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# Cameras in the Courtroom in the Twenty-First Century: The U.S. Supreme Court Learning From Abroad?

*Kyu Ho Youm* \*

## I. INTRODUCTION

The ongoing revolution in the communication technology of the twenty-first century has had little effect on the U.S. federal courts in general and on the Supreme Court of the United States in particular. The Supreme Court has never allowed cameras into its courtroom or live broadcasts of its oral arguments.<sup>1</sup> Rather, oral arguments are audiotaped by the Court for release on Fridays during the weeks the Court hears the arguments.<sup>2</sup>

A recent example of the Supreme Court's "exceptional" aversion to cameras<sup>3</sup> is related to the Court's rejection of the news media's request to televise oral arguments in the healthcare law case of 2012, *National Federation of Independent Business v. Sebelius*.<sup>4</sup> On March 16, 2012, the Supreme Court evaded the media's broadcasting request altogether, announcing the availability of only audio recordings: "Because of the extraordinary public interest in those cases, the Court will provide the audio recordings and transcripts of the oral arguments on an expedited basis through the Court's Website."<sup>5</sup>

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1. For a fascinating account of the "stealthy and illicit" photographing of the oral arguments at the courtroom, see Sonja West, *Smile for the Camera: The Long Lost Photos of the Supreme Court at Work—and What They Reveal*, SLATE (OCT. 1, 2012), <http://www.slate.me/WFfmFI>.

2. Robert Barnes, *Supreme Court Will Not Allow Cameras for Health-care Arguments, Will Release Audio*, WASH. POST (Mar. 16, 2012), <http://www.wapo.st/WFbyUq>.

3. Tony Mauro, *Let the Cameras Roll: Cameras in the Court and the Myth of Supreme Court Exceptionalism*, 1 REYNOLDS COURTS & MEDIA L. J. 259, 270 (2011).

4. 132 S. Ct. 2566 (2012).

5. Press Release, Office of Public Information, U.S. Supreme Court (Mar. 16, 2012), available at <http://www.1.usa.gov/WFbX9z>.

The U.S. Supreme Court's widely discussed hostility to television cameras<sup>6</sup> contrasts sharply with the Canadian Supreme Court's extensive experience with its hearings being broadcast. In a speech made in September of 2011, Chief Justice Beverley McLachlin of the Canadian Supreme Court noted the "very expansive" television broadcasting of her court hearings since the mid-1990s.<sup>7</sup> She added that the Canadian Supreme Court started webcasting the video streams of the court hearings live on the court's website in 2009.<sup>8</sup>

The Supreme Court of the United Kingdom is also more camera-friendly than its U.S. counterpart. The U.K. Supreme Court has allowed its hearings to be broadcast since its opening in October 2009<sup>9</sup> to replace the House of Lords.<sup>10</sup> Televised hearings were made possible through Section 47 of the Constitutional Reform Act of 2005,<sup>11</sup> which provides for an exemption to the Criminal Justice Act of 1925<sup>12</sup> that bans the photographing, filming, and sketching of court proceedings in England.<sup>13</sup>

Brazil, "a vibrant democracy" with an "extremely active" judicial branch,<sup>14</sup> is one of the most open judicial systems when it comes to the broadcast media's access to its highest court: all judicial and administrative meetings of the Supreme Court have been broadcast live on television since 2002.<sup>15</sup> TV Justiça (Justice TV) and Radio Justiça (Justice Radio), which are operated by the Supreme Court of Brazil,

6. See Dean Obeidallah, *Why Is the U.S. Supreme Court Afraid of TV Cameras?*, HUFFINGTON POST (Mar. 27, 2012), <http://www.huff.to/WFdl du>.

7. Beverley McLachlin, *The Relationship Between the Courts and the News Media*, in THE COURTS AND THE MEDIA: CHALLENGES IN THE ERA OF DIGITAL AND SOCIAL MEDIA 24, 32 (Patrick Keyzer et al. eds., 2012).

8. *Id.* at 33.

9. Adam Wagner, *Should Justice Be Televised?*, UK HUMAN RIGHTS BLOG (Dec. 6, 2010), <http://ukhumanrightsblog.com/2010/12/06/should-justice-be-televised>.

10. For a discussion of the transition from the House of Lords to the Supreme Court in the United Kingdom, see *infra* notes 142–152 and accompanying text.

11. Constitutional Reform Act, 2005, c. 4, § 47.

12. Ministry of Justice, PROPOSALS TO ALLOW THE BROADCASTING, FILMING, AND RECORDING OF SELECTED COURT PROCEEDINGS 9 (May 2012).

13. For a concise discussion of the Criminal Justice Act of 1925, see Mark Hanna & Mike Dodd, MCNAE'S ESSENTIAL LAW FOR JOURNALISTS 113–14 (21st ed. 2012). For a more detailed discussion, see Martin Dockray, *Courts on Television*, 51 MOD. L. REV. 593 (1988).

14. Freedom House, *Brazil*, FREEDOM OF THE PRESS 2011, <http://www.freedomhouse.org/report/freedom-press/2011/brazil> (last visited Sept. 9, 2012) [hereinafter *Brazil*].

15. See *Conheça a TV Justiça*, TV JUSTIÇA, <http://www.tvjustica.jus.br/index/conheca> (last visited Sept. 18, 2012).

enable the public and the news media to access that court's proceedings via wireless Internet networks on judgment days.<sup>16</sup>

South Korea is not one of the most camera-ready court systems, although its constitution states: "Trials and decisions of the courts shall be open to the public."<sup>17</sup> Nonetheless, in some circumstances where an exception to its norm and practice is warranted, the Constitutional Court of Korea is more willing to be open to the public via the electronic media than the U.S. Supreme Court. When the Constitutional Court announced its ruling on the impeachment of President Roh Moo Hyun in May 2004,<sup>18</sup> for instance, its decision was read live on national television by the President of the Constitutional Court.<sup>19</sup> A noted media attorney in Korea, Sang-woon Ahn, has cautioned, however, that the television broadcasting of the Constitutional Court's impeachment judgment was so exceptional an event in the judicial history of Korea that it should not be viewed as precedent-setting.<sup>20</sup>

Given that the debate about whether to allow or disallow cameras in the courtroom has been "a global issue"<sup>21</sup> for years,<sup>22</sup> it is more relevant

16. E-mail from Silvio Henrique V. Barbosa, Media Law Professor, Faculdade Casper Libero- Facasper in São Paulo, Brazil, to author (July 30, 2012 5:42:16 PM PDT) (on file with author).

17. DAEHANMINKUK HUNBEOP [HUNBEOP] [CONSTITUTION] art. 109 (S. Kor.). The right to public trial is qualified: "Provided, That when there is a danger that such trials may undermine the national security or disturb public safety and order, or be harmful to public morals, trials may be closed to the public by court decision." *Id.* The Court Organization Act provides for audio-visual recording of trials: "No person shall record on a videotape, take a photograph, relay broadcasting, etc., in the court without the permission of the presiding judge." Court Organization Act, Act No. 3992 (Dec. 4, 1987), last amended by Act No. 10861 (July 18, 2011), art. 59. The Supreme Court Rules require that a presiding judge obtain the consent of the defendant (or the plaintiff and defendant present in the courtroom) before granting an individual's or organization's request to record the court proceedings. Nonetheless, the judge may allow the recording of the proceedings without the requisite consent if it is likely to promote the public interest. *Rules for Attending or Recording Court Proceedings*, Supreme Court Rules No. 502 (Feb. 7, 1973) (S. Kor.), last amended by Rules No. 2061 (Dec. 29, 2006), art. 4(2). In practice, few court proceedings are broadcast in Korea, and various constitutional and statutory provisions are interpreted not as ensuring the media access to the courtroom but as limiting it to protect the defendant's right to a fair trial. E-mail from DongWook Kang, Professor of Law at Dongguk University in Seoul, South Korea, to author (Aug. 27, 2012 7:32:33 PM PDT) (on file with author).

18. 16-1 KOREAN CONSTITUTIONAL COURT REPORT 609, 2004 Hun-Na, May 14, 2004. For the English translation of the Constitutional Court opinion in the impeachment case, see DECISIONS OF THE KOREAN CONSTITUTIONAL COURT 141, 141-202 (2003).

19. Constitutional Court of Korea, TWENTY YEARS OF THE CONSTITUTIONAL COURT OF KOREA 207 (2008).

20. Telephone interview with Sang-woon Ahn, media attorney, Seoul, South Korea (Aug. 28, 2012).

21. Stephen A. Metz, *Justice Through the Eye of a Camera: Cameras in the Courtroom in*

now than ever to place our understanding of the U.S. Supreme Court in a comparative context. Significantly, in 2011 Chief Justice John Roberts Jr. of the U.S. Supreme Court, in response to a question about cameras in the Court, described the Court as “different, not only domestically but in terms of its impact worldwide.”<sup>23</sup>

This Article examines access to judicial proceedings from an international and comparative perspective by focusing on why and how the Supreme Court of the United States is different from those of England, Canada, and Brazil and from several international criminal courts and regional human rights courts. It is primarily a descriptive study in that it centers on how various legal systems approach the presence of cameras in their courtrooms. This study most likely will help judges, lawyers, scholars, journalists, and others develop a “reverse perspective”<sup>24</sup> on the U.S. Supreme Court’s policy regarding free press versus fair trial in the global twenty-first century. Besides, accurately describing other countries’ experience with courtroom television should be “an important preliminary to informed normative criticism”<sup>25</sup> of whether the U.S. Supreme Court’s complete ban on cameras jibes with the defining image of the United States as a nation with an exceptional commitment to a free press,<sup>26</sup> although its influence abroad is less now than in the past.<sup>27</sup>

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*the United States, Canada, England, and Scotland*, 14 DICK. J. INT’L L. 673, 699 (1996).

22. See, e.g., Daniel J. Henry, *Electronic Public Access—An Idea Whose Time Has Come*, in OPEN JUSTICE: LA TRANSPARENCE DANS LE SYSTÈME JUDICIAIRE [TRANSPARENCY IN THE JUSTICE SYSTEM] 389–451 (Yves-Marie Morissette et al. eds., 1994).

23. Mauro, *supra* note 3, at 259 (citations omitted).

24. As the leading U.S. media law attorney Richard Winfield wrote in 2006, “To study or practice international media law is to acquire, by *reverse perspective*, a deeper understanding of the American system of free expression.” Richard N. Winfield, *Globalization Comes to Media Law*, 1 J. INT’L MEDIA & ENT. L. 109, 116 (2006) (emphasis added).

25. *Faculty Q&A: Kendrick Defines Pattern for Supreme Court’s First Amendment Jurisprudence*, UNIV. OF VIRGINIA (May 30, 2012), [http://www.law.virginia.edu/html/news/2012\\_spr/kendrick\\_qa.htm](http://www.law.virginia.edu/html/news/2012_spr/kendrick_qa.htm).

26. For a succinct discussion of what makes the United States “unique” on freedom of expression, see LYOMBE S. EKO, *NEW MEDIA, OLD REGIMES: CASE STUDIES IN COMPARATIVE COMMUNICATION LAW AND POLICY* 59–60 (2012). For a more extended discussion of the American exceptionalism in freedom of speech and the press, see Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29–56 (Michael Ignatieff ed., 2005).

27. Jonathan Peters, *Lord Anthony Lester: It has Become “Difficult Credibly to Cite American Case Law on Freedom of Expression,”* HARV. L. & POL’Y REV. (Aug. 28, 2012), <http://hlpronline.com/2012/08/lord-anthony-lester-it-has-become-difficult-credibly-to-cite-american-case-law-on-freedom-of-expression/>.

