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## COMMENTS

### JUDICIAL ADMINISTRATION— TECHNOLOGICAL ADVANCES— USE OF VIDEOTAPE IN THE COURTROOM AND THE STATIONHOUSE

*Manifestly judicial reform  
is no sport for the short-winded.*

—VANDERBILT, MINIMUM STANDARDS  
OF JUDICIAL ADMINISTRATION xix (1949)

#### INTRODUCTION: THE CRISIS IN THE COURTS

The courts and those who man them, the lawyers and judges, are continually faced with the need for utilization of new and varied techniques and technology in order to meet the ever-changing needs of the society for whose benefit they exist. This pressing need to innovate becomes especially apparent in an era in which the courts are not fulfilling their function as institutions for the promotion of justice. The volume of civil cases has reached such proportions that huge backlogs are developing.<sup>1</sup> This backlog in civil cases has a direct and proportional effect on the criminal courts, since the size of the judiciary is limited.<sup>2</sup>

Means, both quantitative and qualitative, have been proposed to solve these problems in judicial administration. A pure quantitative approach, proposed by those who fear that any change in a time-honored system of fundamental procedures would be a change for the worse, would simply entail more judges, more lawyers, and more courtrooms. This proposal cannot be seriously regarded as practical at this point in time, since, if we were to *double* our number of courtrooms and judges over the next ten-

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1. The average delay before trial in a civil case in Cook County is 61.7 months. Wood, *5 Yrs. Average Age of Settled Lawsuits*, Chicago Tribune, August 19, 1971, § 2B, at 2, col. 4.

2. *Supra* note 1. For a report on judicial reform from the National Conference on the Judiciary see *Williamsburg Cradles Another Revolution—This One in the Administration of Justice*, 57 A.B.A.J. 421 (1971).

year period, no significant reduction in the backlog would occur, as the number of cases filed, at current rates, would also double.<sup>3</sup>

If a quantitative increase in the current system will not solve the problem of overcrowding in the courts, what improvements will be effective?<sup>4</sup> The suggestions are legion. Two recent proposals for change in the areas of torts and domestic relations include the system of "no-fault" insurance<sup>5</sup> and the "no-fault" divorce.<sup>6</sup> Both these suggestions have been the subject of controversy from various interest groups. No-fault insurance has been the subject of past, and probably future, attack by those who have

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3. FRANK, *AMERICAN LAW: THE CASE FOR RADICAL REFORM* (1969). Mr. Frank indicates that of 80,000 cases pending in the federal courts, one-fourth are only two to three years old; in the twenty-six year period from 1941 through 1967, the case backlog increased 170 percent; the current backlog in the New York City civil court is over 150,000 cases, with 100,000 more being filed annually; Los Angeles with 180,000 new filings each year has two and one-half times the number of filings for the entire federal court system. *Id.* at 10-11.

4. "The remedy is not more judges but 'better housekeeping within the judiciary itself.'" *Id.* at 5. Also see AMERICAN BAR ASS'N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *SPEEDY TRIAL* (1968).

5. See Hofeld, *Toward Understanding and Improving "No-Fault" in Illinois*, 59 ILL. B.J. 972 (1971); Ryan, *Massachusetts Tries No-Fault*, 57 A.B.A.J. 431 (1971); *Bar Services Include "No-Fault," Legal Services Shift*, 57 A.B.A.J. 762-64 (1971). But see Clark, *The No-Fair No-Fault Proposal*, 10(3) CALIF. TRIAL LAWYERS ASS'N J. 26 (1971); Beloud, *California Auto Accident Commission Rejects "No-Fault,"* 10(3) CAL. TRIAL LAWYERS ASS'N J. 32 (1971). The Keeton-O'Connell and other no-fault insurance systems have provoked intense controversy, especially in the insurance trade journals. See *First Party Tort Liability Offers "Sounder" System in Auto Reparations*, INS. ADVOCATE, May 23, 1970, at 11; *Hart Offers Some Advance Views on Legislation to Solve Auto Insurance Crisis*, INS. ADVOCATE, May 16, 1970, at 3; *A New Auto Insurance System*, J. INS. INFORMATION, Jan.-Feb. '69, at 2; *National Press Eyes New York No-Fault Plan*, NAT. UNDERWRITER, March 6, 1970, at 1; *Hearings Examine "No-Fault" Auto Reparations Plan Proponents: "Cuts, Premiums"; Critics: "Un-American,"* INS. ADVOCATE, May 9, 1970, at 3; *"Startling and Shocking" Picture of Auto Accident System Revealed: Dot 2 Volume Study Released*, INS. ADVOCATE, May 9, 1970, at 5; *Jones Sees Dot Public Opinion Survey on "No Fault" Supporting Acceptance of Concept*, INS. ADVOCATE, April 18, 1970, at 8; *Stewart, "No Fault" Proposal Attacked at Hearing, Feeling Mixed on Need for Revolutionary Change*, INS. ADVOCATE, Mar. 14, 1970, at 5; *AIA No-Fault Compared with N.Y. Dept. Proposal*, INS. ADVOCATE, Mar. 7, 1970, at 5; *Legislators Hear Pro & Cons of N.Y. Auto Plan*, NAT. UNDERWRITER, Mar. 20, 1970, at 1; *National Press Eyes No-Fault Plan*, NAT. UNDERWRITER, Mar. 6, 1970, at 1; *Fault Backers Glum over Dot Findings? There May Be Cause*, NAT. UNDERWRITER, May 8, 1970, at 1; *Main Dot Study; The Auto System Is Not Working*, NAT. UNDERWRITER, May 1, 1970, at 1; *Traveler's Head Pushes Modified "Fault" Auto Plan*, NAT. UNDERWRITER, April 17, 1970, at 1; *N.Y. No-Fault Plan Gets Cautious Press Approval*, NAT. UNDERWRITER, Feb. 27, 1970, at 1; *No-Fault Auto Program for N.Y. Urged by Gov., Insurance Dept.*, NAT. UNDERWRITER, Feb. 20, 1970, at 1.

6. "[D]ivorce, which is now as a practical matter consensual, should become so as a matter of law." *Supra* note 3, at 113. See Silving, *Divorce Without Fault*, 29 IOWA L. REV. 727 (1944); Crummit, *Divorce—Equal Fault-Granted to Both Parties*, 25 KAN. ST. BAR J. 209 (1956).

the most to lose monetarily if it were to be adopted.<sup>7</sup> The Church and others with the more traditional notions of marriage and divorce have attacked the no-fault divorce with a vigor equal to that of the personal injury attorney assailing no-fault insurance.

Although divorce litigation is by no means a small burden for the courts,<sup>8</sup> the reasons generally advanced in favor of no-fault divorce are often more related to achieving justice between the parties than they are to alleviating problems in judicial administration.<sup>9</sup> However, the situation regarding automobile cases is entirely different. At present, this area of the law composes approximately three-fourths of all major contested civil cases, and a third to one-half of all cases tried.<sup>10</sup> Clearly, if this area were excised, in whole or in part, from court calendars, the improvement in the efficiency of the system would be phenomenal. Other areas of the law, including the Uniform Commercial Code, contracts, conflict of laws, taxation, mortgage foreclosures, probate matters, repossession problems, and fiduciary duties have also been marked for excision from

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7. *Non-fault Meets First Challenge*, 7(1) TRIAL 8 (1971); *Opposition to Non-Fault Rises*, 7(1) TRIAL 48-49 (1971).

8. See Monroe, *Mental Cruelty: The Judge in Search of a Precept*, 19 DE PAUL L. REV. 52, 55 (1970). Judge Monroe states that: "[the] national average [is] 1 divorce for every 2.5 marriages; last year in Cook County, 43 divorce decrees for every 100 marriage licenses; and in Phoenix, 100 divorce decrees for every 100 marriage licenses." *Id.* at 55 n.9.

9. See BLAKE, *THE ROAD TO RENO* 237 (1962): "In most unhappy marriages, husband and wife have both fallen short of perfection. Reconciliation can be achieved only if both recognize their faults and make a cooperative effort to repair the union. If such a reconciliation cannot be achieved, a rational divorce procedure would dissolve the union without attempting to brand one party innocent and the other guilty. Equally troublesome is the doctrine of 'condonation.' If the 'innocent' party continues to live—or sleep—with the 'guilty' party after he becomes aware of the latter's wrong behavior, this bars divorce. A more ingenious way of discouraging reconciliation could scarcely be devised. If a marriage counselor persuades a separated couple that they should try living together again, they may find it difficult to establish grounds for divorce in case the reconciliation fails. Similarly unrealistic is the doctrine that divorce must be refused if there is evidence of 'collusion' between the parties. This principle hampers realistic marriage counseling by preserving the fiction that parties contemplating divorce can safely deal with each other only at arms' length."

10. *Supra* note 3, at 71-72. Accidents in the United States run some thirteen million a year; deaths over 50,000; disabling injuries close to two million; medical expenses \$600,000,000; wage losses \$2,600,000; property losses \$3,300,000,000. Insurance premiums went from \$2,600,000,000 in 1950, to \$9,200,000,000 in 1966. Litigation figures are tricky, but they indicate that some seventy percent of those persons injured retain legal counsel and thirty-five percent sue. While only three or four percent go to trial, these trials constitute sixty-five to eighty percent of all civil court cases; while many are settled, those tried are about one-third to one-half of all contested civil cases.

court decision for possible administrative handling. An alternative procedure would entail merely a decrease in the number of "decision points."<sup>11</sup>

Removing problem areas of the law from the courts may merely be ignoring the problem, not solving it. Opponents of complete removal of problem areas base their objections upon two major arguments: (1) The courts were originally designed to promote justice between the parties; and to the extent that they do not do so, reform is needed, but reform should be *within the realm of the court*, not outside of it; and (2) what assurance does the excision solution give that the problems created by it will not be greater than those it attempts to solve? The alternative proposed by this school of thought is that judicial reform must come about by improvement in *court* procedures.<sup>12</sup> Judge Monroe of the Third Judicial Circuit of Illinois asks:

Why do scientists and historians in pursuit of truth help each other, and trust each other's sources, while lawyers fight and dispute, trusting only an eye witness? In other words, are the adversary system and the hearsay rule really all they seem to be?

Why aren't exhibits made ready in advance and pre-marked?

Why must a lawyer waste half a day attending a docket call when his case will get thirty seconds attention—all that is needed to tell him what later day it might be heard?

Why hold a hearing on an estate account which everybody concerned has seen and nobody concerned disputes?

