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## Lights, Camera, Mistrial: Conflicting Federal Court Local Rules and Conflicting Theories on the Aggregate Effect of Cameras on Courtroom Proceedings

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# **LIGHTS, CAMERA, MISTRIAL: CONFLICTING FEDERAL COURT LOCAL RULES AND CONFLICTING THEORIES ON THE AGGREGATE EFFECT OF CAMERAS ON COURTROOM PROCEEDINGS**

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## **I. INTRODUCTION**

Since causing a mistrial in the Bruno Richard Hauptmann kidnapping and murder case, cameras have been inconsistently used in courtrooms, but have always sparked contentious national debate.<sup>1</sup> In the beginning, the meddlesome presence of large machinery, lighting, and

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<sup>1</sup> See generally Anton R. Valukas, William A. Von Hoene, Jr. & Liza M. Murphy, *Cameras in the Courtroom: An Overview*, 13 COMM. LAW. 1 (Fall 1995) (summarizing nature of debate regarding cameras in courtrooms since 1935). Debate exists on the state-level in Massachusetts as well: while the current Supreme Judicial Court rule permits one television camera and one still camera, the proposed rule would permit a third camera for internet broadcasting purposes. Compare Mass. S.J.C. Rule 1:19 (proposed Nov. 29, 2010), available at <http://www.mass.gov/courts/sjc/docs/Rules/sjc-r119-proposed-changes-012811.pdf>, with Mass. S.J.C. Rule 1:19 (Jan. 1, 2010), available at <http://massreports.com/courtrules/sjcrules.aspx#Rule1:19>.

cabing threatened the court's ability to do justice.<sup>2</sup> More recently, jurors fear the possibility of convicts' allies using video footage to identify jurors and seek retribution against them.<sup>3</sup> Cameras in the courtroom are at the epicenter of a battle between two competing cornerstones of American jurisprudential theory: the public's right to attend trials versus the judiciary's intense aversion toward privacy invasions and distortions of justice.<sup>4</sup>

American jurisdictions have responded differently to the utility-obstruction debate over cameras in the courtroom: while all jurisdictions ban television coverage of jurors, federal district courts deal with cameras differently in their Local Rules.<sup>5</sup> In the District of Massachusetts, Local Rule 83.3 bans broadcasting of any proceeding.<sup>6</sup> In the Southern and Eastern Districts of New York, Local Civil Rule 1.8 confers the discretion to allow cameras upon the presiding judge.<sup>7</sup> Recently, Congress has considered a bill to confer discretion to allow cameras upon presiding judges in the United States District Court, which would preempt the District of Massachusetts Local Rule in favor of the Eastern and Southern Districts of New York.<sup>8</sup> Do the merits of the debate over cameras in the courtroom favor a total ban of cameras, a judicial-discretion rule, or some compromise?

Part II(A) of this Note explains the evolution of Supreme Court case law relative to cameras in the courtroom.<sup>9</sup> Part II(B) examines the 1935 Bruno Richard Hauptmann trial as an example of early media

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<sup>2</sup> Ruth A. Strickland & Richter H. Moore, Jr., *Cameras in State Courts: A Historical Perspective*, 78 JUDICATURE 128, 130 (1994) (explaining overwhelming presence of cameras in Hauptmann courtroom).

<sup>3</sup> Christina Schmucker, *Picture This: DuPage County Court Bans Camera Phones*, DCBA Brief: The Journal of the DuPage County Bar Association, J. DUPAGE COUNTY B. ASS'N, Dec. 2004, at 16 (identifying current fear of retribution against jurors by allies of convicts).

<sup>4</sup> See Valukas et al., *supra* note 1, at \*1-\*18 (outlining arguments for and against allowing cameras in courtroom).

<sup>5</sup> Compare D. Mass. LR 83.3 (prohibiting camera use in any proceeding unless specific court order permits it), with E.D.N.Y. R. 1.8 (conferring judges with discretion to allow cameras in civil proceedings).

<sup>6</sup> D. Mass. LR 83.3, available at <http://www.mad.uscourts.gov/general/pdf/combined01.pdf> (banning cameras in any proceeding unless specific court order permits them).

<sup>7</sup> E.D.N.Y. R. 1.8 (conferring discretion upon judges to decide to allow cameras in civil proceedings).

<sup>8</sup> Sunshine in the Courtroom Act of 2008, S. 352, 110th Cong. (2008) [hereinafter *2008 Sunshine Act*] (conferring discretion upon United States District Court judges to allow cameras in any proceeding). The Sunshine Act was reintroduced on March 19, 2009 and reported in the Senate on April 29, 2010. Sunshine in the Courtroom Act of 2009, S. 657, 111th Cong. (2010).

<sup>9</sup> See *infra* Part II(A) (explaining evolution of Supreme Court jurisprudence regarding courtroom cameras).

intrusion into trial proceedings.<sup>10</sup> Part II(C) summarizes the American Bar Association's promulgation, amendment, and eventual deletion of ethical rules governing cameras in the courtroom.<sup>11</sup> Part II(D) investigates the split between the District of Massachusetts and the Eastern and Southern Districts of New York concerning local rules governing cameras in the courtroom.<sup>12</sup> Part II(E) summarizes recent federal-level legislative efforts to create a uniform rule among federal district courts.<sup>13</sup>

Part III analyzes current arguments for and against broadcasting court proceedings, focusing on the effect on people in the courtroom.<sup>14</sup> Part IV matches Part III's theoretical pro/con analysis with the practical effects of cameras and recommends a model rule to address concerns with cameras while exploiting potential benefits.<sup>15</sup> Camera use would be best regulated by federal legislation conferring judicial discretion and requiring case-by-case analysis of a camera's potential effect on each proceeding.

## PART II. EVOLUTION OF CAMERAS IN THE COURTROOM

The evolution of cameras in the courtroom is best described by addressing three areas. The first part is the United States Supreme Court's jurisprudence, starting in 1963 with *Rideau v. Louisiana*.<sup>16</sup> Second is a discussion of the practical evolution of cameras, beginning with the 1935 trial of Bruno Richard Hauptmann<sup>17</sup> and ending with the 1995 case of O.J. Simpson.<sup>18</sup> Third is a summary of the current split between states permitting and banning cameras in trial and appellate settings.

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<sup>10</sup> See *infra* Part II(B) (discussing *Hauptmann* trial as example of dangers of courtroom media).

<sup>11</sup> See *infra* Part II(C).

<sup>12</sup> See *infra* Part II(D) (identifying local rule split between District of Massachusetts and Eastern/Southern Districts of New York).

<sup>13</sup> See *infra* Part II(E) (discussing recent federal legislative efforts to promulgate rule giving United States District Court judges discretion).

<sup>14</sup> See *infra* Part III (analyzing current arguments for and against allowing cameras in courtrooms).

<sup>15</sup> See *infra* Part IV (proposing rules to meet judicial and practical concerns and considerations).

<sup>16</sup> 373 U.S. 723, 726-27 (1963) (holding televising defendant's confession to crime without changing trial venue violated Due Process Clause).

<sup>17</sup> *State v. Hauptmann*, 180 A. 809 (N.J. 1935) (denying appellate relief after trial and conviction by jury).

<sup>18</sup> *People v. Simpson*, BA 097211 (Cal. Super. Ct. 1995).