This Article comprises six parts. Part II offers an overview of cameras in U.S. courtrooms in light of the First Amendment (freedom of speech and the press) and the Sixth Amendment (the accused's right to a fair trial). Part III analyzes the rules, regulations, and practices of selected foreign countries that have embraced cameras in their highest courts. Also included in Part III is an informed look at some of the international courts such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court, and some regional human rights courts such as the European Court of Human Rights (ECtHR). Part IV compares and contrasts the U.S. Supreme Court with foreign and international courts regarding what underlies their respective acceptance or rejection of broadcasting court proceedings. Part V discusses and analyzes what the U.S. Supreme Court might learn from the experience of the foreign and international courts with cameras in the courtroom. Finally, Part VI concludes that foreign and international law on cameras in the court is a fascinating case in which "no justice should cut off knowledge and analysis of foreign law if it can help the court reach a better understanding of our own."<sup>28</sup>

This comparative study is guided by the "principle of functionality" in that "the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results."<sup>29</sup>

## II. AMERICAN LAW ON CAMERAS IN THE COURTROOM

It is not entirely correct to declare that the public broadcast of court proceedings in America has rarely been part of the history of U.S. courts. Although federal courts have routinely banned cameras from their courtrooms, any discussion of the cameras in American courtrooms will be inaccurate and incomplete unless it takes into account the state courts'

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28. Vicki Jackson, *Yes Please, I'd Love to Talk with You*, LEGAL AFF., July-Aug. 2004, at 46.

29. K. ZWIGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 34 (3d ed. 1998). Considering "functional equivalence" essential to comparison, Professor John Reitz notes a basic principle of comparative method:

[A] good comparative law study should normally devote substantial effort to exploring the degree to which there are or are not functional equivalents of the aspect under study in one legal system in the other system or systems under comparison. . . . By asking how one legal system may achieve more or less the same result as another legal system without using the same terminology or even the same rule or procedure, the comparatist is pushed to appreciate the interrelationships between various areas of law, including especially the relationships between substantive law and procedure.

John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617, 621-22 (1998).

years of experience with courtroom broadcasting. By focusing on several key developments, this section examines both the federal and state laws on camera coverage of court proceedings.

In the United States, cameras in the courtroom are allowed in every state to varying degrees. By August 2012, forty-four states allowed television coverage of trials and appellate proceedings, while the rest of the states—Delaware, Illinois, Indiana, Louisiana, New York, and Utah—limited courtroom coverage to appellate arguments, which are heard solely by judges.<sup>30</sup> In the District of Columbia, neither trial nor appellate proceedings are photographed or broadcast.<sup>31</sup>

The near-universal acceptance of cameras in state courtrooms showcases the social or judicial laboratories in action as part of the American federal system. In *Chandler v. Florida*,<sup>32</sup> the landmark 1981 case on cameras in state courtrooms, Chief Justice Warren Burger, noting that presence of the broadcast media does not necessarily violate due process, stated: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>33</sup>

#### *A. Trial and Error Process in the 1930s–1960s*

The states’ experiments with cameras in the courtroom resulted from a trial and error process that balanced public access to court proceedings with the constitutional right of the accused to a fair trial. Although the American Bar Association (ABA) was wary of the effect of cameras in the courtroom in the early 1930s, it was not until after the sensational murder trial of Bruno Richard Hauptmann in 1935 that the ABA started paying serious attention to the issues involved.<sup>34</sup> Hauptmann was tried in New Jersey for kidnapping and killing the baby of Charles Lindbergh on March 1, 1932.<sup>35</sup>

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30. See *Cameras in the Court: A State-By-State Guide*, RADIO TELEVISION DIGITAL NEWS ASS’N, [http://www.rtdna.org/pages/media\\_items/cameras-in-the-court-a-state-by-state-guide55.php](http://www.rtdna.org/pages/media_items/cameras-in-the-court-a-state-by-state-guide55.php) (last updated Aug. 2012).

31. *Id.*

32. 449 U.S. 560 (1981).

33. *Id.* at 579 (quoting *New State Ice Co. v. Libebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

34. Frank Wm. White, *Cameras in the Courtroom: A U.S. Survey*, 60 JOURNALISM MONOGRAPHS 1, 4 (1979).

35. *Id.*

The carnival-like Hauptmann trial led the ABA to recommend banning cameras from courtrooms.<sup>36</sup> Amendments to the ABA's Canons of Professional and Judicial Ethics were adopted at the ABA convention of 1937. Canon 35, entitled "Improper Publicizing of Court Proceedings," 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 detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.<sup>37</sup>

In 1952, Canon 35 was amended to cover television. In 1963, its wording was revised, but Canon 35's restrictive impact on cameras in state courtrooms was considerable. Most states had adopted it and others had followed it in limiting camera coverage of trials.<sup>38</sup>

In 1946, Congress prohibited radio and photographic coverage of criminal trials in federal courts. As amended in April 2002, Rule 53 of the Federal Rules of Criminal Procedure states: "Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."<sup>39</sup>

By 1959, however, television recording and broadcast of trial proceedings was permitted in three states: Colorado, Oklahoma, and Texas.<sup>40</sup> As a journalism scholar found in 1979, "[I]ndividual judges in at least a dozen others ignored [Canon 35] and were not reprimanded for doing so."<sup>41</sup>

But the "small gains" that broadcasters made in pushing for access to state courtrooms<sup>42</sup> were dashed in the mid-1960s, when four justices of

36. *But cf.* Richard B. Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14, 23 (1979) (arguing that the ABA reaction to the Hauptmann trial "appears now to have been an exaggerated response to an exceptional situation").

37. *Recommendations of Changes in the Canons of Professional and Judicial Ethics*, 23 A.B.A. J. 635, 636 (1937).

38. White, *supra* note 34, at 5.

39. FED. R. CRIM. P. 53.

40. White, *supra* note 34, at 6.

41. *Id.* Professor White has listed Arizona, Connecticut, Iowa, Georgia, Michigan, Mississippi, Nebraska, North Carolina, Pennsylvania, South Dakota, Tennessee, and Washington. *Id.* (citations omitted).

42. MARJORIE COHN & DAVID DOW, *CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE* 19 (2002).



the majority of the U.S. Supreme Court, following *Rideau v. Louisiana*,<sup>43</sup> adopted a “*per se* approach,” holding that televising a criminal trial is by itself disruptive enough to violate a defendant’s due process right to a fair trial.<sup>44</sup>

### *B. The Supreme Court Bans Cameras*

In *Estes v. Texas*,<sup>45</sup> the Supreme Court addressed the oft-cited concerns of the American legal community that underlay its opposition to cameras in the courtroom: physical distraction to trials, psychological distraction to trial participants, and the defendant’s right to due process of law.

Writing for the majority, Justice Tom C. Clark pointed out the disruptive impact of the media’s presence at the pretrial hearings:

These initial hearings were carried live by both radio and television, and news photography was permitted throughout. The videotapes of these hearings clearly illustrate that the picture presented was not one of that judicial serenity and calm to which petitioner was entitled. Indeed, at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge’s bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings.<sup>46</sup>

The Court then turned to the “potential impact” of television on the jurors, which it noted was “perhaps of the greatest significance.”<sup>47</sup> While acknowledging the practical impossibility of assessing how television

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43. 373 U.S. 723 (1963) (holding that the denial of a motion to transfer venue after a defendant’s criminal confession was televised locally inherently violated the Fourteenth Amendment’s due process clause).

44. MATTHEW D. BUNKER, JUSTICE AND THE MEDIA: RECONCILING FAIR TRIALS AND A FREE PRESS 58 (1997); see also *Estes v. Texas*, 381 U.S. 532, 544 (1965).

45. 381 U.S. 532 (1965). Billie Sol Estes, a Texas businessman, was charged with swindling farmers into buying nonexistent fertilizer tanks. His pretrial hearing in Texas entailed wide publicity through live radio and television broadcasting. *Id.* at 535–36. “The two-day hearing and the order permitting television at the actual trial were widely known throughout the community,” the Supreme Court said. “This emphasized the notorious character that the trial would take and, therefore, set it apart in the public mind as an extraordinary case or . . . something ‘not conventionally unconventional.’” *Id.* at 538. He was convicted for swindling at a state trial court. *Id.* at 534.

46. *Id.* at 536 (citations omitted).

47. *Id.* at 545.

affects jury attentiveness, the Court cited the danger of what it termed “jury ‘distraction,’” a phenomenon familiar to trial judges.<sup>48</sup> Rejecting the state’s argument,<sup>49</sup> the Court explained:

[W]e know that distractions are not caused solely by the physical presence of the camera and its telltale red lights. It is the awareness of the fact of telecasting that is felt by the juror throughout the trial. We are all self-conscious and uneasy when being televised. Human nature being what it is, not only will a juror’s eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony.<sup>50</sup>

Justice Clark also probed the dangers that cameras pose to other trial participants such as witnesses<sup>51</sup> and judges.<sup>52</sup>

Finally, the *Estes* Court took special note of the impact of courtroom television on the defendant. Declaring that “[t]rial by television . . . is foreign to our system,”<sup>53</sup> the Court analogized the presence of television cameras to “a police line-up or the third degree” that is similar to a form of mental harassment.<sup>54</sup> Justice Clark reasoned:

The inevitable close-ups of his gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his

48. *Id.* at 546.

49. The state of Texas contended that the jury “distraction” is insignificant because the physical disturbances had been eliminated. *Id.*

50. *Id.*

51. On the witnesses, Justice Clark wrote:

Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization. . . . Indeed, the mere fact that the trial is to be televised might render witnesses reluctant to appear and thereby impede the trial as well as the discovery of the truth.

*Id.* at 547.

52. Calling attention to the “additional responsibilities” that the trial judge has to assume because of the presence of television cameras, Justice Clark said:

His job is to make certain that the accused receives a fair trial. This most difficult task requires his undivided attention. Still when television comes into the courtroom he must also supervise it. . . . Judges are human beings also and are subject to the same psychological reactions as laymen. Telecasting is particularly bad where the judge is elected, as is the case in all save a half dozen of our States. The telecasting of a trial becomes a political weapon, which, along with other distractions inherent in broadcasting, diverts his attention from the task at hand—the fair trial of the accused.

*Id.* at 548.

53. *Id.* at 549.

54. *Id.*

dignity, and his ability to concentrate on the proceedings before him—sometimes the difference between life and death—dispassionately, freely and without the distraction of wide public surveillance. A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nationwide arena. The heightened public clamor resulting from radio and television coverage will inevitably result in prejudice.<sup>55</sup>

Consequently, the *Estes* Court declared that the camera coverage intrinsically violated the defendant's constitutional right to a fair trial: "Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced."<sup>56</sup>

It is noteworthy, however, that the *Estes* Court did not necessarily hold that courtroom broadcasting would remain inherently prejudicial to a fair trial. The Supreme Court pointed out that technological development in communication and public adjustment to the communication technology might change the effect of television broadcasting of criminal trials.<sup>57</sup> In this connection, Justice John Marshall Harlan II's concurring opinion was especially prescient:

[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 in accordance with the traditional workings of the Due Process Clause.<sup>58</sup>

After *Estes*, few states permitted television broadcasting of criminal trials. In fact, "[b]y 1974, all states except Colorado had banned cameras

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55. *Id.*

56. *Id.* at 544.

57. *Id.* at 551–52.

58. *Id.* at 595–96 (Harlan, J., concurring). In a similar vein, Justice Clark said:

Nor can the courts be said to discriminate where they permit the newspaper reporter access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public. The news reporter is not permitted to bring his typewriter or printing press. *When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case.*

*Id.* at 540 (majority opinion) (emphasis added).

from the courtroom.”<sup>59</sup> In 1972, the ban on electronic coverage of criminal proceedings was expanded to cover civil cases. Canon 35 (renumbered as Rule 3A(7)) of the Code of Conduct for United States Judges prohibited “broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto.”<sup>60</sup>

In the latter part of the 1970s, cameras gradually returned to the state courtroom. A journalism researcher contended that this nontraditional change<sup>61</sup> resulted from “a broad range of organizations (press groups, state and local bar associations, and judicial groups) with no clear pattern of national leadership.”<sup>62</sup> He reported that by the end of 1980, thirty-five states permitted electronic coverage of the courtroom “on either a permanent or experimental basis.”<sup>63</sup> In no small measure was the increasing judicial acceptance of television made possible by the “video revolution” of the mid-1970s.<sup>64</sup>

#### C. *Chandler v. Florida: State Courts Allowed to Permit Cameras into the Courtroom*

In 1981, the U.S. Supreme Court in *Chandler v. Florida*<sup>65</sup> revisited the issue of cameras in the courtroom. The question for the *Chandler* Court was rather narrow: May a state allow broadcasting of a criminal trial without violating a defendant’s constitutional right in spite of the defendant’s objection?<sup>66</sup> The Court answered: “[T]he Constitution does not prohibit a state from experimenting with [televising criminal trials]”<sup>67</sup> under Canon 3A(7). By deciding *not* to prohibit cameras, the Court let the then-ongoing revolutionary changes in state courts

59. KENNETH C. CREECH, *ELECTRONIC MEDIA LAW AND REGULATION* 399 (5th ed. 2007).

60. COHN & DOW, *supra* note 42, at 112 (citation omitted).

61. “Non-traditional” refers to the fact that the “suddenness and spontaneity” in the use of cameras and electronic equipment in state courtrooms in the second half of the 1970s was “a clear break with traditional patterns of change” because “[u]sually such a change would be initiated by the federal court system or the American Bar Association.” White, *supra* note 34, at 33.