Why hear witnesses only one at a time? If three people saw the accident why not swear them in together and hear their testimony as a group, as is precisely the way the investigating officer originally heard it?<sup>13</sup>

In the criminal law area, Judge Monroe also advances various proposals for improvement. He suggests:

Pre-trial conferences could limit issues, rule on motions, determine evidence questions involving confessions or search and seizure, prepare instructions, or arrange scheduling at the very least; bills of particulars, interrogatories, and discovery, already used in many states by defendants, should be broadened in scope and made available to the state; when the state's good faith is questioned, its files should be examined; reasonable plea bargaining with both sides fully on the record (without binding the court or precommitting any side to undisclosed facts) should be allowed and encouraged; juries should be picked in hours, not days; misdemeanors should be left to minor disposition, (and what is a minor or major violation should be determined as early as possible); uniform criminal jury instructions should be used, as in civil cases; an after-hours court should be maintained for immediate availability of warrants to arrest or search, for immediate setting of bail, for immediate ad-

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11. *Supra* note 3, at 3.

12. Monroe, *The Urgent Case for American Law Reform: A Judge's Response to a Lawyer's Plea*, 19 DE PAUL L. REV. 466 (1970).

13. *Id.* at 473.

vice regarding counsel, for court record warnings regarding rights of the defendant, or other miscellaneous uses; the insanity defense should be abolished, and become relevant not to guilt or innocence, but to questions of sentence or treatment; alternatively, the question of guilt or innocence should be tried first, and then the question of sanity would be considered, with or without jury, at the defendant's option.<sup>14</sup>

As it has been pointed out, possible techniques of judicial reform may include both excision of troublesome legal areas and a modification of the current procedure to accommodate both present and future cases with the greatest possible efficiency. However, *both* modes of departure suffer the same fundamental deficiency—they fail to utilize, or utilize only indirectly, the benefits of modern technology. One commentator has advocated the utilization of certain technological improvements, such as machines for centralized bookkeeping, computers for rapid data retrieval in scheduling cases, and the elimination of lawyer conflict, and, hence, unnecessary continuances.<sup>15</sup> Many state courts, however, have been slow to adopt these suggestions, preferring instead to continue to use the outdated system of hand-written dockets. Often the political pressure to retain the traditional system is maintained due to considerations of patronage. Only the federal courts have not been lax in adopting these electronic advancements.<sup>16</sup> One technological innovation which has received significant acceptance by no court has been videotape—a medium with unique features which give it the requisite flexibility to serve a myriad of purposes in and in relation to courtroom proceedings.<sup>17</sup>

#### HISTORY AND PRIOR NON-LEGAL USES OF VIDEOTAPE

Invented by the Ampex Corporation<sup>18</sup> of Redwood City, California, in 1956, videotape has received widespread acceptance in all sectors of the business community. Its original use was to make a permanent record of commercial television programs. Later its potential for “instant replay” began to be utilized on network sports presentations, adding a new dimension to the age-old game of second-guessing the umpire. Since

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14. *Supra* note 12, at 475-76.

15. *Supra* note 3, at 172.

16. A comparison of the system utilized by the Criminal Courts, 26th and California, Chicago, Illinois, and that of the federal courts, Federal Court Building, Chicago, Illinois, will place the need for technology in the former in stark relief.

17. Compare Fasan, *Dean Pedrick, Legal Specialization and Liberal Education*, 19 DE PAUL L. REV. 709 (1970) with Pedrick, *Collapsible Specialists*, 55 A.B.A.J. 324 (1969) (reprinted in 19 DE PAUL L. REV. 699 [1970]).

18. See *How Firm Polishes Profit Image*, Chicago Daily News, May 5, 1971, at 53, col. 2 for a discussion of Ampex's tax handling of their sizeable research and development costs.

1963, much smaller portable models for closed circuit use have made the technology available to industry, education, and government.<sup>19</sup> Although there are variations in the placement of the tape reel in relation to the recording surface, *i.e.*, transverse versus helical recording,<sup>20</sup> the fundamental equipment used is the same: a camera, which converts light energy into electric signals; a microphone for converting sound waves into electric impulses; magnetic tape, which serves as a storage bank for both audio and visual electric impulses; and a monitor, which is used to view the recording as it is occurring. One significant feature of videotape is its superiority to high quality color film, and its much lower cost. Sony<sup>21</sup> has plans to retail, in early 1972, a system for home "movie" making. The camera will sell for \$200.00, the color video recorder for \$500.00, and the color monitor for \$200.00-\$500.00.<sup>22</sup> Ampex Instavision, probably

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19. See Lessig, *Stand By for the Cartridge T.V. Explosion*, 83(6) FORTUNE (1971). See also NEWSWEEK 42, August 10, 1970, for a description of videotape uses in the "how-to-do-it" field and for sporting events. NAT. BUS., September, 1970, at 17 reveals a unique use for videotape. An employer can now interview prospective employees by videotape. This procedure developed by Ability Search, Inc. saves the expense of travel and the unpleasantness of a face-to-face rejection. Also see *T.V. Patrol*, TIME, May 10, 1971; Mark, *Tomorrow's Magic Lantern: A. T.V. Studio in Your Home*, Panarama, Chicago Daily News, June 5-6, 1971 at 23.

Since the advent of videotape, new trade journals have been published. AUDIO-VISUAL COMMUNICATIONS is almost exclusively devoted to videotape articles and advertising. See 4(2) AUDIO-VISUAL COMMUNICATIONS 34 (1970); 3(4) AUDIO-VISUAL COMMUNICATIONS 16 (1969); 4(1) AUDIO-VISUAL COMMUNICATIONS 18 (1970); 4(3) AUDIO-VISUAL COMMUNICATIONS 25 (1970).

20. Morrill, *Enter-The Video Tape Trial*, 3 JOHN MARSHALL J. OF PRAC. AND PROC. 236 (1970). "Transverse recording, which was developed in 1956 by the Ampex Corporation, is presently the standard used in the broadcasting industry. This system, [in which] a two inch wide video tape is moved past recording heads at 15 or 7½ inches, was introduced at the National Association of Broadcasters Convention in Chicago. This transverse system has since been developed and is now a sophisticated technique. . . . In 1963, smaller recorders for closed circuit use were introduced. These recorders use a helical recording technique. The helical recording technique takes its name from the following method of operation: one or two records—playback heads are mounted on a moving drum and record across the moving tape in a diagonal curve known as a helix. There are full helical and half helical systems, the helical system using a single transducer of a drum around which tape is wrapped on a scanning assembly. Audio and control tracks occupy narrow spaces near the edge of the videotape. The drawback is that the head must have the tape for a short instant during which no signal will be available. The half-helical utilizes two head transducers on the drum to scan the videotape signal with sufficient overlap so that the electronic switching will permit sequencing the signal from the tape into continuous form with switching time only transient from one head to the next." *Id.* at 251 n.19.

21. As an illustration of the widespread use of video equipment, an advertisement to sell a used videotape system appeared in a recent edition of the Chicago Daily News.

22. See *Multimedia*, SATURDAY REVIEW 51, February 27, 1971, for a complete description of currently available videotape equipment.

the best of the portable systems, will sell for \$1400.00, and color tape will be priced at \$26.00 per one-hour color reel.<sup>23</sup> Thus, the cost of a three-camera system, which would view simultaneously the judge, the attorney presenting his case, and the witness, would be approximately \$4,500.00.<sup>24</sup> The cost of the tape, which can be reused as many as 25 times, per four-hour session, would be approximately \$100.00.

The purpose of this paper is to examine possible uses of videotape in the following areas: a.) disruption of courtroom proceedings by the unruly defendant; b.) preserving the record; c.) taking depositions; d.) recording the entire trial to be later played to the jury; and e.) police investigation and the gathering of evidence.

#### DISRUPTION OF COURTROOM PROCEEDINGS

The Chicago Seven conspiracy trial<sup>25</sup> occupied headlines for four and one-half months. Since this well-publicized trial, there have been disruptions of court proceedings throughout the nation—in New York, Connecticut, and California, among others. Often these trials have been of a so-called “political” nature, involving such areas as freedom of association, freedom of speech, and freedom of assembly. The defendants in these trials have often disrupted the orderly proceedings of the court in an attempt either to prevent its functioning or to gain political support through the extensive press coverage afforded these trials. Mr. Justice Black, dissenting in *Cox v. Louisiana*,<sup>26</sup> made these comments about the cause and effect of such tactics in 1965:

The very purpose of a court system is to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures. Justice cannot be rightly administered, nor are the lives and safety of prisoners secure, where throngs of people clamor against the processes of justice right outside the courthouse or jail house doors. The streets are not now and never have been the proper place to administer justice. Use of the streets for such purposes has always proved disastrous to individual liberty in the long run, whatever fleeting benefits may have appeared to have been achieved. And minority groups, I venture to suggest, are the ones who always have suffered and always will suffer most when street

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23. See *Multimedia*, SATURDAY REVIEW 66-67, March 27, 1971; *Multimedia*, SATURDAY REVIEW 42, January 30, 1971.

24. See Havemann, *Invents Videotape Device to “Guarantee” Testimony*, Chicago Sun-Times, May 6, 1971 at 40, col. 1.

25. United States v. Dellinger, No. 18253 (N.D. Ill. Feb. 6, 1971). For a detailed discussion of courtroom disruption caused by the conduct of the trial judge, the defendant, the attorneys, or the spectators see AMERICAN BAR ASS'N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE JUDGE'S ROLE IN DEALING WITH TRIAL DISRUPTIONS (1971).

26. 379 U.S. 559 (1965).



multitudes are allowed to substitute their pressures for the less glamorous but more dependable and temperate processes of the law.<sup>27</sup>

The history of courtroom disruption, however, does not begin with the *Cox* case or even with the "Chicago Seven" trial, but probably with the trial of the Nazi Seditonists before Judge Edward C. Eicher in 1944.<sup>28</sup> After seven months of continued harassment and personal attack, Judge Eicher, a thoroughly exhausted and depressed jurist, expired. A well-planned and well-executed pattern of disruption had succeeded. The defendants in that trial were not later retried.

