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*Jacob E. Dean**

I. INTRODUCTION

> The qualities that make Twitter seem inane and half-baked are what makes it so powerful . . . .[1]
>
> —Professor Jonathan Zittrain[2]

So what exactly is Twitter? Twitter is a "microblogging" site that allows registered users to answer one question—"what's happening?"—in 140 characters or less.[3] A microblog works much the way a conventional blog does, only with a character limit.[4] Answers to this singular question, known as "tweets," can be sent via mobile texting, instant message, or the internet.[5] In fact, the 140 character limit was imposed specifically to allow tweets to be sent via text message (SMS).[6] Creating a Twitter account is free, and tweets can be easily integrated with other forms of mass communication, such as websites, blogs, and social networking sites.[7]

Twitter is ubiquitous. As evidence, consider the following results of three simple Google searches. The first search, for Twitter, produces 1.26 billion results.[8] A second search for the most important substance

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1. Noam Cohen, *Twitter on the Barricades: Six Lessons Learned*, N.Y. TIMES, June 20, 2009, *available at* http://www.nytimes.com/2009/06/21/weekinreview/21cohenweb.html.

2. Professor Jonathan Zittrain is a professor at Harvard Law School and the co-founder and faculty co-director of the Berkman Center for Internet & Society. Jonathan Zittrain, Berkman Ctr. for Internet & Soc'y, http://cyber.law.harvard.edu/people/jzittrain (last visited April 12, 2010).

3. What Twitter Does, http://www.Twitter.com/about (last visited Jan. 29, 2010).

4. Denise Oliveri, *What is Twitter and How does it Work?*, SUITE101.COM, Jan. 3, 2009, http://onlinepublishing.suite101.com/article.cfm/what_is_twitter_and_how_does_it_work.

5. What Twitter Does, *supra* note 3.

6. Twitter on Your Phone, http://twitter.com/about (last visited Apr. 14, 2010).

7. Oliveri, *supra* note 4.

8. *See* Google Search: Twitter, http://www.google.com (last visited Jan. 29, 2010).

to human existence—water—produces 771 million results.[9] A third search for the last name of the President of the United States—Obama—only returns 189 million results.[10] While these results permit questions regarding society's priorities, it is clear that Twitter has staked a foothold in today's world.

In addition to the unsurprising coverage Twitter receives from news services and tabloids,[11] Twitter's recent surge in popularity[12] has also pushed the San Francisco-based service into a much different forum—federal courtrooms. In at least two cases over the last two years, federal district judges have faced the same Twitter question head-on: Should members of the press be allowed to report on federal criminal trials directly from the courtroom via Twitter? In one case a judge answered *yes*, in the other *no*. In reaching their respective conclusions, each judge relied on a different Federal Rule of Criminal Procedure.

Judge Clay Land, of the U.S. District Court for the Middle District of Georgia, denied a newspaper reporter's request to update his newspaper's Twitter account using his "handheld electronic device (*e.g.*, a BlackBerry or cellular telephone)" during a criminal trial.[13] In reaching this decision, Judge Land determined that Twitter was "broadcasting" for purposes of Federal Rule of Criminal Procedure 53 and was, therefore, prohibited.[14]

In contrast, Judge Thomas Marten, of the District of Kansas, allowed a reporter from the *Wichita Eagle* to tweet, from the courtroom, live updates of the racketeering trial of six Crip gang members.[15] Judge Marten cited Federal Rule of Criminal Procedure 57(b), which grants a

9. *See* Google Search: Water, http://www.google.com (last visited Jan. 29, 2010).

10. *See* Google Search: Obama, http://www.google.com (last visited Jan. 29, 2010).

11. *See, e.g.*, Ryan Singel, *Twitter Ads Test Billion-Dollar Valuation*, WIRED, Apr. 13, 2010, http://www.wired.com/epicenter/2010/04/twitter-tests-worth/; Lance Whitney, *Bing Rolls Out Real-Time Twitter Feed*, CNET NEWS, Apr. 14, 2010, http://news.cnet.com/8301-10805_3-20002454-75.html; Josh Rottenberg, *Jim Carrey Responds to Flap Over Twitter Posts*, ENT. WKLY., Apr. 13, 2010, http://news-briefs.ew.com/2010/04/13/jim-carrey-responds-to-flap-over-twitter-posts/; Editorial, *Jessica Simpson on Her Hair-Raising Twitter Uproar: It's 'So Funny to Me,'* ACCESS HOLLYWOOD, Apr. 13, 2010, http://www.accesshollywood.com/news/jessica-simpson-on-her-hair-raising-twitter-uproar-its-so-funny-to-me_article_31148.

12. This assertion presumes that internet hits equal popularity. *See, e.g.*, Nick Clark, *Facebook Overtakes Google*, INDEP. (London), Mar. 18, 2010, http://www.independent.co.uk/news/business/news/facebook-overtakes-google-1923102.html. Also, a Google search on January 29, 2010 produced 1.26 billion results for "Twitter," but that amount increased to 1.41 billion by April 14, 2010. *See* Google Search: Twitter, http://www.gogle.com (last visited Apr. 14, 2010).

