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Cameras in Maine's Courts: Has the Time Come? Will it Ever?

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CAMERAS IN MAINE'S COURTS: HAS THE TIME COME? WILL IT EVER?

I. INTRODUCTION

Should television cameras be allowed in Maine's courtrooms? The answer to this question implicates policies involving the rights of parties, witnesses, the media, and the public. Nearly ten years ago, the Supreme Court ruled conclusively that there is no constitutional impediment to allowing television coverage of trials in state courts.[1] Since then, the majority of states have promulgated rules, with greater or lesser degrees of restriction, allowing television coverage of proceedings in their courts. This trend has not abated; with the adoption of audio-visual coverage rules by the Vermont Supreme Court in 1989, Maine is now the only New England state which does not allow camera coverage of trial proceedings.[2] New Hampshire has allowed cameras into its courts since 1978, Massachusetts since 1983. Maine television news viewers for several years have watched network and cable broadcasts of in-court coverage of trial court proceedings in other states, including the "Big Dan's" rape trial in Massachusetts, the Richard Ramirez "Night Stalker" trial in California, and the Joel Steinberg child murder and William Hurt "common law marriage" trials in New York. In addition, several states have conducted extensive studies evaluating the effects of their allowance of courtroom television coverage on judges, parties, attorneys, witnesses, and jurors.

In past statements regarding its refusal to allow news cameras into Maine's trial courts, the Supreme Judicial Court has identified several specific concerns.[3] While these concerns will be addressed in detail in this Comment, it is fair to say that among many judges and lawyers, there is a visceral reaction against the notion of cameras in the courtroom, based upon what Justice Douglas called, "a deep instinctive impulse to make the court room sacrosanct—to keep it a place of dignity where the quest for truth goes on quietly and with-

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1. Chandler v. Florida, 449 U.S. 560 (1981). *See also infra* notes 31-34 and accompanying text.

2. *See, e.g.*, CONN. CODE OF JUDICIAL CONDUCT, Canons 3(A)(7) & 3(A)(7A); MASS. SUP. JUD. CT. R. 3:09, CODE OF JUDICIAL CONDUCT, Canon 3(A)(7); N.H. SUPER. CT. R. 78; R.I. SUP. CT. R. 48, CANONS OF JUDICIAL ETHICS 30, Provisional Order 15; VT. R. CRIM. PROC. 53, VT. R. CIV. PROC. 79.2, VT. DIST. CT. CIV. R. 79.2; VT. R. PROBATE PROC. 79.2. The great diversity among the coverage rules of the New England states reflects the diversity of rules among all the states that permit camera coverage. Current rules in Maine allow camera coverage of appellate argument only. The terms "audio-visual coverage," "camera coverage," and simply "coverage" are used interchangeably throughout this paper, to refer to the use of still and video cameras, and audio recorders, in trial courts during the conduct of judicial proceedings.

3. *See infra* notes 50 and 66 and accompanying text.

out fanfare and where utmost precautions are taken to keep all extraneous influences from making themselves felt."[4]

But is the public better served by this prohibition on television coverage of courtroom proceedings? Maine's television stations cover major civil and criminal trials—their reporters attend proceedings, and in criminal trials their reports are accompanied by video of defendants photographed in shackles entering and leaving the courthouse. In prominent trials newspaper, radio, and television reporters may fill the benches, scratching at notebooks, while sketch artists employed by television stations furiously choose and apply colored crayons to large sketchpads in plain view of the jury and witnesses. Defendants, witnesses, jurors, attorneys, and judges may all be photographed and filmed entering and leaving the courthouse.

As the next part of this Comment shows, broadcast media coverage has gone in and out of favor in the United States. The virtually uniform ban against cameras in the courtroom that existed from the late 1930s until the late 1970s was a reaction to what were at least perceived abuses by the electronic and photographic media when they were allowed to cover proceedings. However, over the past dozen or so years, improvements in technology that have made television and still cameras less obtrusive, the public's growing reliance on television as a source of daily information, and a strongly-worded Supreme Court approval of states' rights to control their own court systems,[5] have combined to bring a renaissance of photographic coverage of important proceedings.

The third part of this Comment presents an overview of the arguments for and against cameras in the courtroom. This section presents the thesis that a rulemaking court, in analyzing any proposal to change its policy regarding media coverage of court proceedings, should be governed by neutral principles. That is, to the extent that rulemaking judges disdain empirical evidence in favor of their own innate feelings regarding this issue, their ultimate conclusion will reflect only the judges' predilections and preconceptions. This is not to suggest that judges should ignore their own experience as lawyers, judges, and news consumers when considering this issue; only that they should not foreclose consideration of the abundant experience of other jurisdictions. In particular, this section argues that any consideration of this issue should be based, not on a comparison of news camera coverage of a proceeding to some ideal conception of media coverage, but upon comparison to the current state of media coverage.

The final part of this Comment is a proposed addition to Canon 3(A) of the Maine Code of Judicial Conduct. This author concludes

4. Douglas, *The Public Trial and the Free Press*, 33 ROCKY MOUNTAIN L. REV. 1, 10 (1961).

5. Chandler v. Florida, 449 U.S. at 560.

that electronic media coverage of trial court proceedings is eminently agreeable to the constitutional principle that the public has the "right to know" how judicial proceedings are conducted. Thus, the proposed Rule is, essentially, a proposal to allow for broad use of television cameras in Maine's trial courts, but with regulations that protect against the dangers identified by the Maine Supreme Judicial Court in its previous public statements on this issue.

II. HISTORY OF CAMERAS IN THE COURTROOM

A. *The Banning and Unbanning of Cameras in the Courts*

It is impossible to understand the reasons underlying the ban on cameras in the courtroom, and the process of its being lifted in state after state, without examining the history of the ban, both nationwide and in Maine. In the early years of this century, radio microphones and still and movie cameras were, if not a fixture, not uncommon in the nation's trial courts. In one of the most celebrated cases of this century, the Scopes "Monkey Trial" of 1925, photographs were taken of the defendant and of Clarence Darrow addressing the court, and the entire proceedings were broadcast by a Chicago radio station.[6] Another Darrow trial, the famed Leopold-Loeb murder trial, was also covered by still and newsreel cameramen.[7] The first reported case in which the use of cameras in the courtroom was criticized was a 1917 Illinois case, *People v. Munday*,[8] yet the appeals court's criticism in that case was directed not so much at the presence of cameras as at the trial judge's suspending the proceedings to allow the taking of still and moving pictures.[9]

The event that is universally blamed for turning the bench and bar against cameras in the courtroom was the 1935 trial of Bruno Hauptmann for the kidnapping and murder of the infant son of famed aviator Charles Lindbergh. The "Lindbergh baby" trial was unquestionably a "media circus" of unprecedented dimensions. The extent to which cameras in the courtroom contributed to the hysteria of the trial has been disputed by modern observers.[10] Hauptmann's unsuccessful appeal,[11] which listed more than a dozen alleged evidentiary errors, apparently blamed radio and newspaper coverage equally in his claim that he had been denied a fair trial. This claim was given short shrift by the New Jersey Court of Errors

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6. *See* S. BARBER, NEWS CAMERAS IN THE COURTROOM: A FREE PRESS—FAIR TRIAL DEBATE 1-2 (1987).

7. *See* Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14, 17 (1979).

8. 280 Ill. 32, 117 N.E. 286 (1917).

9. *Id.* at 67, 117 N.E. at 300.

10. *See* Kielbowicz, *supra* note 7, at 17; BARBER, *supra* note 6, at 3.

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

and Appeals. Discussing the "running about of messenger boys and clerks employed by the press," the court stated:

> The press and public were entitled to reports of the daily happenings, and it was quite proper for the trial judge to afford reasonable facilities for sending such reports. During the trial, the court seems to have taken proper action of its own motion to preserve order, and to have responded properly to any suggestions in that regard. No motion for mistrial or for a new trial on this or any other ground is claimed to have been made.[12]

Still, there was a strong enough perception of abuse that in 1937 the American Bar Association adopted Canon 35 of the ABA Canons of Judicial Ethics:[13]

> Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.[14]

Nevertheless, Canon 35 was not universally adopted. Several states continued to experiment with cameras in their courts. In 1965, the Supreme Court issued a damning judgment on the use of cameras in one state court in *Estes v. Texas*.[15] The case involved the trial of Billy Sol Estes, who was accused of conducting a swindle of Texan proportions. The case was heavily covered by the media, and the court denied a defense motion to exclude electronic media coverage. As Justice Clark described the pretrial hearings in his plurality opinion:

> The videotapes of these hearings clearly illustrate that the picture presented was not one of that judicial serenity and calm to which petitioner was entitled. . . . Indeed, at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearing.[16]

While four justices felt that the news camera coverage of Estes's

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12. *Id.* at 827.

