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# TECHNOLOGY AND PUBLIC ACCESS TO AUDIO-VISUAL COVERAGE AND RECORDINGS OF COURT PROCEEDINGS: IMPLICATIONS FOR COMMON LAW JURISDICTIONS

Daniel Stepniak\*

## INTRODUCTION

Courts worldwide increasingly utilise the latest information and communications technology to enhance the efficiency of judicial administration and the conduct of court proceedings.<sup>1</sup> Yet many judges and court administrators remain far less enthusiastic about employing or permitting the latest technology to be used to facilitate public access to recordings or audio-visual coverage of court proceedings.<sup>2</sup>

The regulation of court reporting calls for a balancing of the right to a fair trial with the benefits flowing from the open and publicised administration of justice. Yet, merely leaving courtroom doors open to the public is undoubtedly grossly inadequate as a means of ensuring openness, let alone the publicity required for justice not only to be done, but also be seen to be done. It has long been recognised that the media act as surrogates for the public through its presence in court and scrutiny of judicial proceedings.<sup>3</sup> The attainment of the benefits of open justice hinges on such publication of court proceedings as would permit members of the public to acquire an understanding and form independent and informed views of the manner in which justice is administered on their behalf. While innovations in broadcasting and information technologies make such publicity increasingly possible and no longer dependent on media interest, broadcasters' abuses of access to courts, and increasingly, difficult experiences in endeavouring to regulate the use

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\* Faculty of Law, University of Western Australia. In this article the author expands on issues he addressed at the Courtroom 21 International Conference on the Legal and Policy Implications of Courtroom Technology. He congratulates and thanks the conference organizers, and wishes to express his appreciation to the conference participants for their invaluable comments and insights, to this journal's editors for their fastidious work, and to everyone who assisted in his research.

<sup>1</sup> On the extent to which technology permeates the judicial process, see Bob Debus, *Technology in the Courts*, N.S.W. LAW SOC'Y J., Mar. 2001, at 67.

<sup>2</sup> This contrast is explored in Bernard League, *Access to the Courts and Its Implications*, 1 U. OF TECH. SYDNEY L. REV. 112, 112-14, available at <http://www.austlii.edu.au/au/journals/UTSLR/1999/19.html> (last visited Jan. 24, 2004).

<sup>3</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980); see also *Harman v. Sec'y of State for Home Dep't*, [1983] A.C. 280, 316; *Edmonton Journal v. Alberta*, 2 S.C.R. 1326, 1340 (1989); *R v. Liddel*, 1 N.Z.L.R. 538, 540 (1995).

of technologies that transcend jurisdictions, leave many concerned that such coverage is not in the interests of the administration of justice.<sup>4</sup>

In the hope of promoting an overdue discussion, I seek to set out a number of legal and policy implications of the utilisation of audio-visual broadcasting and information technology to broadcast and record judicial proceedings. My analysis leads me to suggest that in order to address existing concerns and yet attain the benefits of an unprecedented level of public access in audio-visual coverage and recording of judicial proceedings, there is a need to consider why we value and insist on the public administration of justice, and whether the implementation of the principle of open justice needs to be reconsidered in light of contemporary techniques of broadcasting and dissemination of public information. In so doing I put forward some suggestions as to how technology that permits greater public access may be utilised to promote, rather than frustrate, the administration of justice.

#### I. BANNING THE USE OF EARLY AUDIO-VISUAL TECHNOLOGY IN COURT REPORTING

Whether cameras should be permitted to record courtroom proceedings for publication or broadcast has been hotly debated for at least ninety years<sup>5</sup> — from the earliest days of cinema and well before the invention of the television, the medium that is the main focus of contemporary discussion.

It has generally been accepted that bans and restrictions on camera recording of court proceedings in both the United States and England were initially imposed in response to the disruption of judicial proceedings caused by the in-court use of inherently distracting and intrusive photographic and audio-visual technology and by media excesses accompanying such recordings and subsequent broadcasts or screenings.<sup>6</sup>

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<sup>4</sup> See, e.g., *Allowing Cameras and Electronic Media in the Courtroom: Hearing on S.721 Before the Subcomm. on Admin. Oversight of the Senate Comm. on the Judiciary*, 106th Cong. (2000) (statement of Edward Becker, Chief Judge U.S. Court of Appeals for the Third Circuit); N.Y. STATE COMM. TO REVIEW AUDIO-VISUAL COVERAGE OF CT. PROCEEDINGS, *AN OPEN COURTROOM: CAMERAS IN NEW YORK* 207 (1997) [hereinafter *CAMERAS IN NEW YORK*] (minority report of Leonard Noisette); DAVID M. LEPOFSKY, *Cameras in the Courtroom — Not Without My Consent*, in *OPEN JUSTICE* 333–87 (1994); Robin Day, *Injustice Seen to Be Done*, *THE SPECTATOR*, Dec. 30, 1995, at 11.

<sup>5</sup> Even in Australia, where television was only introduced in time for the 1956 Melbourne Olympic Games, the debate has gone on for over twenty years.

<sup>6</sup> For a discussion of the early 1920s British parliamentary debates that led to the imposition of a statutory ban on courtroom photography “because photographs attracted interest in such unwholesome matters as proceedings in court,” see Martin Dockray, *Courts on Television*, 51 *MOD. L. REV.* 593, 597 (1998); Adrian C. Laing, *Televising the Courts in the UK*, 7 *MEDIA LAW* 46 (1989); Susan Prince, *Cameras in Court: What Can Cameras in*

The 1935 Flemington, New Jersey trial of Bruno Hauptmann for the kidnap and murder of Charles Lindbergh's son was particularly significant.<sup>7</sup> Public criticism of media coverage of the trial appeared to tap existing public disquiet at the intrusive and sensationalist nature of the media's reporting of court proceedings,<sup>8</sup> turning it into a movement to regulate media reporting, which culminated in the imposition of a virtual prohibition on audio-visual coverage of American court proceedings.

Accounts of the trial suggest that the numbers and behaviour of media personnel in the courtroom may indeed have been disruptive and an undignified spectacle.<sup>9</sup> National and international interest in the trial was such that up to 141 press reporters and photographers, 125 telegraph operators, and 40 messenger boys were said to have been present in the courtroom at one time.<sup>10</sup> Media scrutiny outside the courtroom, boosted no doubt by the presence of show business celebrities, also led to a situation where it was said that "[w]itnesses, jurors, anyone remotely associated with the trial were fair game for the press."<sup>11</sup> Some media representatives breached restrictions on coverage imposed by presiding Judge Trenchard. In particular, in clear breach of their agreement not to photograph and film while the court was in session, press photographers took photographs of the Lindberghs on the stand, and of Hauptmann as the guilty verdict was read out. The prohibited filming of several days of proceedings by a newsreel camera ultimately led the judge to stop all further camera coverage.<sup>12</sup>

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*Parliament Teach Us?*, 1998 CONTEMP. ISSUES IN L. 82, 83 (1998); see also Daniel Stepniak, *British Justice: Not Suitable for Public Viewing?*, in CRIMINAL VISIONS: MEDIA REPRESENTATIONS OF CRIME AND JUSTICE (Paul Mason ed., 2003). For the early U.S. debate, see ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 67 (1932); MARJORIE COHN & DAVID DOW, CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE 14-17 (1998); RONALD L. GOLDFARB, TV OR NOT TV: TELEVISION, JUSTICE AND THE COURTS 7-9 (1998); Richard B. Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14, 18 (1979); *Report of the Special Comm. on Cooperation Between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings*, 62 A.B.A. REP. 851 (1937) [hereinafter ABA Report].

<sup>7</sup> See *State v. Hauptmann*, 180 A. 809 (N.J. 1935).

<sup>8</sup> For a discussion of pre television publicity of trials, see GOLDFARB, *supra* note 6, at 1-8; J. Anthony Lukas, *Big Trouble: Celebrity Trials and the Good Old Days that Never Were*, 12 MEDIA STUDIES J. 46-49 (1998).

<sup>9</sup> See COHN & DOW, *supra* note 6, at 14-17; Kielbowicz, *supra* note 6, at 18.

<sup>10</sup> COHN & DOW, *supra* note 6, at 15

<sup>11</sup> W.E. FRANCOIS, MASS MEDIA LAW AND REGULATION 358 (1990).

<sup>12</sup> Kielbowicz, *supra* note 6, at 19. Cohn and Dow offer an alternative account, suggesting that in spite of the restrictions imposed by the judge, "Sheriff John Curtiss made a gentlemen's agreement with five newsreel companies, allowing them to film the trial provided they showed no footage until the verdict." COHN & DOW, *supra* note 6, at 15. This is said to have led to the introduction of additional lighting that "helped boost temperatures

In spite of such breaches, there is little evidence to suggest that the employment of still and newsreel cameras in itself disrupted the trial. Indeed, as Richard Kielbowicz has noted, the fact that the unauthorized newsreel camera filming remained undetected by the judge and lawyers for several days appears to challenge the view that the subsequent prohibition of courtroom filming and photography by the ABA was justified by the inherent disruptiveness of cameras and recording equipment in this trial.<sup>13</sup>

Spurred into action by concerns allegedly highlighted by the media coverage of the *Hauptman* trial, ABA's Special Committee on Cooperation Between the Press, Radio and Bar put forward unanimous recommendations on measures to curb extra-legal comments<sup>14</sup> and the "surreptitious procurement of pictures or sound records."<sup>15</sup> Though appearing to also unanimously recommend an absolute ban on the use of cameras or photographic appliances in the courtroom, the Committee in fact made it clear that it was simply "recommending that the use of cameras in the courtroom should be only with the knowledge and approval of the trial judge"<sup>16</sup> and reported disagreement on whether the consent of counsel should also be a precondition of camera coverage.<sup>17</sup> The Committee appeared to be even less prepared to take an unqualified stance in opposition of the use of "sound registering devices."<sup>18</sup> The Committee ultimately conceded that problems inherent in then-current recording technology justified a prohibition of their use. It observed that "all mechanisms which require the participants in a trial consciously to adapt themselves to the exigencies of recording and reproducing devices distract attention which ought to be concentrated upon the single object of promoting justice."<sup>19</sup> However, it noted that "[i]t may well be that the future will provide some method by which a faithful sound record of the proceedings of the court can be used to extend the trial beyond the limits of the audience possible in the courtroom itself."<sup>20</sup> Acting on the Committee's report and recommendations, the 1937 ABA Convention adopted Canon 35 of the Code of Professional and Judicial Ethics, entitled "Improper Publicizing of Court Proceedings."<sup>21</sup>

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in the gallery to uncomfortable levels." *Id.* In any event, the newsreel film was screened in some 10,000 American cinemas.

<sup>13</sup> Kielbowicz, *supra* note 6, at 18–19.

<sup>14</sup> ABA Report, *supra* note 6, at 865.

<sup>15</sup> *Id.* at 862.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 864.

