Will Twitter Be Following You in the Courtroom: Why Reporters Should Be Allowed to Broadcast during Courtroom Proceedings

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Will Twitter Be Following You in the Courtroom?: Why Reporters Should Be Allowed to Broadcast During Courtroom Proceedings

by
ADRIANA C. CERVANTES

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Justice Antonin Scalia’s response when asked about Twitter:

I don’t even know what it is. I’ve heard it talked about, but you know, my wife calls me Mr. Clueless.

I. Introduction

Social networking websites have transformed the way people communicate and stay in touch with one another.2 Thanks to micro-

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2. Steven Johnson, How Twitter Will Change the Way We Live, TIME, June 5, 2009, available at

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blogging and social networking tools, we no longer have to pick up a phone to call our friends and ask them what they are doing. Instead we turn to our laptop, Blackberry, or iPhone to get instant information available to us over the Internet. Twitter is now a key player in the Internet information exchange line-up. Twitter can be used by virtually anyone with an email address who wants to stay updated in the news and lives of others.

So what is Twitter? United States Supreme Court Justice Antonin Scalia himself did not know. Twitter is a social networking and microblogging service that allows users to answer the question, “What’s happening?” within a 140-character message called a “tweet.” Users can tweet from a computer or mobile device (the 140 character limit allows tweets to be created and circulated through the Short Message Service (“SMS”) platform used by most mobile phones). While the 140-character limit may seem short, Twitter users can share links to URLs, pointing users to read longer articles, blogs, videos, etc., at their interest. Twitter serves as a means to update people on what one is seeing, doing, and thinking by allowing users to create accounts to both follow and to be followed by other users. Users who subscribe to another author’s tweets are said to be “following” and subscribers are known as “followers.” Essentially, Twitter allows us to create our own personal newspaper featuring our favorite “tweets,” and with more than 100 million users, Twitter is an easy way to be immediately connected.

http://www.time.com/time/business/article/0,8599,1902604,00.html#ixzz0gDPhZzlG (“We don’t think it at all moronic to start a phone call with a friend by asking how her day is going. Twitter gives you the same information without your even having to ask.”).

3. Id.
5. Id.
7. See TWITTER, http://www.twitter.com (last visited Sept. 30, 2010 ) (“Twitter is a real-time information network powered by people all around the world that lets you share and discover what’s happening now.”).
8. See Johnson, supra note 2.
9. Id.
10. Id.
11. Id.
Twitter has now made its way into one of the oldest and most archaic forums: The courtroom. Twitter’s presence in the courtroom has come up in a variety of contexts. Twitter and other similar websites are being used to bring defamation lawsuits. Jurors’ tweeting has resulted in juror misconduct. As this note will focus, Twitter is being used as a reporting tool to broadcast courtroom proceedings. The Proposition 8 case received national publicity both for the controversy surrounding the California Marriage Protection Act and because the United States Supreme Court prohibited Northern District Chief Judge Vaughn R. Walker from broadcasting the trial via YouTube. Judge Walker allowed reporters to broadcast the trial through live tweets. Tweeters like “@FedCourt Junkie” were followed by more a thousand people who wanted to stay instantly updated on the trial proceeding but who would not be able to actually go to the courtroom. Still, Twitter and other similar websites’ presence in the courtroom has been embraced by some courts and disallowed by others.

This note will discuss the history of prohibitions against tweeting in the court, analyze the reasons why “reporters” should be allowed to use Twitter and other micro-blogging tools in the courtroom, and propose a solution for how their presence can be accounted for in order to maintain order in the court. This topic is significant because the digital era has presented new technology-in-the-court issues.


14. Hilary Hylton, Tweeting in the Jury Box: A Danger to Fair Trials?, TIME (Dec. 29, 2009), available at http://www.time.com/time/nation/article/0,8599,1948971,00.html#ixzz0gDONj7hd (“Despite admonitions from judges, many jurors can’t seem to keep their hands off their electronic devices, posting updates on their Facebook pages and—far more worrisome—mining the Internet during breaks in a trial.”).


16. Id.

17. Id.


19. “Twitter in the Court:” Juror Social Media Use, Internet Research, and Mistrials, AMERICAN BAR ASSOCIATION (Mar. 20, 2009), available at http://new.abanet.org/sitetation/Lists/Posts/Post.aspx?ID=466 (Defense lawyer Peter Raben, “who had been told by the jury that he had been close to winning the case for his client, stated ‘It’s the
People are entering courtrooms across America carrying electronic digital devices that can access blogging sites within seconds. The current laws restricting reporters' ability to broadcast their thoughts during courtroom proceedings are not proper. Even though the trend is becoming more prevalent, the current law does not properly address whether reporters should be allowed to tweet, but the trend is becoming more prevalent. Allowing broadcasting in the courtroom will promote a better public understanding of judicial proceedings. Twitter needs to be addressed with our current society in mind; a society wanting instant access to information. Legislatures and courts have both addressed the question of whether court proceedings should be broadcast differently. This note will examine whether or not broadcasting through websites like Twitter should be allowed during civil and criminal cases so that the public can have instant access to judicial proceedings.

This note is divided into five parts. Part I introduced Twitter and provided an overview of how it works. Part II discusses the history of broadcasting and the federal and state laws regarding broadcasting. Part III discusses the reasons why broadcasting laws are overbroad and how Twitter can increase transparency of the judicial system. Part III also addresses and dispels likely counterarguments. Part IV proposes that reporters should be allowed to broadcast in both federal and state courts at the judge's discretion. Part V concludes by summarizing the arguments in favor of allowing reporters to broadcast in the courtroom.

