is guaranteed under the Fourth Amendment of the US Constitution

³⁹ *Estes v. Texas*, 381 U.S. 532, 540 (1965).

⁴⁰ *Resolution I, Television, Radio, Photographic Coverage of Judicial Proceedings*, adopted at the Thirtieth Annual Meeting of the Conferences of Chief Justices, Burlington, VT (Aug. 2, 1978).

⁴¹ COMMITTEE ON PUBLIC ACCESS TO RECORDS, SPECIAL REPORT ON ELECTRONIC REPRODUCTION OF PUBLIC PROCEEDINGS (Sept. 25, 1979).

By 1981, the United States Supreme Court likewise softened its view on the matter of TV cameras in the court in light of improved technology. In *Chandler v. Florida*,⁴² the Court underscored that *Estes* had not flatly prohibited all TV cameras in courtrooms. Rather, satisfied with the due process protections Florida's experimental TV camera program had in place, the Court found that the defendant, despite his objections, was not prejudiced by the presence of cameras in the courtroom with these precautions in place.⁴³

In *Chandler*, Florida had conducted a controlled experiment in allowing cameras and other recording devices in the courtroom based on its strong belief 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," and that "broadcast coverage of trials would contribute to wider public acceptance and understanding of decisions."⁴⁴ To safeguard against potential abuses that allowing cameras could unleash, the Florida program detailed several restrictions on electronic access that, as described below, still echo in Florida. For example, the regulations allowed the press no more than one television camera in court (forcing them to rely on media pools), and no more than one camera technician; cameramen could not use artificial lighting; were required to position the camera in a fixed location and could not change film, videotape, or lenses while the court was in session; lawyer conferences, discussions between parties and counsel or at the bench could not be audio recorded; and the cameramen were not to film the jury.⁴⁵ The Florida program also gave defendants the right to object to broadcast coverage, and gave the trial judge "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."⁴⁶

Although technology had made television cameras and other forms of courtroom recording and broadcast less intrusive, concerns remained about the possibility that they might impinge a fair trial and that they overextend the right of public and press access. *Chandler*, and its more renowned predecessor *Nixon v. Warner Communications*,⁴⁷ denied that the press held a constitutional right to record and broadcast testimony. Reacting to the specific question of televised trials, the *Chandler* Court found that "[t]he requirement of a public trial is satisfied by the opportunity of members of the public and press to attend the trial and to report what they have observed."⁴⁸ Furthermore, the Court, reviewing *Estes* at length, recognized the affirmative ills that broadcast coverage could incite. Witnesses, attorneys and even judges might "stray, albeit unconsciously, from doing what comes 'naturally' into plumbing themselves for a satisfactory television 'performance.'"⁴⁹ Furthermore, the Court acknowledged the risks of publicity in denying the defendant a fair trial. The Court praised Florida's program for protecting

⁴² *Chandler v. Florida*, 449 U.S. 560, 573 (1981).

⁴³ *Id.* at 583.

⁴⁴ *Id.* at 555-6.

⁴⁵ *Id.* at 566.

⁴⁶ *Id.*

⁴⁷ *Id.* at 569, citing to *Nixon v. Warner Communications*, 435 U.S. 589 (1970).

⁴⁸ *Id.*

⁴⁹ *Id.* at 572, quoting *Estes*, 381 U.S. at 592.

certain participants at trial from the glare of the camera, for example, children, victims of sex crimes, some informants, and “even the very timid witness or party.”⁵⁰

After *Chandler*, many states adopted rules that allowed cameras at trial under certain conditions. Today, there remains great disparity among states over how and if cameras can be used. Most jurisdictions have taken one of two routes: allowing cameras in the court as a default position or declared by statute that cameras did not belong inside the courtroom.⁵¹ Among those states that do allow cameras in the courtroom, various degrees of access exist. Some states allow cameras into the courtroom whenever the trial judge deems it appropriate. Others allow cameras, but only if there is no objection from either party. Yet others, fearing the impact on jurors and witnesses, allow camera coverage only for appellate proceedings.⁵² Approximately, thirty-seven states now explicitly permit television coverage of trials.⁵³ Brief state trial excerpts are now customary on the evening news in particular, and some media outlets supply near gavel-to-gavel coverage of sensational cases.

Citing concerns with dignity and decorum, the federal courts have been far less willing to experiment with cameras in the court.⁵⁴ The Judicial Conference of the United States (the body which establishes policy for the federal judiciary) has refused to reconsider its rules prohibiting television and radio broadcasting from federal district court trials, reasoning that cameras intimidate witnesses and jurors (despite several recent experimental periods that did not result in a change of policy).⁵⁵

For its part, the United States Supreme Court has adamantly refused to allow cameras into the Court, despite a recent move by the Senate Judiciary Committee to approve a measure that would allow camera access. In December 2007, a subcommittee voted 11-7 in favor of

⁵⁰ *Id.* at 577.

⁵¹ N.Y. Civ. Rights Law §52 (2007)(state’s ban of TV cameras in court).

⁵² See MEDIA PRIVACY AND RELATED LAW (Media Law Resource Center 2006-07).

⁵³ Jennifer J. Miller, *Cameras in Courtrooms: The Lens of the Public Eye on Our System of Justice*, 13 S. CAROLINA LAWYER 24 (2002) (coverage permitted of both civil and criminal cases).

⁵⁴ See e.g., Administrative Office of the U.S. Courts, Background on Cameras in Federal Courts, http://www.judges.org/nccm/research/court_media_rules/admin_office_u_s_cts_cameras.htm. Most recently, the Judicial Conference strenuously opposed a bill, H.R. 2128, the Sunshine in the Courtroom Act of 2007 (a bill to allow cameras in federal courts) at a House Judiciary Committee Hearing on the subject in September 2007. U.S. Attorney John Richter from the Western District of Oklahoma testified to concerns that, “The potential harm to fair trials and the cause of justice are many, are likely, and would be severe. In contrast, the benefits, if any, would be small.” See *Judicial Conference Opposes Use of Cameras in Federal Trial Courts*, 39 THIRD BRANCH (Oct. 2007).

⁵⁵ Reporter’s Committee for Freedom of the Press, *Judicial Conference Changes Stand on Cameras in Appellate Proceedings* (March 25, 1996), <http://www.rcfp.org/news/1996/0325c.html>. In 1991, the Judicial Conference of the United States permitted experimental use of cameras in some federal courtrooms. When the experimental period ended three years later, the Judicial Conference declined to renew it. In 1995, the Judicial Conference voted to terminate all electronic coverage of federal courtroom proceedings. In 1996, the Judicial Conference modified its guidelines. Currently, two bills – against which the Judicial Conference is adamantly opposed but the ABA supports – to allow cameras in federal courtrooms are pending in Congress. See *The Sunshine in the Courtroom Act of 2007*, H.R. 2128, S. 352, 110th Cong. (2007).

allowing gavel-to-gavel television coverage of open sessions of court except in cases where the majority of justices deem a violation of the due process rights of one of the parties would result.⁵⁶ Supreme Court justices have been adamant on this issue. Justice Souter, testifying in 1996, famously told a Senate committee that, “[t]he day you see a camera come into our courtroom, it’s going to roll over my dead body.”⁵⁷ It should be noted that the Court has not been wholly unwilling to use technology to make its arguments available to the public: as of October 2006, the Court began releasing same-day transcripts of oral arguments.⁵⁸ In addition, same-day audio recordings of Supreme Court oral arguments are on occasion made available to the public, and all oral arguments are archived at the National Archives.⁵⁹

Web-Based Technologies and Access to Trials

One of the traditional concerns about commercial television coverage of court hearings has been the complaint that the covering station or company will select the video equivalent of “soundbites,” and thus fail to accurately present what is happening in court. The advent of inexpensive webcasting potentially resolves the issue. It is now easily possible for courts to use their own equipment to publish to the web the entirety of court hearings as they happen. This approach, used by the Center for Legal and Court Technology in its annual Laboratory Trials,⁶⁰

⁵⁶ See Reporter’s Committee for Freedom of the Press, *Committee Votes to Allow TV Coverage of High Court*, (Dec. 14, 2007), <http://www.rcfp.org/news/2007/1214-bct-commit.html>. In 2000, the media exerted tremendous pressure to allow TV coverage of hotly contested *Bush v. Gore* hearings, to no avail. See Motion to File a Brief as Amicus Curiae or in the Alternative Motion to Intervene for the Purpose of Allowing Cameras in the Courtroom and Brief as Amicus Curiae or as Intervenor, *Bush v. Gore*, 2000 WL 1818321 (2000). Perhaps in a bow to the value of public access to Supreme Court proceedings, the Supreme Court did release the audiotape of the arguments in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000), just a few hours after oral arguments were concluded. See Marjorie Cohn, *End the TV Blackout in the Supreme Court*, *Christian Science Monitor*, Dec. 13, 2000, at 9.

⁵⁷ *On Cameras in the Supreme Court, Souter Says, ‘Over My Dead Body,’* N.Y. TIMES, March 30, 1996, at A24.

⁵⁸ See *Transcripts and Recordings of Oral Arguments*, available at http://www.supremecourtus.gov/oral_arguments/availabilityoforalargumenttranscripts.pdf (“Beginning with the October 2006 Term, the Court will make the transcripts of oral arguments available free to the public on its Website, www.supremecourtus.gov, on the same day an argument is heard by the Court. The Court’s contracted reporting service, Alderson Reporting Company, with the aid of a court reporter in the Courtroom and high-speed technology, will transcribe the oral arguments more quickly, therefore, providing the transcripts to the Court for same day posting on our website.”) According to an un-identified staffer at the Supreme Court contacted by the authors, same-day real time audio is sometimes released depending on the number of requests the Court receives from journalists, but no official policy exists regarding the release of real time audio of Supreme Court arguments.