13. United States v. Shelnutt, No. 4:09-CR-14 (CDL), 2009 WL 3681827, at *1 (M.D. Ga. Nov. 2, 2009).

14. *Id.*

15. Associated Press, *As Witnesses Sing, Journo's Twitter Tweets*, CBSNEWS, Mar. 6, 2009, http://www.cbsnews.com/stories/2009/03/06/tech/main4847895.shtml.

judge broad discretion to regulate courtroom affairs.[16] He reasoned that allowing Twitter would open the judicial process to the public, which would lead to greater public understanding.[17] This understanding, he asserted, would lead to the public viewing the federal courts with greater legitimacy.[18]

These two examples reach different outcomes, but the underlying question is the same: Should Twitter have a place in federal criminal courts?[19] Before proceeding further, however, Judge Land's order raises a threshold question that must first be answered: *Can* Twitter have a place in federal criminal courts?

This Comment addresses both questions first by analyzing the history and purposes of Federal Rule of Criminal Procedure 53 in Part II. Part III discusses the First Amendment right of access to criminal trials and the role that the Sixth Amendment rights of an impartial jury and public trial play regarding this issue. Part IV argues that tweeting is not broadcasting and is therefore permissible under Rule 53, that Twitter's use should be encouraged by federal courts, and that Twitter is important as both a standalone technology and as a proxy for other new technologies. Finally, Part V concludes that courts should reexamine the issues surrounding broadcasting and determine that Twitter and other technologies further the First and Sixth Amendment rights to a public trial.

II. FEDERAL RULE OF CRIMINAL PROCEDURE RULE 53

Rule 53 of the Federal Rules of Criminal Procedure states: "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."[20]

Any discussion on the use of technology in federal criminal courts must start with this Rule because the Rule clearly prohibits "broadcasting" judicial proceedings. As Part I indicates, however, what

16. FED. R. CRIM. P. 57(b) ("A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance.").

17. Associated Press, *supra* note 15.

18. *Id.*

19. This Comment focuses solely on the issue as it applies to criminal cases in federal court proceedings. For an interesting discussion about the civil side of this issue, see the Supreme Court's recent decision in *Hollingsworth v. Perry*, regarding the challenge to California's Proposition 8 and the use of video in the courtroom. 130 S. Ct. 705 (2010).

20. FED. R. CRIM. P. 53 (emphasis added).

constitutes "broadcasting" is not always clear. Understanding this Rule and its history is essential to understanding whether Twitter should be termed "broadcasting," and therefore categorically prohibited by federal courts.

A. Background of the Federal Rules of Criminal Procedure

The genesis of the current Federal Rules of Criminal Procedure is Congress's enactment of 54 Stat. 688 on June 29, 1940.[21] This Act, codified at 18 U.S.C. § 3771, authorized the Supreme Court to prescribe general rules of criminal procedure prior to and including the verdict.[22] Pursuant to this Act, the Court adopted the original Federal Rules of Criminal Procedure in 1944 and transmitted them to Congress via the Attorney General in 1945.[23] The rules became effective on March 21, 1946.[24] Coupled with § 3772, which empowered the Supreme Court to prescribe rules for all the proceedings following a verdict, § 3771, though oft amended, governed federal criminal procedure until both sections were repealed in 1988.[25]

In 1988, Congress amended the Rules Enabling Act to grant the Supreme Court authority to prescribe rules of criminal procedure for federal district and appellate courts.[26] Congress passed this legislation "to improve the administration of justice in this nation."[27] Though the Court has the power to prescribe amendments under the Act, the Judicial Conference is authorized to recommend rules to the Court,[28] and does so using committees of judges and practicing attorneys.[29] Pursuant to the Act, the Court must submit to Congress any proposed amendments to the Rules by May 1 of a given year, and such amendments cannot take effect until December 1 of the year that the amendment was properly submitted.[30] The purpose of such amendments is "to maintain

21. THE COMM. ON THE JUDICIARY, 111TH CONG., FEDERAL RULES OF CRIMINAL PROCEDURE I, VII (Comm. Print 2009), *available at* http://judiciary.house.gov/hearings/printers/111th/crim2009.pdf.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *See* 28 U.S.C. § 2072(a) (2006).

27. H.R. REP. NO. 100-889, at 22 (1988).

28. 28 U.S.C. § 2073(a)(1) (2006). The Judicial Conference is a group of federal judges summoned every year by the Chief Justice of the United States Supreme Court to survey the condition of business in the federal courts. 28 U.S.C. § 331 (2006).

29. § 2073(a)(2).

30. 28 U.S.C. § 2074(a) (2006).

consistency and otherwise promote the interest of justice."[31] In achieving that end, Congress made clear that "[s]uch rules shall not abridge, enlarge or modify any substantive right."[32]

B. History of Rule 53

As originally worded, Rule 53 declared that, "[t]he taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court."[33] At the time of Rule 53's inclusion in the original Federal Rules of Criminal Procedure, the behaviors prohibited by the Rule were not problematic for federal courts.[34] Nevertheless, it was included to express "a standard which [would] govern the conduct of judicial proceedings."[35]

Rule 53 was amended nearly sixty years later as a part of a general restyling of the Federal Rules of Criminal Procedure.[36] This restyling effort sought to make the Rules more stylistically consistent and more easily understood.[37] The restyling of Rule 53 in 2002 was not without consequence with respect to the issue presented by Twitter in the courtroom. The word "radio" was removed from the Rule, leaving the word "broadcasting" as the current standalone second prohibition.[38] The Advisory Committee did not view the removal of "radio" as a substantive change.[39] Rather, it viewed the change as "one that accords with judicial interpretation applying the current [R]ule to other forms of broadcasting and functionally equivalent means."[40] The committee believed that a more generalized reference to "broadcasting" was appropriate given modern technological capabilities, while also recognizing that the Rule implicitly allows exceptions to the "broadcasting rules" for limited purposes under other Federal Rules of Criminal Procedure.[41]

31. § 2073(b).