II. Background

The public and the press are allowed to attend trials, but the question of whether these courtroom proceedings should be broadcast has stirred controversy. As such, both courts and legislatures have addressed the question. The ability to broadcast
courtroom proceedings varies depending on the type of court and the type of case. Federal courts generally prohibit broadcasting in the courtroom, while state courts generally authorize broadcasting. Historically, case law has generally supported the view that the freedom of press does not include a right to broadcast, record, or photograph.

A. History of Broadcasting in the Courtroom

Historically, the Canons of Judicial Ethics prohibited broadcasting, television coverage, and photographic coverage in the courtroom. In 1935, the New Jersey appellate court found no error in the "much criticized actions of the media at trial," a trial in which defendant Bruno Hauptmann was convicted for the murder of aviator Charles Lindbergh's baby. The canon prohibiting broadcasting was originally proposed in 1937 as a result of the Judicial Ethic Board's disgust over the news coverage of that murder case. The ban on broadcasting and television and photographic coverage continued even after the American Bar Association replaced the Canons of Judicial Ethics with the Code of Judicial Conduct in 1972.

In 1946, the Federal Rules of Criminal Procedure adopted a rule to prohibit the taking of photographs or radio broadcasting of

26. *Validity, Propriety, and Effect of Allowing or Prohibiting Media's Broadcasting, Recording, or Photographing Court Proceedings*, 14 A.L.R. 4th 121, § 3 (2009), citing U.S. v. Yonkers Bd. of Educ., 747 F.2d 111 (2d Cir. 1984); Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16 (2d Cir. 1984); Dorfman v. Meiszner, 430 F.2d 558 (7th Cir. 1970) (recognizing rule prohibiting broadcast and photograph); Combined Commc'ns Corp. v. Finesilver, 672 F.2d 818 (10th Cir. 1982).
30. *Validity, Propriety, and Effect of a Allowing or Prohibiting Media’s Broadcasting, Recording, or Photographing Court Proceedings*, supra note 26; *see also Waters*, supra note 29, at 339.
courtroom proceedings.\textsuperscript{31} Rule 53 now states that “except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.”\textsuperscript{32} Federal law prohibits broadcasting from the courtroom in federal criminal judicial proceedings,\textsuperscript{33} and federal law has also stopped broadcasting in state courts when it violates Due Process.\textsuperscript{34}

In 1965, the United States Supreme Court in \textit{Estes v. Texas} overturned a criminal conviction under the Due Process Clause because the courtroom proceedings were televised and broadcast over petitioner’s objections.\textsuperscript{35} The Petitioner had been indicted by a Texas grand jury for swindling.\textsuperscript{36} The state pre-trial hearing was carried on live television and radio, and news photography was permitted.\textsuperscript{37} Four of the jurors selected for the trial had seen or heard all or part of the broadcasts.\textsuperscript{38} During the actual trial, live telecasting was prohibited but the State’s opening and closing arguments were transmitted live.\textsuperscript{39} The cameramen caused a great deal of disruption as they took pictures and lay cables snaked around the courtroom.\textsuperscript{40}

Petitioner appealed, claiming that the televising and broadcasting of the trial had denied him due process in violation of the Fourteenth Amendment, but both the trial court and appellate court at the State level denied his claims.\textsuperscript{41} The Supreme Court found otherwise. The Court reversed the State’s conviction, holding that televising a criminal trial over the petitioner’s objections was inherently invalid because it infringed upon the fundamental right to a fair trial guaranteed by the Due Process Clause.\textsuperscript{42} The Court found that when the procedure used by the state has a high probability that the accused will be prejudiced, an actual showing of prejudice is not required.\textsuperscript{43} Ironically, even forty-five years ago, the Court described

\begin{footnotes}
\footnotetext[31]{FED. R. CRIM. P. 53 (amended 2002).}
\footnotetext[32]{\textit{Id.}}
\footnotetext[33]{\textit{Id.}}
\footnotetext[34]{Estes v. Tex., 381 U.S. 532 (1965).}
\footnotetext[35]{\textit{Id.}}
\footnotetext[36]{\textit{Id.}}
\footnotetext[37]{\textit{Id.}}
\footnotetext[38]{\textit{Id.}}
\footnotetext[39]{\textit{Id.}}
\footnotetext[40]{\textit{Id.}}
\footnotetext[41]{\textit{Id.}}
\footnotetext[42]{\textit{Id.}}
\footnotetext[43]{\textit{Id.}}
\end{footnotes}
that "[t]he ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials."  

Justice Harlan concurred in the Court's opinion but filed separately, concluding that "televised trials, at least in cases like this one, possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned."  

Further, Justice Harlan wrote "that the day may come when television broadcasting will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process."  

In 1978, the American Bar Association's Committee on Trial-Free Press proposed allowing broadcasting when coverage would not be obtrusive. Florida adopted a canon in its Code of Judicial Conduct which permitted electronic media and still photographic coverage. Appellate and trial judicial proceedings could be broadcast at the judge's discretion. In Chandler v. Florida, the Supreme Court reviewed the constitutionality of Florida's broadcasting canon and held that television coverage of a criminal trial is not inherently unconstitutional because it does not violate a defendant's due process rights, but that television coverage is not mandated. In an opinion by Chief Justice Burger, joined by Justices Brennan, Marshall, Blackmun, Powell, and Rehnquist, the Court rejected the notion that defendant's due process rights had been violated by the televising and broadcasting of judicial proceedings pursuant to the state canon. The Court reached this decision because the defendants did not attempt to offer evidence that any juror or participant in their case...

44. Id. at 551-52, ("The ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today.").

45. Id. at 595 (Harlan, J, concurring).

46. Id.

47. Validity, Propriety, and Effect of a Allowing or Prohibiting Media's Broadcasting, Recording, or Photographing Court Proceedings, supra note 26, ("The American Bar Association's Committee on Trial Free Press proposed that television, radio, and photographic coverage of judicial proceedings can be permitted whenever the trial judge determined that such coverage would be unobtrusive and would not distract the attention of trial participants, however the proposal was not adopted by the Association's House of Delegates.").