62. James M. Jennings II, *Is Chandler a Final Rewrite of Estes?*, 59 *JOURNALISM Q.* 66, 70 (1982).

63. *Id.* As of the end of 1978, 20 states were allowing cameras in the courtroom. See White, *supra* note 34, at 8.

64. COHN & DOW, *supra* note 42, at 25.

65. 449 U.S. 560 (1981).

66. *Id.* at 562.

67. *Id.* at 583.

“continue to move—sporadically and idiosyncratically but inexorably—toward allowing cameras in most state courtrooms.”<sup>68</sup>

*Chandler* arose after two Miami police officers were convicted of burglary in a televised trial.<sup>69</sup> At the time, Florida had a program under the state’s Canon 3A(7) that allowed cameras in the courtroom without the consent of the accused.<sup>70</sup> The Canon 3A(7) program was experimental.<sup>71</sup>

The Supreme Court, in an 8–0 ruling,<sup>72</sup> held that televising a criminal trial does not automatically make the trial unfair to the defendant.<sup>73</sup> In the opinion of the Court, Chief Justice Burger refused to read into *Estes* a constitutional rule that broadcasting coverage is prohibited “in all cases and under all circumstances.”<sup>74</sup> He continued: “[*Estes*] does not stand as an absolute ban on state experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964, and is even now in a state of continuing change.”<sup>75</sup>

Chief Justice Burger’s response to the arguments, seemingly based on *Estes*, in favor of the per se ban on broadcasting of court proceedings, could not have been more clear-cut. He stated:

An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the

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68. White, *supra* note 34, at 34.

69. *Chandler*, 449 U.S. at 567.

70. As quoted in the *Chandler* opinion, Florida’s Canon 3A(7) states:

Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

*Id.* at 566.

71. *Id.* at 564–65.

72. Justice John Paul Stevens did not participate in the *Chandler* decision. *Id.* at 583.

73. *Id.*

74. *Id.* at 573 (citation omitted).

75. *Id.* at 573–74.

printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage.<sup>76</sup>

Noting that any publication of a trial involves a risk of juror prejudice, Chief Justice Burger offered an “appropriate safeguard” against the prejudice: Allow the defendant to prove that the media’s coverage of his trial, whether broadcast or print, affected the jury’s ability to fairly hear his case.<sup>77</sup>

Calling the psychological impact of broadcasting coverage on trial participants “a subject of sharp debate,”<sup>78</sup> Chief Justice Burger suggested making a distinction between “general psychological prejudice” and “particularized” prejudicial impact.<sup>79</sup> Again, he emphasized the judicial authority to prohibit broadcast coverage if it were demonstrated that the “mere presence” of visual and broadcasting equipment in the courtroom would “invariably and uniformly” affect the judges, witnesses, and lawyers, and other trial participants.<sup>80</sup> “[A]t present,” he said, “no one has been able to present empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect on that [judicial] process.”<sup>81</sup>

In analyzing *Chandler*, one commentator claimed that the Court “did not overrule” *Estes*.<sup>82</sup> However, his characterization of *Chandler* misses the mark. As Chief Justice Burger stated, “There is no need to ‘overrule’ a ‘holding’ never made by the Court [in *Estes*].”<sup>83</sup> He, drawing from Justice Harlan’s limiting statement in his concurring opinion in *Estes*,<sup>84</sup> declared that the *Estes* Court had not “announced a *per se* rule banning all broadcast coverage of trials” as a violation of due process.<sup>85</sup>

As a result of *Chandler*, the states that already permitted television coverage or still photography in courtrooms could continue to do so, while a number of additional states opted for electronic and photographic courtroom coverage.<sup>86</sup> Further, some states that conditioned cameras in

76. *Id.* at 574–75.

77. *Id.* at 575.

78. *Id.* at 578.

79. *Id.* at 575.

80. *Id.*

81. *Id.* at 578–79 (citation omitted).

82. Jennings, *supra* note 62, at 72 (emphasis added).

83. *Chandler*, 449 U.S. at 573 n.8.

84. For Justice Harlan’s concurring opinion, see *Estes v. Texas*, 381 U.S. 532, 595–96 (1965) (Harlan, J., concurring).

85. *Chandler*, 449 U.S. at 573 n.8.

86. GENELLE BELMAS & WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 344

the courtroom to the consent of defendants stopped requiring the consent.<sup>87</sup> Also, the ABA in 1982 revised Canon 3A(7), which advised the states to severely restrict broadcast coverage of criminal trials.<sup>88</sup> The revised ABA rule provides that states can allow judges to let cameras into the courtroom if it is “consistent with the right to a fair trial and subject to express conditions, limitations, and guidelines which allow such coverage in a manner that will be unobtrusive, will not distract or otherwise adversely affect witnesses or other trial participants, and will not otherwise interfere with the administration of justice.”<sup>89</sup>

#### *D. Cameras Still Banned from Federal Courts*

*Chandler* had no impact on U.S. federal courts because it concerned state law, and resistance to broadcasting trials remains “substantial” in the federal courts.<sup>90</sup> For instance, the Federal Rules of Criminal Procedure prohibit the use of cameras in criminal trials: “Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.”<sup>91</sup>

But in the early 1990s, the federal courts had a three-year experiment allowing cameras during the civil proceedings of two federal appellate and six trial courts. The experiment was extended through December 31, 1994, by the Judicial Conference of the United States, a policy-making body for the federal courts. The experiment resulted in little change in the federal policy for cameras in the courtroom, although it was favorably evaluated by the Federal Judicial Center, the research and development arm of the U.S. court system.<sup>92</sup> Indeed, while the

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(2013).

87. *Id.*

88. *Id.*

89. ABA STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS, STANDARD 8-3.8, BROADCASTING, TELEVISION, RECORDING AND PHOTOGRAPHING COURTROOM PROCEEDINGS (1982), available at [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_fairtrial\\_blk.html#3.8](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_fairtrial_blk.html#3.8). This ABA standard of 1982 replaced Canon 3A(7) as a text for a fair trial-free press standard. In February 1991, ABA repealed Canon 3A(7) but retained its standard. ABA STANDARDS FOR CRIMINAL JUSTICE: FAIR TRIAL AND FREE PRESS 54 n.2 (3rd ed. 1991).

90. MARC A. FRANKLIN ET AL., MASS MEDIA LAW: CASES AND MATERIALS 604 (8th ed. 2012).

91. FED. R. CRIM. P. 53.

92. Comments of the Radio Television Digital News Ass’n at 2, *In re Notice of Opportunity for Comment on Ltd. Amendment to Local Rule 83.4 Concerning Broad. of Civil Proceedings*, July 25, 2011 (finding that “the attitudes of judges toward coverage of civil proceedings became more

experiment was still continuing, the Judicial Conference unanimously decided to retain its ban on cameras in criminal cases. The appellate and district judges that constituted the Judicial Conference were concerned about the “potential” impact of cameras on witnesses and jurors and about “the sound-bite problem.”<sup>93</sup>

In 1996, the Judicial Conference backpedaled on its ban on cameras, albeit slightly. While strongly rejecting a proposal to open district courts to broadcasting, it approved a rule to permit television, radio, and still photography into federal appellate court proceedings.<sup>94</sup> Only two federal appellate courts, however, have decided to allow cameras into their appellate arguments.<sup>95</sup>

In 2011, the Judicial Conference authorized another three-year experiment with cameras in the courtroom similar to the one of the 1990s conducted by the Conference. The latest experiment of the federal courts is an exception to a local camera ban on federal courts. It is designed to address the request from Congress and some federal judges who positively view broadcast of court proceedings.<sup>96</sup> The experiment is still limited in that it is only confined to civil trials and requires the approval of the presiding judge and the consent of all parties.<sup>97</sup> In addition, the pilot program will not involve the news media organizations’ “independent” cameras. Rather, court personnel will make the recordings, and it is up to the judge’s discretion to make the recordings available to the public and the press. Moreover, the judge can switch off the recording “at any time.”<sup>98</sup>

The Supreme Court demonstrated indirectly but unmistakably that it has no inclination to broadcast its own proceedings. In early 2010, the Court by a 5–4 vote barred a federal district court from broadcasting a

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favorable after experience with electronic coverage”). It cited the Federal Judicial Center’s 1994 report, *Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals*.

93. COHN & DOW, *supra* note 42, at 115. The oft-noted “sound-bite problem” as a reason for hostility to broadcasting of trials refers to “the tendency of news organizations to distill the day’s courtroom events into a few snippets of testimony or argument laced together with the footage of courtroom scenes.” *Id.* (citation omitted).

94. *Id.* at 116.

95. *Cameras in Courtrooms*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/node/98974> (last visited Aug. 25, 2012).

96. Kathleen Kirby, *Federal Courts Begin Camera Experiment* (July 27, 2011), <http://www.rtdna.org/pages/posts/federal-courts-begin-camera-experiment1398.php> (last visited Aug. 25, 2012).

97. *Id.*

98. *Id.*



trial in San Francisco that concerned Proposition 8, an amendment to the Constitution of California that outlawed same-sex marriage in California. In *Hollingsworth v. Perry*,<sup>99</sup> the Court held that “without expressing any view on whether such trials should be broadcast,” the broadcast should be prohibited on the ground that the trial court failed to follow the appropriate judicial procedures under federal law relating to such broadcasting.<sup>100</sup> The Court, citing *Estes*, was concerned about the impact of broadcasting on witnesses. “[W]itness testimony may be chilled if broadcast,” the majority wrote.<sup>101</sup> “It is difficult to demonstrate or analyze whether a witness would have testified differently if his or her testimony had not been broadcast. And witnesses subject to harassment as a result of broadcast of their testimony might be less likely to cooperate in any future proceedings.”<sup>102</sup>

A variety of U.S. experiences with cameras in the courtroom indicates that American judges are affected by a diversity of stakeholders in the free press versus fair trial debate. The familiar stakeholders have been congressional, judicial, and professional: Congress, state and federal courts, bar associations, and media organizations have actively engaged with each other in considering how to promote public access to trials while ensuring the defendant’s right to a fair trial. As in the past, the federal courts’ ongoing experiment with court broadcasting shows promise, although it is impossible to know if it will open the federal courts to radio and television cameras sooner or later.

### III. INTERNATIONAL AND FOREIGN LAW ON CAMERAS IN THE COURTROOM

It is true that “[m]ost countries do not allow cameras in their courtrooms.”<sup>103</sup> Hence, it should be no wonder that the leading U.K. media law scholar Eric Barendt has found Germany “not . . . altogether dissimilar” to the United States in approaching television coverage of trial proceedings as a constitutional issue: Openness of court proceedings is limited to those present in the courtroom, not necessarily

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99. 130 S. Ct. 705 (2010) (per curiam).

100. *Id.* at 706.

101. *Id.* at 713 (citing *Estes v. Texas*, 381 U.S. 532, 547 (Harlan, J., concurring)).

102. *Id.*

103. Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, ARIZ. ST. L.J., (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1969115](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1969115) (last visited Aug. 27, 2012).

encompassing the broadcasting media's right to televise them.<sup>104</sup> Yet Barendt has characterized the U.S. Supreme Court's uncompromising camera ban as "most surprising[],"<sup>105</sup> probably because freedom of the press has been accorded a preferred position in American free-speech jurisprudence.

This section takes a measured look at how a select group of foreign and international courts have grappled with cameras as an increasingly important element of the open justice principle. It identifies and explicates the similarities and differences between the courts on permitting radio and television broadcasting of their proceedings.