32. 28 U.S.C. § 2072(b) (2006).

33. United States v. Cicilline, 571 F. Supp. 359, 361 (D.R.I. 1983), *aff'd* 740 F.2d 952 (1st Cir. 1984).

34. The issues had become problematic in state courts, so the adoption of the Rule was preventative rather than corrective. FED. R. CRIM. P. 53 advisory committee's note to 1944 adoption.

35. *Id.*

36. FED. R. CRIM. P. 53 advisory committee's note to 2002 amendment.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* (citing cases that prohibit television proceedings and tape recordings).

41. *Id.*

C. Purposes of Rule 53

Though the purposes of Rule 53 are not found neatly enumerated in a single source, themes begin to emerge as one reads about Rule 53 and similar rules of individual courts that regulate broadcasting. In having a rule such as Rule 53 in place, legislators and judges seem to be trying to ensure that at least two main objectives are met: judicial order and procedural fairness. This subsection first discusses the two objectives and their sources generally. Then, it focuses on a specific type of procedural harm that a broadcasting prohibition tries to protect against—psychological bias.

1. Ensure Judicial Order and Procedural Fairness

In 1944, the Advisory Committee stated that Rule 53 is to "govern the conduct of judicial proceedings"; implicit in this assertion is a desire for orderly behavior within the courtroom.[42] Then in 1962, the Judicial Conference adopted a resolution concerning Rule 53 that sheds even more light on the purposes of the Rule. In condemning photographs and broadcasting in federal courts, the Conference found that the use of such practices was inconsistent with fair judicial procedure.[43] Justice William O. Douglas, Associate Justice of the United States Supreme Court, stated in a 1960 article for the American Bar Association Journal that "[t]he courtroom by our traditions is a quiet place where the search for truth by earnest, dedicated men goes on in a dignified atmosphere."[44] Though his article was specifically addressing the constitutionality of Canon 35 of the American Bar Association's Canons of Judicial Ethics, Justice Douglas's reasoning is instructive because the Canon addresses the propriety of photography and broadcasting in the courtroom.[45]

More explicitly, a federal judge from the District of Rhode Island determined that "a strong inference arises to the effect that [the Rule's]

42. FED. R. CRIM. P. 53 advisory committee's note to 1944 adoption.

43. United States v. Cicilline, 571 F. Supp. 359, 361–62 (D.R.I. 1983), *aff'd* 740 F.2d 952 (1st Cir. 1984) (citing CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 861, at 345).

44. William O. Douglas, *The Public Trial and the Free Press*, 46 A.B.A. J. 840, 841 (1960).

45. *Id.* Justice Douglas acknowledged that, "Rule 53 of the Federal Rules of Criminal Procedure was written in the same tradition." *Id.* He further stated that treating trials as entertainment "is to deprive the court of the dignity which pertains to it and can only impede that serious quest for truth for which all judicial forums are established." *Id.* He also argued that the public trial guaranteed by the Sixth Amendment is for the benefit of the accused, not for the public's entertainment or education. *Id.* at 842. He asserted that even still photos could lower the public's perception by showing only the sensational moments of the trial. *Id.* He worried about the effect that mass opinion would have on the outcome of a trial should it be opened up to broadcasting, concluding that mass opinion has no business in the operation of the legal system. *Id.* at 843–44.

natural and primary purpose is to prevent members of the press and broadcast media from interfering with the business of the court and with the right to a fair trial."[46] The case, *U.S. v. Cicilline*, involved a defense attorney who moved to suppress evidence of a tape-recorded conversation that occurred between himself and a potential witness who was working with the FBI.[47] Donning a recorder provided by the FBI as part of an investigation, the potential witness had several conversations with the defense attorney over the course of a day.[48] Their conversation was recorded in the proximity of two courtrooms but was not part of any court proceeding.[49]

In construing the applicability of a local rule patterned after Rule 53, the District Court of Rhode Island acknowledged that, at least superficially, the recorded conversation fell within the plain meaning of the local rule.[50] After analyzing the decisions of other courts as well as resolutions passed by the Judicial Conference, the court concluded that the purpose these rules—the local rule and Rule 53—was to maintain an orderly and dignified environment for conducting solemn judicial proceedings, free from ancillary distractions.[51] Relying on that purpose, the court determined that the recording at issue was beyond the intended reach of the local rule and was therefore permitted.[52]

2. Protect Against Psychological Bias

An early and important case in understanding the purposes of Rule 53 is *Estes v. Texas*.[53] In *Estes*, the Court considered whether the defendant was deprived of his Fourteenth Amendment right to due process when he was convicted in a highly publicized, broadcasted trial.[54] Although a state criminal trial, which precluded the application of the Federal Rules of Criminal Procedure, the case provides valuable insight into the link between broadcasting courtroom proceedings and procedural inequities.