⁵⁹ The Court makes its own set of oral argument recordings available at the National Archives. See *id.*

⁶⁰ Laboratory Trials at CLCT are experimental “mock” cases often presided over by a visiting federal judge. “Lab Trials” undertake multiple experiments aimed at testing the impact of various technologies on the trial process. Past trials have included a simulated terrorism prosecution with testimony from three continents (2001); an experimental terrorism case (with the support of the Department of Justice’s Counter Terrorism Section) using the world’s first known use of concurrent judicial proceedings from different countries (2003); an international parental child abduction case during which courts in both Williamsburg and in Monterrey, Mexico convened independently but took evidence from each other via web-based connections (2005); and an assistive technology trial in which many of the key participants had vision, hearing, and/or mobility limitations (2006). See The Center for Legal and Court Technology, <http://www.legaltechcenter.net/about.html>.

has already been done in real cases at the trial level. The Circuit Court of Wise County, Virginia, for example, has experimented extensively with webstreamed trials, as have other courts as discussed below.⁶¹ CLCT cases provide the public with the audio, video, court reporter's realtime draft transcript, and even images of the evidence. It is thus possible to give the computer-using public the ability to access any trial or proceeding taking place in an appropriately set up webstreaming courthouse. Further, courts can and do give access to past cases by archiving the recordings and making them available on the web as well. Indeed, Courtroom Live is now extensively advertising its subscription-based webstreamed coverage of trials.⁶²

Remote access to trials online is far from the norm. Not surprisingly, the most common type of live webstream currently provided by courts is found at the state supreme court and appellate levels.⁶³ These venues, unlike trial-level proceedings, are juror- and witness- free and feature relatively less sensitive personal information than trials tend to dredge up. Having risen to the appellate level, they also arguably have the most potential for educational purposes and public import. As shown in Table 1 below, some appellate courts offer archives of webstreamed proceedings, while others explicitly do not.⁶⁴

⁶¹ See Kathy Still, *Court Clerk Disputes Contention on Broadcasts*, RICHMOND TIMES-DISPATCH, April 24, 2000 at B1. The April 2000 murder trial was billed as the first murder trial to be broadcast online. Controversy arose when the defense attorney complained that conversations with the defendant at the counsel table at trial were audible in the broadcast (a claim the clerk of court strenuously denied). See *id.* Jack Kennedy, the Clerk of Court for the Wise County and City of Norton Circuit Court, notes that the court has plans to re-institute the webcasting program, date uncertain. Of the court's webcasting experience, Clerk Kennedy notes that the webcasts were very popular. The court received multiple complaints when webcasts were discontinued. The sitting judge at the time received emails commenting on webcasted cases from as far afield as Australia and Russia. Clerk Kennedy reports that he believes the webcasts provided the public an excellent educational opportunity and "a better understanding of what frequently viewed by the public as a closed branch of government." Telephone Interview with Jack Kennedy, Clerk of Court for the Wise County and City of Norton Circuit Court, in Norton, Va. (June 29, 2007).

⁶² See, e.g., NAT'L L. J., February 18, 2008, at 7 (advertisement).

⁶³ See e.g., Florida Supreme Court, *Gavel to Gavel Online*, <http://www.wfsu.org/gavel2gavel/>; Massachusetts Supreme Judicial Court, *Oral Arguments Before the Massachusetts Supreme Judicial Court*, <http://www.suffolk.edu/sjc/>; Mississippi Supreme Court, *Oral Argument Webcasts*, http://www.mssc.state.ms.us/appellate_courts/sc/scoralarguments.html; New Hampshire Supreme Court, *Supreme Court WebCAST*, http://www.mssc.state.ms.us/appellate_courts/sc/scoralarguments.html; North Dakota Supreme Court, *Listen to the Supreme Court*, <http://www.court.state.nd.us/court/webcasts.htm> (except mental health cases); Supreme Court of Appeals for West Virginia, *Argument Webcast*, <http://www.state.wv.us/wvsca/Webcast.htm>; and Supreme Court of Ohio, *Supreme Court Streaming Video Technology*, <http://www.sconet.state.oh.us/videostream/default.asp>.

⁶⁴ See e.g., Supreme Court of Appeals for West Virginia, *Argument Webcast*, *supra* note 57 ("Internet streaming technology now allows attorneys, judges, and members of the public outside of Charleston to follow court proceedings, and avoid the user limitations and charges associated with the call-in line. The webcast is streamed live directly from the courtroom. Proceedings are not archived and copies are not available.")

Table 1. Appellate Courts Currently Webcasting⁶⁵

COURT	LIVE	ARCHIVED COPIES AVAILABLE
Florida Supreme Court	✓	✓
Florida's Fifth District Court of Appeals	✓	✓
Indiana Supreme Court	✓	✓
Massachusetts Supreme Judicial Court*	✓	
Mississippi Supreme Court**	✓	
New Hampshire Supreme Court	✓	✓
New Jersey Supreme Court	✓	✓
New York State Court of Appeals***		✓
North Dakota Supreme Court	✓	✓
Ohio Supreme Court	✓	✓
Texas Supreme Court****	✓	✓
West Virginia Supreme Court	✓	

*Archive available through Suffolk University Law School website.

** Archive available through Mississippi College School of Law website.

*** Archived webcasts of capital cases and "other important cases" available; no live webcasts.

**** Live and archived webcasts available at St. Mary's University School of Law website at <http://www.stmarytx.edu/law/webcasts/?go=live>.

Relegating webcasts to appellate level proceedings may be the safest route as the incorporation of new technologies continues. The question becomes whether something is lost in confining webcasts to the appellate level. Access enthusiasts argue that webcasts offer tremendous educational and oversight advantages by allowing people who could otherwise not make it to court to see its goings on at the trial level. In their view, webcasting addresses the problem of empty courtrooms, offering an opportunity to recapture open court ideals.

Indeed, there are some pioneering trial courts actively experimenting with real time broadcast of trials. Two examples of trial-level webcasts come from Florida's 9th Judicial Circuit (Orange and Osceola Counties) and the Delaware Municipal Court in Ohio. A third example of technology-driven attempts to broaden access to trials is cablecasting, also discussed below.

⁶⁵ Note that some archived webcasts are free to the public, others, such as Alaska Supreme Court webcasts, are available from the archive for a fee (in Alaska, \$40 for a videotape version, *see* <http://www.ktoo.org/gavel/courtaudio.cfm>). It is unclear why some states choose to webcast hearings but not archive the webcasts. Perhaps the hope is to achieve a layer of practical obscurity as a result.

i. *Florida's Ninth Judicial Circuit*

Among the most interesting examples of experimental use of real time access to trials is Florida's 9th Judicial Circuit (hereinafter, the "NJC"). It is worthy of mention at the outset that the NJC's webcasts of live trials are currently limited to daily arraignment broadcasts. As of February of 2004, the Florida Supreme Court placed a moratorium on trial webcasts and other releases of electronic court records.⁶⁶ The moratorium continues to this day, with limited exceptions.⁶⁷

Despite the current circumstance in which webcasting is extremely limited, the NJC's innovative experiments with live broadcasts of trials before the moratorium is instructive. The NJC was the first court to broadcast a trial live on the Web in 1999.⁶⁸ The NJC has invested heavily in technology. Each of its courtrooms, totaling 64 venues in two counties, has the capability of broadcasting real time trials. The NJC accomplishes this either through a fixed court camera permanently installed (including in Courtroom 23⁶⁹ digital-broadcast quality cameras) or a camera from a media source.⁷⁰ Footage from trials in the NJC runs to a media room inside the court and to an outside "pedestal," in the media parking lot. The pedestal allows the media to plug in for access to immediate live feed from courthouses at all courts in the NJC.⁷¹

⁶⁶ See Committee on Privacy and Court Records, Amended Administrative Order No. AOSC04-4, (Fla. 2004). In 2005, the Florida Committee on Privacy and Court Records found that even a Florida state constitutional right of public access did "not include an affirmative right to compel publication of records on the Internet or the dissemination of records in electronic form." FLORIDA COMM. ON PRIVACY AND COURT RECORDS, FINAL REPORT 125 (2005). Observers note that the remote broadcast efforts were shut down largely because of fears that court clerks were not taking adequate care in placing judicial records online. See Lynn E. Sudbeck, *Placing Court Records Online: Balancing Judicial Accountability with Trust and Confidence: An Analysis of State Court Electronic Access Policies and a Proposal for South Dakota Court Records*, 51 S.D. L. Rev. 81, 110-12 (2006) ("[E]ven open government advocates supported the moratorium imposed by the order, noting some clerks were posting confidential material online that could encourage angry citizens to urge their legislators to enact laws that would place even greater restrictions on public records.").

⁶⁷ On September 7, 2007, after receiving an interim progress report and recommendations from its Committee on Access to Court Records, the Florida Supreme Court issued a revised "interim" policy with no stated end date. It largely continued the previous policy, but made a few specific changes, including: (1) it added the clarification that the policy did not apply to "digital recordings of judicial proceedings or other records in the custody or control of court administrators"; (2) it limited access to traffic court records in *civil* cases, and prohibited access to "images of traffic citations, which can contain personal identifying information"; and (3) it permitted "clerks of court to provide attorneys remote electronic access to records in cases in which the entire court file [was] not confidential." See Revised Interim Policy on Electronic Release of Court Records, Administrative Order No. AOSC07-49, (Fla. 2007).

⁶⁸ See Debbie Salamone Wickham, *Justice at Work: Watch on the Internet: Web Surfers Have Been Given Access to a Place and Process That Has Sometimes Been Shrouded in Mystery*, THE ORLANDO SENTINEL, Jan. 3, 2000, at C3.

⁶⁹ The Ninth Circuit's Barker Courtroom is customarily referred to as Courtroom 23 based on its 23rd floor location.

⁷⁰ The Circuit requires the media to pool its camera coverage such that only one camera is actually present at trial. See *Media Policies and Procedures*, www.ninja9.org.

⁷¹ Though live web broadcasts to the public are currently silenced by the moratorium, the Circuit continues to use its technological capabilities to experiment with the capacity of webcasts to further justice. A battery defendant's trial, for example, was to be webcast to the child victim in the case, an English citizen who resides in Britain, as a

The NJC is its own Internet service provider, which allows it to control the broadcast schedule and the content being aired. When webcasting was up-and-running, the trials were typically selected for webcast as a result of a request (by attorneys or the media) – requests the court granted an average of once a month from 1999 until the moratorium in 2004. Once a request had been made to broadcast a trial, the NJC adopted an unofficial procedure to evaluate (1) whether the trial had educational value, (2) whether it focused on an issue of public interest, and (3) whether the content was salacious. A positive answer to one of the first two and a negative answer to the last cleared the case for webcast. Between 1999 and 2004, the NJC broadcast approximately 50 real time trials online.

When the NJC did elect to broadcast a trial, the judge retained discretion to immediately stop the real time broadcast either by requesting that the cameraman turn off the camera or by pressing a button at the bench that killed the feed for portions the judge deemed inappropriate for broadcast. As a rule, no jurors were broadcast. In addition, certain witnesses and certain evidence were not broadcast, again under the discretion of the judge. Aside from these instances, the feed was unfiltered.

One of the most interesting components of the NJC's experience in this area was its traffic court experiment. In 2003, without advertising its intent and on its own initiative (i.e., not at the request of the media, particular attorneys, or parties), the NJC webcast traffic court proceedings for a two-week period. The webcasts broadcast the contents of traffic court sessions from the time court opened in the morning to its close at the end of the day. Court administrators were amazed not only to find the webserver fully saturated for the full two-week duration of the test, but that no complaints were filed and no incidents arose as a result of the experiment. The NJC conducted the experiment to determine if interest in court webcasts existed. Indeed, there is ample such interest.⁷²

ii. *The Delaware Municipal Court in Ohio*

Due to Florida's moratorium, the Delaware Municipal Court in Ohio is currently the only jurisdiction (of which the authors are aware) webcasting the contents of trial-level proceedings in real time online.⁷³ The court handles a variety of cases at the trial level including felony cases (initial appearance/preliminary hearings); misdemeanor cases, through final determination; traffic and parking violations; civil actions, up to \$15,000; small claims actions, up to \$3,000; and administrative appeals. The Delaware Municipal Court has been webstreaming trials since 1999.⁷⁴ Live webcasts are available only in certain circumstances: the court must be in session, the proceedings must be public, and the judge must have made the decision to stream the

means of allowing the victim to witness the court proceedings of his attacker. Telephone Interview with Matt Benefiel, Court Administrator in Florida's 9th Judicial Circuit, in Orlando, Fla. (July 3, 2007).