<sup>19</sup> *Id.*

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

<sup>21</sup> Canon 35 read:

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to

The Canon 35 prohibition coincided with moves by a number of U.S. state and local legislatures and bar and judicial organisations to also ban photography and broadcasting of judicial proceedings.<sup>22</sup> The Canon was amended in 1952 to ban television cameras specifically.<sup>23</sup> In so doing, the ABA added “and distract the witness in giving his testimony” to the Canon’s rationale:

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or *telecasting* 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 minds of the public and should not be permitted.<sup>24</sup>

By 1965 all state courts — with the exception of Colorado, Texas and Oklahoma<sup>25</sup> — had banned television cameras from their courtrooms.<sup>26</sup> The prohibition on audio-visual coverage also extended to federal courts. In 1946, Rule 53 of the Federal Rules of Criminal Procedure, banning photography and radio broadcasting of criminal trials in federal courts came into effect.<sup>27</sup> In 1962, the Judicial Conference of the United States unanimously condemned audio-visual recording of court proceedings, deeming “such practices to be inconsistent with fair judicial procedure.”<sup>28</sup>

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detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the minds of the public and should not be permitted.

CODE OF PROF'L AND JUDICIAL ETHICS Canon 35 (1937).

<sup>22</sup> See Kielbowicz, *supra* note 6, at 20 (discussing actions by Maryland, Los Angeles, and New York).

<sup>23</sup> CODE OF PROF'L AND JUDICIAL ETHICS Canon 35 (1952).

<sup>24</sup> *Proceedings of the (ABA) House of Delegates: Mid-Year Meeting*, 38 A.B.A. J. 425, 427 (1952) (amending Canon 35 of the Code of Professional and Judicial Ethics).

<sup>25</sup> Interestingly, courts in Oklahoma, Kansas, Texas and Colorado experimented with television coverage in their courtrooms during the 1950s. See COHN & DOW, *supra* note 6, at 18. A 1953 Oklahoma Trial is believed to be the first to be recorded and broadcasted. *Id.*

<sup>26</sup> For an outline of the development of the Canon 35 prohibition, see *Estes v. Texas*, 381 U.S. 532, 596–601 (1965) (appendix to opinion of Mr. Justice Harlan).

<sup>27</sup> For the text of the rule and discussion, see Laralyn M. Sasaki, *Electronic Media Access to Federal Courtrooms: A Judicial Response*, 23 U. MICH. J. L. REFORM 769–811 (1990).

<sup>28</sup> Annual Report of the Proceedings of the Judicial Conference of the United States 10 (1962); see also Erwin N. Griswold, *The Standards of the Legal Profession: Canon 35 Should Not be Surrendered*, 48 A.B.A. J. 615, 618 (1962).

In *Estes v. Texas* the U.S. Supreme Court appeared to endorse the basis of these prohibitions — the inherent disruptiveness of camera coverage.<sup>29</sup> In that case, the Court held that the media's recording of the pre trial hearing and parts of the trial had disrupted proceedings and consequently deprived the defendant of his constitutional right to due process.<sup>30</sup> The Court's ruling was not based on evidence of any actual prejudice suffered by the defendant, but on what the Court saw as problems inherent in the presence of cameras — the potential impact on jurors, witnesses, the defendant, and the additional responsibilities imposed on a trial judge.<sup>31</sup> Significantly, however, while holding that a defendant's right to a fair trial outweighed any access right the media might have to televise proceedings, some members of the Court foreshadowed a day when technological advances would bring about a change in the effect that television coverage had on the fairness of a trial.<sup>32</sup>

The extent of the prohibition appeared to peak shortly after *Estes*. By the early 1970s, only Colorado courts permitted camera coverage.<sup>33</sup> In 1972, the ban on audio-visual coverage of federal court proceedings was extended from criminal trials to all proceedings when the Judicial Conference of the United States enacted Canon 3A(7) of the Code of Conduct for U.S. judges, prohibiting the "broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto . . . ."<sup>34</sup>

<sup>29</sup> 381 U.S. 532 (1965).

<sup>30</sup> The preliminary hearing and parts of the trial of celebrity Texan financier Billie Sol Estes, were recorded and broadcast on television in spite of his objections. In adjudging that the recording process had disrupted proceedings, the opinions referred to a *New York Times* newspaper report of "a television motor van, big as an intercontinental bus" parked outside the courthouse, which described the courtroom as "a forest of equipment" with six television cameras, numerous microphones and cables and wires snaked over the floor and mentioned a "jury box, now occupied by an overflow of reporters from the press table." *See id.* at 536; *id.* at 553 (Warren, J., concurring).

<sup>31</sup> *See id.* at 545–50.

<sup>32</sup> Justice Clark's majority opinion noted that "the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials." *Id.* at 551–52. He further noted that "when the advances in these arts permit reporting by . . . television without their present hazards to a fair trial we will have another case." *Id.* at 540. Justice Harlan noted in his concurring opinion:

[T]he day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination.

*Id.* at 595–96 (Harlan, J., concurring).

<sup>33</sup> KENNETH CREECH, *ELECTRONIC MEDIA LAW AND REGULATION* 290 (1993).

<sup>34</sup> MOLLY TREADWAY JOHNSON & CAROL KRAFKA, *FED. JUD. CTR., ELECTRONIC MEDIA*

Similarly, in Britain the publication of courtroom photographs, and particularly a photograph depicting Old Bailey Judge Bucknell in the act of passing sentence of death on convicted murderer Frederick Seddon, and apparently taken without the consent of the court,<sup>35</sup> was used by parliamentarians to justify the enactment of the statutory prohibition of courtroom photography,<sup>36</sup> which remains in place in England and Wales.<sup>37</sup> Even Nick Catliff, the BBC television producer who pioneered camera access to Scottish courts, has summarized the events leading up to the statutory ban on the use of cameras in English courts in the following terms: “[f]ollowing several rather sordid attempts by the press to take sneak photographs in court, all cameras were outlawed.”<sup>38</sup> Though such an explanation is increasingly challenged, it nevertheless continues to play a significant role in promoting the view that the initial prohibitions on audio-visual coverage of court proceedings were imposed due to the inherent disruptiveness of the equipment used, or misused, by the media.

## II. TECHNOLOGICAL ADVANCES AND THE RELAXATION OF THE BAN

A study of press and broadcast reporting in courtrooms stated that:

By the mid-1970s, technology had advanced to the point where coverage of events by broadcast media had fewer distractions; no longer were lights needed for more sophisticated TV cameras. Cameramen could be content to cover trials from a fixed position, rather than roam at will.

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COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS 3 (1994); see also COHN & DOW, *supra* note 6, at 112.

<sup>35</sup> The photograph was published in the *Mirror* newspaper on March 15, 1912. See the photograph and further discussion of the incident in Laing, *supra* note 6; see also Martin Dockray, *A Sentence of Death*, COUNSEL, May/June 1989, at 17.

<sup>36</sup> See JOSEPH JACONELLI, OPEN JUSTICE: A CRITIQUE OF THE PUBLIC TRIAL 315–16 (2002); Dockray, *supra* note 6, at 593; Laing, *supra* note 6, at 46; Prince, *supra* note 6, at 83; Stepniak, *supra* note 6, at 255–58.

<sup>37</sup> Section 41 of the *Criminal Justice Act 1925* prohibits both the taking and publishing of photographs in courtrooms and even in precincts of court buildings. The Act states:

No person shall: (a) take or attempt to take in any court any photograph, or with a view to publication make or attempt to make in any court any portrait or sketch, of any person, being a judge of the court or a juror or a witness in or a party to any proceedings before the court whether criminal or civil; or (b) publish any photograph, portrait or sketch taken or made in contravention of the foregoing provision of this section or any reproduction thereof.

*Criminal Justice Act, 1925*, 15 & 16 Geo. 5 c. 86, § 41 (Eng.).

<sup>38</sup> Nick Catliff, *The Trial and the British Experience*, Address at the Cameras in the Courtroom Conference, Southampton Institute (Feb. 12, 1999).



Microphones were more common and less fear-evoking than in the generation previous.<sup>39</sup>

Perhaps not surprisingly, therefore, a number of U.S. state courts began to relax their prohibition by granting television cameras access to their courts on an experimental basis. Even the ABA relaxed its opposition to in-court cameras when it reaffirmed its opposition to camera coverage through the 1972 replacement of Canon 35 with Canon 3A(7) of its Code of Judicial Conduct, which permitted cameras to be admitted into courts for certain non-news-gathering purposes.<sup>40</sup>

An analysis of its own experiment with cameras led the Supreme Court of Florida in the 1979 case *In re Petition of Post-Newsweek Stations*, to conclude that new technology had made obsolete the physical disruption objection to the presence of television cameras in courtrooms.<sup>41</sup> This finding was virtually endorsed by the U.S. Supreme Court in the 1981 case of *Chandler v. Florida*,<sup>42</sup> where the Court ruled that the advances in the state of television technology, which it had foreseen in *Estes v. Texas*, had now effectively come to pass.<sup>43</sup> Though still of the view that the use of cameras in court potentially endangered a defendant's right to a fair trial, the Court ruled that an absolute ban on the televising of court proceedings was unjustified in the absence of actual evidence and proof that such a contingency had, in fact, materialised.<sup>44</sup>

Consequently, it warrants underlining that over twenty years ago, American courts recognised that developments in audio-visual recording technology had advanced to the point where, in the absence of evidence to the contrary, the presence of cameras in court could no longer be presumed to be inherently physically disruptive, and thus, prejudicial to a fair trial. Considering how far audio-visual recording technology has advanced since 1981, presumptions as to inherent physical disruption ought to no longer figure in the cameras-in-courts debate. Currently, not only is state-of-the-art audio-visual recording equipment unobtrusive, but, importantly, its increasing utilisation in courts for other purposes, such as the recording of transcripts, video links, amplification or CCTV, means that the recording of proceedings for broadcast need no longer even involve the presence of additional cameras, microphones or personnel in the courtroom. Increasingly,

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<sup>39</sup> Val E. Limburg et al., *How Print and Broadcast Journalists Perceive Performance of Reporters in Courtroom*, 65 JOURNALISM QUARTERLY 621, 621 (1988); see also David Graves, *Cameras in the Courts: The Situation Today*, 63 JUDICATURE 24 (1979).

<sup>40</sup> FRANCOIS, *supra* note 11, at 392; Diane L. Zimmerman, *Overcoming Future Shock: Estes Revisited, or a Modest Proposal for the Constitutional Protection of the News-Gathering Process*, 1980 DUKE L.J. 641, 667-69 (1980).

<sup>41</sup> 370 So. 2d 764 (1979).

<sup>42</sup> 449 U.S. 560 (1981).

<sup>43</sup> *Id.* at 576.

<sup>44</sup> *Id.* at 578-79.

audio-visual recording of courts and tribunals is undertaken by utilising a court's own audio-and/or visual-recording equipment,<sup>45</sup> or a court's own recordings.<sup>46</sup>

### III. OPPOSITION EXTENDING BEYOND TECHNOLOGY

To express dismay that many courts continue to prohibit audio-visual recording and broadcast of proceedings, in spite of the long-standing acceptance that technological advances have eliminated opposition grounded in concerns for the distraction and disruption inherent in audio-visual recording, would be to overlook concerns that arguably played a more significant role in the imposition of the original prohibitions and continue to influence the debate.

While concerns relating to courtroom distraction and disruption caused by audio-visual recording may be said to have been allayed,<sup>47</sup> concerns relating to breaches of recording restrictions remain and appear to be reignited by high-profile celebrity trials such as the 1993 O.J. Simpson trial and the current Kobe Bryant trial.<sup>48</sup> As this has been a key and long-standing concern, the relaxation of restrictions and prohibitions currently applied to audio-visual coverage is not only contingent on the judiciary accepting that such coverage is in the interests of the administration of justice, but also dependant on coverage being appropriately regulated and sufficiently under courts' control to ensure that such concerns do not eventuate.

