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Justice Through the Eye of a Camera: Cameras in the Courtrooms in the United States, Canada, England, and Scotland

I. Introduction

Does educating the public about our legal system and allowing maximum freedom of the press prevail over the accused's right to a fair trial? In the United States, both the courts and legal scholars have attempted to balance the rights of a free press and the accused's right to a fair trial.¹ In other countries, this balancing has not been such a significant issue. However, in recent years, increasingly more nations have explored the use of cameras in the courtroom.² Countries experimenting with cameras in their courtrooms include Canada,³ Australia, Israel, Italy, The Netherlands, Norway, Spain, and Scotland.⁴ While many other countries have not yet experimented with cameras, there are a number of people in some countries who think cameras should be permitted in the courtroom. Thus, the media issue has become a subject of debate. The purpose of this Comment is to examine and compare law and policy in Canada, England, Scotland, and the United States to determine to what extent cameras are permitted in the courts. The history of the laws and policies in these countries play a vital part in the reasoning behind why some of these countries allow the use of cameras in their courtrooms while others do not.

1. Valerie P. Hans & Juliet L. Dee, *Media Coverage of Law. Its Impact on Juries and the Public*, 35 AM. BEHAVIORAL SCIENTIST 136, 142 (1991).

2. *See On Camera*, THE TIMES, Feb. 1, 1994, Features.

3. As an experiment on cameras in the courts, a Canadian Supreme Court case was televised in 1993. Mario Toneguzzi, *To Live or Die: Rodriguez Takes Her Plea to Supreme Court*, *Calgary Herald*, May 20, 1993, at A5. The case involved an appeal to overturn a law that makes it illegal for anyone to assist in suicide. *Id.* Specifically, Sue Rodriguez, who was dying from Lou Gehrig's disease, wanted to be able to end her own life when her suffering became too great. *Id.* This experiment does not affect the analysis in this Comment with respect to Canada allowing cameras in its criminal trials.

4. *On Camera*, *supra* note 2.

This Comment analyzes four individual countries because historical and legal differences render it impossible to promulgate the same solutions for every country. Part II focuses on some of the sensationalized, high profile trials which have taken place in the United States, Canada, England, and Scotland, and how these respective countries have dealt with the media issue. Part III examines Canadian law and its impact on the issue of cameras in the courtroom. Next, Part IV discusses England's current position on the issue of cameras in the courtroom, its contempt of court rules, and its future. Part V then explains Scotland's connection with England, England's influence on Scots law, and the current state of the law in Scotland regarding cameras in the courtroom. Part VI examines the legal history of cameras in the courtroom in the United States, the current state of the law, and the possible future of this issue. Part VII discusses the general impact of behavioralism, social science studies, and the concept of individualism on the issue of cameras in the courtroom. Finally, Part VIII concludes that while each country has a different system of law regarding cameras in the courtrooms, each country can allow relative amounts of camera usage without unfairly prejudicing the accused.

II. Background and the Sensationalized Trials

In June 1994, O.J. Simpson, the well-known American football hero and actor, was charged with the murders of his ex-wife Nicole Brown Simpson and her friend Ronald Goldman.⁵ By the conclusion of the Simpson trial, there were more than one million

5. *People v. Simpson*, No. BA097211, 1994 WL 564433 (Felony Compl. Filed L.A. Mun. Ct. June 17, 1994). See also Henry J. Reske, *Verdict on Simpson Trial, Observers Say Prosecution Lost the Case over a Bloody Glove, Racist Cop*, A.B.A. J., Nov. 1995, at 48a.

lines of transcript data subject to public scrutiny.⁶ In the end, Simpson was acquitted.⁷

As a result of the highly publicized trial, a movement has evolved to reform various aspects of the U.S. legal system.⁸ One area of suggested reform is the issue of allowing cameras into the courtroom.⁹ Some commentators claim that cameras adversely affect the defendant's right to receive a fair trial.¹⁰ However, in the beginning of the Simpson trial, the defense team went on record to welcome cameras into the courtroom but stipulated that cameras would not influence a judicial decision to sequester the jury.¹¹ As a result of the defense team's acceptance of cameras, the issue arose of whether the presence of cameras could actually *help* the accused get a fair trial. By contrast, the traditional argument always has been that cameras prevent the accused from

6. *Number Crunching the Trial of the Century*, PR NEWSWIRE, Oct. 2, 1995, available in NEXIS, World Library, ALLWLD File. Other Simpson statistics include:

- Marcia Clark was the most verbose attorney, generating more than 37,000 words. Johnnie Cochran was second with more than 33,000 words. Christopher Darden was a distant third with more than 15,000 words. Robert Shapiro finished fourth with more than 12,000 words.
- Nicole Simpson was mentioned more than Ron Goldman, approximately 6,700 times to Goldman's 5,000.
- A total of 126 witnesses were called for the trial.
- A total of 10 jurors were dismissed during the trial.
- The trial included more than 300 sidebar conferences.
- The most significant word of the trial was "blood," which came up more than 15,000 times. The word "glove" was second, appearing more than 13,000 times. "DNA" was third with more than 10,000 mentions.
- The trial included more than 16,000 objections, which were overruled approximately 9,000 times and sustained more than 7,000 times by Judge Lance Ito.
- More than 500 apologies were made during the trial.

Id.

7. Reske, *supra* note 5, at 48.

8. *Expedition Simpson Trial's Biggest Problem, Lawyer Says* (CNN television broadcast, Oct. 6, 1995)(transcript #1042-16), available in NEXIS, World Library, ALLWLD File. The highlight of the broadcast was: "The Simpson trial has inspired arguments about reforming the legal system, with sequestration coming at the core of the argument. But one ABA member doubts the case will force the removal of cameras from court." *Id.*

9. See Karen Lowe, *Simpson Case Spurs Changes in US Legal System*, AGENCE FR. PRESSE, Oct. 7, 1995, Advisory.

10. See Wendy Kaminer, *Cameras in the Courtroom. Should Judges Permit High-Profile Trials to be Televised? No: Tabloid Television Does Not Belong at Trial*, A.B.A. J., Sept. 1995, at 37.

11. Laurie L. Levenson, *What Is the Real Reason the Simpson Defense Team Wants Cameras in the Courtroom?*, Nov. 10, 1994, 1994 WL 620920.

receiving a fair trial.¹² Further, in response to the critics' arguments, supporters counter that any detrimental effects from the courtroom cameras are merely illusory.¹³ These supporters argue that any negative media effects in the Simpson trial were due to statements made outside of the courtroom.¹⁴

During the Simpson trial, another highly publicized case attracted national attention.¹⁵ Susan Smith was charged with and ultimately convicted of drowning her two young children in a lake while trapped inside her car.¹⁶ Unlike the Simpson case, Susan Smith had a camera-free trial.¹⁷ Judge Howard, the presiding judge in the Smith case, stated that the cameras would "interfere with the ends of justice as I see them to be."¹⁸

Another trial that attracted substantial media attention was the Rosemary West trial in England.¹⁹ In 1987, West and her late husband were accused of killing ten people and hiding the bodies in and around their house.²⁰ The press dubbed the West home the "house of horrors."²¹ Because English law prohibits the use of cameras in the courtroom,²² camera coverage of the West trial never became an issue. Nevertheless, because of strong public interest, the Lord Chancellor's Department took extra steps to "ensure [that] the Rosemary West trial [did] not degenerate into a media circus"²³ and issued a guide explaining the laws that applied to the media in regard to its coverage of the case.²⁴

Additionally, in Canada, the legal system was forced to confront the media in a trial of very high public interest in the Paul

12. See *Estes v. Texas*, 381 U.S. 532 (1965).

13. Kenneth B. Noble, *Why Judge Might Have Banned Cameras From Prominent Trial*, N.Y. TIMES, Oct. 8, 1995, § 1, at 31.

14. *Id.*

15. *The Susan Smith Trial—No Cameras Allowed*, (CNN television broadcast, July 2, 1995)(transcript # 175-3), available in NEXIS, World Library, ALLWLD File.