49. Id. at 574-75.

50. Id. at 579, 581-82.
had been affected by the presence of cameras. As such, the Court did not find that the trial had been compromised by television coverage.51

In reaching its decision in *Chandler*, the Court debated as to whether its holding conflicted with the holding in *Estes* and, therefore, should overturn *Estes*.52 Justice Stewart, concurring in the result, would have overruled the Court's finding that broadcasting over a defendant's objections was sufficient to violate due process, with or without actual prejudice.53 Justice White concurred and also agreed that *Estes* should be overruled in *Chandler*, since *Estes* was in conflict under both a broad reading which establishes a *per se* constitutional rule against televising any criminal trial if the defendant objects and a more narrow reading which forbids the televising of only widely publicized and sensational criminal trials.54

In an opinion by Chief Justice Burger, the Court stated that *Estes* did not represent a *per se* constitutional rule barring still photographic, radio, and television coverage in all cases because Justice Harlan's opinion in *Estes* limited the scope of that holding. As such, the Court did not overrule *Estes*.

In 1983, the United States Court of Appeals for the Eleventh Circuit affirmed that Federal Rule 53, which prohibits televising, broadcasting, recording, and photographing proceedings, and Local Rule 20 did not violate the First or the Sixth Amendment of the United States Constitution.55 In *United States v. Hastings*, the Appellants, media entities, and the defendant wanted the trial court to permit the use of television and other electronic recording devices during trial so that the judge's reputation could be restored.56 The Court noted that it would not address appellants' argument that Rule 53 does not, by its terms, ban television because "the time for serious consideration had long since passed."57 The Court analyzed the ruling in *Globe Newspaper Co. v. Superior Court*, which held that the press and public have the same right of access to observe criminal trials, and derived the "right of access" to mean the media's right to attend, listen, and report on trials as they always had and not to include a right to broadcast.58 The Court found that the appellants' claim

51. *Id.* at 560.
52. *Id.*
53. *Id.* at 583.
54. *Id.* at 587.
56. *Id.* at 1280.
57. *Id.*
resembled the claim rejected in *Nixon v. Warner Communications, Inc.*, the Watergate tape case. There, the Court denied Warner Communications' assertion of a First Amendment right to copy and publish the Watergate tapes after the trial had began. The Court also held that the Sixth Amendment does not require any part of a trial be broadcast live or on tape to the public.

**B. Current Federal Broadcasting Rules**

In 1996, the Judicial Conference of the United States decided to prohibit electronic media coverage of Federal District civil and criminal proceedings, while the Circuit Council adopted a policy authorizing Federal appellate courts judges to allow broadcasting at their discretion. In 2007, only the Second and Ninth Circuits permitted broadcasting during courtroom proceedings.

Broadcasting bans now include the use of Twitter. In *United States v. Shelnutt*, a reporter for the *Columbus Ledger-Enquirer* was denied his request to use his handheld electronic device to send "tweets" to the newspaper's Twitter page, which would then be available to anyone who visited the newspaper's Twitter page. In *Shelnutt*, the District Court for the Middle District of Georgia held that reporters could not tweet during a criminal trial because such activity violated Rule 53, and that Rule 53 does not unconstitutionally restrict the freedom of the press under the First Amendment. The court found that the term "broadcasting" in Rule 53 includes sending electronic messages from a courtroom that contemporaneously describes the trial proceedings and are instantaneously available for public viewing.


60. *Nixon*, 435 U.S. at 610.

61. *Hollingsworth*, 130 S. Ct. at 711 ("In 1996, the Judicial Conference of the United States adopted a policy opposing the public broadcast of court proceedings.").

62. Validity, Propriety, and Effect of a Allowing or Prohibiting Media's Broadcasting, Recording, or Photographing Court Proceedings, *supra* note 26, at § 2a, ("Federal District criminal and civil proceedings have been prohibited by a directive of the Judicial Conference. Federal appellate courts, in contrast, have been authorized by the conference to use their discretion in determining whether to allow electronic media coverage of appellate arguments.").

63. *Id.*

64. *Id.*

65. *Id.*


67. *Id.*
In reaching its decision, the court determined that although the term "broadcasting" is typically associated with the dissemination of information via television or radio, its plain meaning is broader. The court looked at the definition of the word "broadcast" in *Webster's Third New International Dictionary* and concluded that the definition of "broadcast" includes "casting or scattering in all directions" and "the act of making widely known." Relying heavily on the 1983 broadcasting case, *Hastings*, the court concluded that the drafters of Rule 53 intended to extend the Rule's reach beyond the transmission of trial proceedings through television and radio.

In 2010, the Supreme Court stayed the Northern District of California from broadcasting the trial challenging Proposition 8. The Court analyzed the District Court's local rule amendment, the harm caused to potential parties, and the Court's interest in overseeing the judicial system. The Court upheld that district courts have discretion to adopt local rules that allow the broadcasting of courtroom proceedings, so long as the adoption or amendment process follows federal law. In a 5-4 split, the majority determined that the Northern District's local rule amendment allowing the recording and transmission of certain court proceedings through a "pilot program" violated federal law because the District Court had failed to give the public proper notice and opportunity for comment on the pilot program. The dissent found otherwise, making four determinations: first, that the broadcasting amendment was proper; second, that the Court's certiorari was improper; third, that broadcasting would not cause harm; and fourth, that no fair balancing of equities could support issuance of the stay. The Court stated that it "resolve[d] the [broadcasting] question without expressing any view on whether such trials should be broadcast"; however, in explaining their determinations both the majority and minority analyzed whether broadcasting the courtroom proceedings would cause

