The Center for Legal and Court Technology White Paper

REAL TIME TECHNOLOGY, TRIALS, AND THE QUESTION OF PRIVACY

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I. Introduction

Much of the privacy focus of the electronic revolution's effect on the court system revolves around access to court records. Electronic access to records gives rise to fears that their "practical obscurity," on which we have come to rely, may be a thing of the past, leaving litigants and third parties who use the court system vulnerable to privacy violations on a potentially enormous scale.

A less considered question is the privacy impact of "real time trials" – thus far a largely experimental phenomenon that is fast gaining momentum. What is the privacy impact of immediate remote public access to trials or hearings through technological means? If a solution in the paper-to-electronic records context is redaction of personal identifiers and other private information before records can be released, what protections can be instituted for open court testimony (or even discussions at sidebar) beamed out through simultaneous webcast?

What are the privacy implications of releasing real time transcripts? Historically, litigants have had the luxury (at least from a privacy perspective) of official transcripts taking days if not weeks or months to prepare (if they were prepared at all), and then most commonly relegated to obscurity. What happens to this tradition when "unofficial" transcripts are released online in real time, before the court reporter has had the time to develop the "official" record, or even a clean copy free of the most obvious errors?

What are the privacy implications of evidence presentation technology on real time access to exhibits? What happens if, as some are doing, a court elects to make every piece of evidence at trial viewable to anyone in the courtroom at the time it is presented, including the media, and even to make it available in electronic form over a webcast? Must changes be made in how trials are run and how evidence is presented to accommodate privacy interests in this new reality?

Some of these issues are not new. For example, the debate surrounding television cameras in courtrooms raised many of the same issues: to what extent does the public's right to access translate to persons *not able to be physically present* at trial? But how do TV broadcasts compare to webcasts and other forms of real time access? If different, does this difference call for a different privacy balance than the one previously struck?

This paper will explore these questions, attempting to bring to light some of the core privacy tensions that surface in a world of real time transmission of trials, transcripts, and evidence.

II. Real Time Realities: To What Extent Is Real Time Access to Trials, Transcripts, and Evidence a Reality?

Is there reason for privacy advocates to be concerned about real time access to trials, transcripts, and evidence beyond the media frenzies that occasionally visit celebrity trials? The country was glued to real time footage of OJ's trial, its transcripts, and detailed images of the bloody glove. And many trials since have featured the same real time media access frenzy. But are privacy issues related to real time access of concern to "commoners" who must go to court to resolve non-sensational matters as trivial (to most everyone else) as divorces, bankruptcies, and low-profile criminal infractions?

To answer this question we must first get a sense of how common real time broadcasts of trials, transcripts, and evidence are in U.S. courts.

a. Real Time Trials

Real time trials are far from the norm. Several court systems are experimenting, most recently, with technology that allows them to broadcast trials online. Before the online craze, several access-friendly judges in states like Kentucky found a way to make their trials public using local access cable channels, a practice that continues to this day in scattered jurisdictions across the country.[1] And of course, Court TV has been broadcasting real time trials now since 1991.

Somewhat unsurprisingly, the most common type of live webstream currently provided by courts in the United States is at the state supreme court and appellate level.[2] These venues, unlike trial-level proceedings, tend to feature relatively less sensitive personal information that trials tend to dredge up. They also arguably have the most potential for educational purposes, having risen to the appellate level. Some appellate courts offer archives of webstreamed proceedings,[3] while others explicitly do not.[4]

[1] For example, Judge Julia Hylton Adams of the Kentucky Circuit Court has allowed a local access cable station to broadcast sessions of her court for the past decade.

[2] See e.g., Supreme Court of Ohio at http://www.sconet.state.oh.us/videostream/default.asp; Florida Supreme Court Oral Arguments at http://www.wfsu.org/gavel2gavel/; Mississippi Supreme Court at http://www.mssc.state.ms.us/DocketCalendar/default.asp; New Hampshire Supreme Court at www.courts.state.nh.us; Supreme Court of Appeals for West Virginia at http://www.state.wv.us/wvsca/Webcast.htm; North Dakota Supreme Court (except mental health cases) http://www.court.state.nd.us/court/webcasts.htm; and the Massachusetts Supreme Judicial Court http://www.suffolk.edu/sjc/.

[3] See for example the Massachusetts Supreme Judicial Court webstream site at http://www.suffolk.edu/sjc/ and the Florida Supreme Court webstream site at http://www.wfsu.org/gavel2gavel/, and the Mississippi Supreme Court and Court of Appeals webstream site at http://www.mssc.state.ms.us/DocketCalendar/default.asp.

Table 1. Appellate Courts Currently Webcasting[5]

COURT	LIVE	ARCHIVED COPIES AVAILABLE
Alaska Supreme Court	✓	✓
Florida Supreme Court	✓	✓
Indiana Supreme Court	✓	✓
Massachusetts Supreme Judicial Court	✓	
Mississippi Supreme Court	✓	
Missouri Supreme Court	✓	✓
New Hampshire Supreme Court	✓	✓
New Jersey Supreme Court	✓	✓
North Dakota Supreme Court	✓	✓
Ohio Supreme Court	✓	✓
South Dakota Supreme Court	✓	
Vermont Supreme Court		✓
Washington Supreme Court	✓	✓
West Virginia Supreme Court	✓	
Wisconsin Supreme Court	✓	✓

But appellate courts are not the only ones to experiment with real time webcasts. Two examples of trial-level webcasts have occurred in Florida's 9th Judicial Circuit (Orange and Osceola Counties) and the Delaware Municipal Court in Ohio.

i. Florida's Ninth Judicial Circuit

Among the most interesting examples of experimental use of real time access to trials is Florida's 9th Judicial Circuit (hereinafter the "Circuit").

It is worthy of mention at the outset that the Circuit's webcasts of live trials are currently limited to daily arraignment broadcasts. As of February of 2004, the Florida Supreme Court placed a moratorium on trial webcasts and other releases of electronic court records until a specially convened Committee on Privacy and Court Records releases rules pertaining to privacy and electronic records.[6] As of this writing, the Florida Supreme Court's resolution of its policy is expected any day.

[4] See for example the Supreme Court of Appeals of West Virginia at http://www.state.wv.us/wvsca/Webcast.htm ("Internet streaming technology now allows attorneys, judges, and members of the public outside of Charleston to follow court proceedings, and avoid the user limitations and charges associated with the call-in line. The Webcast is streamed live directly from the courtroom. Proceedings are not archived and copies are not available.") Other examples of courts that are using local access cable to broadcast include municipal courts in Ohio's Medina and Massillon Counties. *See* Annie Gentile, "And the Verdict Is: News and Knowledge," *American City and County*, July 1, 2005 at http://www.americancityandcounty.com/mag/government_verdict_news_knowledge/index.html.

[5] Taken from weblog of Rory Perry II, "Court Webcasting: A Project of the West Virginia Supreme Court Clerk," at http://radio.weblogs.com/0103705/categories/courtWebcasting/.

[6] See Supreme Court of Florida Amended Administrative Order No. AOSC04-4, "Committee on Privacy and Court Records," February 12, 2004.