⁷² *Id.*

⁷³ Live broadcasts can be seen when court is in session at www.municipalcourt.org.

⁷⁴ Paula Canning, *Battles for cameras in courtrooms continue*, 27 THE NEWS MEDIA AND THE LAW 34 (Spring 2003), available at <http://www.rcfp.org/news/mag/27-2/bct-battlesf.html>.

contents of the proceedings.⁷⁵ Even when the streaming occurs, the site warns patrons that live webstreaming will not be available if (1) for confidentiality purposes, no audio is being streamed; (2) the court is between hearings or other proceedings; or (3) the court is in session, but the proceedings are not public.⁷⁶ Wonderfully, the court's live broadcast website features pictures of two courtroom doors, allowing the public to literally enter one of the two live broadcast courtrooms (when in session) approximating the sensation of walking into a real courtroom. Also like a real courtroom (with no offense to the efforts of the Delaware Municipal Court bench and staff to make such trials accessible), the authors can attest that the contents of the broadcast are rarely riveting.

iii. Cablecasting

A most obvious example of live trial cablecasting, at least until very recently, was Court TV.⁷⁷ Court TV broadcast live trial events from 1991 to December 31, 2007 on cable television. For the most part, Court TV broadcast sensational trials or trials of national interest only. Its stated criteria for choosing trials were (1) the importance and interest of the issues in the case; (2) the newsworthiness of the case and the people involved; (3) the quality and educational value of the trial; and (4) the expected length of the trial.⁷⁸ Court TV followed a policy of a 10-second delay on its real time broadcasts "...to prevent the airing of information such as the addresses of witnesses, the names of jurors, private conversations between a lawyer and his/her client."⁷⁹

The traditional model of Court TV allowed for live broadcast of only one trial. To combat this scheduling problem, the company added an online broadcast feature in 2005 called "Court TV Extra" intended to give paying subscribers the ability to view multiple webcasts of trials online at once.⁸⁰ Explained Galen Jones, then-executive vice president and chief strategy officer at Court TV, "traditionally on Court TV we only followed one trial at a time — gavel to gavel — and we'd run into huge scheduling issues if a more interesting case came along."⁸¹ This

⁷⁵ <http://www.municipalcourt.org/videostreams.asp>.

⁷⁶ *Id.*

⁷⁷ On January 1, 2008, Court TV officially became TruTV. Although the company maintained that it would continue its legal-based content, TruTV seems an attempt to capitalize on the reality TV craze (hence it's new tagline, "Not Reality. Actuality." It appears that some court-related content continues on TruTV (for example one weekly selection called "Arrest and Trial."). Court TV's Internet access to trials is now provided exclusively through CCN Crime News Online (*see* www.cnn.com/CRIME). Time-Warner (half owner of TruTV) claims that access to live trial news and verdicts are available on the CNN site, but it appears so far that such access is limited to special cases (namely, sensational trials that CNN.com would ordinarily webcast live). Trials are now webcast by Courtroom Live, which is available by subscription.

⁷⁸ Former Court TV FAQ page at <http://www.courtvtv.com/about/ctvfaq.html>, last viewed June 26, 2007 (while this site is no longer available at the original address, it may be accessed using Internet Archive's *Wayback Machine*, found at <http://www.archive.org/>).

⁷⁹ *Id.*

⁸⁰ 'Court TV Extra' will stream trial coverage, BNET.com (April 2005), http://findarticles.com/p/articles/mi_hb4895/is_200504/ai_n17971242. Court TV offered "Court TV Extra" as a subscription web-based service allowing viewers the opportunity to watch multiple live trials on the Internet "while accessing the tremendous resources of Court TV Online." Court TV Extra was discontinued when Court TV became TruTV.

⁸¹ Quoted in Annie Gentile, *And the Verdict Is: News and Knowledge*, American City and County, July 1, 2005, available at http://www.americancityandcounty.com/mag/government_verdict_news_knowledge/index.html.

innovation (demonstrating the recent confluence of cablecasting and webcasting) allowed Court TV to broaden the depth of the kinds of cases it selects for broadcast. Conceivably, had Court TV's reach to continue to grow, it could have begun to offer real time web broadcast of the more mundane trials at the local level.⁸²

It is worthy of note that Court TV was not the only cable show in town. A few jurisdictions have experimented with broadcasting trials through agreements with public access cable TV stations. For example, the Wise County Circuit Court in Wise, Virginia experimented with replacing webcasting with cablecasting on the Wise County PEG Channel 97.⁸³ Ohio's Medina and Massillon Counties have also experimented with cablecasting trials as well.⁸⁴

A final example of webcasting of trials worthy of note here are efforts by the private sector to make live webcasts of trials available to interested members of the legal and business professions for profit. For instance, a company called CourtroomLive makes select "newsworthy" and "precedent-setting" trials available for download (or live webcast) to one's computer for those who pay for the service.⁸⁵ For example, were one interested in viewing the live webcast of the trial of the *State of Alaska v. Eli Lilly & Co*⁸⁶ currently pending as of this writing, one could, through CourtroomLive's website, pay \$400 per day to watch. For an extra \$100, viewers can gain access within an hour of placing their order.⁸⁷

The real meat of real time broadcast will come in figuring out how and whether to use real time technology to open the courtroom doors of everyday trials as Ohio's Delaware Municipal Court has done. The question that lingers is whether trial courts should use available technology to replicate the packed courtrooms of yesteryear, especially when the frenzied modern pace leaves most courtrooms shockingly empty.

New Technologies and Access to Transcripts

⁸² During Court TV's 17-year run, not a single litigant brought suit against it for privacy violations associated with broadcasting the contents of trials. From 2004-2005, Court TV was a plaintiff in a suit against the State of New York, challenging New York Civil Rights Law §52, which prohibited audio-visual coverage of courtroom proceedings. The network initially lost on summary judgment, a ruling affirmed by the state's court of appeals. *See Courtroom TV Network, LLC v. State*, 5 N.Y.3d 222 (N.Y. 2005). During its tenure, Court TV was a stalwart advocate of open-access principles and the import of bringing the workings of the justice system to the people.

⁸³ Telephone Interview with Jack Kennedy, Clerk of Court for the Wise County and City of Norton Circuit Court, at Norton, Va. (June 29, 2007). Other examples at the appellate level of cable TV access include the aforementioned Alaska public access TV's coverage of Alaska Supreme Court proceedings (<http://www.ktoo.org/gavel/court.cfm>), and Washington Supreme Court coverage on public access cable TV Washington (www.tvw.org).

⁸⁴ Gentile, *supra* note 75.

⁸⁵ See www.courtroomlive.com. "CourtroomLive captures courtroom proceedings to deliver live and on-demand video directly to subscribers' desktops. Viewers can simultaneously view video of the proceedings while examining digital snapshots of evidence presented in court. Video is used for trial preparation, research, and educational purposes by a range of legal and business professionals, from litigators to in-house counsel to financial analysts to educational institutions."

⁸⁶ Case No. 3AN-06-05630CI.

⁸⁷ See <http://shopping.courtroomconnect.com/s.nl/sc.8/category.534/f>.

The process by which official transcripts are taken and filed with courts has changed drastically in the last fifteen years as trial recordation technologies have advanced. Although court reporter-based court records (stenographic and voice-written) remain common – and are substantially augmented by modern technology, in many jurisdictions, trials are increasingly recorded through digital audio mechanisms for potential later transcription.⁸⁸ Typically, written transcripts are created only when parties (or judges) so request. In most cases, digital audio recordings of court proceedings are made by court staff using court-owned equipment.⁸⁹ At the state level, as in the case of paper transcripts discussed above, whether the digital audio recording becomes available to the public is hard to predict.

Federal courts recently took a major step forward on this front by allowing online access to digital audio recordings of trials in a pilot project begun in June of 2007. Under the pilot program, a handful of district courts will put the audio of all proceedings, except closed hearings, online.⁹⁰ Importantly, audio files will be made available on the same day, but not in real time.⁹¹

Another recent PACER innovation: rather than trudging to federal courthouses to inspect transcripts, individuals may now access transcripts online through PACER. On September 18, 2007, the federal judiciary announced that transcripts of federal district and bankruptcy court proceedings would become available on PACER ninety days after being delivered to the clerk of court.⁹² PACER subscribers can now view, print, and download transcripts for \$.08 a page online.⁹³

⁸⁸ At the federal level, digital audio recording is one of three authorized methods for preparing an official record of a court proceeding since 1999, when the Judicial Conference voted to make it an alternative to court reporters and analog recording. *Pilot Project Will Post Digital Audio Recordings Online*, 39 THE THIRD BRANCH (June 2007).

⁸⁹ When prepared in this manner, the recording arguably belongs to the public for purposes of access. See, e.g., *State ex rel. Harmon v. Bender*, 494 N.E.2d 1135 (Ohio 1986) (videotapes of trial proceedings are public records).

⁹⁰ Tony Mauro, *Judicial Conference Urges End to 'Secret' Dockets*, Legal Times, March 13, 2007, <http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1173776612126> (“[T]he [Judicial] conference [of the United States] ... endorsed a pilot project aimed at making audio of court proceedings available online through the federal judiciary’s PACER electronic access system. The U.S. Court of Appeals for the 8th Circuit has posted audiotapes of its oral arguments online since the turn of the century, but other courts have been slow to follow suit.”) The five pilot project participants (the U.S. District Court for the District of Nebraska, the U.S. District Court for the Eastern District of Pennsylvania, the U.S. Bankruptcy Court for the District of Maine, the U.S. Bankruptcy Court for the Northern District of Alabama, and the U.S. Bankruptcy Court for the Eastern District of North Carolina) plan to integrate their recordings and Case Management/Electronic Case Files (CM/ECF). See *Pilot Project Will Post Digital Audio Recordings Online*, *supra* note 79. In the past, computer disks of hearings were available for purchase for \$26 (and required a trip to the courthouse). Digital audio files are available online through PACER at \$.16 per audio file (\$.08 for accessing the docket sheet and \$.08 for selecting the audio file.) It will be interesting to see whether remote access to audio recordings of bankruptcy proceedings—hearings involving highly personal information—will result in privacy complaints.

⁹¹ According to Richard Carelli, Senior Public Affairs Specialist of the Administrative Office of the U.S. Courts, only two courts (the U.S. District Court in Nebraska and the U.S. Bankruptcy Court for the Eastern District of North Carolina) are participating as of February 15, 2008.

⁹² THE FEDERAL JUDICIARY, *Transcripts of Federal Proceedings Nationwide to be Available on PACER* (Sept. 18, 2007), available at http://www.uscourts.gov/Press_Releases/judconf091807.html.

⁹³ *Id.* During the 90-day window, those who wish to view transcripts must still appear in person at the clerks’ office, and may inspect the transcript only. Those wishing to purchase a copy of the transcript may do so through the court reporter following traditional practice.