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68. *Id.*
69. *Id.* at *2–3.
70. *Id.* at *4.
71. *Id.* at *3.
73. *Id.* at 715.
74. *Id.* at 710.
75. *Id.* at 709.
76. *Id.* at 715–19.
irreparable harm. Ironically, the Prop 8 trial was not broadcast over television but was still broadcast using Twitter.\textsuperscript{77}

C. State Laws Regulating Broadcasting in the Courtroom

Rules regulating broadcasting in the courtroom vary state by state.\textsuperscript{78} Like Federal rules, most states' media regulation rules define "cameras in court" to include photographing, recording, and broadcasting from inside the courtroom.\textsuperscript{79} State restrictions on broadcasting and cameras in the court generally fall into three groups.\textsuperscript{80}

The first group includes nineteen states that allow the broadest coverage, giving broad discretion to the presiding judge.\textsuperscript{81} The second group includes sixteen states that prohibit coverage of important types of cases, or when witnesses object to broadcasting their testimony.\textsuperscript{82} The third group includes fifteen states that allow appellate coverage only, or that have such restricting trial coverage rules which essentially prohibit coverage.\textsuperscript{83} Most of these states only allow appellate court coverage or coverage at the consent of all parties.\textsuperscript{84}

California falls into the first group, allowing broadcasting at the judge’s discretion.\textsuperscript{85} Rule 1.150 of the California Rules of Court authorizes judges to allow photographing, recording, and broadcasting in court as long as the fairness and dignity of the courtroom proceedings are not adversely affected.\textsuperscript{86} The Rule

\textsuperscript{77} Eskenazi, \textit{supra} note 15.

\textsuperscript{78} Kathleen Kirby, \textit{Cameras in the Court: A State-By-State Guide} (May 25, 2007), available at http://www.rtdna.org/pages/media_items/cameras-in-the-court-a-state-by-state-guide55.php (Interactive website which allows users to read the current law regarding cameras and microphones in the courtroom. While the site does not directly categorize broadcasting specifically, the three-tier breakdown still applies.).

\textsuperscript{79} Id.

\textsuperscript{80} Id.

\textsuperscript{81} Id. (California, Colorado, Florida, Georgia, Idaho, Kentucky, Michigan, Montana, Nevada, New Hampshire, New Mexico, North Dakota, South Dakota, South Carolina, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming).

\textsuperscript{82} Id. (Alaska, Arizona, Connecticut, Hawaii, Indiana, Iowa, Kansas, Massachusetts, Missouri, North Carolina, New Jersey, Ohio, Oregon, Rhode Island, Texas, and Virginia).

\textsuperscript{83} Id.

\textsuperscript{84} Id. (Alabama, Arkansas, Delaware, Illinois, Louisiana, Maine, Maryland, Minnesota, Mississippi, Nebraska, New York, Oklahoma, Pennsylvania, South Dakota, and Utah).

\textsuperscript{85} Kirby, \textit{supra} note 78.

\textsuperscript{86} \textit{CAL. R. OF CT.} 1.150.
requires a media request to first be filed with the court at least five
court days before the proceeding unless good cause is shown. 87
Further, the judge may hold a hearing on the request or may rule on
the request without a hearing. 88 The California rule does not create a
"presumption for or against granting permission to photograph,
record, or broadcast court proceedings" and leaves to the judge's
discretion the use of cameras in all areas. 89 According to Rule 1.150,
the judge should consider the following eighteen factors, as well as
any other factor the judge deems relevant: 90

1. The importance of maintaining public trust and
   confidence in the judicial system;
2. The importance of promoting public access to the judicial
   system;
3. The parties' support of or opposition to the request;
4. The nature of the case;
5. The privacy rights of all participants in the proceeding,
   including witnesses, jurors, and victims;
6. The effect on any minor who is a party, prospective
   witness, victim, or other participant in the proceeding;
7. The effect on the parties' ability to select a fair and
   unbiased jury;
8. The effect on any ongoing law enforcement activity in the
   case;
9. The effect on any unresolved identification issues;
10. The effect on any subsequent proceedings in the case;

87. Id.
88. Id.
89. Id. at §a.
90. Fact Sheet: Cameras in California Courts, JUDICIAL COUNCIL OF CALIFORNIA
    /camerasc.pdf.
11. The effect of coverage on the willingness of witnesses to cooperate, including the risk that coverage will engender threats to the health or safety of any witness;

12. The effect on excluded witnesses who would have access to the televised testimony of prior witnesses;

13. The scope of the coverage and whether partial coverage might unfairly influence or distract the jury;

14. The difficulty of jury selection if a mistrial is declared;

15. The security and dignity of the court;

16. Undue administrative or financial burden to the court or participants;

17. The interference with neighboring courtrooms;

18. The maintenance of the orderly conduct of the proceeding.

While most states have a system that allows some form of broadcasting, the third group of states has decided to completely ban broadcasting devices. Maryland recently proposed legislation that would prohibit electronic devices in the entire courthouse by not allowing people to enter the courthouse with electronic devices. Florida is also considering a similar policy. While there are instances in which the courts may need to limit the Press’ ability to broadcast during trial, especially when due process is at risk, this policy creates a presumption against allowing broadcasting.

91. Tricia Bishop, New Rule Could End Tweets from Trials Statewide, Policy would bar Electronic Devices in Courthouses, THE BALTIMORE SUN (Feb. 22, 2010), available at http://www.baltimoresun.com/news/maryland/bal-md.twitter22feb22,0,2718213.story (“A Baltimore judge last month banned posts to such sites from the Circuit Court, as Mayor Sheila Dixon’s much-Tweeted corruption case wrapped up. And though the rule targeted media, it affected everyone. This new ban would be much wider.”).