Despite its current circumstance, the Circuit has long been seen by court technologists and access advocates as a pioneer in real time broadcasts of trials. The Circuit was the first court, for example, to broadcast a trial live on the Web in 1999.[7] The Circuit has invested heavily in technology. Each of its courtrooms, totaling 60 venues in two counties, has the capability of real time broadcasting trials. This is accomplished either through a fixed court camera permanently installed (including in some courtrooms digital-broadcast quality cameras) or a camera from a media source (the circuit requires the media to pool its camera coverage such that only one camera is actually present at trial). Footage from trials in the Circuit runs to a media room inside the court and to an outside "pedestal," usually in the courthouse parking lot. The pedestals allow the media to plug in for access to immediate live feed from courthouses at all courts in the Circuit.[8]

The Circuit is its own internet service provider, which allows it to control the broadcast schedule and the content being aired. The trials were selected by the court either as a result of a request (by attorneys or the media) to webcast the trial – a request the court granted an average of once a month from 1999 until the moratorium in 2004. Once a request had been made to broadcast a trial, the Circuit adopted an unofficial procedure to ask (1) whether the trial had educational value, (2) whether it focused on an issue of public interest, and (3) whether the content was salacious. A positive answer to one of the first two and a negative answer to the last cleared the case for webcast. Between 1999 and 2004, the 9th Judicial Circuit broadcast approximately 50 real time trials online.

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

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

[7] See Debbie Salamone Wickham, "Justice at Work: Watch on the Internet: Web Surfers Have Been Given Access to a Place and Process That Has Sometimes Been Shrouded in Mystery," *The Orlando Sentinel*, January 3, 2000.

[8] Though live web broadcasts to the public are currently silenced by the moratorium, the Circuit continues to use its technological capabilities to experiment with the capacity of webcasts to further justice. A battery defendant's trial, for example, is about to be webcast to the child victim in the case, an English citizen who resides in Britain, as a means of allowing the victim to witness the court proceedings of his attacker. [Interview with Matt Benefiel, Court Administrator in Florida's 9th Judicial Circuit, May 2, 2006].

ii. The Delaware Municipal Court in Ohio

Due to Florida's moratorium, the Delaware Municipal Court in Ohio is currently the only jurisdiction webcasting the contents of trials real time online.[9] The court handles a variety of cases at the trial level including felony cases (initial appearance/preliminary hearings); misdemeanor cases, through final determination; traffic and parking violations; civil actions, up to $15,000; small claims actions, up to $3,000; and administrative appeals. The Delaware Municipal Court has been webstreaming trials since 1999.[10] Live webcasts are available only in certain circumstances: the court must be in session, the proceedings must be public, and the judge must have made the decision to stream the contents of the proceedings.[11] Even when the streaming occurs, the site warns patrons that live webstreaming will not be available if (1) for confidentiality purposes, no audio is being streamed; (2) the court is between hearings or other proceedings; or (3) the court is in session, but the proceedings are not public.[12] Wonderfully, the court's live broadcast website features pictures of two courtroom doors, allowing the public to literally enter one of the two live broadcast courtrooms (when in session) approximating the sensation of walking into a real courtroom. Also like a real courtroom (with no offense to the efforts of the Delaware Municipal Court' staff to make such trials accessible), the author can attest that the contents of the broadcast are rarely riveting.

iii. Cablecasting

Before real time webcasts, the public's craving for remote video access to trials was sated by "cablecasting." Through agreements with local cable TV stations, courts provide live feed of certain proceedings on local access cable. Hardly outmoded by web technology, cablecasting continues in various forms to this day. For example, the Wise County Circuit Court in Wise, Virginia once *had* a program to webcast live trial-level proceedings in the past, but recently discontinued webcasting in favor of cablecasting on the Wise County PEG Channel 97.[13]

A most obvious example of live TV broadcasts of trials is, of course, Court TV. Court TV has broadcast live trial events since 1991 on cable television. For the most part, Court TV broadcasts sensational trials or trials of national interest only. Its criteria for choosing trials are (1) the importance and interest of the issues in the case; (2) the newsworthiness

[9] The live broadcasts can be seen when court is in session at www.municipalcourt.org.
[10] Paula Canning, "Nevada Court Plans to Broadcast Proceedings Over the Internet," Reporters Committee for Freedom of the Press, (Spring 2003, Vol. 27, No. 2) p. 34 (http://www.rcfp.org/news/mag/27-2/bct-battlesf.html).
[11] http://www.municipalcourt.org/videostreams.asp.
[12] http://www.municipalcourt.org/videostreams.asp.
[13] See http://www.courtbar.org/courtcam.htm. The court's website notes that cablecasting of Circuit Court proceedings are at the complete discretion of the presiding Circuit Court Judge. Criminal and civil cases "of significant public interest" are the most likely candidates for cablecast. The site notes that cablecasting will not be available for cases involving juveniles, contested divorces, or cases where counsel for the parties is able to obtain a court order to stop the broadcast.

of the case and the people involved; (3) the quality and educational value of the trial; and (4) the expected length of the trial.[14] Court TV follows a policy of a 10-second delay on its real time broadcasts "…to prevent the airing of information such as the addresses of witnesses, the names of jurors, private conversations between a lawyer and his/her client."[15]

The traditional model of Court TV allowed for live broadcast of only one trial. To combat this scheduling problem, the company recently added an online broadcast feature, "Court TV Extra," giving paying subscribers the ability to view multiple broadcasts of trials.[16] Explained Galen Jones, executive vice president and chief strategy officer at Court TV, "traditionally on Court TV we only followed one trial at a time — gavel to gavel — and we'd run into huge scheduling issues if a more interesting case came along."[17]

Courts considering live broadcasts of trials can certainly learn a great deal from Court TV's experience in real time transmission, and some of the issues it has confronted will be discussed below. However, it remains the case that the kinds of trials which Court TV broadcasts are the kinds of trials courts already make every effort to bring to the public – using Court TV as a conduit to educate and inform the public about proceedings of high general interest. This innovation has allowed Court TV to broaden the depth of the kinds of cases it selects for broadcast. Conceivably, were Court TV's reach to continue to grow, it could begin to offer real time web broadcast of the genuinely more mundane trials at the local level.

The real meat of real time access will come in figuring out how and whether to use real time technology to open the courtroom doors of everyday trials as Ohio's Delaware Municipal Court has done – whether trial courts should do their very best to use technology to replicate the packed courtrooms of yesteryear when a frenzied modern pace leaves many courtrooms shockingly empty.

b. Real Time Transcripts

If real time trials are scattered in isolated pockets, real time transcripts are fast becoming far more prevalent. By some estimates, a full third of court proceedings in this country are recorded by court reporters in real time. Of the members of the National Court Reporter's Association, roughly nine percent are certified real time reporters.[18]

The difference is that unlike real time broadcasts of trials, the emphasis on real time transcripts has not been to broadcast transcripts remotely, but rather for the very inward