The initial hearings for Estes's trial were carried by live radio and television broadcast, and news photography was permitted throughout the trial.[55] Justice Clark's plurality opinion[56] discusses the physical

46. *Cicilline*, 571 F. Supp. at 361.
47. *Id.* at 360.
48. *Id.* at 361.
49. *Id.*
50. *Id.*
51. *Id.* at 363.
52. *Id.* at 361.
53. 381 U.S. 532 (1965).
54. *Id.* at 534–35.
55. *Id.* at 536.

surroundings of the initial hearings, which is instructive in understanding the first purpose for prohibiting broadcasting—maintaining judicial order.[57] In his concurring opinion, Chief Justice Warren noted "the inherent unfairness of television in the courtroom" and determined that "its presence [was] inconsistent with the 'fundamental conception' of what a trial should be."[58] Three members of the plurality recognized that their decision largely rested on policy considerations in determining the constitutional conception of a "trial,"[59] and the plurality determined that the defendant's due process rights were violated.[60]

Though the pretrial hearings were not the picture of "judicial serenity and calm to which petitioner was entitled,"[61] the actual trial was much more subdued than the pretrial hearing.[62] For the trial, cameras and newsreel photographers were limited to a booth constructed in the back of the courtroom.[63] Despite this, Justice Clark recognized that it was difficult for one to put "his finger on [television's] specific mischief and prove with particularity wherein [the defendant] was prejudiced."[64] Shifting focus more to the intangible harms presented by television, Justice Clark viewed the psychological impact that television has on jurors as "perhaps of the greatest significance."[65] Beyond the distraction of the physical presence of the cameras, the plurality stated:

It is the awareness of the fact of telecasting that is felt by the juror

56. *Estes* was a plurality decision due to Justice Harlan's limitation of the holding in his concurrence:

> My conclusion is that there is no constitutional requirement that television be allowed in the courtroom, and, at least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment.

Id. at 587 (Harlan, J., concurring). His limitation of the holding to the specific case at hand does not affect the discussion of whether cameras should be allowed in the courtroom.

57. At the hearing, at least twelve cameramen took motion and still pictures. *Id.* at 536 (plurality opinion). Cables and wires were all over the courtroom and microphones were placed on the judge's bench, in front of the jury box and at counsels' tables. *Id.* Thirty or more people were standing in the aisles. *Id.* at 553. Both sides conceded that the activities of the media led to considerable disruption of the trial. *Id*. at 536.

58. *Id.* at 580 (Warren, C.J., concurring).

59. *Id.* at 582–83

60. *Id.* at 532, 534–35 (plurality opinion).

61. *Id.* at 536.

62. *Id.* at 537.

63. *Id.*

64. *Id.* at 544.

65. *Id.* at 545.

> throughout the trial. We are all self-conscious and uneasy when being televised. Human nature being what it is, not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony.[66]

Justice Clark further stated that it is impossible to calculate the potential impact knowledge of a large audience could have on a witness's testimony.[67] He contended that embarrassment and a natural human tendency for over-dramatization "may impede the search for the truth."[68] While the plurality acknowledged that some of these dangers would be present in newspaper coverage, it concluded that "the circumstances and extraneous influences intruding upon the solemn decorum of court procedure in the televised trial are far more serious than in cases involving only newspaper coverage."[69]

D. Modern Interpretation of Rule 53

As mentioned in Part I, in *U.S. v. Shelnutt*, a district judge for the Middle District of Georgia denied a newspaper reporter's request to update his newspaper's website via Twitter.[70] This subsection focuses on the reasoning Judge Land used to reach this conclusion.

In denying the reporter's request, the court found that Federal Rule of Criminal Procedure 53 prohibited tweeting from the courtroom and that the Rule was not an unconstitutional restriction on freedom of the press.[71] According to the court, the Rule prohibited tweeting because "broadcasting" as used in the Rule included sending electronic messages from the courtroom that described the trial proceedings contemporaneously and were instantaneously available for public viewing.[72]

In reaching this broad definition of "broadcasting," the court relied on both the dictionary definition of the word and the 2002 Amendment to Rule 53. The court found that the plain meaning of "broadcast" was much broader than the mere dissemination of information via television or radio that one often associates with the word; "broadcast" includes "'casting or scattering in all directions'" and the "'act of making widely

66. *Id.* at 546.

67. *Id.* at 547.

68. *Id.*

69. *Id.* at 548.

70. United States v. Shelnutt, No. 4:09-CR-14 (CDL), 2009 WL 3681827, at *1 (M.D. Ga. Nov. 2, 2009).

71. *Id.* at *1–2.

72. *Id.* at *1.

known.'"[73] The court concluded that it could not reasonably be disputed that tweeting would result in casting the trial proceedings to the general public and thus making them more widely known.[74]

Additionally, the court found that the drafters of the Rule intended for it to reach beyond the scope of television and radio broadcasting.[75] Citing the 2002 Amendment, which dropped the adjective "radio" and left a prohibition against "broadcasting" generally, the court determined that tweeting was broadcasting within the meaning of the Rule.[76] Though the Advisory Committee did not view the 2002 Amendment as a substantive change, the Committee did infer from its notes that the Rule would cover additional types of broadcasting.[77]

III. THE FIRST AND SIXTH AMENDMENTS

While Part II provided the foundation for answering the question of whether Twitter *can* be used to report on federal criminal proceedings, this Part briefly addresses the same issue, but also lays the framework for answering the question of whether Twitter *should* be used in that context. Accordingly, this Part addresses the additional constitutional issues involved, namely, the First and the Sixth Amendments to the U.S. Constitution. This Part outlines the public's right to access criminal trials, details the First Amendment's relationship with the Sixth Amendment in the context of criminal trials, and addresses the constitutionality of Rule 53 in an effort to provide a holistic picture of the constitutional issues involved.

A. First Amendment Right of Access to Criminal Trials

Although the Federal Rules of Criminal Procedure dictate how court proceedings are conducted, one must not take for granted being given access to federal criminal courts in the first place. The acknowledgement of the public and press's constitutional right to access criminal trials was only made thirty years ago.[78] This subsection discusses the establishment and limitations of this right.