92. Id. (“Florida is considering a statewide policy, as is Maryland, where the Standing Committee on Rules of Practice and Procedure also looked at a blanket policy in October, but members voted against it 11 to 5. The issue was resurrected last month, however, after Robert M. Bell, chief judge of the Maryland Court of Appeals, requested it.”).

93. Id.
D. Legislative Efforts

Legislative attempts to allow media coverage of Federal court proceedings in the Supreme Court, Appellate Courts, and District Courts have failed. Currently, the 111th Congress has introduced and referred to the committee the Sunshine in the Courtroom Act of 2009. The Sunshine in the Courtroom Act would allow the presiding Federal District Court or Appellate Court judge to permit electronic media coverage of court proceedings. If adopted, this measure would allow the public a greater understanding of the judicial process by making it more transparent, as well as granting access to Federal judicial proceedings in a way that promotes fairness. However, the Senate and House of Representatives have introduced similar bills over the last five years, none of which have passed.

III. Analysis

Broadcasting during courtroom proceedings is generally prohibited. There are several problems with this prohibition. First, the laws regarding broadcasting are overbroad. Second, allowing limited broadcasting will increase transparency and in turn increase communication and accountability. Third, courts across the nation are advocating types of broadcasting like Twitter in their courtroom despite the rules prohibiting broadcasting. Overall, it appears that the potential problems associated with authorizing judges to allow broadcasting during courtroom proceedings are significantly outweighed by the benefits of allowing broadcasting in both civil and criminal trials.

A. Broadcasting Prohibitions are Overbroad

Federal and state rules which prohibit broadcasting during courtroom proceedings are overbroad because the word "broadcast" applies equally to very different means of transmitting information. In federal courts, the language of Rule 53 does not distinguish between different types of broadcasting because it applies equally to cameras, photographs, and broadcasting, all of which are electronic in nature but provide very different types of coverage during judicial

96. Id.
proceedings.\textsuperscript{98} Originally, Rule 53 prohibited radio broadcasting.\textsuperscript{99} In 2002, the Advisory Committee deleted the word "radio" and instead used the word "broadcast." The amendment was not meant to be a substantive change, but rather a change that harmonized with judicial interpretation by applying the current rule to broadcasting and other functionally equivalent means.\textsuperscript{100} However, as nice as this sounds, it is simply not true. The reason the Advisory Committee note is a substantive change is because the amendment expands the previous regulatory justifications to all broadcasting technologies (past, present, and future), regardless of their individual limitations.

The term "broadcast" has several meanings. According to the Merriam-Webster Online Dictionary, the term "broadcast" means "to [c]ast or scatter in all directions;" "[m]ake public by means of radio or television," or "[o]f or relating to radio or television broadcasting."\textsuperscript{101} The first definition, "to cast or scatter in all directions," can apply to radio waves, television, satellite, print, YouTube, text messaging a tweet, and publishing. The second and third meanings seem to apply to just radio and television. Arguably, broadcasting by using tools like Twitter does not fall under the second or third definition, and the first definition of the word would be far too broad.

Cameras, photographs, and broadcasting all portray what is happening in a court proceeding but differ significantly in their dissemination capabilities. Cameras provide the most coverage because they allow viewers to both see and hear what is happening directly. As a result, courts have prohibited live video broadcasting when it will result in a violation of the Due Process Clause.\textsuperscript{102} Courts have recognized that witness testimony may be chilled if broadcast.\textsuperscript{103} Cameras can turn trials into a "theatrical performance," and negatively affect judicial proceedings.\textsuperscript{104} Further, while cameras allow an individual to interpret what they see, if the cameras do not cover the entire trial the viewers are left with a less than complete story.

\textsuperscript{98} FED. R. CRIM. P. 53.
\textsuperscript{99} Id. (advisory committee's note on 2002 amendment).
\textsuperscript{100} Id. (emphasis added).
\textsuperscript{102} Estes, 381 U.S. at 532.
Perhaps the most widely publicized trial in American history is the O.J. Simpson murder case. During the trial, one camera allowed millions of people to watch the courtroom trial on their televisions. Subsequent judges have denied the use of cameras in their courtrooms, pointing out that the Simpson trial was a “circus.” Coincidently, while a great deal of people, both the public and media alike, blame cameras for causing the “circus,” the camera captured what it saw. Before the camera entered the courtroom, the trial was already a high profile murder case involving an American Football star and his ex-wife. While it is very likely that cameras added more incentive to “perform,” the truth of the matter is that the attorneys representing either side were already prepared to do just that for the jury. The case was already controversial; cameras simply allowed more people to join the debate.

In the Proposition 8 case, the Supreme Court’s stay order stated that it did not express any view on the question of whether federal trials should be broadcast. Nevertheless, in determining whether to grant a writ of certiorari, four Justices of the Court must determine that irreparable harm will result from the denial of a stay to broadcast the trial. The dissent argued, “[n]either the applicants nor anyone else ‘has been able to present emperical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse affect’ on [the judicial process].” Proponents of camera coverage in the courtroom further argue that camera coverage benefits the public because it helps the public learn about our legal system. This argument will be discussed in Section B of Part III.

105. Id. (“Because of this lone television camera, millions of people throughout the world followed every detail of the O.J. Simpson’s murder trial. It was the theater of the century. Never before has a defendant so truly received his right to a ‘public’ trial guaranteed by the Constitution of the United States. And never has the public had greater access to a U.S. courtroom.”).

106. Id.

107. Id. at 5 (During the Richard Allen Davis first degree murder trial, Judge Lawrence Antolini denied cameras in his courtroom. Richard Allen Davis trial was accused and later convicted of abducting and murdering twelve-year-old Polly Klaas from her Petaluma home.).