[14] Court TV FAQ page at http://www.courttv.com/about/ctvfaq.html.
[15] Court TV FAQ page at http://www.courttv.com/about/ctvfaq.html.
[16] See www.courttv.com, "a subscription web-based service, offers viewers an interactive opportunity to watch multiple live trials on the internet while accessing the tremendous resources of Court TV Online).
[17] Quoted in Annie Gentile, "And the Verdict Is: News and Knowledge," *American City and County*, July 1, 2005 at http://www.americancityandcounty.com/mag/government_verdict_news_knowledge/index.html.
[18] This is not an accurate reflection of how many court reporters are certified in real time since other organizations offer real time certification, and since all court reporters are not members of the National Court Reporters Association. [Interview with M. Sanchez, May 1, 2006]

goals of bettering the administration of justice within the court. The vast majority of real time transcription done by court reporters is performed for the benefit of the bench. Some judges, especially those who have become accustomed to real time transcript services, rely heavily on real time transcripts to review the record as the trial is happening to rule on motions, objections, jury communications, etc. According to one court reporter, taking away real time transcript capability would make some judges feel like they had lost their right arm.[19]

A second growing use of real time transcripts are for-profit services that provide real time transcripts to attorneys in particular cases. Lawyers use real time transcription services, in ways similar to the judges who use them, to manage their performance at trial. LiveNote, a for-profit company not affiliated with courts or court reporters, provides an instructive example. LiveNote's software enables attorneys to "translate" the real time feed from the court reporter's desk into readable text at their laptops at trial (or even remotely online).[20] Attorneys can then email this unofficial transcript to colleagues, manipulate the text, or do what they will with it. In addition, LiveNote offers its clients a searchable database of transcripts.[21] According to LiveNote, its real time transcript service is used in more than 500 hearings a day in the United States; also according to LiveNote, 81% of the Top 200 US law firms use LiveNote for transcript management.[22]

Is real time remote transmission of court transcripts to the public and the media a reality? So far, the question is answered largely in the negative. Except for sensational trials picked up by local and national media when real time transcription services have come to be the norm, real time transcripts in everyday proceedings are commonly available only to the judge, court staff, and increasingly to lawyers. As more court reporters become conversant in real time transcription, and as software like LiveNote's becomes more prevalent in use, unofficial versions of transcripts threaten to proliferate in the online environment.

c. Real Time Evidence

Real time evidence can be broken into two categories since there are two distinct sets of audiences for real time evidence: remote audiences and audiences already in the courtroom.

Evidence presented in court and simultaneously available to members of the public remotely, whether online or through other means, is far from the norm. Like real time transcripts, electronic copies of evidence broadcast remotely are typically available only in the most sensational trials where key pieces of evidence are made available to the

[19] [Interview with Kathleen Wirt, May 1, 2006].
[20] Interestingly, court reporters charge LiveNote customers for the live feed they provide. Sometimes court reporters bundle the package, charging one fee for real time feed and ultimate official transcript. Often court reporters charge LiveNote users a per page fee for real time feed.
[21] Note that LiveNote pays court reporters for all transcripts entered into its database.
[22] See AmLaw Tech Survey, September 2004, quoted at http://www.livenote.com/company.asp.

public for detailed inspection. But real time transmission of evidence remotely remains by far an exception to the rule.

What is more common is the growing trend of real time access to evidence *within* the courtroom through evidence presentation technologies that are starting to have a real impact on how trials are conducted. The Federal Judicial Center and the National Institute for Trial Advocacy put out a comprehensive, if already dated, guide for judges on the use of technology in courtroom proceedings. Discussing the increasing use of evidence display technologies, the guide explains,

> At its foundation, courtroom technology is a means for putting evidence before everyone in the courtroom…at the same time. The displays…convey many kinds of information more efficiently. Most lay people can look at a display and following along with an explanation more readily that they can find the place in a hard copy document and try to read the small type while also trying to listen… Courtroom technology is also a means to draw attention to particular points, to emphasize certain aspects of the evidence, and to make visible that which would otherwise exist only as a mental picture formed from words spoken by an advocate or a witness.[23]

Courtroom display of evidence to the jury, judge, and the gallery using presentation technology is becoming more and more common. Before the age of computers, lawyers employed large poster boards, transparency projectors, and other tools to make evidence accessible to those assembled at trial. The difference with real time evidence displays in courtrooms is the depth of detail that new presentation technology allows lawyers to display, and the fact that the evidence can be captured and recorded in new ways.

People attending trials with such technology in place are able to view (and hear) evidence that they would not previously have had access to. Picture, for example, a lawyer admitting into evidence financial records of a spouse in a divorce case. Assuming the trial took place in a state where divorce cases are open to the public, someone attending this trial would know only that financial records were entered into evidence, and would learn their details only to the extent that portions of the admitted evidence were read aloud. If a piece of evidence is admitted in a technologically advanced courtroom with screens that display evidence offered, the gallery in a courtroom stands to see far more information than would have been the case in the past. This raises obvious privacy concerns for litigants in a trial, but also for third parties whose information may be included in evidence displayed in such a fashion.

Is such evidence presentation technology prevalent? Courts across the country, state and federal, are gearing up to supply lawyers with capabilities to present evidence using cutting edge technology. [STATS?] Many are outfitting their courts with media pedestals that allow lawyers to display evidence using multiple presentation technologies. Although there has been some resistance to using technology for these purposes (some

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

lawyers are conscious of the negative impact of a technologically "slick" presentation may have on a jury), juries and court attendees are increasingly coming to expect them as high tech presentation capabilities become more commonplace.[24] There was a time, after all, when lawyers expressed these same fears about displaying evidence in color instead of black and white.[25]

III. Bedrock Principles: Access to Court Proceedings

> *All… is doone openlie in the presence of the Judges, the Justices, the enquest, the prisoner, and so manie as will or can come so neare as to heare it, and all depositions and witnesses given aloude, that all men may heare from the mouth of the depositors and witnesses what is saide*."[26]

England's tradition of open trials forms the basis of American courts response to the question of access. American courts, like their English predecessors, view court openness as accomplishing the twin goals of providing judicial oversight and educating the public about the workings of justice system. As central as these goals have been to maintaining the presumption of openness, the common law right of access has never been absolute. Courts have consistently ruled that trial judges must balance openness with competing interests according to the facts and circumstances of each case.[27] The tradition of access falters, for example, when confronted with a defendant's right to a fair trial,[28] the government's interest in the integrity of an ongoing investigation,[29] the safety of an informant,[30] the need to avoid injury to third persons,[31] and certain privacy rights.[32]

In addition to the common law tradition of access, courts locate the right of access in several provisions of the Constitution. The Sixth Amendment, for example, provides defendants with the right to a fair trial, which courts have interpreted to mean an open trial scrutinized by the public. The Sixth Amendment, however, can cut against openness when the right to a fair trial and the Fourteenth Amendment's due process rights have been used to close trials to prevent them from becoming a "media circus."