Aside from recent strides in access to digital audio recordings and online transcripts on the federal level, another important innovation in court reporting has been slowly changing the way courts and lawyers (and in some cases the general public) engage with trials: real time reporting. Real time reporting involves specially-trained court reporters who provide judges, lawyers, and in certain cases the public at large with a draft electronic text transcript that is contemporaneous with what is said. With appropriate wiring, that verbatim transcript can be sent anywhere via the Internet. When United States District Judge Roger Strand presided over the trial of Governor Symington of Arizona, his court reporter, Marilyn Sanchez,⁹⁴ provided the electronic transcript to the media every night, as a public service on a pro bono basis. Many courts now have the ability to supply by web a verbatim text copy of everything said in the proceedings. The catch, of course, from a privacy perspective, is that this verbatim web version in some cases will include highly personal data.

By some estimates, a full third of court proceedings in the United States are recorded by court reporters in real time.⁹⁵ Of the members of the National Court Reporter's Association, roughly nine percent are certified real time reporters.⁹⁶ According to an article in the judicial publication *The Third Branch*, the number of requested transcript pages of real time reporting in federal courts rose from 1.76 million to 2.26 million, an increase of 28%, between fiscal year 2003 and 2004.⁹⁷

Real time transcription has proliferated in large part to meet the very inward goal of bettering the administration of justice within the court. The vast majority of real time transcription done by court reporters is performed not for the public at large or even for the bar, but for the benefit of the bench.⁹⁸ Judges use real time transcripts for four main purposes: (1) as a reference for difficult motions, evidentiary rulings, and the like; (2) as an "interpreter" service for witnesses with accents difficult to understand; (3) as a way to review a question to a witness to rule on a lawyer's objection; and (4) as a means of focusing on trial without having to take notes.⁹⁹ Additionally, real time electronic transcripts allow judges to search the transcripts using key words (something that technology doesn't currently allow with as great efficiency on the audio side). Touting the benefits of real time transcription, Chief Judge B. Lynn Winmill of the District of Ohio explained, "It's absolutely invaluable... I don't know how I could function

⁹⁴ Former President of the National Court Reporter's Association and frequent speaker at CLCT's Privacy and Public Access to Court Records Conferences.

⁹⁵ Telephone Interview with Marilyn Sanchez, former director of the National Court Reporters Association (May 1, 2006).

⁹⁶ This is not an accurate reflection of how many court reporters are certified in real time since other organizations offer real time certification, and since all court reporters are not members of the National Court Reporters Association. *Id.*

⁹⁷ *Real Time Court Reporting Grows in Popularity*, 37 THE THIRD BRANCH, Dec. 2005, at 9. In FY 2005, the total pages reported were 2,219,976, a decline of 1.9% from the prior year. Statistics indicate that approximately 92% of the total volume of real time feed is requested by judges. The small drop in total use of real time may have been caused by limited funding available at the Department of Justice and the Office of Defender Services.

⁹⁸ *Id.* (noting that 85% of requested real time transcripts come from judges).

⁹⁹ *Id.*

without it.”¹⁰⁰ According to one court reporter, taking away real time transcript capability would make some judges feel like they had lost their right arm.¹⁰¹

A second growing use of real time transcripts are for-profit services that provide transcripts to attorneys in particular cases.¹⁰² Lawyers use real time transcription services principally to manage their performance at trial. LiveNote, a company not affiliated with courts or court reporters (but now owned by Thompson-West), provides an instructive example. LiveNote’s software enables attorneys to send the real time feed from the court reporter to counsels’ laptops at trial or remotely online.¹⁰³ Attorneys can then annotate the text for easy use in witness examination, preparation of jury instruction, or for later appellate use, and with court reporter agreement counsel can e-mail this unofficial transcript to colleagues. In addition, LiveNote offers its clients a fast-growing searchable database of transcripts.¹⁰⁴ According to LiveNote, its real time transcript service is used in more than 500 hearings a day in the United States; also according to LiveNote, 81% of the “top 200” U.S. law firms use LiveNote for transcript management.¹⁰⁵

A third use of real time transcripts worthy of note is to make courts more accessible to the deaf and hard-of-hearing. Of the more than 20 million deaf and hard-of-hearing individuals in the United States, many may find reading transcripts a useful alternative to sign language interpretation. Captioning for the hearing impaired using real time transcription also helps courts comply with the Americans with Disabilities Act.¹⁰⁶

Although most real time transcript broadcasts to the public occur only during sensational trials (for which real time transcription services have become the norm), real time transcripts in everyday proceedings are commonly available to the judge, court staff, and increasingly to lawyers. As more court reporters become conversant in real time transcription, and as software like LiveNote’s becomes more prevalent, unofficial versions of real time transcripts are certain to proliferate.¹⁰⁷

¹⁰⁰ *Id.*

¹⁰¹ Telephone Interview with Kathleen Wirt, (May 1, 2006).

¹⁰² U.S. attorneys requested 13,978 pages in FY 2004, an increase of 518 percent over FY 2003. *See Real Time Court Reporting Grows in Popularity*, *supra* note 87.

¹⁰³ Court reporters charge LiveNote customers for the live feed they provide. Sometimes court reporters bundle the package, charging one fee for real time feed and ultimately the official transcript. Often court reporters charge LiveNote users a per page fee for real time feed.

¹⁰⁴ Note that LiveNote pays court reporters for all transcripts entered into its database.

¹⁰⁵ *See* AmLaw Tech Survey, Sept. 2004, quoted at <http://www.livenote.com/company.asp>.

¹⁰⁶ *See Realtime Court Reporting*, www.ninja9.org/courtadmin/mis/Realtimereporting.htm. The CLCT conducted an assisted technology Lab Trial on April 1, 2006 to test various courtroom technologies in enabling disabled persons (judges, lawyers, jurors, members of the public) to participate in a mock trial. During the Lab Trial, the Center successfully experimented with the use of realtime transcription to assist deaf jurors and deaf and hard-of-hearing persons in the gallery. *See Courtroom 21 to Use High-Tech Assistive Technologies in Pioneering Experimental Trial*, <http://www.legaltechcenter.net/media/pr/2006/06lab.html>.

¹⁰⁷ In addition to the proliferation of real time transcription, it should also be noted that more and more companies are adding the business of transcript databasing, allowing lawyers and the general public access to searchable databases of electronic versions of transcripts. Organizations such as the American Association for Justice (formerly American Trial Lawyers Association) and the Defense Research Institute have vast collections of transcripts

Multiple privacy concerns come to mind with the rise of electronic transcripts. To begin, once electronic versions of transcripts are released, it becomes difficult for courts and court reporters to police the accuracy of their content.¹⁰⁸ Transcripts released on the web may be easily manipulated such that it becomes difficult to discern which transcript is the “real” transcript. The privacy implications of “unofficial” and even official electronic or online versions of transcripts proliferating on the Web are also of concern given the potential for inaccuracies, manipulability, searchability, and the potential for the release of non-public personal information of litigants and third parties. As we have seen in numerous contexts, misinformation published on the web is difficult if not impossible to “put back in the tube.”

Some federal courts have attempted to respond to these issues by requiring lawyers receiving real time transcripts to sign an agreement not to disseminate the transcript.¹⁰⁹ In addition, federal court rules require that parties requesting real time transcripts must ultimately purchase an official certified transcript. This requirement is in part intended to diffuse the problem of the “wrong” transcript floating around by making the accurate official version publicly available.

Judicial policymakers are also rethinking traditional procedures for developing, redacting, and releasing transcripts to accommodate the electronic and online contexts. At the federal level, the Court Administration and Case Management Committee (CACM), a subcommittee of the Judicial Conference, proposed a redaction policy in June 2003 requiring each party to a proceeding to file a notice of redaction signaling the party’s intent to redact personal data identifiers from the electronic transcript of the court proceeding within five days of the court reporters’ filing of the official transcript with the court. If no such notice is filed in the 5 day period, the court could assume that redaction was not necessary and would be free to release the transcript electronically.¹¹⁰ Real time transcripts are not considered part of the court record, and are not therefore subject to redaction policies.

available to members, primarily deposition and in-court testimony of experts. A number of commercial companies operate transcript depositories, *see e.g.*, Trial Smith (“The Nation’s Largest On-line deposition Bank Exclusively for Plaintiff Lawyers,” www.trialsmith.com), RealLegal E-Transcript Manager, Metatomix JFA, and FileTrail Passive Tracking, to name a few.

¹⁰⁸ Note that these same fears are present in the case of digital audio recordings of hearings. As one FJC Working Group noted, “Digital audio files can be modified with off-the-shelf software—segments can be removed, new material can be added, the order of material can be changed, and the pitch and speed of voices and other sounds can be modified.” *See Working Group Outline on Digital Audio Recordings, Real-time Court Reporting, and Court Interpreting*, (Fed. Judicial Center Resources on Courtroom Technology Working Group, 2001), available at [http://www.fjc.gov/public/pdf.nsf/lookup/CTtech06.pdf/\\$file/CTtech06.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CTtech06.pdf/$file/CTtech06.pdf).

¹⁰⁹ *See e.g.*, the *Realtime Unedited Disclaimer Form* from the United States District Court for the Northern District of Ohio, http://www.ohnd.uscourts.gov/Attorney_information/Realtime/realtime.html; Kathleen Wirt, former president of the National Court Reporters Association, reports being aware of at least one instance where attorneys posted a real time transcript online in a high profile case. Telephone Interview with Kathleen Wirt, (May 11, 2006).

¹¹⁰ *See UNITED STATES JUDICIAL CONFERENCE, Policy on Electronic Availability of Transcripts of Court Proceedings* (Sept. 20, 2005). The recommendation allowed a court to stop electronic transmission of an unredacted transcript “for good cause related to the application of the Judicial Conference policy on privacy and public access to electronic case files, finds that the transcript should not be available electronically for a period of up to 60

This proposal met (and continues to meet) with great resistance from court reporters, who feel the proposal added significantly to their responsibilities without providing for additional compensation.¹¹¹ The work of redacting, especially in the case of a voluminous record, can be very onerous. In addition, court reporters pointed out that the proposed solution gave no recourse to third parties who, for example, might testify at trial, and whose nonpublic personal information could wind up in a transcript.¹¹² Also, would liability for privacy violations stemming from the release of non-redacted transcripts fall on the court reporter? The Judiciary?