108. Hollingsworth, 130 S. Ct. at 710.

109. Id. at 718 (Breyer, J., dissenting) (alteration in original).

110. Cohn & Dowd, supra note 104, at 7 (“I think people know less about the judiciary and legal system than the other branches of government,’ opines Professor Chemerinsky. Broadcast coverage, he says, may be the only readily-available check citizens have over the judiciary. ‘If people see that there was a fair trial,’ he notes, ‘confidence in the judiciary is inspired. If people see that there wasn’t a fair trial, then people can take remedial steps and react in the appropriate way.’”).
Even if cameras are, as some consider, too intrusive, other forms of broadcasting are less intrusive and less harmful. In Estes, Justice Harlan’s concurred:

The distinctions to be drawn between the accouterments of the press and the television media turn not on differences of size and shape but of function and effect. The presence of the press at trials may have a distorting effect, but it is not caused by their pencils and notebooks. If it were, I would not hesitate to say that such physical paraphernalia should be barred. 111

Unlike cameras, broadcasting through Twitter, which is limited to written text, does not provide direct visual or sound coverage of a trial. Instead, those receiving broadcasts must read the information they receive in a manner similar to that of a newspaper.

Twitter resembles immediate note-taking that others can follow. 112 Judge Tom Marten of the U.S. District Court for the District of Kansas agrees with that logic and recently commented that he did not “see any difference between this and a journalist sitting there taking notes.” 113 In fact, it is surprising how much the Twitter world resembles that of a newspaper—a newspaper in which the reader chooses which opinion editors to read and which to ignore. 114

The Shelnutt court did not properly discuss why tweeting is unlike the broadcasting of audio or visual information in reaching its decision to include Twitter under the blanket prohibition of Criminal Procedure Rule 53. 115 Hopefully, subsequent courts will make this distinction since the coverage that each type of broadcasting provides differs.

In State courts that allow media coverage, some state court local rules, like California’s, require the requesting party to indicate the type of media coverage requested in their application. 116 Thus, these local rules acknowledge the differences in the types of coverage that

113. Id.
116. CAL. R. CT. 1.150.
broadcasting devices will provide and allow the judge to consider those differences when reviewing media requests. Simply put, these types of court rules allow judges to approach broadcasting in the courtroom using an open-minded case-by-case assessment.

B. Allowing Twitter in Courtrooms Will Increase Transparency in the Judicial System

It is well-established that greater transparency helps enhance the public's trust and confidence in the judicial process.\textsuperscript{117} Despite the interest in high-profile cases, the judicial process has and continues to be something that Americans don't quite understand.\textsuperscript{118} A 2009 C-SPAN Supreme Court Survey found that sixty-one percent of Americans would like to see cameras in the courtroom.\textsuperscript{119} While this number cannot speak to the use of other broadcasting tools, it indicates that Americans want to know more about the courts.\textsuperscript{120}

Since the court functions as the location where the public experiences justice at work, it is important for the public to have access to the judicial branch in our system of democracy and open government.\textsuperscript{121} Traditional "access" is available because the courts are open for the public to physically attend. Just as physical access is available to the public, electronic access which allows individuals to follow while trials are happening in courtrooms should also be made available. If courts have the ability to provide the public "access" to court proceedings through broadcasting, then courts should so that the public can "attend" high-profile cases.\textsuperscript{122}

\textsuperscript{117} Senator Arlen Spector, Democrat Pennsylvania, Senate Session (Nov. 5, 2009, at minute 281), available at http://www.c-spanvideo.org/program/289817-1\&start=16002\&stop=17022 (stating that "In a democratic society, there should be transparency at all levels of government. The judicial independence of the Supreme Court is enormous – it is of vital importance to be maintained and they have life tenure. But to reason the American people should not understand what they are doing . . . .”).

\textsuperscript{118} See Johnson, supra note 2.

\textsuperscript{119} Penn, Schoen & Berland Associates, C-SPAN Supreme Court Survey, C-SPAN (July 9, 2009), available at http://www.c-span.org/pdf/C-SPAN%20Supreme%20Court%20Online%20Survey_070909_6pm.pdf (conducting online interviews on June 7, 2009, among 1,002 2008 general election voters in the United States. "The margin of error for the entire sample is +/- 3.1 at the 95% confidence level and larger for subgroups. Question 10: The U.S. Supreme Court currently does not allow television coverage of its sessions. Please indicate if you strongly agree, somewhat agree, somewhat disagree or strongly disagree that the U.S. Supreme Court should allow television coverage of its sessions.”).

\textsuperscript{120} Id.

\textsuperscript{121} Spector, supra note 117.

Nevertheless, increasing transparency in the courtroom by allowing broadcasting is subject to a balancing test to protect citizen's fundamental due process rights. The Legislature has attempted to pass a bill that would broaden the scope of court coverage while balancing the need to protect due process, but these attempts have failed. Justice Louis Brandeis once wrote, "Sunlight is said to be the best of disinfectants." Coincidently, the Sunshine in the Courtroom Act proposes to allow broadcasting and addresses the problems that broadcasting may present by allowing courtrooms to broadcast but also allowing judges to use their discretion. The bill emphasizes the importance of judges being appropriately careful that media coverage of court proceedings will not impair a citizen's fundamental right to a fair and impartial trial. Many opposed to broadcasting courtroom proceedings have argued that allowing reporters to broadcast in the courtroom will harm due process and privacy rights of participants in federal judicial proceedings by opening them to intrusive electronic media. Essentially, the concern is that allowing broadcasting will result in too much transparency. It is true that an individual's willingness to testify before a judge or jury may be impacted by the scope of media coverage and therefore affect an individual's willingness to file a claim or testify. However, these are not concerns that should be remedied by making public "access" to courts more difficult.