The next disruption case of major significance was *United States v. Foster*.<sup>29</sup> Eugene Dennis and ten other members of the Communist Party were placed on trial before Judge Harold Medina. The tactics employed by the defendants and their attorneys were carbon copies of those which had succeeded only too well in the Nazi Seditonists case in 1944. This time, however, these efforts did not meet with success. Judge Medina, a man of strong constitution and great patience, weathered the storm, and later sentenced his tormentors for contempt.<sup>30</sup>

Thus, the stage was set for the Chicago Seven conspiracy trial. William Kunstler, defense counsel, who was later sentenced for contempt, defended his somewhat unorthodox conduct during the trial in a subsequent interview:

All of the outbursts in the courtroom and all of the protests made by both the lawyers and the clients were provoked by the court. I think it's impossible to divorce the lawyer or the defendant from the human being: and when there are ultimate outrages committed in the courtroom by the judge, he must anticipate a human reaction, and that's exactly what happened in Chicago. These were human reactions by ten people—two of them lawyers, eight of them defendants—when provoked by a court that lacked all sensibility, all sense of fair play and due process.<sup>31</sup>

Mr. Kunstler thus focuses on a personality and general life-style clash with Judge Hoffman as the cause of most of the defendants' outbursts. But even if Mr. Kunstler's charges of bias are true, will the written record accurately indicate the non-verbal subtleties which would provoke the ordinary, reasonable man? How could videotape be used to remedy the situation?

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27. *Id.* at 583.

28. *United States v. McWilliams*, 54 F. Supp. 791 (D.D.C. 1944).

29. 81 F. Supp. 280 (S.D.N.Y. 1948), *aff'd* in *Dennis v. United States*, 183 F.2d 201, 341 U.S. 494 (1951).

30. *In re Isserman*, 9 N.J. 269, 87 A.2d 903 (1952), *aff'd* 345 U.S. 927 (1952).

31. *Playboy Interview: William Kunstler*, 17(10) PLAYBOY 71, 74-76 (1970). See Koskoff, *Quest for a Fair Trial*, 7(1) TRIAL 22, at 23 (1971).

Bobby Seale, one of the Chicago Seven, had been bound and gagged during the course of the trial to prevent his continuous outbursts over failure of the court to permit him to appear *pro se*. At the time, this solution to the unruly problem was not entirely free from constitutional attack. Fortunately, a similar situation was dealt with in *Illinois v. Allen*,<sup>32</sup> which held, in reversing the Seventh Circuit Court of Appeals, that a trial judge acted "completely within his discretion" when he removed an unruly defendant from his own trial during the presentation of the prosecution's case.<sup>33</sup> The Court suggested three alternate means of restraining or preventing disruptive conduct; the judge could: (1) bind and gag the defendant, keeping him physically present within the courtroom; (2) remove him from the courtroom until he promised to behave in a more proper fashion; and (3) cite him for contempt.<sup>34</sup> There is, however, a more suitable alternative, which guarantees the *constructive* presence of the defendant in a manner which is not prejudicial to him, but which will prevent the disruptive effects of the defendant's actual presence—videotape recording of the trial, with instant replay in an adjoining room.

Videotape has all the advantages of defendant's presence, with virtu-

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32. 397 U.S. 337 (1970). For a discussion of the right to appear *pro se*, see *Von Moltke v. Gillies*, 332 U.S. 708 (1948). Also see *United States v. Bentvena*, 319 F.2d 916, 937 (2nd Cir. 1963); *Butler v. United States*, 317 F.2d 249, 258 (8th Cir. 1963).

33. 397 U.S. at 347. "No conditions may be imposed on the absolute right of a criminal defendant to be present at all stages of the proceedings. The insistence of a defendant that he exercise this right under unreasonable conditions does not amount to a waiver. Such conditions if insisted upon should and must be dealt with in a manner that does not compel the relinquishment of his right."

34. Inherent power to punish for contempt has long been recognized. *Ex parte Terry*, 128 U.S. 289 (1888); *Cooke v. United States*, 267 U.S. 517 (1925). See *Sacher v. United States*, 343 U.S. 1 (1952); *In re Oliver*, 333 U.S. 257 (1948). *Allen v. Illinois*, *supra* note 32. See also *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *United States v. Conder*, 423 F.2d 904 (6th Cir. 1970). *Contra*, 84 HARV. L. REV. 95 (1970) in which it is stated: "Contempt will not effectively deter the defendant who faces the likelihood of severe punishment for the substantive criminal offense, or who is motivated by deeply held political philosophical views to mock a judicial system which he mistrusts. Similarly, a defendant may seek nothing but notoriety or martyrdom, or may be convinced that the judge is 'railroading' him, and thus will not be influenced by the threat of contempt."

"Contempt permits lengthy incarceration of the defendant without the most elemental due process rights, including indictment, hearing, proof, and trial by jury, substituting for these the summary judgment of a judge who is often emotionally involved."

"Criminal contempt—unlike recess or removal—rises above a primarily corrective measure used to remedy disorder and becomes power to punish, whose use might turn not only on defendant's courtroom behavior but also on his motives for disruption." *Accord*: See Pitts, *Courtroom Conduct and the Preservation of Freedom*,

ally no drawbacks, psychologically or constitutionally. Witnesses will realize that they are being watched.<sup>35</sup> The defendant can communicate with his counsel by telephone, so that he would be able to assist in his own defense.<sup>36</sup> The defendant would not be forced to appear bound and gagged before the jury which would tend to prejudice the jury psychologically against him.<sup>37</sup> Also, his contact with counsel would insure his right to confront and cross examine his accusers.<sup>38</sup> This solution to the problem would be effective, to a certain extent, even in cases where the judge is in part responsible for the defendant's behavior, since there would be no possibility of contact between the parties.<sup>39</sup> Instant replay in another room would not, of course, remove defense counsel from conflict with the judge.

THE ILLINOIS EXPERIMENT: "FAIR TRIAL" V. "FREE PRESS"

In September and October, 1968, the Administrative Office of the Illinois Courts installed videotape on a trial basis in several suburban Chicago courtrooms, using a system known as Trialvision.<sup>40</sup> This experimentation represents the first attempt to utilize videotape in courtrooms as a substitute for or a supplement to stenographic court reporting,<sup>41</sup> although sound tape has been proposed and used in some jurisdictions for this purpose for many years.<sup>42</sup> Although many of the objections to the use of sound recording to preserve the record do not apply to videotape (due to its added dimension of visual recording) other objections have been expressed, which are probably a result of a confusion of videotape,

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59 ILL. B.J. 648 (1971). See generally Laub, *The Problem of the Unrepresented, Misrepresented, and Rebellious Defendant in Criminal Court*, 2 DUQUESNE L. REV. 245 (1964).

35. *Pointer v. Texas*, 380 U.S. 400 (1965).

36. *Powell v. Alabama*, 287 U.S. 45 (1932).

37. *Way v. United States*, 285 F.2d 253 (10th Cir. 1960) which stated that under the common law, a defendant who was bound and gagged during his trial cannot possibly be said to have received a fair trial.

38. U.S. CONST. amend. VI.

39. *Supra* note 31.

40. MADDEN, INTERIM REPORT TO THE SUPREME COURT OF ILLINOIS—EXPERIMENTAL VIDEO-TAPING OF COURTROOM PROCEEDINGS (1968). A copy can be obtained by writing to Administrative Office of the Illinois Courts, Room 2010, 30 North Michigan Avenue, Chicago, Illinois, 60602.

41. See Sullivan, *Court Record by Videotape-Tape Experiment—A Success*, 50 CHI. B. REC. 336 (1969).

42. See Rodebaugh, *Sound Recording in the Courtroom: A Reappraisal*, 47 A.B.A.J. 1185 (1961). See also STATE OF ALASKA, ALASKA COURT SYSTEM MANUAL OF ELECTRONIC RECORDING (1960).

to be used internally within the court, with motion pictures, photography, and television, which are primarily for the purpose of broadcast to the public.<sup>43</sup>

The cases of *Sheppard v. Maxwell*<sup>44</sup> and *Estes v. Texas*<sup>45</sup> do not encourage the use of cameras in the courtroom. In order to examine the reason behind this general hesitancy, it is necessary to examine the evolution of judicial policy considerations in this area. Canon 35 of the Canons of Judicial Ethics, adopted in Illinois and the federal courts, reads as follows:

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public and should not be permitted.<sup>46</sup>

Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.<sup>47</sup>

It was adopted in response to the 1935 case of *State v. Hauptmann*,<sup>48</sup> when over 700 newspapermen and 129 cameramen were assigned to cover the trial, in a courtroom designed to accommodate 260 persons! Some of the numerous abuses included scare headlines; purported confessions; polls of public opinion as to guilt or innocence; moving picture and recording equipment smuggled into the courtroom; and even gifts of sub-

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43. See 44 F.R.D. 391, 417 (1968) for a discussion of the dilemma of free press v. free trial; Annot., 100 A.L.R.2d 1404 (1966). See also Annots., Published article or broadcast as direct contempt of court: 69 A.L.R.2d 676 (1930); Exclusion of public during criminal trial: 156 A.L.R. 265 (1945); 48 A.L.R.2d 1436 (1956); Legal aspects of television: 15 A.L.R.2d 785 (1951); Rights of privacy: 138 A.L.R. 22 (1942); 168 A.L.R. 446 (1947); 14 A.L.R.2d 750 (1951); Legal aspects of radio communication and broadcasting: 40 A.L.R. 1515 (1926); 66 A.L.R. 1361 (1930); 82 A.L.R. 1106 (1933); 89 A.L.R. 420 (1934); 104 A.L.R. 872 (1936); 124 A.L.R. 982 (1940); 171 A.L.R. 765 (1947). For a discussion of counsel's control over the taking of photographs and radio or television broadcasting in or near the courtroom, see 1 AM. JUR. *Trials* § 303; *Controlling Trial Publicity* § 36.

44. 384 U.S. 333 (1966).

45. 381 U.S. 532 (1966).

46. REPORT OF THE ILLINOIS JUDICIAL CONFERENCE 168-69 (1964). For a concise history of the development of Canon 35, see *supra* note 45, at 596-601.

47. Colorado and Texas leave the question to the discretion of the trial judge with the exception that a witness may not be compelled to testify if he is to be photographed. See 132 Colo. 591, 296 P.2d 465 (1956); 88 A.B.A. Rep. 314 (1963).

48. 115 N.J.L. 412, 180 A. 809, *cert. denied*, 296 U.S. 649 (1935).

poenas to those who feared that otherwise they would not be able to attend.<sup>49</sup> The reason for the adoption of Canon 35 was clear—to give the defendant a fair trial free from prejudicial publicity.<sup>50</sup> Cameras had been shown to be likely to distract attention, to upset already nervous witnesses; to increase tensions both inside and outside the courtroom, and generally to turn the entire proceeding into a circus.<sup>51</sup> Those who oppose Canon 35-inspired rules of court procedure generally do so on one or more of four basic grounds: (1) the free speech argument;<sup>52</sup> (2) the free press argument; (3) the public trial argument; and (4) the equality of access argument.<sup>53</sup> These theories of opposition to Canon 35 need not be resorted to in order to use internal videotape, for, in each of the prior cases, the picture or moving pictures were for dissemination to the public.<sup>54</sup>

Not all jurisdictions have adopted or utilized Canon 35. Colorado, for example, has not made exclusion of cameras a mandatory provision, but rather has left it to the discretion of the trial judge as to whether publicity would prove to be prejudicial to the defendant.<sup>55</sup> Colorado has good results without Canon 35 in that there has been little of the abuse

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49. Hallam, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. L. REV. 453, 454 (1940).