16. See *Judge: Judicial System Needs Mending*, THE ARIZ. REPUBLIC, Oct. 28, 1995, at B7.

17. *The Susan Smith Trial—No Cameras Allowed*, *supra* note 15.

18. *Id.*

19. *Guide Stays Chances of Media Circus at West Trial*, THE LAW., Oct. 10, 1995, at 36.

20. "House of Horrors" Murder Victims Were Decapitated, Court Is Told, DEUTSCHE PRESSE-AGENTUR, Oct. 6, 1995. Rosemary West's husband, Frederick West, committed suicide after being convicted of twelve counts of murder. *Id.*

21. *Id.*

22. See Criminal Justice Act, 1925, ch. 86, § 41 (Eng.).

23. *Guide Stays Chances of Media Circus at West Trial*, *supra* note 19.

24. See *id.*

Bernardo trial.²⁵ In the Bernardo trial, the defendant was accused of abducting a fourteen year-old at knifepoint, imprisoning her, raping her, beating her, and sodomizing her before strangling her with an electrical cord.²⁶ He was also accused of butchering the body in his basement with an electric circular saw, encasing parts of her body in cement blocks, and ultimately dumping these blocks into a nearby lake.²⁷ Pursuant to traditional Canadian law, the Bernardo trial was not televised.²⁸ A survey taken during this sensational double murder trial "showed that while Canadians were fascinated by the case, most agreed with the decision to keep cameras out of the courtroom."²⁹

In Scotland, the first televised criminal trial was the Philip Gorman trial.³⁰ In 1994, Mr. Gorman was on trial for stealing a bus, driving while intoxicated, and refusing to take a breathalyser test.³¹ He was sentenced to twelve months in jail.³² The issue was "whether this pioneering transmission of the highlights . . . was a [g]ood idea or not, and whether it should become the norm that television should be able to add another penalty of publicity to what the law and the print media can do to the unhappy felon on their own."³³ Among others, these trials indicate the increasing pressure of the media to present the legal system to the public.

III. Canada

A. *History of the Legal Issue and Factors Affecting Whether to Allow Cameras in the Canadian Courtrooms*

An absence of statutory guidance permits Canadian courts to exercise great discretion in deciding whether to allow cameras into

25. See Charles Trueheart, *Gruesome Murder Case Is Unveiled in Canada; Publicity Ban Ends on Sex Killings of Teens*, THE WASH. POST, May 19, 1995, at A28.

26. *Id.*

27. *Id.*

28. See *Murder Trial in Canada Sets Off Censorship Debate*, (National Public Radio broadcast, May 12, 1995)(Segment Number: 13, Show Number: 1605), 1995 WL 2958274.

29. Doug Fischer, *The Simpson Verdict: Trial Offered Lessons*, CALGARY HERALD, Oct. 4, 1995, at A5 [hereinafter Fischer, *The Simpson Verdict*].

30. John Arlidge, *Lawyers Urge Televising of Court Proceedings; Bar Council Condemns 'Absurd' Ban After Scottish Experiment*, THE INDEPENDENT, Apr. 9, 1994, at 5.

31. Kenneth Wright, *Stop This Trial Now*, THE HERALD (Glasgow), Apr. 9, 1994, at 13.

32. *Id.*

33. *Id.*

their courtrooms.³⁴ Pursuant to section 136 of the Courts of Justice Act, Ontario is the only province³⁵ that statutorily prohibits its courtroom cameras.³⁶ Otherwise, the Charter of Rights and Freedoms, Canada's Constitution,³⁷ which confers constitutional rights to the media,³⁸ is relied upon to resolve the issue of cameras in court.

In Canada, the debate over this issue is highly divisive.³⁹ Court TV,⁴⁰ a successful television show in the United States, intends to eventually expand into Canada.⁴¹ The managers of Court TV believe that "[t]he 'ultimate step' is to offer foreign viewers their own justice system."⁴² Currently, there is great pressure on the Canadian court system to permit televised court

34. The Public Affairs Committee of the General Council of the Bar, *Televising the Courts: Report of a Working Party*, May 1989, § 3.1 (The Caplan Report, named after its chairman, Jonathan Caplan, QC) [hereinafter *The Caplan Report*].

35. Each Province or region of Canada is a sovereign unit. Margaret Kinnear, *The Legal System of Canada*, in MODERN LEGAL SYSTEMS CYCLOPEDIA 1.20.38 (Kenneth R. Redden ed., 1988). Over the years, the Provinces have grown in strength, but in cases where the law of a Province and the central government conflict, the central federal government usually prevails. *Id.*

36. Courts of Justice Act, R.S.O., ch. 43, § 136 (1990) (Can.). Section 136 provides that no person shall:

(a) take or attempt to take a photograph, motion picture, audio recording or other record capable of producing visual or aural representations by electronic means or otherwise,

(i) at a court hearing,

(ii) of any person entering or leaving the room . . . or

(iii) of any person in the building . . . ;

(b) publish, broadcast, reproduce . . . in contravention of clause (a); or

(c) broadcast or reproduce an audio recording made as described in clause (2)(b) [an exception clause].

Id.

37. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

38. Section 2 of the Canadian Charter of Rights and Freedoms provides:

"2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association." *Id.* § 2.

39. Jeff Goodell, *As the Courtroom Turns . . .*, CANADIAN LAW., Jul.-Aug. 1995, at 13.

40. Court TV was first televised in 1991 in the United States. David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 801 (1993). In general, Court TV offers viewers broadcasts of actual trials nationwide. *Id.*

41. Goodell, *supra* note 39.

42. *Id.*

proceedings for several reasons, including the relative youth of the Canadian Constitution, Canada's geographic connection with the United States, the widespread televising of U.S. proceedings, and Court TV's intention to expand into Canada.

In an attempt to begin to televise courtroom proceedings, the Canadian Broadcasting Corporation (CBC) sought to televise the *Bernardo* trial.⁴³ In this 1995 high-profile, double murder trial, CBC applied for leave to intervene in the principle case of *Her Majesty the Queen v. Paul Kenneth Bernardo*.⁴⁴ CBC's purpose was to persuade the court that it had "a presumptive right, and ought to be granted access to the courtroom to record and broadcast, via television, the proceedings in th[e] criminal trial."⁴⁵ In the *Bernardo* case, the court refused to allow CBC to even apply for permission to have cameras in the trial.⁴⁶ In its reasoning, the court refused to analyze this issue, stating that it would take too long to have a full hearing on all of the issues, and that a hearing would unduly delay the schedule of the *Bernardo* trial.⁴⁷

However, the court did not decide on the merits of CBC's ultimate request.⁴⁸ In fact, the court acknowledged that it was reasonable for CBC to wait until it did to file such a petition because CBC had waited for a recent Canadian Supreme Court decision.⁴⁹ CBC proposed that the recent Canadian Supreme Court decision, *Dagenais v. Canadian Broadcasting Corp.*,⁵⁰ gave it new avenues to pursue. When *Dagenais* and others were charged with offenses arising out of alleged physical and sexual abuse at training schools run by a Catholic religious order,⁵¹ CBC sought to televise a fictional account of sexual and physical abuse of children in a Catholic institution.⁵² In *Dagenais*, the accused obtained a publication ban on the proposed fictional television program.⁵³ In deciding whether the publication ban was constitutional, the Canadian Supreme Court discussed how such issues in

43. See *supra* text accompanying notes 25-29.

44. 1995 Ont. C. J. LEXIS 714 (Ont. Court of Justice 1995).

45. *Id.*

46. *Id.* at *3.

47. *Id.*

48. *Id.*

49. *Bernardo*, 1995 Ont. C. J. LEXIS 714 at *3.

50. 120 D.L.R.4th 12 (Sup. Ct. Can. 1994).

51. *Id.*

52. *Id.* at 18.