73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

1. Establishing the Right of Access—*Richmond Newspapers, Inc. v. Virginia*

In *Richmond Newspapers, Inc. v. Virginia*, the Supreme Court addressed the narrow question of "whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution."[79] *Richmond Newspapers* involved the criminal prosecution of a murder defendant that was in his fourth trial due to a Virginia Supreme Court reversal and two mistrials.[80] The defense attorney moved to have the fourth trial closed to the public, citing a desire to keep information about the trial from leaking out and being seen by jurors.[81] Persuaded by the defendant's arguments, the trial court ordered that the courtroom be kept closed except for witnesses when they testified.[82] The local newspaper and its reporters, who were shut out of the trial, appealed the trial court's decision.[83]

The issue addressed by the Supreme Court was one of first impression.[84] Justice Burger, writing for the Court, first looked to the history of the trial, and in so doing, recognized that an open criminal trial "has long been recognized as an indispensible attribute of an Anglo-American trial."[85] He then cited justifications supporting this attribute provided by Hale and Blackstone—that an open trial gives an assurance that the proceedings are fair, and discourages perjury, misconduct, and decisions that are based on bias or partiality.[86] In addition, the Court noted that open trials have therapeutic value to the community, providing an emotional outlet, and discouraging vigilante justice by individuals.[87]

Justice Burger recognized that these reasons remained valid and concluded that a presumption of openness is inherent in the very essence of a criminal trial.[88] The Court determined that the right of access to places traditionally open to the public, such as criminal trials, have long been assured "by the amalgam of the First Amendment guarantees of speech and press, and [the Constitutional drafters'] affinity to the right

79. *Id.* at 558.
80. *Id.* at 559.
81. *Id.* at 561.
82. *Id.* at 560.
83. *Id.* at 562.
84. *Id.* at 563–64.
85. *Id.* at 569.
86. *Id.*
87. *Id.* at 570–71.
88. *Id.* at 573.

of assembly is not without relevance."[89] Relying on this information, the Court held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment."[90] The Court further declared that without this right "important aspects of freedom of speech and 'of the press could be eviscerated.'"[91]

2. Limitations on the Right of Access—*Globe Newspaper Co. v. Superior Court*

Only a few years after *Richmond Newspapers*, the Court once again faced a case involving the exclusion of the press from a criminal trial in *Globe Newspaper Co. v. Superior Court*.[92] *Globe Newspaper* involved a Massachusetts statute, which as construed by the Massachusetts Supreme Court, required trial judges to exclude press from the courtroom when an underage victim was testifying in certain sexual assault cases.[93]

In addition to the rationales provided in *Richmond Newspapers*, Justice Brennan, in his opinion for the Court, gave more justifications for recognizing a First Amendment right to access criminal trials. Justice Brennan noted that as commonly understood one purpose of the Amendment was "'to protect the free discussion of governmental affairs.'"[94] Another was to ensure that each citizen "can effectively participate in and contribute to our republican system of self-government."[95] In sum, the First Amendment ensures that an individual's right to engage in political discussion is an informed one.[96]

The Court held, however, that the public's right to access trials is not absolute,[97] indicating that when the government restricts access to a criminal trial, such actions must withstand strict scrutiny, specifically, the government must show it has a compelling governmental interest and that the restriction is narrowly tailored to meet that interest.[98] The Court determined that reasonable time, place, and manner restrictions are subject to a lower level of scrutiny.[99] The Court concluded that the

89. *Id.* at 577.
90. *Id.* at 580.
91. *Id.* (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).
92. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 598 (1982).
93. *Id.*
94. *Id.* at 604 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).
95. *Id.*
96. *Id.* at 604–05.
97. *Id.* at 606.
98. *Id.* at 606–07.
99. *Id.* at 607 n.17.

Massachusetts statute was unconstitutional because it was construed as a mandatory rule that did not allow for different determinations in individual cases.[100] However, the Court emphasized that the First Amendment did not stand as an absolute bar to excluding the press and public from the courtroom when minor, sex-offense victims testify.[101]

B. Intersection of the First and Sixth Amendments

In his concurrence in *Richmond Newspapers*, Justice White noted that the Court would not have had to find the right of access in the First Amendment if the Court, in *Gannett Co. v. DePasquale*, had construed the Sixth Amendment to hold that the public had a right to access criminal trials.[102] While the Court did not find that the public had a right to access criminal trials under the Sixth Amendment in *Gannett*, it did find such a right protected by the First Amendment in *Richmond Newspapers*.[103]

The Sixth Amendment is often referred to as just that—the Sixth Amendment—without reference to what particular provision is being discussed. However, the Sixth Amendment has two distinct guarantees relevant to this Comment: (1) the right to a public trial and (2) the right to a trial by an impartial jury.[104] It is necessary to distinguish between these two provisions because each provision interacts differently with the First Amendment.

As the Court noted in *Estes*, a defendant's Sixth Amendment right to a public trial, is more for the benefit of the accused than the public.[105] A public trial ensures that the accused is "fairly dealt with and not unjustly condemned."[106] The justifications used to support a public trial, are similar, if not identical, to those used to support a First Amendment right to public access in criminal trials.[107] In holding that the right of the public and press to attend criminal trials is a First Amendment right in *Richmond Newspapers*, the Court seemed to indicate that the Constitution's guarantees of an open criminal trial are two-fold: first, a defendant's right under the Sixth Amendment, and second, the public's

100. *Id.* at 610–11.

101. *Id.* at 611 n.27.

102. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581–82 (1980) (White, J., concurring) (citing Gannet Co. v. DePasquale, 443 U.S. 368 (1979)).