13. CANONS OF JUDICIAL ETHICS Canon 35 (1937) (replaced 1972).

14. *Id.*

15. 381 U.S. 532 (1965).

16. *Id.* at 536 (citations omitted). The Court included in its opinion photographs of the cameras inside and outside the courtroom during the Estes trial. *Id.* following 586.

trial was a per se constitutional violation,[17] Justice Harlan, in a concurring opinion, declined to reach that conclusion, stating only that the use of cameras in that proceeding was a denial of Estes's due process rights under the fourteenth amendment. That distinction was pointed out by Justice Brennan in his dissent, in which he noted, "[t]hus today's decision is *not* a blanket constitutional prohibition against the televising of state criminal trials."[18]

On the basis of that analysis, several states pressed ahead with camera coverage. The conduct condemned in *Estes* was taken as a how-not-to-do-it on the use of courtroom cameras, and the state courts were careful to adopt rules designed to protect the due process rights of defendants and other parties and participants in judicial proceedings. By 1978, Colorado, Alabama, Nevada, Washington, Georgia, Kentucky, Florida, and New Hampshire had adopted rules allowing some sort of camera coverage of court proceedings.[19] The rules covered a very broad range. Colorado, which opened its courtrooms to cameras in 1956, originally required the consent of criminal defendants, while Alabama required the consent of criminal defendants and all litigants in civil trials. At the other extreme, Florida, Kentucky, Nevada, and New Hampshire adopted rules which, on paper at least, appeared positively to encourage camera coverage of trials.[20]

The Canon 35 ban on courtroom cameras was continued when the Canons of Judicial Ethics were replaced in 1972 by the Code of Judicial Conduct, in which Canon 35 was replaced by Canon 3(A)(7).[21] Efforts to relax that canon were rebuffed by a 165-143 vote of the ABA House of Delegates in 1979.[22] However, the Conference of Chief Justices in 1978 voted 44 in favor to 1 against (with one abstention, Chief Justice McKusick of Maine)[23] to allow each state, through its highest court, to promulgate guidelines allowing for the use of cameras in courts.[24] Finally, the ABA House of Delegates

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17. *Estes v. Texas*, a five-four decision, generated five different opinions. Justice Clark wrote for the majority, holding that the extensive media coverage deprived the defendant of a fair trial. *Id.* at 550-52. Both Chief Justice Warren and Justice Harlan wrote concurring opinions. Justices Stewart and Brennan filed opinions in dissent.

18. *Id.* at 617 (Brennan, J., dissenting).

19. *See generally* Silverstein, *TV Comes to the Courts*, ST. CT. J., Spring 1978, at 14, 17-19, 49-52.

20. *Id.*

21. CODE OF JUDICIAL CONDUCT 12-13 (1972). *See also* Thode, *Reporter's Notes to the Code of Judicial Conduct* 56-59 (1973). The House of Delegates of the American Bar Association voted unanimously to adopt the Code of Judicial Conduct on August 16, 1972. *Id., Foreword* at 1.

22. Graves, *Cameras in the Courts: The Situation Today*, 63 JUDICATURE 24, 25 (1979).

23. *Id.*

24. This resolution is reprinted in Appendix 2 to *In Re Post-Newsweek Stations*, 370 So.2d 764, 791-92 (Fla. 1979). *See also* Brief of the Conference of Chief Justices

voted 162-112 in August, 1982 to allow state courts to adopt rules permitting such coverage.[25] Ironically, by the time that vote came, some thirty-eight states had already adopted rules allowing some type of camera and/or broadcast coverage in their courts.[26]

The constitutionality of cameras in the courtroom again came before the Supreme Court in 1981. In *Chandler v. Florida*,[27] two defendants convicted of burglary claimed a deprivation of due process rights because of the presence of television photographers in the court. The case aroused considerable interest with seventeen state attorneys general and the Conference of Chief Justices filing *amicus curiae* briefs in support of allowing continuing experimentation with broadcast media in state courts.[28]

Although Florida's rules were among the most liberal in terms of allowing coverage, the Florida Supreme Court carefully distinguished *Estes* in announcing its rules.[29] This point was noted by Chief Justice Burger in an opinion that made it clear that there is no constitutional impediment to allowing courtroom coverage. Writing for the Court, Chief Justice Burger cited Justice Brandeis's oft-quoted ode to federalism: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[30]

In the wake of *Chandler*, the state courts have gone in every direction. Forty-five states allow some camera coverage in their courtrooms, but this number includes some that allow only coverage of appellate courts, and others whose restrictions on cameras in trial courts are in application no less restrictive than former ABA Canon 35.[31] In conjunction with allowing cameras in the courts, several states have undertaken studies to evaluate the effect of the change. To detail all of those findings is beyond the scope of this Comment,[32] however, it is significant that no state that has allowed cam-

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Amicus Curiae, Chandler v. Florida, 449 U.S. 560 (1981) (No. 79-1260).

25. *ABA Adopts New Camera Rule*, 66 JUDICATURE 250 (1983).

26. *Id.*

27. 449 U.S. 560, 570 (1981). The trial aroused intense public interest because the defendants were police officers.

28. *Id.* at 563 n.*.

29. *In Re Petition of Post-Newsweek Stations*, 370 So.2d 764, 771-73 (Fla. 1979).

30. Chandler v. Florida, 449 U.S. at 579 (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

31. See Rosenblatt, *Report of the Chief Administrative Judge to the New York State Legislature, the Governor and the Chief Judge on the Effect of Audio-Visual Coverage on the Conduct of Judicial Proceedings* Appendix 3 (1989) [hereinafter Rosenblatt Report] for a recent summary of the rules of the fifty states.

32. For a summary of studies done as of 1987, see S. BARBER, NEWS CAMERAS IN THE COURTROOM: A FREE PRESS—FAIR TRIAL DEBATE (1987), see especially *Part Three: Summary and Discussion of the Courtroom Cameras Research.* This is an excellent study by a nonlawyer (Ms. Barber is a professor of mass communication at

eras in the courts has rescinded that action.

In the federal courts media coverage has remained more restricted than in many state courts. Federal Rule of Criminal Procedure 53, adopted in 1944, prohibits cameras in federal criminal proceedings;[33] and in 1962 the Judicial Conference of the United States adopted a resolution instructing all federal courts to ban television from both the courtroom and "its environs."[34] Following a study undertaken at the request of some media organizations, the Judicial Conference in 1984 reiterated its opposition to cameras in the courtroom.[35] Although the United States Supreme Court under Chief Justice Burger reaffirmed the rights of the media and public to attend trials,[36] the Court has shown no inclination to relax the ban on cameras in federal courts.[37] Since *Chandler* the Court has never granted certiorari on a case challenging television coverage of a trial.

B. Maine

Cameras were not explicitly banned in Maine courtrooms until the adoption of the Maine Rules of Criminal Procedure. Maine declined to adopt Canon 3(A)(7) of the Code of Judicial Conduct. In recommending the adoption of a Maine Rule 53 almost identical to Federal Rule of Criminal Procedure 53, the Reporter's Note offered as its sole comment, "While there is no specific statute or rule on this subject in Maine, it is doubtful that it makes any change in existing practice."[38] Although Maine never adopted Canon 35 of the 1937

Emerson College) who has long been involved in this issue. *See also supra* note 31.

33. Federal Rule of Criminal Procedure 53 reads in full: "The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court."

34. Annual Reports of the Proceedings of the Judicial Conference of the United States, March 8-9, 1962, p. 10 (quoted in Estes v. Texas, 381 U.S. 532, 582-83 n.41 (1965)). *See* FED. DIST. CT. R. 42 (D. Me.).

35. Report of the Judicial Conference Ad Hoc Committee on Cameras in the Courtroom, (Sept. 1984) (cited in *In re* Ch. 515, P.L. 1985, Me. Rptr., 498-509 A.2d CXXVI, CXXVIII-IX (letter of direct address from the Maine Supreme Judicial Court to the Legislature declining to promulgate rules governing cameras in courtrooms as directed by P.L. 1985, ch. 515 on separation-of-powers grounds)). *See infra* notes 43-45 and accompanying text.

36. *See* Press-Enterprise Co. v. Superior Ct., 478 U.S. 1 (1986) (*Press-Enterprise II*); Press-Enterprise Co. v. Superior Ct., 464 U.S. 501 (1984), (*Press-Enterprise I*); Globe Newspaper Co. v. Superior Ct., 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). The collective doctrine of these cases is that the public has a right to attend trials, or pre-trial hearings, over the objections of the defendant, unless the party seeking to close the hearing advances an overriding interest in closure.

37. *See* Conway v. United States, 852 F.2d 187 (6th Cir. 1988), *cert. denied*, ——— U.S. ———, 109 S.Ct. 370 (1988) (per curiam decision upholding court rules restricting broadcasting, telecasting, and photographing of criminal trials).