53. *Id.*

general should be analyzed, especially under the Canadian Charter of Rights.⁵⁴

The court recognized that the analysis based on the Canadian Charter of Rights differed from the prior common law analysis.⁵⁵ Specifically, section 2(b) of the Charter guarantees the rights of all Canadians to freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication.⁵⁶

Traditionally, the pre-Charter common law rule governing bans on publications emphasized the right to a fair trial over the free expression interests of those affected by the ban.⁵⁷ However, as a result of the recently enacted Charter, the court found it necessary to reformulate the common law rule governing the issuance of publication bans in a manner that reflects the principles of the Charter.⁵⁸ Therefore, the court initiated a more rights-oriented standard for publication bans.⁵⁹ The court's decision is a step in the direction of allowing televised court proceedings in Canada.

In this precedent-setting case, the *Dagenais* court formulated an illustrative list of concerns to consider in applying the new rule for publication bans.⁶⁰ For instance, one concern is the adverse

54. *Id.* at 36-47.

55. *Dagenais*, 120 D.L.R.4th at 37. See Kinnear, *supra* note 35, at 1.20.17. The Canadian Charter of Rights and Freedoms, which came into force in 1982, is the

first express written constitutional guarantee of individual rights in Canada, and signifies a substantial change in the role of the courts, which are now vested with the power to review the substance of the acts of Parliament and the provincial legislatures and to ensure their conformity with the right and freedoms set out in the Charter.

Id.

56. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2(b).

57. *Dagenais*, 120 D.L.R.4th at 37.

58. *Id.*

59. The modified rule that the court set forth is as follows:

A Publication ban should only be ordered when:

(a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
 (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

Id. at 38.

60. Factors which may be considered when deciding whether there should be a publication ban are:

[O]rdering bans may:

influence a publication, including a television broadcast, could have on jurors.⁶¹ The court made it clear that the rule permitting publication bans was not absolute.⁶² If alternatives other than a ban exist to remedy the possible adverse influence of the publication, an argument may be made in favor of the media broadcasts.⁶³ The court reasoned that if other remedies existed, then there may not be a "rational connection" between banning the publication and preventing the jury from being adversely influenced by possible information broadcast outside the courtroom.⁶⁴ Thus, the ultimate consideration is whether "reasonable alternative measures" exist to an absolute publication ban.⁶⁵

Finally, the *Dagenais* court set forth general guidelines for future cases.⁶⁶ These guidelines include a presumption against publication bans. Thus, a party seeking a ban bears the burden of justifying the limitation, and the "judge must consider all possible ways to limit the ban and must limit the ban as much as possible."⁶⁷

Subsequent to the *Dagenais* case, the Northwest Territories Supreme Court applied *Dagenais* in *Canadian Broadcasting Corp. v. Canada*.⁶⁸ In this case, CBC sought to duplicate audio and

— limit freedom of expression (and thus undercut the purposes of s. 2(b) discussed above);

— prevent the jury from being influenced by information other than that presented in evidence during the trial (for example, information presented in a tabloid television show and evidence discussed in the absence of the jury and held to be inadmissible);

— maximize the chances that witnesses will testify because they will not be fearful of the consequences of publicity;

[N]ot ordering bans may:

— maximize the chances of individuals with relevant information hearing about a case and coming forward with new information;

— prevent perjury by placing witnesses under public scrutiny;

— prevent state and/or court wrongdoing by placing the criminal justice process under public scrutiny;

— reduce crime through the public expression of disapproval for crime; and

— promote the public discussion of important issues.

Id. at 41-42.

61. *Id.*

62. *Dagenais*, 120 D.L.R.4th at 44.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 47.

67. *Dagenais*, 120 D.L.R.4th at 47-48.

68. 122 D.L.R.4th 698 (N.W.T. Sup. Ct. 1995).

videotape exhibits where the accused was convicted of murder.⁶⁹ Further, CBC requested permission to broadcast parts of the evidence on television.⁷⁰ Since the facts were similar to those in *Dagenais*, the court applied the constitutional principles set forth in that case.⁷¹ The court recognized that the pre-Charter common law rule which placed fair trial rights over free expression rights was no longer current law and that the *Dagenais* case marked the departure from the pre-Charter rule.⁷² Thus, the court concluded that a hierarchical approach of ranking one right over another is to be avoided. Rather, fair trial/free expression cases should be analyzed according to the particular factual circumstances in order to balance the rights of freedom of expression with the accused's right to a fair trial.⁷³

After applying the constitutional balancing test, the court held that CBC could duplicate the evidence it sought.⁷⁴ However, the court also held that CBC could not broadcast any of the evidence until all the "proceedings" against the accused were finally concluded.⁷⁵ Further, the court noted that "proceedings" includes any appeal the accused may seek.⁷⁶ Thus, the court recognized that CBC's request to duplicate exhibits was legitimate as long as it did not infringe on the accused's legitimate privacy interests and fair trial interests.⁷⁷

B. *The Future in Canada*

As these cases portend, under the Canadian Constitution, there will be increasingly more pressure from the media to televise court proceedings. Inevitably, cameras may be present in the courtroom despite the Canadian public's dissent. Experts contend that the idea of televising court proceedings will not flourish due to public

69. *Id.*

70. *Id.*

71. *Id.* at 708.

72. *Id.*

73. *Canadian Broadcasting Corp.*, 122 D.L.R.4th at 708.

74. *Id.* at 718.

75. *Id.*

76. *Id.* "[N]o broadcast . . . shall be made . . . until all proceedings against the accused and any appeal in respect thereof, with reference to the offences of which he stands convicted, or any of them, are finally concluded." *Id.*

77. *Canadian Broadcasting Corp.*, 122 D.L.R.4th at 716-17.

dissent,⁷⁸ and that most of the Canadian public thinks that cameras should be kept out of the courtrooms.⁷⁹

On the other hand, it is unlikely that the use of cameras in the Canadian courtrooms will be nearly as prevalent and pervasive as they are in the United States. If cameras are permitted in Canadian courtrooms, there will be many restrictions on their use. One reason for this is that in Canada, juries are rarely sequestered.⁸⁰ Thus, more restrictions are needed to reduce the risk of jurors hearing evidence when they are not in the courtroom.⁸¹ Furthermore, judges will probably have editorial privileges to decide which parts of the proceedings can be televised. Moreover, criminal cases probably will not be televised live due to the possibility of an appeal and the resultant risk of prejudicing a second jury panel. Consequently, the U.S. practice of live coverage does not appear to be a possibility.

In Canada, the advent of cameras in the courtroom seems close to becoming a reality. However, because of the Simpson trial in the United States, many Canadians are satisfied that their system does not allow for such pervasive media coverage.⁸² In fact, Canadian legal experts believe that the "media 'circus' surrounding the Simpson case may deter Canada from allowing cameras into its own courtrooms."⁸³ Therefore, although "Canada's top, federally appointed judges were close to recommending that television cameras be allowed into criminal courts," the judges decided it would not be in the interest of justice to televise criminal trials.⁸⁴ The judges made this decision as a result of viewing the Simpson trial.⁸⁵

Despite its fears of a media circus, Canada is poised to allow cameras into its courtrooms on an experimental basis. In view of

78. See Russel Blinch, *Simpson Trial May Deter Cameras in Canadian Courts*, REUTERS, LIMITED, Oct. 3, 1995.

79. Fischer, *The Simpson Verdict*, *supra* note 29.

80. Doug Fischer, *A Lesson for Canada: We Should Be Skeptics; The Simpson Trial*, THE GAZETTE (Montreal), Oct. 4 1995, at B4 [hereinafter Fischer, *A Lesson for Canada*].

81. *Id.*

82. Nomi Morris, *Beyond the Verdict; O.J. Simpson Is Free but a Debate Rages About His Acquittal*, MACLEAN'S, Oct. 16, 1995, at 40.