Even the "media-only-has-itself-to-blame" explanation for why it is consistent for courts to dispense open justice and yet restrict or deny access to television cameras may be said to mask arguably more significant explanations for the initial banning of cameras from British, American, and other common law courtrooms, and

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<sup>45</sup> As, for example, is the case in the Canadian Supreme Court. See DANIEL STEPNIAK, FED. CT. OF AUS., *ELECTRONIC MEDIA COVERAGE OF COURTS* 6.2–6.10 (1998).

<sup>46</sup> As is the case in the International Criminal Tribunal for the Former Yugoslavia, where the Tribunal records all proceedings and makes videotapes available to the media on a thirty-minute delay basis, though on at least one occasion — in December 2003, when former NATO commander and former Democratic presidential candidate Wesley Clark testified in the trial of Former Yugoslav President Slobodan Milosevic, the Tribunal agreed to edit the transcript of the testimony before making it public, at the request of the U.S. government. See generally Paul Mason, *Report on the Impact of Cameras at the International Criminal Tribunal for the Former Yugoslavia* (2000), available at <http://www.usfca.edu/pj/camera-mason.htm>.

<sup>47</sup> The fact that such disruption may still be seized upon to exclude cameras was memorably illustrated in Canada when a technical glitch in the audio recording of the 1981 *Patriation Reference* case led the Canadian Supreme Court to suspend further television camera recording of its proceedings until 1993. See *Reference re Questions Concerning Amendment of Constitution of Canada*, [1981] 1 S.C.R. 753.

<sup>48</sup> See, e.g., *Kobe in the Dock: Yet Another "Trial of the Century" is Gearing Up*, THE ECONOMIST, Oct. 18, 2003, at 34 [hereinafter *Kobe in the Dock*].

incidentally, provide more persuasive explanations for why many courts continue to resist electronic media coverage.

The early twentieth-century prohibitions of audio-visual court reporting may be more accurately explained as reflecting official disapproval of the media's promotion and facilitation of widespread public interest in judicial proceedings. In referring to the British parliamentary debates of the 1920s, which led to the enactment of the statutory ban on photography, Martin Dockray observed: "[I]t was precisely because photographs attracted interest in such unwholesome matters as proceedings in court that they were suppressed in 1925."<sup>49</sup> Records of parliamentary proceedings reveal, for example, that during the Second Reading Speech debate on the Criminal Justice Bill in the House of Commons on May 11, 1925, Mr. Goodman Roberts declared the clause banning the taking of photographs in court to be "very reasonable and very commendable" and thus likely to "meet with everyone's assent" and went on to observe that:

It is a pity, no doubt, that it could not be extended to taking photographs outside police courts of the whole of the people who are concerned in these *causes célèbres*, and all around prevention of the publicity attaching to cases which had better be left much less commented upon than they are at the present time.<sup>50</sup>

Similarly, in the United States, the ABA opposed the broadcast of court proceedings in the early 1930s because it considered such coverage to change "what should be the most serious of human institutions . . . into an enterprise for the entertainment of the public . . . . Using such a trial for the entertainment of the public or for satisfying its curiosity shocks our sensibilities."<sup>51</sup>

Heightened levels of public interest in judicial proceedings continue to elicit expressions of concern by politicians, lawyers, and judges. The voicing of such reservations following the admission of cameras into Scottish courtrooms in the early-1990s provoked reactions from the media in England who commented that feelings of resistance towards trial television were based in pretentiousness.<sup>52</sup>

Where snobbery or elitism lies behind such objections, they clearly warrant exposure for their unsustainability in a world that has discarded blind obedience of authority and in which true respect is sought through familiarity and understanding, rather than blissful ignorance or unquestioning reliance on the wisdom of those in authority.<sup>53</sup>

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<sup>49</sup> See Dockray, *supra* note 6, at 597.

<sup>50</sup> Hansard Reports, House of Commons, May 11, 1925, at 1616.

<sup>51</sup> ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 67 (1932).

<sup>52</sup> This author remembers reading such comments in the *Evening Standard*.

<sup>53</sup> For arguments in favour of restricting the publicity of criminal proceedings, see Gerhard O.W. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 11-26 (1961).

The early prohibitions also reflected the legal establishment's disdain for the intrusiveness of courtroom reporting and concerns for the impact that such concerted media attention, and particularly audio-visual recording and broadcasts, may have on trial participants. Thus, in the course of his second reading speech on the proposed statutory ban, Home Secretary Sir William Joynson-Hicks presented the following brief rationale for the prohibition: "everybody has suffered for a long time by prisoners in the dock and witnesses being pilloried by having their photographs taken, and this is to prevent that happening."<sup>54</sup> Reporting of celebrity civil cases was also criticised for its invasion of privacy, with extensive press coverage of high-profile divorce proceedings also supporting the enactment of the English statutory ban on courtroom photography.<sup>55</sup>

Such concerns relating to the perceived invasion of privacy and the psychological impact of extensive media coverage, no matter how unobtrusive, on those participating in trials are unlikely to be eased by new technology.<sup>56</sup> However, public familiarisation with, and increased utilisation of, audio-visual technology may serve to lessen the impact of audio-visual coverage on participants. For example, persons holding public positions now expect media attention and scrutiny, while ever-present CCTV cameras that record our movements in public make very few of us self-conscious.

Advances in technology may have led to a recognition that the audio-visual recording of proceedings is no longer inherently *physically* distracting or disruptive, but they have not allayed the original and ongoing concerns regarding media reporting's *psychological* impact on participants, its fueling of public interest in the details of judicial proceedings, nor the perception that audio-visual reporting is, in the words of Canon 35, "calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the minds of the public."<sup>57</sup>

Though it is true that experiments and studies do not substantiate such concerns, neither do they conclusively prove them to be unfounded. Regardless of the findings of studies, it is the public perception of whether audio-visual coverage has a negative effect that ultimately determines whether justice is seen to be denied or

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<sup>54</sup> Hansard Reports, House of Commons, May 11, 1925, at 1599.

<sup>55</sup> See Dockray, *supra* note 6, at 594–96.

<sup>56</sup> Technology has introduced some novel privacy concerns. Courts in Australia, Japan and Britain have expressed concern at privacy and security issues flowing from the use of such phones in courtrooms. See Garry Barker, *Courts May Crack Down on Mobiles, The Age* (Melbourne, Australia) June 17, 2003, at <http://www.theage.com.au/articles/2003/06/16/1055615728563.html> (last visited Apr. 20, 2004); *Camera-Equipped Cell Phones Courting Disaster*, MAINICHI DAILY NEWS, Nov. 3, 2002, at <http://mdn.mainichi.co.jp/features/0211/03cameraphones.html> (last visited Apr. 20, 2004).

<sup>57</sup> CODE OF PROF'L AND JUDICIAL ETHICS Canon 35 (1937).

prejudiced by the audio-visual coverage. Ultimately it could be said that it is *how* such coverage is introduced and regulated that matters, rather than *whether* it is permitted. Thus, the perception that audio-visual coverage will adversely impact participants is certain to be lessened if such coverage is introduced with input and agreement of the bench, bar, media and organizations representing the interests of victims of crimes, as well as the public. Studies have also revealed that the acceptability of such coverage hinges on those involved being accustomed to such technology and scrutiny.<sup>58</sup> This appears to support the view that audio-visual coverage should be introduced incrementally, beginning with proceedings least likely to be adversely affected. This would permit judges and lawyers to grow accustomed to the presence of cameras and members of the public to come to see broadcasts of proceedings as just another aspect of the public administration of justice.

#### IV. ANALYSING CONCERNS

Since the 1970s, numerous experiments with and studies of cameras in courts have been undertaken not only in the United States, but in other common law countries, such as Canada, Britain, New Zealand, and Australia.<sup>59</sup> Without exception, such studies and experiments have revealed that courtroom recording for broadcast has no significant detrimental impact on courtroom participants or on the administration of justice, and have declared potential dangers capable of being addressed through appropriate regulations.<sup>60</sup> For example, following a year-long study of overseas experiences with cameras in courts, the Working Party of the Public Affairs Committee of the General Council of the Bar (of England and Wales) released a report<sup>61</sup> in which it concluded that "the benefit of televising outweighs

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<sup>58</sup> See, e.g., CAMERAS IN NEW YORK, *supra* note 4, at 78; JOHNSON & KRAFKA, *supra* note 34, at 7; Allison Small, *Cameras in the Courtroom: Pilot Project Preliminary Report and Survey Results, Mar. 6, 1997*, in ELECTRONIC MEDIA COVERAGE OF COURTS, *supra* note 45, at app. 51, sched. 5.

<sup>59</sup> See, e.g., JOHNSON & KRAFKA, *supra* note 34, at 7; *Televising the Courts: Report of Working Party of the Public Affairs Committee of the General Council of the Bar* (1989) (summarizing the findings of a study carried out by the General Council of the English and Welsh Bar) [hereinafter Caplan Report]. For a discussion of these and other experiments and studies, including the evaluations of Canadian experiments, see ELECTRONIC MEDIA COVERAGE OF COURTS, *supra* note 45.

<sup>60</sup> For an overview of the findings, see Susanna Barber, *News Cameras in the Courtroom: A Review of the Empirical Literature*, 8 PROGRESS IN COMM. SCIS. 177 (1987). However, some have questioned the methodology and conclusiveness of such findings. See, e.g., Ralph E. Roberts, Jr., *An Empirical and Normative Analysis of the Impact of Televised Courtroom Proceedings*, 51 SMU L. REV. 621-45 (1998); Dan Slater & Valerie P. Hans, *Methodological Issues in the Evaluation of "Experiments" with Cameras in the Courts*, 30 COMM. Q. 376-80 (1982).

<sup>61</sup> Caplan Report, *supra* note 59.

the arguments against it”<sup>62</sup> and recommended that legislation be amended to allow a televising of court proceedings under strict controls, for a trial period of two years.<sup>63</sup> The Working Party deemed objections to the televising of courts to be “based largely on fears which, in practice, are revealed to be unfounded, and in part upon an emotive reaction to television,”<sup>64</sup> and urged that any inherent risks could be “effectively removed or controlled by the rules of coverage and the trial judge’s discretion” and ought not to be perceived as “justification for banning the camera altogether.”<sup>65</sup>

Though such consistently reassuring experiences and positive evaluations have caused a continually increasing number of jurisdictions and courts to permit audio-visual coverage, opposition and concerns continue to be heard.<sup>66</sup> It is often overlooked that even jurisdictions that in theory permit audio-visual coverage of court proceedings rarely do so in practice, because their judges choose to exercise their discretionary powers to deny access to the electronic media. Significant reservation is found among many judges in the United States and New Zealand, where cameras are permitted in most courts, albeit under varying levels of restrictions;<sup>67</sup> England, where a statutory ban remains in place,<sup>68</sup> and countries such

<sup>62</sup> *Id.* at 35, para. 4.13.

<sup>63</sup> *Id.* at 49, para. 7.1 (recommendation iv).

<sup>64</sup> *Id.* at 47, para. 6.1.