103. Though the Sixth Amendment was not the source of the public's right of access, it still plays an important role in the issues relevant to this Comment.

104. U.S. CONST. amend. VI.

105. Estes v. Texas, 381 U.S. 532, 538–39 (1965).

106. *Id.*

107. *See Richmond Newspapers*, 448 U.S. at 555.

right under the First Amendment.

While these two rights are harmonious, tension can arise between the First Amendment's right of access and the Sixth Amendment's guarantee of a trial by an impartial jury. In the vast majority of criminal trials, a defendant's right to a fair trial by an impartial jury is not threatened by pretrial publicity.[108] When the case is a "sensational" one, however, tensions can develop between the accused's right to an impartial jury and the public's right, including the press, to access criminal trials.[109] Thus, when courts address the public's right to access criminal trials, it is against the backdrop of the accused's right to an impartial jury.

C. Constitutionality of Rule 53

As case law has clearly established, the public and press have a First Amendment right to access criminal trials. At first blush, Rule 53 seems to limit the right of access and could therefore be unconstitutional. The Supreme Court, which prescribes the Federal Rules of Criminal Procedure as outlined in the Rules Enabling Act, has not directly addressed the constitutionality of Rule 53.[110] Four federal courts of appeals, however, have found that Rule 53 is constitutional and that the First Amendment right of access "does not include a right to televise, record or otherwise broadcast federal criminal trial proceedings."[111]

The U.S. Court of Appeals for the Eleventh Circuit, in *U.S. v. Hastings*, was the first court to address the issue.[112] In *Hastings*, the defendant—a federal judge on trial for conspiracy and obstruction of justice—sought to have his trial televised. In support of his motion, he cited his Sixth Amendment right to a public trial.[113] Numerous media outlets sought to intervene in the case, citing their First Amendment right to access criminal trials.[114] On appeal, the Eleventh Circuit determined that recent Supreme Court decisions did not suggest that the Court would find the exclusion of television cameras or other recording devices an abridgement of the press's First Amendment rights.[115]

The Eleventh Circuit held that the press's fundamental right to access

108. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 551 (1976).

109. *Id.*

110. United States v. Moussaoui, 205 F.R.D. 183, 185 (E.D. Va. 2002).

111. *Id.*

112. United States v. Hastings, 695 F.2d 1278 (11th Cir. 1983). *See* United States v. Shelnutt, No. 4:09-CR-14 (CDL), 2009 WL 3681827, at *2 (M.D. Ga. Nov. 2, 2009).

113. *Hastings*, 695 F.2d at 1279–80 n.6.

114. *Id.* at 1280.

115. *Id.*

criminal trials was a right to attend trials, not a right to televise, record, or broadcast trials.[116] The court reasoned that unlike the statute at issue *Globe Newspaper Co.*, Rule 53 does not close the trial from public scrutiny and that *Globe Newspaper* was controlling.[117] In addition, the court found that Rule 53 resembled a time, place, and manner restriction, and was therefore subject to a lower level of scrutiny.[118] The rule did not bar people from the trial; rather, it restricted the manner that the media could gather news.[119] Thus, the per se rule could withstand the lower level of scrutiny, though the Massachusetts rule at issue in *Globe Newspaper* could not withstand strict scrutiny.[120]

The court weighed the interests in support of the media ban against those in favor of allowing the media coverage and determined that allowing the media coverage would only slightly advance First Amendment interests.[121] In contrast, the court found the significant interests of preserving court order and ensuring fair procedure supported the rule.[122] Subsequently, three other circuit courts faced the same issue, and all three held Rule 53 constitutional.[123]

IV. ARGUMENT

If tweeting is characterized as "broadcasting," then the inquiry is over and Twitter could not have a place in federal criminal courts. This Part argues that such a characterization is erroneous, that tweeting is not broadcasting under Federal Rule of Criminal Procedure 53, and that Twitter can therefore be used in federal courts. This Part further argues that not only can Twitter be used, but it should be used to further the constitutional rights afforded the press and defendants. Finally, this Part asserts that this issue is worth careful consideration because Twitter is a proxy for other technological advances.

A. Twitter Can Be Used in Federal Courts

In *Shelnutt*, Judge Land determined that tweeting was broadcasting

116. *Id.*

117. *Id.* at 1281–82.

118. *Id.* at 1282.

119. *Id.*

120. *Id.*

121. *Id.* at 1283–84.

122. *Id.* at 1284.

123. *See* United States v. Kerley, 753 F.2d 617 (7th Cir. 1985); United States v. Edwards, 785 F.2d 1293 (5th Cir. 1986); Conway v. United States, 852 F.2d 187 (6th Cir. 1988).

for purposes of Rule 53.[124] In reaching that conclusion, Judge Land relied heavily on the dictionary definition of "broadcasting"; he was also concerned with the contemporaneous nature of the communication. This subsection argues that "broadcasting" does not lend itself to a plain meaning analysis and asserts that "broadcasting" should be defined by considering the harms that Rule 53 was meant to protect against. Additionally, this subsection argues that the timing of the communication is not an issue.

1. Dictionary Definition

Citing Webster's dictionary, Judge Land determined that the plain meaning of "broadcast" included "'casting or scattering in all directions'" and "'the act of making widely known.'"[125] He reasoned that one could not reasonably dispute that tweeting would result in the details of a trial proceeding being made more widely known.[126] Further, he stated that the Advisory Committee's Notes to the 2002 Amendment bolster this position because the Committee intended the Rule to cover additional types of broadcasting.[127] A logical and judicially accepted starting place to define a term is a dictionary, but the rationale behind Judge Land's decision falls short for two reasons.