At the state level, the National Center for State Courts and the Justice Management Institute on behalf of the Conference of Chief Justices and the Conference of State Court Administrators produced the *Guidelines for Public Access to Court Records* (the “COSCA Guidelines”), released in 2002, to serve as a basis for states considering legislation on public access to court records in an electronic age.¹¹³ The COSCA Guidelines, like the federal counterpart, require that personal identifiers be redacted from court records,¹¹⁴ and include transcripts in the definition of “court record.”¹¹⁵ The COSCA Guidelines are far less explicit than its federal counterpart as how states should accomplish redaction mandates, much less how to handle the problem of redaction amidst real time transcript delivery.¹¹⁶

Following the general dictates of the COSCA Guidelines, many states require redaction for electronic court records, including transcripts. Virginia, for example, recently passed legislation requiring that any pleading, motion, order or decree, “including any agreements of the parties or transcripts, shall not contain the social security number of any party or of any minor child of any party, or any financial information of any party that provides identifying account numbers for specific assets, liabilities, accounts or credit cards.”¹¹⁷ Many other states have also

days.” Note that there is some concern that court reporters are selling electronic copies of transcripts before the 5 days has lapsed. Letter from Sophie M. Korczyk, Ph.D, to Kathleen M. Wirt, CM/ECF Committee Chair, United States Court Reporters Association (January 22, 2004). On December 1, 2007, new rules aimed at protecting privacy of online records in federal, district, and bankruptcy courts went into effect supplementing and in some cases changing the policy laid out in 2003 (the biggest difference: allowing courthouse-only access to some types of case files). The new rules for civil, criminal, and bankruptcy courts (Civil Procedure Rule 5.2, Criminal Rule 49.1, and Bankruptcy Rule 9037) require, *inter alia*, that case files show only the last four digits of a person’s financial account or Social Security number; only the year, not date, of someone’s birth; and only the initials, not name, of persons known to be minors. See *New Privacy Rules Immanent, Another Privacy Change Contemplated*, THE 39 THIRD BRANCH, (Nov. 2007).

¹¹¹ Court reporters were also anxious about the Judicial Conference’s simultaneous move to comply with the E-Government Act of 2002 by allowing transcripts to be posted on PACER with a cut of the PACER fee to go to court reporters.

¹¹² Memorandum from the United States Court Reports Association (USCRA), to USCRA Members and other Court Reporters (Aug. 13, 200)(on file with authors)(The title of the memorandum is *Electronic Access to Official Transcripts*.)

¹¹³ See www.courtaccess.org/modelpolicy.

¹¹⁴ See *COSCA Guidelines*, *supra* note 29, at §4.30(c).

¹¹⁵ See *id.*, at §3.10(a).

¹¹⁶ No doubt this omission was intentional, allowing states to experiment with best practices.

¹¹⁷ VA. CODE ANN. § 20-121.03(2007) (emphasis added).

adopted policies requiring that certain sensitive personal information¹¹⁸ be banished from court records, including Arizona,¹¹⁹ California,¹²⁰ Florida,¹²¹ Indiana,¹²² Maryland,¹²³ Massachusetts,¹²⁴ Missouri,¹²⁵ New York,¹²⁶ and Washington,¹²⁷ to name a few. Other states, such as Utah and Wisconsin, are proceeding with policies that simply bar remote access rather than requiring redaction of the record.¹²⁸

The COSCA Guidelines and redaction policies being adopted by states such as Virginia neglect to state who bears the burden of redaction. Even in states where the onus of redaction is on the parties, once the request that certain sensitive personal information be redacted is filed, the court reporter is ultimately responsible for redacting the transcripts.

New Technologies and Access to Evidence

No discussion of “the new court record” would be complete without including the impact of technology on the presentation of evidence. As court technologies have evolved, lawyers’ ability to project evidence in the courtroom (and outside the courtroom) has evolved, allowing members of the public greater ability to review evidentiary submissions. It is now possible, as demonstrated in CLCT Laboratory Trials and in other experiments around the country to broadcast evidence to remote audiences online. Access to evidence remotely is far from the norm. Like real time transcripts, electronic copies of evidence broadcast remotely are typically available only in the most sensational trials where key pieces of evidence are made available to

¹¹⁸ Different states have different definitions of what constitutes “sensitive” data, but common examples include, addresses, phone numbers and other contact information for victims (not including defendants) in domestic violence, stalking, sexual assault, and civil protection order and criminal proceedings; social security numbers; account numbers of specific assets, liabilities, accounts, credit cards, and PINs (Personal Identification Numbers); photographs of involuntary nudity; photographs of victims and witnesses involved in certain kinds of actions; obscene photographs and other materials; medical records; family law proceedings including dissolution, child support, custody, visitation, adoption, domestic violence, and paternity, except final judgments and orders; termination of parental rights proceedings; abuse and neglect proceedings; and names of minor children in certain types of actions. See *COSCA Guidelines*, *supra* note 29, at Commentary to § 4.50(a).

¹¹⁹ See ARIZ. REV. STAT., Sup.Ct. Rule 123 (2007).

¹²⁰ See CAL. RULES OF COURT 2.500-2.507 (2007).

¹²¹ See Committee on Privacy and Court Records, Administrative Order No. AOSC03-49, (Fla. 2003).

¹²² See revisions to Indiana Administrative Rule 9. IND. ADMIN. RULE 9 (2007).

¹²³ See MD. RULES, Rule 16-1001-11 (2007).

¹²⁴ Mass. Sup. Judicial Court, *Policy Statement by the Justices of the Supreme Judicial Court Concerning Publication of Court Case Information on the Web* (May 2003) available at <http://www.courtaccess.org/states/ma/documents/ma-webpubpolicy.pdf>.

¹²⁵ MO. SUP. CT. OPERATING RULE 2.01 (Missouri tackles the issue slightly differently by requiring that case records containing social security numbers cannot be disseminated and court personnel cannot expunge or redact those numbers that appear in case records).

¹²⁶ COMMISSION ON PUBLIC ACCESS TO COURT RECORDS (Feb. 2004), available at http://www.nycourts.gov/ip/publicaccess/Report_PublicAccess_CourtRecords.pdf.

¹²⁷ See WA. GEN. RULE 31.

¹²⁸ See UTAH RULES OF JUD. ADMIN. 4-202.02 and the Wisconsin Policy on Disclosure of Public Information Over the Internet (April 2003), available at <http://wcca.wicourts.gov/AB0304.xsl>.

the public for detailed inspection.¹²⁹ Real time transmission of evidence remotely in the ordinary course remains rare.

What is more common is the growing trend of evidence projected at trial within the courtroom. Presentation technologies are starting to have a real impact on how trials are conducted. In 2001, the Federal Judicial Center and the National Institute for Trial Advocacy put out a comprehensive, if already dated, guide for judges on the use of technology in courtroom proceedings. Discussing the increasing use of evidence display technologies, the guide explains,

At its foundation, courtroom technology is a means for putting evidence before everyone in the courtroom...at the same time. The displays...convey many kinds of information more efficiently. Most lay people can look at a display and following along with an explanation more readily than they can find the place in a hard copy document and try to read the small type while also trying to listen... Courtroom technology is also a means to draw attention to particular points, to emphasize certain aspects of the evidence, and to make visible that which would otherwise exist only as a mental picture formed from words spoken by an advocate or a witness.¹³⁰

Attendees at trial are enjoying a far greater level of access. In the past, out of necessity, evidence was presented primarily for the benefit of jury and judge. When lawyers chose to play to the public as well, they used large poster boards, transparency projectors, and other tools to make evidence accessible. Advancing technology allows lawyers to capture and record evidence in new ways.¹³¹

People attending trials with such technology in place are able to view (and hear) evidence to which they would not previously have had access. Picture, for example, a lawyer admitting into evidence financial records of a spouse in a divorce case. Assuming the trial took place in a state where divorce cases are open to the public, someone attending this trial in a traditional courtroom would know only that financial records were entered into evidence, and would learn their details only to the extent that portions of the admitted evidence were read aloud in court. In

¹²⁹ The U.S. District Court for the Eastern District of Virginia posted copies to its website of approximately 1,200 exhibits admitted into evidence during the trial in *U.S. v. Zacarias Moussaoui*—providing public access to nearly every exhibit viewed by the jury. *Web Opens Access in High Profile Case*, 39 THE THIRD BRANCH (Sept. 2006). (“A consortium of media organizations appealed to the Fourth Circuit the trial court’s decision not to make trial evidence public until after the trial’s conclusion. The Circuit gave the media a partial win by agreeing that the trial exhibits were public records. But, during the trial, the court had to provide public access only to exhibits that had been “published in full” to the jury. According[ly]..., this meant that if a photograph was displayed to the jury on the courtroom’s electronic evidence system, that photograph had to be made available to the media. However, if six minutes of a 12-minute videotape were played, that piece of evidence did not need to be provided until the end of the trial.”) See *United States v. Zacarias Moussaoui*, Criminal No. 01-455-A, www.vaed.uscourts.gov/notablecases/moussaoui/index.html.

¹³⁰ Federal Judicial Center, *Effective Use of Courtroom Technology: A Judge’s Guide to Pretrial and Trial 1* (2001), available at [http://www.fjc.gov/public/pdf.nsf/lookup/CTtech00.pdf/\\$file/CTtech00.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CTtech00.pdf/$file/CTtech00.pdf)

¹³¹ Problems recording evidence presented using new technologies for later dissemination have been the basis of several suits, primarily brought by members of the media interested in accessing evidence presented at trial. See discussion *infra* notes 127-32 and accompanying text.

The impact of technology on access to evidence used at trial has been a subject of several important public access cases. The most prominent, *Nixon v. Warner Communications*,¹³⁵ involved press access to recordings of conversations at the White House Oval Office during the Nixon administration. The press heard the recordings at trial, and the court provided the press transcripts of the recordings, but the insatiable press wanted to replay the *recordings themselves*—the sound of Nixon’s voice—to the public and sued for the actual tapes. The United States Supreme Court sided with the trial judge, concerned that releasing the tape might cater to base commercial exploitation that would reflect poorly on the dignity of the justice system. The Court cited the trial judge’s concern that immediate access to the tapes might “result in the manufacture of permanent phonographic records and tape recordings, perhaps with commentary by journalists or entertainers; marketing of the tapes would probably involve mass merchandising techniques designed to generate excitement in an air of ridicule to stimulate sales.”¹³⁶ The Court refused to release the tapes to the media.

More recently, new forms of evidence presentation have similarly challenged access principles. In 2002, for example, the United State Court of Appeals for the First Circuit decided *In re Providence Journal* in which the press requested copies of videotape and audiotape evidence introduced at the trial of the colorful former Mayor of Providence, Buddy Cianci.¹³⁷ The court denied access to copies of the tapes based on a particular technological issue not present in previous iterations of this issue: the government had not simply played tapes in court, it had used “cutting edge technology [Sanction software]... to play for the jury medleys of selected excerpts from the universe of taped materials stored on its laptop computer.”¹³⁸ Consequently, the court noted, there was no “tape” to turn over. In order to give the press access to the material played in open court, the court would have to create a new medium containing only the taped excerpts actually played. Did the press have access rights to this “new medium”? Did the court have the obligation to create a new medium to satisfy access demands? The First Circuit held that it did not. Relying on *Nixon*, the First Circuit held that the court had satisfied its First Amendment access obligations by accommodating the press’ access during trial (for example reserving seats at trial for members of the press and providing an overflow room).¹³⁹ In many ways, this has now become a court record issue. Does the public have the right to view *all* evidence introduced at a proceeding, including evidence captured only in digital form?

Did a common law right to inspect and copy documents afford the press the right to copy the evidence in question? The court found that the right of access indeed extends to the right to “examine the materials on which the court relies in determining litigants’ substantive rights.”¹⁴⁰ However, the court decided that judges are not obliged to afford such access where the evidence is not so easy to copy. Looking at the historical impact of technology on the right to copy evidence presented at trial, the court reflected that “[o]ver time, the right [to copy records from

¹³⁵ *Nixon v. Warner Communications*, 435 U.S. 589 (1978).