50. McCoy, *The Judge and Courtroom Publicity*, 37 J. AM. JUD. SOC. 167-81 (1954).

51. See, e.g., as favoring retention and observance of Canon 35 in its present form: *Televising Court Proceedings, A Plea for Order in the Court*, 36 NOTRE DAME LAW. 147 (1960); *Televising and Broadcasting Trials*, 37 CORNELL L.Q. 701 (1951); *Television and Newsreel Coverage of a Trial*, 43 IOWA L. REV. 616 (1957); *The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered*, 48 A.B.A.J. 615 (1962); *Judicial Canon 35 Should Not Be Changed*, 48 A.B.A.J. 540 (1962); *A Country Lawyer Looks at Canon 35*, 47 A.B.A.J. 761 (1961); *The Public Trial and the Free Press*, 46 A.B.A.J. 840 (1960) (lecture delivered under the auspices of the Law School of the University of Colorado, May 10, 1960, by William O. Douglas, Associate Justice of the Supreme Court of the United States). As favoring modification or elimination of Canon 35, see the following: *The New Star Chamber—TV in the Courtroom*, 32 SO. CAL. L. REV. 281 (1958); *The Case of the Controversial Canon*, 48 A.B.A.J. 429 (1962); *Courts, Communications and Canon 35*, 46 A.B.A.J. 1295 (1960); *Should Canon 35 Be Amended? A Question of Fair Trial and Free Information*, 42 A.B.A.J. 334 (1956). For a general discussion see AMERICAN BAR ASS'N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS (1968).

52. See *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1949).

53. See *United Press Assoc. v. Valente*, 281 App. Div. 395, 120 N.Y.S.2d 179 (1953). Accord: *Ohio v. Clifford*, 118 N.E.2d 853 (1954), *aff'd* 123 N.E.2d 8 (1954), *cert. denied* 349 U.S. 929 (1955).

54. See 132 Colo. 591, 296 P.2d 465 (1955). *Contra: Television Court Proceedings A Plea for Order in the Court*, 36 NOTRE DAME LAW. 147 (1961).

55. See Hall, *Colorado's Six Years' Experience Without Judicial Canon 35*, 48 A.B.A.J. 1120 (1962).

which originally caused the rule to be promulgated.<sup>56</sup> Colorado's experience with cameras in the courtroom would be further evidence that inobtrusively placed videotape cameras would not cause a "circus atmosphere."

Although the history of Canon 35, the policies behind it, and the circumstances surrounding its adoption are not accurately recorded within its text, it would seem logical that the original prohibition was intended to extend only as far as the facts and circumstances it was designed to control. However, in 1953, Illinois adopted a statute in response to the negative publicity surrounding the McCarthy Senate investigations:

No witness shall be compelled to testify in any proceeding conducted by a court . . . if any portion of his testimony is to be broadcast or televised or if motion pictures are to be taken of him while he is testifying.<sup>57</sup>

The wording encompasses an absolute prohibition. In the absence of a showing of contrary legislative intent, it would appear to foreclose judicial interpretation softening its terms. This statute should be amended to exclude from its prohibitions videotape for *internal* use, adding "except where videotape recording under the control of the court supplements or supplants stenographic notes of proceedings."<sup>58</sup>

When this statute has been amended, there will be no specific statutory pronouncements as to the use of videotape. Two questions, however, remain: (1) whether the internal use of videotape for the recording of courtroom proceedings violates fundamental rights of the accused deemed so basic as to amount to a denial of due process; and (2) whether the videotape system is sufficiently effective to merit continued testing and use?

Professor Bassiouni has conceptualized the standards to be applied in order to determine whether a procedure violates due process as follows: The Constitution undertakes to safeguard "immutable principles of justice" by applying standards acceptable to a civilized society. It is a set of minimum standards which are "of the very essence of a scheme of ordered liberty." Inherent in this scheme are canons of decency founded on principles of natural law and fundamental principles of liberty and justice, all of which are indispensable to secure life, liberty, property, and the pursuit of happiness in a free society. These minimal standards of justice, which society has a right to expect from those entrusted with sovereign prerogatives and the power of collective law enforcement, are at the base of all civil and political structures designed to preserve freedom and democracy. Mr. Justice Frankfurter, in *Rochin v. California*, noted the absence of any "formal

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56. *Contra*: Douglas, *The Public Trial and the Free Press*, 33 ROCKY MT. L. REV. 1 (1960).

57. ILL. REV. STAT. ANN. ch. 51, § 57 (Smith-Hurd 1967).

58. *Supra* note 40, at 21.

exactitude and fixity of meaning in the due process clause because words symbols do not speak without a gloss. The gloss of some of the verbal symbols of the Constitution does not give them a fixed technical context, but it exacts a continuing process of application." In the *Rochin* case, the facts revealed that officers had pumped the stomach of the defendant after they witnessed him swallowing narcotics. The officers who had forcefully entered into the defendant's room on the strength of a search warrant were considered to have acted unreasonable and in a manner shocking to the conscience of the people and thus reprehensible. Nevertheless, in other cases, the Court held that the involuntary taking of blood from a person to perform a blood analysis was not shocking to the conscience of the people and was not unreasonable. This leads to a question: What is the process by which judges can determine the difference and distinction between pumping the stomach and drawing blood? The standards of a society at a given time will constitute the basis of what is acceptable and what is not. As stated by Munroe Smith:

In their effort to give to the social sense of justice articulate expression in rules and in principles, the methods of lawfinding experts has always been experimental and the rules and principles of case laws have never been treated as final proofs, but as working hypotheses continually retested in those grave laboratories of the law—courts of justice. Every new case is an experiment; the accepted rule which seems applicable yields a result, which, if felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development of general rules impossible; but if a rule continues to work injustice it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the rules themselves must ultimately be reexamined.<sup>59</sup>

The right to a fair trial includes the right to an impartial jury, unbiased and uninfluenced in its determination. In the case of *Turner v. Louisiana*,<sup>60</sup> the Court indicated that the evidence presented at the trial must be the sole basis for its verdict. Furthermore, this evidence shall come from duly sworn witnesses where defendants' rights to confrontation, cross examination and right to counsel are not abridged.<sup>61</sup> It does not appear that the use of videotape would abridge any of these rights of the defendant.

In order to determine the propriety of videotape's future use in the promotion of justice, its possible disruptive effects, both physically and psychologically, must be examined. The size, noise, and physical layout of the system will determine its disruptive effect. If the parties must vary their conduct in any way from their normal patterns, a disruption, albeit a small inconvenience, may occur. The Trialvision system utilized in the

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59. BASSIOUNI, CRIMINAL LAW AND ITS PROCESS: THE LAW OF PUBLIC ORDER 319-20 (1969).

60. 379 U.S. 466 (1965).

61. See *supra* note 59, at 491-503.

Illinois experiment, however, was small, inconspicuous, and silent.<sup>62</sup> No special lighting was necessary.

Psychological disruption may occur, however, in the absence of any physical disruption.<sup>63</sup> It was just this factor which constituted a violation of due process in the *Estes* case because of the inherent psychological effects of television cameras on the judge, the jury, witnesses and the defendant.<sup>64</sup> However, the holding in *Estes* is confined to an audio-visual dissemination to the public; no such psychological effects could be said to stem from a mere internal use of videotape, particularly the type of system used experimentally in the Illinois experiment. One might ask, however, whether the presence of a camera would cause the participants to engage in actions prejudicial to the defendant? The Illinois experiment found no evidence of counsel "playing to the camera." In fact, after the judge had revealed the presence of the camera and explained its function, it was treated in a very routine fashion.<sup>65</sup> The "circus atmosphere"<sup>66</sup> originally feared in videotape recording situations simply did not exist. If anything, the presence of a permanent record would tend to improve the performance of the parties, as they would be aware that their actions may later be viewed by the appellate courts. A danger which should be closely guarded against exists here. If appellate courts are viewing the trial as it actually occurred by means of videotape, there will be a pronounced tendency, perhaps due to nothing other than human nature, to substitute their view of the facts for that of the trial court, which would constitute a trial *de novo* on appeal. This result would clearly be outside the traditional scope of appellate review. One thing is certain, however, there would be no doubt as to what facts were actually found.

#### THE "DEMEANOR" PROBLEM

A Texas court found that the trial judge had "indulged in facial expressions in the nature of frowns or scowls, and shook his head from side to side in a negative manner."<sup>67</sup> A Montana appellate court noted

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62. See *supra* note 41, at 337; and Madden, *Illinois Pioneers Videotaping of Trials*, 55 A.B.A.J. 457-60 (1969). See generally, MADDEN, *supra* note 40.

63. *Supra* note 45, at 541.

64. Interestingly enough, the Court uses videotapes of the trial proceeding as evidence to show the lack of "judicial serenity and calm. . ." *Supra* note 45, at 536.

65. *Supra* note 41, at 337-38.

66. *Supra* note 41, at 338-39.

67. See *People v. Fort*, 14 Ill. 2d 491, 153 N.E.2d 120 (1961). But see *People v. Butler*, 78 Ill. App. 2d 479, 223 N.E.2d 431 (1967).



that the trial judge "shook his finger at counsel for defendant, tapped his desk with a pencil, and talked in a loud and angry manner."<sup>68</sup> In both cases, the appellate courts, however, could not reverse the convictions on the basis of conduct prejudicial to the defendant because of the inherent inability of the medium—a stenographic transcript—to reflect accurately the subtle mannerisms, facial expressions, or tone of voice of the judge while engaging in the enumerated conduct.