38. H. Glassman, reporter, A REPORT TO THE SUPREME JUDICIAL COURT'S ADVISORY

ABA Canons of Judicial Ethics, and while there is no analogue to former[39] Maine Rule of Criminal Procedure 53 in the Maine Rules of Civil Procedure, there is no record of any civil trial ever being covered by still or moving picture cameras in Maine. At the request of the Maine Supreme Judicial Court in 1981, the Criminal Rules Advisory Committee undertook a study of the ban against cameras in the courtroom. The committee's report stated:

> Essentially, it is the Committee's feeling that the very presence of the media will become a factor in jury deliberations and in decisions by witnesses as to whether to appear, how they act and what they will say if they appear. There is no justification for this factor becoming part of judicial proceedings. Rather than recite at length the basis of this position, we would refer to the separate opinion of Justice Clark in *Estes v. Texas*, 381 U.S. 532 (1965).[40]

If the Supreme Judicial Court did feel that "an experiment with media in the courts [was] warranted," the Committee added, "such an experiment [should] begin at the appellate level."[41]

This recommendation was adopted in an administrative order by the Maine Supreme Judicial Court in 1982.[42] The effect of this order was to allow audio-visual coverage—under guidelines contained in the order—of oral arguments in the Law Court for a one-year trial period. However, the ban on cameras in the trial courts was maintained, except for coverage of ceremonial proceedings such as investitive or naturalization proceedings. The order also authorized the use of electronic or photographic means for presentation of evidence, for the preservation of the record, or for other purposes of judicial administration.[43] The court extended the order in 1983 for another one-year trial period; in 1984 the order was made permanent.

The next move regarding cameras in Maine's courtrooms came from the Legislature, which in 1986 passed Public Law 1985, chapter 515. Codified at Maine Revised Statutes Annotated, title 4, sections 119 (superior courts) and 182 (district courts), the statute provided that: "The taking of photographs or radio or television broadcasting

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COMMITTEE ON RULES OF CRIMINAL PROCEDURE, Working Draft Rule 53 (1963).

39. This rule was repealed in 1989. *See infra* note 47 and accompanying text.

40. Report of Maine Criminal Rules Advisory Committee to Supreme Judicial Court, *Administrative Order in Regard to Photographic and Electronic Coverage of the Courts*, Appendix A (1982). This note was published as Appendix A to the court's copy of the administrative order; however, Appendix A was not published in the Maine Reporter with the administrative order (copy of the Advisory Committee's report on file at the MAINE LAW REVIEW).

41. *Id.*

42. *Administrative Order in Regard to Photographic and Electronic Coverage of the Courts*, Me. Rptr., 459-466 A.2d XXV.

43. Justice Wathen dissented only from the allowance of cameras in the Law Court, while Justice Nichols dissented from both parts of the order. *Id.* at XXVII.

or transmitting of judicial proceedings in the [superior and district courts] shall be permitted upon the promulgation of and in accordance with rules adopted by the Supreme Judicial Court." Chapter 515 also contained a sunset clause that would have automatically repealed the statute on November 1, 1987, a little more than fifteen months after its effective date of July 16, 1986.

The Supreme Judicial Court's response came in an unusual form. In a first-ever "Direct Letter of Address" to the Governor and Legislature of the State of Maine,[44] the court,[45] citing the separation of powers provisions of the Maine Constitution, simply refused to give effect to Chapter 515. The Legislature chose not to contest the issue.[46] A potential constitutional crisis was avoided, and title 4, sections 119 and 182 of the Maine Revised Statutes Annotated were deleted.

At least one technical obstacle to allowing cameras in Maine's courts was removed in the elimination of former Rule 53 in the 1989 revision of the Maine Rules of Criminal Procedure.[47] In its note to the amendment, the Advisory Committee characterized former Rule 53 as redundant, noting that this issue is governed by the Supreme Judicial Court's Administrative Order.[48] The question, then, remains to be confronted by the Maine Supreme Judicial Court.

III. THE DEBATE: WHERE YOU START IS WHERE YOU END

Many of the arguments for and against audio-visual coverage of court proceedings are too visceral or philosophical to be addressed by scientific proof. One writer has gone so far as to describe this debate as being one manifestation of a larger conflict based on the Hamiltonian versus Jeffersonian (that is, aristocratic, hierarchical, and institutional versus populist, democratic, and anti-institutional) view of the role of the judiciary in our constitutional system.[49] The

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44. Me. Rptr., 498-509 A.2d CXXVI-CXXIX (1986).

45. Maine's Supreme Judicial Court was created by ME. CONST. art. VI, § 1. ME. REV. STAT. ANN. tit. 4, § 1 (1989) states: "The Supreme Judicial Court shall have general administrative and supervisory authority over the Judicial Department and shall make and promulgate rules, regulations and orders governing the administration of the Judicial Department." Many rules regarding jurisdiction, procedure, and evidence are enacted by the Legislature. *See, e.g.*, ME. REV. STAT. ANN. tit. 4 (judiciary), tit. 14 (civil procedure), tit. 15 (criminal procedure). When the Supreme Judicial Court sits as a court of appeals on civil and criminal cases, it is referred to as the Law Court. ME. REV. STAT. ANN. tit. 4, §§ 51-57 (1989).

46. Chapter 515 was hotly debated in the Legislature. *See* Legis. Rec. 1023-27, 1061-62, 1092-94 (1st Reg. Sess. 1985).

47. The current M.R. CR. PROC. 53 is the former Rule 55.

48. Me. Rptr. 551-562 A.2d CXVIII. *See also* D. CLUCHEY & M. SEITZINGER, MAINE CRIMINAL PRACTICE, 52-53 (1989).

49. Nejelski, *The Jeffersonian/Hamiltonian Duality: A Framework for Understanding Reforms in the Administration of Justice*, 64 JUDICATURE 451, 457-58 (1981).

most blatant dangers of audio-visual coverage of court proceedings were amply demonstrated in *Estes*. Of greater concern to many judges and lawyers is the fear that allowing television and still cameras into the courtroom, even under strict regulation, may injure the interests of defendants, witnesses, and jurors in subtle and even undetectable ways. Skeptics say thirty-second slices of testimony on the evening news may create misconceptions of court proceedings and degrade the public's respect for its courts. Coupled with concerns of added burdens on court administration and facilities, opponents of audio-visual coverage contend that the potential dangers far outweigh the dubious and speculative advantages cited by proponents.[50]

In that sense, whether a supervisory court decides to allow cameras into its appellate and trial courts, and if so, on what terms, depends on how the court defines the issues, as well as on how the court assigns both the burden of proof and the standard of proof on the issues. It is a basic thesis of this Comment that a rulemaking judge, when presented with a question of whether to allow cameras in the state's courtrooms, should attempt to act as a neutral factfinder in weighing the merits of the issue. To the extent that judges take "judicial notice" of their own visceral or philosophical objections to televised proceedings, the "burden of proof" on proponents may rise to the insurmountable. Thus, if proponents are required to persuade the rulemaking court beyond a reasonable doubt that cameras will have no deleterious effects on court proceedings, it is difficult to see how that burden can ever be met. On the other hand, the rulemaking court might begin its analysis by agreeing to decide only whether it is more likely than not that the beneficial effects of cameras outweigh the detrimental effects. In that case, the proponents—armed with considerable evidence of the use of cameras in many other states—should have a good chance of winning their case.

Still another starting point posits that the supervising court should not do a cost-benefit analysis at all. Rather, the court should simply decide whether it is possible to design a rule which regulates courtroom camera coverage so that the potential dangers are minimized. This view arises from the larger (Jeffersonian, if you will) notion that the judiciary is a coordinate branch of our democratic

50. In discussing audio-visual coverage of trial proceedings, the Maine Supreme Judicial Court raised concerns about the effect of courtroom cameras on judicial decision making, the fairness of criminal trials, and the potentially reluctant witness; the potential for juror distraction; additional expense and need for judicial supervision; and the potential impact on public perception of the judicial institution. *In re* Ch. 515, P.L. 1985, Me. Rptr. 498-509 A.2d CXXVI, CXXVIII-CXXIX. *See infra* Part IV, Introduction to the Proposed Amendment to the Maine Code of Judicial Conduct.

government and should be as accessible as possible to the public (always keeping in mind, of course, the courts' special and often non-democratic function). Under this view, judges are not high priests but public officials; courtrooms are not temples but public (and publicly funded) forums for the settlement of disputes. Finally, this view assumes that banning television cameras from the courtroom inherently discriminates against one medium in favor of another. Disarming television reporters of their cameras is akin to preventing newspaper reporters from bringing notebooks into the courtroom. While television reporters share the right of their print counterparts to attend court proceedings, when television news is deprived of half its very medium—the visual coverage of news events—it requires no leap of logic to realize that television reporters will go where they are more welcome.[51] This assumption was borne out in the single study that included a comparison of the quantity of television coverage of trials in which cameras were or were not allowed.[52] As one

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51. *See* Tajgman, *From Estes to Chandler: The Distinction Between Television and Newspaper Trial Coverage*, 3 COMM/ENT L.J. 503 (1981). It is important to consider the distinction between newspaper and television coverage of an event. It is also important to keep in mind that unlike earlier times, when most communities of any size had competing newspapers, today almost every newspaper enjoys a monopoly in its community. There is no city in Maine with competing daily newspapers. E.B. White wrote:

> The press in our free country is reliable and useful not because of its good character but because of its great diversity. As long as there are many owners, each pursuing his own brand of truth, we the people have the opportunity to arrive at the truth and to dwell in the light. The multiplicity of ownership is crucial. It's only when there are few owners, or, as in a government-controlled press, one owner, that the truth becomes elusive and the light fails.