In addition to the common law access heritage, a right of access also derives from the First Amendment. Courts have held that the First Amendment requires a presumption of openness unless specific, on-the-record findings show that closure is necessary.[33]

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[24] See e.g., Stanley C. Sandstrom & Adam Bloomberg, An Ancient Art Jazzed by High Tech, Nat'l L. J., Nov. 5, 2001 at B14. 3 Legal Tech News 1 (Spring 2002), at www.provid.com/LegalTechNews-Spring.pdf.
[25] Gordon Bermant, "The Development and Significance of Courtroom Technology: A Thirty-Year Perspective in Fast Forward Mode," 60 N.Y.U. Ann. Surv. Am. L. 621 (2005).
[26] T. Smith, *De Republica Anglorum* 101 (Alston ed. 1972) (quoted in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 566 (1980)).
[27] Nixon v. Warner Communications, Inc. 435 U.S. 589, 599 (1978).
[28] U.S. v. Edwards, 672 F.2d 1289, 1294 (1982).
[29] Phoenix Newspapers, Inc. v. Sup. Ct. of Maricopa County, 680 P.2d 166, 172 (1983).
[30] Com. v. Fenstermaker, 530 A.2d 414, 420 (1987).
[31] In re Nat. Broadcasting Co., Inc., 653 F.2d 609, 620 (1981).
[32] U.S. v. Smith, 776 F.2d 1104, 1112 (1985).
[33] Press-Enterprise Co. v. Superior Court of California, Riverside (Press Enterprise I), 464 U.S. 501, 510 (1984).

Richmond Newspapers v. Virginia and its progeny follow a two-part balancing test to determine when the press has a First Amendment right of access to criminal trials. Judges must first ask "whether the place and process have been historically open to the press and the general public."[34] Second, the court must weigh "whether public access plays a significant positive role in the functioning of the particular process in question."[35] If the judge denies access where the First Amendment rights apply, the judge must demonstrate that the closure is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[36] The Supreme Court has never decided whether there is a First Amendment right to access civil trials, but several federal appeals courts have found such right.[37]

The above discussion outlines the source of the public's right to attend trials. This right has become the basis for the modern-day access rights to other elements of trial access: cameras in the courtroom, the public's right to inspect transcripts, and the right of the public to access evidentiary material.

IV. Access and Remote Broadcast

The first cameras to attempt to film trials for the purpose of broadcast outside the courtroom caused an uproar from the first. In 1937, after the camera-cluttered trial of the man charged with kidnapping and murdering the baby of aviator Charles A. Lindbergh, the ABA House of Delegates adopted Judicial Canon 35. Canon 35 declared that all photographic and broadcast coverage of courtroom proceedings should be prohibited.[38] In 1952, the House of Delegates amended Canon 35 to prohibit television coverage as well.[39] All but two states, Texas and Colorado, adopted Canon 35. The federal judiciary banned cameras in federal courts outright.[40]

The Texas refusal to ban cameras turned out to be instructive for the rest of the country: a Texas trial judge first propelled the issue to the Supreme Court in 1965. In *Estes v. Texas*, the judge allowed cameras at the trial of then-well-known swindler Billie Sol Estes. At the time, the *New York Times* described the courthouse scene as follows: "A television

[34] Press Enterprise Co. v. Superior Court (Press Enterprise II), 478 U.S. 1, 8 (1986).
[35] Id.
[36] Press Enterprise Co. v. Superior Court (Press Enterprise I), 464 U.S. 501 (1984) (Holding that sealing voir dire transcript in rape trial violated First Amendment) (quoting Globe Newspaper v. Superior Court, 457 U.S. 596, 607 (1982)).
[37] See e.g., *Publicker Indus. v. Cohen*, 733 F.2d 1059 (3rd Cir. 1984); In re Iowa Freedom of Information Council, 724 F.2d 658 (8th Cir. 1984), Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893 (7th Cir. 1994).
[38] 62 A.B.A..Rep. 1134-1135 (1937).

[39] 77 A.B.A..Rep. 610-611 (1952). The proscription was reaffirmed when the ABA replaced the Canons of Judicial Ethics with the Code of Judicial Conduct in 1972. Canon 3A(7) superseded Canon 35. E. Thode, Reporter's Notes to Code of Judicial Conduct 56-59 (1973).
[40] Marjorie Cohn, "End the TV Blackout in the Supreme Court," *Christian Science Monitor* (December 13, 2000); In 1996, the Judicial Conference of the United States (the body that establishes policy for the federal judiciary) permitted experimental use of cameras in some federal courtrooms. When the experimental period ended WHEN, the Judicial Conference declined to renew it. CITE

motor van, big as an intercontinental bus, was parked outside the courthouse and the second-floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four more marked cameras were aligned just outside the gates…Cables and wires snaked the floor."[41] Including this description in its opinion, the Court was clearly swayed by the intrusiveness of the equipment on the administration of justice, holding that chaotic scene prejudiced the defendant's Fourteenth Amendment due process rights. The justices were clearly bothered by the morass of wires and cameras used, but noted explicitly, in the majority and the dissent, that advances in technology might merit a different result. Wrote Justice Clark for the majority, "All are permitted the same rights as the general public. The news reporter is not permitted to bring his typewriter or printing press [into the courtroom]. When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case."[42] The ruling boded well for future access if technology found a way to be less intrusive, which of course, it did.

By the 1970s, TV cameras and other electronic methods of recording trials had become far less disruptive. Cameras and other forms of recording were smaller, made less noise and required fewer wires. Perhaps taking its cue from *Estes* for such advancements, the ABA's Committee on Fair Trial-Free Press recommended a change in the standards on cameras in court in 1978. Also in 1978 the Conference of State Chief Justices voted 44-1 to approve a resolution allowing the highest court of each state to set its own guidelines for radio, TV, and other photographic coverage.[43] States began to experiment with different access programs for electronic media. By 1979, 11 states permitted trial and appellate coverage (five permanently, the rest on an experimental basis); three states permitted trial coverage only (all on an experimental basis); and seven states permitted appellate coverage only (four experimentally, three permanently). Fifteen states were considering proposals for appellate or trial proceedings.[44]

By 1981, the Supreme Court likewise softened its view on the matter of TV cameras in the court in light of improved technology. In *Chandler v. Florida*, the Court underscored that *Estes* had not flatly prohibited all TV cameras in courtrooms.[45] Rather, satisfied with the due process protections Florida's experimental TV camera program had in place, the Court found that the defendant, despite his objections, was not prejudiced by the presence of cameras in the courtroom with these precautions in place.[46]

As the basis of *Chandler*, Florida had conducted a considered experiment in allowing cameras and other recording devices in the courtroom based on its strong belief that because of the "significant effect of the courts on the day to day lives of the citizenry … it was essential that the people have confidence in the process," and that "broadcast

[41] AUTHOR, TITLE, NY Times, September 25, 1962.
[42] Estes v. Texas, 381 U.S. at 540.
[43] "Resolution I, Television, Radio, Photographic Coverage of Judicial Proceedings," adopted at the *Thirtieth Annual Meeting of the Conferences of Chief Justices*, Burlington, VT , Aug. 2, 1978.
[44] Committee on Public Access to Records, "Special Report on Electronic Reproduction of Public Proceedings," September 25, 1979.
[45] Chandler v. Florida, 449 U.S. 560, 573 (1981).
[46] Chandler v. Florida, 449 U.S. at 583.

coverage of trials would contribute to wider public acceptance and understanding of decisions."[47] To safeguard against potential abuses that allowing cameras could unleash, the Florida program detailed several restrictions on electronic access. For example, the regulations allowed the press no more than one television camera in court (forcing them to rely on media pools), and no more than one camera technician; cameramen could not use artificial lighting; were required to position the camera in a fixed location and could not change film, videotape, or lenses while the court was in session; lawyer conferences, discussions between parties and counsel or at the bench could not be audio recorded; and the cameramen were not to film the jury.[48] The Florida program also gave defendants the right to object to broadcast coverage, and gave the trial judge "discretionary power to forbid coverage whenever satisfied that coverage may have a deleterious effect on the paramount right of the defendant to a fair trial."[49]