*A. Supreme Court Jurisprudence*

The first major consideration of video publicity of a trial was in *Rideau v. Louisiana*, where police videotaped an interview with the defendant, a suspect in a robbery, kidnapping, and murder.<sup>19</sup> The video contained an interrogation and subsequent admission to the alleged crimes by the defendant.<sup>20</sup> That video was broadcast the night of the interrogation, then for two subsequent days, with a peak viewership of 53,000 people during the middle day of the broadcast.<sup>21</sup> The trial court refused the defendant's motion to change venue.<sup>22</sup> The Supreme Court held that the pervasive broadcasting of the defendant's confession before trial was a denial of due process.<sup>23</sup> The Court held that when the community is affected by such a highly-publicized confession, no fair trial can be conducted in that venue.<sup>24</sup>

The first leading Supreme Court case to consider cameras in the courtroom was *Estes v. Texas*.<sup>25</sup> The *Estes* trial was a macrocosm of the *Rideau* problem of broadcasting preliminary proceedings pervasively throughout the population of the trial venue.<sup>26</sup> Several pre-trial sessions involved twelve or more cameramen, wires and cables cluttering the courtroom floor, and many microphones strewn about the room, including near the jury.<sup>27</sup> During trial, "[a] booth had been constructed at the back of the courtroom which was painted to blend with the permanent structure of the room."<sup>28</sup> Additionally, the trial judge permitted only some parts of the trial to be broadcast live, which ultimately resulted in broadcasts of sound bites and video clips with reporter commentary.<sup>29</sup> The Court in *Estes* held

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<sup>19</sup> See *Rideau*, 373 U.S. at 724 (detailing facts of case).

<sup>20</sup> *Id.*

<sup>21</sup> *Rideau v. Louisiana*, 373 U.S. 723, 724 (1964).

<sup>22</sup> *Id.* at 724.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was *Rideau's* trial-at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.

*Id.*

<sup>25</sup> 381 U.S. 532 (1965).

<sup>26</sup> See *id.* at 535-36 (describing radio and news publication of initial trial proceedings).

<sup>27</sup> *Id.* at 536.

<sup>28</sup> *Id.* at 537.

<sup>29</sup> *Id.*

that the Anglo-American court system's ability to provide fair trials depends on the trial atmosphere, which cameras disturb to the point of denaturing the proceedings.<sup>30</sup> Finding such a probability of prejudice resulting from cameras in the courtroom, the Court held that parties do not need to demonstrate prejudice to make a due process argument against broadcasting.<sup>31</sup>

*Estes* enumerated several concerns over the probable, negative effects of cameras in the courtroom: the impact of televised newscasts on jurors;<sup>32</sup> the impact on witnesses when they discover they will be heard by a larger audience than those in the courtroom;<sup>33</sup> the increase in workload on the judge in supervising telecasting;<sup>34</sup> and the numerous effects on defendants, such as distracted and less-effective counsel and public prejudice.<sup>35</sup> Despite finding myriad negative effects of cameras, the Court remained open to changing the ban on cameras if technology and different tactics could prevent the aforementioned effects in the future.<sup>36</sup>

In *Chandler v. Florida*,<sup>37</sup> the Supreme Court reversed course from *Estes*, "hold[ing] that the Constitution does not prohibit a state from

<sup>30</sup> *Estes v. Texas*, 381 U.S. 532, 540-41 (1965). The Court reasoned:

Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the sine qua non of a fair trial. . . . We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs.

*Id.* at 540.

<sup>31</sup> 381 U.S. at 542-43 (rejecting requirement that parties demonstrate "identifiable" prejudice to make due process argument against cameras). The Court in *Estes* explains: "at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Id.*

<sup>32</sup> *Id.* at 545 (explaining community interest from pre-trial news coverage heightens likelihood of prejudice). The Court notes that if the public is watching jurors and the jurors are aware of public opinion, pressure to side with the public can become intense and "have a direct bearing on his vote as to guilt or innocence." *Id.*

<sup>33</sup> *Id.* at 547 (suggesting likely effects large audiences would have on witnesses). The Court suggests witnesses who are aware of a large audience might be prone to "overstatement," decreased accuracy, increased dramatization, and might withhold information due to embarrassment or intimidation. *Id.*

<sup>34</sup> *Id.* at 548.

<sup>35</sup> *Id.* at 549.

<sup>36</sup> *Estes v. Texas*, 381 U.S. 532, 540 (1965) ("When the advances in these arts permit reporting . . . by television without their present hazards to a fair trial we will have another case."); see also MARJORIE COHN & DAVID DOW, CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE 20 (McFarland & Co., Inc. 1998) (discussing *Estes* Court's openness to lifting ban after camera technology further develops).

<sup>37</sup> 449 U.S. 560 (1981).

experimenting with the program authorized by revised Canon 3A(7).<sup>38</sup> In *Chandler*, the Court re-opened the issue of allowing cameras in courtrooms by holding that *Estes*, a plurality opinion, did not bar “photographic, radio, and television coverage in all cases and under all circumstances.”<sup>39</sup> The Court then attacked the Court in *Estes*’ identification of the dangerous effects of cameras as lacking empirical support.<sup>40</sup> The Court found the existence of psychological impacts resulting from cameras were still debated by experts in the field and could not be readily proven for a total ban.<sup>41</sup> Since cameras were, at the time, run on an experimental basis and those experiments included guidelines to protect from possible bad effects, the potential risk of prejudice to the legal system did not warrant a ban.<sup>42</sup>

*B. Famous Shortfall of Cameras in the Courtroom: the Bruno Richard Hauptmann Trial*

The first major trial to include televised broadcasts was *State v. Hauptmann*.<sup>43</sup> In 1935, Hauptmann was charged and tried for the kidnapping and murder of Charles Lindbergh’s son.<sup>44</sup> Conflicting reports exist regarding the overwhelming quality of cameras’ presence in the *Hauptmann* trial, but many sources agree that the press saturated the proceedings.<sup>45</sup> Reports do agree on the overwhelming presence of journalists covering the trial, with estimates of 700 reporters and 121 to 129

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<sup>38</sup> *Id.* at 583.

<sup>39</sup> *Id.* at 573. The Court found that Justice Harlan’s opinion is what lends the crucial vote on the question of banning the rule, and Justice Harlan’s concurrence contained enough reservations to prevent the Court from announcing a “*per se* rule.” *Id.* at 574 n.8 (citation omitted).

<sup>40</sup> *Id.* at 576 n.11 (“[T]here is no unimpeachable empirical support for the thesis that the presence of the electronic media, *ipso facto*, interferes with trial proceedings.”).

<sup>41</sup> *Id.* at 578 (indicating amici briefs conflicted on presence of psychological factors as identified by *Estes*).

<sup>42</sup> *Chandler v. Florida*, 449 U.S. 560, 577-78 (1981) (identifying experimental status and Florida guidelines to ensure fair trials with broadcasting). The Court explained Florida’s guidelines that require defendant’s objections to broadcast coverage to be “heard and considered on the record by the trial court.” *Id.* at 577 (citing *Green v. State*, 377 So. 2d 193, 201 (Fla. Dist. Ct. App. 1979)).

<sup>43</sup> 180 A. 809 (N.J. 1935).

<sup>44</sup> Strickland & Moore, *supra* note 2, at 130.

<sup>45</sup> See *id.* at 130; SUSANNA BARBER, NEWS CAMERAS IN THE COURTROOM: A FREE PRESS-FAIR TRIAL DEBATE 3 (Alex Publishing 1987) (identifying conflicting recollections of cameras’ effect in *Hauptmann* trial). Barber identifies conflicting arguments regarding the effect of cameras. *Id.* One report was that “‘photographers clambered on counsel’s table and shoved their flashbulbs into the faces of witnesses,’” while another report blamed the public fanfare, rather than the photographers present in the courtroom. *Id.* (citing Richard B. Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 68 JUDICATURE 14 (1979-80)).

photographers inside and outside the courtroom.<sup>46</sup> Ultimately, as many as 275 spectators and 135 journalists were present inside the courtroom.<sup>47</sup> Lights were added to the courtroom to assist both the still-and motion-cameras, raising the ambient temperature in the courtroom.<sup>48</sup>

While one report claimed Judge Thomas W. Trenchard tightly restricted photography and newsreel camera placement,<sup>49</sup> another explained that Sheriff John Curtiss permitted newsreel companies to record the trial if the cameras were hidden and no newsreels were played before the end of the trial.<sup>50</sup> The cameras, however, were obvious, and one newsreel was released prior to the trial's end.<sup>51</sup> Hauptmann was found guilty and appealed his conviction, claiming, in part, that the media's presence denied him a fair trial.<sup>52</sup> The New Jersey Court of Appeals rejected the argument, and held that the court was correct to afford reasonable access to the media, and that the judge's regulation of the media was adequate and not reversible.<sup>53</sup> Although the New Jersey Court of Appeals did not react to the allegations of media disturbance during the *Hauptmann* trial, some credit the case with sparking the development of American Bar Association Canons.<sup>54</sup>

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<sup>46</sup> BARBER, *supra* note 45, at 4; Strickland & Moore, *supra* note 2, at 130.