E.B. WHITE, LETTERS OF E.B. WHITE 659 (1976). *See also* A.J. Liebling, *The Press* (1961). Liebling is perhaps best known for his observation: "Freedom of the press is guaranteed only to those who own one." Liebling's major theme was consonant with White's: that the disappearance of competing newspapers in this country deprives citizens of the diverse and even competing information and points of view that are fundamental to an informed citizenry, which is itself essential to a democracy. As Liebling pointed out in the same essay, "[E]ach newspaper disappearing below the horizon carries with it, if not a point of view, at least a potential emplacement for one. A city with one newspaper, or with a morning and an evening paper under one ownership, is like a man with one eye, and often the eye is glass." *Id.* at 29. Ironically, however justly television is criticized for "sensationalizing" current events, for today's news consumer the benefits of diversity and competition that White and Liebling praised may only be reaped by turning to television news.

52. ALASKA JUDICIAL COUNCIL, NEWS CAMERAS IN THE ALASKA COURTS: ASSESSING THE IMPACT 36 (1988) [hereinafter ALASKA REPORT]. Perhaps surprisingly, the ALASKA REPORT found increased coverage by both newspapers and television, but the Report added,

> This increased coverage of the courts is especially true for television. The nature of television requires visual presentation of a story. It is only reasonable that a visual medium, such as TV news, would take more time and interest in a subject when it has accompanying video. Not only has there

federal appeals judge said: "The cost of a per se rule shielding the courts from the administrative problems caused by the broadcast media is the denial of public information to the growing number of citizens who rely on television and radio for their news."[53]

Television is a major part of our society. It is well within the scope of judicial notice that the majority of Americans get most of their news from television. While it may focus on the sensational, television has also played a major part in American political life over the past forty years. From the Army-McCarthy hearings of the 1950s to the Watergate, Iran-Contra, and Robert Bork confirmation hearings of the 1970s and 1980s, television has created a truly national forum for discussion of major issues. Judicial proceedings often encompass major public policy issues. Should not the public be privy to the information related in such trials, out of the mouths of the participants themselves? The public's right to observe firsthand discussion of public policies has been recognized by Congress and state legislatures, including Maine's, which have opened their chambers to television coverage.[54] As the Florida Supreme Court has said:

> The court system is no less an institution of democratic government in our society [than the legislature]. Because of the courts' dispute resolution and decision-making role, its judgments and decrees have an equally significant effect on the day-to-day lives of the citizenry as the other branches of government. It is essential that the populace have confidence in the process, for public acceptance of judicial judgments and decisions is manifestly necessary to their observance.[55]

The Supreme Court has clearly stated that the public and the media have a constitutional right to attend criminal trials, and that proceedings may be closed only upon a clear showing of prejudice to one of the parties.[56] While some non-criminal cases are closed to the public as a matter of law and unchallenged judicial discretion, most

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> been an increased use of court story clips but the stories themselves continue to be slightly longer if the video is in-court footage.

Id.

53. Judge Alfred T. Goodwin, of the Ninth Circuit Court of Appeals and the chairman of the ABA Adjunct Committee on Fair Trial and Free Press, reacting to the ABA's 1979 rejection of the committee's proposal to liberalize Canon 3(A)(7). Goodwin, *A Report on the Latest Rounds in the Battle over Cameras in the Courts*, 63 JUDICATURE 74, 76-77 (1979).

54. Most Congressional committee hearings have been open to cameras since the 1940s, and the floor of the United States House and Senate since the early 1970s. The Maine Legislature has allowed cameras in its chambers since 1977. H.P. 19 (108 Legis. 1977), Legis. Rec. 7 (1977) (presented by Rep. Jalbert).

55. *In re* Post-Newsweek Stations, 370 So.2d 764, 780 (Fla. 1979) (citation omitted). *See generally* Annotation, *Validity, Propriety, and Effect of Allowing or Prohibiting Media's Broadcasting, Recording, or Photographing Court Proceedings*, 14 A.L.R. 4th 121 (1982).

56. *See supra* note 36.

civil trials are open to the public. Thus, except for the inclusion of cameras and camera operators, there is virtually no prohibition on the media's attendance at most court hearings. Therefore, in evaluating the arguments against and in favor of allowing television into the courts, any potential problems must be considered in relation to the current state of media coverage of judicial proceedings, rather than some unattainable ideal.[57]

Watching televised trials is nothing new to Maine television viewers. Network-affiliated stations often show, on their national and local news broadcasts, in-court footage of trials in states in which camera coverage is allowed. Viewers of cable news programs may see extended broadcasts of trials of national interest. Nor are microphones strangers to Maine's courtrooms. Most, if not all, of Maine's superior courts already have microphones on their witness stands for amplification in the courtroom, and district court proceedings are recorded on a large reel-to-reel tape deck, operated by a headphone-wearing recorder who sits next to the judge.[58]

"Newsworthy trials will be covered by the electronic media whether from within or without the courtroom," the Florida Supreme Court has said.[59] As Chief Justice Burger noted in *Chandler v. Florida*, "Any criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial."[60] Maine's television stations regularly cover judicial proceedings. Both civil and criminal trials often provide the "lead story" on the evening news. Frequently, the television cameras focus on a defendant before he or she has ever gone to court. It is hardly uncommon for Maine television viewers or newspaper readers to watch or see photographs of newly-arrested suspects being led into jails, always in handcuffs and often attempting to cover their faces with hands or clothing. Frequently, this "file footage" is used to accompany a reporter's audio reporting of a trial or other courtroom proceeding. In other cases, when a defendant en-

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57. *See* S. Barber, *The Problem of Prejudice: A New Approach to Assessing the Impact of Courtroom Cameras*, 66 JUDICATURE 248 (1983):

> [S]uppose it can be shown that factors other than cameras are responsible for prejudicing trials, and that consequently, cameras make little or no difference to the fairness of a trial, since the trial process is already loaded with subjectivity and lack of impartiality. An underlying contention here is that to make a fair assessment of the impact of cameras on the trial process and its participants, it is first necessary to identify the factors operating in the trial environment before cameras are introduced. This way it will become clear which prejudices are inherent in the trial process, and which are introduced by cameras.

Id. at 249-50. Barber's article is a review of the then current literature regarding prejudicial influences on the trial process.

58. *See, e.g.*, M.R. Civ. P. 76H; M.R. Crim. P. 27.

59. *In re* Post-Newsweek Stations, 370 So. 2d at 777.

60. 449 U.S. 560, 574 (1981).

ters or leaves the courthouse, the gauntlet of cameras must be run again. If the defendant is in custody, television viewers and newspaper readers get to see him or her being led into or out of the courthouse in handcuffs, flanked by sheriff's deputies, and taken out of or put into the back of a police car. When cameras are excluded from court, such "visuals" may be used to accompany a television reporter's audio account of trial proceedings. Another familiar sight to television viewers is the post-recess or post-trial interview with counsel "on the courthouse steps."[61]

Nor are the proceedings of a major trial remotely similar to those of more mundane matters. A significant trial will bring reporters from one or more newspapers and wire services, as well as television reporters from the local network affiliates, and possibly one or more radio reporters as well. They are all entitled to quote (or possibly misquote) the judge, the attorneys, and every witness. They are entitled to describe in detail every participant's dress and demeanor; if a witness argues with counsel on cross-examination or breaks down in tears, they can and will report it. Moreover, a major trial will bring out the sketch artists, who draw instant portraits of the participants on large sketchpads, dipping frequently into their boxes of colored chalks.[62] Perhaps some witnesses, seated in the witness box in front of a microphone, with the eyes of judge, jury, parties, counsel, clerks, court and news reporters, and spectators upon them, will notice a qualitative difference in their stress level when a couple of television and still cameras are placed in a remote area of the courtroom. It is hard to presume that many, if any, people will be adversely affected by this incremental added stress factor. Surely a well-drafted rule can accommodate the particularly sensitive, while providing the public with the greatest possible amount of information concerning the operation of a co-equal branch of their government.