83. Blinch, *supra* note 78.

84. Chris Cobb, *For Canadians, Trial Was Highly Entertaining, Even Educational*, THE OTTAWA CITIZEN, Oct. 4, 1995, at A6. See also Morris, *supra* note 82. "The Simpson trial probably set back by 10 years or so the position of those people who want television in the courtroom." *Id.*

85. Cobb, *supra* note 84.

the *Dagenais* holding, it appears that according to the Canadian constitution, cameras are not per se banned from the courtroom.⁸⁶ However, as the *Canadian Broadcasting Corp.* case illustrates, restrictions are still needed.

IV. England

A. *Legal and Other Factors Affecting Camera Usage*

In comparison to the United States, England traditionally has been a very secretive country.⁸⁷ In England, pursuant to section 41 of the Criminal Justice Act, cameras are not permitted in the courtroom, not even by discretionary permission of the official presiding over the case.⁸⁸ According to the *Caplan Report*, written in 1989 regarding the future televising of court proceedings, "it is clear that no magistrate, trial judge or appellate court has any discretion to allow the taking of any photograph in the courts."⁸⁹ Although the statute, enacted in 1925 before the invention of television does not specifically address television cameras, section 41 has been applied to television.⁹⁰ The *Caplan Report* argues that this subsequent application was an "unforeseen consequence" and that lawmakers should have given and should give more consideration to the application of section 41 to television.⁹¹ Thus, although some support exists for allowing cameras in the courtroom in England, section 41 continues to prohibit courtroom cameras.⁹²

86. See *Dagenais*, 120 D.L.R.4th at 12-13.

87. See *Leading Article: Tried — and Prejudiced; Media Circuses over Court Cases Happen Here, Too*, THE GUARDIAN, Oct. 6, 1995, at 18.

88. Section 41 provides:

(1) No person shall —

(a) take or attempt to take in any court any photograph, or with a view to publication make or attempt to make in any court any portrait or sketch, of any person, being a judge of the court or a juror or a witness in or a party to any proceedings before the court, whether civil or criminal; or

(b) publish any photograph, portrait or sketch taken or made in contravention of the foregoing provisions of this section or any reproduction thereof;

and if any person acts in contravention of this section he shall, on summary conviction, be liable in respect of each offense to a fine

. . . . This Act does not extend to Scotland.

Criminal Justice Act, 1925, ch. 86, § 41 (Eng.).

89. *The Caplan Report*, *supra* note 34, § 2.1.

90. *Id.* § 2.2

91. *Id.*

92. See § 41 of the Criminal Justice Act (Eng.).

In weighing the factors for and against permitting televised court proceedings in England, the final opinion of the *Caplan Report* stated "that the benefit of televising outweighs the arguments against it."⁹³ Although televising in English courtrooms is still prohibited, there is a definitive movement towards allowing cameras in courts, and much support exists for this trend.⁹⁴

At the Edinburgh International Television Festival in late August of 1995, there was a session devoted to the future of cameras in the courtroom in England.⁹⁵ Supporters of cameras in the courtroom in England argue that it is inevitable.⁹⁶ In an attempt to convince the legal community and the public that cameras should be in the courtroom, supporters propound a universal argument. Advocates argue that televising court proceedings will inform and educate, expose the legal system to public scrutiny, and prevent miscarriages of justice.⁹⁷ Supporters also argue that the "system has to be open to safeguard the right to know" and that taxpayers who pay for the justice system "have the right to see it in operation."⁹⁸

Those in favor of cameras in English courtrooms now must convince Parliament to amend the present Criminal Justice Act. Judges cannot circumvent Parliament's law.⁹⁹ The task of convincing Parliament to amend section 41 must focus not only on reasons why cameras should be permitted, but also why those reasons outweigh the arguments against allowing cameras into the courtroom.

On the other hand, those who oppose cameras in England's courtrooms base their opposition partly on the U.S. experience.¹⁰⁰ However, supporters respond that the English contempt laws would ensure that allowing cameras in England's courtrooms would not

93. *The Caplan Report*, *supra* note 34, § 4.13.

94. Fiona Barton, *Murder Trials To Be Broadcast on British TV Within Two Years; How the Impact of America's O J Simpson Case May Force the Law To Allow Cameras into the Old Bailey*, MAIL ON SUNDAY, Sept. 10, 1995, at 8.

95. Allan Laing, *TV Coverage of English Courts 'Set Back 50 Years'*, *The Herald* (Glasgow), Aug. 28, 1995, at 5.

96. Barton, *supra* note 94.

97. *Id.*

98. *Id.*

99. *See id.*

100. *See* Christopher Reed, *If OJ Were on Trial at the Bailey; It Could Have Been Over in Weeks, Experts in Both Systems Tell Christopher Reed*, THE GUARDIAN, Oct. 3, 1995, at T17.

include the apparent problems of the U.S. experience.¹⁰¹ English proponents rely on the Contempt of Court Act 1981,¹⁰² arguing that “[s]trict contempt of court rules are supposed to prevent British justice [from] sliding into U.S. style ‘trial by media’ where freedom of expression takes precedence even over the right to a fair trial.”¹⁰³ The contempt of court rules in England differ markedly from those in other countries, particularly the United States. Essentially, the Contempt of Court Act states that in bringing an action for contempt against the media, the attorney general does not have to prove that the media establishment intended to create a “substantial risk of serious prejudice” to a trial.¹⁰⁴ In contrast, in the United States almost nothing spoken outside the courtroom is punishable as contempt.¹⁰⁵

The primary reason contempt of court rules must be so rigid in England is because juries are rarely sequestered.¹⁰⁶ Consequently, in order to prevent prejudicing the jury panel, strict rules governing the conduct of the media are necessary.

An example of the application of the Contempt of Court Act is illustrated in guidelines set forth for the media in the *West* trial.¹⁰⁷ In the *West* trial,¹⁰⁸ the court not only set forth strict rules for the media, but for the first time in English history, published a media guide.¹⁰⁹ The media guide apprised the media as to what they could report, where they could report, and when

101. Stephen Ward, *Jury Still Out on Court Cameras; OJ Simpson: The Aftermath*, THE INDEPENDENT, Oct. 5, 1995, at 3.

102. The Contempt of Court Act provides in part:

(1) The strict liability rule applies only in relation to publications, and for this purpose “publication” includes any speech, writing, . . . or other communication in whatever form, which is addressed to the public at large or any section of the public.

(2) The strict liability rule applies to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

Contempt of Court Act, 1981, ch. 49, § 2 (Eng.).

103. Grania Langdon-Down, *Law: Trial by media: Watching for Prejudice; After the Geoff Knights Fiasco, Can We Trust the Press to Allow the Accused a Fair Trial? After OJ, Can We Trust the Jury?*, THE INDEPENDENT, Oct. 11, 1995, at 12.

104. John Darnton, *The Press Be Hanged! Britains’ Judges Prefer Order in the Court*, N.Y. TIMES, Oct. 6, 1995, at A11.

105. See *infra* notes 154-57 and accompanying text.

106. Darnton, *supra* note 104.

107. See *Media Court Guide. Regina -v- Rosemary Pauline West Crown Court at Winchester*, (Lord Chancellor’s Dept., England), Oct. 1995 [hereinafter *Media Court Guide*].

108. See *supra* notes 19-24 and accompanying text.

109. *Id.*

they could report.¹¹⁰ On the topic of "Photography/Filming," the media guide set forth an order stating that "[u]nder the provision of Section 41 of the Criminal Justice Act 1925, filming and photography is forbidden within the precincts of a Court at any time."¹¹¹ The media guide further defined "precincts" as encompassing much more than just the actual interior of the courthouse.¹¹² Thus, in consideration of both section 41 of the Criminal Justice Act 1925 and the Contempt of Court Act 1981, the Crown Court at Winchester in the West trial set forth explicit instructions for the media.

B. The Future in England

Many English lawyers fear what may happen if trials are permitted to be televised.¹¹³ In addition, much of the English legal community believes that the Simpson trial was a media circus.¹¹⁴ Many now contend that a media circus is the inevitable result of allowing cameras in the courtroom.¹¹⁵ On the other hand, as previously discussed, there is still much support for cameras in the courtroom.¹¹⁶ Currently, supporters are trying to convince Parliament to amend section 41 of the Criminal Justice Act 1925.