<sup>65</sup> *Id.* at 46, para. 6.1.

<sup>66</sup> Perhaps the most compelling outline of arguments against televising court proceedings is to be found in Leonard Noisette’s dissenting minority report of the N.Y. State Committee’s recommendation to allow audio-visual coverage of court proceedings. See *CAMERAS IN NEW YORK*, *supra* note 4 (minority report of Leonard Noisette). For a detailed analysis of this dissenting report, see *ELECTRONIC MEDIA COVERAGE OF COURTS*, *supra* note 45, at 4.56–4.78. An interesting illustration was provided by a superior court in Prague, which in late October 2003, cancelled the Czech Republic’s first live televised trial very shortly after proceedings got under way. See Kathleen Knox, *Czech Republic: Verdict Still Out on Merits of Televised Trials*, RADIO FREE EUROPE/RADIO LIBERTY, available at <http://www.rferl.org/nca/features/2003/10/30102003174829.asp> (last visited Jan. 24, 2004); see also *Czech Television to Offer Live Coverage for Murder Trial*, at <http://www.rferl.org/newsline/2003/10/3-CEE/cee-241003.asp> (last visited Dec. 21, 2003).

<sup>67</sup> For a detailed listing of the level of audio-visual coverage permitted in American courts, see RADIO-TELEVISION NEWS DIRS. ASS’N & FOUND., *CAMERAS IN THE COURT: A STATE-BY-STATE GUIDE*, available at <http://www.rtnda.org/foi/scc.shtml> (last visited Jan. 24, 2004). Since May 2000, New Zealand courts permit radio, television coverage, and press photography of their proceedings, albeit subject to strict guidelines. See 2003 New Zealand Guidelines for Media Coverage of Court Proceedings, available at <http://www.courts.govt.nz/media/mediacoverageguidelines.html> (last visited Jan. 24, 2004). This move followed the positive assessment of the three year (1995–1998) pilot project in the High Courts in Auckland, Wellington, Christchurch and the District Court in Auckland. See KIMBERLY ALLAN ET AL., *DEP’T FOR CTS., THE IMPACT OF TELEVISION, RADIO AND STILL PHOTOGRAPHY COVERAGE OF COURT PROCEEDINGS — FINAL REPORT*, (1998). For further discussion of the New Zealand experience, see *ELECTRONIC MEDIA COVERAGE OF COURTS*, *supra* note 45, at ch. 3.

<sup>68</sup> It appears, however, increasingly likely that the Department of Constitutional Affairs

as Scotland, Canada, and Australia, where though not prohibited by statute, largely only ad hoc camera coverage has been permitted by the judiciary.<sup>69</sup>

It appears that the positive findings of studies and experiments have failed to quash the reservations of opponents. It is probably true to say that neither those arguing in favour of audio-visual coverage nor those opposed have made headway. This has led to an impasse.

## V. WHY THE IMPASSE?

A consideration of explanations for this impasse, I believe, serves to identify policy and legal implications of the audio-visual recording and broadcast of court

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will soon authorize experimental recording of appeal hearings, with a view to assessing the nature and potential of recordings before deciding whether to lift or relax the statutory ban on courtroom photography that has existed since 1925. For a discussion of moves towards such an experiment, see Stepniak, *supra* note 6, at 274–75; Matt Wells & Clare Dyer, *First Step to Put Cameras into Courtroom*, THE GUARDIAN, Nov. 17, 2003, available at [http://www.guardian.co.uk/uk\\_news/story/0,3604,1086759,00.html](http://www.guardian.co.uk/uk_news/story/0,3604,1086759,00.html).

<sup>69</sup> Audio-visual coverage of Scottish courts is not subject to the statutory ban of the Criminal Justice Act of 1925. Coverage is governed by guidelines issued in 1992 by the Lord President of Scotland, Lord Hope. These guidelines impose strict conditions on the recording and broadcast of judicial proceedings. For a reproduction of these guidelines, see *BBC v. Petitioners No. 1*, J.C. 419, para. 6 (2000), available at <http://www.scotcourts.gov.uk/index1.asp> (last visited Jan. 24, 2004). A number of documentaries have been filmed subject to these guidelines. The appeal in the Lockerbie Bomber's case remains the only Scottish judicial proceeding that has been permitted to be recorded for news broadcast. For a discussion of Scottish experience with cameras, see Stepniak, *supra* note 6, at 263–66. On Lockerbie, see Ros McInnes, *Scotch Mist: The Lockerbie Trial and Article 10*, 46 J.L. SOC'Y OF SCOT. 21–23 (2001).

While no statutory prohibition of audio-visual recording exists in Australia, most Australian courts have been reluctant to permit cameras to record and broadcast their proceedings. Some judges of the Australian Federal Court and the state courts of Victoria, South Australia, and Western Australia have permitted audio-visual reporting on an ad-hoc basis. Western Australia remains the only Australian jurisdiction to have formulated specific guidelines for audio-visual coverage. For a detailed discussion of the Australian experience, see ELECTRONIC MEDIA COVERAGE OF COURTS, *supra* note 45, at ch. 7.

Apart from the Supreme Court of Canada, which has permitted all its proceedings to be recorded and broadcast by CPAC since 1995, Canadian courts have also been hesitant to admit cameras. While experimental programs undertaken by the Federal Court of Appeal and the Supreme Court of Nova Scotia have not led to any problems, the Canadian Judicial Council remains opposed to cameras in Canadian courts. For a discussion of the Canadian experience, see the Ad IDEM Web site: <http://adidem.org/> (last visited Jan. 24, 2004). In 2001, the CJC rejected the recommendation of its Cameras in Courts Committee and declined to reconsider the view that televising courts other than the Supreme Court of Canada “would not be in the interests of the administration of justice,” a position it has held since 1983. See Cristin Schmitz, *Judicial Council Divided Over TV Cameras in Court: “It’s Like Working in a Juristic Jurassic Park,”* says Critic, 21 LAWS. WKLY. (2001).

proceedings, which are often overshadowed by arguments over whether audio-visual recordings and broadcasts affect the participants of televised trials, and, in particular, the parties' rights to a fair trial.

Particularly insightful is a consideration of the reasons given for opposing audio-visual coverage of *appeal* hearings. In the absence of largely unsubstantiated, but nevertheless understandable, concerns for the impact of recordings and broadcast coverage on the rights of witnesses, jurors and parties, judicial opposition to appellate coverage appears to focus on concerns for the preservation of judicial anonymity, the mystique of the law, traditional court procedures, and a preference for less than fully open justice.

U.S. federal judges, and especially Supreme Court Justices, appear to base their objections to camera coverage of appeal cases on the grounds that such coverage would undermine the mystique of the appellate process, take away their independence and anonymity, and turn their deliberations into subjects for street talk.<sup>70</sup> Chief Justice Rehnquist is said to have "expressed fear about the loss of 'mystique and moral authority' that might result from camera exposure."<sup>71</sup> Justice Anthony Kennedy said in 1995, "I'm delighted I'm less famous than Judge Ito."<sup>72</sup> Justice Byron White is said to have confessed one reason why he did not want his court televised: "I am very pleased to be able to walk around, and very, very seldom am I recognized. It's very selfish, I know."<sup>73</sup> Such rationales, though understandable as personal preferences, appear to dismiss the electronic media's potential to enhance public access and understanding, and suggest a preference for limited publicity of judicial proceedings in forms that are unintelligible or inaccessible to the public at large.

Such objections raise the question: does audio-visual coverage of courts undermine the authority of decisions as claimed by U.S. Supreme Court Justices? While it is difficult to refute the suggestion that greater public exposure may lead to more public commentary being personalised, it is also important to consider whether confidence in and respect for the judicial system may not be undermined by courts being the last public institution to resist the type of transparency that the public is accustomed to with other public institutions. It is often said that the judiciary is the arm of government that is most accountable because it conducts its hearings in open courtrooms and delivers detailed reasons for its decisions. This argument, however, loses any persuasiveness when we consider that few people are able to attend and observe proceedings; that even judges and lawyers have difficulty understanding judicial opinions; and that the vast majority of the population gain their information from television, which is hampered in its coverage of court

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<sup>70</sup> See Tony Mauro, *The Camera-Shy Federal Courts*, 12 MEDIA STUD. J. 60 (1998).

<sup>71</sup> *Id.* at 65.

<sup>72</sup> *Id.* at 63.

<sup>73</sup> *Id.* at 64.



proceedings because it is rarely permitted to record and broadcast the visual content that viewers expect.

Surveys of public perception of the judicial process carried out in common law countries have revealed low levels of public understanding of the role of courts and of judicial processes, and correspondingly low levels of confidence in the judiciary.<sup>74</sup> Significantly, such studies have also revealed a startling discrepancy between public perceptions of courts and the courts' perceptions of their own performance. In their analysis of the National Center for State Courts 1999 National Survey,<sup>75</sup> David Rottman and Alan Tomkins concluded that "the general public and the judiciary hold views of the courts so divergent as almost to be mirror images."<sup>76</sup>

The lack of public confidence in the judiciary often reflects a low level of public understanding of the role of courts and the judicial process. This has led to calls for courts to take an active role in promoting or facilitating public education and awareness. For example, Professor Parker's 1998 Australian Institute of Judicial Administration study led him to find that "[t]he court system needs to think about proactive ways of educating the public about the role, function and activities of Australian courts. It seems that there is considerable public receptiveness to attempts to convey accurately what courts do and why they do it."<sup>77</sup>

South Australian Chief Justice John Doyle has argued that:

[C]onfidence of the public in the courts depends upon the public having access to the courts, in the sense of being able to observe and understand what the courts are doing . . . . If the courts are going to leave it to

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<sup>74</sup> See, e.g., STEPHEN PARKER, *COURTS AND THE PUBLIC* (1998); see also MARKETSHARE, *MARKET REPORT: COMMUNITY AND CLIENT PERCEPTIONS OF THE QUEENSLAND COURT SYSTEM* (1991); PUBLIC ATTITUDES SURVEYS LTD., *NATIONAL SURVEY OF COURT USERS: EXECUTIVE REPORT* (1994); MARLENE WINFIELD, *SEEKING CIVIL JUSTICE: A SURVEY OF PEOPLE'S NEEDS AND EXPERIENCES* (1995); S. Wain, *Public Perceptions of the Civil Justice System*, in ONTARIO LAW REFORM COMMISSION, *RETHINKING CIVIL JUSTICE: RESEARCH STUDIES FOR THE CIVIL JUSTICE REVIEW* (1996); Grace Meertens, *Survey Finds Public Unhappy with Courts*, THE W. AUSTL. (Perth), Sept. 5, 1998, at 39. For a comparative analysis, see PATRICIA KNAGGS, DEP'T FOR CTS., NEW ZEALAND, *THE PROVISION OF SERVICES FOR COURT CUSTOMERS IN AUSTRALIA, CANADA AND THE UNITED KINGDOM: A LITERATURE REVIEW AND ANNOTATED BIBLIOGRAPHY* (1996).

<sup>75</sup> NAT'L CTR. STATE CTS., *HOW THE PUBLIC VIEWS THE STATE COURTS: A NATIONAL SURVEY* (1999), available at [http://www.ncsconline.org/WC/Publications/Res\\_AmtPTC\\_PublicViewCrtsPub.pdf](http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf) (last visited Dec. 20, 2003).