#### *A. Canadian Supreme Court as a "Pioneer" in Broadcasting of Court Proceedings*

An Australian law professor has observed that the Supreme Court Justices of the United States are distinguished from their colleagues on the Supreme Court of Canada and the House of Lords (now the Supreme Court) in Great Britain in that they "have staunchly and consistently" banned cameras from their courtroom.<sup>106</sup> He should have added to his list of foreign courts the Supreme Court of Brazil, which "even allows cameras to cover the justices' deliberations inside their chambers."<sup>107</sup>

The Canadian Supreme Court's "positive" experience with cameras in the courtroom<sup>108</sup> since 1997<sup>109</sup> deserves careful attention because "cameras are just part of the scenery, barely worth a mention" in that court.<sup>110</sup> Yet the general practice of television coverage in Canada is

104. ERIC BARENDT, *FREEDOM OF SPEECH* 348 (2d ed. 2005).

105. *Id.*

106. DANIEL STEPNIAK, *AUDIO-VISUAL COVERAGE OF COURTS* 142 (2008).

107. Todd Hollingshead, *Supreme Court Reporters at BYU: Let Cameras in the Court*, BRIGHAM YOUNG UNIVERSITY NEWS (Jan. 30, 2012), <http://news.byu.edu/archive12-jan-lawsymposium.aspx>. If the Brazilian Supreme Court justices' "deliberations inside their chambers" is understood as similar to the *private* meeting of the U.S. Supreme Court justices *behind the closed doors* in the Court's Conference Room to deliberate the cases orally argued during the week, such understanding is incorrect. For there is no such thing as a secret conference in a conference room for deliberations of cases among the justices of the Brazilian Supreme Court. See *infra* notes 155–59 and accompanying text. For a discussion of the "conference" of the U.S. Supreme Court as "a critical stage in the Court's decision-making process," see Robert J. Janosik, *Conference. The*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 201, 202 (Kermit L. Hall ed., 2d ed. 2005).

108. MCLACHLIN, *supra* note 7, at 33.

109. Dean Jobb, *Ont, BC Take Camera Access Lead – Lawyers Weekly*, DEAN JOBB (Mar. 1, 2011), <http://www.deanjobb.com/?p=1364> (republication of *Report Recommends Ontario Permit Camera Access in Courthouses, Critics Fear "Reality TV,"* LAW. WKLY., Apr. 1, 2011).

110. Tony Mauro, *In Canada's Supreme Court, Cameras are No Big Deal*, BLT: BLOG OF

diametrically different from that in the United States in varying degrees. In Canada, trial courts have not permitted their hearings to be televised.<sup>111</sup>

The Canadian Supreme Court first allowed the use of cameras to broadcast its decision in the *Patriation Reference* case in 1981,<sup>112</sup> but the court permitted no further camera access for a dozen years.<sup>113</sup> The Canadian Supreme Court in October 1992 produced guidelines for the use of cameras during the pilot project of a televised hearing at the court.<sup>114</sup> The guideline stated:

(a) The case to be filmed will be selected by the Chief Justice. (b) The Chief Justice or presiding Justice may limit or terminate media coverage to protect the rights of the parties; the dignity of the court; to assure the orderly conduct of the proceedings; or for any other reason considered necessary or appropriate. (c) No direct public expense is to be incurred for equipment, wiring, or personnel needed to provide media coverage.<sup>115</sup>

The court used the appeal of *Symes v. The Queen* for its audio and videotape pilot project, and the proceedings were televised live nationally as heard in the courtroom on March 2, 1993.<sup>116</sup> *R. v. Rodriguez* and *Egan v. The Queen* were heard, respectively, on May 20, 1993, and on November 1, 1994, and they were also televised nationally.<sup>117</sup> Nadia Loreti, director of the Registry Branch of the Supreme Court of Canada, stated: “Both of these cases were of national interest and it was the Chief Justice and Justices of the Court who decided to allow the televising of these hearings. All the parties and

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LEGAL TIMES (Aug. 31, 2010, 10:13 AM), <http://legaltimes.typepad.com/blt/2010/08/in-canadas-supreme-court-cameras-are-no-big-deal.html> [hereinafter “Mauro, *In Canada’s Supreme Court*”].

111. MCLACHLIN, *supra* note 7, at 32; *see also* DEAN JOBB, MEDIA LAW FOR CANADIAN JOURNALISTS 352 (2d ed. 2011) (“With few exceptions—and in stark contrast to practices in many American [state] courts—cameras are banned from Canadian courtrooms.”).

112. *See* Tom McFeat, *Cameras in the Courts*, CBC NEWS (Mar. 12, 2010, 4:47 PM), <http://www.cbc.ca/news/canada/story/2010/03/12/f-cameras-courts.html> (noting that the Supreme Court of Canada has been called “a pioneer in allowing electronic access to its proceedings”).

113. Henry, *supra* note 22, at n.414.

114. E-mail from Nadia Loreti, Dir. of the Registry Branch of the Supreme Court of Can., to Sara Stroo, Research Assistant, Univ. of Or. Sch. of Journalism and Commc’n (Apr. 18, 2012, 2:58 PM PDT) (on file with author).

115. SUGGESTED GUIDELINES FOR THE USE OF CAMERAS DURING THE PILOT PROJECT IN THE SUPREME COURT OF CANADA (1992) (draft).

116. E-mail from Nadia Loreti, *supra* note 114.

117. *Id.*

interveners were asked for their consent to the taping of the proceedings.”<sup>118</sup>

After the successful pilot project, the Supreme Court of Canada entered into an agreement with the Cable Public Affairs Channel (CPAC), Canada’s version of C-SPAN (Cable-Satellite Public Affairs Network) in the United States, that allows CPAC to televise the appeal hearings at the Court.<sup>119</sup> According to Loreti, CPAC decides which appeals to broadcast and when to broadcast them, although the Court may direct CPAC specifically “not to broadcast an appeal, for example, where the argument of the appeal will involve information subject to a publication ban.”<sup>120</sup>

The hearings are excerpted for nightly news programs not different from the “snippets” that the U.S. Supreme Court Justices guard against.<sup>121</sup> Chief Justice McLachlin of the Canadian Supreme Court has found the media exceedingly responsible in treating the hearings in a balanced manner.<sup>122</sup>

The CPAC agreement with the Supreme Court of Canada provides that the broadcast feed be made available to other television networks, and CPAC and all other networks are required to respect all non-broadcast orders.<sup>123</sup>

Before a hearing can be recorded, the Canadian Supreme Court requires parties to acknowledge and consent to the recording and televising of the proceedings.<sup>124</sup> “If a party does not want to have their appeal televised, they must advise the Registrar in writing at least two weeks prior to the hearing date.”<sup>125</sup>

The appeal hearings of the Canadian Supreme Court have been webcast since February 10, 2009, and archived on the court’s website.<sup>126</sup>

118. *Id.*

119. *Id.*

120. *Id.* The Supreme Court of Canada “may (and frequently must) impose a publication ban” when the privacy of victims and witnesses is at stake or, as statutorily required, when the names of young offenders must be withheld. *Decisions of the Court: Publication Bans*, SUPREME COURT OF CANADA, <http://www.scc-csc.gc.ca/media/decisions/index-eng.asp> (last modified Apr. 5, 2012).

121. See Mauro, *In Canada’s Supreme Court*, *supra* note 110. See *supra* note 93 and accompanying text for a discussion about the “sound-bite problem.”

122. Mauro, *In Canada’s Supreme Court*, *supra* note 110.

123. E-mail from Nadia Loreti, *supra* note 114.

124. *Id.*

125. *Id.*

126. See *Webcasts by Session*, SUPREME COURT OF CANADA, <http://www.scc-csc.gc.ca/case-dossier/cms-sgd/webcasts-webdiffusions-eng.aspx> (last modified Apr. 12, 2012).

The hearings are “webcast unless a case may not be suitable for webcasting due to a publication ban or privacy concerns.”<sup>127</sup>

At present, the courtroom is equipped with four stationary cameras, which are monitored from a booth located behind the courtroom.<sup>128</sup> The Canadian Supreme Court has no written protocol for the cameras. The cameras are voice-activated, and prefixed settings allow the cameras to focus on the person who is speaking.<sup>129</sup> Loreti notes that “the cameras belong to the Court and Court employees operate them. We do not permit outside cameras (except for pool cameras supplied by the Parliamentary Press Gallery during ceremonial events).”<sup>130</sup>

*B. U.K. Supreme Court an Exception to No Camera in Courtroom in England*

The law on courtroom television in England is similar to that in Canada. As in Canada, courtroom broadcasts are banned from lower courts in England,<sup>131</sup> although there has been “a sea change” in the attitude of the U.K. bar toward televising court proceedings in recent years.<sup>132</sup> As discussed earlier, however, courtroom television in ordinary trial courts as well as the Court of Appeal requires revisions of the Criminal Justice Act and the Contempt of Court Act.<sup>133</sup> The prohibitions on television coverage of judicial proceedings have been questioned over the years, and the ban on cameras in the courtroom is more likely to be lifted now than ever. In her statement to Parliament of May 2012, Queen Elizabeth stated: “The courts and tribunals service will be reformed to increase efficiency, *transparency* and judicial diversity.”<sup>134</sup> The Crime and Courts Bill, as introduced to Parliament, would allow cameras into more courts by revising the Criminal Justice Act and the Contempt of Court Act.<sup>135</sup>

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127. *Id.*

128. E-mail from Nadia Loreti, *supra* note 114.

129. *Id.*

130. *Id.*

131. For a concise background on broadcasting court proceedings in the United Kingdom, see DEPARTMENT OF CONSTITUTIONAL AFFAIRS, BROADCASTING COURTS, 2004, CP 28–04, at 13–15 (U.K.).

132. GEOFFREY ROBERTSON & ANDREW NICOL, *MEDIA LAW* 588 (5th ed. 2008).

133. For a discussion of the statutory ban on broadcasting of legal proceedings in the United Kingdom, see *supra* notes 12–13 and accompanying text.

134. *Queen’s Speech 2012 – Full Text*, GUARDIAN (MAY 9, 2012, 07:16 EDT), <http://www.guardian.co.uk/politics/2012/may/09/queens-speech-2012-full-text> (emphasis added).

135. Crime and Courts Bill, 2012, H.L. Bill [4] cl. 22 (U.K.).

As the American federal courts and state courts did in the 1990s and in the 1970s, respectively, British courts conducted a pilot project for court broadcasting in 2004. In a history-making moment for U.K. law,<sup>136</sup> the Criminal Division of the Court of Appeal allowed television cameras to film the “Speechley Appeal”<sup>137</sup> in November 2004. In exploring the “overarching question” about courtroom broadcasts as a possible way to increase public confidence in the British legal system, the case was taped and edited for purposes of evaluation, not actual broadcast to the public.<sup>138</sup> While the appeal hearing was filmed, the cameras were focused on the lawyers in the case and on the appeal judges.

The footage of the “Speechley Appeal” was shown to a panel of government ministers and senior judges before it was decided whether to move courtroom television further as a worthy idea for British courts. The pilot project was “a resounding success,” and the panel stated that “there should be no reason why such appeals should not be shown on public television as part of bringing the ‘open justice principle’ to people who had otherwise no time or inclination to attend court.”<sup>139</sup>

Broadcasting of court proceedings has never been part of British law insofar as *courts* are concerned. In this regard, it is interesting that the Appellate Committee of the House of Lords, the “highest appeal court” of the United Kingdom, had been televised since 1989, not as a court under any law but as part of the U.K. Parliament.<sup>140</sup>

Meanwhile, before the experimental television broadcasting of Parliament, a 1986 judgment by the Appellate Committee was broadcast on the radio under a provision for Parliament that allowed “a broadcaster to apply to the Select Committee on Sound Broadcasting for permission to broadcast proceedings of a judicial nature.”<sup>141</sup> Shortly after

136. See generally Simon Bucks, *Court on Camera: Appeals in Action*, THE OBSERVER (Mar. 5, 2005), <http://www.guardian.co.uk/media/2005/mar/06/business.broadcasting2>.

137. The “Speechley Appeal” involved former Lincolnshire County Council Leader Jim Speechley, who had been convicted of misconduct as a public official and sentenced to eighteen months in jail. *Cameras Record High Court Appeal*, BBC NEWS (Nov. 16, 2004), [http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/uk\\_news/england/lincolnshire/4015977.stm](http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/uk_news/england/lincolnshire/4015977.stm).