In order for the defendant to receive a fair trial, the judge must not permit the jury to receive any idea whatsoever as to the trial judge's state of mind during the trial,<sup>69</sup> for if the jurors are able to determine how the court "regard[s] the witness' testimony, or the merits of the case, . . . [the jury] . . . almost invariably [will] follow them."<sup>70</sup> Videotape will in fact discourage the tendency of a judge to show bias during the trial. Also it will provide a permanent record of counsel's demeanor, should the question of contempt arise and necessitate appellate review,<sup>71</sup> for it is well recognized that not only what is said, but how it is said, is important in determining whether the dignity of the court has been injured. Counsel's demeanor in delivering closing arguments often is not accurately reflected in the record. Although an Illinois attorney is not permitted to weep before the jury,<sup>72</sup> how close may he come and still produce the same effect? As for the prosecution's closing argument, only videotape could reflect the full inflammatory effect of counsel's reference to the sordid details of an abortion<sup>73</sup> or the equally sordid exhibits thereof.<sup>74</sup> The videotape record will do one thing that an ordinary stenographic transcript can never do—it will *show* (not tell) the appellate court *exactly* what happened at the trial level.

#### PROBLEMS IN UTILIZATION OF VIDEOTAPE AS A COURT RECORD

Like the audiotape before it, the videotaped trial record is being sub-

68. Compare *People v. Murdock*, 39 Ill. 2d 553, 237 N.E.2d 442 (1968) with *People v. Myers*, 35 Ill. 2d 101, 195 N.E.2d 675 (1964).

69. "It is essential that jury trials shall be managed fairly, and that trial judges shall not only be just to both sides, but that they shall conduct themselves in such a manner that an impartial state of mind is apparent to all concerned." *Loncar v. Nat. Union Fire Ins. Co.*, 84 Mont. 841, 274 P. 844 (1929).

70. See *People v. Dukes*, 12 Ill. 2d 334, 146 N.E.2d 14 (1955). See also Annot., 67 A.L.R.2d 724 (1955).

71. *United States v. Dellinger*, No. 18253 (N.D. Ill. Feb. 6, 1970).

72. See *People v. Murdock*, 39 Ill. 2d 553, 237 N.E.2d 448 (1968). But see *People v. Tyner*, 30 Ill. 2d 101, 195 N.E.2d 675 (1964).

73. *People v. Young*, 398 Ill. 117, 75 N.E.2d 349 (1947).

74. *State v. Boozer*, 80 Ariz. 8, 291 P.2d 786 (1955).

jected to certain traditional criticisms. Court reporters complain that the systems are too expensive. But as seen, the current cost of a three-camera system would be only about four-thousand dollars, and re-useable magnetic tape costs only twenty-six dollars per hour reel. Only when it is known that Alaska, which since 1960 has used sound recording as its *exclusive* courtroom recording technique, has saved nearly three million dollars, do we begin to realize the tremendous cost of stenographic reporting.<sup>75</sup> In fact, it is estimated that by not adopting sound recording when it first became realistic in 1960 the courts have wasted two billion dollars;<sup>76</sup> two billion dollars would buy a lot of video tape. Court reporters also emphasize the likelihood of mechanical failure, but fail to note that human beings also, and with far greater frequency, are in need of rest, recovery from illness, or general "repairs." It is also argued, with far less validity for videotape than for sound tape, that present single-track recorders do not differentiate sufficiently between voices to permit the viewer to know who is talking.<sup>77</sup> However, synchronized lip movements on videotape solves this problem, so that no difficulty will be had, even in transcribing the video record.<sup>78</sup>

But what of the stenotype system? What are its drawbacks? Since the world's record for stenotype (a phonetic system produced by simultaneous strokes on a machine which resembles both a typewriter and an adding machine) is only 282 words per minute,<sup>79</sup> often the reporter cannot keep up with the conversation, either because the parties are speaking too fast or because several parties begin speaking at once. Reporters often must have technical words spelled, and foreign languages are all but hopeless. What, then, is the real motivation behind this unwarranted criticism? Perhaps it is the same motivation possessed by the personal injury attorney who attacks no-fault insurance or the domestic relations attorney who attacks the no-fault divorce—that of economics. Clearly, if videotape were widely adopted the court reporter would be obsolete. He would not be necessary even for transcribing, as a typist, using a rheostat to slow the speed of the tape to the desired rate, could

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75. See *Electronic Recording (Scourge of Court Reporter)*, LAWYER REFORM NEWS 1-3 (1971).

76. *Id.* See also *supra* note 41, at 339.

77. Rodenbaugh, *Sound Recording in the Courtroom: A Reappraisal*, 7 A.B.A.J. 1187 (1961). For a comparison of sound recording with stenotype, see *Conventional Method Preferred*, 57 A.B.A.J. 754 (1971).

78. *Id.* at 1185.

79. *Supra* note 75, at 1.

type directly from the videotape.<sup>80</sup> Judges often have been very little concerned about the smooth and efficient functioning of the courts, which could be made possible through modern technology. In many cases, they have abandoned their position of leadership and authority in the court, giving court reporters a free hand to frustrate modernization.<sup>81</sup> It is significant that Alaska did not permit any trial period, which would give court employees the opportunity to subvert the system and then find "technical problems requiring further study." The Chief Justice of the Alaska Supreme Court has simply stated: "All personnel were advised that it had been officially determined that the equipment and techniques were adequate if instructions were followed."<sup>82</sup> Perhaps the courts of Illinois would be well advised also to take this type of no-nonsense approach.

The use of videotape must be examined in light of current practice regarding the record. The question arises as to how the videotape record will be certified? Will it automatically become certified, will it become certified only in the discretion of the trial judge, or only upon stipulation by the parties?

For arraignments,<sup>83</sup> trial,<sup>84</sup> or post-conviction hearings,<sup>85</sup> a verbatim transcription of the proceedings is mandatory in Illinois. It is the responsibility of the trial court to certify the record for appeal.<sup>86</sup> The parties may stipulate as to the composition of the record,<sup>87</sup> or, in the absence of a stipulation, the clerk will fulfill this role,<sup>88</sup> although the trial judge has the ultimate authority as to what may be included.<sup>89</sup> He may in fact refuse to certify the record in his discretion,<sup>90</sup> which would foreclose

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80. *Contra*: see *supra* note 41, at 340; Morrill, *Enter the Video Tape Trial*, 3 JOHN MARSHALL J. OF PRAC. AND PROC. 252 (1970).

81. For another example of lack of judicial leadership, see generally Gazell, *Leadership Competition in Judicial Management at the State Level*, 19 DE PAUL L. REV. 737 (1970).

82. *Supra* note 75, at 3.

83. ILL. REV. STAT. ANN. ch. 37, § 163 (f)(1) (Smith-Hurd 1969).

84. ILL. REV. STAT. ANN. ch. 37, § 163 (f)(3) (Smith-Hurd 1969).

85. ILL. REV. STAT. ANN. ch. 37, § 163 (f)(2) (Smith-Hurd 1969).

86. ILL. REV. STAT. ANN. ch. 110A, § 608 (Smith-Hurd 1969).

87. ILL. REV. STAT. ANN. ch. 110A, § 323(c) (Smith-Hurd 1969). For a historical development of this procedure, see *People v. Lyle*, 329 Ill. 418, 422, 160 N.E. 742 (1928); *People v. Holdom*, 193 Ill. 319, 323, 61 N.E. 1014 (1901); *Weatherford v. Wilson*, 3 Ill. 253, 256 (1840).

88. *People v. McKee*, 25 Ill. 2d 553, 185 N.E.2d 682, cert. denied 374 U.S. 810, reh. denied 375 U.S. 872 (1962).

89. See *People v. Teggelaar*, 82 Ill. App. 2d 67, 227 N.E.2d 91 (1967); *People v. Buzinski*, 64 Ill. App. 2d 194, 212 N.E.2d 270 (1965).

90. *People v. Thomas*, 88 Ill. App. 2d 619, 232 N.E.2d 259 (1967).

appeal;<sup>91</sup> in this case, the appellant's remedy would be a writ of mandamus to force him to certify the record.

Because the trial judge has been a participant in the trial and may have motives to prevent the viewing of the record on appeal, especially if the trial judge fears that he may have acted improperly, it is not reasonable to permit the trial judge to decide whether to certify the record. This is especially true for the videotape record, since the judge's actions will be clearly shown to all who view it. It simply makes no sense to permit this potential for abuse to exist, especially where a judge's retention and promotion may be tied to political consideration. Certification of the complete videotaped proceedings should be mandatory; an enactment of the state legislature should remedy this situation.

#### PROBLEMS OF ADMISSION OF VIDEOTAPE RECORDINGS INTO EVIDENCE

To date, only one case has been reviewed by an appellate court where the admissibility of videotape played to the jury was at issue.<sup>92</sup> The precise issue was whether a videotaped confession would be allowed into evidence. The court stated: "The rule governing admissibility into evidence of photographs applies with equal force to the admission of motion pictures and videotapes."<sup>93</sup> The court then went on to quote a 1937 California case<sup>94</sup> which dealt with the admissibility of a motion picture:

This particular case well illustrates the advantage to be gained by court's utilizing modern methods of science in ascertaining facts. . . .

We are satisfied that it should, and that it stands on the same basis as the presentation in court of a confession through any orthodox mechanical medium, that is, there is a preliminary question to be determined by the trial judge as to whether or not the sound moving picture is an accurate reproduction of that which it is alleged occurred. If after a preliminary examination, the trial judge is satisfied that the sound moving picture reproduces accurately that which has been said and done, and the other requirements relative to the admissibility of a confession are present, i.e., it was freely and voluntarily made without hope of immunity or promise of reward, then, not only should the preliminary foundation and the sound moving picture go to the jury, but in keeping with the policy of the courts to avail themselves of each and every aid of science for the purpose of ascertaining the truth, such practice is to be commended as an inestimable value to triers of fact in reaching accurate conclusion.<sup>95</sup>

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91. *People v. Cinci*, 8 Ill. 2d 619, 137 N.E.2d 40 (1955).

92. *Paramore v. State*, 229 So. 2d 855 (Fla. 1969) *See also* Note, 16 *LOYOLA L. REV.* 194 (1970).

93. *Paramore v. State*, *supra* note 92, at 859.

94. *People v. Hayes*, 21 Cal. App. 2d 320, 71 P.2d 321 (1937).

95. *Paramore v. State*, *supra* note 92, at 859.

There is virtual universal accord that, once a proper foundation is laid for a voice recording, it may be placed in evidence.<sup>96</sup> This foundation would consist of the following: (1) a showing that the recording device was capable of taking testimony; (2) a showing that the operator of the device was competent; (3) establishment of the authenticity and correctness of the recording; (4) a showing that changes, additions, or deletions have not been made; (5) a showing of the manner of the preservation of the recording; (6) identification of the speakers; and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement.<sup>97</sup> These factors would insure not only that the videotape recorded exactly what the camera saw, but that the results would be what they purport to be, without distortion of perspective or time.