A witness who is testifying under oath should not be deterred from telling the truth depending on whether a person is physically watching the trial from inside the courtroom, watching the trial from a computer, or reading a reporter's posting on Twitter. Furthermore, even if a witness's privacy was protected by not allowing a reporter to tweet while in the courtroom, the reporter transmitting information once outside the courtroom would infringe on the same privacy

125. Justice of the United States Supreme Court Louis Brandeis, Other People's Money—and How Bankers Use It (1914) (stating that "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."); see also H.R. 2128 ("As Judge Louis Brandeis once said, 'Sunshine is the best disinfectant.'").
127. Id.
128. Id.
129. Id. at 2 ("The prospect of public disclosure of all personal information may have a material effect on our individual's willingness to testify or place an individual at risk of being a target for retribution or intimidation.").
rights. The courts that require reporters to step outside to broadcast do so because of disruption concerns. As long as the electronic transmission of tweets is not disruptive, the difference between a reporter taking notes by paper and a reporter taking notes on their electronic device is a small one, and the latter does not require the reporter to step outside the courtroom to subsequently type the notes on their electronic device.\footnote{130}

Others argue that Twitter is not appropriate in courtrooms because it is an Internet-based website, “trendy,” and therefore not reliable as a form of important communication. If that is true, why are so many people using Twitter? In the midst of the worst economic crisis in generations, Twitter continues to grow.\footnote{131} Twitter has over one million users.\footnote{132} This is in part because people want to communicate with each other. Tools like Twitter allow people to stay instantly connected and to have conversations about what is happening, wherever they may be.\footnote{133} Before the age of blogs, newspaper coverage of trials was limited to the result of the case. Bob Egelko of the \textit{San Francisco Chronicle} commented on how the use of blogging tools like Twitter has provided more trial coverage for readers who are interested in knowing more about the case, but who previously would have been unable to get that information since traditional printed newspapers limit the amount a reporter can write about a case.\footnote{134} This is in part because newspaper production continues to be very expensive\footnote{135} and reporters are limited in the amount of words they can publish, which results in limited coverage of an already limited amount of cases. Micro-blogging sites like Twitter, on the other hand, are free.\footnote{136}

An increase in case coverage availability and accessibility raises the issue of the influence of Twitter and other similar networking and microblogging websites on public opinion and mass media. This opposition to Twitter in the courtroom highlights the problems

\footnote{130}{See Cohn & Dow, supra note 104.}
\footnote{131}{See Twitter Snags over 100 Million Users, Eyes Money-Making, supra note 12.}
\footnote{132}{Id.}
\footnote{133}{See TWITTER, supra note 7.}
\footnote{134}{Bob Egelko, \textit{San Francisco Chronicle} Reporter, Speaker at the University of California, Hastings Law Journal Symposium: Democracy and the Courts Symposium (Feb. 19, 2010).}
\footnote{136}{See TWITTER, supra note 7.}
associated with making unreliable and unaccounted-for individual trial opinions too readily available. Unlike judicial opinions, books, articles and television, Twitter has no editorial oversight. Anyone with email and Internet access can tweet about whatever they want, regardless of its validity. The fear is that the Internet allows one person to post an opinion or position that lacks any merit, or an allegation that is untrue. This kind of report would never make it into a newspaper or evening news without having its source and credibility first verified. This individual may succeed in posting flyers in public places but those efforts will face geographical limitations. As a result, because the Internet bypasses traditional limitations, one person with one voice can post hundreds of times on various websites using various blogs and other Internet tools. This can pollute the Internet with misinformation relating to a pending trial. This issue also raises the questions of how to ensure reporters broadcast accurate information and how to stop others from reposting inaccurate information.

While this may prove to be the case, preventing reporters from being able to tweet while in a courtroom versus outside of court will not stop the misinformation pollution of Twitter itself, and more importantly, will not stop people from wanting to get and share information. Users will simply find another means to communicate the information they want to share. Also, certain tweeters (like @FedCourtJunkie) could gain trustworthy reputations in the same way newspapers do.

Among those who seek additional information are jurors. The majority of criticism against the use of broadcasting stems from the fear that allowing broadcasting during trial will result in the obstruction of justice through juror misconduct. Jurors are not allowed to communicate with anyone about the case since such communication, regardless of the way in which it is made, violates a jurors’ oath. Jurors take an oath to refrain from outside research.

137. See Hylton, supra note 14.
138. Kathy E. Gill, Senior Lecturer, Univ. of Wash., How Can We Measure the Influence of the Blogosphere (May 17-22, 2004).
140. Id. ("[M]odel jury instructions (.pdf) the Judicial Conference released to the federal judiciary in late January specify: You may not communicate with anyone about the case on your cellphone through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any Internet chat room, or by way of any
Today, this oath extends to jurors searching the Internet. There have been instances in which jurors have used their phones to broadcast during trial. Twitter comments by jurors have included statements such as “I just gave away TWELVE MILLION DOLLARS of somebody else’s money!” In another case, a juror wrote, “gonna be fun to tell the defendant they’re guilty” as her Facebook status before the prosecution finished its case. The court subsequently filed contempt charges against that juror.

Jurors who violate this oath by communicating and conducting online research do so as the risk of facing charges of contempt of court. As a result of this abuse, some courts have proposed banning cell phones from courtrooms entirely. Juror misconduct can occur as a result of tweeting from the jury box however, entire bans on cell phones to prevent broadcasting is not an appropriate remedy because this solution will be overbroad and time consuming. Limiting the information available to the public in response to a fear of jury misconduct misses the real problem, which is that today’s generation expects to use technology to get the information it wants instantly. The average person is no longer used to sitting for long periods of time, especially without access to the Internet. Requiring people to check in their cell phones before entering court buildings will not be well-accepted by citizens waiting in jury pools, may result in significantly longer lines, and may further deplete the court’s already limited resources.

other social networking websites, including Facebook, MySpace, LinkedIn and YouTube.”)