<sup>47</sup> COHN & DOW, *supra* note 36, at 15. As depicted by photographs taken during the *Hauptmann* trial, the courtroom was packed with reporters. See *The Trial of Hauptmann, Iconic Photos* (May 21, 2009, 9:26 AM), <http://wp.me/pvhXv-9v> [hereinafter *Newspaper Cover*] (depicting *Hauptmann Sobs and Denies His Guilt*, THE SUN, Feb. 21, 1935, at 1). The video cameras used inside the courtroom stood taller than witnesses, such as Anne Morrow Lindbergh, who walked past a camera that towered over and was surrounded by people. *Anne Morrow Lindbergh About to Testify at Hauptmann Trial*, in *Flemington, NJ*, YALE UNIVERSITY MANUSCRIPTS & ARCHIVES, DIGITAL IMAGES DATABASE, <http://images.library.yale.edu/madid/> (search images "3268"; then follow "3268" hyperlink) (exhibiting photograph taken of Anne Morrow Lindbergh, near video camera, before testifying in Hauptmann trial) [hereinafter *A.M.L. Photo*].

<sup>48</sup> COHN & DOW, *supra* note 36, at 15 (citing JOYCE MILTON, *LOSS OF EDEN* 300 (HarperCollins 1993)). While some photographs cut out the bright light bulbs from photographs of the courtroom scene, the effect of the lights can be seen when viewing those close to the judge's bench and the witness stand. See *Newspaper Cover*, *supra* note 47. Viewing what appear to be examples of the same photograph, without cropping out the lighting, demonstrates the intensity of the courtroom lighting. *Bruno Hauptmann Hearing Guilty Verdict*, Corbis Images, <http://www.corbisimages.com> (search "U725729INP").

<sup>49</sup> BARBER, *supra* note 45, at 3 (noting Judge Trenchard restricted photographic and video opportunities and camera placement).

<sup>50</sup> COHN & DOW, *supra* note 36, at 15.

<sup>51</sup> *Id.* at 15-16.

<sup>52</sup> *State v. Hauptmann*, 180 A. 809, 827 (N.J. 1935).

<sup>53</sup> Strickland & Moore, *supra* note 2, at 130 (citing *Hauptmann*, 180 A. at 827).

<sup>54</sup> *Id.* ("Although the New Jersey Court of Appeals saw no major problem with the conduct of the Hauptmann trial, the ABA reconsidered the role of cameras in the courtroom due to the reported carnival-like atmosphere of the Hauptmann trial.").



*C. ABA Canon Evolutions: 1937, 1952, 1982, and Removal of Camera Canons*

Although the American Bar Association (“ABA”) originally contemplated the issue of cameras in the courtroom in 1924, the first relevant canons were created in 1937 in response to *Hauptmann*.<sup>55</sup> ABA Canon 35 banned photographs and broadcasting from the courtroom, citing the propensity to cause public misconceptions and detract from the trial’s proceedings.<sup>56</sup> Most states adopted ABA Canon 35 after its promulgation.<sup>57</sup> ABA Canon 35 went unchanged until 1952, when it was “amended to prohibit television cameras.”<sup>58</sup>

After these changes, ABA Canon 35 underwent a slow softening process beginning in 1972, when ABA reworked its Canons, and transformed Canon 35 to Canon 3A(7).<sup>59</sup> The transformation included a new exception permitting still and video recording, subject to various rules, for educational purposes in learning institutions.<sup>60</sup> In 1982, the Canon language saw yet another retreat from a total ban, “recommend[ing] allowing camera usage in courtrooms for news purposes at the discretion

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<sup>55</sup> COHN & DOW, *supra* note 36, at 17 (describing formation of ABA special committee and promulgation of Canon 35); Strickland & Moore, *supra* note 2, at 130 (suggesting 1920s trials sparked ABA’s interest in media, but *Hauptmann* caused promulgation of new canon). Cohn and Dow note the special committee convened “to conduct an exhaustive analysis of press coverage and other facets of the Lindbergh case.” COHN & DOW, *supra* note 36, at 17.

<sup>56</sup> COHN & DOW, *supra* note 36, at 17.

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

*Id.* (quoting Canon 35).

<sup>57</sup> Strickland & Moore, *supra* note 2, at 130.

<sup>58</sup> COHN & DOW, *supra* note 36, at 17 (indicating ABA’s 1952 prohibition of television cameras in courtrooms); Valukas et al., *supra* note 1, at \*18 (explaining 1952 “forbid[dance of] television coverage in the courtroom as well as photographic and broadcast coverage”). Strickland and Moore note that most states accepted the amendment to Canon 35, although sometimes in altered form. Strickland & Moore, *supra* note 2, at 130.

<sup>59</sup> See *infra* notes 60-62 and accompanying text (describing evolution of ABA Canons regarding courtroom cameras).

<sup>60</sup> Valukas et al., *supra* note 1, at \*18 (citing Strickland & Moore, *supra* note 2, at 130-32). The 1972 version of Canon 3A(7) reads: “A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions.” MODEL CODE OF JUDICIAL CONDUCT CANON 3A(7) (1972).

and under the supervision of the state's highest appellate court."<sup>61</sup> The ABA finally removed Canon 3A(7) from the books in 1989, holding that media coverage fell outside the ABA Canon's purview and was instead a question to be decided by local rules in the various jurisdictions.<sup>62</sup>

*D. District of Massachusetts vs. Eastern/Southern District of New York  
Local Rules Split*

As forecasted by ABA Canon 3A(7)'s removal, local administrative rules of court and interpreting case law now regulate camera use in trial courts.<sup>63</sup> New York and Massachusetts both have local rules, and both have case law definitively interpreting those local rules.<sup>64</sup>

1. Massachusetts's Local Rule 83.3 and Case Law Interpretation  
Thereof

In Massachusetts, Rule 83.3 of the Local Rules of the United States District Court for the District of Massachusetts has regulated still and video recording and broadcasting since September 1, 1990.<sup>65</sup> The rule bans all types of video and electronic recording from several floors of the courthouses in the District of Massachusetts.<sup>66</sup> There are only two relevant

<sup>61</sup> *Id.* (describing 1982 updates to Canon 3(7)).

<sup>62</sup> Valukas et al., *supra* note 1, at \*18 (citing STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASS'N, FINAL DRAFT OF RECOMMENDED REVISIONS TO ABA CODE OF JUDICIAL CONDUCT (1989)). "The canon subsequently was removed from the ABA Code of Judicial Conduct as the result of the ABA's determination that the topic of electronic media coverage in courtrooms was not directly related to judicial ethics and should be addressed by administrative rules adopted within specific jurisdictions." *Id.*

<sup>63</sup> See *supra* note 5 and accompanying text (suggesting comparison of D. Mass. LR 83.3 with E.D.N.Y. and S.D.N.Y. Local Civil Rule 1.8).

<sup>64</sup> See *supra* note 5 and accompanying text (suggesting comparison of two federal districts' local rules on cameras).

<sup>65</sup> D. Mass. LR 83.3, available at <http://www.mad.uscourts.gov/general/pdf/combined01.pdf>.

<sup>66</sup> See Local Rule 83.3(a) indicates, in relevant part:

Recording and Broadcasting Prohibited. Except as specifically provided in these rules or by order of the court, no person shall take any photograph, make any recording, or make any broadcast by radio, television, or other means, in the course of or in connection with any proceedings in this court, on any floor of any building on which proceedings of this court are or, in the regular course of the business of the court, may be held. This prohibition shall apply specifically but shall not be limited to the second, third, ninth, eleventh, twelfth, thirteenth, fifteenth, sixteenth, eighteenth, nineteenth and twentieth floors of the John W. McCormack Post Office and Courthouse Building in Boston and the fifth floor of the Courthouse Building in Springfield.