If the foregoing is an accurate depiction of media coverage of major criminal and civil proceedings, the question then becomes whether allowing cameras into the courtroom can possibly do more damage to the goals of nonintimidation of parties and witnesses, and maintenance of the independence of the jury than the current (and

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61. The Maine Code of Professional Conduct 3.7(j) states: "A lawyer involved in the prosecution or defense of a criminal matter or in representing a party to a civil cause shall not make or participate in making any extra-judicial statement which poses a substantial danger of interference with the administration of justice." Obviously this wording leaves significant room for commentary by attorneys regarding the merits of the case. See ALASKA REPORT, *supra* note 52, at 39, regarding the "before and after" effects of courtroom cameras on this type of coverage.

62. Rhode Island permits sketch artists in its courts only with permission of the trial judge. R.I. SUP. CT. R. 48, CANONS OF JUDICIAL ETHICS 30(A). The ALASKA REPORT is highly critical of distractions caused by sketch artists. ALASKA REPORT, *supra* note 52 at 57, 63.

constitutionally mandated) status quo. This question becomes more intriguing if one considers whether the courts could exact a quid pro quo from the electronic media, by allowing cameras into the courtroom only upon the media's agreement that they will forego other coverage which may be more prejudicial to a defendant or invasive of a witness's privacy. In fact, restrictions, such as conditioning courtroom coverage on the media's agreement not to photograph defendants in handcuffs, have already been imposed in some states.[63]

Aside from prejudice resulting from the coverage of particular proceedings, opponents of television in the courts warn that such coverage could trivialize court proceedings, create misconceptions regarding court procedures, and generally diminish respect for the judicial system. Again, however, it is important to consider how the public gets its information concerning the judicial system. From Shakespeare to Dickens to Perry Mason to "L.A. Law," fictional plays, stories, and novels centering around court proceedings are as old and pervasive as the common law itself.[64]

Recent years, however, have seen the rise in a new form of television: the "docudrama," or "non-fiction fiction," in which recent events are "recreated" by actors, writers, and directors. Besides made-for-television specials concerning notorious trials, series such as "Divorce Court" and "Superior Court" focus exclusively on simulated trials in simulated courtrooms. And, of course, there is the "real-life" (and real judge) world of Judge Wapner and "The People's Court." By claiming to depict court proceedings accurately, while at the same time "dramatizing" them, such programs blur the line between fiction and nonfiction, perception and misperception. It may be argued that televising real court proceedings, however selectively, would help offset the misconceptions of the court system created by such programming. At any rate, it is hard to see how it could do more harm.

Again, there is an abundance of empirical knowledge of the effects of cameras in many states' trial courts. Since this experience is inherently subjective, it can never be sufficient to satisfy those judges who insist on proof positive before they will allow cameras into the courtroom. To a great extent, the rulemaking court's underlying beliefs will predict its results. If the court believes that no good can be gained by allowing camera coverage, it will simply maintain the ban.

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63. *See, e.g.*, KAN. SUP. CT. R. 1001(11): "Prior to rendition of the verdict, criminal defendants shall not be photographed in restraints as they are being escorted to or from court proceedings." In New York, trial judges have imposed, as part of an order allowing coverage, prohibitions on photography of manacled defendants. *See generally* Rosenblatt Report, *supra* note 31, at 12-13. Because coverage is not a constitutional right but a privilege granted by the court, such orders are readily enforceable.

64. It is an oft-noted paradox that while most Americans claim to hold lawyers in general in low esteem, individual lawyers, both real (Abraham Lincoln, Clarence Darrow) and fictional (Perry Mason, Atticus Finch) are among our national heroes.

If, on the other hand, the court feels that it must give the appearance of flexibility in the face of public and legislative sentiment, it could adopt a rule so restrictive (e.g., requiring consent of all participants) that its application will produce the same effect as an outright ban.[65]

If, however, the court feels that the public's constitutional right to information about court proceedings is better served by allowing television coverage of those proceedings, then the court could set about designing a plan that would allow for the greatest possible coverage while minimizing potential problems resulting from such coverage. This is the approach used in designing the proposed Judicial Canon 3(A)(7) which is Part Four of this Comment. If desired, such a Rule could be instituted on a temporary basis with provisions for study of the Rule's effect on the bench, bar, witnesses, jurors, media, and the public.

IV. Proposed Amendment to the Maine Code of Judicial Conduct

Introduction

As noted above, the Supreme Judicial Court has identified the following concerns in refusing to allow cameras into Maine's courtrooms:

> 1. Protecting the judiciary's decision-making function from potentially serious and unnecessary impediment.
> 2. The risk that cameras in the courtroom might pose to the fairness of criminal trials.
> 3. The potential unwillingness of witnesses to become involved in criminal and civil proceedings.
> 4. The potential for decreasing the ability of jurors to devote their full attention to the fair and impartial determination of disputes.
> 5. The burden on judges of having to supervise media personnel.
> 6. Additional expense on the court system.
> 7. The potential of courtroom cameras to detract from the solemnity and dignity of the courtroom.[66]

Any consideration of a change in the court's policy regarding cameras in Maine's trial courts must address those concerns. At one time, this consideration would have depended largely on speculation. However, the Maine Court now has more than a decade of experience in the courts of many states, from the largest to the smallest, from the most populous to the most rural, upon which to base its conclusions. State courts have employed many methods to implement their camera coverage rules, including administrative orders, amendments to existing procedural rules, additions or amendments

65. *See infra* Comment to proposed Maine Canon of Judicial Conduct 3(A)(7)(d).
66. *In re* Ch. 515, P.L. 1985, Me. Rptr. 498-509 A.2d CXXVI, CXXVIII-IX.

to the state's code of judicial conduct, and (in cooperation with their legislatures) enactment of statutes. In many cases, these devices are used in combination. For the purposes of this Comment, these devices will be collectively referred to as "rules." Not only do these rules vary greatly in terms of substance, they also cover the spectrum of detail—compare, for example, New Hampshire's stereotypically terse guidelines[67] with Connecticut's extensive judicial canon.[68]

The basic presumption underlying this proposed Rule is that judicial proceedings that are otherwise open to the public ought to be available to the public through the electronic media, unless it can be shown that this would be detrimental to the fairness or accuracy of the proceeding. The primary concern in drafting this Rule was to address the Supreme Judicial Court's above-noted reservations regarding audio-visual coverage. Therefore, unlike the rules in some states, the proposed Rule is written in the greatest possible detail.[69] The various provisions of this Rule are designed to:

1. Protect all parties' due process rights by vesting control over camera coverage of proceedings in the trial judge or justice (subject to the Rule itself and clearly defined review procedures);

2. Eliminate (to the greatest degree possible) the possibility of juror intimidation or distraction by prohibiting the photographing of jurors;

3. Prevent (to the greatest degree possible) the unwillingness of witnesses to become involved in civil and criminal proceedings, by prohibiting coverage of specified sensitive proceedings, and by allowing the presiding judge to ban coverage of other proceedings or certain witnesses, based on good cause as defined in the Rule;

4. Prevent courtroom cameras from detracting from the solemnity and dignity of the courtroom, by specifying the number and location of cameras, and specifying the allowable conduct of camera operators;

5. Eliminate the possibility of additional expense to the Judicial Department, by requiring that all costs of camera coverage be borne by the media; and

6. Reduce the burden on judges of having to supervise media personnel. This is done by requiring the designation by the media of a single Media Representative to handle questions regarding coverage, providing clear guidelines for the exercise of judicial discretion regarding closure of proceedings or prohibitions on coverage of partic-

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67. N.H. SUPER. CT. R. 78, CODE OF JUDICIAL CONDUCT, Canon 3(A)(7).

68. CONN. CODE OF JUDICIAL CONDUCT, Canon 3(A)(7)-(7A).

69. This rule is proposed as an addition to the Maine Code of Judicial Conduct. While the same provisions could be enacted by other means, such as an expansion of the existing Administrative Order, the great majority of states have modified their Judicial Conduct Codes to allow camera coverage. This proposal follows that convention.

ular witnesses, and by providing clear guidelines for the conduct of the media where coverage is allowed.

If the Supreme Judicial Court is willing to examine the experience of other states, and undertake affirmative action to minimize the very real dangers posed by audio-visual coverage of trials, Maine could adopt a state-of-the-art rule. Furthermore, by reviewing the numerous studies conducted by other states, the justices could identify the areas of greatest concern, and commission a study of the effect of an experimental rule. Given the relatively small size of the Maine bench and bar, and the limited number of trials likely to draw camera coverage, and with the assistance of existing bar committees and the University of Maine System and the University of Maine School of Law, such a study could likely be conducted at small cost.