Technological advance did not, however, render cameras and other non-intrusive recording devices a staple of the courtroom. Although technology had made television cameras and other forms of courtroom recording and broadcast less intrusive, concerns remained about the possibility that they impinge a fair trial and that they overextend the right of public and press access. *Chandler*, and its more renowned predecessor *Nixon v. Warner Communications*, denied that the press held a constitutional right to record and broadcast testimony.[50] The Court held that "[t]he requirement of a public trial is satisfied by the opportunity of members of the public and press to attend the trial and to report what they have observed."[51] Furthermore, the Court, by reviewing *Estes* at length, recognized the affirmative ills that broadcast coverage could incite. Witnesses, attorneys and even judges might "stray, albeit unconsciously, from doing what comes 'naturally' into plumbing themselves for a satisfactory television 'performance.'"[52] Furthermore, the Court acknowledged the risks of publicity in denying the defendant a fair trial. The Court praised Florida's program for protecting certain participants at trial from the glare of the camera, for example, children, victims of sex crimes, some informants, and "even the very timid witness or party."[53]

In reaction to *Chandler*, many states adopted rules that allowed cameras at trial under certain conditions. Today, there remains great disparity among states over how cameras can be used. Most jurisdictions have taken one of two routes: allowing cameras in the court as a default position or decided flat out by statute, as has New York as to TV cameras, that cameras do not belong inside the courtroom.[54] Among those states that do allow cameras in the courtroom, various degrees of access exist. Some states allow cameras into the courtroom whenever the trial judge deems it appropriate. Others allow cameras, but only if there is no objection from either party. Yet others, fearing the impact on jurors and witnesses, allow camera coverage only for appellate proceedings.

[47] Chandler v. Florida, 449 U.S. at 555-6.
[48] Chandler v. Florida, 449 U.S. at 566.
[49] Chandler v. Florida, 449 U.S. at 566.
[50] Chandler v. Florida, 449 U.S. at 569, citing to Nixon v. Warner. Communications, 435 U.S. 589 (1970).
[51] Chandler v. Florida, 449 U.S. at 569.
[52] Chandler v. Florida, 449 U.S. at 572, quoting *Estes supra* at 592.
[53] Chandler v. Florida, 449 U.S. at 577.
[54] New York Civil Rights Law §52 (state's ban of TV cameras in court).

The federal courts have been far less willing to experiment with cameras in the court, citing concerns with dignity and decorum.[55] The Judicial Conference of the United States, the body that establishes policy for the federal courts, has refused to reconsider its rules prohibiting television and radio broadcasting from federal district court trials, reasoning that cameras intimidate witnesses and jurors (despite several recent experimental periods that did not result in a change of policy).[56] For its part, the Supreme Court has adamantly refused to allow cameras into the court, most recently denying the requests of several broadcasters to televise the historic argument in *Bush v. Gore*.[57]

V. Access to Transcripts

For much of the history of the access debate in U.S. courts, the question of access to transcripts was considered synonymous to the question of access in general. If a court proceeding was closed to the public, the transcript should be similarly sealed. If the public has the right to attend a court proceeding, the transcript should likewise be available.[58] However, in the age of the electronic transcript, it is not at all clear that the degree of access to transcripts should fall in line with access to the physical trial. To understand why, we must understand how court reporters create and file (or don't file) transcripts.

The process by which official transcripts are taken and filed with courts has changed drastically in the last fifteen years as electronic transcripts and other forms of recording trials have become an increasing reality.[59] Before discussing these changes, it is important to note that the role of the court reporter and the rules (or lack thereof) guiding them varies widely from state to state, and even jurisdiction to jurisdiction within states. In some states, for example in Virginia, Tennessee, and Florida, court reporters are not officially affiliated with the courts in which they operate. In these states, complete transcripts of trials are prepared only if one of the parties or an interested third party requests (and pays for) a complete transcript. Reporters in these states may or may not file completed transcripts with the court to function as part of the official record subject to public access rules. As a result, court reporters' stenographic notes from trials in these states may never see the light of day as an official transcript accessible through public

[55] See e.g., Administrative Office of the U.S. Courts, Background on Cameras in Federal Courts, at www.judges.org.nccm/research/court_media_rules/admi_office_u_s_cts_cameras.htm.
[56] "Judicial Conference Changes Stand on Cameras in Appellate Proceedings," *Reporter's Committee for Freedom of the Press News Media Update*, March 25, 1996 at http://www.rcfp.org/news/1996/0325c.html.
[57] The Supreme Court denied a motion to allow cameras at the Bush v. Gore argument. See Bush v. Gore, 2000 WL 1818321 (Appellate Brief) Motion to File a Brief as Amicus Curiae or in the Alternative Motion to Intervene for the Purpose of Allowing Cameras in the Courtroom and Brief as Amicus Curiae or as Intervenor, (December 10, 2000).
[58] See e.g., Press-Enterprise Company v. Superior Court of California, 478 U.S. 1 (1986) ("Press Enterprises II").
[59] It is worthy of note that many courts, for example Florida's 9th Judicial Circuit, are experimenting with recording trials through digital/audio mechanisms, creating written transcripts only when parties (or judges) so request. In the 9th Judicial Circuit, court reporters view recordings remotely to control the quality of the recording and to annotate where necessary.

records channels. In other states and in the federal court system, court reporters function as officials of the court. [60]

Federal court reporters transcribe each session of the court and any other proceeding as designated by rule. Federal law requires that federal court reporters file the original shorthand notes or other original records taken during each proceeding and file them "promptly" with the clerk who preserves these records for public access purposes for not less than 10 years.[61] If a rule of court requires, or if so requested by one of the parties or a judge, the court reporter uses the shorthand notes to prepare, again "promptly," an official transcript, delivered to the requestor and filed with the court for public access purposes.[62] These original notes or other original records plus the official transcript filed at the office of the clerk must be "open during office hours to inspection by any person without charge."[63]

Court reporters earn their income in two ways: from recording trials and from selling transcripts. Court reporters affiliated with a court earn a base salary for recording proceedings within that court, and then receive fees for completed transcripts they sell to parties in the case, the media, and interested members of the public. As discussed above, court reporters also receive income from selling real-time feed to lawyers using software like LiveNote, and from selling electronic versions of transcripts to databasing companies. Understanding the income streams for court reporters is important in order to grasp the concept that the system is designed such that court reporters benefit by selling as many transcripts as possible. As a result, the system currently in place does not compensate court reporters for protecting privacy interests.[64] Quite the opposite, it encourages court reporters to sell transcripts (even in real time) to anyone who will pay.[65]