*Id.*

exceptions to the blanket ban. First, Local Rule 83.3(b) permits court reporters to use recording technologies “for the sole purpose of discharging their official duties.”<sup>67</sup> Second, Local Rule 83.3(c) permits the use of electronic recording to preserve evidence, keep a record, and for “the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.”<sup>68</sup>

Local Rule 83.3’s application was most recently contested in *In re Sony BMG Music Entertainment et al.*,<sup>69</sup> in April 2009. In *Sony BMG*, the First Circuit considered whether “a federal district judge ha[s] the authority to permit gavel-to-gavel webcasting of a hearing in a civil case?”<sup>70</sup> The question was prompted by a defendant’s motion to permit the Courtroom View Network to record and broadcast on the internet (“webcast”) a non-evidentiary motions hearing in the United States District Court for the District of Massachusetts; the District Court previously granted the motion.<sup>71</sup> Appellants directly argued “Rule 83.3 of the Local Rules of the United States District Court for the District of Massachusetts prohibited webcasts of civil proceedings.”<sup>72</sup>

In *Sony BMG*, the First Circuit reviewed the issue of using an abuse of discretion standard, with “a special degree of deference.”<sup>73</sup> The court held the District Court judge’s interpretation of Local Rule 83.3 created “a discretionary catchall exception,” which ran contrary to the rule’s apparent blanket prohibition against broadcasting trial proceedings.<sup>74</sup>

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<sup>67</sup> D. Mass. LR 83.3(b), available at <http://www.mad.uscourts.gov/general/pdf/combined01.pdf>. Rule 83.3(b) provides: “Voice recordings by Court Reporters. Official court reporters are not prohibited by section (a) from making voice recordings for the sole purpose of discharging their official duties. No recording made for that purpose shall be used for any other purpose by any person.”

<sup>68</sup> D. Mass. LR 83.3(c), available at <http://www.mad.uscourts.gov/general/pdf/combined01.pdf>. Rule 83.3(c) provides: “The court may permit (1) the use of electronic or photographic means for the preservation of evidence or the perpetuation of a record, and (2) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.” *Id.*

<sup>69</sup> 564 F.3d 1 (1st Cir. 2009).

<sup>70</sup> *Id.* at 2 (identifying appellate issue).

<sup>71</sup> *Id.* (reciting procedural history relevant to requests to film civil hearings); see also *Capitol Records, Inc. v. Alaujan*, 593 F. Supp. 2d 319, 324-25 (D. Mass. 2009). *Capitol Records* is the antecedent district court proceeding sparking the *Sony BMG* appeal. *Sony BMG*, 564 F.3d at 2.

<sup>72</sup> *Sony BMG*, 564 F.3d at 3 (discussing petitioner’s appellate argument).

<sup>73</sup> *Id.* at 5 (quoting *Crowley v. L.L. Bean, Inc.*, 361 F.3d 22, 25 (1st Cir. 2004)) (explaining standard review with added deference for cases involving courtroom management). The court in *Sony BMG* demonstrated a reluctance to interfere in the administration of proceedings in the lower courts; consequently, it incorporated extra deference into its analysis. 564 F.3d at 5.

<sup>74</sup> *In re Sony BMG Music Entertainment*, 564 F.3d 1, 4-5 (1st Cir. 2009) (describing and characterizing district court judge’s interpretation of D. Mass. LR 83.3 as erroneous). “Here, we think that the limits of the district judge’s discretion were exceeded; her interpretation of Local

In deciphering Rule 83.3, the court in *Sony BMG* referred to the Judicial Conference of the United States' *Guide to Judiciary Policies and Procedures* and the First Circuit Judicial Council, both of which indicated that cameras should not be permitted in courtrooms, nor should broadcasting be allowed.<sup>75</sup> While *Sony BMG* considered that new technology may have removed some of the old fears regarding cameras in the courtroom, the court decided that Rule 83.3 was controlling; therefore, deference to the rule required a continued ban on courtroom broadcasting.<sup>76</sup>

## 2. New York's Local Civil Rule 1.8 and Case Law Interpretation Thereof

The United States District Courts, Eastern and Southern Districts of New York, share a common Local Civil Rule 1.8, which governs still and video cameras, as well as broadcasting.<sup>77</sup> Like the District of Massachusetts' Local Rule 83.3, the Eastern and Southern Districts of New York Local Civil Rule 1.8 provides for a blanket ban of broadcasting or recording.<sup>78</sup> However, unlike Massachusetts Local Rule 83.3, New York Local Civil Rule 1.8 permits a judge to give written permission to use broadcasting or recording equipment.<sup>79</sup>

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Rule 83.3 is unprecedented and, in our view, palpably incorrect." *Id.* at 5.

<sup>75</sup> *Sony BMG*, 564 F.3d at 7 (citing *Guide to Judiciary Policies and Procedures of the Judicial Conference of the United States*, Vol. 1, Ch. 3, Pt. E.3; First Circuit Judicial Council, Resolution of June 1996). The *Sony BMG* decision has drawn criticism for over-reliance on the non-binding First Circuit Judicial Council materials. See Jordan K. Schwartz, Comment, *Federal Civil Practice Local District Court Rule Does Not Provide Judge Authority to Order "Narrowcast" of Motion Hearing-In re Sony BMG Music Entertainment*, 564 F.3d 1 (1st Cir. 2009), 43 SUFFOLK U. L. REV. 787, 794 (2010) (suggesting over-reliance upon non-binding Judicial Conference materials).

<sup>76</sup> See *Sony BMG*, 564 F.3d at 9 (recognizing technology improvements argument but deferring to controlling Massachusetts Local Rule 83.3).

<sup>77</sup> E.D.N.Y. and S.D.N.Y. Local Civil Rule 1.8, available at <http://www.nyed.uscourts.gov/localrules.pdf>. Local Civil Rule 1.8 states:

No one other than court officials engaged in the conduct of court business shall bring any camera, transmitter, receiver, portable telephone or recording device into any courthouse or its environs *without written permission of a judge of that court*.  
 Environs as used in this rule shall include the entire United States Courthouse property, including all entrances to and exits from the buildings.

*Id.* (emphasis added).

<sup>78</sup> Compare *supra* notes 65-68 and accompanying text (describing District of Massachusetts' approach), with *supra* note 77 and accompanying text (describing Southern and Eastern Districts of New York approach).

<sup>79</sup> See *supra* note 77 and accompanying text (reciting Local Rule 1.8 of the E.D.N.Y./S.D.N.Y.).

Local Civil Rule 1.8 was further clarified in 2008, in the case of *In re Zyprexa Products Liability Litigation*.<sup>80</sup> In *Zyprexa*, the court confirmed “Rule 1.8, formerly Local Rule 7, has been interpreted to commit the decision to allow or deny camera access to the courtroom to the judge’s discretion.”<sup>81</sup> Unlike the court in *Sony BMG*, which used the Judicial Conference to bolster its holding that cameras should not be permitted in the courtroom, the *Zyprexa* court disposed of the Judicial Conference’s opposition to cameras as non-binding.<sup>82</sup> *Zyprexa* noted the importance of “opening the courts to the public” using video broadcasts, especially where many people across the United States have a stake in the outcome.<sup>83</sup>

#### E. Federal Legislative Activity

Congress has considered legislating rules to govern cameras in the courtroom since as early as 2007.<sup>84</sup> The United States Senate originally filed the Sunshine in the Courtroom Act (“Sunshine Act”) in 2007, considered it again in 2008, and finally reintroduced it in 2009; the Act’s sponsor was Senator Charles Grassley, an Iowa Republican.<sup>85</sup> Section 2(b)(1)(A) of the Sunshine Act proposes to confer discretionary authority to permit courtroom recording and broadcasting upon the presiding judge in the federal courts of appeals.<sup>86</sup> Section 2(b)(2)(A) confers similar discretion upon federal district court judges presiding over a case, with several limiting provisions.<sup>87</sup>

The Sunshine Act requires judges to make witnesses aware of their right to have their appearance and voice disguised upon request.<sup>88</sup> Under

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<sup>80</sup> No. 04-MD-1596 (JBW), 2008 WL 1809659, at \*1 (E.D.N.Y. Mar. 4, 2008).