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96. See *HAUTS*, PHOTOGRAPHIC MISREPRESENTATION § 30.02 (1964). See generally, *Monroe v. United States*, 234 F.2d 49 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 873 (1957); *Burgman v. United States*, 188 F.2d 637 (D.C. Cir. 1959); *cert. denied*, 342 U.S. 838 (1951); *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950). See *Belfield v. Coop*, 8 Ill. 2d 293, 134 N.E.2d 249 (1956). See also *Fikes v. State*, 263 Ala. 89, 81 So. 2d 303 (1955), *rev'd on other grounds*, 352 U.S. 191 (1955); *Wright v. State*, 38 Ala. App. 64, 79 So. 2d 66 (1954), *cert. denied*, 262 Ala. 420, 79 So. 2d 74 (1954); *People v. Dabb*, 32 Cal. 2d 491, 197 P.2d 1 (1948); *People v. Mackenzie*, 144 Cal. App. 2d 100, 300 P.2d 700 (1956); *People v. Avas*, 144 Cal. App. 2d 91, 300 P.2d 695 (1956); *People v. Fratianno*, 132 Cal. App. 2d 610, 282 P.2d 1002 (1955); *People v. Jackson*, 125 Cal. App. 2d 776, 271 P.2d 196 (1954); *People v. Eads*, 124 Cal. App. 2d 393, 268 P.2d 561 (1954); *People v. Sica*, 112 Cal. App. 2d 574, 247 P.2d 72 (1952); *People v. Porter*, 105 Cal. App. 2d 324, 233 P.2d 102 (1951); *Wilms v. Hano*, 101 Cal. App. 2d 811, 226 P.2d 728 (1951); *People v. Haves*, 21 Cal. App. 2d 320, 71 P.2d 321 (1937); *State v. Lorain*, 141 Conn. 694, 109 A.2d 504 (1954); *Kilpatrick v. Kilpatrick*, 123 Conn. 218, 193 A. 765 (1937); *Gulf Life Ins. Co. v. Stossel*, 131 Fla. 127, 179 S. 163 (1938); *Steve M. Soloman Jr., Inc. v. Edgar*, 92 Ga. App. 207, 88 So. 2d 167 (1955); *State v. Sutton*, 273 Ind. 305, 145 N.E.2d 425 (1957); *State v. Triplett*, 248 Iowa 339, 79 N.W.2d 391 (1956); *State v. Alleman*, 218 La. 821, 51 So. 2d 83 (1950); *McGuire v. State*, 700 Mo. 601, 92 A.2d 582 (1952), *cert. denied*, 344 U.S. 928 (1953); *State v. Gensmer*, 235 Minn. 72, 51 N.W.2d 680 (1951), *cert. denied*, 344 U.S. 824 (1952); *State v. Raasch*, 201 Minn. 158, 275 N.W. 620 (1937); *Ray v. State*, 213 Miss. 650, 57 So. 2d 469 (1952); *State v. Perkins*, 355 Mo. 851, 198 S.W.2d 704 (1946); *State v. Porter*, 125 Mont. 503, 242 P.2d 984 (1952); *Epstein v. Epstein*, 285 App. Div. 1128, 141 N.Y.S.2d (1955); *Frank v. Cossitt Cement Prod.*, 197 Misc. 670, 97 N.Y.S.2d 337 (1950); *People v. Hornbeck*, 277 App. Div. 1136, 101 N.Y.S.2d 182 (1950); *People v. Miller*, 270 App. Div. 107, 58 N.Y.S.2d 525 (1945); *State v. Reyes*, 209 Or. 607, 308 P.2d 182 (1957); *Commonwealth v. Bolish*, 381 Pa. 500, 113 A.2d 464 (1955); *Commonwealth v. Clark*, 123 Pa. Super. 277, 187 A. 237 (1936); *Kirkendoll v. State*, 198 Tenn. 497, 281 S.W.2d 243 (1955); *State v. Williams*, 49 Wash. 2d 354, 301 P.2d 769 (1956); *State v. Lyskowski*, 47 Wash. 2d 102, 287 P.2d 114 (1955); *State v. Slater*, 36 Wash. 2d 357, 218 P.2d 329 (1950); *State v. Salk*, 34 Wash. 2d 183, 708 P.2d (1949); *Paulson v. Scott*, 260 Wis. 141, 50 N.W.2d 376 (1951).

97. *United States v. McKeever*, 169 F. Supp. 426 (S.D.N.Y. 1958); *Steve M. Soloman, Jr., Inc. v. Edgar*, 92 Ga. App. 207, 88 S.E.2d 167 (1955); *State v. Williams*, 49 Wash. 2d 354, 301 P.2d 769 (1956); *State v. White*, 60 Wash. 2d 551, 374 P.2d 942 (1962), *cert. denied*, 375 U.S. 883 (1963).

In addition to the admission of a videotaped confession into evidence, other uses of videotape evidence at trial include a videotaped interrogation of defendant while under the influence of sodium pentothal ("truth serum") in the *Kidwell* case.<sup>98</sup> Kidwell's conviction of first-degree murder had been reversed by the Supreme Court of Kansas. His videotaped interview with his attorney, under supervision of experts, vividly pointed out the actual circumstances surrounding his wife's death. The charge was reduced to a lesser offense.<sup>99</sup> Several months later a similar use of videotaped evidence was made by a Santa Clara court. A woman convicted of murdering her child participated in a videotaped conference with a psychiatrist while under hypnosis. The trial judge permitted this tape to be played to the jury. Although the defendant was convicted, it seems apparent that the use of videotape made the conviction rest on more solid footing.<sup>100</sup> Other possibilities for use of videotape evidence encompass those areas where insanity or intoxication would vitiate any showing of specific intent by the prosecution, if the videotape were made close enough in time to the alleged offense. One limitation, however, should be kept in mind: Photographic evidence must not be overly inflammatory; it must possess adequate value and, yet, not unfairly prejudice defendant's case.<sup>101</sup>

The most significant use of videotape could be in the evidence deposition.<sup>102</sup> Chief Judge Leland Simkins of the 11th Circuit is experimenting in his courts with evidence depositions of medical experts in personal injury cases.<sup>103</sup> This should result in a considerable saving of court time, for previously, if an expert were unavailable, the trial could not proceed. The court is asking that opposing counsel stipulate to their use, even though the deponent's absence does not meet the standards of Supreme Court Rule 212(6).<sup>104</sup> It is this latter rule which prevents full utilization

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98. See TIME, December 29, 1967, at 38.

99. See TIME, April 12, 1968, at 57.

100. See *People v. Wright*, 30 Ill. 2d 519, 198 N.E.2d 316 (1964).

101. Cerny, *Court Reporting: Facts for Public Officials*, 42 A.B.A.J. 437 (1956). See *supra* note 73.

102. See Havemann, *Invents Videotape Device to "Guarantee" Testimony*, Chicago Sun-Times, May 6, 1971, at 40, col. 1.

103. See *Eleventh Circuit Plans Use of Videotaped Medical Testimony*, 1(1) JUDICIAL ADMINISTRATION SECTION NEWSLETTER OF THE ILLINOIS STATE BAR ASSOCIATION 2 (1970).

104. "(b) Use of Evidence Depositions. All or any part of an evidence deposition may be used, and may be used by any party for any purpose if the court finds that at the time of the trial:

(1) the deponent is dead or unable to attend or testify because of age, sickness, infirmity, or imprisonment;

of the evidence deposition. The authorities are in complete agreement that evidence depositions or testimony in a prior hearing cannot be used if the deponent or witness is available for in-person testimony.<sup>105</sup> Evidently, the courts at common law placed great value upon the jury's opportunity to observe the demeanor of the witness, especially upon cross examination. In the days before videotape became available, the only possible method of maximizing the opportunity of juries to observe a witness' demeanor was to promulgate such a rule. However, today, as the reasons behind the rule's adoption no longer exist, the rule ought to be repealed, either under the rule-making power delegated to the courts by the legislature, or by direct legislative enactment.

IN-COURT:  
OTHER USES OF VIDEOTAPE

One commentator, Morrill, has advocated taping the entire trial, not for purposes of preserving the record for appeal, but primarily for the purpose of playing it at a later date to a jury.<sup>106</sup> This would permit inadmissible statements to be stricken before they are heard by the jury.<sup>107</sup> This would represent a considerable improvement over the present method of rectifying non-reversible error—merely admonishing the jury to disregard the statement. Clearly, an entirely recorded trial would be a convenience to the jurors, who would be able to plan weeks ahead for future jury duty. It is also pointed out that far fewer errors in judicial rulings will result, because the judge would have a much longer period in which to view the problem at hand.<sup>108</sup> Evidence will not be lost<sup>109</sup> and the cost of expert testimony will be significantly reduced.<sup>110</sup> Mr. Morrill further advances the thesis that such a system will permit a more efficient use of

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(2) the deponent is out of the county, unless it appears that the absence was procured by the party offering the deposition, provided, that a party who is not a resident of this state may introduce his own deposition if he is absent from the county; or

(3) the party offering the deposition has exercised reasonable diligence but has been unable to procure the attendance of the deponent by subpoena; or finds, upon notice and motion in advance of trial, that exceptional circumstances exist which made it desirable, in the interest of justice and with due regard for the importance of presenting testimony of witnesses orally in open court, to allow the deposition to be used."

105. 5 WIGMORE, EVIDENCE § 1401 at 146 (3rd ed. 1940).

106. See Morrill, *supra* note 80.

107. Morrill, *supra* note 80.

108. Morrill, *supra* note 80, at 241.

109. Morrill, *supra* note 80, at 242.

110. Morrill, *supra* note 80, at 243.

the current bar with increased possibilities for specialization in the future.<sup>111</sup> It is also pointed out that with his evidence depositions recorded on videotape an attorney can then evaluate his case *before* trial,<sup>112</sup> and possibly this perspective would encourage settlement of claims, and, thus, ultimately reduce the load on the courts.<sup>113</sup>

These are only a few of the possible legal uses for videotape. Ultimately, the entire legal process, criminal and civil, will utilize videotape. For example, in the area of contracts, a videotape recording of preliminary negotiations and the later signing might clarify the meaning of any ambiguous terms, and thus lessen litigation. In cases where the testator is of advanced years, and it is feared that the validity of the will may later be questioned by an attack on the testator's competence, a videotape recording of the execution of the will would prove valuable to the estate in a later will contest.