¹³⁶ *Id.* at 595, quoting *United States v. Mitchell*, 397 F.Supp. 186, 188 (1975).

¹³⁷ *In re Providence Journal*, 293 F.3d 1 (1st Cir. 2002).

¹³⁸ *Id.* at 17. The lawyers used Sanction by Verdict Systems (www.verdictsystems.com).

¹³⁹ *Id.* at 16.

¹⁴⁰ *Id.* quoting *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986).

trial] has been extended to accommodate advancements in document reproduction such as photography, photocopying, and the replication of videotapes and audiotapes.”¹⁴¹ The court noted, however, that the records involved typically were quite easy to reproduce. As the trial court had determined, reproducing the medley evidence presented at this trial was a “daunting task” given the evidence presentation technology used. The First Circuit concluded that releasing evidentiary materials presented at trial to the press was an issue that should remain with the “informed discretion” of the trial judge who had not abused his discretion in ruling that the job of producing copies of this particular form of evidence would be to onerous on court staff.¹⁴²

Perhaps *In Re Providence Journal* is one of those “moment in time” cases where the technology used has quickly been replaced by technology that remediates the issue at trial (here, for example, makes medley evidence presentations easy to record for later dissemination). But the reluctance of the court to grant access to this new form of evidence presentation remains an indication of the judiciary’s sensitivity to the pace of technological change in the realm of evidence presentation. Courts seem warm to the idea that just because technology enables greater access to evidence does not mean greater access should be afforded.

The question of the nature and level of access to evidence is certain to be raised more frequently as evidence technologies develop. New technologies, for example, allow counsel and witnesses to annotate exhibits electronically during trial. If a court fails to capture this annotation for later public dissemination, will it have failed its public access obligations? The First Circuit would likely answer no – the public access duty has been met by allowing open access during trial.¹⁴³

A second question raised by evidence technology relates not to methods used by lawyers to display evidence, but architectural to choices made by courts themselves, irrespective of particular cases, relating to courtroom design. Some courts, for example, have elected to install one or several large flat screen TVs for the display of evidence to the judge, the jury, and the gallery alike. Others have invested significantly in small screens affixed to the witness stand, the judge’s bench, and to attorney tables that are intended to display material only to the parties, the witness, the jury, and the judge,¹⁴⁴ but which customarily fail to protect displayed content from anyone sitting behind the display. Courts that decide to modernize are faced with questions they never previously faced that have huge implications to the privacy rights of those who use (both indirectly and directly) the technologically sophisticated courtrooms they ultimately construct.

Should technological innovation in evidence presentation and courtroom design change the access balance, allowing members of the public attending court proceedings the ability to see

¹⁴¹ *Id.* at 17.

¹⁴² *Id.*

¹⁴³ Other courts may not be as willing to parse access to evidence issues. See e.g., *United States v. Massino*, 356 F. Supp.2d 227 (E.D.N.Y. 2005) (court declined to bifurcate the right to listen to audio recordings played at trial versus the right to duplicate them).

¹⁴⁴ Note that this practice is far more expensive than the single display, and as a result far less common. Perhaps because in open trials members of the public have the right to witness evidence used to determine outcomes of trials, many courts feel the expense of investing in small, slanted screens strategically placed is not worth the effort.

information they would not previously have seen? Judging by the lack of policy guidance in this area, and the relative free-for-all in which courts are engaged as they construct their “courtrooms of the future,” privacy concerns raised by the real time projection of evidence have not made it onto most policymakers’ radar.

* * *

Modern technology is increasingly making it possible for members of the public anywhere in the world to have access to a verbatim rendition of an unattended—but otherwise open—court session, be it through remote access to the proceedings itself, to real time transcripts, and to evidence projection. Just as e-filing and online access to court records destroyed the doctrine of practical obscurity for court documents, webcasting of trials, transcripts, and evidence may do so as well for proceedings themselves. Before long, it may be the case that the practical obscurity litigants and third parties enjoyed in the empty courtrooms of yesteryear could be replaced by real-time, searchable imprints of their time in court. The questions then ought to be, should we care, and if so, what choices do we have?

Questions of Policy

The manifold issues that have been part of the privacy debate over public access to court documents and records would seem to apply equally well to court proceedings. Concededly, the easy access to social security numbers and other personal identifiers found in many court documents may be less prevalent in testimony, although, as we have seen, such data is actually commonly collected in the course of many proceedings. However, the degree of personal detail present in court testimony, especially in family law and criminal cases, can be huge. Further, if evidence is viewable, amazing amounts of data could be compromised. Every check fraud case, for example, could reveal bank account numbers.¹⁴⁵ The very bankruptcy proceedings which largely ignited the privacy and e-filing debate would again present the very same personal information privacy issues if documentary evidence were viewable.

At the same time, detailed public access to the content of court proceedings presents a slightly different issue of public policy. In the era of the Courthouse of 1770, many of one’s neighbors might attend trial and hear the embarrassing details of one’s case. The accused or embarrassed litigant, however, might choose to move away from the community and make a new start, especially if leaving for the frontier. Today, absent major media coverage, most people have little knowledge of court proceedings. Live and archived web recordings could change that just as web-accessible registrations of convicted sex offenders have destroyed anonymity in that area.¹⁴⁶ Modern technology could make it possible for everyone with web access¹⁴⁷ to become

¹⁴⁵ And testimony might supply helpful details on how to replicate the procedure fraudulent used.

¹⁴⁶ See, e.g., Kimberly B. Wilkins, *Sex Offender Registration and Community Notification Laws: Will These Laws Survive?*, 37 U. RICH. L. REV. 1245 (2003) (every state now operates an Internet-accessible registries. The federal government also operates a national sex offender database, see <http://www.fbi.gov/hq/cid/cac/registry.htm>).

familiar with all of the details of a neighbor's case, whether that neighbor is a criminal accused, a testifying victim of a crime, a "turncoat" government witness,¹⁴⁸ or an innocent witness subjected to merciless impeachment.¹⁴⁹ Worse yet, we may face a future in which digital images are catalogued making accurate image searching possible, leading to highly undesirable circumstances for litigants and third parties appearing in court hearings.¹⁵⁰ The Supreme Court has recognized that trial participants have potential privacy interests.¹⁵¹ Electronic access to proceedings could sharply expand the potential compromise of those interests.

Although our primary concern has been with the consequences of spreading accurate, personal, information, we have not really come to grips with the impact of the modern destruction of the ability to escape one's past combined with the plague of media-produced misinformation. In 1981, the late Art Buchwald in his unique humorous fashion captured the possible impact of that destruction when accompanied by observation and memory error. He recounts the story of a gentleman tried by jury in New York for refusing to pay for an Amtrak train ride (train was late, no heat in the car, etc.) In Buchwald's fictional story, broadcast of the trial on TV causes major trouble for his hero, despite his being found innocent on all charges. As the man goes about his business in the days following the televised trial, passers by declare, "Look, there's the man we saw on television who held up the liquor store in the Bronx!" At the bank, a guard recognizes him and draws his gun, exclaiming, "You're not going to pull another bank robbery here!" And so it goes, with the gentleman meeting countless persons who watched him on TV and got the story wrong – including his boss who fires him for being a wife beater. When he counters that he is not in fact a wife-beater, that he was in court for an unpaid train ticket, his boss explains candidly, "I know it and you know it, but the TV audiences don't know it. They got you mixed up with a fellow who was tried right after you. We can't afford to have a bad image. You're going to have to pack it in." Buchwald's character ends up driving a bus, unable to get a job anywhere else, but even there is issued a warning: "...one false move and I'll call your parole office, and you'll go back to the slammer where you belong."¹⁵² Such is Art Buchwald's conception of a world of mass access to court proceedings. A haunting tale indeed.

The Fate of Practical Obscurity and the Road Ahead

So far, the debate surrounding the privacy implications of electronic access in the court context has largely focused on (1) television and radio access and (2) more recently, electronic court records access. As for TV and radio broadcasts, the main issues have revolved around

¹⁴⁷ Approximately 300,000,000 people in North America currently have access to the Internet. See *Internet World Stats*, www.internetworldstats.com.

¹⁴⁸ The risks already faced by witnesses, especially informants, in drug, murder, terrorism, and other types of cases are well known. Those risks have already been multiplied by technology. See *Who's A Rat*, www.whosarat.com, the "largest online database of informants and agents!"

¹⁴⁹ Creating a real risk in some cases of reprisals being taken against the witness or party.

¹⁵⁰ Student Note, *In the Face of Danger: Facial Recognition and the Limits of Privacy Law*, 120 HARV. L. REV. 1870 (2007).

¹⁵¹ *Press Enterprise I*, 464 U.S. at 510-11 (1984)(jurors); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-08 (1982)(physical and psychological well-being of a minor rape-victim witness).

¹⁵² Art Buchwald, *Defendant '81: Innocent Until Televised*, LOS ANGELES TIMES, February 10, 1981.

which types of proceedings should be broadcast in these mediums. In the electronic court records context, the central questions have been what kinds of records should be available electronically, in which form, and whether and to what degree (if at all) electronic records should be available to the general public online.

Electronic access to court proceedings, transcripts, and evidence complicates the debate for at least four important reasons. First, remote broadcast of hearings and evidence threatens the privacy interests of non-litigant participants at trial in new ways. If, for example, searchable image databases become the norm (which is already possible given the ability to search audio that is linked to video) would non-litigants refuse to appear at trial? The prospect of court testimony, often delivered in duress, being broadcast online and preserved in a retrievable and searchable format may be too much for some would-be trial participants to stomach.¹⁵³ In a world where ordinary trials, transcripts, and evidence are webcast, the luxury of a practically obscure court appearance would be a thing of the past.

Second, the potential for the remote dissemination of inaccurate information—be it unofficial transcripts or bits of webcasts released Art-Buchwald-style – surges exponentially. In the case of electronic court files, judges and court clerks at least in theory serve as solid gatekeepers over which parts of the record are open to the public. In a world of simultaneous remote broadcast of hearings, transcripts, and evidence, the clerk's gatekeeper function diminishes while the judge's expands greatly. The implications for this shift are weighty.

Third, the ability to redact is severely restricted in a world of real time trials, transcripts and evidence. In the "records world," data in individual records can be parsed. Personally identifiable information such as social security numbers, addresses, bank account numbers, and so forth can be redacted with increasing ease.¹⁵⁴ With simultaneous remote broadcast, the ability to select out information is reduced or eliminated. Furthermore, it is not clear that the public's right to information at trial should be diminished when it is simultaneously webcasted: case law clearly directs that the public has the right to be present at trial—not parts or pieces of the trial at the discretion of the judge, but the whole trial. Court attendees, to make the point more concrete, have never been instructed to cover their ears when a witness states her address. Should remote observers have the same access rights as trial attendees?