<sup>76</sup> David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, 36 COURT REV. 24, 31 (1999), available at [http://www.ncsconline.org/WC/Publications/Res\\_AmtPTC\\_SurveysMeanToJudgesPub.pdf](http://www.ncsconline.org/WC/Publications/Res_AmtPTC_SurveysMeanToJudgesPub.pdf) (last visited Dec. 20, 2003).

<sup>77</sup> PARKER, *supra* note 74, at 163.

others, the media in particular, to determine how much and what sort of information the public gets about their workings, then the courts are saying that they are content to leave it to others to shape the public understanding and perception of the courts. That to me is not acceptable. I believe that the courts are well placed to explain their function. I consider that experience shows that leaving that task to others is, in the long term, unsatisfactory.<sup>78</sup>

Accepting that the most relied upon source of public information on court proceedings is the media, and particularly the electronic media, public confidence in the judiciary may be said to hinge on media reporting of proceedings. For this very reason, in Australia, Sir Ninian Stephen, former Australian Governor-General and High Court Justice, urged the High Court to consider televising its proceedings to redress falling public confidence and to counter misinformed public criticism of the Court's "judicial activism."<sup>79</sup> The High Court did not accept Sir Ninian's advice, apparently rejecting the suggested link between public confidence and electronic media access. Sir Ninian's call for the High Court to promote public access was echoed recently by Professor Michael Coper who called on the High Court to "make its judgments more accessible if there is to be proper dialogue on its decision[s]."<sup>80</sup>

However, currently the High Court appears less concerned with public confidence; Chief Justice Gleeson is reported as saying that "above all it requires the confidence of other judges and the legal profession."<sup>81</sup> Such an unfortunate remark tends to reinforce the perception that our judiciary prefers to shroud its administration of justice in mystique and resists greater transparency for fear that the public may not approve of the manner in which justice is administered in their name.

It could be argued that the potential to broadcast or stream the proceedings of certain courts would appear to provide a means of addressing specific, current, public concerns. Thus, the significant public concern voiced over New Zealand's abolition of Privy Council appeals and the establishment of a New Zealand Court of Appeal could in large measure be addressed by ensuring that the public, already

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<sup>78</sup> The Hon. John Doyle, *The Courts and the Media: What Reforms are Needed and Why*, 1 U. OF TECH. SYDNEY L. REV. 25, 26–27, available at <http://www.austlii.edu.au/au/journals/UTSLR/1999/6.html> (last visited Dec. 20, 2003).

<sup>79</sup> See Right Hon. Sir Ninian Stephen, Address on the Occasion of the President's Luncheon at the Law Institute of Victoria (Aug. 19, 1988), in ELECTRONIC MEDIA COVERAGE OF COURTS, *supra* note 45, at 13.

<sup>80</sup> David McLennan, *High Court Decisions Must be Open to Dialogue — Professor Michael Coper*, CANNBERRA TIMES, Sept. 22, 2003, at 7.

<sup>81</sup> Bernard Lagan, *Courting Controversy*, THE BULLETIN, Oct. 14, 2003, at 30.

accustomed to viewing trial proceedings on television, would be able to scrutinise and judge for themselves whether the new court is politically biased.<sup>82</sup>

Similarly, Britain's replacement of the system of Law Lords operating as a committee of the House of Lords with a new Supreme Court coincides with reforms designed to enhance the independence, access to, and transparency of British courts. Consequently, a pilot program, designed to ascertain and evaluate the nature of potential television coverage, is shortly expected to be undertaken in the Court of Appeal. Audio-visual coverage of Appeal Court hearings would permit the British public to better scrutinise and understand the working of its courts, at a time of controversial judicial reform. In the absence of juries and witnesses, it would also appear to be suited perfectly to being the venue for the long-proposed experiment with cameras in courts,<sup>83</sup> the first step towards removing the statutory ban on courtroom photography.

Another ground for opposing the broadcast of appeal hearings was aired at the time of the *Bush v. Gore*<sup>84</sup> hearings, with Chief Justice Rehnquist presenting the argument that camera coverage of the Court would alter the dynamics of oral argument.<sup>85</sup> While judges, whom I have asked to comment, have been split on whether this would really be the case, the experiences of the Supreme Court of Canada would not appear to support such a contention.<sup>86</sup> It is difficult to appreciate why an avenue, which would permit the public to observe the submissions and oral arguments in their highest court, should remain closed because it is feared that the

<sup>82</sup> The public outcry over the government's decision to abolish appeals to the Privy Council and set up a new Supreme Court has been led by New Zealand's popular press. Under the heading "Judges Will Be Under Microscope," the *New Zealand Herald's* October 15, 2003 editorial declared that:

[I]t will fall to the news media to scrutinise Supreme Court appointments in a manner that judges in this country have never known. The influence these appointees could exert on our lives and rights cannot allow them to be installed without critical examination. This newspaper will ensure that each will receive our most careful and searching attention. The court will be no place for judges with a thin skin.

Editorial, *Judges Will Be Under Microscope*, THE N.Z. HERALD, Oct. 15, 2003, at A18.

In his letter to the editor, published in the *Sunday Star Times* on October 19, 2003, Auckland barrister Christopher Harder suggested that the formal recording of the proceedings of the new court would serve to "make the abolition of the Privy Council more palatable to those opposed to it." Christopher Harder, *Tapes in Court*, STAR TIMES, Oct. 19, 2003, at C9. It may be of interest to note that most New Zealand Courts do not record the transcript of their proceedings, and rely instead on long-hand notes taken by judges' associates.

<sup>83</sup> See Caplan Report, *supra* note 59, at 7.1; discussion *supra* note 68.

<sup>84</sup> 531 U.S. 98 (2000).

<sup>85</sup> *KSPS: Episode 9635* (PBS television broadcast, Feb. 18, 2001) (Charlie Rose interview with William Rehnquist).

<sup>86</sup> Since 1995, Canada has permitted all its judicial proceedings to be broadcast by CPAC, Canada's political channel, without incident.

public may not appreciate that questions asked by judges may not actually reflect their own views, or that it may cause judges to be more careful in the questions that they do ask. Educating the public or even considering changing the manner in which appellate hearings are conducted may indeed be warranted, particularly if we accept that facilitating greater public access and scrutiny is likely to lead to better informed public commentary.<sup>87</sup> Thus, courts have much to gain from permitting camera coverage of oral argument. Why does the lack of public understanding of appellate procedure apparently not concern Chief Justice Rehnquist, nor other similarly disposed appellate court judges? Is this view symbolic of an elitism that appears to maintain that lay people are best “kept in the dark,” as too much exposure to the complexities of the law will only confuse them? Such a view appears to reveal an undesirable elitism and the existence of a concern, similar to that expressed in the early twentieth century that the lay public ought not to be permitted to become too involved or interested in judicial matters.

A recent media interview suggests that Justice Sandra Day O’Connor’s opposition to television coverage of the Supreme Court is at least in part based on the argument that broadcasting of Supreme Court oral arguments would create a false impression that the Court makes its decision on the basis of presented oral arguments.<sup>88</sup> I consider this argument to be quite significant in that it implicitly concedes that members of the public observing proceedings from the public gallery are equally misled and that the level and nature of currently permitted openness is not such as would permit the public scrutiny required by the principle of open justice.

Such a concession of the inadequate openness of the Supreme Court of the United States, and consequently of appellate proceedings in U.S. courts, should not be seen as a persuasive argument for the retention of the status quo, but as a powerful argument for either more extensive media coverage, or the revision of current appeal processes so as to permit such proceedings truly to be administered openly. Rather than being seen as a sound argument for the prohibition of camera coverage, it should be seen as an opportunity for technology to remedy the lack of openness. Audio-visual transmission of oral argument supplemented by electronic access to written submissions, either via the Internet or utilising available

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<sup>87</sup> A more informed public commentary is particularly important in view of the gravity of the issues concerned. *See, e.g., Bush v. Gore*, 531 U.S. 98 (2000) (determining the legitimacy of a U.S. presidential election). I wonder how much more informed the Australian debate of Native Title would have been had the public been permitted to see and hear the legal argument in *Mabo and Others v. Queensland [No. 2]* (1992) 175 C.L.R. 1, available at <http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html> (last visited Dec. 20, 2003), or *The Wik Peoples v. The State of Queensland* (1996) H.C.A. 40, available at <http://www.austlii.edu.au/au/cases/cth/HCA/1996/40.html> (last visited Dec. 20, 2003).

<sup>88</sup> *This Week* (ABC television broadcast, July 6, 2003) (interview with Justice Sandra Day O’Connor).

interactive digital broadcasting technology, would arguably permit members of the public to acquire an understanding of cases, which they are currently deprived of, not only through the absence of audio-visual coverage,<sup>89</sup> but as a consequence of the adoption of judicial procedures, such as reliance on written briefs and time-restricted oral submissions, introduced for the sake of efficiency.

In introducing procedural reforms in the name of efficiency, such as those designed to reduce time-consuming and expensive court appearances, and often through the utilisation of technical innovations such as e-court,<sup>90</sup> care must be taken to not overlook the impact such reforms may have on the public's ability to access and scrutinise court proceedings. Where reforms do have such an impact, consideration ought to be given to employing available technology to ensure that court efficiency does not come at a cost to open justice.

Another reason why the debate over the admission of cameras in courtrooms remains unresolved may be that the debate has become preoccupied with high profile celebrity cases, and at times lacks the scrutiny and close analysis one expects of a legal debate. There appears to be a great need to focus on available evidence rather than anecdotal accounts of subjective, and at times uninformed, impressions. For example, assumptions made about, and inferences drawn from, accounts of the media's coverage of the O.J. Simpson case have taken on mythical dimensions, and often ignore vital realities, such as the orderly and appropriate nature of the Simpson trial proceedings,<sup>91</sup> and the substantive and procedural laws of other jurisdictions that would prevent the most offensive aspects of that trial's media

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<sup>89</sup> Transcripts of Supreme Court hearings as well as Court opinions are now available from the Court's Web site. See [http://www.supremecourt.us/oral\\_arguments/argument\\_transcripts.html](http://www.supremecourt.us/oral_arguments/argument_transcripts.html) and <http://www.supremecourt.us/opinions/opinions.html> (last visited on Dec. 20, 2003). Only on two occasions (*Gore v. Bush*, 531 U.S. 98 (2000) and *Grutter v. Bollinger*, 531 U.S. 306 (2000)), the April 2003 University of Michigan affirmative action cases) has the Court released audiotapes of the oral argument on the same day. See Karen Aho, *TV and the Supreme Court: Broadcasters Want Access, But Will They Deliver Serious Coverage?*, 5 COLUM. JOURNALISM REV. (2003), available at <http://www.cjr.org/issues/2003/5/tv-aho.asp> (last visited Dec. 20, 2003).

<sup>90</sup> In February 2001, the Federal Court of Australia commenced a pilot of its e-court initiative, enabling parties "to participate in an electronic hearing which will replicate the usual manner in which Court hearings are conducted but without the constraints of the requirement that all of the parties (as well as the Judge) be in the courtroom at the [sic] one time." Public notice issued by Warwick Soden, Registrar and Chief Executive, Federal Court of Australia. See FED. CT. OF AUSTL.: E-COURT (2001) (para. 9). In permitting hearings to be conducted over the Internet, the court may be said to have operated in cyberspace. For current information on the Court's initiative, see [http://www.fedcourt.gov.au/ecourt/ecourt\\_background.html](http://www.fedcourt.gov.au/ecourt/ecourt_background.html) (last visited on Mar. 15, 2004).