Largely as a result of the Simpson trial, it seems that the introduction of cameras in the courtroom in England will be delayed. However, because of the worldwide debate over cameras in the courtroom and the increased pressure to permit them, cameras may be permitted in England's courtrooms within a few years. When cameras are permitted in English courts, there undoubtedly will be strict rules. Further, judges will likely have great discretion to balance the media's request to broadcast with the accused's right to a fair trial and to privacy.

No real substantive reasons exist for absolutely banning cameras from the courtroom. The English contempt rules should adequately protect the accused from prejudice. Therefore, as long

110. *Guide Stays Chances of Media Circus at West Trial*, *supra* note 19, at 36.

111. *Media Court Guide*, *supra* note 107, at 4.

112. *Id.* "The precincts at the Winchester Combined Court centre [sic] extend from the front of the courthouse to the top of the steps at Castle Avenue, across to (but not including) the pathway at the back of Three Ministers House on High Street, and to the guardbox outside Trafalgar House." *Id.*

113. Laing, *supra* note 95.

114. See Ward, *supra* note 101.

115. *Id.*

116. See *supra* notes 93-98 and accompanying text.

as the current contempt rules are enforced, it is unlikely that any broadcast of court proceedings would be shown live, as this would be a violation of the contempt rules. If a trial were to be broadcast after its conclusion and after the time for a possible appeal, the risk of prejudicing the jury or the accused's rights would be minimal.

However, there is concern that the contempt rules are not enforced. As a result, the media may not be inclined to abide by reporting standards.¹¹⁷ For example, when eight tabloid newspapers published too much information prior to a court proceeding, the judge dismissed charges against the accused because he felt the accused would not receive a fair trial.¹¹⁸ The judge further recommended that the attorney general charge the tabloids with contempt of court.¹¹⁹ After the trial, the attorney general commented that such charges would be considered,¹²⁰ and he ultimately charged the tabloids with contempt.¹²¹ Thus, in order for the contempt of court rules to protect those who are accused, the rules must be enforced. If the rules are enforced, however, cameras should be permitted in the courtroom because the accused's rights would not be prejudiced.

Nevertheless, there is strong public sentiment in England that the United States Simpson trial demonstrated what happens when cameras are allowed in the courtroom.¹²² Assuming, arguendo, that the Simpson trial was a negative legal experience, the English fear that the same "circus" will occur in England despite the great variance in contempt laws.

117. See Isabel Hilton, *A Contemptible Result of Trial by Tabloid*, THE GUARDIAN, Oct. 17, 1995, at 15.

118. Helen Branswell, *British Tabloids Could Get Unwanted Day in Court*, THE OTTAWA CITIZEN, Oct. 6, 1995, at A11.

119. Colin Brown & Rhys Williams, *Newspapers Paid West Witnesses; Murder Trial: Wakeham Concerned at Tabloid's Cash Deals*, THE INDEPENDENT, Nov. 13, 1995, at 5.

120. *Id.*

121. Andrew Culf, *Tabloids Face Contempt Case Over Halted Knights Trial*, THE GUARDIAN, Dec. 22, 1995, at 8. The case against the papers — the Daily Mail, Daily Mirror, the Sun, Daily Star and the now defunct Today — will probably be heard in the end of 1996. *Id.*

Even though the attorney general ultimately decided to bring charges against the media in this case, it is thought that the attorney general is "too busy to monitor the press," and that the contempt rules are blurred. Hilton, *supra* note 116. In addition, it seems that the contempt rules are in conflict with the interests of the press to publish as much as it can and for the police to "secur[e] favorable coverage for their investigations."

Id.

122. See Stephen Pollard, *OJ What Price for UK Law?*, THE LAW., Oct. 10, 1995, at 15.

V. Scotland

A. *The English Influence and Other Factors*

It is important to understand the connection between the legal systems of Scotland and England before analyzing the laws and policies of Scotland. The United Kingdom comprises three separate legal systems — England and Wales, Northern Ireland, and Scotland.¹²³ The legal system in Scotland is based on both common law and civil law, unlike its neighbor England, which has a common law system.¹²⁴ Scots law has been influenced over the centuries by many systems of law,¹²⁵ but in recent times, it has increasingly mimicked the law of England.¹²⁶ As a result, the Scots people have not sought other systems for guidance.¹²⁷ Furthermore, the House of Lords, which sits as a judicial body in Scottish appeals but has had no training or perceived interest in Scotland's separate system, has often introduced English legal doctrine into Scots law.¹²⁸ Even though Scots law mirrors English law in certain respects, it maintains its independence and is not completely dominated by English Doctrine.¹²⁹

Despite similarities between the countries' laws, in August 1992, Lord Hope, the Lord Justice-General and the most senior judge in Scotland, granted documentary-makers the right to film court proceedings.¹³⁰ This decision was only made possible because Scotland is not subject to the Criminal Justice Act 1925.¹³¹ Before Lord Hope made this decision, the unauthorized use of cameras in courtroom was considered to be contempt.¹³²

While certain trials may be televised, Lord Hope's decision mandates that consent be obtained prior to televising trials, and

123. KENNETH R. REDDEN & LINDA L. SCHLUETER, *MODERN LEGAL SYSTEMS CYCLOPEDIA* 3.240.12 (1994) [hereinafter REDDEN (1994)].

124. *Id.*

125. *Id.* "Scots law draws on both the common law and civil law traditions and is therefore, along with a few other jurisdictions in the world (such as South Africa, Israel, Quebec and Louisiana) a rarity." *Id.*

126. *Id.* at 3.240.14.

127. REDDEN (1994), *supra* note 123, at 3.240.14.

128. *Id.*

129. *Id.*

130. Arlidge, *supra* note 30.

131. Section 41 of the Criminal Justice Act 1925, which forbids the use of cameras in the courtroom, explicitly states that it is not applicable to Scotland.

132. Alistair Bonnington, *Camera Shy?*, *GLASGOW BAR ASS'N LEGAL REV.*, Sept. 1994, at 4.

strict rules govern when the trial can be publicly televised.¹³³ The purpose of Lord Hope's decision was to allow citizens to see how the court system works because the public lacked understanding of the system and was losing faith in the courts.¹³⁴

While cameras are technically no longer prohibited in the courts in Scotland, they are not legally permitted to the extent allowed in U.S. courts. Generally, television does not have free access to Scottish courts.¹³⁵ According to the rules that Lord Hope established, televising a current trial is never permitted; only civil and criminal appeals are permitted to be televised.¹³⁶ Furthermore, if the solicitor/attorney, the client, or the judge does not want the proceeding to be recorded, it will not be recorded.¹³⁷ Also, if the judge permits cameras in the courtroom, the judge then has complete editorial discretion of all recordings.¹³⁸ Further,

133. The rules as set forth by Lord Hope provide:

(a) The rule hitherto has been that television cameras are not allowed within the precincts of the court. While the absolute nature of the rule makes it easy to apply, it is an impediment to the making of programmes [sic] of an educational or documentary nature and to the use of television in other cases where there would be no risk to the administration of justice.

(b) In future the criterion will be whether the presence of television cameras in the court would be without risk to the administration of justice.

(c) In view of the risks to the administration of justice the televising of current proceedings in criminal cases at first instance will not be permitted under any circumstances.

(d) Civil proofs at first instance do not normally involve juries, but the risks inherent in the televising of current proceedings while witnesses are giving their evidence justify the same practice here as in the case of criminal trials. . . .

(h) [S]uch filming may be done only with the consent of all parties involved in the proceedings.

Television in the Courts, reprinted in THE J. L. SOC'Y SCOT., Sept. 1992, at 371 [hereinafter *Television in the Courts*].

134. Rhys Williams, *Cameras in Court 'Will Let Justice Be Seen To Be Done'*; *Edinburgh Television Festival: Lawyer Advocates Live Coverage*, THE INDEPENDENT, Aug. 28, 1995, at 4.