#### THE USE OF VIDEOTAPE IN CRIMINAL INVESTIGATIONS

Videotape has shown definite promise of useful application in the areas of criminal investigation and evidence gathering, in addition to its uses in the courtroom. Since the development of a low-cost, portable videotape system in 1966, Ampex has had considerable sale to law enforcement bodies,<sup>114</sup> including the Federal Bureau of Investigation, the Connecticut State Police, the Santa Barbara Police Department, and the Chicago Police Department.

Chief Jack Howe of the Santa Barbara Police Department has uncovered a possible problem area in the unfettered use of videotape equip-

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111. Morrill, *supra* note 80, at 236-37.

112. Morrill, *supra* note 80, at 247.

113. See generally, Monroe, *The Urgent Case for American Law Reform: A Judge's Response to a Lawyer's Plea*, 19 DE PAUL L. REV. 466 (1970).

114. See HANSEN AND KOLBMANN, *CLOSED CIRCUIT TELEVISION FOR POLICE* (1970). Captain Hansen and Sergeant Kolbmann of the Daly City, California Police Department have described the experiences of their police force with videotape since its initiation in 1967. The work is a practical manual for police departments in the use of videotape. Videotape techniques as well as the most current equipment available are aptly described. The authors effectively point out potential and actual uses of videotape by police in the areas of: 1.) administration, intelligence, including crowd control, traffic control, riot control, and high crime areas; 2.) surveillance in the area of homicide, burglary, and robbery investigations, as well as in vice control and automobile theft investigations; 3.) training in police tactics; and 4.) security in the areas of internal and external police premises and jail complexes. In addition the illustrations make the manual a particularly effective training tool.



ment by law enforcement agencies. In drunken driving cases, the suspect's interrogation is videotaped as a supplement to the testimony of the arresting officer. Chief Howe reports that after later viewing these tapes, many defendants do not contest the charges and a guilty plea is entered.<sup>115</sup> The danger implicit in this use of technology is that a sub-system of justice will develop, wherein it will be the police and technicians, rather than the courts, who would in effect determine guilt or innocence. Other investigatory uses of videotape include (1) its use in department stores, airports, railroad stations, factories, and warehouses for surveillance purposes; (2) its use in squad cars to record "stop and frisk" situations, the arrest of a suspect, or possibly the criminal occurrence;<sup>116</sup> and (3) its use in the station-house to record lineup procedures.

In light of the issues raised by the *Miranda* warnings as to the voluntariness of a confession and the *Escobedo*<sup>117</sup> case regarding right to counsel, these police uses must be examined for possible violations of the constitutional rights of the accused. Examination of the three types of cases is necessary in order to determine whether an unconstitutional violation of rights in videotape investigation has occurred: (1) right to counsel: (2) privilege against self-incrimination; and (3) right to privacy.

#### RIGHT TO COUNSEL PROBLEMS IN VIDEOTAPING AN IDENTIFICATION OR INTERROGATION

The right to counsel in criminal prosecutions is a constitutional mandate.<sup>118</sup> In 1932, the Supreme Court interpreted this right to include "effective assistance of counsel"<sup>119</sup> in cases where the defendant through "ignorance, feeble-mindedness, illiteracy, or the like" was rendered incapable of carrying out his own defense. Extended to all indigent defendants in federal courts in 1948,<sup>120</sup> the standard of application as to when the right matured was enunciated in *Hamilton v. Alabama*,<sup>121</sup> as soon as

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115. National Shorthand Reporters Association, *Experiences with Electronic Reporting*, HANDBOOK ON ELECTRICAL REPORTING (1965).

116. Proper placement of videotape camera stations during the 1968 Democratic Convention riots in Chicago, Illinois would have done much either to discourage criminal acts within the view of the cameras or in the event of such conduct provide evidence for an effective prosecution.

117. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

118. U.S. CONST. amend. VI.

119. *Powell v. Alabama*, 287 U.S. 45 (1932).

120. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

121. 368 U.S. 52 (1961). *Gideon v. Wainwright*, 372 U.S. 335 (1963) overruled *Betts v. Brady*, 316 U.S. 455 (1942), which held that the sixth amendment right to counsel did not apply to state prosecutions.

the proceedings reached a "critical stage,"<sup>122</sup> the right attached. The question in identification cases regarding the right to counsel is whether the identification is itself a "critical stage?"

It was against this background that the cases of *United States v. Wade*,<sup>123</sup> *Gilbert v. California*,<sup>124</sup> and *Stovall v. Denno*<sup>125</sup> were decided. In *United States v. Wade*, the United States Supreme Court held (5-4) that a federal judgment convicting defendant Wade of bank robbery should be vacated because he had been required to appear in a *post-indictment lineup* without the presence of his counsel or a valid waiver thereof—which lineup was therefore conducted in violation of defendant's sixth amendment rights. In *Gilbert v. California*, the High Court held (6-3) that a state court judgment convicting defendant Gilbert of murder and armed robbery should be vacated because of the admission during the prosecution's case in chief of evidence of a post-indictment lineup in which defendant had been required to appear without the presence of his counsel or a valid waiver thereof—such admission being *per se* erroneous—and that the judgment should be reversed unless it was determined upon remand that the error was harmless. The case of *Stovall v. Denno* involved a witness who was confined to a hospital bed, close to death. As there was no time in which to stage a lineup or notify defendant's counsel, a "showup," or face-to-face identification, was used. The Court, reasoning that since the only witness was *in extremis*, these facts constituted an exception to the general rule of *Wade-Gilbert*.

In any examination of right-to-counsel problems arising from the videotaping of lineup proceedings, it is necessary to distinguish between the following situations: (1) videotaping the lineup occurrence and any associated identification of the defendant; (2) showing a videotape of a previously staged lineup to a witness who was not available at the time of the original lineup; and (3) videotaping an identification made from a showing of a previously recorded lineup.

In the first case, the use of videotape would present no right-to-counsel problems, assuming that the proceedings were conducted according to the *Wade-Gilbert* rules. In fact, videotape of this occurrence would be bene-

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122. The "critical stage" concept has been shaped by the cases of *Massiah v. United States*, 377 U.S. 201 (1964); *Escobedo v. Illinois*, *supra* note 117; and *Miranda v. Arizona*, 384 U.S. 436 (1966).

123. 388 U.S. 218 (1967).

124. 388 U.S. 263 (1967). For an extension of the *Wade-Gilbert* rules to pre-indictment lineups, see *People v. Fowler*, 82 Cal. Rptr. 363, 461 P.2d 643 (1969), noted in 19 DE PAUL L. REV. 789 (1970).

125. 388 U.S. 293 (1967).

ficial to defendant in cases where the witness had been prejudiced by police conduct, as a permanent record would be available to support a subsequent motion to suppress. Similar reasoning would apply to situation three, *supra*, assuming that counsel were present at the original lineup. It is in situation two where a recording of a proper lineup procedure is made in the presence of counsel, but may later be shown to witnesses for identification *when counsel is not present*. Does this procedure violate defendant's right to counsel?

By the rationale of *United States v. Collins*,<sup>126</sup> where identification of the defendant was made from a showing of photographs taken at a properly conducted lineup, use of videotaped lineups for later identification would not violate defendant's sixth amendment rights. The court reasoned that, as counsel had been present at the original proceeding, any subsequent showing of the events of this proceeding would be within the standards enunciated in *Simmons v. United States*.<sup>127</sup> Applying this reasoning to the use of videotape, rather than photographs, it becomes apparent that the holding of *Collins* is applicable to videotape. In fact, since videotape is a complete sequential record of the events of the lineup, rather than a recording of several isolated events, as with photographs, it is subject to a far lower probability of abuse, and in fact encourages law enforcement officials to behave in a constitutionally proper fashion. The presence of a clock or similar timing device in the videotape record would prevent "editing" of the record to conceal questionable circumstances from later judicial discovery.

It has been argued that the possibility for abuse still exists, even with a full videotape recording of the events of a lineup, since prejudicial conduct would occur beyond the range of the camera or before the witness has entered the lineup room. These objections are true, but are not useful, for these abuses could occur even more easily in the absence of a videotape record. In short, there is no system devised by man which cannot be circumvented; it is incumbent upon the legal profession, however, to discover and use those systems which are subject to the least abuse.

#### PRIVILEGE AGAINST SELF-INCRIMINATION

The privilege against self-incrimination is guaranteed by the United

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126. 416 F.2d 696 (4th Cir. 1969), *followed in*: *United States v. Cunningham*, 423 F.2d 1275 (4th Cir. 1970); *Searles v. Minnesota*, 428 F.2d 1188 (8th Cir. 1970); and *United States v. Canty*, 430 F.2d 1333 (4th Cir. 1970).

127. 390 U.S. 377 (1968).

States Constitution<sup>128</sup> and has been made applicable to the states by incorporation under the fourteenth amendment.<sup>129</sup> Recent decisions of the Supreme Court in this area have provoked a sea of controversy. Such jurists and legal scholars as Judge Henry Friendly and Justices Walter Schaefer and Roger Traynor have been critical of fifth amendment decisions by the court.<sup>130</sup> This criticism has recently led to proposals for constitutional amendment by Judge Friendly,<sup>131</sup> who would retain the privilege at trial, but remove it in pre-trial interrogation or investigation.<sup>132</sup> Judge Friendly bases his argument on the fact that the policies behind the privilege have never been sufficiently explained; if they have been spelled out, they are meaningless<sup>133</sup> or are better protected by first amend-

128. U.S. CONST. amend. V.

129. *Malloy v. Hogan*, 378 U.S. 1 (1964). *Griffin v. California*, 380 U.S. 609 (1965) *overruling* *Adamson v. California*, 332 U.S. 46 (1947).

130. See, e.g., Friendly, *The Bill of Rights as a Code of Criminal Procedure*, BENCHMARKS 235 (1967); Friendly, *A Postscript on Miranda, id.*, at 266; SCHAEFER, THE SUSPECT AND SOCIETY (1967); Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CINN. L. REV. 671 (1968); Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. CHI. L. REV. 657 (1966).

131. Cf. Thompson, *Judge Friendly's Amendment to the Fifth Amendment: A Comment on Recent Criticism of the Supreme Court*, 38 U. CINN. L. REV. 488, 522 (1969).

132. He suggests that the privilege not prohibit:

(1) Interrogating any person or requesting him to furnish goods or chattels, including books, papers, and other writings, without warning that he is not obligated to comply, unless such person has been taken into custody because of, or has been charged with, a crime to which the interrogation or request relates.