138. URSULA SMARTT, *MEDIA & ENTERTAINMENT LAW* 173 (2011).

139. *Id.*

140. DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *supra* note 131, at 15. The Appellate Committee of the House of Lords was not regarded by the Lords as a “court” subject to the Criminal Justice Act. STEPNIAK, *supra* note 106, at 21 (citing Joshua Rozenberg, *The Pinochet Case and Cameras in Court*, PUB. LAW 178 (1999)).

141. STEPNIAK, *supra* note 106, at 21 (quoting Lord Taylor, *Justice in the Media Age*, paper presented at the Commonwealth Judges’ and Magistrates’ Association Hertfordshire Symposium,

Parliament started its television broadcasting, BBC Television was permitted to broadcast the Appellate Committee delivering their opinions to the House of Lords.<sup>142</sup>

The House of Lords broadcasts evolved incrementally. The Law Lords initially allowed the broadcasting of only the delivery of their formal judgments.<sup>143</sup> When it comes to the BBC recording and broadcasting of the Appellate Committee's oral arguments in the 1990s, however, the Lords wanted to exercise editorial control. The BBC resisted. One authority on the broadcasting media's access to legal proceedings suggested that the BBC should have been more accommodating to the Law Lords' requests:

Though the BBC's reluctance to surrender editorial control to the Law Lords . . . may be understandable, its willingness to accept such control at least while the Law Lords grew accustomed to such coverage would have provided invaluable guidance for the televising of appeal proceedings and may well have led the Law Lords to relax this requirement after such broadcasts became routine.<sup>144</sup>

In the late 1990s, the House of Lords became more willing to provide radio and television coverage of its proceedings. In the Augusto Pinochet appeal, the Law Lords permitted their judgments and brief explanations to be televised.<sup>145</sup>

On October 1, 2009, the new Supreme Court took over from the House of Lords as the highest court of the United Kingdom under the Constitutional Reform Act of 2005.

The Constitutional Reform Act replaced the Law Lords with a new Supreme Court. Its institutional significance and impact was undoubtedly considerable. The court was established "to achieve a complete separation" between the senior U.K. judges and the U.K. House of Lords.<sup>146</sup>

The U.K. Supreme Court proceedings are broadcast live by Sky News. The court television at the U.K. Supreme Court is not necessarily new; it continues to televise the proceedings of the Judicial Committee of the House of Lords. The U.K. government consultation paper of 2004,

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April 15, 1995, at 10).

142. *Id.*

143. *See id.*

144. *Id.* at 33.

145. *Id.* at 34.

146. *The Supreme Court: Significance to the UK*, <http://www.supremecourt.gov.uk/about/significance-to-the-uk.html> (last visited Aug. 26, 2012).

*Broadcasting Courts*, makes it clear that the Constitutional Reform Act, as it was proposed during the 2003–2004 session of Parliament, was “not an indication of a Government position on the wider issue of courts broadcasting” but “simply to replicate the existing arrangements,” i.e., broadcasting of the House of Lords as the highest appellate court.<sup>147</sup>

Nonetheless, the U.K. Supreme Court wanted to film and broadcast its proceedings to make “open justice” closer to reality by boosting the public access to the proceedings.<sup>148</sup> The operational rules on the filming and broadcasting of the Supreme Court proceedings were formulated by main national broadcasters such as BBC, ITN, and Sky News. The footage of the court proceedings is available to news, current affairs, and educational programs, but may not be used for entertainment, satires, party political broadcasts, and advertising or promotion.<sup>149</sup> In addition, any still images produced from the broadcasting cannot be used in such a way as to undermine the Court’s dignity and its functions.<sup>150</sup>

In mid-May of 2011, Sky News broadcast live the Supreme Court proceedings on their website.<sup>151</sup> All the court hearings are accessible online anywhere around the world through the live stream. Noting the “public appetite for watching court proceedings,” the Ministry of Justice reported that the extradition hearing of Julian Assange in February 2012 attracted 14,500 unique visitors to the live-stream on the first day of the controversial case.<sup>152</sup>

### *C. Brazilian Supreme Court Stands Out as Most Camera-Friendly*

When it comes to cameras in the courtroom, Brazil, which Freedom House classified as “partly free” in 2011,<sup>153</sup> is unquestionably a standout. Unfortunately, however, it is rarely discussed or acknowledged as such, probably because few books, articles, or blogs on the Brazilian Supreme Court, known as the Supremo Tribunal Federal (STF) in Brazil, are available in English.<sup>154</sup> As Professor Nancy Marder notes in her

147. DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *supra* note 131, at 15.

148. See Ministry of Justice, *supra* note 12, at 9.

149. *Id.* at 9–10.

150. *Id.* at 10.

151. Adam Wagner, *Victory! UK Supreme Court Hearings to be Streamed Live*, UK HUMAN RIGHTS BLOG, (May 16, 2011), <http://ukhumanrightsblog.com/2011/05/16/victory-uk-supreme-court-hearings-to-be-streamed-live/> (last visited Aug. 26, 2012).

152. Ministry of Justice, *supra* note 12, at 10.

153. *Brazil*, *supra* note 14.

154. Only two published U.S. law journal articles, in addition to the forthcoming article by Professor Marder, *supra* note 103, mention the Brazilian Supreme Court relating to court TV, but do



forthcoming law review article, Brazil is “one of the most unusual arrangements.”<sup>155</sup>

Professor Diana Kapiszewski of the University of California-Irvine, emphasizing the Brazilian Supreme Court’s “very strong tradition of transparency,” remarked that “broadcasting its sessions is one way of demonstrating that; I believe that was one of the major impetuses behind it.”<sup>156</sup> Given the sheer volume of cases that the Brazilian Supreme Court decides a year,<sup>157</sup> “only the most critical are heard by the whole Court” and the vast majority of the cases are handled by a single justice, which is acceptable as long as the justice follows the precedent on point relating to a question before the court.<sup>158</sup> Consequently, Kapiszewski said, “[A] very very tiny (and likely unrepresentative) minority of the Court’s case load” is actually broadcast in Brazil.<sup>159</sup>

The Brazilian Supreme Court’s court television started on August 11, 2002, as a brainchild of Justice Marco Aurélio Mello to bring more transparency to the court proceedings.<sup>160</sup> TV Justiça (TV Justice) was created by law and signed by Justice Marco Aurélio Mello in May 2002,

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so briefly. See Chad M. Oldfather, *The Prospect of Open Deliberations in the Wisconsin Supreme Court*, 95 JUDICATURE 94 (Sept.–Oct. 2011); *The Second Conversation with Justice Samuel A. Alito, Jr.: Lawyering and the Craft of Judicial Opinion Writing*, 37 PEPP. L. REV. 33, 39 (2009) [hereinafter “*Conversation with Justice Alito*”].

155. Marder, *supra* note 12, at 63.

156. Email from Diana Kapiszewski, professor at the Univ. of Cal. -Irvine, to author (Sept. 1, 2012 5:52:15 PM PDT) (on file with author).

157. According to Professor Kapiszewski, “tens of thousands of cases a year (sometimes more than 100,000)” are decided by the Brazilian Supreme Court. *Id.* For a detailed discussion of the “internal structure and case review procedures” of the Brazilian Supreme Court, see Diana Kapiszewski, *High Courts and Economic Governance in Argentina and Brazil* (2012), at *Web Appendix 4.6*, 87-94, <http://www.cambridge.org/9781107008281> (last visited Sept. 8, 2012).

158. E-mail from Diana Kapiszewski, *supra* note 157. Professor Kapiszewski has noted: “For instance, many types of cases can be decided by a ‘turma’ (chamber); the Court is divided into two (five members each, the Court’s president sits on neither), and the turmas’ deliberations are not broadcast.” Email from Diana Kapiszewski, professor at the Univ. of Cal.-Irvine, to author (Oct. 7, 2012 7:05:49 AM PDT) (on file with author). One Brazilian law professor has characterized many lower court rulings on appeal as “a lot of rubbish” that the Supreme Court dismisses through a one-justice decision. E-mail from Rafael Mafei Rabelo Queiroz, professor of law at DIREITO GV in Sao Paulo, Braz., to author (Sept. 5, 2012, at 10:23 AM PDT) (on file with author) [hereinafter “E-mail from Prof. Queiroz”].

159. Sept. 1 e-mail from Diana Kapiszewski, *supra* note 156.

160. E-mail from Diana Kapiszewski, professor at the Univ. of Cal.-Irvine, to author (Sept. 3, 2012 6:19:39 AM PDT) [hereinafter “E-mail of Sept. 3, 2012, from Prof. Kapiszewski”]. The e-mail contains a Portuguese reply from Professor Kapiszewski’s Brazilian lawyer friend to the author’s queries about the Brazilian Supreme Court’s broadcasting of its court proceedings. The author draws on the Google Translate version of the reply.

when he served as the interim president of Brazil.<sup>161</sup> The court proceedings are broadcast directly from the courtroom when the court is meeting en banc.<sup>162</sup>

The sessions of the Brazilian Supreme Court are broadcast by TV Justiça and Rádio Justiça (Radio Justice), which are owned by the Brazilian judicial branch and operated by the Supreme Court. They are also accessible on the Internet.<sup>163</sup> The Court maintains its own Twitter feed and YouTube channel.<sup>164</sup>

In Brazil, cameras are permitted in the proceedings of the Supreme Court. Rafael Mafei Rabelo Queiroz, professor of law at DIREITO GV in Sao Paulo, Brazil, wrote in early September of 2012:

[E]very case trialed in a collegiate session is broadcast, because the “tv show” that broadcasts STF is on every afternoon except Friday, when they don’t have judgment sessions. STF dismisses a lot of rubbish from lower courts, and this is done through monocratic decisions. In these cases, there is no broadcast. On all others (constitutionality control, criminal cases, tax law cases, social rights, etc.), where the judges deliberate and give the court’s decision, the deliberations are held before the public and the decision is forged live on national TV.<sup>165</sup>

What sets the Brazilian Supreme Court apart from the highest courts of England and Canada is that cameras are permitted into the conferences where the justices deliberate. Thus, there are no private deliberations following the lawyers’ presentations of their case before the Supreme Court in the courtroom. According to an American expert on the Brazilian judicial system who spoke with Supreme Court clerks and watched the court proceedings, “The justices move directly to discussing the case and deciding it right there in the courtroom.”<sup>166</sup> Thus, the justices’ deliberations are broadcast live on television, which Justice Samuel Alito of the U.S. Supreme Court found “astonish[ing]” and said

161. *Id.*

162. *Id.*

163. *STF ampliará estrutura de imprensa para cobertura de julgamentos desta semana [STF Will Expand Press Coverage of Trials This Week]*, NOTÍCIAS STF [STF (SUPREME FEDERAL TRIBUNAL) NEWS], April 9, 2012, at <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=204486> (last visited Aug. 27, 2012).

164. Oldfather, *supra* note 154, at 94.

165. E-mail from Prof. Queiroz, *supra* note 158.

166. E-mail from Diana Kapiszewski, professor at the Univ. of Cal.-Irvine, to author (Sept. 6, 2012, 6:19:24 AM PDT) (on file with author).

“that can’t be the real conference.”<sup>167</sup> Professor Queiroz, calling the justices’ conference “the real deliberation,” observed: The justices “come in with their individual opinions, offer them to the plenary, and they decide which opinion should prevail. All this is live on television. Sometimes the justices jump on each other’s necks . . . .”<sup>168</sup>

*D. Regional Human Rights and International Courts:  
Broadcasting the Rule, Not the Exception*

In comparison with the Supreme Courts in Canada, England, and Brazil, several international courts, including regional human rights courts, have more extensive experience with courtroom cameras. That is, since the International Military Tribunal at Nuremberg broadcast its trial of Nazi leaders in connection with World War II in 1945,<sup>169</sup> several regional human rights courts and international criminal courts have opened their proceedings to cameras not as the exception but as the rule.<sup>170</sup>

*I. European Court of Human Rights and Inter-American Court of Human Rights*

The European Court of Human Rights (ECtHR), whose opinions are cited more frequently by high courts in other “developed democracies” than the U.S. Supreme Court,<sup>171</sup> uses a written procedure that allows the ECtHR to make rulings primarily on the basis of “written observations” submitted by the parties, although it holds oral hearings occasionally.<sup>172</sup>

167. *Conversation with Justice Alito, supra* note 154, at 39.