135. Bonnington, *supra* note 132. See generally Gordon McIlwraith, *OJ Justice in the Dock; We'd Never Allow Farce; How the OJ Simpson Trial Could Never Happen in Scotland*, DAILY REC. (Scotland), Sept. 11, 1995, at 4 (discussing other differences between United States and Scotland in context of Simpson case). In Scotland, an accused can be held in prison for a maximum of 110 days before trial whereas O.J. Simpson was in prison for approximately 200 days, a jury is picked in minutes, the trial proceeds straight into the evidence, and jurors are not sequestered. *Id.*

136. *Television in the Courts*, *supra* note 133.

137. *Id.*

138. *Id.*

witnesses can preclude their particular portions of the evidence from being shown.¹³⁹

As a result of Lord Hope's rules, it took the British Broadcasting Corporation (BBC) five months to find a trial where all participants agreed to be televised.¹⁴⁰ Perhaps one reason may be the nature of the trial. This trial, the *Gorman* trial,¹⁴¹ involved a theft as opposed to a murder, as in the *Simpson* trial. In addition, because two jurors did not want to be televised, none of the jurors were televised.¹⁴² As a result of strict rules, what was actually televised was very limited.¹⁴³

Scotland does not have a constitution, thus there are no rights to be analyzed to the extent as there are in the United States or in Canada. In the U.S. and Canada, advocates of televising trials claim that the decision rests in part on freedom of speech and freedom of press issues. In Scotland, the reasons set forth for allowing cameras in the courtroom are based more on practicality.¹⁴⁴ One reason set forth by Lord Hope was that technology is now at such an advanced state that it will not interfere with the conduct of the proceedings.¹⁴⁵ Another reason was that the people in Scotland should be able to learn about their legal system and how justice is administered.¹⁴⁶ Thus, whether broadcast coverage of trials will continue or expand seems to depend on which side has more support and who has the power to make the ultimate decision.

B. *The Future in Scotland*

In Scotland, while cameras technically are permitted in the courtroom, the restrictions are not likely to abate.¹⁴⁷ The consensus in Scotland is that the "rights of the US [sic] media are constitutionally enshrined, to the point where they appear to

139. *Id.*

140. Tom Brown, *How Can We Take a Judge Seriously . . . With a Plate of Pasta on His Head?; Tom Brown Takes a Look at Justice on the Box; Focal Point's First Trial to be Shown on TV in Britain*, DAILY REC., Apr. 8, 1994, at 19.

141. See *supra* notes 30-33 and accompanying text.

142. Brown, *supra* note 140.

143. See *id.*

144. See *Press Release* (Television in the Courts) (issued by the Lord President) (Scot. 1992).

145. *Id.*

146. *Id.*

147. See *Television in the Courts*, *supra* note 133. See also Bonnington, *supra* note 132 (discussing how lawyers in Scotland are fearful of cameras in courtrooms).

encroach on the rights of the defendant."¹⁴⁸ There is virtually no chance that the law lords of Scotland will allow the same magnitude of coverage that many of the states in the United States now allow. However, Scotland should continue to permit the limited use of cameras in its courtrooms in order to provide the public the opportunity to see how the judicial system works. With the restrictions and safeguards that are in place, not many hearings or portions of hearings will likely be shown, and those that are broadcast will not inhibit the defendant from receiving a fair trial.

Regardless of the restrictive rules controlling the use of cameras in the courtroom, much of Scotland still disapproves of allowing cameras in court. Some believe that allowing cameras in the courtroom necessarily means that the demands of the media are being placed above the need for a fair trial.¹⁴⁹ To many in Scotland, the Simpson trial exemplifies the dangers of televising trials.¹⁵⁰ The consensus in Scotland is that the Simpson trial demonstrates why televised courtroom proceedings must be banned.¹⁵¹

VI. United States

A. *The History of Courtroom Cameras*

"The United States enjoys one of the freest presses in the world, operating relatively unconstrained by legal or other pressures."¹⁵² The First Amendment¹⁵³ of the United States Constitution guarantees freedom of the press. Although this right is not absolute, this guarantee has been the basis for allowing cameras in the courtroom.¹⁵⁴

148. See Leader, *Trial by television*, THE SCOTSMAN, Oct. 4, 1995, at 12.

149. See, e.g., *id.*

150. *Id.*

151. Letter from Alistair J. Bonnington, Solicitor Scotland, British Broadcasting Corporation, to Stephen Metz 2 (Oct. 13, 1995) (on file with author).

152. Nadine Strossen, *Press Law in the United States*, in PRESS LAW AND PRACTICE; A COMPARATIVE STUDY OF PRESS FREEDOM IN EUROPEAN AND OTHER DEMOCRACIES 192 (Sandra Coliver et al. eds., 1993).

153. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphasis added).

154. SUSANNA BARBER, NEWS CAMERAS IN THE COURTROOM: A FREE PRESS-FAIR TRIAL DEBATE 33 (1987).

Related to the First Amendment are contempt of court rules. In the United States, it is a violation of the First Amendment to issue a contempt citation in response to specific statements.¹⁵⁵ However, if a statement is an "imminent threat to the administration of justice,"¹⁵⁶ a court can punish for contempt.¹⁵⁷ Because it is difficult to prove that an "imminent threat to the administration of justice" exists, almost nothing said outside of the courtroom will be punishable as contempt.¹⁵⁸

In 1965, the Supreme Court first addressed the effect of cameras and broadcasting on trials in *Estes v. Texas*.¹⁵⁹ In *Estes*, the Court held that the defendant "was deprived of his right under the Fourteenth Amendment to due process by the televising and broadcasting of his trial."¹⁶⁰ The Court discussed the First Amendment and freedom of the press by stating that the freedom of the press is not absolute. "While maximum freedom must be allowed the press . . . its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process."¹⁶¹

In 1981, the Court revisited this issue in *Chandler v. Florida*.¹⁶² In *Chandler*, the Court held that neither the Constitution nor the decision in *Estes* per se precluded Florida from allowing its criminal proceedings to be televised.¹⁶³ The Court discussed the fact that the Florida Supreme Court had promulgated a revised Code of Judicial Conduct Canon 3A(7), which permitted cameras

155. Strossen, *supra* note 152, at 207.

156. *Id.*, (quoting *Eaton v. City of Tulsa*, 415 U.S. 697, 698 (1974)).

157. Strossen, *supra* note 152, at 207.

158. *Id.*

159. *Estes*, 381 U.S. at 532.

160. *Id.* at 534.

161. *Id.* at 539. See also *Mares v. United States*, 383 F.2d 805, 808 (10th Cir. 1967) (analyzing the conflict between freedom of press and accused's right to fair trial). The *Mares* court stated that:

Media of publicity have the right to report what happens in open court. An accused has a right to a trial by an impartial jury on evidence which is legally admissible. The public has the right to demand and expect "fair trials designed to end in just judgments." These rights must be accommodated in the best possible manner.

Id. (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).

162. 449 U.S. 560 (1981).

163. *Id.* In *Chandler*, the Court discussed the fact that in *Estes*, five justices were of the opinion that cameras should not have been allowed in the courtroom. *Id.* at 571-573. In his concurring opinion, Justice Harlan, however, limited his view to "cases like this one." *Id.* at 573 (quoting *Estes*, 381 U.S. at 596). Justices Stewart, Black, Brennan, and White dissented in *Estes*, thus the *Chandler* court held unanimously that *Estes* was not a per se ban on cameras in the courtrooms. *Id.* at 572-73.

in the trial and appellate courts, subject to the authority of the presiding judge.¹⁶⁴ Pursuant to its revised Canon 3A(7), Florida had also adopted "implementing guidelines" setting forth specific rules and limitations on the use of cameras in its courtrooms.¹⁶⁵ Thus, the broad issue in *Chandler* was whether Florida's program and others like it are unconstitutional, whereas the narrower issue was whether the accused had received a fair trial.¹⁶⁶ The Court held that Florida's program was not unconstitutional and that those who were accused had not demonstrated that the media denied them due process.¹⁶⁷

Currently, forty-seven states allow some televising of trials, but only twenty-three allow routine coverage.¹⁶⁸ Of the twenty-four states that allow only some coverage, some of the conditions of broadcasting in those states include restrictions such as allowing a veto by any party.¹⁶⁹ These restrictions virtually stop all coverage.¹⁷⁰ In addition, the federal courts do not allow televised District Court trials,¹⁷¹ but this continues to be a controversial issue. The United States Judicial Conference¹⁷² voted unanimous-

164. *Id.* at 566. The Florida Code of Judicial Conduct, Canon 3A(7) provided:

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.