Fourth, when comparing online broadcast of trials, transcripts, and evidence to TV and radio broadcast, it may seem at first blush that the issues are largely the same. However, there is at least one critical distinction: searchability. Databasing and search technology makes TV and radio broadcast of the content of proceedings seem tame. The relative inability to search and index radio and TV broadcasts added a layer of practical obscurity that web-based broadcast of trials, transcripts, and evidence removes. Indeed audio can now be searched, and that search can retrieve the associated video.

¹⁵³ Or would, at the very least, detrimentally constrict witness testimony.

¹⁵⁴ Todd Weiss, *Data exposure: Using Software To Redact Personal Data From Public Documents*, COMPUTER WORLD, April 16, 2006.

To address the unique issues raised by the prospect of remote digital broadcast of trials, transcripts, and evidence, we suggest a three pronged strategy:

- (1) Judges must take on an enhanced gate keeping role;
- (2) Legislatures and court administrators should consider altering or creating rules governing what is allowed to enter the court record; and
- (3) The public—including lawyers, pro-se litigants, and non-litigant participants—must be educated about the new realities and provided tools to protect privacy interests.

Judge as Privacy Gatekeeper

Addressing the privacy problems associated with remote simultaneous broadcast of hearings and evidence arguably rests squarely on the shoulders of the judge. The judge is the only individual with the authority to make split decisions about the content of the court record, and, by extension, what information may be disclosed in court.

Judges are fully accustomed to this role. Indeed, much of what judges do amounts to protecting the privacy interests of litigants and non litigants: sealing documents, closing hearings, allowing anonymous suits, and even deciding whether evidence is admissible are all judicial actions requiring judges to weigh, *inter alia*, privacy concerns. Many of these gatekeeping responsibilities expanded with the advent of camera, TV, and radio coverage of trials. State statutes governing media access to court, for example, give judges tremendous discretion to turn off the cameras or audio taping.¹⁵⁵ Not surprisingly, we see the same judicial discretion promoted by courts experimenting with remote broadcast of trials. It is only natural to expect that new forms of ‘broadcast’ require new forms of judicial responsibility. Jurisdictions like Florida’s NJC have installed mechanisms at the bench allowing judges to cut off remote feed with the press of a button when the judge decides the contents of the testimony inappropriate for remote viewing.¹⁵⁶ Because “pressing the button” does not affect the public’s right to physically attend the trial at issue, it has largely been taken for granted that so long as the public has the right to be physically present, judges should be allowed to exercise power over what alternative access forms the public is allowed. Far from being criticized for wielding too much power over what the public may see through electronic means, judges experimenting with remote access are typically respected for their attempts to enhance remote access to their courts through technology while balancing privacy concerns. There may come a time when the public demands remote access more closely equivalent to physical presence (i.e., arguing for less judicial discretion). In the early stages of remote broadcast, however, the public and the courts’ comfort level in

¹⁵⁵ See, e.g., KAN. SUP. CT. RULE 1001(2). This rule, entitled *Electronic and Photographic Media Coverage of Judicial Proceedings*, states “The privilege granted by the rule does not limit or restrict the power, authority or responsibility of the judge to control the proceedings before the judge. The authority of the judge to exclude the media or the public at a proceeding or during the testimony of a witness extends to any person engaging in the privilege authorized by this rule.”

¹⁵⁶ *Supra* note 16.

allowing it to proceed seems assuaged by relying on judges to black out remote access when they deem it appropriate.

Aside from the example of the judicial “pulling of the plug” during potentially privacy-invasive portions of remote broadcasts, judges may be called upon to protect privacy interests of participants in proceedings before them in more subtle ways. In the discussion above we note instances of witnesses being asked to verify their social security numbers in open court—a common practice in courts across the United States. As real time technology-based access increases, judges must become more sensitive to what types of information will be allowed to enter that record, and must do so without compromising the accuracy and truth-finding function the record provides.¹⁵⁷

Revising the Rules

While increasingly-educated judicial discretion will play a part in protecting the privacy of trial participants in a world of real time broadcast of trials, transcripts, and evidence, it may well be that rule changes should be contemplated. Indeed, it would not be the first time that rules were developed to protect the privacy of litigants at trial. One obvious example of this phenomenon: rules developed to protect the privacy of rape victims.

Protecting the Privacy Interests of Rape Victims in Court

Rape shield laws came into prominence in the United States in the late 1970s and early 1980s. Rape shield laws were designed to combat a prevalent feature of rape trials at the time: namely, that the victim was put on trial as well. Rape victims were commonly forced to share their sexual histories in open court, prompting victim advocates to call for changes in the law to protect victims from having their sexual histories aired in open court.¹⁵⁸ As victims of rape shied from bringing forward claims to avoid the ordeal, legislatures realized that rape shield laws might be a way to encourage victims to come forward by protecting their privacy rights in court.

The federal rape shield law was first introduced in 1976. The bill was not without its detractors. The obvious concern was the blanket prohibition of introducing certain types of sexual history evidence would be a violation of the defendant’s constitutional rights. Despite these concerns, the “Privacy Protection for Rape Victims Act” was passed in 1978, and is now Federal Rule of Evidence 412.

Since rape shield laws came into effect at the federal and state levels, critics have argued that rape shield laws go too far, citing several instances where rape shield laws prevented truly relevant information from coming in during a trial, in one case requiring a reversal of the conviction.¹⁵⁹ Rape shield laws are admittedly not without their side effects. Occasionally, they

¹⁵⁷ For example, judges must find alternative ways of identifying witnesses aside from , for example, social security number verification.

¹⁵⁸ See Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51 (2002) and Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986).

¹⁵⁹ See Cathy Young, *Excluded Evidence: The Dark Side of Rape Shield Laws*, Reason Magazine (Feb. 2002), available at <http://www.reason.com/news/show/28281.html>. (“These statutes, hailed as a way to keep victims from

exclude evidence which would have gone a long way toward satisfying the truth-seeking function of courts in rape trials.

Aside from rape shield laws, there have been other attempts by state legislatures to limit information available about rape victims. In *Cox Broadcasting Corp. v. Cohn*,¹⁶⁰ for example, the Supreme Court invalidated a Georgia law which allowed for civil liability suits against the press if they revealed the name of a rape victim, even during a trial. The Court held the statute violated the First Amendment, especially as the name and other information had been released in the public record since.¹⁶¹ The court recognized a right to privacy, but found that right outweighed given that the name and identifying information about the victim had already been released. The Court was "reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man."¹⁶²

The comparison of rape shield laws protecting rape victims' privacy and laws that would be enacted to protect the privacy interests of court participants in the face of enhanced remote access is an admittedly imperfect one, to say the least. It is of course ludicrous to compare harsh interrogation of victims of sexual violence to a lawyer asking a witness to state her social security number. That said, new technologies discussed above threaten to make disclosure in court of personal identifying information more and more injurious to participants in court proceedings. The more court participants are forced to lay bare the contents of their personal affairs for real time broadcasts that are subsequently lodged in searchable databases, the more litigants and third parties may shy away from accessing or participating in the judicial process. Much the same as we feared the withdrawal of rape victims from the courts, the Information Age may (and indeed already is) creating just as shocking a withdrawal from a far greater constituency: the American public at large. Indeed, observers have already noted the dizzying increase in "private justice" in the United States as litigants increasingly avail themselves of alternative dispute resolution mechanisms that allow them to escape the public glare of the court system. The trend raises obvious concerns about the future of public justice in the Information

being smeared as sluts in court, have sometimes kept juries from hearing evidence highly relevant to the guilt or innocence of the accused.")

¹⁶⁰ 420 U.S. 469 (1975).

¹⁶¹ The reporter obtained the name of the victim through indictments made available for his inspection in the courtroom. That the indictments were public records was not at issue at trial. *Id.* at 473-74 n.3 ("...during a recess of the said trial, I [the reporter] approached the clerk of the court, who was sitting directly in front of the bench, and requested to see a copy of the indictments. In open court, I was handed the indictments, both the murder and the rape indictments, and was allowed to examine fully this document. As is shown by the said indictments . . . the name of the said Cynthia Cohn appears in clear type. Moreover, no attempt was made by the clerk or anyone else to withhold the name and identity of the victim from me or from anyone else and the said indictments apparently were available for public inspection upon request.")

¹⁶² *Id.* at 496. See also *Florida Star v. B.J.F.*, 491 U.S. 524, 526 (1989) in which the Court invalidated a Florida statute making it illegal to "print, publish, or broadcast . . . in any instrument of mass communication' the name of the victim of a sexual offense." The Court held that because the police report with the victim's name was available to the public the name was part of the public record and therefore not protected by privacy interests of the victim.

Age.¹⁶³ It may be that a “personal information shield law” should be considered to protect court participants from being required to reveal certain personal information in open court.¹⁶⁴

While it may be easy to make the case for a statute protecting trial participants from being compelled to reveal personally identifying information like social security numbers and bank account numbers in open court, the question becomes far more muddled when we turn to textured testimony closer on the spectrum to the sexual history of rape victims—for example, the sordid details of a marriage-gone-bad in divorce proceedings. The “embarrassing facts” dilemma has been an ongoing topic in the debate about access to electronic court records that is amplified greatly by the specter of remote broadcast of trials—searchable and databaseable video and transcripts of embarrassing facts being revealed in court.¹⁶⁵

In the case of rape shield laws, the privacy interests of rape victims are deemed to outweigh the probative value that sexual history testimony would provide the truth-seeking function of the court. The personal history information of non-rape victim participants in trial in most cases would not tip the same balance. Indeed, salacious details of one’s private life are common, and often central, in the truth-seeking process trials represent.

Will remote, simultaneous access to trials, transcripts, and evidence ever generate enough concern about court participants’ privacy interests and resultant willingness to participate in court proceedings to fundamentally alter court practice? A personal information shield law, especially one that starts by protecting personal identifying information only, may be a step towards getting such information out of the public information flows stemming from court proceedings and protecting important privacy interests of court litigants. As more and more courts experiment with live broadcasts of trial online, our willingness to expand a personal information shield law may increase.

Revise Federal Rule of Evidence 403

An alternative to drafting a personal information shield law is to modify Federal Rule of Evidence 403. According to the dictates of Rule 403, evidence—even when it is relevant—may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, if it may mislead the jury, or by considerations of undue delay, waste of

¹⁶³ See e.g., Laurie Kratky Doré, *Public Courts Versus Private Justice: It’s Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463 (2006).

¹⁶⁴ Indeed, this attempt to remove identifying information from the record was the ultimate response of many jurisdictions, including the federal judiciary, when it came to online court records, to wit, the new privacy rules implemented on December 1, 2007 (*supra* note 100). Perhaps it is only a matter of time, assuming real time webcasting of transcripts, trials, and evidence proliferates, that similar moves are required for such broadcasts.