<sup>91</sup> Even opponents of cameras in courts concede that the televised proceedings were conducted in a dignified and appropriate manner. See ELECTRONIC MEDIA COVERAGE OF COURTS, *supra* note 45, at 88-89.

coverage.<sup>92</sup> Enforceable restrictions imposed on court reporting in common law jurisdictions outside of the United States would unquestionably have avoided the trial by media.<sup>93</sup> When we consider what was objectionable about the Simpson trial, we are likely to come up with a list of factors that appeared to be magnified by the television coverage. The footage broadcast from inside the court appeared to provide the only objective account of the trial. However, while even Jerriane Hayslett, the Los Angeles Superior Court Public Information Officer who oversaw the media coverage of the case, admits that broadcast footage can sensationalise some of the testimony and evidence,<sup>94</sup> it does not mean that this mandates keeping cameras out of court. Rather, it suggests that restrictions on camera coverage should seek to ensure that viewers at home are presented with an audio-visual experience as similar as possible to that of those personally attending the proceedings.<sup>95</sup>

As the 1981 inquest into the disappearance of Azaria Chamberlain revealed in Australia, keeping cameras out of court and even strict regulation of reporting may not suffice to prevent trial by media and the dissemination of misinformation.<sup>96</sup> It is worth remembering that the coroner in that inquest invited television cameras to record his findings specifically to counter the misinformation disseminated by the media from outside the courtroom.<sup>97</sup> It is important to concede that, having been deprived of the opportunity to see and hear the trial for themselves, many Australians remain convinced of Lindy Chamberlain's guilt on the basis of discredited, selective media reporting.<sup>98</sup>

As with assumptions made regarding the reasons for the imposition of original prohibitions on courtroom photography and filming, there is a need to carefully identify the causes of undesirable court reporting, without simply attributing the cause to the use of audio-visual recording equipment in court.

<sup>92</sup> See, e.g., Michael Chesterman, *OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt with in Australia and America*, 55 AM. J. COMP. L. 109, 142-44 (1997) [hereinafter Chesterman, *OJ and the Dingo*]; Micheal Chesterman, *Controlling Courtroom Publicity: Common Law Strategies*, INT'L LEGAL PRACTITIONER, June 1985, at 47.

<sup>93</sup> See Chesterman, *OJ and the Dingo*, *supra* note 92, at 142-43.

<sup>94</sup> See COHN & DOW, *supra* note 6, at 83-84.

<sup>95</sup> For a comprehensive discussion of related issues, see TIMOTHY R. MURPHY ET AL., *MANAGING NOTORIOUS TRIALS* (2d ed. 1998).

<sup>96</sup> Sam Lipski, *Azaria Case Reflects Journalism's Worst — and Best*, THE BULLETIN, Feb. 25, 1986, at 86. On media reporting of the Chamberlain inquests and trials, see generally JOHN BRYSON, *EVIL ANGELS* (1985); KEN CRISPIN, *LINDY CHAMBERLAIN: THE FULL STORY* (1990); NORMAN YOUNG, *INNOCENCE REGAINED* (1989).

<sup>97</sup> NEW SOUTH WALES LAW REFORM COMM'N, *PROCEEDINGS OF CTS. AND COMM'S TELEVISION FILMING, SOUND RECORDING AND PUBLIC BROADCASTING, SKETCHES AND PHOTOGRAPHS* 34 (1984) (citing personal communication with Mr. Barritt, S.M.).

<sup>98</sup> Paul Toohey, *Witch Hunt*, THE AUSTRALIAN, July 15, 2000, available at <http://www.theaustralian.com.au/extras/toohey/s1s1.html>; see also *supra* note 96.

An objective analysis of the media's reporting of high-profile trials will reveal complexities extending well beyond the simplistic attribution of sensationalist reporting to the electronic media. It will show that such media reporting had been deemed a problem well before issues of audio-visual recording came into the equation.<sup>99</sup> As Hayslett notes, evidence also suggests that in-court television camera coverage of a high-profile case may act as a catalyst for excessive media coverage.<sup>100</sup>

Importantly, those who have studied the effects of cameras in courtrooms have drawn inconclusive results. Perhaps findings of studies and evaluations of experiments with cameras in courts are deemed inconclusive because they inevitably rely on measuring perceptions rather than actual impact of such recording and reporting — a point expressly made in a qualification to the Federal Judicial Center's evaluation of the study of the U.S. federal courts' pilot program.<sup>101</sup>

A number of issues emanate from the realisation that it is ultimately perceptions as to the impact of audio-visual recordings and their subsequent broadcasts that determine whether they are deemed appropriate. Evidence from numerous jurisdictions suggests that perceptions of participants, including judges, as to the desirability of audio-visual coverage tend to improve through personal experience.<sup>102</sup> Being aware of this, media organisations seeking access to courts should not balk at what they consider overly restrictive conditions that judges may impose. Instead they may wish to see such as opportunities to reassure judges, who on the basis of their positive experiences and improved perceptions of the process, may be ready to assent to more extensive or liberal access. Public perceptions of the desirability and appropriateness of audio-visual coverage have also been shown to similarly improve. It is interesting to note that while the televising of Victorian Supreme Court Justice Teague's sentencing of a convicted child murderer in May 1995 was the subject of much public criticism,<sup>103</sup> similar broadcasts today barely warrant a mention.

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<sup>99</sup> See *supra* note 6.

<sup>100</sup> See Jerriane Hayslett, *What a Difference a Lens Makes*, 12 CT. MANAGER 21 (1997) (comparing the media reporting of trials where television coverage was permitted with others where such coverage was denied).

<sup>101</sup> JOHNSON & KRAFKA, *supra* note 34, at 8.

<sup>102</sup> See *id.* at 7. For other studies see *supra* note 58.

<sup>103</sup> See, e.g., David Adams, *Child Murder: Judges Question TV Sentence*, THE AGE, Dec. 23, 1995, at 1–2; Nicole Brady & Rachel Gibson, *A Mixed Reaction to a Slice of History*, THE AGE, May 19, 1995, at 8; Michelle Coffey & Rachel Hawes, *Murder Sentence Broadcast Divides the Nation*, THE AUSTRALIAN, May 19, 1995, at 1, 4; Michelle Coffey, *Telecast Whets an Appetite*, THE AUSTRALIAN, May 19, 1995, at 4; Paul Conroy, *Teague Takes TV Lead But Reception Still Hazy*, THE AGE, Dec. 23, 1995, at 2; Peter Gregory & Rachel Gibson, *Killer Gets Life as "TV Judge" Makes History*, THE AGE, May 19, 1995, at 1, 8.

The nature of the evidence opponents of camera coverage demand be produced as a prerequisite to the admission of cameras into courts also warrants scrutiny. What is typically expected is conclusive evidence or reassurances that the presence of cameras will not adversely effect participants; in particular, that it will not deter witnesses from coming forward and participants will not be affected by an awareness of being recorded. Such an approach to trial publicity, while almost universally accepted and appearing eminently appropriate, appears to be at sharp odds with classic statements of the principle of open justice. In the benchmark House of Lords decision of *Scott v. Scott*,<sup>104</sup> Lord Atkinson appeared to stress that the principle of open justice called for precisely such pressures and inconveniences to be tolerated:

The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.<sup>105</sup>

It is worth considering why the cameras-in-courts debate is premised on proof that audio-visual publicity will have no adverse effect on participants, will not scandalise society, etc. Perhaps the test employed in Florida, where in order for cameras to be denied access to proceedings, a court must be persuaded that proceedings would be adversely affected because of a “qualitative difference” between audio-visual and conventional media coverage, is a test much more in keeping with the spirit of the principle of open justice.<sup>106</sup>

Though evaluations on the basis of perceptions make it difficult to substantiate the realisation of potential benefits of televised proceedings, such as the claimed potential of audio-visual coverage to educate and inform the public, it is generally accepted that, in a number of ways, broadcasts have not lived up to some claims and expectations. Thus, in its evaluation of the federal courts’ experiment with cameras in courts, the Federal Judicial Center noted that electronic media coverage provided little information to viewers about the legal process generally,<sup>107</sup> and that most judges believed that the potential educational benefit had only been realised to a

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<sup>104</sup> [1913] A.C. 417.

<sup>105</sup> *Id.* at 463.

<sup>106</sup> FLA. R. OF JUD. ADMIN. 2.170.

<sup>107</sup> JOHNSON & KRAFKA, *supra* note 34, at 35–36.



small extent or not at all.<sup>108</sup> Similarly, the electronic media's almost exclusive focus on criminal cases by the New Zealand broadcasters, and Canadian networks' apparent lack of interest in utilising access to the Canadian Federal Court of Appeal<sup>109</sup> disappointed many. It is also clear that commercial electronic-media networks are not interested in "gavel-to-gavel" coverage. Even rare audiotape of current U.S. Supreme Court oral argument does not appear to attract much media attention.<sup>110</sup>

Such findings may be seen by some as evidence that audio-visual coverage is incapable of producing the benefits that proponents have claimed. On the other hand, it may be seen as exposing a fundamental flaw in the thinking underlying the issue of audio-visual coverage of court proceedings — the treatment of the publication of audio-visual recordings of court proceedings as a vested media interest and its promotion as a media right.

## VI. COURTROOM BROADCASTING AS A MEDIA INTEREST

The broadcasting of court proceedings tends to be perceived as being in the media's interest for a number of reasons. First, circumstances surrounding the initial prohibitions of camera coverage together with subsequent media excesses in the reporting of notorious cases created and maintained a perception of audio-visual recording and broadcast of judicial proceedings as inherently incompatible with judicial proceedings. Secondly, courts have difficulty with the nature of the medium, which they view as an overly pervasive entertainment medium, which values appearance over substance. Courts' preference for press reporting may be attributed to traditional legal preference for written over oral or pictorial material and its greater protection of judicial anonymity. As principles and rules regulating court reporting were developed in the era of press reporting, the preference for press reporting also stems from the courts' greater ability to regulate and enforce

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<sup>108</sup> *Id.* at 24.

<sup>109</sup> Of approximately one thousand cases heard by the Canadian Federal Court of Appeal during the two years of the pilot program (1995 and 1996), only four cases were televised. Small, *supra* note 58, 114-19, app. 51. Although the court extended the project, no applications seeking camera access were received by the court in the following two years. *Id.* at 119.