(2) Comment by the judge at any criminal trial on previous refusal by the defendant to answer inquiries relevant to the crime before a grand jury or similar investigating body, or before a judicial officer charged with the duty of presiding over his interrogation, provided that he shall have been afforded the assistance of counsel when being so questioned and shall have then been warned that he need not answer; that if he does answer, his answer may be used against him in court; and that if he does not answer, the judge may comment on his refusal. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CINN. L. REV. 671, 721-22 (1968). Judge Friendly's proposed amendment would also allow compulsory production of documents and other tangible objects; dismissal of government employees or de-licensing of persons licensed by the state for refusal to give information relevant to their performance of duties; requiring a suspect to identify himself and make himself available for physical examination; and compulsory registration under specified circumstances. *Id.* at 722. See also *supra* note 131.

133. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, *supra* note 130, at 686-87.

ment provisions dealing with freedom of speech or freedom of religion.<sup>134</sup>

Undoubtedly, much of the reason for the privilege originated with the activities of the High Commission and the Star Chamber. The dilemma of the witness in such situations is illustrated by the statement of Sir Thomas Tresham, who, when brought before the Star Chamber on the charge of harboring the Jesuit, Edmond Campion, stated: "[I]f I swear falselie, I am perjured; if by me othe I accuse myselfe, I am condemned to the penaltie of the law . . . . If I swear trulie, then I laye myself wyde open . . . to perjurie, because Mr. Campion hath opporitely accused me in the affirmatyve."<sup>135</sup> The privilege against self-incrimination, then, does serve a valid purpose in interrogation proceedings—that of preventing injury to a defendant's case whether he swears affirmatively or negatively.

In order to determine whether videotaping an accused in a lineup proceeding constitutes a violation of his privilege against self-incrimination, it is necessary to examine under what circumstances the accused is deemed to have given "testimony" against himself. The cases have drawn a sharp distinction between verbal testimony extracted from a person, in which case he would truly be a "witness" against himself and using the "body" as (real or physical) evidence where it may be material.<sup>136</sup> Under this reasoning, only an individual's "communications" are protected by the fifth amendment.<sup>137</sup> Examples of physical evidence are compulsory fingerprinting, voice-print identification, writing samples, blood tests, breath analysis, photographs of the accused, and body measurements. The Illinois courts have held that evidence derived from a compulsory lineup<sup>138</sup> or other physical examination of a suspect's body<sup>139</sup> is not constitutionally inadmissible.

It may be argued that, even though recording a person's image on videotape may not constitute an infringement of the accused's fifth amendment privilege against self-incrimination, any words spoken by the sus-

134. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CRIM. L. REV. 671, 696-97 (1968).

135. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 103 (1968).

136. *Holt v. United States*, 404 F.2d 914 (10th Cir. 1968), *cert. denied*, 393 U.S. 1086 (1969), *reh. denied*, 394 U.S. 967 (1969).

137. In his dissent in *Schmerber v. California*, 384 U.S. 757 (1966), Mr. Justice Black criticizes the "communication" or testimony guideline. In a case which involved mandatory extraction of blood from an arrestee in order to determine the alcohol level in his blood, Mr. Justice Black asks: "How can it reasonably be doubted that the blood test evidence was not in all respects the actual equivalent of 'testimony' taken from petitioner when the result of the test was offered as testimony, was considered by the jury as testimony, and the jury's verdict of guilt rests in part on that testimony?" *Id.* at 778.

138. *People v. Blewitt*, 75 Ill. App. 2d 281, 221 N.E.2d 135 (1966).

139. *People v. Finney*, 88 Ill. App. 2d 204, 232 N.E.2d 247 (1967).

pect will be protected as his "communications." This argument must be rejected, however, since the suspect's spoken words are not utilized to convey information, but are merely for the purpose of comparison of their tonal quality with the voice remembered by the witness. Thus, in videotaped lineup situations those who have been compelled to appear therein can not object that they are being forced to incriminate themselves.

#### THE RIGHT OF PRIVACY UNDER THE FOURTH AMENDMENT

The fourth amendment<sup>140</sup> prevents the use of testimony which is obtained by unreasonable means; admissibility is to be determined by an evaluation of the motivating probable cause, the scope of the search, the methods and means used to effectuate the search, and the type of evidence sought.<sup>141</sup> Although judicial guidelines are lacking in the area of videotape use, an examination of the right of privacy, including cases involving electronic surveillance, would aid in determining whether use of videotape would violate the constitutional rights of the suspect.

Although the courts have recognized conversations to be constitutionally protected by the fourth amendment, no similar protection has been granted to the seizure of one's image. The cases involving electronic surveillance have thus far dealt only with listening and audio-recording devices.

*Katz v. United States*,<sup>142</sup> in overturning a long line of eavesdropping and electronic surveillance cases,<sup>143</sup> held that the fourth amendment pro-

140. For a discussion of the right of privacy, see Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 5 (1890); MILLER, *THE ASSAULT ON PRIVACY* (1970); Ashman, Book Review, 20 DE PAUL L. REV. — (1971).

141. The Supreme Court, in accepting "reasonableness" as the standard to be applied in "stop and frisk" situations, has eroded traditional standards of probable cause in search and seizure cases. *Terry v. Ohio*, 392 U.S. 1 (1968).

142. 389 U.S. 347 (1967). See *Berger v. New York*, 388 U.S. 41 (1966). The Court in *Katz* stated: "Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of 'oral statements, overheard without any technical trespass under . . . local property law.'" *Silverman v. United States*, 365 U.S. 505, 511. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of the Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure. We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.* at —.

143. *Katz v. United States*, *supra* note 142, expressly overruled *Olmstead v.*

fects people and not property, because it embodies a fundamental right of privacy. This "person" rule expressly replaced the "trespass rule," which theorized that as long as there was no physical intrusion into the property of the suspect, his right to privacy was not violated.<sup>144</sup> Applying the reasoning of *Katz* to videotape cases, the question is whether the right to one's image is absolute or is conditional, being subject to seizure without a warrant when the suspect is in a public place and with a warrant when he is in a private place. *Katz* would permit videotape use only with a warrant. It is quite probable, however, that for searches in private areas, a higher standard than reasonableness, that of probable cause, would be required.<sup>145</sup> In non-surveillance situations where video-

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United States, 277 U.S. 438 (1928). Wire connections to defendant's telephone produced extensive evidence. This surveillance was considered to be outside the fourth amendment right against unreasonable search and seizure, as there was no physical intrusion onto defendant's property, nor was there the seizing of any material object belonging to defendant. A similar view was expressed in *Goldman v. United States*, 316 U.S. 129 (1942), which held that the use of a sound amplifying device did not violate the fourth amendment, as there was no "trespass." This trespass aspect of the *Ohmstead* case was expressed by Mr. Chief Justice Taft as follows: "The amendment itself shows that the search is to be of material things—the person, the house, his papers, or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or things to be seized . . . . The language of the Amendment can not be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office." *Olmstead v. United States*, *supra*, at 464-65. For decisions in the area of eavesdropping and electronic surveillance, see *Hoffa v. United States*, 385 U.S. 293 (1966); *Osborn v. United States*, 385 U.S. 293 (1966); *Lopez v. United States*, 373 U.S. 427 (1962); *Rathburn v. United States*, 355 U.S. 107 (1957); *On Lee v. United States*, 343 U.S. 747 (1952); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Dancy v. United States*, 390 F.2d 370 (5th Cir. 1968); *Fountain v. United States*, 384 F.2d 624 (5th Cir. 1968).

For a general discussion see AMERICAN BAR ASS'N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, ELECTRONIC SURVEILLANCE (1971).

144. The "trespass rule," first expressed in *Goldman v. United States*, *supra* note 142, was used in *Clinton v. Virginia*, 377 U.S. 158 (1964), in which it was determined that the device could not constitutionally be used, as the device pricked the wall against which it was placed. It is submitted that the right of privacy cannot be rested upon such tenuous distinctions as these. A rule similar to the "trespass rule" is the "constitutionally protected area rule," expressed in *Lanza v. New York*, 370 U.S. 139 (1962). The problem with this rule is that it provides very little by way of definiteness, is arbitrary, and would require cases covering a multitude of factual situations before it would be a useful standard. Another alternative which could be gleaned from the *Olmstead* and *Goldman* cases is the "risk" rule, wherein the defendant would assume the risk that his words would be overheard. The difficulty with this rule is that it fails adequately to define any situations where the defendant would be able to exercise his right to privacy. As Professor Bassiouni has pointed out: "With today's ability to eavesdrop, there is no risk—only virtual certainty." BASSIOUNI, CRIMINAL LAW AND ITS PROCESSES: THE LAW OF PUBLIC ORDER 398 (1969).

145. It should not be forgotten that an exclusionary rule would be applied to any videotapes which were made in violation of defendant's rights under the fourth

tape is used, such as the recording of confessions, lineups, and trial-record situations, the objection of invasion of privacy and the resulting deprivation of fourth-amendment rights do not apply, since there is no element of secrecy involved and the subject's express or implied consent may be assumed.

#### CONCLUSION

In an era vastly in need of new technology and judicial innovation, videotape has shown itself to be a flexible tool for use both in the courtroom and by the police. Although there are valid objections regarding its use in certain situations where abuse or deprivation of constitutional rights potentially may occur, such as surveillance situations, it must not be forgotten that the instrumentality used is not responsible for the violations of personal liberty which may occur—the individual members of the investigative or judicial bodies utilizing the equipment are solely responsible for any unconstitutional use. Therefore, useful applications of videotape should not be curtailed merely because potentials for abuse exist in these areas. When abuses occur, it should not automatically be assumed that the greater justice is done if the evidence gained thereby is excluded, which would in many areas prevent effective use of technological advances. There may be something to be said for the objective principle of "truth," as opposed to the subjective concept of "justice." As videotape is real evidence, it is, if relevant, an important factor in any determination of truth. Perhaps the problem lies with our adversary system of justice. But even in an adversary system, as the then Judge Cardozo stated, "[t]he criminal . . . [should not] . . . go free because the constable has blundered."<sup>146</sup> As with any technological innovation, problems exist with respect to videotape use; however, the great potential of videotape should not be lost to the system, nor should needless delay be permitted. In the words of Mr. Chief Justice Warren E. Burger, in reference to judicial reform as a whole, but equally applicable to the specific innovation of videotape: "Why should it take so long?"

*Robert M. Ward*

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amendment. For an articulate criticism of the exclusionary rule, see Burns, *Mapp v. Ohio: An All-American Mistake*, 19 DEPAUL L. REV. 80 (1969).

146. *People v. DeFore*, 242 N.Y. 13, 22, 150 N.E. 585, 587 (1926).