CANON 3

A Judge Should Perform the Duties of the Office Impartially and Diligently

A. Adjudicative Responsibilities

* * * *

(7) Audio-visual and still photographic coverage of trial proceedings in the District and Superior courts shall be allowed, subject to the following provisions. Other than as provided in this Canon, still or moving photography or audio recording or broadcasting shall not be allowed inside court buildings. This Canon does not otherwise limit or affect the right of the news media to cover and report on court proceedings.

Comment[70]

One assumption underlying these rules is that the trial court is to be given wide discretion, and appeal of trial court rulings should be strictly limited. At the same time, simple fairness dictates that the rules should be applied as uniformly as possible. Therefore, the rules attempt to specify to the greatest extent possible what is to be required of the bench, bar, and media.

The prohibition on coverage in court buildings outside of courtrooms is designed to avoid problems that have been noted in some states, of distraction caused by television and still photographers in hallways.

(a) Definitions.

(1) "Audio-visual coverage" (or "coverage") means filming, videotaping, or still photography, and audio recording of court proceedings

70. *For the readers' convenience, authorities cited in the Comments to the proposed rules are not footnoted, but are cited in the text of each Comment.*

for immediate or future public broadcast.
(2) "Court proceeding" means any civil or criminal proceeding, in any court, which is open to the public, and in which the parties must appear.
(3) "Trial court" means the District Court Judge or Superior Court Justice who is to preside over the hearing in which coverage is sought. However, if a request for coverage is granted for a trial by a judge or justice other than the one who presides at trial, the trial court shall not amend the order except for good cause.
(4) "Media" means any professional newsgathering organization, print or electronic, whose function is to inform the public.
(5) References to "this Rule" or "these rules" include Canon 3(A)(7) or the applicable part.

(b) Mandatory closure of proceedings.

Camera coverage shall not be allowed in:
(1) Divorce, paternity, child custody, child protection, or adoption proceedings;
(2) Juvenile proceedings under Title 15 M.R.S.A., except that coverage may be permitted in criminal trials where a juvenile is being tried as an adult;
(3) In criminal cases, all pre-trial proceedings other than arraignment;
(4) In trials of sexual assaults, as defined in 17-A M.R.S.A. ch. 11, except that coverage may be allowed where the victim consents to coverage prior to the proceeding; or
(5) Any proceeding which is closed to the public as a matter of law.

Comment

This section is designed to specify those proceedings in which coverage is not allowed under any circumstances. Its purposes are several: to protect the privacy interests of parties and witnesses in cases that are by their nature particularly sensitive; to ensure that victims in such cases will not be deterred from reporting crimes and testifying in proceedings; to protect defendants in criminal cases from pre-trial prejudice by precluding coverage of suppression hearings and other pre-trial proceedings; to provide notice to the media of those proceedings in which applications for coverage will not be entertained; and to relieve trial judges of having to weigh competing demands in these sensitive cases. It is important to keep in mind that other sections of this Rule give the trial court discretion to prohibit coverage of all or part of other proceedings.

Specifically, paragraph (1) prohibits coverage of domestic relations and human services hearings. However, this is not intended to include all proceedings in which such issues may be referred to (e.g., an assault case in which the victim and defendant are in the process of getting divorced).

Paragraph (2) prohibits coverage of juveniles, even where pro-

ceedings are otherwise open to the public, except in cases where the juvenile is being tried as an adult.

Paragraph (3) is designed to protect defendants in criminal cases from pre-trial prejudice, by prohibiting in-court coverage of suppression and bail hearings and other pre-trial hearings.

Paragraph (4) deals with an especially sensitive area. It is based on the belief that sex offenses *are* different. See Dyer & Hauserman, *Electronic Coverage of the Courts: Exceptions to Exposure*, 75 GEO. L.J. 1633 (1987) at 1686-92 for a persuasive discussion of this issue. It has often been observed that sex offenses are the most underreported of crimes, usually because the victim fears publicity. Even where a sex offense is reported to the police, the victim may be reluctant to testify for the same reason. The discretionary sections of this Rule would clearly allow a trial court to prohibit coverage of a sex offense trial, or a victim's testimony. However, the *certainty* that an unwilling victim will under no circumstances be covered by television or still cameras (at least in the courtroom) should eliminate any danger that victims will be deterred by the possibility of camera coverage from reporting sex offenses or testifying at trial.

(c) Jurors.

Jurors are not to be photographed. Where placement of cameras to cover testimony makes photographing the juror box unavoidable, there shall be no close-ups of jurors or shots focused on jurors. The trial judge shall inform the jurors of this rule at the start of proceedings.

Comment

Informing all jurors that they will not be photographed should allay concern and distraction on the part of jurors regarding coverage, and should eliminate any temptation to watch the television news to see if they are "on TV." Of course, the trial court already instructs jurors not to watch television reports as well as newspaper coverage of trials. While the influence of trial publicity on jurors is always a threat, it is hard to believe that a conscientious juror will be irresistibly tempted to watch television or newspaper accounts of the trial where cameras are in the courtroom—especially after the juror has been told that he or she will not be part of the coverage.

(d) Discretionary denial of camera coverage.

In all other cases, the trial court shall issue an Order governing coverage, according to the procedures specified in paragraph (e) of this Rule. The trial judge has discretion to prohibit, terminate, limit, or postpone video or still photography, or the broadcast or publication thereof of all or part of any proceeding, on the court's own motion or at the request of a party or witness in the proceeding. Whenever possible, the limitation on coverage should be by the least

restrictive means. The judge shall consider the following factors in ruling on the request to deny or limit coverage:

(1) The impact of camera coverage upon rights of the parties to a fair trial;

(2) The likelihood that a witness, the alleged victim, or a juror will avoid the obligation to appear for any proceeding, even if under subpoena or order;

(3) The likelihood that a witness, the alleged victim, or a juror will be so inhibited by coverage that that person will not responsibly perform his or her respective function within the proceeding;

(4) Whether the private nature of the testimony outweighs its public value;

(5) The likelihood that physical, emotional, or economic injury may be caused to a witness, a party, or an alleged victim;

(6) The age and mental and medical condition of the party, witness, or alleged victim requesting limited coverage;

(7) The reasonable wishes of the parties, witness, alleged victim, next of kin, or other persons as to whether to allow coverage;

(8) The conduct of the media generally, or of a particular news organization requesting coverage, during previous proceedings in which coverage was allowed; or

(9) Other good cause shown.

In addition, a trial court may terminate or suspend coverage at any time during the proceedings without notice to any participants, if the court finds that action is necessary to protect the rights of parties or participants, to protect the dignity of the court, or to assure the orderly conduct of the proceedings.

In all rulings upon requests to deny or limit coverage, the trial court shall explain the reasons for its action on the record.

Comment

This paragraph establishes the trial court's discretion to deny or limit coverage, and clarifies the factors the court should consider in applying its discretion. Paragraph (e) prescribes the procedures to be used in applying for coverage, and for hearing objections to coverage by parties or witnesses.

This section attempts to strike a balance between giving the trial courts wide discretion and giving the trial courts clear guidelines for the exercise of that discretion. Thus, the first and last considerations provide for a broad exercise of judicial discretion. At the same time, by laying out specific issues to be considered, the Rule does indicate that more is required to deny coverage than the mere desire for privacy of a party, attorney, or witness. Finally, limitations on coverage should be by the least restrictive means. For example, if coverage of particular witness's testimony should be denied under the guidelines listed in the Rule, that does not require that the whole proceeding to be closed to coverage.

There is a major difference between requiring consent of trial participants for coverage of trials, and allowing partial suspension of coverage upon objection of a trial participant. This issue is discussed in Dyer & Hauserman, 75 GEO. L.J. at 1651-56. "The potential difficulties in securing consent are important because consent requirements seem especially appealing to states as they embark on cautious experiments with electronic coverage." *Id.* at 1654.

Experience has clearly shown that requiring consent of parties—or automatically denying coverage upon the objection of any party or witness—is tantamount to an outright ban on coverage. "[W]hen a significant number of trial participants must grant consent before any electronic coverage is permitted, one person's failure to consent can effectively negate the consent of others to electronic coverage. In practice, therefore, such consent rules almost completely bar coverage." *Id.* at 1653. Both Alaska and Colorado, which were among the earliest states to allow camera coverage, have eliminated their original requirements that civil parties or criminal defendants consent to such coverage.