<sup>110</sup> For a discussion, see Aho, *supra* note 89. Justice Kirby, the only Justice of the High Court of Australia who is openly supportive of courtroom televising, has lamented the lack of media interest in covering judicial matters and has urged a proactive approach by the judiciary. See Justice Michael Kirby, Media and Courts — The Dilemma, Speech at Southern Cross University Graduation Ceremony (Apr. 27, 2002), available at [http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_dilemma.htm](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_dilemma.htm) (last visited Dec. 20, 2003). He has noted that the High Court's decisions now appear on the Internet within ten minutes of their delivery and urged that "[i]f our concern, as judges and citizens, is with law and justice, we must make sure that information technology is more than a medium of entertainment." *Id.*

reporting restrictions on the press. On the other hand, courts' disdain for the electronic media's emphasis of the visual over the written could be seen as inconsistent with courts' preference for vision over text, and recognition that written accounts of proceedings cannot be relied on to draw reliable inferences, as evidenced by appellate courts' reluctance to overrule a trial court's findings as to the veracity of evidence and by courts' insistence on oral testimony.<sup>111</sup>

It is no longer tenable for courts to ignore the reality that the vast majority of the population receives their public information not from the press, but from electronic media, and in particular from television. Equally it is important for courts to accept that even press reporting is increasingly reliant on visuals to supplement its stories and Internet publications.

The perception that audio-visual recording and broadcasting are media interests has caused much of the debate, particularly in the United States, to focus on media rights, which in turn has reinforced a public perception of the cameras-in-courts debate as a struggle between the interests of the media and those of the judiciary. By insisting that permission to record court proceedings is a constitutional right, media organisations have forced courts into reactive stances and roles of defenders of the competing rights of defendants to a fair trial — a First-versus-Sixth-Amendment battle. Though the constitutional debate is less than twenty-five-years-old, it has undergone significant changes. In *Gannett v. DePasquale*, only Justice Powell appeared to recognise that the press may have a First Amendment right to insist on public trials, which needed to be considered alongside the Sixth Amendment's protection of public trials for the benefit of a defendant.<sup>112</sup> Yet soon after, in *Richmond Newspapers, Inc. v. Virginia*, a majority of the Supreme Court recognised a First Amendment right for the press to attend a criminal trial.<sup>113</sup> In the 1984 case of *Westmoreland v. Columbia Broadcasting System*, the Second Circuit Court of Appeals, though not prepared to convert the public and press right of access to court proceedings into a presumptive right of camera coverage, did leave the door open to such a possibility, noting that additional experience with telecasting could some day warrant the recognition of a presumptive right to televise all court proceedings.<sup>114</sup> Twelve years later, in the Southern District of New York,

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<sup>111</sup> This also raises the issue of whether audio-visual transcripts of trials should be capable of being used by judges on appeal to overturn trial court findings as to the demeanor of witnesses. See Anne Wallace, *The Challenge of Information Technology in Australian Courts*, 9 J. OF JUD. ADMIN. 8, 15 (citing Australian Law Reform Commission, *Technology — What it Means for Federal Dispute Resolution*, Issues Paper 23, 5.30 (1998), available at <http://www.austlii.edu.au/au/other/alrc/publications/issues/23/ALRCIP23.html> (last visited Dec. 20, 2003)).

<sup>112</sup> 443 U.S. 368, 398 (1979).

<sup>113</sup> 448 U.S. 555, 581 (1980).

<sup>114</sup> 752 F.2d 16, 23 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985).

Judge Sweet ruled in *Katzman v. Victoria's Secret Catalogue*,<sup>115</sup> that technological advances and several decades of cameras in courts, which had allayed initial concerns, meant that the time to recognise a presumptive right to televise court proceedings had arrived. A presumptive constitutional right to televise court proceedings was also recognised by New York Supreme Court Judge Joseph C. Teresi in *People v. Boss*.<sup>116</sup> Judge Teresi ruled that due to the positive findings of evaluations of experiments with cameras in courts, earlier concerns were no longer applicable, and thus, "should no longer stand as a bar to a presumptive First Amendment right of the press to televise as well as publish court proceedings, and of the public to view those proceedings on television."<sup>117</sup>

Though few American courts recognise such a presumptive constitutional right, it seems that if the U.S. Supreme Court were to revisit the specific issue of the constitutional rights of the electronic media to gain permission to record court proceedings, the Court would be unlikely to deny access in the absence of overriding and appropriate reasons.

However, seeking admission on the basis of media rights, rather than on the basis of such coverage being in the interests of the administration of justice, arguably, has also had a negative impact, as it has reinforced the perception that such coverage is a vested interest of the media and, consequently, that it ought only be permitted on proof and condition of it not having an adverse effect on the proceedings. In contrast, when the presence of cameras is considered in terms of its potential to educate, inform, and ensure that justice is done, admission is less likely to be contingent on the cameras' lack of impact on proceedings.<sup>118</sup>

Possibly the most damaging implication of insisting on permission to record and broadcast court proceedings is that the case for such coverage suffers a set-back every time something occurs that underlines the reality that the interests of justice and the electronic mass media do not always coincide.

## VII. IMPACT OF NEW TECHNOLOGIES

British courts, and consequently those of most commonwealth countries, have traditionally been entrusted with the regulation of court reporting. Such regulation requires the courts to balancing the interests of the administration of justice, including the right to a fair trial, against interests flowing from the open and

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<sup>115</sup> 923 F. Supp. 580, 585–86 (S.D.N.Y. 1996).

<sup>116</sup> 701 N.Y.S.2d 891 (2000).

<sup>117</sup> *Id.* at 894.

<sup>118</sup> The conduct of Native Title cases by the Federal Court of Australia, often in remote locations and in the absence of the formal trappings of courtrooms, is possibly an appropriate illustration. See the description of the audio-visual recording of the *Yorta Yorta* hearings in ELECTRONIC MEDIA COVERAGE OF COURTS, *supra* note 45, at 7.4–7.9.

publicised administration of justice. In these jurisdictions, courts enforce restraints and prohibitions on courtroom reporting through *sub judice* and contempt laws.<sup>119</sup>

However, innovations in broadcasting technology, and in particular the growing utilisation of the Internet as a form of communication and source of public information, may be said to have undermined much of the rationale for *sub judice* and contempt of court laws, as well as the principles used to severely restrict the reporting of court proceedings in countries such as Britain, Canada, New Zealand and Australia that were formulated at a time when the press was the dominant source of public information. Broadcasting and information technologies, particularly satellite broadcasting and the Internet, which are increasingly utilised in the reporting of court proceedings, arguably highlight the inappropriateness and inadequacy of continuing to regulate court reporting through *sub judice* and contempt laws. They suggest a need to move away from the traditional enforcement of reporting restrictions by courts towards greater reliance on open justice, freedom of speech and the public's right to receive information.<sup>120</sup> By largely eliminating the relevance of geographical boundaries, advances in broadcasting and information technologies have served to undermine restrictions enforceable within jurisdictions.<sup>121</sup> They have also made calls for greater enforcement of identity suppression justice sound futile.<sup>122</sup>

New and audio-visual technologies employed in court reporting may be said to challenge some of the overriding principles and rules governing public and media access to court proceedings. The principle of open justice, or public administration of justice, appears to be premised on the desirability of subjecting court proceedings to the level of public scrutiny occasioned by permitting members of the public to gain access to proceedings and court documents and journalists to attend and report

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<sup>119</sup> See G. Stuart Adam, *The Thicket of Rules North of the Border: Canadian Perspectives on a Free Press and Fair Trials*, 12 MEDIA STUD. J. 24 (1998). Adam provides an informative insight into how Canada's approach to media reporting of courts differs from that of the United States. For a discussion of Canadian endeavours to reconcile freedom-of-speech provisions of the Canadian Charter of Rights with Canada's traditional English-style contempt of court and *sub judice* laws, which empower courts to severely restrict the reporting of court proceedings and even of pending decisions, see *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *Alberta v. The Edmonton Sun*, [2003] A.B.C.A. 3.

<sup>120</sup> Clive Walker, *Fundamental Rights, Fair Trials and the New Audio-Visual Sector*, 59 MOD. L. REV. 517 (1996).

<sup>121</sup> This is illustrated by the British Columbia trial of Robert Pickton, where the court had to decide whether to close proceedings to the public because restrictions on media reporting of preliminary hearings would not be effective or enforceable against Internet and U.S. broadcasts accessible in British Columbia. See *R. v. Pickton*, [2002] B.C.P.C. 526.

<sup>122</sup> As graphically illustrated by John Leslie in Britain (Editorial, *Trial by Media: The Leslie Case Raises Key Questions*, THE GUARDIAN, Aug. 1, 2003, at 25) and Kobe Bryant in the United States (*Kobe in the Dock*, *supra* note 48, at 34).

on what they saw — a concept the Chief Justice of New South Wales recently described as “practical obscurity.”<sup>123</sup> Noting how electronic access has served to enhance “the opportunity of access by the general public,” Chief Justice Spigelman suggested that even though the principle of open justice is unquestionably an important principle, it has always been accepted that it “can operate unfairly in some specific circumstances.”<sup>124</sup> Consequently, “exceptions to the right of access to legal information have long been acknowledged”<sup>125</sup> and further exceptions such as restrictions imposed on the identification of victims of sexual assault and juveniles accused of criminal offences, have been enacted by legislation. The balance between publicity and the right to a fair trial, secured in this way, is, according to the Chief Justice, being undermined by electronic access:

[T]he principle of open justice has operated in a system which, although access was in theory available to all, there was a high level of what has been called “practical obscurity”. The identification of a person’s criminal past or involvement in litigation of any character was not readily ascertainable. It is now.<sup>126</sup>

This led him to suggest that “[d]evelopments in technology pose new challenges to the ability to ensure a fair trial.”<sup>127</sup> The Chief Justice went on to identify specific areas of concern:

By reason of on-line access and the efficiency of contemporary search engines, access to prior convictions and other information about the conduct of individual accuseds or witnesses has been transformed. The assumption that adverse pre-trial publicity will lose its impact on a jury with the passage of time, may no longer be valid. Changes of venue may no longer work in the way they once did. In a number of proceedings, which will only grow, the ease of access to adverse information has arisen in applications for the discharge of a jury or in the context of an appeal against conviction and also in contempt proceedings.<sup>128</sup>

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<sup>123</sup> The Hon. J.J. Spigelman AC, *Open Justice and the Internet*, Address at The Law Via the Internet 2003 Conference (Nov. 28, 2003), available at [http://www.agd.nsw.gov.au/sc/%5Csc.nsf/pages/spigelman\\_281103](http://www.agd.nsw.gov.au/sc/%5Csc.nsf/pages/spigelman_281103) (last visited Dec. 20, 2003).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> This particular remark secured headlines in the Australian press. See, e.g., Louise Milligan, *Top Judge says Electronic Age Risks Right to Fair Trial*, THE AUSTRALIAN, Nov. 29–30, 2003, at 7.

<sup>128</sup> Spigelman Address, *supra* note 123.

Similar concerns have been expressed elsewhere in relation to “jurors being able to access portions of proceedings relating to rulings made in their absence” and transcripts of rape-victim testimony being available on the Internet.<sup>129</sup>

Broadcasting and Internet technologies make it possible for a virtually limitless public audience to view proceedings and access court documents. It may be interesting to reflect on whether public access via audio-visual broadcast or Internet posting of civil proceedings and their documents can be justified in terms of the principles of open justice.<sup>130</sup> Will potential exposure to every Internet user in the world have an impact on the choice of dispute resolution venue, driving disputes away from the courts and towards alternative dispute resolution proceedings that are not required to be open to public scrutiny?<sup>131</sup>

In significantly altering the dissemination of public information, technological developments certainly appear to be challenging the manner in which public access has been regulated and also appear to provide the rationale for imposing greater restraints on reporting that utilises such technologies. Noting difficulties experienced by courts in the United States “in deciding whether and to what extent they should provide full access to electronic records,”<sup>132</sup> Anne Wallace observes that electronic filing of court documents “will challenge courts to develop policies that establish a framework for public access to court records in the age of electronic communication. A central concern of such policies will be to balance the public right to know what goes on in open court against concerns relating to individual privacy.”<sup>133</sup>

This implication may also explain why courts remain reluctant to turn the right to report on judicial proceedings that are open to the public into a presumptive right to record proceedings for broadcast or streaming. Consequently, it may be appropriate to revisit the current implementation of the principle of open justice — or the constitutional rights related to public trials as discerned from the First and Sixth Amendments.