First, he asserts that the "plain meaning" of broadcasting is broader than just the dissemination of information via television or radio.[128] For purposes of Rule 53, that assertion must be true if one reads the Advisory Committee Notes. However, the Amendment does not provide a blanket prohibition against anything that makes information more widely known; rather, the Rule was amended to include "functionally equivalent means."[129] Judge Land failed to recognize this limitation of the definition, and he fails to establish how Twitter and television and radio are functionally equivalent means.

A second related problem is that the definition Judge Land employed is over inclusive; tweeting was not allowed because it makes the happenings of the court more widely known. Using his dictionary definition, any form of press would be broadcasting because it takes facts and disseminates them to the population at large. Under this

124. *See supra* Part II.D.

125. United States v. Shelnutt, No. 4:09-CR-14 (CDL), 2009 WL 3681827, at *1 (M.D. Ga. Nov. 2, 2009) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 280 (1993)).

126. *Id.*

127. *Id.*

128. *Id.*

129. FED. R. CRIM. P. 53 advisory committee's note to 2002 amendment.

interpretation, newspaper, magazine, and television reporting would all be prohibited under Rule 53. Any individual who attended a criminal trial and talked to others about his or her experience would be broadcasting. This result is untenable; therefore, broadcasting cannot be defined so broadly as to prohibit anything that casts or scatters in all directions, or makes information more widely known.

2. Functionally Equivalent Means

When a word has many different dictionary definitions, one must draw its meaning from the context.[130] The context for Rule 53 is the Advisory Committee Notes. The Notes make clear that broadcasting should not be limited to radio, but should include other "functionally equivalent means" such as television and audio recordings.[131] At first glance, this information seems illustrative, but not altogether helpful. The Notes do not explicate how to determine whether something is a "functionally equivalent means." However, a closer look at the phrase is revealing.

The Committee could have stated that the Rule was meant to prohibit functionally equivalent technologies, or functionally equivalent processes, but it prohibits functionally equivalent *means*. Means are defined as "how a result is obtained or an end is achieved."[132] In choosing the word *means*, the Committee seemed to show its concern for ensuring the quality of the end product—the result of a criminal prosecution. Having this purpose makes sense given the mission of the Criminal Rules—"to improve the administration of justice in this nation"[133]—and Rule 53's goal of being a standard that would govern the conduct of judicial proceedings.[134] Given this context, "functionally equivalent means" should be judged by comparing the harms of the technology in question to those harms Rule 53 is meant to protect against.

Rule 53 is meant to ensure that a defendant receives due process and has an impartial jury. The Rule works to protect these rights by maintaining courtroom order and limiting the psychological bias that can occur from knowing one is on television or radio. In amending the Rule,

130. Kucana v. Holder, 130 S. Ct. 827, 828 (2010) (quoting Ardestani v. INS, 502 U.S. 129, 135 (1991)).

131. FED. R. CRIM. P. 53 advisory committee's note to 2002 amendment.

132. Princeton WordNet Search 3.0, "Means," http://wordnetweb.princeton.edu/perl/webwn?s=means (last visited Sept. 9, 2010).

133. H.R. REP. NO. 100-889, at 22 (1988).

134. FED. R. CRIM. P. 53 advisory committee's note to 1944 amendment.

the Committee recognized that, considering modern technology, it could not enumerate all technological advances that would fit into this category. For example, the Committee probably could not envision with specificity that in 2010, an individual could use an iPhone to record judicial proceedings, download the video to his or her computer, and broadcast it to the general public on YouTube. While the Committee could not have envisioned this exact scenario, the hypothetical typifies why "broadcasting" was expanded—to protect against situations where technologies could be differentiated from radio and television, but present the same harms.

However, the use of Twitter in the courtroom does not give rise to the same concerns that have been outlined in cases like *Estes*.[135] One can use Twitter discreetly from a cell phone or Blackberry, preserving judicial order. In addition, tweets are the world as one individual sees it; they are filtered much like a newspaper column, which no matter how objective it purports to be, comes through the eyes of the writer. The risks of psychological harm by having a television in the courtroom are not present when a reporter is tweeting on the proceedings. As Justice Harlan stated in *Estes*:

> 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 note books.[136]

Tweeting is the functionally equivalent means to typing up a newspaper column on a laptop or writing a story with pen and paper, not to a television broadcast.

3. Contemporaneous Nature of the Communication

A final issue that must be discussed in regard to allowing the use of Twitter—the instantaneous nature of tweets—in reality is a red herring. In prohibiting Twitter, Judge Land stated that "the contemporaneous transmission of electronic messages from the courtroom . . . in a manner such that [the messages] are widely and instantaneously accessible to the general public, falls within the definition of 'broadcasting.'"[137] While timing seems important, it does not affect the discussion. Television and radio are prohibited all the time, not just in real time. This underscores

135. *See supra* Part II.C.2.

136. Estes v. Texas, 381 U.S. 532, 590 (1965) (Harlan, J., concurring).

137. United States v. Shelnutt, No. 4:09-CR-14 (CDL), 2009 WL 3681827, at *1 (M.D. Ga. Nov. 2, 2009).

that the psychological harms the Rule tries to prevent—juror bias—are not a function of timing. Those harms are a function of the unfiltered nature of television and radio, which results in the self-consciousness of court actors. It does not matter that Twitter is instantaneous because when one receives a filtered view of court proceedings, the risk of bias due to the way someone looks, or the way they talk, is diminished. Recording courtroom proceedings and showing them later does not protect against the harm courts have worried about in regard to the media; it is the filtering of the information that is the true concern.