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[60] 28 USC 753(a).
[61] 28 USC 753(b).
[62] 28 USC 753(b).
[63] 28 USC 753(b).
[64] Provision 4 of the Court Reporters Code of Professional Ethics requires court reporters to preserve the confidentiality of information entrusted to the court reporter by the parties of the proceeding. See *Code of Professional Ethics* published by the National Court Reporters Association. Provision 4: "A member shall, "Preserve the confidentiality and ensure the security of information, oral or written, entrusted to the Member by any of the parties in a proceeding." *See* http://www.ncraonline.org/infonews/ethics/index.shtml. Court reporters are forbidden to sell or otherwise release transcripts to *third parties* unless the transcript of the proceeding they record is made part of the official record of the proceeding. See transcripts and online repositories, http://www.ncraonline.org/news/2006/060223.shtml#2.
[65] In September 2005, prompted by the E-Government Act of 2002, the Judicial Committee proposed legislation requiring all transcripts be electronically filed on the federal judiciary's online records repository, the Public Access to Court Electronic Records ("PACER"). The proposed legislation included a payment system for remunerating court reporters for their services when patrons of PACER access their transcripts. Court reporter associations have protested forcefully that including transcripts on PACER substantially reduces their income source since PACER documents can be copied and distributed without payment to court reporters and the remuneration proposed by the legislation would not be sufficient to compensate. See Memorandum to USCRA Members and Fellow Reporters, from Kathleen M. Wirt, President, United States Court Reporters Association, Re "Electronic Access to Official Transcripts," August 13, 2003. Note that viewing transcripts from the case file, whether through a computer terminal in the court clerk's office or in hard copy is free to the public (i.e., the court reporter receives no additional fees).

Multiple concerns have arisen with the inevitabilities associated with electronic transcripts. Once electronic versions of transcripts are released, it becomes difficult for courts to police the accuracy of their content. The privacy implications of "un-official" and even official electronic or online versions of transcripts are also of concern given the potential for inaccuracies, their manipulability, their searchability, and the potential for the release of non-public personal information of litigants and third parties.

To respond to these problems, judicial policymakers are rethinking traditional procedures for developing and releasing transcripts to accommodate the electronic and online contexts. At the federal level, the Court Administration and Case Management Committee (CACM), a subcommittee of the Judicial Conference, proposed a redaction policy in June 2003 requiring each party to a proceeding to file a notice of redaction signaling the party's intent to redact personal data identifiers from the electronic transcript of the court proceeding within five days of the court reporters' filing of the official transcript with the court. If no such notice is filed in the 5 day period, the court could assume that redaction was not necessary and would be free to release the transcript electronically.[66] Real time transcripts are not considered part of the court record, and are not therefore subject to redaction policies.

This proposal met with great resistance from court reporters, who felt the proposal added significantly to their responsibilities without additional compensation.[67] The work of redacting, especially in the case of a voluminous record, can be very onerous. In addition, court reporters pointed out that the proposed solution gave no recourse to third parties who, for example, might testify at trial, and whose nonpublic personal information could wind up in a transcript.[68] Also, would liability for privacy violations stemming from the release of non-redacted transcripts fall on the court reporter? The Judiciary?

At the state level, the National Center for State Courts and the Justice Management Institute produced the *CCJ/COSCA Model Policy on Public Access to Court Records*, released in 2002 [hereinafter the "CCJ Model Policy"] to serve as a basis for states considering legislation on public access to court records in an electronic age.[69] The CCJ Model Policy, like its federal counterpart, requires that personal identifiers be redacted

[66] See CACM "Electronic Availability of Transcripts of Court Proceedings," June 2003. The recommendation allowed a court to stop electronic transmission of an un-redacted transcript "for good cause related to the application of the Judicial Conference policy on privacy and public access to electronic case files, finds that the transcript should not be available electronically for a period of up to 60 days. Note that there is some concern that court reporters are selling electronic copies of transcripts before the 5 days has lapsed. See Letter to Kathleen M. Wirt, CM/ECF Committee Chair, United States Court Reporters Association from Sophie M.Korczyk, Ph.D., January 22, 2004.

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

[68] "Electronic Access to Official Transcripts," August 13, 2003 Memorandum to USCRA members and Fellow [Court] Reporters, From Kathleen M. Wirt, President, United States Court Reporters Association.

[69] A joint project of the National Center for State Courts and the Justice Management Institute, see www.courtaccess.org/modelpolicy.

from court records,[70] and includes transcripts in the definition of "court record."[71] The CCJ Model Policy is far less explicit than its federal counterpart as how states should accomplish redaction mandates.

Following the dictates of the CCJ Model Policy, many states are requiring redaction for electronic court records, including transcripts. In Virginia, for example, recently passed legislation requires that any pleading, motion, order or degree, "including any agreements of the parties or *transcripts*, shall not contain the social security number of any party or of any minor child of any party, or any financial information of any party that provides identifying account numbers for specific assets, liabilities, accounts or credit cards."[72] Many other states have also adopted policies requiring that certain sensitive personal information be banished from court records, including Arizona,[73] California,[74] Florida,[75] Indiana,[76] Maryland,[77] Massachusetts,[78] Missouri,[79] New York,[80] and Washington,[81] to name a few. Other states, such as Utah and Wisconsin, are proceeding with policies that simply bar remote access rather than requiring redaction of the record.[82]

The CCJ Model Policy and redaction policies being adopted by states such as Virginia neglect to state who bears the burden of redaction – an exercise that can take a court reporter hours and hours of effort. Even in states where the onus of redaction is on the parties, once the request that certain sensitive personal information be redacted is filed, the court reporter is ultimately responsible for redacting the transcripts.

VI. Access to Evidence

Evidence introduced at trial is considered part of the court record for purposes of public access.[83] A recent expression of this standard comes from the recently published *Sedona Guidelines for Managing Information and Records in the Electronic Age*, a compilation of policy recommendations put forth by jurists, lawyers, academics, and others. The *Guidelines* advise that, "It follows from the right of public access to trial proceedings that there is similarly a right of public access to evidence admitted during trial, including not

[70] See *CCJ Model Policy*, Section 4.30(c).
[71] See *CCJ Model Policy*, Section 3.10(a).
[72] Virginia Code 20-121.03 (emphasis added).
[73] See Arizona Supreme Court Rule 123.
[74] See California Rules of Court 2070-2077.
[75] See Supreme Court of Florida Administrative Order No. AOSC03-49, Committee on Privacy and Court Records.
[76] See revisions to Indiana Administrative Rule 9.
[77] See Title 16, Chapter 1000 of the Maryland Rules, Access to Court Records.
[78] See Policy Statement by the Justices of the Supreme Judicial Court Concerning Publication of Court Case Information on the Web, May 2003.
[79] See Missouri Supreme Court Operating Rule 2 (Missouri tackles the issue slightly differently by requiring that case records containing social security numbers cannot be disseminated and court personnel cannot expunge or redact those numbers that appear in case records).
[80] Report on the Commission on Public Access to Court Records, February 2004.
[81] See Washington General Rule 31.
[82] See Utah Rules of Judicial Administration Section 4-202.02 and the Wisconsin Policy on Disclosure of Public Information Over the Internet, released April 2003.
[83] Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986).

only testimony that is memorialized in the transcript, but also exhibits that are offered or admitted into evidence."[84] The right of access to exhibits applies to evidence offered at hearings or trials even when it is not admitted into evidence.[85] Typical court practice dictates that trial exhibits offered at trial, and especially those not admitted into evidence, are returned to the parties when the proceedings end.[86]