<sup>129</sup> See Anne Wallace, *Technology and the Judiciary: The Use of Technology in the Criminal Trial Process*, Presentation at the Fourth National Outlook Symposium on Crime in Australia Convened by the Australian Institute of Criminology (June 21–22, 2001), available at <http://www.aic.gov.au/conferences/outlook4/Wallace.pdf> (last visited Dec. 20, 2003).

<sup>130</sup> For privacy concerns relating to Internet access to court documents, see Chris Puplick, NSW Privacy Commissioner, *Open Justice: Cui Bono?*, Address to the Third Australian Institute of Judicial Administration “Technology for Justice” Conference (Oct. 22, 2002), available at online at <http://www.aija.org.au/tech3/program/presentations/AIJA.doc> (last visited Dec. 20, 2003).

<sup>131</sup> For an outline of the potential of new technologies and a discussion of issues such as the conflict between access and privacy, see Allison Stanfield, *Cyber Courts: Using the Internet to Assist Court Processes*, 8 J. LAW & INFO. SCI. 241 (1997).

<sup>132</sup> Anne Wallace, *Courts On-line: Public Access to the Electronic Court Record*, 10 J. JUD. ADMIN. 94, 100 (2000).

<sup>133</sup> *Id.* at 95.

Justice Spigelman's warning that "[d]evelopments in technology pose new challenges to the ability to ensure a fair trial"<sup>134</sup> may also be applicable if the focus on the potential of technology obscures the lack of equality in public access and the ability to utilise such technology. Thus the Australian Law Reform Commission has emphasised the need to ensure that utilisation of technology is not at the expense of those who do not have access to or the skills to use the technology, noting that "advances in information technology could create a class of people who are 'information poor' as opposed to 'information wealthy.'"<sup>135</sup>

While new technology may create new issues for courts seeking to balance principles of open justice with competing interests, such as the right to a "fair trial, privacy or rehabilitation,"<sup>136</sup> they also offer technological solutions. Thus, Chief Justice Spigelman pointed to technology's concurrent potential to:

inhibit access in some manner, e.g. by the use of abbreviations or pseudonyms for a certain period of time, to allow time for appeal. There may be an electronic equivalent to the spent convictions regime, so that records of conviction are no longer accessible electronically after a certain period of time has elapsed.<sup>137</sup>

As Anne Wallace has observed, in questioning whether in response to problems created by electronic access, courts may need to "consider differential access rights to some material for parties and the public[.] . . . [T]he issue is not the technology, but rather, how we use it."<sup>138</sup>

The arrival of new technologies (and in particular the readily accessible Internet), and their increasing utilisation by courts, has coincided with reforms instigated in the 1990s by many governments and courts to enhance public understanding of their role, facilitate access and scrutiny, redress loss of confidence, and promote informed commentary. Judicial and political reforms also have led some governments to take steps to open judicial processes to greater scrutiny, to promote greater public understanding of judicial processes, and to accommodate newly-imposed rights. Thus, for example, public inquiries into access to justice in Britain and Australia have led to reforms of the judiciary and to greater focus on

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<sup>134</sup> Spigelman Address, *supra* note 123.

<sup>135</sup> AUSTRALIAN LAW REFORM COMMISSION, ISSUES PAPER 23: TECHNOLOGY — WHAT IT MEANS FOR FEDERAL DISPUTE RESOLUTION ch. 5.30 (1998), available at <http://www.austlii.edu.au/au/other/alrc/publications/issues/23/ALRCIP23.html> (last visited Dec. 20, 2003).

<sup>136</sup> Spigelman Address, *supra* note 123.

<sup>137</sup> *Id.*

<sup>138</sup> See Wallace, *supra* note 129.

public access, efficiency and transparency.<sup>139</sup> In part due to the devolution of the United Kingdom, Scottish courts and authorities have also embarked on promoting public understanding of Scottish law.<sup>140</sup>

Many courts have taken steps to promote accurate reporting and informed commentary and criticism by, for example, providing the media with judgment/opinion summaries or posting such on court Web sites. Thus, the Web pages of most courts are now used to provide a wide range of informative material for the public.<sup>141</sup> Canadian courts such as those of British Columbia have developed interesting and innovative materials accessible to the public via the Internet.<sup>142</sup> Even the U.S. Supreme Court appears prepared to make audio transcripts of proceedings more readily available.<sup>143</sup>

Perhaps most significantly, Internet technology and its utilisation by courts worldwide has provided an acceptable means for courts, reluctant to permit television cameras to record and broadcast proceedings, to make audio-visual recordings of proceedings available to the public. As a result, some courts, such as the Federal Court of Australia, have begun to stream and archive audio-visual footage.<sup>144</sup>

The Internet has removed the need for courts to rely entirely on the media for any publicity and in particular for audio-visual publicity. With the aid of this technology, courts have the means to facilitate public access to courts and court

<sup>139</sup> See LORD CHANCELLOR'S DEP'T, DEP'T FOR CONST. AFF., RESOLVING AND AVOIDING DISPUTES IN THE INFO. AGE (1998), at <http://www.dca.gov.uk/consult/itstrat/civindex.htm> (last visited Dec. 20, 2003); RONALD SACKVILLE, ACCESS TO JUSTICE ADVISORY COMM., ACCESS TO JUSTICE: AN ACTION PLAN (1994); LORD WOOLF, DEP'T FOR CONST. AFF., ACCESS TO JUSTICE: FINAL REPORT (1996), at <http://www.dca.gov.uk/civil/final/index.htm> (last visited Feb. 20, 2004). See generally Justice Ronald Sackville, Access to Justice — The Way Forward, Keynote Address at Australian Institute of Judicial Administration Annual Conference (July 13, 2002), available at <http://www.aija.org.au/ac02/Sackville.rtf> (last visited Feb. 29, 2004).

<sup>140</sup> On Scottish devolution, see Stephen Tierney, *Constitutionalising the Role of the Judge: Scotland and the New Order*, 5 THE EDINBURGH L. REV. 49–72 (2001).

<sup>141</sup> The Australian High Court of Appeals has posted all reported and unreported cases on its Web site. See Aust. Legal Info. Inst., High Court of Australia, at <http://www.austlii.edu.au/au/cases/cth/HCA/> (last visited Dec. 20, 2003).

<sup>142</sup> B.C. Courthouse Library Soc'y Home Page, at <http://www.bccls.bc.ca/index.cfm> (last visited Jan. 26, 2004).

<sup>143</sup> See Aho, *supra* note 89.

<sup>144</sup> See Federal Court of Australia, Video Archives of Judgment Summaries, at [http://www.fedcourt.gov.au/judgments/judgmts\\_video01.html](http://www.fedcourt.gov.au/judgments/judgmts_video01.html) (last visited Dec. 20, 2003). It is perhaps worth underlining that unlike comparable overseas jurisdictions, Australians have free access to the case law and statutes of all jurisdictions; see Aust. Legal Info. Inst., at <http://www.austlii.edu.au/> (last visited Dec. 20, 2003), and that even transcripts of all High Court hearings and decisions are freely and promptly available on the Internet. See *supra* note 141.



proceedings and to promote public understanding of the role of our courts. By permitting courts to post audio-visual footage of proceedings on the World Wide Web inexpensively, public access to audio-visual recording of court proceedings need no longer depend on media interest.

The Internet medium appears to provide courts with a readily available means of overcoming concerns that many courts have had with electronic media coverage; recall that those concerns include the electronic media's selectivity in what proceedings are broadcast,<sup>145</sup> the possibility that the media presence may disrupt proceedings, and the potential for media broadcasts to distort, misrepresent and sensationalise proceedings through editing and commentary.<sup>146</sup> Significantly, it also places the means of overcoming these obstacles in the hands of the courts.

An illustration of how Internet technology has helped overcome judicial reservations regarding electronic media coverage is provided by the courts of Mississippi, which together with those of South Dakota were, prior to 2001, the only U.S. state courts still completely closed to camera coverage.<sup>147</sup> The Mississippi Supreme Court began to record and post footage of legal argument on the World Wide Web and to allow media networks to access and broadcast video and audio recorded by the court in 2001.<sup>148</sup> It is also interesting to note that although six of the seven justices of Australia's High Court are said to be staunchly opposed to television coverage of their proceedings, the Court is upgrading its audio-visual facilities and equipment and considering Web casting its own proceedings.<sup>149</sup>

Increasing judicial awareness of the importance of publicising the role and work of the courts has also caused many courts to take steps to assist media reporting. Such assistance has included the provision of judgment summaries, media briefings, access to courts recordings or recording equipment, the establishment of bench/press committees and the provision of information regarding the law and judicial procedures.

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<sup>145</sup> The media's apparent unwillingness to provide extended coverage of legally significant, though not necessarily newsworthy, cases is documented in Canadian experiments and in New Zealand's experience. See ELECTRONIC MEDIA COVERAGE OF COURTS, *supra* note 45.

<sup>146</sup> For further discussion, see Daniel Stepniak & Paul Mason, *Court in the Web*, 25 ALTERNATIVE L.J. 71, 73-74 (2000).

<sup>147</sup> Radio-Television News Directors' Association & Foundation, at <http://www.rtnda.org/foi/scc.shtml> (last visited Dec. 20, 2003). The South Dakota Supreme Court opened to cameras on an experimental basis in July 2001; the policy became permanent July 1, 2003. S.D. CODIFIED LAWS §§ 15-24 comm'n note (2003).

<sup>148</sup> See *Cameras in the Courtroom*, Panel Discussion Hosted by The Mississippi Associated Press Broadcasters Association (June 28, 2003), at <http://www.mssc.state.ms.us/news/default.asp> (last visited Dec. 20, 2003).

<sup>149</sup> The innovations and success of the streaming of Australia's Federal Parliament provides a fine model. See Parliament of Australia, at <http://www.aph.gov.au/Live/webcast2.asp> (last visited Dec. 20, 2003).

### VIII. CONCLUSION

Even this brief overview of the utilisation by the media of audio-visual recording equipment in reporting court proceedings and consideration of some of the implications reveals why many courts in common law countries remain reluctant to embrace media recording and broadcast of court proceedings. It has also revealed that many courts' recognition of the need to promote public understanding of and access to records of judicial proceedings has made them more sympathetic and accommodating of media needs. Undoubtedly, courts utilisation of audio-visual technology to enhance the efficiency of administration and proceedings has led many courts to acquire a greater appreciation of what audio-visual coverage and recordings of court proceedings can accomplish that mere press reporting cannot. New technology, in particular the Internet, appears to provide courts with viable means of addressing the long-standing concerns regarding the media's audio-visual coverage of court proceedings, and of securing the balance between the rights to a fair trial and those of the open and public administration of justice.