<sup>81</sup> *Id.* (citing *Hamilton v. Accu-Tek*, 942 F. Supp. 136, 137 (E.D.N.Y. 1996)).

<sup>82</sup> Compare *supra* note 75 and accompanying text (explaining court in *Sony BMG*’s use of Judicial Conference findings to support banning cameras from courtrooms), with *In re Zyprexa*, 2008 WL 1809659, at \*1 (declining to follow Judicial Conference recommendations). The court in *Zyprexa* noted: “[t]he position of the Judicial Conference opposing televised district court proceedings, while entitled to great weight, does not bind federal district courts.” *Id.* (citing *Accu-Tek*, 942 F. Supp. at 137).

<sup>83</sup> *In re Zyprexa*, 2008 WL 1809659, at \*1.

<sup>84</sup> See Sunshine in the Courtroom Act, S. 352, 110th Cong. (2007), 1 (indicating January 22, 2007 as filing date).

<sup>85</sup> *Id.*; see also Govtrack.us, S.657: Sunshine in the Courtroom Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=s111-657> (indicating filing date and sponsorship of Sunshine in the Courtroom Act of 2009).

<sup>86</sup> Sunshine Act, S. 352 § 2(b)(1)(A) (conferring discretion to permit courtroom recording/broadcasting upon the presiding judge in appellate courts).

<sup>87</sup> Sunshine Act, S. 352 § 2(b)(2)(A) (conferring discretion to permit courtroom recording or broadcasting upon presiding judge in United States District Courts).

<sup>88</sup> Sunshine Act, S. 352 § 2(b)(2)(A)(ii) (requiring judges to inform witnesses of their right to

the Act, the presiding judge may never permit recording or broadcasting of jurors or potential jurors during jury selection.<sup>89</sup> The Sunshine Act also confers discretion upon presiding judges to use voice or visual disguise if failing to do so would threaten the witness, the court, current or future law enforcement activity, or “the interest of justice.”<sup>90</sup> Finally, the Sunshine Act’s provisions for district courts differ from its provisions for appellate courts in intended timeframe: the district court provisions would be subject to a three-year sunset provision, from the date of the Act’s enactment.<sup>91</sup>

#### *F. Three Regulatory Systems with Three Different Purposes*

The evolution of cameras in the courtroom has caused different organizations to create vastly different rules. The American Bar Association first banned all recording or broadcasting, then permitted limited amounts, then repealed its Canon in favor of local rules.<sup>92</sup> The District of Massachusetts never permits recording or broadcasting, except during ceremonial events.<sup>93</sup> The Southern and Eastern Districts of New York confer discretion upon the presiding judges without any guidance.<sup>94</sup> Proposed legislation, which would potentially preempt local rules, will confer jurisdiction upon the presiding judges but also provides mandatory guidelines, safety considerations, and powers to disguise witnesses.<sup>95</sup> The

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request voice/visual disguise during testimony). When properly requested, judges must employ the disguises. *Id.*

<sup>89</sup> Sunshine Act, S. 352 § 2(b)(2)(B) (“The presiding judge shall not permit the photographing, electronic recording, broadcasting, or televising of any juror in a trial proceeding, or of the jury selection process.”).

<sup>90</sup> Sunshine Act, S. 352 § 2(b)(2)(C). The section reads:

Discretion of the judge—The presiding judge shall have the discretion to obscure the face and voice of an individual, if good cause is shown that the photographing, electronic recording, broadcasting, or televising of the individual would threaten—

- (i) the safety of the individual;
- (ii) the security of the court;
- (iii) the integrity of future or ongoing law enforcement operations; or
- (iv) the interest of justice.

*Id.*

<sup>91</sup> Sunshine Act, S. 352 § 2(b)(2)(D) (prescribing sunset provision for Act’s rules governing the district courts).

<sup>92</sup> See *supra* notes 60-62 and accompanying text (summarizing history of ABA’s rules regarding courtroom cameras).

<sup>93</sup> See *supra* notes 66-68 and accompanying text (explaining and quoting D. Mass. LR 83.3).

<sup>94</sup> See *supra* notes 77-79 and accompanying text (explaining E.D.N.Y. and S.D.N.Y. Local Civil Rule 1.8).

<sup>95</sup> See *supra* notes 88-90 and accompanying text (explaining *Sunshine Act* provisions).

result is three significantly different approaches to the same problem.

### PART III. CONCERNS DERIVED FROM CAMERA PRESENCE IN THE COURTROOM

Thus far, this Note has identified three different approaches to address cameras in the courtroom and offered three cases considering the use of cameras in the courtroom: *Estes*, *Chandler*, and the *Hauptmann* murder trial. This Note now turns to discuss which of the three models best addresses the issues posed by courtroom broadcasting and recording today, and will that approach continue to work as technology evolves?

#### *A. Physical Imposition of Broadcasting or Recording Equipment*

To determine the best approach, it is critical to first identify the issues posed by allowing cameras in the courtroom. A good starting point is *Chandler*, which addresses the Court in *Estes*' finding of "general psychological prejudice" as an "adverse psychological impact on participants in the trial," caused by the mere presence of cameras in the courtroom.<sup>96</sup> *Chandler* distinguishes between "general psychological prejudice," an effect feared by the concurring justices in *Estes*, and "the more particularized problem of prejudicial impact."<sup>97</sup> *Chandler* found a lack of proof that the mere presence of broadcasting/recording equipment causes particularized prejudicial impact.<sup>98</sup> *Chandler* suggests the general psychological impacts identified in *Estes* have been lessened by technological improvements such as the reduced size of broadcasting and

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<sup>96</sup> *Chandler v. Florida*, 449 U.S. 560, 575 (1981). The Court in *Chandler* confirmed the general, sweeping nature of the "general psychological prejudice" concept identified by *Estes*. *Id.*; see also *Estes*, 381 U.S. at 599 (Harlan, J., concurring) (presenting hearing supporting adverse effect of cameras in courtrooms) (quoting Report of Special Bar-Media Conference Comm. on Fair Trial-Free Press, 83 A.B.A. Rep. 645 (1958)). The Court in *Chandler* also noted the issue of "adverse psychological impact" cannot be proven to exist during all proceedings involving cameras, which contradicted the *Estes* Court's finding of cameras' generalized and pervasive impact on trial participants. *Chandler*, 449 U.S. at 575; see also *id.* at 578 ("[I]t is clear that the general issue of the psychological impact of broadcast coverage upon the participants in a trial, and particularly upon the defendant, is still a subject of sharp debate . . .").

<sup>97</sup> *Chandler*, 449 U.S. at 575.

<sup>98</sup> *Id.* ("If it could be demonstrated that the mere presence of photographic and recording equipment and the knowledge that the event would be broadcast invariably and uniformly affected the conduct of participants so as to impair fundamental fairness . . . prohibition of broadcast coverage of trials would be required."); see also *id.* at 576 n.11 ("[T]here is no unimpeachable empirical support for the thesis that the presence of the electronic media, *ipso facto*, interferes with trial proceedings.").

recording equipment and the decreased number of people now necessary to run this type of equipment.<sup>99</sup>

The size of camera equipment has certainly been reduced.<sup>100</sup> The 1937 *Hauptmann* trial involved over one hundred reporters,<sup>101</sup> the installation of bright-lights were to assist in filming,<sup>102</sup> and large, unhidden cameras were placed throughout the courtroom.<sup>103</sup> The 1962 *Estes* case also suffered from large equipment, many cables, changed lighting, and many cameramen.<sup>104</sup> In 1981, the Court in *Chandler* discussed how technological developments reduced the imposing, cumbersome nature of camera equipment, which lessened the equipment's impact on the trial process.<sup>105</sup> Today, concerns have turned from the imposition of cumbersome equipment to cell phones featuring cameras and related broadcasting technologies.<sup>106</sup> Recent trends in the law suggest the imposing quality of cameras due to their physical size in the courtroom has diminished significantly over time.<sup>107</sup>

#### *B. Psychological Impacts from Recording or Broadcasting Equipment, Size of the Equipment Notwithstanding*

The psychological impact of recording and broadcasting courtroom proceedings is hotly debated.<sup>108</sup> Debate centers on the effect cameras have

<sup>99</sup> *Id.* at 576.