¹⁶⁵ See Gregory M. Silverman, *Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records*, 79 WASH. L. REV. 175, 215-19 (discussion pros and cons of protecting “embarrassing facts” revealed in the course of trials from being included in electronic court records available online). See also, Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307, (2004). Other creative solutions, this one forwarded in the context of electronic records access, include lawyer malpractice suits when attorneys allow damaging and irrelevant information to enter the record. Michael Caughey, *Keeping Attorneys from Trashing Identities: Malpractice as a Backstop Protection for Clients Under the United States Judicial Conference’s Policy on Electronic Court Records*, 79 WASH. L. REV. 407 (2004).

time, or needless presentation of cumulative evidence.¹⁶⁶ Perhaps the rule could be revised to include an additional factor: "undue invasion of privacy."

Rule 403 came to be as part of the Preliminary Draft of the rules by the Advisory Committee in March of 1969. At the time of its proposal, it was largely seen as codification of existing court practice.¹⁶⁷ Since its proposal and adoption in 1972, the language of Rule 403 has remained unchanged. Under Rule 403, the trial judge has wide discretion whether to admit evidence under the direction of Rule 403's language.¹⁶⁸ Given the rampant rise of identity theft and privacy concerns inherent in live webcast formats, a revision to Rule 403 could be used to address the interests of litigants and third parties asked to share, for example, personal identifiers in open court.

Several barriers exist to using Rule 403 for the purposes of protecting the privacy of litigants and third parties. Commentators note that Rule 403 was designed to favor allowing evidence to come in, and that, traditionally, it is rare to find evidence excluded solely on the basis of this rule.¹⁶⁹ Revising Rule 403 on privacy grounds could put into motion a sea-change, whereby Rule 403 is exerted far more commonly. Indeed, the authors admit that in practice it would be difficult to craft the revised rule with sufficient specificity to (1) enable judges to understand the boundaries of its reach, and (2) to enable appellate courts to review the soundness of Rule 403 decisions at the trial level.

However, just as Rule 403 originally appeared to codify what was already happening in common practice, perhaps any future modification of Rule 403 will turn out to be just that in the modern context. We have noted above the phenomenon of judges experimenting with real time broadcasts to install a "silencer" button to prevent certain portions of the proceeding from

¹⁶⁶ Fed. R. Evid. 403. This rule reads:

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice,

Confusion, or Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Note that the military and the vast majority of states have a rule that tracks the current language of rule 403 with no changes. See David W. Louisell & Christopher B. Mueller, *Federal Evidence* 5-6 (New York, N.Y.: Lawyers Co-operative Pub., 1985) (1977).

¹⁶⁷ Herman Trautman, *Logical or Legal Relevancy-A Conflict in Theory*, 5 VAND. L. REV. 385, 387 n.7 (1952) (citing 1 Wigmore's Evidence, §28 (1942)), and specific case law; see also *Construction, Ltd. v. Brooks-Skinner Bldg. Co.*, 488 F.2d 427, 431 n.15 (3d Cir. 1973) (discussing the proposed rule before its official enactment).

¹⁶⁸ STEPHEN A. SALTZBURG ET AL, *FEDERAL RULES OF EVIDENCE MANUAL* 403-43 (San Francisco, Calif.: LexisNexis Matthew Bender) (8th ed. 2002). However, due to the presumption of admissibility, authorities on the subject generally note that the rule should rarely be used, noting that "the trial court's decision to exclude evidence is more likely to be found an abuse of discretion than is a decision to admit evidence." *Id.* at 405. Interestingly, Rule 403 is already being used, in some instances, to prevent new evidence technologies from prejudicing juries. In one case involving computer-generated animation evidence, the court held that, "Relying upon the old adage, 'seeing is believing,' we conclude that the jury may give undue weight to an animated reconstruction of the accident." *Racz v. R.T. Merryman Trucking, Inc.*, Civ. A. No. 92-3404, 1994 WL 124857 at *5 (E.D.Pa. 1994). Using this reasoning, the court used Rule 403, with reference to the technology being a waste of time, the court blocked the animated reconstruction (*Id.* at 1115 n.251, citing to *Pino v. Gauthier*, 633 So. 2d 638 (La. Ct. App. 1993)). For a general discussion of animated evidence, see Dean A. Morande, *A Class of Their Own: Model Procedural Rules and Evidentiary Evaluation of Computer Generated "Animations,"* 61 U. MIAMI L. REV. 1069, 1115 (2007).

¹⁶⁹ "Rule 403 . . . is an extraordinary remedy to be used sparingly because it permits the trial court to exclude otherwise relevant evidence." *United States v. Mende*, 43 F.3d 1298, 1302 (9th Cir. 1995).

inclusion in the real time feed. Perhaps a revised Rule 403 would simply become a codification of the silencer button phenomenon. The real difference, of course, is that the silencer button does not prevent evidence from entering the record. Rather, it only prevents such evidence from being beamed outside the court.

Amend Courthouse-Only Access Rules to Include Real Time Trials, Transcripts, and Evidence

Perhaps in the end a revision to Rule 403 goes too far and is not in the best interests of justice. Instead, just as many jurisdictions have deemed some electronic records to be “courthouse only” (meaning, in most cases, individuals must trudge to the courthouse to access the information), maybe the best solution to privacy concerns related to Internet broadcast of trial proceedings is to impose a “courthouse only” equivalent to some or all real time broadcasts of trials, transcripts, and evidence. That is to say, in certain cases—or for certain *parts* of cases—the judge must have discretion to hit the silencer button (or the practical equivalent, whatever it might be).¹⁷⁰ Those physically attending trials would continue to be privy to personal identifying information or embarrassing facts revealed in court. Remote viewers would be denied such access and would be instead required, as before (though with the substantial gain of not having to be present at time of trial), to trudge to the courthouse to access the desired information from an internal court kiosk.

The courthouse only solution is attractive for a number of reasons—the biggest of which is that in many ways it preserves the status quo. It punts on the question of whether new technologies that *can* enable more widespread access to the justice system *should* do so. It may be that the courthouse only solution is a good buffer to take us through this time of tumultuous technological change until we can regain our bearings and figure out how best to draw access-privacy boundaries, or until a time when more technological solutions to the problem become available.

¹⁷⁰ Increasingly, jurisdictions around the country are experimenting with the “courthouse only” solution to online public records. See e.g., CAL. RULES OF COURT 2.503(c)(1) [family law]; and WA. GEN. RULE 22(c)(2). For those records for which it is deemed the veil of practical obscurity is best preserved, these jurisdictions require that individuals come to the courthouse to view records, often at electronic kiosks within the court. According to Alan Carlson, President of the Justice Management Institute, approximately 12 out of the 22 states (Alaska, California, Connecticut, Idaho, Kansas, New York, Michigan, Minnesota, New Hampshire, Pennsylvania, South Carolina (draft rule), and Texas) provide electronic access to court records have some form of courthouse only access for such records. The COSCA Guidelines Section 4.50 (“Court Records That Are Only Publicly Accessible At a Court Facility”) provides a template. Commentary to the rule notes, “The limitation of manner of access is one way of reducing the risk of negative impacts from public accessibility, such as injury to an individual, while maintaining traditional public access at the courthouse.” The commentary continues with alternative to courthouse only solutions that are interesting for present purposes: “There are alternatives means of achieving these protections. One alternative is to allow remote electronic access only through a subscription service.... Another alternative adopted by several states is to limit remote, electronic access to one case at a time. All information remains available at the courthouse, but it can be accessed through the electronic case management system only by a requestor specifying which case they want to see, that is, access is on a case-by-case basis.” *COSCA Guidelines*, *supra* note 29, § 4.50. These same means could become viable vehicles for distributing webcasts of trials, transcripts, and evidence while still protect the privacy of proceeding participants. Note that critics of the courthouse only approach respond that courts have no business purposefully thwarting the ease of the public’s access to documents deemed public.

Public Education

Finally, a big part of the puzzle in addressing privacy concerns inherent in the remote broadcast of trials, transcripts, and evidence will come with public education. Some may note that public education will exacerbate the problem—the more the public becomes aware of the resource, the more people will be accessing trials, transcripts, and evidence remotely, and consequently the more the privacy of court participants will be potentially threatened. On the other hand, helping the public understand exactly what kinds of access technologies are in use will allow individuals to better secure their own privacy as they interface with the court system. For example, a person unaware of the searchability and databasing of trial transcripts is far less able to advocate for privacy interests in connection with what is revealed at her trial. Real and sustained public education about technologies impacting their privacy in court will at least start a more widespread dialogue between members of the public, their lawyers, court administrators, and judges about the desired limits of remote broadcast as the medium becomes increasingly prevalent.

In the electronic court records context, public education has been viewed as a critical part of the open access strategy. The COSCA Guidelines, for example, include public education principles in the text of the Model Rules:¹⁷¹

Section 8.10 – Dissemination of Information to Litigants About Access To Information In Court Records

The court will make information available to litigants and the public that information in the court record about them is accessible to the public, including remotely and how to request to restrict the manner of access or to prohibit public access.

Section 8.20 – Dissemination of Information To The Public About Accessing Court Records

The Court will develop and make information available to the public about how to obtain access to court records pursuant to these CCJ/COSCA Guidelines.

Section 8.30 – Education of Judges and Court Personnel About An Access Policy

The Court and clerk of court will educate and train their personnel to comply with an access policy so that Court and clerk of court offices respond to requests for access to information in the court record in a manner consistent with this policy.

The Presiding Judge shall insure that all judges are informed about the access policy.

Although the commentary to the rules does not specify exactly how a public information campaign should be undertaken, the inclusion of public education in the Model Rules and the accompanying commentary provides some clear thinking about why public education is so important in the context of changing access norms, and how such education might ideally be pursued.

¹⁷¹ See COSCA Guidelines, *supra* note 29, at 66-69.

Conclusion

The guiding principles for how to proceed in an era of remote broadcast of trials, transcripts and evidence should be to promote those core public access principles that motivated openness in the first place: transparency of the judicial system, judicial accountability, public education about the justice system, and informed debate about matters of public policy. As in the electronic records context, the great fears brought about by remote broadcast are that, far from buttressing these lofty goals, remote broadcast of trials, transcripts, and evidence will serve only those individuals (and businesses) whose aim is to expose the details of people's lives, not the functioning of the judiciary. The voracious appetite for these details and the business it generates threaten to prevent what could be a hugely promising frontier in the open access story.

With the demise of Court TV, the moratorium on remote broadcast in Florida's Ninth Judicial Circuit, and the hesitancy of most jurisdictions to webcast proceedings (especially below the appellate level), one wonders if jurisdictions across the United States have decided that broadcasting trials, transcripts, and evidence on the Internet creates too much trouble from a privacy perspective. At the same time, however, recent moves by private companies like CourtroomLive and LiveNote to earn revenue by making trials accessible electronically as well as the Administrative Office of the United States Courts' decision to make digital audio records available to the public suggest the possibility that the public may soon have substantial electronic access to everything that takes place at trial. As courts, the legal profession, and the public grapple with the numerous issues that surround the use of technology in the courtroom we hope fervently that the privacy issues inherent in enhanced public access will be fully debated. If we can provide sufficient protection for critical private data, it may be that we can embrace court-sponsored, free, remote access to trials, transcripts, and evidence as a means of bringing back what we have undoubtedly lost in public participation in and understanding of the judicial process that used to be commonplace in the days when Williamsburg's Courthouse of 1770 gave true meaning to a "public" trial.