FLORIDA CODE OF JUDICIAL CONDUCT Canon 3 A(7) (1979).

165. *Chandler*, 449 U.S. at 566.

166. *See id.* at 560.

167. *Id.*

168. Sandra Torry, *In Some Courtrooms, Check Those Cameras at the Door*, THE WASH. POST, Oct. 23, 1995, at F7. Jurisdictions that totally ban cameras from their courts include Indiana, Mississippi, South Dakota, and the District of Columbia. *Id.*

169. *Id.*

170. *Id.*

171. *See* 87 F.R.D. 518 (1980). The Judicial Conference of the United States recommends that each United States District Court adopt a rule of court providing in substance that "[t]he taking of photographs and operation of tape recorders in the courtroom . . . or television broadcasting from the courtroom . . . is prohibited." *Id.* at 535-36. *See also* Joan Biskupic, *A New Eye on Federal Courts; Committee Votes to Permit Cameras in Appeals Hearings*, THE WASH. POST, Mar. 13, 1996, at A12.

172. The United States Judicial Conference was formed pursuant to 28 U.S.C. § 331 (1988). Section 331 appoints the Chief Justice of the United States as the presiding officer of the Conference, which is comprised of the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit. 28 U.S.C. § 331 (1988). Section 331 calls for

ly in September, 1995 to reconsider the issue of allowing cameras in federal courts when the Conference reconvened in March, 1996.¹⁷³ When the Conference reconvened, the members voted to permit cameras only in federal appeals courts, subject to each circuit's individual approval.¹⁷⁴

B. *The Future in the United States*

Does the Simpson trial indicate that the United States needs "cameras in the courtroom" reform? Supporters of reform claim that one of the reasons the trial took so long was because of the cameras in the courtroom.¹⁷⁵ Moreover, supporters of reform blame the presence of cameras for attorney grandstanding.¹⁷⁶

The flaw with these criticisms is that untelevised trials sometimes take as long, and contain undesirable lawyer behavior.¹⁷⁷ For this reason, the United States does not need "cameras in the courtroom" reform. If any reform is needed, it is needed in the codes of professional conduct or in the codes of judicial conduct which dictate what lawyers and judges should and should not do. For example, the California Supreme Court took a step in that direction by adopting Rule 5-120 of the Rules of Professional Conduct.¹⁷⁸ Rule 5-120 imposes substantial disciplinary sanctions upon an attorney who makes any out-of-court statement about an

annual meetings of the Judicial Conference. *Id.* Section 331 also requires the Conference to "submit suggestions and recommendations to the various courts to promote uniformity of management procedures." *Id.*

173. John F. Rooney, *Panel Backs Access' to Federal Courts but Delays Vote on Cameras*, *Chicago Daily L. Bull.*, Sept. 20, 1995, at 1. See also Douglas E. Mirell, *Reexamining the Need for Courtroom Cameras Under Rule 5-120*, Sept. 22, 1995, 1995 WL 559116. The Judicial Conference's executive committee chair, 6th Circuit Chief Justice Gilbert S. Merritt commented that there could be a "more analytic discussion" after the Simpson case was over. *Id.*

174. Biskupic, *supra* note 171. The Judicial Conference met on March 12, 1996, and the vote to permit cameras in appeals courts was 14 to 12. *Id.* Justice Gilbert S. Merritt said that the vote in favor of permitting cameras in appeals courts "was as much as those in favor of cameras could get done." *Id.* Presently, it is difficult to predict which circuits will vote to allow cameras in the courtrooms and whether the new policy only applies to civil cases or both civil and criminal cases. Linda Greenhouse, *Reversing Course, Judicial Panel Allows Television in Appeals Courts*, *N.Y. TIMES*, Mar. 13, 1996, at A14.

175. Floyd Abrams, *Cameras in the Courtroom. Should Judges Permit High-Profile Trials to be Televised? Yes: Cameras Reflect the Process, for Better or Worse*, *A.B.A. J.*, Sept. 1995, at 36.

176. *Id.*

177. *Id.* The untelevised Charles Manson case lasted nine months, and the untelevised Hillside Strangler case lasted 23 months. *Id.*

178. Mirell, *supra* note 173.

“investigation or litigation” in which the attorney “is participating or has participated” where that lawyer “knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”¹⁷⁹ This rule went into effect October 1, 1995 in California.¹⁸⁰ Moreover, these rules must actually be enforced. With these rules, trials can still be televised and people can be exposed to their legal system by watching segments of trials on the news or by watching Court TV. However, such a rule will likely preclude the courthouse steps press conferences, like those in the *Simpson* trial, which tend to rouse the press and the public.

VII. Other General Factors

A. Behavioral and Social Science Factors

Laws and policies that dictate the proper use of cameras in the courtroom are partly based on factors such as the effect of cameras on the legal players' behavior. For example, the *Estes* court evaluated the potential impact of cameras on jurors, witnesses, the judge, and the defendant.¹⁸¹ The inherent difficulty with this analysis is that the focus is on human behavior, an unpredictable factor. In *Estes*, the Court decided that the defendant was deprived of his right to due process “largely on the basis of speculation, supposition, and personal opinion.”¹⁸² Thus, it is difficult to establish black letter law on how cameras affect the legal players' behavior because of the multitude of variables affecting the decisions.

179. *Id.* (quoting Michael J. Hall, *Justices Release Rule on Talk Outside Court; State Bar Displeased*, L.A. DAILY J., Sept. 15, 1995, at 1, 5).

180. *Id.* In fact, California's Rule 5-120 was passed in response to the Simpson trial. STEPHEN GILLERS & ROY D. SIMON, JR., *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 789-91 (1996). Furthermore, California was the last state to pass such a rule of professional conduct. *Id.* “The public statements by lawyers involved in the O.J. Simpson murder case, which began with Simpson's arrest in June 1994, spurred the California legislature to pass a statute commanding the State Bar to submit to the Supreme Court” a rule that would regulate extrajudicial statements made by lawyers. *Id.* “Many observers of the legal scene say that concern about media coverage of trials is misplaced, and is part of an overreaction to the media excesses seen in the Simpson trial.” Anthony Flint, *Judges Putting Curbs on Media in Big Cases*, THE BOSTON GLOBE, Feb. 12, 1996, at 25. Thus, it is important to note that had this rule been in effect during the Simpson trial, or had the trial taken place in another state, the public opinion likely would be very different.

181. *Estes*, 381 U.S. at 545-48.

182. BARBER, *supra* note 154, at 61.

Since *Estes*, many social science studies have been conducted, but it remains uncertain how cameras actually affect the legal players. One empirical study¹⁸³ attempted to measure the effects of cameras on witnesses and jurors. This study was based on a controlled laboratory courtroom experiment.¹⁸⁴ The study consisted of three groups comprised of witnesses and jurors: (1) the EMC (electronic media coverage) group; (2) the CMC (conventional media coverage) group; and (3) the no-media control group.¹⁸⁵ The study concluded that the EMC "may not impair witness recall or the ability to present credible testimony."¹⁸⁶ Further, the study discussed Justice Clark's analysis in *Estes* of the impact of cameras on witnesses.¹⁸⁷ Specifically, Justice Clark discussed in the opinion of the Court that as a result of cameras, "memories may falter . . . and accuracy of statement may be severely undermined."¹⁸⁸ The study concluded, however, that the EMC witnesses recalled more than the CMC and no-media control group, thereby contradicting Justice Clark's discussion.¹⁸⁹

Nevertheless, the authors of this empirical study suggest that a serious drawback of the research is the external validity of such a laboratory courtroom study.¹⁹⁰ Seemingly, every situation would be different because of the uniqueness of each trial and the persons involved. Depending on the specific trial, certain factors would play more important roles than others.