141. Id.
142. Id.
145. Id.
146. Id.
148. See generally Bilton, supra note 114.
149. Id.
150. See generally Varavong, supra note 20.
C. Judges Across America Have Allowed Twitter in Their Courtrooms

Not all courts have banned Twitter in the courtroom. Several courts have found the use of Twitter appropriate and opened their courtroom doors to the press for a variety of reasons, including allowing more transparency. Judge Marten, the same judge who commented that he does not see a difference between tweeting and a reporter taking hand notes, has allowed reporters to post live Twitter updates straight from trial.

Reporter Ron Sylvester of the Wichita Eagle started using Twitter during courtroom proceedings in 2007 during a capital murder case. The Kansas newspaper reporter was able to use Twitter to instantly update interested readers who would otherwise be unable to attend or follow the trial. Sylvester’s use of Twitter also gave readers an opportunity to read a more detailed story than would normally be available in a newspaper. Sylvester himself is an advocate of open courtrooms. He states that “[w]hile the public [is] obviously allowed in the courtroom, for many people, that’s not how they want to learn about what goes on... [u]pdates weren’t coming fast enough and they weren’t coming often enough, but generally, [readers] liked the idea of being able to follow a court case throughout a day.”

Federal Judge Federico Moreno of the United States District Court of the Southern District of Florida chose not to allow reporters to post live on websites such as Twitter while directly in the courtroom, but allows reporters to step outside to the hall to do so. This approach is a middle ground for judges who advocate for more open courts, but who are also sensitive to the possible disruption of using electronic devices while in a courtroom.

Iowa Federal Judge Mark Bennet also agreed that transparency is lacking in the judicial branch and addressed the argument that allowing reporters to tweet from the courtroom is distracting. He

152. See Marek, supra note 112.
153. Id.
154. Id.
155. Id.
156. Id. ("Stories in the Kansas newspaper rarely top 25 inches, he said, but this time, thanks to a judge’s ruling, readers could follow Sylvester’s full account online through Twitter, the micro-blogging tool.")
157. Id.
158. Id.
159. Id.
believes transparency could be remedied, at least in part, by enabling the media to cover court cases using different tools. Judge Bennett allowed a reporter to micro-blog from a tax fraud trial, so long as the reporter sat towards the back of the courtroom. The judge explained that sitting in the back of the courtroom would ensure that the reporter would cause minimal distraction with her typing. Sitting in the back of the courtroom may also reduce the “feedback” noise that can occur when cell phones get to close to the court microphones.

IV. Proposal

Broadcasting in both federal and state courts should be authorized, allowing judges to use their discretion to balance the scope of broadcasting against the need to protect individuals’ rights. Broadcasting prohibitions in federal court should not extend to all broadcasting and other functionally equivalent means, but rather allow judges to distinguish the types of coverage that different forms of broadcasting provide. Judges will be able to balance these needs by requiring reporters who want to broadcast during trial to make a written media request to the judge, indicating the scope and type of broadcasting coverage sought. This written request will allow the judge to address any potential broadcasting problems, such as a parties who do not want the trial broadcast or trials in which witnesses are uncomfortable with their testimony being broadcast. Most importantly, the judge will know whether an individual wants to take pictures, video, or tweet. A judge who is opposed to cameras can still allow the broadcasting of notes. While this middle ground would still allow judges to restrict cameras in the courtroom, it will make news regarding trials available instantly and in larger quantities than ever before.

The written request will also serve as an agreement between the judge and reporter. The reporter’s request indicates the type of coverage the reporter desires and the scope of that coverage. For example, a reporter may request to bring a cell phone to tweet during the entire trial. The judge may decide that certain witnesses need to be protected, perhaps because they are minors, and thus limit the reporter’s ability to broadcast during their testimony. The reporter

160. Id.
161. Id.
162. Id.
will be able to tweet as allowed per the agreement with the court. The court can rely on this agreement in the event that the reporter deviates from the coverage indicated in the media request and exceeds the scope of permitted coverage. The court could perhaps punish these individuals with a fine or prevent them from broadcasting in courts again, or in some cases punish the reporter as if he or she violated violating a court order. A judge’s approval or denial of broadcasting requests should be subject to review under an abuse of discretion standard.

Banning cell phones altogether in court is not an effective solution. Aside from creating mayhem for court security and court staff by requiring courts to allocate additional resources that do not exist, it will further inconvenience attorneys representing clients and individuals summoned for jury duty. Furthermore, allowing people more access to the courts through electronic communication will not dilute the sanctity of court, but rather will increase transparency.

The laws regarding broadcasting in courtroom should start from a position that allows broadcasting and then restricts such broadcasting depending on the courtroom and the case. In particular, reporters should be able to use their electronic devices to tweet in both civil and criminal trials so long as they have provided the court with a media request in advance, thus ensuring that reporters will not disrupt due process.

V. Conclusion

In conclusion, reporters should be allowed to broadcast using micro-blogging tools like Twitter. While both the legislatures and courts have tried to address the issue of whether to allow the broadcasting of court proceedings, neither has truly succeeded because there are still many courts which altogether ban judges from authorizing broadcasting. Restrictions on broadcasting courtroom proceedings do not reflect the huge societal communication shift as a result of the Internet. Websites like Twitter represent modern channels for communication and access. The courts cannot ignore these changes and continue to rely on laws that are overbroad. Judges should have the discretion to allow reporters to broadcast in order to provide open and public trials, except for cases in which due process will be violated. Allowing Twitter in the courtroom will increase transparency and public understanding of the judicial process. Through Twitter, Americans will have the opportunity to follow and discuss what is happening inside our legal system as it is happening.