168. E-mail from Prof. Queiroz, *supra* note 158.

169. Alex Ross, *TELEVISION VIEW: Watching for a Judgment of Real Evil*, N.Y. TIMES (Nov. 12, 1995), <http://www.nytimes.com/1995/11/12/arts/television-view-watching-for-a-judgment-of-real-evil.html?pagewanted=all&src=pm>.

170. For a discussion of court broadcasting at regional human rights and international criminal courts, see *infra* notes 172–195, and accompanying text.

171. Adam Liptak, *U.S. Court Is Now Guiding Fewer Nations*, N.Y. TIMES (Sept. 17, 2008), <http://www.nytimes.com/2008/09/18/us/18legal.html?pagewanted=all>.

172. Regarding oral hearings, the Rules of the European Court of Human Rights (Sept. 1, 2012) provide for oral hearings:

A hearing on the merits shall be held if one or more of the Contracting Parties concerned so requests or if the Chamber so decides of its own motion. The President of the Chamber shall fix the oral procedure.

Rule 58: Inter-State applications, as amended by the ECtHR on June 17–July 8, 2002.

The Chamber may decide, either at the request of a party or of its own motion, to hold a hearing on the merits if it considers that the discharge of its functions under the Convention so requires.

When the ECtHR holds public hearings, they are required to be public unless the Chamber of seven judges or the Grand Chamber of seventeen judges otherwise decides.<sup>173</sup> The ECtHR states: “All hearings are filmed and broadcast on the Court’s website on the day itself, from 2:30 p.m. (local time).”<sup>174</sup>

The Inter-American Court of Human Rights (IACHR) is required to keep its hearings and deliberations “on audio-recordings” under its rules of procedure, as approved by the Court in November 2009.<sup>175</sup> Eduardo Bertoni, professor at the Palermo University School of Law in Argentina and a former special rapporteur for freedom of expression of the Inter-American Commission of Human Rights, said the Commission started broadcasting its proceedings a few years ago and the IACHR’s broadcasting began “just this year.”<sup>176</sup> He added: “The Court used to allow [journalists] to take photos and some images *before* the hearing and then requested photographers to leave the room.”<sup>177</sup>

## 2. *International Criminal Tribunal for the Former Yugoslavia*

Some of the most extensively televised international court proceedings are those at the International Criminal Tribunal for the former Yugoslavia (ICTY), a U.N. court in The Hague, which adjudicates the war crimes that occurred during the conflicts in the Balkans in the 1990s.<sup>178</sup> Since it first heard cases in 1994, it has

Rule 59: Individual applications, as amended by the ECtHR on June 17–July 8, 2002.

173. The ECtHR allows the closure of its hearings to the public and the press “in exceptional circumstances.” As the ECtHR Rules state:

The press and the public may be excluded from all or part of a hearing in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Chamber in special circumstances where publicity would prejudice the interests of justice.

Rule 63: Public Character Hearing, as amended by the ECtHR on July 7, 2003.

174. *The European Court of Human Rights: The ECHR in 50 questions?* <http://www.filestube.com/er1eL4kxQNgEE3GF7ffC7T/The-European-Court-of-Human-Rights-The-ECHR-in-50-questions.html> (last visited Aug. 26, 2012).

175. Rules of Procedure of the Inter-American Court of Human Rights, approved by the Court during its 85th regular period of sessions on Nov. 16-28, 2009, art. 15(4).

176. E-mail from Eduardo Bertoni, professor at the Palermo Univ. School of Law in Arg. and a former special rapporteur for freedom of expression of the Inter-Am. Comm’n of Human Rights, to author (Sept. 4, 2012, 7:20:48 AM PDT) (on file with author).

177. *Id.*

178. In 2002, the ICTY attracted global attention in connection with its ruling on war correspondents’ privilege to protect news sources. See *Prosecutor v. Brdjanin & Talic*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, ¶ 46 (Int’l Crim. Trib. for the Former Yugoslavia

routinely recorded its proceedings and distributed them to the world's media.

An American lawyer, commenting on the value of camera coverage of courtroom trials, noted the ICTY in 1996: "The best recent example [of televised trials bringing important social issues to the forefront] is Court TV's coverage of the [ICTY] trial of Bosnian Serb Dusko Tadic, the first person to stand before an international war crimes tribunal since the Nuremberg trials."<sup>179</sup> She continued that this television coverage of the ICTY proceedings was made possible "because some foreign nations allow camera coverage of trials."<sup>180</sup>

The audio-visual recording of the ICTY proceedings was designed "to make sure that justice would be seen to be done, to dispel any misunderstandings that might otherwise arise as to the role and the nature of the Tribunal proceedings[,] and to fulfill the educational task of the Tribunal."<sup>181</sup>

The ICTY proceedings, "other than deliberations of the Chamber, shall be held in public, unless otherwise provided."<sup>182</sup> Proceedings can be televised "in a modified manner,"<sup>183</sup> for example, with the witness's voice or image distorted if a witness is "protected" under Rule 75 on "Measures for the Protection of Victims and Witnesses" of the ICTY Rules of Procedure and Evidence.<sup>184</sup> The ICTY may close its

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Dec. 11, 2002). It is often referred to as the *Randal* case, because it arose from former *Washington Post* reporter Jonathan Randal's refusal to testify about his source's statements before the ICTY. For a discussion of the *Randal* case, see Kyu Ho Youm, *International and Comparative Law on the Journalist's Privilege: The Randal Case as a Lesson for the American Press*, 1 J. INT'L MEDIA & ENT. L. 1, 36–51 (2006).

179. Teresa Herdman Sittenauer, *Television Cameras Ever-Present in the Courtroom: Right to Televisе Forces Public to Tune in—or out*, 82 WOMEN LAW. J. 6, 8 (1996).

180. *Id.* (noting the countries in which trials are televised: Argentina, El Salvador, France, Greece, Israel, Mexico, Norway, Paraguay, Russia, and Spain, in addition to the International Court of Justice).

181. Press Release, *A Report on the Audiovisual Coverage of the ICTY's Proceedings Finds that Cameras Contribute to a Proper Administration of Justice*, ICTY (April 19, 2000), <http://www.icty.org/sid/7869>.

182. ICTY R. P. AND EVID. 78.

183. E-mail from Steven Koh, Associate Legal Officer, ICTY, to author (June 6, 2012, 08:30 PDT) (on file with author).

184. ICTY Rules of Procedure and Evidence states:

A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

ICTY R. P. AND EVID. 75.

proceedings to protect witnesses who have been granted such measures under Rule 75.<sup>185</sup>

Further, the ICTY may bar its proceedings from being broadcast when the Chamber or the parties to a case under review discuss materials that have been provided under a rule that allows entities (states or organizations) to provide materials to a party subject to certain conditions.<sup>186</sup> “Often,” ICTY associate legal officer Steven Koh states, “such conditions may stipulate that the entity not be identified with the materials publicly or that the contents of the materials not be publicly broadcast, thus warranting ‘closed session’ and no broadcast to the outside world.”<sup>187</sup>

The ICTY courtrooms each contain six cameras. The video directors of the ICTY are responsible for broadcasting the trials, but their discretion is limited. For example, they are prohibited from zooming or panning on screen, and they are required not to focus on “any visibly distressed court participant.”<sup>188</sup>

The ICTY staff selects pictures from the six cameras in compliance with “strict instructions” to assure that the public will be provided with “a full, balanced, fair[,] and accurate account” of the public hearings. The news media receives the footage with a thirty-minute delay.<sup>189</sup> Witnesses have the right not to be shown and to have their identities withheld through face and/or voice alteration.<sup>190</sup>

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185. ICTY R. P. AND EVID. 79.

186. The ICTY rule on “Matter Not Subject to Disclosure” stipulates:

(A) Notwithstanding the provisions of Rules 66 [Disclosure by the Prosecutor] and 67 [Additional Disclosure], reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.

(B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

ICTY R. P. AND EVID. 70.

187. Koh, *supra* note 183.

188. Paul Mason, *Court on Camera: Electronic Broadcast Coverage of the Legal Proceedings*, U.S.F., <http://usf.usfca.edu/pj/camera-mason.htm> (last visited Aug. 26, 2012).

189. Press Release, *supra* note 181.

190. ICTY R. P. AND EVID. 75.

### 3. *International Criminal Court*

The International Criminal Court (ICC) in The Hague is similar to the ICTY. The Rome Statute for the International Criminal Tribunal mandates that trials “shall be held in public.”<sup>191</sup> However, similar to the ICTY, the ICC Trial Chamber may find special circumstances that require that certain proceedings be closed for the purposes set forth in Article 68 (“Protection of the victims and witnesses and their participation in the proceedings”), or to protect confidential or sensitive information to be given in evidence.<sup>192</sup>

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191. Rome Statute of the International Criminal Court, A/CONF. 183/9, art. 64, para. 7 (1998) (effective 2002).

192. Rome Statute of the International Criminal Court, A/CONF. 183/9, art. 68 (1998) (effective 2002). Article 68 of the ICC statute reads:

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
2. As an exception to the principle of public hearings provided for in article 67 [Rights of the Accused], the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.
3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.
4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, [counseling] and assistance as referred to in article 43, paragraph 6.
5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

*Id.*

The ICC statute also provides for similar “protective measures” for a victim, a witness, or another person at risk due to testimony given by a witness.<sup>193</sup> The trial chamber may hold an *in camera* hearing in deciding whether to order preventive measures against releasing the information on the identity or the location of the victim, the witness, or the other person who is vulnerable to the consequences of the testimony provided.<sup>194</sup>

Koh, who has worked at the ICC, observed recently: “[T]here is the same general approach to broadcasting proceedings. Everything is televised and ‘streaming’ over the Internet, though . . . there is also a 30-minute delay to the public. Again, this is subject to the necessary protective measures in place.”<sup>195</sup>

#### IV. THE U.S. SUPREME COURT DIFFERS FROM U.K. AND OTHER COURTS: WHY AND HOW?

Though there are certainly exceptions, the general trend among foreign and international courts examined is that they recognize the positive role of cameras to expand the public access to court proceedings. Instead of being stuck with the often elusive issue of how televising judicial proceedings benefit the public or adversely affect trial participants—these courts have been willing to opt for more exposure of their proceedings to the public via broadcasting media.

Linda Greenhouse, a former U.S. Supreme Court correspondent of the *New York Times*, wrote in 2012 that “other nations choose features of the Court to reject as well as to emulate, as they tailor their constitutional courts to their own needs.”<sup>196</sup> One of the Supreme Court’s most notable features that several foreign countries have refused to “emulate” is the Court’s persistent refusal to permit television or other cameras into the courtroom.<sup>197</sup> In one way or the other, high courts in the U.K., several other foreign countries, and international courts have heeded Yale law professor Owen Fiss’s advice of 1996—albeit not in the court television context—that American experience with press freedom should be

193. *Id.*

194. ICC R. P. AND EVID. 87.

195. E-mail from Steven Koh, Associate Legal Officer, ICTY, to author (July 27, 2012, 05:12 PDT) (on file with author).

196. LINDA GREENHOUSE, *THE U.S. SUPREME COURT: A VERY SHORT INTRODUCTION* 87 (2012).

197. *Id.*



selectively adopted.<sup>198</sup> It is singularly ironic that Court TV (changed to TruTV in January 1, 2008) of the United States went global, although it was refused access by the U.S. Supreme Court and lower federal courts.<sup>199</sup> It broadcast the first war crimes trial from the ICTY in 1996 and court proceedings in several countries in Europe, Asia, Africa, and South America.<sup>200</sup>

What is especially interesting about the U.S. Supreme Court's camera aversion is that foreign and international courts have learned more from the state courts' experience of broadcasting of court proceedings than from the federal courts' ban in the United States. Why and how? Possible answers can be teased out from a closer look at the institutional and non-institutional concerns about the actual or perceived negative impacts of cameras on the Supreme Court and its proceedings.

In her comprehensive analysis of what inhibits radio and television media access to the U.S. Supreme Court, Professor Lisa T. McElroy lists several "sincere" concerns of the Court:

[A] desire for day-to-day privacy, a concern that allowing cameras or internet streaming will somehow damage the public's perception of the Court, fears that broadcasting could somehow subject the Court or the Justices personally to mockery, and concerns that funny or less-than-devout comments made during oral argument might end up on the Internet or on programs like Jon Stewart. It is concerned that televising Supreme Court proceedings would change the very nature of those proceedings.<sup>201</sup>

In answering whether these concerns are factually grounded or "a fairy tale"<sup>202</sup> that the Justices tell Americans, Professor McElroy suggests that the Court should "open up its doors" by allowing television cameras—for the American public's interest in seeing the Court in action through cameras outweighs the Court's adherence to its institutional secrecy.<sup>203</sup>

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198. See OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 157 (1996).