<sup>100</sup> See *supra* notes 96-99 and accompanying text; *infra* note 106 and accompanying text (describing decreasing concerns over size of cameras and refocusing on other media issues).

<sup>101</sup> See *supra* note 47 and accompanying text (describing presence of journalists at *Hauptmann* trial).

<sup>102</sup> See *supra* note 48 and accompanying text (describing additional courtroom alterations used to facilitate recording at *Hauptmann* trial).

<sup>103</sup> See *A.M.L. Photo*, *supra* note 47 (depicting Anne Morrow Lindbergh walking past courtroom camera).

<sup>104</sup> See *Chandler v. Florida*, 449 U.S. 560, 576 (1981) (describing recording/broadcasting equipment in *Estes* courtroom); see also Valukas et al., *supra* note 1, at \*18 (describing physical imposition of media in *Estes* trial).

<sup>105</sup> See *supra* note 90 and accompanying text (identifying provisions of Sunshine Act that confers judicial discretion regarding camera use in courtrooms).

<sup>106</sup> See, e.g., *United States v. Fumo*, No. 06-319, slip op. at \*58 (E.D.Pa. June 17, 2009) (discussing juror use of cellular telephone to broadcast information using Internet application Twitter); Schmucker, *supra* note 3, at 16 (discussing broadcasting of information using cellular telephones and resultant psychological effect on juries); Renee Loth, *Mistrial by Google*, BOSTON GLOBE, Nov. 6, 2009, at A15 (describing importation of media into courtroom via cellular telephones).

<sup>107</sup> See *supra* notes 96-99, 106 and accompanying text (describing modern decrease in concerns over cameras' imposing quality).

<sup>108</sup> See *supra* notes 3, 32; *infra* Section IV(B)(ii) and accompanying text (discussing arguments regarding cameras' effect on jurors); see also *infra* Section IV(B)(i) and



on the judge, the jury, the witnesses, and to a lesser extent, the attorneys. This section evaluates the arguments related to the potential psychological effects that cameras have on these parties.

### 1. Potential Effect on Judges

Judges' behavior in televised trials has often been monitored and commented upon.<sup>109</sup> While judges have argued that cameras do not affect them,<sup>110</sup> anecdotal evidence suggests otherwise. One argument concerns elected judges: if the judge can be immediately observed by the electorate, she may focus on her career aspirations as opposed to the merits and intricacies of the case at hand.<sup>111</sup> Still others argue that even if judges are affected by cameras, their rulings remain consistent with rulings made without camera coverage.<sup>112</sup>

One of the more recent, notorious instances of affected judicial behavior was Judge Larry Seidlin, a Broward Circuit Court judge handling a case concerning former model Anna Nicole Smith's burial site.<sup>113</sup> Judge Seidlin, long known for unorthodox behavior in the courtroom, captured

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accompanying text (discussing arguments regarding cameras' effect on judges).

<sup>109</sup> See generally, COHN & DOW, *supra* note 36, at 70-71 (addressing Judge Hiller Zobel's discussion of potential media impacts); Ann O'Neill & Kate King, *If Anna Nicole Smith Case is a Circus, Judge is Ringmaster*, CNN (Feb. 22, 2007), <http://www.cnn.com/2007/LAW/02/21/judge.larry> (commenting that judge extended hearing because "he seems to enjoy being on television."). During the Louise Woodward murder trial, Judge Zobel quoted John Adams, saying "the law is 'deaf as an adder to the clamours of the populace.'" COHN & DOW, *supra* note 36, at 71. Zobel added, "In this country, we do not administer justice by plebiscite." COHN & DOW, *supra* note 36, at 71.

<sup>110</sup> See COHN & DOW, *supra* note 36, at 71 (describing Judge Zobel's argument of justice rising above public commentary).

<sup>111</sup> COHN & DOW, *supra* note 36, at 71-72 (quoting George Gerbner). Gerbner, Dean Emeritus of the Annenberg School for Communication at the University of Pennsylvania, suggests:

When you enlarge the audience to millions of people, including the communities, families, bosses and voters who determine the fate beyond the courtroom of most of its participants . . . you all of a sudden change the stakes from examining the guilt or evidence pertaining to that particular case to reflecting on how the rest of your life is going to shape up. The election of judges depends on how they appear on camera to millions of voters . . . .

*Id.*

<sup>112</sup> *Id.* at 70 (quoting Charles Sevilla). "While it may be the outwardly tyrannical judge will pull in his horns if the camera is there" says Sevilla, "inwardly, you will still get the same rulings from the tyrant. They'll just be sugar-coated cyanide tablets as opposed to cyanide without the sugar." *Id.*

<sup>113</sup> See O'Neill & King, *supra* note 109.

national interest in his handling of the case.<sup>114</sup> While on the bench during hearings, Judge Seidlin broke with accepted practices and took telephone calls from his wife, discussed his morning exercise routine, and told an attorney she was beautiful.<sup>115</sup> Judge Seidlin also allowed testimony regarding the custody and paternity of Smith's child, which was irrelevant to the issue before Judge Seidlin.<sup>116</sup> Judge Seidlin's behavior sparked debate that the camera does have an effect on judges' behavior.<sup>117</sup>

## 2. Potential Effect on Jurors

A number of legal scholars and commentators have carefully considered the effects on jurors.<sup>118</sup> At one end of the spectrum, some commentators fear that jurors will be impacted by the placement of simple cords and equipment too near the jury box.<sup>119</sup> At the other end, some argue that mere camera placement can help prevent photographs of the jury, thereby removing jurors from public scrutiny.<sup>120</sup>

A more modern jury issue is the return of juror coercion and intimidation due to cell phone technology.<sup>121</sup> Traditionally, this concern arose from filming and reporting on jurors during a trial.<sup>122</sup> In these

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<sup>114</sup> Chris Francescani, *Exclusive: Judge's Wife: People Say He Should Have His Own TV Show*, ABC NEWS (Feb. 22, 2007), <http://abcnews.go.com/US/LegalCenter/story?id=2896934&page=1> ("The judge has garnered almost as much attention as Anna Nicole Smith herself.").

<sup>115</sup> *Id.*

<sup>116</sup> O'Neill & King, *supra* note 109. CNN Senior Analyst Jeffrey Toobin commented of Judge Seidlin: "He is letting this thing meander all over creation, mostly because he seems to enjoy being on television." *Id.*

<sup>117</sup> *Id.* News outlets speculated that Judge Seidlin was angling for a role on a television show. Francescani, *supra* note 114. After the Anna Nicole Smith burial matter, Judge Seidlin retired from the bench, intending to focus on family and other opportunities. *Judge in Anna Nicole Smith Case Says He'll Retire*, CNN, June 19, 2007, <http://www.cnn.com/2007/LAW/06/19/judge.larry/index.html>.

<sup>118</sup> See *supra* notes 3, 32 and accompanying text (discussing potential effects of cameras on jurors as identified by Supreme Court and legal commentators); Section III(B)(ii) and accompanying text (discussing arguments regarding cameras' effects on jurors).

<sup>119</sup> See *supra* notes 27-31 and accompanying text (identifying equipment itself as affecting critical aspects of trial proceedings).

<sup>120</sup> Brief of the Attorneys General of Ala., et al., as Amici Curiae in Support of Appellee at \*2-3 *Chandler v. Florida*, 449 U.S. 560 (1981), (No. 79-1260), 1980 WL 339558 at \*22 [hereinafter *Chandler Brief*] (suggesting that cameras placement rules can protect jury, removing jurors from public visibility). This protection, the attorneys general argue, reduces possible prejudicial effect on jurors to the same as pretrial publicity and other local news reports. *Id.* at \*22.

<sup>121</sup> See *infra* notes 122-124 and accompanying text (describing potential effect of cameras and media on juror intimidation).