Even if the prior consent of participants is not required, a rule which requires that coverage of an entire proceeding be denied upon the objection of any participant may have the same effect as a rule requiring consent. *See Jim Halsey Co. v. Bonar*, 688 S.W.2d 275 (Ark. 1985) (concurring opinion of Hays, J., regarding Canon 3 of the Code of Judicial Conduct, which eliminated consent requirement but requires denial of coverage upon objection by any party, witness, or attorney: "A rule that requires the approval of opposing litigants is almost no rule at all, as experience teaches that adversaries in a lawsuit rarely agree on anything." *Id.* at 276.) On the other hand, a rule which provides for discretionary denial of coverage of a particular witness upon that witness's objection serves to protect the witness's interest, while protecting the public's interest in observing the conduct of judicial proceedings. As the comment to Canon 3A(7) of the Florida Code of Judicial Conduct states, "Limited only by the authority of the presiding judge in the exercise of sound discretion to prohibit filming or photographing *of particular participants*, consent of participants to coverage is not required." FLA. CODE OF JUDICIAL CONDUCT, Commentary to Canon 3A(7) (1989) (emphasis added). *See* N.J. CODE OF JUDICIAL CONDUCT, Canon 3A(8) and Supreme Court Guidelines for Still and Television Camera and Audio Coverage of Proceedings in the Courts of New Jersey, Guideline 11, "Consent of Participants Not Required" (1989).

The Florida Supreme Court established the following standard for trial judges:

> The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.

Re Petition of Post-Newsweek Stations, 370 So. 2d 764, 779 (Fla. 1979). *See also* Alaska's "Plan for Media Coverage of Judicial Proceedings § 1(c) (1985)," reprinted in ALASKA REPORT, *supra* note 52, at Appendix 2.4 (virtually identical wording). On the other hand, Iowa (which prohibits coverage of sex crimes without consent of the "victim/witness"), states that:

> [O]bjection[s] to coverage by a victim/witness in any other [than sex offense] forcible felony prosecution, and by police informants, undercover agents and relocated witnesses, shall enjoy a rebuttable presumption of validity. The presumption is rebutted by a showing that expanded media coverage will not have a substantial effect upon the particular individual objecting to such coverage which would be qualitatively different from the effect on members of the public in general and that such effect will not be qualitatively different from coverage by other types of media.

40 IOWA CODE ANN. 602 App. A, CODE OF JUDICIAL CONDUCT, Canon 3A(7)(2)(c) (1988).

Dyer and Hauserman, 75 GEO. L.J. at 1697, attempt to draw a distinction between the "qualitative difference" test exemplified by the Florida rule, FLA. CANON 3A(7), and the "good or reasonable cause" test, as used in the Arizona rules, ARIZ. CANON 3(A)(7), contending that the latter are more protective of an individual's privacy rights than the former. However, this is a fine distinction, and while this proposed Rule includes the consideration of "privacy" similar to that used in the Arizona rule, it also contemplates that the trial court should compare the effect of audio-visual coverage in a particular proceeding to the "traditional" media coverage expected in that proceeding, in determining whether the *addition* of camera coverage would be unduly invasive of a participant's privacy interests. In other words, the trial court should first consider whether presently existing (and constitutionally mandated) media coverage may inhibit the witness. The court should then consider whether the addition of audio-visual coverage, as defined in this rule, would exacerbate such inhibitions to the extent that it would qualitatively affect the witness's ability to testify fully and truthfully. Even if the trial court finds that coverage will not affect the witness's ability to testify fully and truthfully, the court may still find that other circumstances justify the denial of coverage of that witness's testimony, or in extreme cases, the entire proceeding.

(e) Applications for and Objections to Coverage

(1) Procedure. Media organizations who wish to conduct audio-visual coverage of proceedings must apply in writing to the trial court at least seven days before the first proceeding in which camera coverage is sought, using the forms provided, except that the court may waive the seven-day requirement at its discretion. A copy of the application form shall be sent to the clerk of courts and to the attorneys of record at the same time the request is submitted to the

court.

Parties who wish to object to coverage of a proceeding must inform the trial court at least three days prior to the proceeding, except that this requirement may be waived by the court at its discretion. Upon notice to the parties, to the one person or entity which has been designated by the media to be notified on behalf of all potentially interested members of the media ("Media Representative"), and to any person who has filed a request to be heard on this particular motion, the judge shall hold a prompt hearing on the motion, except that the court may, in its discretion, hear such objections at the pretrial conference described in this Rule.

Witnesses who wish to object to coverage of their testimony should inform the court of their objection prior to the part of the proceeding in which their testimony will be given. Objections by witnesses shall be considered by the court, following consultation with counsel and the Media Representative, at the earliest possible time prior to the part of the proceeding in which the witnesses's testimony will be given.

In each case in which coverage is requested, the court shall issue a written order stating whether coverage is to be allowed or not allowed, and if coverage is allowed, any limitations on coverage. In all cases, the court should state its reasons so that they can become part of the record.

Comment

The objective of this paragraph is to ensure that parties and witnesses have the opportunity to present their objections to coverage, and the opportunity for fair hearing and consideration of their objections. At the same time, the media should have an opportunity to respond to such objections, through the single Media Representative designated pursuant to the next paragraph. To effect this goal, this paragraph establishes a standard procedure for the consideration of applications for coverage and for the hearing of objections by parties or witnesses to coverage. Use of standard application, objection, and coverage order forms should ensure standard practice. Such forms are included in the Alaska, California, and Iowa rules of court.

(2) Media Representative. In the event that more than one petition is received, or if additional petitions are received after issuance of an Order, the trial court may order the "pooling" of coverage. In that case, the electronic and print media shall designate one person to be the Media Representative for that proceeding. This individual will be responsible for all communications between the court and other media personnel. Designation of the Media Representative shall be the sole responsibility of the media, and no other media personnel shall attempt to communicate with the trial court regarding coverage of that proceeding.

Comment

This paragraph makes it clear that the trial court is not expected to negotiate, explain, or otherwise deal with numerous media personnel during the course of a trial. It is anticipated that the trial court's written order will specify any special limitations on camera coverage (see *infra* paragraph (f) for standard restrictions). If any questions do arise among media organizations, they should be referred to the Media Representative who, in turn, will present them to the trial judge or justice. Further emphasis of the trial court's relation to the media is given in the next subparagraph.

(3) Enforcement. Any "pooling" arrangements among the media ordered by the court shall be the sole responsibility of the named media. In no case shall the court be called upon to mediate or decide disputes among the media. Violation of any Coverage Order by one or more members of a media pool may result in termination of coverage by the entire pool, or an order by the court that the media organization which violated the Coverage Order be banned from using still or video photographs taken by the pool. Any such ban against an organization shall not otherwise limit the right of that organization to cover and report on the proceeding.

Comment

This paragraph makes it clear that the trial court is not expected to supervise or settle disputes among the media. It also makes explicit the court's power to enforce its order by banning all cameras, or participation by a single organization. Since camera coverage is not a right, but a privilege, this sanction is well within the court's authority. Note also that paragraph (d)(8) of this Rule allows the court to consider previous coverage by the media generally or by a particular organization, when considering whether to allow coverage generally or by that particular organization.

The final sentence is a recognition that the court cannot deprive the media of any constitutional rights to coverage that may exist outside of this Rule.

(f) Limitations on Coverage.

(1) In General. The following limitations shall apply to all proceedings in which coverage is allowed:

(a) In jury trials, there shall be no coverage of any matters in which the jury has been excused from the courtroom.

(b) Coverage of *in camera* proceedings is prohibited.

(c) Close-up or audio coverage of sidebar conferences is prohibited.

(d) Audio coverage of conferences between a party and counsel is prohibited.

(e) The use of film, videotape, or any other reproduction of audio or visual court photography for advertising or promotional purposes is prohibited.

(f) Recorded audio-visual coverage of a proceeding shall not be admissible as an exhibit on appeal, except where the appeal is based on an allegation of prejudice against a party as a direct result of such coverage; nor shall any recorded coverage be admissible as evidence in any retrial or other proceeding related or unrelated to that proceeding.

Comment

The provisions of this paragraph, and the following paragraphs, are designed to provide clear guidelines for the media in all proceedings in which coverage is allowed. It is also intended to reduce the supervisory duties of the trial court. Thus, these provisions shall not be included in any Coverage Order. Violation of these provisions may, of course, result in the trial court's amendment or rescission of the Coverage Order.

All these restrictions are designed to protect the integrity of trials. The first four subparagraphs are self-explanatory. Subparagraph (e) is designed to preserve the dignity and independence of the courts by ensuring that the judiciary and judicial proceedings will not be used for promotional or other commercial purposes. Subparagraph (f) is a reinforcement of the rule that there is only one official transcript of a proceeding, and audio-visual coverage by the media is not part of the official record.

(2) Placement of Audio-Visual Equipment. The trial court shall, prior to the proceeding, designate the placement of equipment and personnel for electronic and still photographic coverage of the proceeding, and all equipment and personnel shall be restricted to the area so designated. Whenever possible, media equipment and personnel shall be placed outside the courtroom. Videotape recording equipment, not a component part of a television camera, shall be placed outside the courtroom. In addition, to the extent possible, wiring should be hidden, and in any event shall not be obtrusive or cause inconvenience or hazard. No rearrangement of courtroom furnishings is to be done without express permission of the court.