199. COHN & DOW, *supra* note 42, at 133–34.

200. *Id.* at 134.

201. Lisa T. McElroy, *Cameras at the Supreme Court: A Rhetorical Analysis* 38–39 (Drexel University Earle Mack School of Law, Working Paper No. 2011-W-02) (citations omitted), available at <http://www.ssrn.com/link/Drexel-U-LEG.html>.

202. *Id.* at 39.

203. *Id.* at 66.

*A. Effects on the Justices*

It is often difficult, if not impossible, to divine what underlies the entrenched camera-shy attitude of the U.S. Supreme Court as an institution. As the veteran Supreme Court correspondent Lyle Denniston wrote in November 2011, “The Court and its members have never explained, in an official way, why they do not want live, or even delayed, TV broadcasts of their hearings on cases.”<sup>204</sup> But, individually, a few Justices have publicly explained their opposition to broadcasts. Justice David Souter and Justice Anthony Kennedy, appearing before a congressional committee in March of 1996, left no doubt about their opposition to allowing television and radio broadcast of court proceedings. Justice Souter stated: “I think the case is so strong . . . that I can tell you the day you see a camera come into our courtroom, it’s going to roll over my dead body.”<sup>205</sup> He remembered that his behavior as a judge in New Hampshire had been affected by cameras in the courtroom because of his belief that news media would take some questions out of context.<sup>206</sup> Justice Souter said courts were neither a political institution nor “part of the entertainment industry.”<sup>207</sup> Justice Kennedy agreed, maintaining that the Supreme Court as a nonpolitical body was different from the executive and legislative branches of the government.<sup>208</sup>

Justice Souter’s first-person statement about the psychological impact of broadcasting on himself as a state court judge cannot be ignored as an aberration. Chief Justice McLachlin of the Canadian Supreme Court was equally mindful of the impact of televised court hearings on participants in the proceedings when she noted in 2011: “[T]he risk of juror or witness contamination;” “the increased stress on witnesses—in an already stressful environment—can affect participants’ performance and impact credibility assessments;” and “the loss of privacy might make parties, witnesses and jurors reluctant to participate.”<sup>209</sup>

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204. Lyle Denniston, *TV in the Supreme Court? Don’t Count on It*, CONST. DAILY (Nov. 22, 2011), <http://blog.constitutioncenter.org/2011/11/tv-in-the-supreme-court-dont-count-on-it/>.

205. *On Cameras in Supreme Court, Souter Says, “Over My Dead Body,”* N.Y. TIMES, Mar. 30, 1996, at A24 (quoting Souter, J., as reported by the Associated Press) (internal quotation marks omitted).

206. *Id.* (quoting Souter, J., as reported by the Associated Press).

207. *Id.*

208. *Id.*

209. McLachlin, *supra* note 7, at 32.

Most tellingly, however, Chief Justice McLachlin made no mention of the impact of court television on judges. Was it an inadvertent, even glaring, omission on the part of the Canadian Chief Justice to ignore the effects of camera coverage on judges, especially on the justices of the Canadian Supreme Court? Probably not. One year earlier, in a roundtable discussion of the Judicial Conference for the U.S. Court of Appeals for the Tenth Circuit, she addressed Justice Souter's objection to the presence of cameras in the courtroom due to their effect on judges: "I don't think my colleagues and I would say that it has [had that effect]."210

Meanwhile, Chief Justice McLachlin pointed out that at the beginning of her court's experiment with the cameras, she and her colleagues were "very wary."<sup>211</sup> But now they "are just oblivious" to the cameras, she stated, adding that "I don't think I ever think about them in the course of a hearing . . . They're unobtrusive."<sup>212</sup> She has found little consequential impact of cameras on the justices of the Canadian Supreme Court and the lawyers arguing before the Court. "[N]obody's dumbing down the process," Chief Justice McLachlin said. "Nobody is out there trying to put on a performance."<sup>213</sup>

Similarly, the Supreme Court justices of the United Kingdom pay little attention to the cameras in their courtrooms. Sir John Dyson, a justice of the U.K. Supreme Court, was quoted as saying: "[I]t hasn't impinged on me at all. I know there is a television camera stuck in the little corner, I'm simply not aware of it."<sup>214</sup> His colleague, Lady Hale, agreed: "We are being filmed all the time, and we're not really very conscious of it. Except that sometimes if the camera moves you have this funny noise going on. You think what's that? And then you remember."<sup>215</sup>

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210. Mauro, *In Canada's Supreme Court*, *supra* note 110.

211. *Id.*

212. *Id.* (internal quotation marks omitted). Relatedly, one study of Australian experiences of courtroom televising in 2008 is worth noting: The experiences "have not provided evidence substantiating concerns regarding the effect of televising on *judges* and lawyers. . . . Indeed, commentary on televised cases has almost invariably noted that the presence of cameras was soon forgotten by all participants." Stepniak, *supra* 106, at 390 (emphasis added) (citations omitted).

213. Mauro, *In Canada's Supreme Court*, *supra* note 110 (internal quotation marks omitted).

214. Owen Bowcott, Maya Wolfe-Robinson & Cameron Robertson, *Video: Supreme Court: Does Deliver Justice?*, at 8:15, *GUARDIAN* (Oct. 25, 2011), <http://www.guardian.co.uk/law/video/2011/oct/25/supreme-court-deliver-justice-video?intcmp=239>.

215. *Id.* at 8:34.

These and similar comments by the justices of the U.K. and Canadian Supreme Court with first-hand experience with courtroom cameras should lead Justice Kennedy to reconsider his worry about “the insidious temptation to think that one of my colleagues is trying to get a soundbite for the television.”<sup>216</sup>

The Canadian Chief Justice’s experiential refutation of Justice Souter’s concern about cameras’ possible negative impact on judges, among others, cannot be dismissed as a unique case limited to the Canadian Supreme Court. A recent study of the “open justice principle” in England relating to cameras in the courtroom concluded that technological advances have reduced the courtroom broadcasting’s “disruptive and distracting effect” to such an extent that it is not a valid ground for prohibiting filming of court proceedings.<sup>217</sup> More directly pertinent is the 2011 study’s qualified conclusion that “some empirical evidence” suggests a possible psychological effect of broadcasting on “witnesses, litigants and jurors.”<sup>218</sup> Again, similar to Chief Justice McLachlin is the virtual absence of judges in the author’s discussion of what detrimental impact broadcasting may exert on judges in comparison with other trial participants. This absence is probably better placed in context when the effect on judges (and lawyers) is more often a nonissue than a major concern when televising of trials should or should not be considered.

### *B. Cameras for Trial Courts, not the Supreme Court*

American veteran journalist Tony Mauro, a longtime observer of the U.S. Supreme Court, was critical of the Supreme Court’s “exceptionalism,” which he saw as a “myth” for maintaining the Court’s no-camera stance.<sup>219</sup> The Court’s focus on exceptionalism might stem from its relationship with the other two branches, which have been open to television cameras for years. In 1996, however, Justice Kennedy of the U.S. Supreme Court took pains to argue that federal *district* courts might permit cameras, although the Supreme Court does not. He said it might

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216. *Cameras in the Court*, C-SPAN, <http://www.c-span.org/The-Courts/Cameras-in-The-Court> (last visited Sept. 7, 2012) (Justice Kennedy’s statement of Feb. 14, 2007, during his appearance before the Senate Judiciary Committee).

217. Edward Thompson, *Does the Open Justice Principle Require Cameras to be Permitted in the Courtroom and the Broadcasting of Legal Proceedings?*, 3 J. MEDIA L. 210, 232 (2011).

218. *Id.*

219. Mauro, *supra* note 3, at 270.

be “somewhat perverse” to exclude cameras from trial courts, where “the most orderly presentation of an issue is made.”<sup>220</sup>

Justice Kennedy’s apparent distinction between the Supreme Court (i.e., cameras banned) and lower federal courts (cameras possibly allowed) reflects his colleagues’ thoughts, given “the justices’ deeply held feeling that their Court is exceptional—unlike any other public institution [and that] [t]he Supreme Court is not like any other court.”<sup>221</sup> But foreign courts’ experience and experiments prove his proposition less than convincing. Indeed, his argument contradicts what has informed the foreign counterparts of the U.S. Supreme Court studied here.

The ongoing reforms of courtroom broadcasts in the United Kingdom are a good illustration of these contradictions. In May 2012, the Ministry of Justice of the British government proposed legislation that would allow broadcasting of the judgments and sentencing decisions in cases before the Court of Appeal. While stressing “no plans” to allow cameras in the trial courts,<sup>222</sup> the U.K. government stated:

Cases in the Court of Appeal normally deal with complex issues of law or evidence, and victims and witnesses rarely appear in order to provide new evidence. Given the complexity of legal issues in Court of Appeal cases, we believe that allowing advocates’ arguments to be filmed in addition to judgments would be more likely to improve public understanding than judgments alone.<sup>223</sup>

The Canadian experience is more directly to the point. Trial courts are differentiated from appellate courts on televising of court proceedings. Trial courts are prohibited from using cameras in the courtroom during trials, while the use of cameras is allowed in the appellate courts. Chief Justice McLachlin of the Canadian Supreme Court, then as a justice in 1995, expressing the widely shared “concern that the presence of cameras might adversely affect the privacy of witnesses or turn the already difficult task of testifying into an ordeal,” concluded that “trial proceedings are better left to take their course outside the glare of television cameras.”<sup>224</sup> Brazil is not much different

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220. *On Cameras in Supreme Court, Souter Says, “Over My Dead Body,” supra* note 205, at A24.

221. Mauro, *supra* note 3, at 270.

222. Ministry of Justice, *supra* note 12, at 21.

223. *Id.* at 8.

224. Beverley McLachlin, *OJ and All That*, in *AUDIO-VISUAL COVERAGE OF COURTS* 162 (Daniel Stepniak, ed. 2008).

from Canada in that cameras are allowed only in the courtroom of its Supreme Court, and cameras are still banned from trial courts.

Television cameras in the high courts of England, Canada, and Brazil parallel one of the “incremental steps” that Professor Marder proposes:

If cameras were to enter any federal courtrooms, then the appellate court rather than the trial court is a more appropriate starting-place. Although cameras could affect the dynamics between lawyers and judges during appellate oral argument, the potential harms are more limited than in trial court, where many more participants could be adversely affected, including parties, witnesses, and jurors.<sup>225</sup>

### *C. Transparency of and Access to the Court*

“[O]n the positive side,” Chief Justice McLachlin of the Canadian Supreme Court said in 2011, “television, as a medium, has the power to place the public inside the court room and actually observe the proceedings. If openness is the objective, this is about as good as it can get.”<sup>226</sup> Chief Justice McLachlin’s assessment of the television cameras in the courtroom is invariably accepted by the high courts of England and Brazil and also by the international criminal courts. As a Brazilian lawyer commented in early September of 2012, TV Justice of the Brazilian Supreme Court was intended to bring more transparency of the court proceedings to Brazilians.<sup>227</sup>

The two “prominent” reasons the ICTY staff argued in the late 1990s that radio and television broadcasting of international trials also closely related to more access, not less, for the public to see justice in action. “First, cameras enabled the workings of the court [ICTY] to be revealed to the international community . . . . In essence, cameras enable justice to be seen to be done—allowing the international community the opportunity to scrutinize the due process of international justice.”<sup>228</sup> And “[s]econd . . . cameras enabled endorsement and approval [of the ICTY trials] from the international community.”<sup>229</sup> The favorable experience of the Canadian Supreme Court with television has led to webcasting of

225. Marder, *supra* note 103, at 68, 70.

226. McLachlin, *supra* note 7, at 32.

227. Email from Brazilian lawyer to Diana Kapiszewski (Sept. 3, 2012) (on file with the author).

228. Paul Mason, *Reflections of International Law in Popular Culture: Justice Seen to be Done? Electronic Broadcast Coverage of the International Criminal Tribunal for the Former Yugoslavia*, 2 J. INT’L MEDIA & ENT. L. 210, 213 (2001).