<sup>122</sup> See Corbis Images, *Jury for the Bruno Richard Hauptmann Trial*,

instances, jurors were harangued by the media and public for their statements or their decisions.<sup>123</sup> More recently, the prevalent concern has been that jurors may now fear that a defendant's associates will use a camera phone in the courtroom to photograph them. Those photos could then be disseminated or otherwise used to identify jurors and avenge a conviction.<sup>124</sup> Although the fear of retribution can be couched in terms of different technologies—cameras *versus* cell phones—the fact remains that this fear has persisted for over seventy years.<sup>125</sup>

Another fear is that cameras can be a distraction to jurors.<sup>126</sup> One extreme example is ex-juror Francine Florio-Bunten, who served as a juror on the O.J. Simpson murder trial for over four months.<sup>127</sup> Although sequestered, Florio-Bunten used the cameras' microphones to communicate with her husband.<sup>128</sup> Florio-Bunten and her husband had a code wherein she would greet her husband each day by coughing at 3:00 p.m. so the television cameras could capture it.<sup>129</sup> While such behavior does not affect juror deliberations per se, for the Simpson case, it meant that at least one juror was distracted by using the cameras for her own agenda—not entirely dissimilar from Judge Seidlin's possible use of cameras to further his own career.<sup>130</sup>

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<http://www.corbisimages.com/Enlargement/U289976ACME.html> (depicting photograph of jury, seated in jury box, in Hauptmann murder trial); *see also* COHN & DOW, *supra* note 36, at 99 (remarking that Florida, among only a few other states, permits camera coverage of jury selection).

<sup>123</sup> *See* COHN & DOW, *supra* note 36, at 99 (discussing national media attention regarding prospective juror who made passing comment during televised jury selection); *see also* Schmucker, *supra* note 3, at 17-18 (citing Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trial*, 49 VAND. L. REV. 123 (1996)) (discussing threats, taunts, phone harassment, and other intimidation after juror's names made public).

<sup>124</sup> Schmucker, *supra* note 3, at 17 (describing camera phone usage as tool for retribution against jurors). Schmucker cites an interview with Robert K. Kilander, Chief Judge of the Eighteenth Judicial Circuit for DuPage County, Illinois, wherein Judge Kilander explains that the juror retribution fear exists mostly in criminal cases involving gangs. *Id.* Judge Kilander argues that a loss of juror anonymity makes way for juror retribution and a tainted jury pool. *Id.*

<sup>125</sup> *See generally supra* Part II (describing history of debate and regulation of courtroom cameras).

<sup>126</sup> *See infra*, notes 127-129 and accompanying text (identifying anecdotal evidence of cameras distracting jurors).

<sup>127</sup> COHN & DOW, *supra* note 36, at 8.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *See supra* notes 116-117 and accompanying text (discussing Judge Seidlin's possible use of cameras to gain re-election or audition for television show).

### 3. Cameras Acting as the ‘Thirteenth Juror’ in Deliberations

The presence of the public as a ‘thirteenth juror’ can have a substantial effect on the jury. Some studies suggest that judges believe certain television reports aid the pursuit of justice.<sup>131</sup> Others fear the public believes it is just as capable, if not more, than the jury to decide cases; a sentiment that could potentially affect the jury.<sup>132</sup> If the jury is aware of the public’s disposition in a case, the jury may then try to decide in accordance with public opinion.<sup>133</sup>

Because the primary focus of televised broadcasts is to generate a profit, a further concern is that impartiality will be a peripheral goal.<sup>134</sup> Some argue the fear in *Estes* that only notorious trials would be televised to increase ratings has been preempted by the advent of public and community cable television, which broadcast events without commercial consideration.<sup>135</sup> More popular television shows decidedly have a commercial interest.<sup>136</sup> Television networks, such as Court TV, deploy their assets to selected trials and feed live or taped video to an editorial staff, which adds voiceovers and commentary after editing the videos.<sup>137</sup>

The risk remains, even if the video is not edited or commented on, that the public has access to information that the jurors would not—or should not—have access.<sup>138</sup> The public, viewing snippets of a trial, can elect to tune-in and watch only pieces of the already edited snippets of court proceedings.<sup>139</sup> Other videos and shows about cases are likely

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<sup>131</sup> Valukas et al., *supra* note 1, at \*20 (citing Court TV study). Court TV conducted a poll and sixty percent of questioned judges found that “the presence of Court TV’s cameras and its reporting ‘helped convey the events of the trial in a way that contributed to public understanding of the legal system.’” *Id.*

<sup>132</sup> COHN & DOW, *supra* note 36, at 87 (describing public’s perception of its ability to decide proper outcome).

<sup>133</sup> Schmucker, *supra* note 3, at 20 (describing effect of public sentiment on jurors).

<sup>134</sup> PAUL THALER, *THE WATCHFUL EYE: AMERICAN JUSTICE IN THE AGE OF THE TELEVISION TRIAL* 5 (Praeger Publishers 1994) (“Whether or not viewers will actually learn anything from such programming is questionable and perhaps irrelevant. More to the point is whether the cable network will be able to deliver an audience large enough to sustain itself.”).

<sup>135</sup> *Chandler Brief*, *supra* note 120, at \*16.

<sup>136</sup> See THALER, *supra* note 134, at 3 (quoting George Gerbner, *Trial by Television: Are We at the Point of No Return?*, 63 JUDICATURE 416, 426 (1980)) (“Television presents a coherent world of images and messages serving its own institutional interests. The question is whether the judiciary should be enlisted to add further credibility to media mythology. Plugging courtrooms into the television system can make them appendages of that system.”).

<sup>137</sup> THALER, *supra* note 134, at 4 (describing Court TV production plan).

<sup>138</sup> See COHN & DOW, *supra* note 36, at 87 (explaining jury constrained in terms of what and how it may consider).

<sup>139</sup> *Id.*

inadmissible and may be created to stir public sentiment.<sup>140</sup> Critics such as Paul Thaler raise questions about the difference between the public's sentiment and a jury's deliberations as constrained by rules of evidence and procedure.<sup>141</sup> The implication of Thaler's argument is that the court and public perceptions can concentrate on two different sets of information, thus they can arrive at two different results.<sup>142</sup> Therefore, if one group were to see the other's resulting disposition towards the case, the crossover could taint the decision-making process.<sup>143</sup>

#### 4. Effect on the Evidence and Witnesses

Other studies suggest witnesses are subjected to positive influences from the presence of cameras in the courtroom.<sup>144</sup> The effect could be as simple as a witness' fear that a member of the public might know the truth about a matter and might come forward if the witness lies.<sup>145</sup> The effect might be more psychological as it involves both witness performance and juror reaction. A 1990 University of Minnesota study placed people role playing as jurors and witnesses in situations with different levels of media presence to observe the affects of increased camera presence on the parties.<sup>146</sup> The result was only increased nervousness on the witnesses'

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<sup>140</sup> See THALER, *supra* note 134, at 5 (describing ABC show *Prime Time Live* regarding Menendez murder trial). In this instance, ABC took snippets of a witness' testimony, police reports, and segments of a bail hearing to create a show that aired *before* the trial. *Id.* at 5-6. Paul Thaler argues that photographs "were selectively pieced together to drive home the point that the brothers were unremorseful and, we may deduce, pathological." *Id.* at 6. Thaler posits that the show was "clearly emotionally engaging—and manipulative—as powerful images revealed visual connotations that went beyond a prepared script." *Id.*

<sup>141</sup> See *id.* at 5 (explaining media outlets tailor coverage of trials, mixing truth and "tabloid-styled" trial coverage). Thaler argues "tabloid-styled" television shows use trial footage in reports to show "forceful images" and do not necessarily focus on relevancy when selecting footage. *Id.*

<sup>142</sup> See *supra* notes 134-136, 140 and accompanying text (highlighting contrast between courtroom proceedings and courtroom television).

<sup>143</sup> See *supra* notes 134-136, 140 and accompanying text (highlighting conflict between courtroom proceedings and courtroom television).