The impact of technology on access to evidence used at trial has been a subject of several important public access cases. The most prominent, *Nixon v. Warner Communications*, involved press access to recordings of conversations at the White House Oval Office during the Nixon administration.[87] The press heard the recordings at trial and the court provided the press transcripts of the recordings, but the press wanted to replay the *recordings themselves* – the sound of Nixon's voice – to the public and sued for the actual tapes. The trial judge was concerned that releasing the tape might cater to base commercial exploitation that would reflect poorly on the dignity of the justice system. He determined that immediate access to the tapes might "result in the manufacture of permanent phonographic records and tape recordings, perhaps with commentary by journalists or entertainers; marketing of the tapes would probably involve mass merchandising techniques designed to generate excitement in an air of ridicule to stimulate sales."[88]

Recently, new forms of evidence presentation have challenged access principles in ways similar to those the *Nixon* court faced. In 2002, for example, the First Circuit decided *In re Providence Journal*. In *Providence Journal*, the press requested copies of videotape and audiotape evidence introduced at the trial of the colorful former Mayor of Providence, Buddy Cianci. The court rested its conclusion denying the press copies of the tapes on a particular technological issue not present in previous iterations of this issue: the government had not simply played tapes in court, it had used "cutting edge technology [Sanction software]… to play for the jury medleys of selected excerpts from the universe of taped materials stored on its laptop computer."[89] Consequently, the court noted, there was no "tape" to turn over. In order to give the press access to the material played in open court, the court would have to create a new medium containing only the taped excerpts actually played. Did the press have access rights to this "new medium"? The First Circuit held that it did not. The First Circuit reasoned, relying on *Nixon*, that the

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

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

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

[87] Nixon v. Warner Communications, 435 U.S. 589 (1978).

[88] United States v. Mitchell, 397 F.Supp. 186, 188 (1975) cited in Nixon v. Warner, 435 U.S. at 595.

[89] In re Providence Journal, 293 F.3d 1, 17 (1st Cir. 2002). The lawyers used Sanction by Verdict Systems, see verdictsystems.com.

court had satisfied its First Amendment access obligations by accommodating the press' access during trial (for example reserving seats at trial for members of the press and providing an overflow room).[90] But it continued its analysis to review whether a common law right to inspect and copy documents might afford the press the right to copy the evidence in question. The court found that the right of access indeed extends to the right to "examine the materials on which the court relies in determining litigants' substantive rights."[91] However, the court decided that judges are not obliged to afford such access where the evidence is not so easy to copy.

Looking at the historical impact of technology on the right to copy evidence presented at trial, the court reflected that "[o]ver time, the right [to copy records from trial] has been extended to accommodate advancements in document reproduction such as photography, photocopying, and the replication of videotapes and audiotapes." The court noted, however, that the records involved typically were quite easy to reproduce. As the trial court had determined, reproducing the medley evidence presented at this trial was a "daunting task" given the evidence presentation technology used. The First Circuit concluded that releasing evidentiary materials presented at trial to the press was an issue that should remain with the "informed discretion" of the trial judge who had not abused his discretion in ruling that the job of producing copies of this particular form of evidence would be to onerous on court staff.[92] Perhaps *In Re Providence Journal* is one of those "moment in time" cases where the technology used has quickly been replaced by technology that remediates the issue at trial (here, makes medley evidence presentations easy to record for later dissemination). But the reluctance of the court to grant access to this new form of evidence presentation still remains an indication of the judiciary's sensitivity to the pace of technological change in the realm of evidence presentation.

As lawyers begin to present evidence using sophisticated software, the question of exactly what the press and public have access to will become a major question of concern. Given new evidence presentation technologies, at what point has the court satisfied public access requirements? Evidence presentation technology, for example, allows counsel and witnesses to annotate exhibits electronically. If a court fails to capture this annotation for later public dissemination, will it have failed its public access obligations? The First Circuit would clearly answer no – the public access duty has been met by allowing open access during trial. Other courts have and certainly will in the future decline to bifurcate access questions similarly.[93]

A second question raised by evidence technology relates not to certain methods used by lawyers to display evidence, but to choices made by courts themselves, irrespective of particular cases, in regard to courtroom design. Some courts, for example, have elected to install one large plasma screen for the display of evidence to the judge, the jury, and the

[90] In re Providence Journal , 293 F.3d 1, 16 (1st Cir. 2002).
[91] In re Providence Journal, 293 F.3d 1, 16 (1st Cir. 2002) quoting Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986).
[92] In re Providence Journal, 293 F.3d 1, 17 (1st Cir. 2002).
[93] United States v. Massino, 356 F.Supp.2d 227 (E.D. NY. 2005) (court declines to bifurcate the right to listen to audio recordings played at trial versus the right to duplicate them).

gallery alike. Others have invested significantly in small screens affixed to the witness stand, the judge's bench, and to attorney tables that are slanted at just such an angle that the contents of the evidence are presented only to the parties, the witness, the jury, and the judge.[94] Courts that decide to modernize are faced with questions they never previously faced that have huge implications to the privacy rights of those who use (both indirectly and directly) the technologically sophisticated courtrooms they ultimately construct.

The question becomes whether technological innovation (the ability to project evidence) should change the access balance, allowing members of the public attending court proceedings the ability to see information they would not previously have seen unless they went to the trouble to request the documents from the court record later.

Judging by the lack of policy guidance in this area, and the relative free-for-all in which courts are engaged as they construct their "courtrooms of the future," privacy concerns raised by the real time projection of evidence within the courtroom have not made it on policymakers' radar.

III. Privacy Concerns of Real Time Access

a. Real Time Broadcasts

Why should real time broadcasts raise any particular privacy concerns not already implicated in the "real world"? If a judge sees no reason to overcome the presumption of openness and allows the public to attend a trial physically, how can there be objection to people also attending that same trial remotely? Trials open to the public should be open to the public, whether or not they feature virtual access. To put it in concrete terms, the person in Phoenix who wants to watch a trial in Vermont in theory at least has every bit as much a right to access that trial as the member of the public sitting in the open court session in Montpelier. Doesn't technology in this instance act as a great equalizer? The technology exists to allow even those without money for travel to follow the administration of justice remotely.

Is the public getting something more when it gets real time remote access to court proceedings? Does the obligation of courts somehow change if technology is available to let more people in a courtroom than spatial restraints would ordinarily allow? Is there something to the earlier soundings by the Supreme Court in cases such as *Nixon* and *Chandler* that just because a court can offer enhanced access doesn't mean that it should? If technology enables us to fit a million people in a courtroom, aren't the bedrock principles of access – judicial oversight, public education, etc. – only enhanced by real time access? What are the limits of the right of public access to trials?

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

What is it particularly about real time remote access that is threatening? Does real time remote access impact flavor traditional cameras-in-the-courtroom arguments? Does it matter if the broadcast happens simultaneously as opposed to later that day or even weeks later? Do echoes of the *Chandler* and Nixon courts' concern that TV broadcasts may "overextend" the public's right of access apply in the case of real time access? Does a court satisfy its duty of public access by opening the court doors to the public in a world where (1) the public seldom attends, and (2) access technology allows courts to bring the trial to the people?