Comment

Except for the last sentence, this paragraph is taken verbatim from the Arizona rule. *It should seldom be needed*, as it is anticipated that prior to the effective date of this Rule, the presiding judges and justices of the state's courts can meet with local media to determine the standard location for cameras in each courtroom. This paragraph also provides, however, that the placement of cameras shall be as unobtrusive as possible, to the point that equipment and personnel not essential to the photographing of the proceedings should remain outside the courtroom. The last sentence makes explicit that photographers are not to rearrange the courtroom furniture to suit their convenience.

(3) Number of and Types of Cameras Allowed. No more than one television camera, operated by a single person, and two still cameras, operated by one person, shall be permitted at any proceeding. All cameras shall be mounted on tripods. No movement of tripods is permitted while a trial or hearing is in progress, nor shall photographers enter or leave the courtroom, change their location within the courtroom, or change camera lenses, film, or video cassettes during the progress of a particular proceeding. Only equipment which does not produce distracting sound or light shall be employed. No motorized film advancing mechanism or artificial lighting device of any kind shall be employed. Audio microphones should be connected to the court's audio system whenever possible, but in no event shall more than one microphone, in addition to the court's, be placed at the witness stand, bench, and counsel's lectern.

The trial court should, prior to the proceeding, witness a demonstration of the operation of camera equipment to ensure that this rule will be complied with. If the court finds that the sound of still camera shutters may be distracting to trial participants, the court may order, either orally or as part of its Coverage Order, that no still photographs be taken during the taking of testimony.

Comment

To the extent that any rule regarding courtroom cameras is standard, this is it. The purpose here is clearly to minimize distraction during proceedings. Several states' rules list specific makes and models of still and video cameras and audio recorders that can be used in the courts. Those examples were not followed here because it is not the court system's responsibility to determine whether a particular piece of equipment is "state of the art." Besides, the listed equipment could be made obsolete at any time.

To ensure compliance with this rule, the trial court should (but is not required to) inspect the location and operation of the cameras and sound recorders prior to trial. This should not be a problem, as the media could work out standard locations and equipment types for each courtroom with the presiding judge or justice or court administrators prior to implementation of this Rule. If this is done, the trial court should have to do no more than observe the use of the equipment to see whether it is causing a distraction. If so, the trial court can suspend coverage until the equipment is replaced, or, in the case of the distracting shutter sound of still cameras, restrict still photography as provided in this rule.

The requirement of tripods is designed to keep photographers stationary. (Consider the following variation: Iowa CODE OF JUDICIAL CONDUCT Canon 3A(7)(4)(e) (1988) does not require tripods but cautions: "Still photographers shall not assume body positions inappropriate for spectators.")

(4) Conduct of Media Personnel. All media personnel admitted under this Rule should maintain a standard of dress and conduct

which does not detract from the dignity of the court. In no case should media personnel wear clothing bearing the insignia or logo of their news organization, and identifying marks such as call letters or network logos should be removed from or otherwise concealed from all equipment.

Comment

Newspaper photographers and television camera operators spend much of their time outdoors, and may be called to a fire or disaster scene at any time; they dress accordingly. Also, since they have never been admitted into courtrooms, photographers and camera operators may not be immediately aware of the solemnity in which such proceedings are supposed to be conducted. The courts should not expect camera operators to dress like attorneys, but media personnel should realize that when coverage is allowed in the courtroom, they become participants in the proceeding. Therefore, individual media organizations and media associations would be well advised to draft codes of courtroom dress and conduct for their photographers.

(5) Pre-trial Conference. In all cases in which coverage has been approved in whole or in part, the trial court shall hold a pre-trial conference with the attorneys and the Media Representative. At this conference, the participants shall review the terms of the Order, and the trial court shall clarify any issues at the request of the participants. This conference should be held in all cases, except where circumstances make it impossible. Other media personnel may attend at the trial court's discretion; however, no questions or discussion shall be allowed regarding the proceeding other than concerning the coverage.

Comment

The purpose of this Rule is to ensure that there is no misunderstanding or confusion regarding the terms of coverage in a particular proceeding. However, this is not an opportunity for a press conference regarding the trial itself.

(6) Photography when Proceedings are Not in Progress. No photography is allowed in the courtroom during recesses, except by permission of the presiding judge or justice.

Comment

Photographing people entering or leaving the courtroom, or conferring during recesses, tends to detract from the dignity of the proceedings. In particular, television reporters should not do "stand-ups" (where the reporter speaks directly to the camera) while other people are in the courtroom. However, the trial court may allow "stand-ups" after the courtroom has been cleared for

the noon recess or court has adjourned for the day.

(g) Appeals.

There shall be no appeal to the Law Court from the granting or denial of camera coverage, except that the Law Court shall accept an appeal where it is alleged that the allowance or denial of camera coverage violated a criminal defendant's due process rights. A party or Media Representative aggrieved by an order granting or denying coverage may appeal the trial court's action to the Chief Judge of the District Court or the Chief Justice of the Superior Court, as appropriate. Such appeal shall be made promptly after the trial court's action and, if possible, no more than one day thereafter.

Reversal of the trial court's action should be done only where the appellant clearly demonstrates manifest abuse of discretion by the trial court. However, the pendency of such appeal shall in no case be grounds for continuance or otherwise delay the proceeding.

In addition, the Supreme Judicial Court may grant, at its discretion, motions to appeal by any party or Media Representative concerning the granting or denial of camera coverage, where the Court feels that an opinion would clarify and contribute to uniform application of the rule.

Comment

Because of the potential of additional burden on the judiciary, and for delay of proceedings, the issue of appeals regarding camera coverage is particularly sensitive. Nowhere is the diversity among state coverage rules more extreme than on this issue. Some states flatly prohibit any appeal from a trial court's granting or denial of coverage. However, to clarify and provide for uniform application of the Rule, it seems that some appeals process is desirable. Allowing appeals to the chief judges of the district and superior courts provides a means of review of trial court rulings under this Rule; however, the "manifest abuse of discretion" standard reinforces the basic premise of this Rule, that a trial court's exercise of discretion should not be disturbed except under the most extreme circumstances. The provision for discretionary review by the Supreme Judicial Court is included simply to provide an opportunity for that Court to clarify this Rule, if the Justices feel that clarification is required.

It is important to keep in mind that, given the limited number of both media organizations and sensational cases in Maine, it is unlikely that many appeals will be brought, especially given the strict standard of review.

(h) Conduct by Attorneys.

(1) It shall be the responsibility of each attorney to notify that attorney's client of a request for coverage of a proceeding involving that client, and to inform the court of the party's objection. Failure by an attorney to comply with this rule shall not alone be grounds

for appeal of coverage of a proceeding.
(2) In criminal prosecutions of sex offenses, the attorney for the State shall, upon receipt of a request for coverage, ascertain whether the victim consents to such coverage, and inform the court of the victim's response.
(3) It shall be the responsibility of each attorney in a proceeding to inform each witness to be called by that attorney of any outstanding order concerning coverage, and to inform the court of the witness's objection.
(4) Nothing in this Rule shall affect an attorney's responsibility under Maine Bar Rule 3.7(j) or any other rules of the Maine Code of Professional Responsibility.

Comment

This Rule explains the duties of attorneys. While this Rule does expand the obligations of attorneys in litigation, this is inevitable. If coverage is part of a proceeding, counsel must deal with that fact within the context of the attorney's responsibility to the client. Simple efficiency also dictates that, since it is the attorneys who know beforehand who they will call as witnesses, the attorneys should inform their witnesses of the likelihood of coverage.

The first paragraph of this section makes it clear that failure of counsel to inform the client of the potential of coverage is not grounds for appeal—just as the granting or denial of coverage itself is not grounds for an appeal from judgment, barring an *Estes* showing of denial of due process resulting from such coverage. Because of this substantive law, failure of counsel to comply with this rule is not grounds for a collateral attack on the judgment based on ineffective assistance of counsel.

(i) Expenses of Coverage.

Any costs required to implement this Rule shall be borne entirely by the media, except that court personnel may supervise the installation of audio-visual equipment to ensure safety and compliance with this Rule. No court shall participate in or mediate disputes among the media regarding apportionment of costs.

Comment

This Rule is designed to ensure, first, that *no* costs associated with audio-visual coverage will be borne by the Judicial Department. (If the media can persuade the Legislature that there is sufficient public benefit in camera coverage of court proceedings, the Legislature might make an appropriation for this purpose, but that is not within the province of the Judicial Department.) Also, not only the costs, but the apportionment of those costs are the media's responsibility; judges shall not become mediators in disputes among the media about expenses or anything else.

CONCLUSION

The foregoing proposed Rule is an attempt to balance many competing policies. One policy that should never be compromised, however, is the right of all parties, in either civil or criminal cases, to the fairest trial that the judicial system can provide.

Joseph M. O'Connor