The *Simpson* trial will have a global effect on the future of cameras in the courtroom more so than a social science study which may not accurately predict trial participants' behavior. The trial sparked the debate of whether cameras in the courtrooms are worth the benefits, such as seeing justice done,¹⁹¹ and educating society.¹⁹² In addition, the other aspect of the issue is whether the good outweighs the bad, such as possibly influencing jurors to

183. Eugene Bordiga et al., *Cameras in the Courtroom. The Effects of Media Coverage in Witness Testimony and Juror Perceptions*, 14 L. & HUM. BEHAV. 489 (1990).

184. *Id.* at 506.

185. *Id.* at 489. For the EMC group, a video camera was present; a journalist was present for the CMC group; the control group had no media representative or equipment. *Id.*

186. *Id.* at 506.

187. Bordiga, *supra* note 183, at 506 (quoting *Estes*, 381 U.S. at 547).

188. *Estes*, 381 U.S. at 547.

189. Bordiga, *supra* note 183, at 506.

190. *Id.*

191. *See, e.g.*, Arlidge, *supra* note 30; Williams, *supra* note 134.

192. *See, e.g.*, Goodell, *supra* note 39, at 13.

make a decision that would be more acceptable to the public at large¹⁹³ or causing judges to play to the cameras and thus do things differently than they would have if not for the presence of the cameras.¹⁹⁴ Public opinion in the United States, Canada, England, and Scotland regarding the *Simpson* trial will likely affect the future of cameras in the courtroom more so than any empirical social science study.

B. Individualism, Technology, and the Media

The factor of human behavior plays a significant role in the shaping of our laws, as does the concept of "individualism."¹⁹⁵ The concept of individualism has changed and has molded some of our contemporary laws.¹⁹⁶ The legal individual has no doubt played a role in the expanding use of cameras in the courtrooms. This concept, along with ever-expanding technological developments, have affected the legal past and will affect the future of cameras in the courtroom on a global basis. Today's individual, as compared to the Nineteenth century individual, is a "full-blooded autonomous person; an expressive individual, a kaleidoscopic individual . . . whose needs and demands as expressed in life and law are greater and more complex."¹⁹⁷

In addition, technology places demands on the legal system. "[T]echnology reacts chemically with elements of general culture — with existing habits, arrangements, ideas, and institutions. Out of this chemical reaction comes new ideas and expectations, new patterns of demand and response,"¹⁹⁸ which affect the law and legal systems. Technological advances affect the issue of cameras in the courtroom. When the United States Supreme Court decided the *Estes* case, cameras were very distracting and cumbersome.¹⁹⁹ Now, however, one could be completely unaware of the unobtrusive courtroom camera.²⁰⁰

193. See, e.g., Kaminer, *supra* note 10, at 37.

194. *Id.*

195. See Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 *YALE L.J.* 1579, 1585 (1989).

196. *Id.* "[I]f there is a single leitmotif of modern law, whether civil rights law, commercial law, family law, or the law of landlord and tenant, it is an extreme emphasis on the individual, and on individual choice or consent; the whole system turns on this point." *Id.*

197. *Id.*

198. *Id.* at 1583.

199. See *Estes*, 381 U.S. at 568.

200. See *Chandler*, 449 U.S. at 576.

The concept of individualism and the influence of technology together affect the media. After all, "[l]aw and legal institutions are absolutely ubiquitous in modern society, and thus, quite naturally, in the media."²⁰¹ Technology makes it easier for such law and legal institutions to be in the media. Reporters utilize less cumbersome equipment. Broadcasts can be transmitted via satellite to remote places in minutes, permitting worldwide access to such information. Indeed, the media, as "individuals," strives to broadcast (or investigate and report in other forms of media) whatever it can of the legal institutions present in society, whether it be in secretive countries such as England or in very open countries, such as the United States. It is likely that this pressure will not abate. The pressure may be beneficial considering that many people think the law is what they see on soap operas, movies, prime-time television, and even the nightly news.²⁰²

Another trend that is concomitant with individualism is the "suspicion of authority."²⁰³ In modern times, individuals simply do not accept authority, especially what is "large-scale, organized, [and] governmental."²⁰⁴ This trend is reflected in the fact that one of the reasons why Lord Hope of Scotland decided that cameras should be permitted in some of Scotland's courts was because it seemed that the public was losing faith in the courts.²⁰⁵ This is yet another factor which puts pressure on our court systems and governments to allow cameras in the courtrooms.

VIII. Conclusion

The debate over whether to allow cameras in courtrooms is a global issue. Canada, England, Scotland, and the United States have the ability to continue to allow or to initiate relative amounts

201. Friedman, *supra* note 195, at 1587.

202. *See id.* at 1588. What is presented by the media may not be an accurate reflection of our legal systems.

[P]opular culture, as reflected in the media, is not, and cannot be taken as, an accurate mirror of the actual state of living law. Suppose our legal sources were all destroyed in a nuclear nightmare which wiped out the West Digest, the Federal Register, the revised statutes, federal and state, and all casebooks; later generations, digging in the ruins, discover intact only the archives of NBC Television. The diggers would certainly get a distorted picture of the legal system.

Id. *See also id.* at 1593 (discussing that U.S. and foreign studies show that modern populations know little about law and legal systems).

203. *Id.* at 1592.

204. Friedman, *supra* note 195, at 1592.

205. Williams, *supra* note 134.

of camera usage in their courtrooms. In reaching this conclusion, it is important to realize that whether to allow cameras in the courtroom should be based more on what laws and policies are in place to protect the rights of the accused versus the general public opinion.

In Canada, the recent court decisions indicate that with more pressure from the media, the Supreme Court of Canada will no longer absolutely ban the use of cameras in the courtrooms, given an adequate amount of protection. The Canadian Supreme Court's constitutional analysis is similar to one that the United States Supreme Court would undertake, but the application of the Canadian Supreme Court's views will likely be narrower. Thus, while Canada should allow cameras soon, their use will not be as prevalent as they are in the United States.

By contrast, the English are further from allowing cameras into their courtrooms. Parliament must be persuaded to amend the Criminal Justice Act before cameras are permitted in courtrooms. Because of the negative publicity of the United States *Simpson* trial, much of the legal and general English community feel that cameras in the courtroom cause an inevitable media circus. Nevertheless, the English should allow cameras into their courts on an experimental basis. The English contempt of court rules, if enforced, will adequately preserve the accused's rights to a fair trial and of privacy.

Scotland, however, should continue to keep the same rules, which technically permit cameras in some courts. The law lords or judges should not fear the televising of the proceedings. The accused and the other participants in the case can adequately protect their rights by refusing to have the case televised or by refusing to have their part in the case televised. Therefore, the Scottish public can view the judicial system in action.

The United States should also continue to allow cameras in its courtrooms, despite the arguments by those who think the *Simpson* trial demonstrated that cameras should not be permitted in the courtroom. Instead of absolutely banning camera usage in the courtroom as some suggest, there is a need for more rules which prevent lawyers from acting in a manner that they know or should know will materially prejudice the proceedings. Such rules should apply equally to conduct undertaken to positively affect one's own case, as well as to conduct which would negatively prejudice the opposing side.

As the pressure from the media increases, as communications technology continues to advance, and as the public remains

intrigued with its legal systems, more legal systems will be confronted with the issue of whether to permit cameras in court. As long as there are strict rules in place to protect the rights of the accused, which will vary depending on country-specific factors, the camera can be present in the courtroom.

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