<sup>144</sup> See Valukas, *infra* notes 146-150 and accompanying text (discussing several studies on effects of cameras in courtrooms).

<sup>145</sup> See COHN & DOW, *supra* note 36, at 70 (quoting J. Norbert Ehrenfreund). Judge Ehrenfreund believes that cameras facilitate fact finding: "'In my experience,' he says, 'the witnesses, knowing other people outside the courtroom may be watching, are all the more careful about telling the truth because there may be somebody out there who can see if they're lying'—someone who *knows* the truth, he says." *Id.*

<sup>146</sup> Valukas et al., *supra* note 1, at \*18 (explaining 1990 University of Minnesota study). The jurors and witnesses performed in three different situations: one with video cameras present ("extended media coverage"), one with a journalist present ("conventional media coverage"), and one without any journalists present. *Id.* The study found that the quality of testimony and juror's

part, as none made any additional mistakes during their testimony.<sup>147</sup> Jurors' perceptions of the witnesses were also not affected.<sup>148</sup> Many tests have been conducted in both actual courts and mock-court settings, analyzing the level of distraction caused by cameras, and the effect of cameras on cognitive abilities.<sup>149</sup> Nonetheless, Anton Valukas, William Von Hoene, Jr., and Liza Murphy of the Chicago criminal defense firm Jenner & Block, posit "few, if any, of these studies can be considered valid."<sup>150</sup>

#### PART IV. EVALUATION OF THE LOCAL RULES & PROPOSED LEGISLATION'S ABILITY TO ADDRESS CONCERNS

District of Massachusetts Local Rule 83.3's blanket ban on cameras in the courtroom is one comprehensive approach to reducing the effect cameras have on those inside the courtroom. However, the First Circuit in *Sony BMG* held that technology has removed many of the old fears regarding the imposition of cameras.<sup>151</sup> A ban on cameras in the courtroom may stop the public from tuning in and seeing selected portions of the trial as aired on television, but such a ban does not address the issue of the public deciding cases based on television shows such as ABC's *Prime Time Live*, which uses photographs and other materials to convey emotionally charged material to the public.<sup>152</sup> Furthermore, jurors now fear broadcasting from cell phone cameras and other devices, because a ban on courtroom cameras may still fail to resolve the aforementioned concerns.<sup>153</sup> Thus, while a ban on courtroom cameras may remedy the prejudices faced by witnesses, such a resolution would not extend to jurors.

The Eastern and Southern Districts of New York Local Civil Rule 1.8 confers discretion on judges to permit broadcasting and recording

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perception of the witness did not suffer with media coverage. *Id.* at 18, 20.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 18, 20-21 (surveying prominent surveys/studies relating to effects on jurors/witnesses). The studies tend to suggest that most courtroom participants hold a neutral or positive view of cameras while pockets of resistance exist among attorneys and some judges. *Id.*

<sup>150</sup> *Id.* at 19 (citing J. Stratton Shartel, *Cameras in the Courts: Early Returns Show Few Side Effects*, 7 INSIDE LITIG. 1, 24 (1993)) (arguing surveys and studies regarding courtroom cameras are invalid).

<sup>151</sup> See *supra* notes 65-68 and accompanying text (discussing D. Mass LR 83.3).

<sup>152</sup> See *supra* notes 136-137, 140 and accompanying text (discussing television production using non-trial information in its reporting).

<sup>153</sup> See Schmucker, *supra* note 124 (discussing juror's fear in gang cases by affiliates using cell phone cameras to identify and target jurors).

equipment.<sup>154</sup> However, no guidelines exist within the statute for judges to conform with; no standards exist for judges in those districts.<sup>155</sup> Some anecdotal evidence supports the theory that judges have the ability to assess the effects of cameras in their courtrooms.<sup>156</sup> The danger in such a situation is: what if the judge is also affected by the cameras? Local Civil Rule 1.8 does not provide criteria or grounds for appeal for parties appealing based on the camera's effect on the judge.<sup>157</sup> Judges who enjoy the spotlight may prolong hearings, possibly to the detriment of one or more parties to the case.<sup>158</sup>

The current form of the Sunshine Act aims to achieve uniformity among the federal courts and provides specific protections to concerned parties.<sup>159</sup> Section 2(b)(2)(A)(iii) explicitly bans cameras where there is a violation of due process and does not permit cameras "until the Judicial Conference of the United States promulgates mandatory guidelines . . . ."<sup>160</sup> This approach is beneficial, as the judge has discretion subject to restrictions, which permits experimentation, and allows for potential positive effects of cameras, while still guaranteeing integrity of the trial process. Such a statutory approach also provides parties with a statutory basis for appeal.

While the Sunshine Act stands to benefit courtroom proceedings, one must also recognize that this Act cannot and, or currently would not, address all issues related to the effect of cameras on the judicial system.

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<sup>154</sup> See *supra* note 77 and accompanying text (describing and quoting E.D.N.Y./S.D.N.Y. Local Civil Rule 1.8).

<sup>155</sup> See *supra* note 77 and accompanying text (describing E.D.N.Y./S.D.N.Y. Local Civil Rule 1.8).

<sup>156</sup> See COHN & DOW, *supra* note 36, at 8 (citing Transcript from Hearing, *People v. Orenthal James Simpson*, No. BAO97211, 980 (Cal. Super. Ct., Nov. 7, 1994)) (describing Judge Lance Ito's self-proclaimed ability to understand cameras' effects in his courtroom).

[C]oming into this courtroom and taking this witness seat and having cameras six feet away is pretty intimidating. You look at this array of photographic equipment, that's intimidating. This camera pointing at the witness stand here is intimidating . . . . When I listen to counsel argue in this courtroom, I see the nervousness in their eyes, especially with counsel that I'm familiar with. I've seen counsel come into this courtroom and speak on this case that I've known for 20 years who I can tell are nervous and I can tell that their performance is affected by this eye here.

*Id.* Despite seeing this nervousness, Judge Ito never banished cameras in his courtroom during the *Simpson* trial. *Id.*

<sup>157</sup> See *supra* note 77 (quoting E.D.N.Y. and S.D.N.Y. Local Civil Rule 1.8).

<sup>158</sup> See *supra* notes 116-117 and accompanying text (discussing Judge Seidlin's motivations in prolonging case for career gains).

<sup>159</sup> See *supra* notes 84-91 and accompanying text (defining and discussing Sunshine Act).

<sup>160</sup> Sunshine in the Courtroom Act, S.352, 110th Cong. § 2(b)(2)(B)(iii) (2007).

Even the Sunshine Act fails to address jurors who come into contact with pre-trial publicity; it also fails to completely counter the argument that jurors fear retribution from non-credentialed broadcasts via cellular telephones.<sup>161</sup> None of the three above-described approaches addresses all potential outside influences on the jury.

## PART V. CONCLUSION

The introduction and evolution of cameras in the courtroom has undergone a long history and garnered much notoriety. The technology debate has moved from concerns over bright bulbs and cumbersome, intrusive machinery to the problem of non-journalists snapping photographs with cellular telephone cameras. Debate rages on regarding the effect of cameras on judges, jurors, and witnesses. The split between the local rules of the District of Massachusetts and the Eastern and Southern Districts of New York reflects differences in tolerance of cameras, but neither rule addresses every issue. The proposed Sunshine Act would confer judicial discretion yet constrain judges with rules protecting jurors and witnesses. Compared to the District of Massachusetts' and the Eastern and Southern Districts of New York's approaches to regulating courtroom media, the Sunshine Act permits the benefits of courtroom media while providing the most in-depth level of protection through its itemized safeguards. Notwithstanding the Sunshine Act's attempt at comprehensively regulating courtroom media, evolving technology and remaining effects on juries suggest that even the most carefully planned rules and regulations will meet challenges that they cannot overcome.

*Jacob Marvelley*

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<sup>161</sup> See *supra* notes 3, 124 and accompanying text (discussing camera ban's failure to address juror's perceived threat of retribution); see also *supra* note 32 and accompanying text (discussing camera ban's failure to address jurors' contact with pre-trial (or during-trial) publicity).