229. *Id.*

its proceedings and expanding the public access to the Court. “Live webcasting, in particular,” Chief Justice McLachlin said in her 2011 speech at the Supreme Court of Queensland, Australia, “has opened up the Court to many citizens across our vast country.”<sup>230</sup>

The transparency and access issue over the audio-visual broadcasting of court proceedings is more compelling than publishing their transcripts. The Supreme Court of Canada recognized the unique value of the court broadcasting in 2011, when it stated:

[T]he message conveyed by broadcasting the official audio recordings of hearings is not the same as one conveyed using another method of expression. . . . [T]he informative content conveyed by the method of expression [audio broadcasting] the media organizations wish to use is not the same as when a transcript is used or even when the most accurate possible description is given.<sup>231</sup>

The Canadian Supreme Court stopped short of declaring whether audio or visual broadcasting better facilitates the “open justice” principle that it has termed to be “of crucial importance” in a democracy based on the “rule of law.”<sup>232</sup> Maybe the court simply wanted to avoid belaboring the obvious about more advantages of electronic court broadcasting than of their print publications. Justice Elena Kagan, one of the few U.S. Supreme Court justices who favors having cameras in the courtroom, maintained that “reading about it is not the same experience as actually seeing.”<sup>233</sup> As the senior legal counsel of the Canadian Broadcasting Corporation, Daniel J. Henry, forcefully articulated nearly twenty years ago, electronic reports of court cases are “more accurate” as first-hand reports and they provide more context and clarity than the traditional print media do.<sup>234</sup>

Hence, it was just natural that the Supreme Court of the United Kingdom regarded facilitating the public access to its proceedings as “a key objective” and that, in an effort to attain that objective, the Court records and “routinely” broadcasts its proceedings.<sup>235</sup> The U.K. government’s plan to make audio-visual information from its court system, at least for its appellate courts, more open to the public and the

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230. McLachlin, *supra* note 7, at 33.

231. Canadian Broad. Corp. v. Canada, [2011] 1 S.C.R. 19, para. 52 (Can.).

232. *Id.* at para. 1.

233. Cameras in the Court, *supra* note 216 (Justice Kagan’s statement of Aug. 2, 2011, at the Aspen Institute).

234. Henry, *supra* note 22, at 425.

235. Ministry of Justice, *supra* note 12, at 9.

news media is a clear-cut rebuttal of the U.S. Supreme Court's rather calcified refusal to embrace cameras and warrants an extended quotation:

With certain exceptions, most courts are open to the public and journalists are already able to be present in and report from court, subject to reporting restrictions. Despite this, very few people have direct experience of court proceedings. For many, the criminal justice system is still seen as opaque, remote and difficult to understand. *We need to make it a reality that our courts are open and accessible to as many people as are interested in seeing them work.* The judge, when he gives a sentence or a judgment, is a public official performing a public function; his words can be quoted, he will be reported and *we therefore believe that it would be appropriate for a judge to be filmed.*<sup>236</sup>

#### V. LESSONS FROM FOREIGN AND INTERNATIONAL COURTS FOR THE U.S. SUPREME COURT

Americans have a constitutional right to attend court trials that is no different from the rights of Englishmen, Canadians, and Brazilians, whose countries embrace "open justice" as a right to see justice being administered. What separates the United States from the United Kingdom, Canada, and Brazil, however, is whether courtroom broadcasting is accepted or rejected by their highest courts. The U.S. Supreme Court continues to ban radio and television coverage of its proceedings. By contrast, the Supreme Courts in England, Canada, and Brazil have embraced courtroom broadcasts to promote a more transparent and accessible judiciary.

The U.S. Supreme Court's strict proscription of radio and television coverage of its oral arguments and decision announcements should be puzzling to those who know First Amendment law on free speech and free press as well as state courts' television coverage of court proceedings. This is more baffling since it was Chief Justice Burger of the U.S. Supreme Court who spoke of the intrinsic value of the "open processes of justice" in 1980: "The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'"<sup>237</sup> But the Court has not extended the public's right to observe trials to access for broadcasters. Opening the courtroom is not a matter of

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236. *Id.* (emphasis added).

237. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (alteration in original) (citation omitted).



constitutional or statutory law but a matter of discretion for the Supreme Court.

It is particularly interesting, however, that the U.S. government has supported broadcasting of the international war crime trials, including those at Nuremberg, as actively as, if not more actively than, other governments.<sup>238</sup> But the U.S. administration's eagerness to encourage, not discourage, the broadcast of international trials abroad has contrasted with its clear ambivalence toward the broadcast of court trials at home throughout the years.

The U.S. government's seemingly contradictory approach to cameras in domestic versus international courts is not entirely unusual. In exporting the First Amendment abroad, for example, American lawyers have successfully persuaded foreign and international courts to recognize the journalistic privilege to shield confidential news sources, while they have failed to convince their Supreme Court to read the privilege into the Free Press Clause of the First Amendment in favor of American journalists.<sup>239</sup> In any event, the U.S. Supreme Court's still obdurate rejection of court televising throws into sharp relief the problematic concerns and assumptions of several Justices regarding the effects of televising when the beneficial experience of foreign and international courts is borrowed as a frame of analysis. More often than not, those Justices' anti-camera arguments tend to be tendentious, dilatory, conclusory, and paternalistic rather than supported by any conclusive evidence.

For instance, consider Justice Stephen Breyer's public plea for "really pretty serious research and study" before the Court decides on whether to let the public watch its work real time on television.<sup>240</sup> Justice Clarence Thomas worries about the camera's possible impact on himself and other justices: "It runs the risk of undermining the manner in which we consider the cases. Certainly it will change our proceedings. And I don't think for the better."<sup>241</sup> The experiences of the U.K. and Canadian Supreme Courts and the research on the ICTY show that several U.S.

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238. Simone Monasebian, *Media Matters: Reflections of a Former War Crimes Prosecutor Covering the Iraqi Tribunal*, 39 CASE W. RES. J. INT'L L. 305, 315 (2006–2008).

239. See Youm, *supra* note 178, at 53.

240. *Cameras in the Court*, *supra* note 216 (Justice Breyer's statement of Nov. 10, 2005, during the ABA Law Symposium Panel on the Role of the Judiciary).

241. *Id.* (Justice Thomas's testimony of April 4, 2006, before a House Appropriations subcommittee). See also *id.* (Chief Justice Roberts's remarks of July 13, 2006, at the Ninth U.S. Circuit Court of Appeals conference: "There's a concern (among justices) about the impact of television on the functioning of the institution.").

Supreme Court Justices' protestations notwithstanding, the benefits flowing from placing cameras inside the courtroom outweigh any possible harm. For the presence of cameras affects judges or justices in so negligible a way that it is rarely raised as a major issue for those advocates and opponents of television coverage. Judicial professionalism is without doubt at work here.

Further, the behavioral impact and related challenges for the U.S. Supreme Court Justices should be less formidable than some camera-wary Justices assume. If the Canadian Supreme Court is used as a well-informed reference, the institutional culture and internal dynamics of the U.S. Supreme Court would likely inhibit flashy public showing by some otherwise tempted Justices. Most of the frequently expressed but overstated worries about cameras at the U.S. Supreme Court are less consequential than the lack of appreciation by some justices of the educational and "open justice" value that is sure to increase, not to decrease, from televised proceedings. Justice Scalia is candid in expressing his reservations: "I think it would miseducate and misinform. . . . Nobody's going to be watching that gavel-to-gavel except a few C-SPAN junkies."<sup>242</sup>

The foreign and international courts studied have invariably given the benefit of the doubt to the short- and long-term values of broadcasting their proceedings. Their conceptual frame can be considered within the context of the electronic access to courts as freedom of information—that is, the public's access to government records. This informational right is for everyone, not necessarily for news media organizations, to ensure governing transparency. Not coincidentally, the demand for electronic access to judicial proceedings has been debated as an issue of global interest during the past twenty years, when "a veritable revolution" has been taking place in terms of the "right to information."<sup>243</sup>

In the United States, however, the debate about cameras in the courtroom has often been framed as a media-centric issue.<sup>244</sup> As a result, there is more tension than necessary between the U.S. Supreme Court and the news media on broadcasting of court proceedings. This is aggravated by the differing views of the Court and the press on the status

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242. *Id.* (Justice Scalia's statement of Oct. 20, 2006, at the Georgetown University's "Blue and Gray").

243. TOBY MENDEL, *FREEDOM OF INFORMATION: A COMPARATIVE LEGAL SURVEY* 3 (2d ed. 2008).

244. *See* STEPNIAK, *supra* note 106, at 410.

of the broadcasting issue. The Court feels that it is more or less settled, although it has offered no institutional position since C-SPAN first requested access to the courtroom in February 1988. Nonetheless, the media organizations continue to regard it as unsettled.

Further, the adamant refusal of the U.S. Supreme Court to let cameras into its proceedings is more discernible when it is examined against the Court's grudging accommodation of the media's demands for electronic coverage. Almost without exception, the Court's response to the media's request is reactive, not proactive, or ignored outright. This unwittingly reveals the Court's view of its self-contained role by consigning broadcast of court proceedings as something for the media only, not for the Court and the public.

The weekly release of audio recordings of the Court's oral arguments is illustrative, for it was an improvement of the release at the end of each term until 2010. Access to the Court proceedings beyond actual attendance is a privilege to be granted by the Supreme Court, and this is the Court's institutional message to Americans and American news media in the century of communication revolutions. The Supreme Courts of England, Canada, and Brazil and the international courts are refreshing in their proactive, collaborative approach to facilitate the media's audio-visual access to courts. The taping and recording of the court proceedings is more or less controlled by court authorities to ensure "open justice" for the public. Most important, the courts abroad, unlike the U.S. Supreme Court, are focusing on how to help the media improve the public access to the courts, not on whether the media is entitled to audio or video tapes of the proceedings if they are made.

The camera issue for the U.S. Supreme Court is still alive and well, largely thanks to the vociferous push of media professionals and entities for broadcast access to the courtroom. The ongoing three-year experimental broadcast of lower federal courts, albeit limited, may serve as an overdue opportunity for the Supreme Court to revisit the controversy. The Court is no longer a "fragile flower" of the kind that the anti-camera advocates portray it to be, but a "powerful" institution in the United States.<sup>245</sup> More significantly, as Mauro suggested, the Court should consider learning from those foreign and international courts that "have allowed broadcast coverage for years or decades and survived."<sup>246</sup>

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245. Mauro, *supra* note 3, at 275.

246. *Id.*

## VI. SUMMARY AND CONCLUSIONS

These days government officials, judges, lawyers, journalists, and academics in the United States and abroad pay more systematic attention to the debate about cameras in the courtroom than in the past. The key issues of the debate are increasingly examined from an international and comparative law perspective.

The American experience has influenced international and foreign law on court broadcasting with its fair amount of studies and experiments and its case law on free press and fair trial procedures. However, these resources are limited in venue to lower federal and state courts. There is little information about the U.S. Supreme Court readily available to the rest of the world because electronic media coverage of its proceedings has never been permitted.

There is a slim chance that the risk-averse U.S. Supreme Court will open its courtroom to radio and television broadcasters in the near future. Considering Americans' universally recognized exceptional commitment to free speech and a free press, this continuing no-camera policy of the U.S. Supreme Court makes the high courts' embrace of courtroom broadcasting in England, Canada, and Brazil quite a significant development in the "open justice" principle. Equally important is the international criminal courts' and the regional human rights courts' acceptance of cameras into their proceedings to promote access to judicial proceedings for the global public.

Foreign and international courts' consistently positive experience with allowing electronic media access to courtrooms should be a useful guide for the justices of the U.S. Supreme Court. Nearly all the major assumptions, worries, and concerns that several Justices cite in opposing cameras are unlikely to be substantiated as learned from the real-life experience of justices of the Supreme Courts of England and Canada. The U.K. and Canadian Supreme Court justices had their own worries and concerns when opening up their doors to cameras; however, these justices now concede that they were wrong.

The technical and operational rules of court broadcasting, as considered by the Supreme Courts in England, Canada, and Brazil and the international courts, will serve the U.S. Supreme Court well. Of course, this hinges on whether the U.S. Supreme Court decides to be less exceptional by emulating the foreign and international courts in expanding the public access to courtroom to electronic media.