B. Twitter Should Be Used in Federal Courts

Because Twitter is not "broadcasting" or a "functionally equivalent means" of broadcasting under Rule 53, its use should be allowed in federal criminal courtrooms. Just because something is permissible, however, does not mean it is advisable. Courts may be hesitant, especially without a compelling reason to do so, to move forward into uncharted waters for fear the technological floodgates may open. This Comment does not argue that the floodgates should be opened to all types of technological advances; rather, it argues that careful consideration should be given to individual technological advances as their uses become mainstream. In undergoing this analysis, courts will realize that some technologies like Twitter, do not harm the Constitution, but actually promote it.

As mentioned in the previous subsection, using Twitter does not violate a defendant's rights to due process and an impartial jury.[138] Using Twitter, you do not need to worry about embarrassment or over-dramatization affecting the search for truth.[139] One need not worry that the court will not be able to retain a "solemn environment free from the interferences which so often accompany modern news coverage of the events"[140] when someone sends a tweet because the same interferences do not apply. A person can tweet by discreetly pulling out his or her phone and sending a message without noise, fanfare or interruption.

Some may legitimately question the wisdom in allowing Twitter in the courtroom because of the possibility of abuse. Most Blackberries, PDA's, iPhones and the like, have picture taking capabilities and other recording devices, which would allow the user to record portions of the trial in clear violation of Rule 53. However, if people are going to cheat, they are going to cheat regardless; courts have the power to punish those

138. *See supra* Part IV.A.

139. *See Estes*, 381 U.S. at 547.

140. Dorfman v. Meiszner, 430 F.2d 558, 561 (7th Cir. 1970).

who violate courtroom rules, and reasonable time, place, and manner restrictions are subject to a lower level of scrutiny.[141] Those two tools give courts power to police the use of technological advances, and such worries should not deter federal courts from allowing the use of Twitter.

Moreover, courts should not be deterred because Twitter actually furthers the constitutional underpinnings of a defendant's right to a public trial and the public's right of access; "'[t]he law, however, favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned.'"[142] The more open a trial is to the public, the more it benefits the accused. As Hale and Blackstone noted, an open trial gives an assurance that the proceedings are fair, and discourages perjury, misconduct, and decisions that are based on bias or partiality.[143] In addition, legitimacy necessitates transparency; "[t]o work effectively, it is important that society's criminal process 'satisfy the appearance of justice.'"[144] Open trials, as Justice Brennan noted, promote the discussion of governmental affairs and ensure that our participation in government is informed.[145]

Another reason that Twitter should be allowed is that media representatives are often given preferential seating in crowded trials.[146] Implicit in this practice is an acknowledgement of the value of reporters as a source of information for the public discourse to which Justice Brennan alluded. Justice Clark foreshadowed technologies like Twitter when he said, "[t]he 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."[147] Twitter is such a case, and allowing its use is simply allowing a tool to aid the press in its important role of communicating information to society.

C. Twitter Is a Proxy for Other Forms of Technological Advances

Though this Comment has addressed the narrow issue of Twitter in the federal criminal courtroom and concluded that its use should be

141. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).

142. *Estes*, 381 U.S. at 542 (quoting 2 COOLEY'S CONSTITUTIONAL LIMITATIONS 931–32 (8th ed. 1927)).

143. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980).

144. *Id.* at 556 (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)).

145. *Globe Newspaper Co.*, 457 U.S. at 605.

146. Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 397–98 (1979).

147. *Estes*, 381 U.S. at 540.

allowed, Twitter's importance is more far-reaching. Twitter serves as a proxy for many modern technological advances. It represents communication tools that can be used discretely and non-intrusively. It represents tools of the press, which allow the media to more quickly and accurately communicate with the public. Maybe Twitter is the technology *du jour*—something that's popularity will only fade with time. But maybe it is not. Unless there is a technological Nostradamus in existence, no one can determine Twitter's longevity. However, such a promise is not necessary. Technology will continue to progress and the discussion of the issues surrounding Twitter will remain relevant, regardless of its fate, because of what it represents.

Twitter is a proxy for all technologies that fit within the competing constitutional issues involved and are constitutionally allowable. No court should be able to disallow such technologies based on a Federal Rule or the Constitution. Given that at least one court has already done this with Twitter, and that the use of Twitter or similar technologies to report on criminal trials is an issue that will increasingly arise, it is important to look at the issues involved with such technologies before too much precedent is hastily set. Twitter is easily rubberstamped as a broadcasting technology and thrown into the prohibitive radio–television boat. However, Twitter is not a fungible product with television or radio, nor is it a functionally equivalent means. It is different, and should be treated as such, recognizing its unique status as a technology that balances the First, Sixth, and Fourteenth Amendment rights surrounding a criminal trial.

V. CONCLUSION

In *Estes*, the Supreme Court implicitly recognized that changes in technology would potentially give rise to a new analysis of the issues surrounding "broadcasting" as the field of electronics developed.[148] *Estes* was decided forty-five years ago, and now is the time to reevaluate the issues. Tradition and precedent are important in our American legal system, but so are equity and justice. Once the Sixth and Fourteenth Amendment issues of an impartial jury and due process are resolved, one can see that the remaining constitutional issues involved—the First and Sixth Amendment guarantees to a public trial—call out for more openness. By taking a hard look at Twitter and the issues involved, courts and scholars alike will find that Twitter, and possibly other technological advances that have been or will be made, are not only

148. *Id.* at 551–52.

constitutionally permissible, but constitutionally advisable.