One of the biggest privacy concerns real time broadcasts present is the classic toothpaste problem. Information can be stricken from the official record of a proceeding. Motions can be filed to block footage from being released. But once a trial is beamed out in real time, the toothpaste cannot be put back in the tube. Taken out of context (e.g., without the part where the judge strikes the comment/evidence/outburst from the record), information recorded in the broadcasting process could prove highly damaging to both litigants and non-litigants appearing at trial. What are the possible solutions? Would implementing Court TV's 10-second delay solve the problem? Or, as many courts have clearly concluded, should the problem be avoided altogether by declining real time broadcasts altogether?

There is also the problem of permanency. Especially in the case of web broadcasts, and less so in the case of cablecasting, the ease with which the stream can be captured, catalogued, and stored in a searchable database – and recalled with extraordinarily little effort – may well tip the careful balance that the court system has struck with respect to access versus privacy. This is not, of course, as much the fault of real time access as it is a consequence of it. Unless courts can find a way to ensure that real time broadcasts are not recorded by the receiver (virtually impossible to guarantee with existing capabilities), the decision to broadcast a trial real time is a decision to create a permanent unofficial record. The problem is very similar in the court records context. It may be one thing for dusty files to exist somewhere in the records room of a backcountry courthouse where they quickly become obsolete. Put the records online and you destroy what is commonly referred to as their "practical obscurity." People who go through trials also rely on the practical obscurity of the trial itself: the surprising prevalence of the empty courtroom. Widespread real time broadcast of trials would destroy the reliance many people have on public apathy.

Other privacy concerns that real time broadcasts implicate boil down to the question of volume. People may be able to bear the thought of five or even 50 people watching their divorce trial unfold, but the thought of untold thousands bearing direct witness to its contents as it unfolds might intimidate people from accessing our system of justice. In theory, public is public; but in practice opening up the court system on the scale that real time technology makes possible may threaten the viability of the justice system as a safe and protected vehicle for adjudicating disputes.

A huge question related to courts' decisions to broadcast trials on the web is who decides which trials will be broadcast. If courts are investing in technology, as Florida's 9th

Judicial Circuit has done, that allows them to webcast live, how do they pick which trials to broadcast? In the past, the media and the Court TV's of the world have been the judge of what to bring to public light. What happens when courts themselves become the arbiter of this decision? Will the system be fair if courts determine on an ad hoc basis, as Florida's 9th Judicial Circuit elected to do, which trials seem to have educational content or are otherwise in the "public interest"?

Should remote access to real time broadcasts be allowed to flower? Does real time access promote goals worthy enough of the risks, or does pursuing such a program simply open up a can of worms courts would be wise to leave well enough alone? Does real time remote access fundamentally shift the access/privacy balance to such an extent that its effects will hamper the administration of justice? Do real time broadcasts of trials serve any particular public access need that other forms of access do not meet? How should real time broadcasts be administered? Who make the decisions and who bears the responsibility?

b. Privacy and Real Time Transcripts

The privacy implications of real time transcripts are starting to bubble to the surface. The problem can be split into two main categories: (1) the universal problem within electronic court records generally of error-riddled documents being released into the mainstream, and (2) the problem of redaction.

Court technology entrepreneurs like LiveNote are fast catching on that there is money to be made from databasing transcripts and selling their searchable contents to lawyers and other interested parties. Such businesses that place transcripts on the web in searchable form for commercial access allow lawyers, for example, almost effortlessly to impeach witnesses based upon what they said in a prior trial. But it is not altogether clear *which versions* of the electronic transcripts are going into commercial databases. Real time transcript services provided by companies like LiveNote ensure that unofficial electronic transcripts enter the digital highway in droves. An almost impossible amount of time and effort would be required to determine whether a particular transcript in a particular database is or is not error free. Whereas court reporters could zealously protect the integrity of the transcript in years past (before the days of the electronic transcript, only one official transcript, in paper form, was filed and distributed as the official version), court reporters find themselves in a different world where reasonable quality control becomes far more difficult to accomplish. The privacy implications are monumental. In a world where litigants do their best to impeach witnesses by discrediting them, where nasty (and sometimes wildly untrue) accusations are hurled left and right by zealous attorneys, and where transcripts are replete with sensitive personal information about litigants and third parties, the wide release of imperfect electronic versions of transcripts could be dangerous indeed. It may soon be the case that the practical obscurity of the *transcript* may become a thing of the past – a fate its documentary cousins in the court file have already suffered. Different *versions* of transcripts, official versus unofficial, threaten to make for huge privacy headaches in the future on a scale that threatens to dwarf other electronic records access controversies we are already witnessing.

Questions about how best to accomplish redaction are a second category of concern from a privacy perspective. Courts may reach agreement that certain forms of sensitive personal information should not be released within transcripts, but how the system will function, and who will bear the burden, costs, and potential consequences of the enormous task of redacting a transcript is far from clear. Even when courts purport to put the onus of redaction on attorneys, court reporters are left with the task of redacting the transcript as per lawyers' redaction notices. And on top of that, unofficial transcripts disseminated by individuals with no court affiliation renders the prospect of one true, official, properly redacted version of a transcript highly elusive.

c. Privacy and Real Time Evidence

Before technology enabled lawyers to exercise so many options in weighing how to display evidence, and before courts found themselves making decisions about courtroom design that would greatly impact the way evidence appears during trial, few people thought about the privacy implications of evidence presentation. Collateral evidence (that is, pieces of information contained in evidence offered at trial that may or may not relate to the issue at stake) was a relative non-issue during the course of the trial from a privacy perspective. Before, the issue of privacy and evidence surfaced as general records access questions after the evidence had been relegated to the court file after trial (assuming it was not, as much evidence is, returned to the parties after the court closed the matter).

In a way, people's sense of privacy in the face of the public's right to view material that served as the basis for a court's determination relied on practical obscurity, too. You may have lost privacy interest in evidence presented at trial, but only to the extent that such evidence was displayed fully to the jury and the gallery. Collateral evidence was effectively shielded from view of all but the most zealous court record retrievers.

Perhaps one reason that privacy concerns associated with real time evidence presentation have not hit center stage is the common perception that evidence presentation technology that protects litigant and third party privacy interests is simply a matter of improving the display technology – i.e., not a matter of developing policy.

As to the capability of evidence to be broadcast remotely, it is not at all clear that the *Nixon* court's fear of "base commercial exploitation" isn't a valid concern. Since real time remote access to evidence is currently not a reality except in sensational trials, it is hard to imagine a day when evidence presented at real people's trials would ever be broadcast out. However, as technology makes the transfer of different forms of information increasingly easier, and cost increasingly less, the potential for profit ensures that a future of searchable electronic evidence repositories is not necessarily far away.

V. Conclusion

Some people believe that whatever happens in open court should rightly be made available, by whatever technological means are available at a given time, to the widest

audience possible. Why let a trivial matter like physical space stop courts from granting access to as many components of the trial to as many people as possible? Let everyone see everything; chances are they won't pay attention anyway. But there is something new about real time transmission of trials, transcripts, and evidence that fundamentally changes the equation. Courts, lawmakers, and members of the public must revisit the systems in place that govern the transfer of information in our judicial system to the public to account for – and plan for – these new realities.