

**Television Courtroom Broadcasting:  
A Normative Analysis of the Legal-Policy  
Issues, Challenges and Opportunities  
Regarding TCB Effects-Research**

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**Television Courtroom Broadcasting:  
A Normative Analysis of the Legal-Policy Issues, Challenges and  
Opportunities Regarding TCB Effects-Research**

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Year: 2015

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#### COURTROOM BROADCASTING ABBREVIATIONS

TCB:	Television courtroom broadcasting
CB:	Courtroom broadcasting generally
RCB:	Radio courtroom broadcasting
MCB:	Movie theatre courtroom broadcasting
CCB:	Closed circuit courtroom broadcasting
RYCB:	The relay of CB footage other than through a pushed public television broadcast ECB: The distribution and use of CB footage on CD, DVD or other electronic media recording or storage devices (recording media CB);
PCB:	Still photography of courtroom proceedings

#### TCB ABBREVIATIONS

iTCB:	Internet television courtroom broadcasting
jTCB:	Juryroom TCB
aTCB:	TCB for archival or record keeping purposes (record keeping TCB)
rTCB:	Reality entertainment TCB (eg Judge Judy)
nTCB:	News TCB
dTCB:	Documentary TCB
TCB TV:	dedicated TCB channel
TCB-P:	dedicated TCB programme
programme	
segment TCB:	Dedicated TCB part of a programme
nTCB:	News TCB
G2G-TCB:	full length broadcasts of TCB cases or gavel to gavel TCB
ITCB:	live TCB
n-TCB:	non-live TCB
P-TCB:	pictures and no in-court sound TCB
P+TCB:	pictures and in-court sound recordings TCB
ipTCB:	interviews or statements from parties
ICsTCB:	interviews with correspondents
ieTCB:	interviews with experts
apTCB:	appeal court or appeal TCB
tTCB:	trial court TCB
crTCB:	criminal court TCB
cvTCB:	civil court TCB
peTCB:	public education TCB programme
piTCB:	public information TCB programme
pcTCB:	public confidence TCB programme



## SUMMARY/ABSTRACT

There has been a lot of popular opinion based discussion in relation to TCB issues. Frequently the arguments propose that there will/will not be particular effects. Yet TCB needs a ‘proper, evidence-based assessment’ according to Lord Thomas, the Lord Chief Justice of England and Wales,<sup>1</sup> to move beyond popular unsubstantiated opinions. The thesis focuses on TCB effects-research, effects issues, the adequacy of available effects-research and makes suggestions for normative TCB effects-research. The thesis seeks to contribute to determining what counts as relevant ‘evidence’ for this purpose, and also how researchers should go about seeking it. For example, the TCB distraction-effects arguments, namely, the concern that TCB cameras and or TCB cameras plus camera operators, will distract some of the courtroom participants.<sup>2</sup> This concern was highlighted by the US Supreme Court.<sup>3</sup> The thesis will suggest that eye-tracking research can advance our level of knowledge and assessment of the TCB distraction-effects. Advancing on this, the thesis will undertake an actual demonstration of eye-tracking in a real courtroom.<sup>4</sup> The assessment, proposals and in-court proof-of-concept demonstration of TCB related eye-tracking is new. This can also lead to wider TCB effects research. The thesis will refer to the debate and some of the issues arising in this jurisdiction.<sup>5</sup> The

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<sup>1</sup> F Gibb, ‘Britain Rethinks Cameras in Court’ *Times* (London, 16 May 2014).

<sup>2</sup> Therefore, such issues as courtroom broadcasting, TCB generally and the legal arguments for and against are beyond the scope of this work.

<sup>3</sup> *Estes v Texas* 381 US [1964] 532; *Chandler v Florida* 449 US [1981] 560; and *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 19 January 2014.

<sup>4</sup> Advancing to further studies can be in mock courtrooms, non-live courtrooms and like scenarios. It is not presently suggested include live courtrooms.

<sup>5</sup> While there is no TCB in Ireland the intention was not only to repeat and expand the earlier research (valuable in and of itself) but also to undertake comparison, and to develop it in a three-way manner. This was intended to encompass research of attitudes of the judiciary; the television and newspaper media; and the general public in Ireland. The thesis was successful in two of these endeavours, namely, in relation to the judiciary and the first representative public attitudinal TCB survey in Ireland. As a consequence, therefore, there is no research of actual TCB effects. No Irish (or UK) caselaw exists in relation to CB or TCB, or in relation to CB or TCB effects. There is no explicit policy or rule in relation to same. In addition, the general climate appears to be against such broadcasting in Ireland. There appears no representative research in the UK. While the media responses were disappointing, this might be more successful in future research. Such a valuable research endeavour is highly recommended by the thesis. The only empirical research in relation to TCB and TCB effect issues in Ireland was that of the author in 1996. This was in the form of a judicial questionnaire regarding TCB issues. The extensive and varied research undertaken as part of this current research is the only additional effects related research in Ireland. In terms of the judiciary specifically, the current research has found that judicial attitudes in Ireland have not become any more favourable towards permitting TCB since 1996. While the author repeats and expands the judicial research of 1996 again in 2010 (thus the first replicated research in Ireland or the UK), the judicial research is also compared with relevant research from New York. The author, therefore, introduces a valuable comparative element to the current research. While the author’s current research (and past research) are all important in and of themselves, this research is extremely

case of a lay litigant applying to have his defamation case broadcast via TCB will be considered.<sup>6</sup> In addition, the thesis will replicate judicial TCB attitudinal research in Ireland. The thesis will also undertake the first representative public TCB attitudes survey in Ireland. It will be a beneficial baseline. In addition, the thesis undertakes an international survey in relation to the prevalence of TCB in over thirty jurisdictions.

The thesis is relevant and important because the issue of TCB is ever more prominent in the legal-media landscape. Following the iconic *Simpson* (criminal) TCB case, there is a regular stream of TCB celebrity and notoriety type cases, including the recent *Pistorius*<sup>7</sup> case in South Africa. Courts and legal-policymakers in various countries (and across court levels) are under increasing pressure to accommodate some form of TCB in their courtrooms. This is evident in the US, Canada, Australia, the UK and elsewhere. In dealing with such considerations (whether on a general planned legal-policy level or in the pressure cooker of an individual instant case) it might have been assumed that there would be a ready and reliable legal-empirical research literature available to assist courts when they have to consider these important issues. Courts and judges come to consider these issues from a legal-policy perspective in addition to individual cases where there may be applications to permit TCB.<sup>8</sup> Consideration is also given by the thesis to the distinction between planned and instant access issues. Arguably less considered TCB may occur in an instant case where a judge may be asked to permit TCB in that case and unilaterally decides to permit some form of TCB. In such instances, such as the *Pistorius*<sup>9</sup> case and Irish case,<sup>10</sup> the individual judge may have less opportunity to consider all of the issues, particularly in terms of the available TCB research, the effects issues, how to minimise particular adverse effects and how to maximise particular positive effects, etc. The pressures on the individual judge may be most enhanced in isolated TCB access applications.

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valuable in terms of establishing baselines and parameters for any future research in Ireland.

<sup>6</sup> J McCarthy, 'Teacher Argues For Libel Court Case to be Televised' *Sunday Times* (Dublin, 13 July 2014). Judge Keane will hear the application on 24 November 2014.

<sup>7</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>8</sup> There may also be appeals as a consequence of what TCB may have occurred – or what TCB may be about to occur. An example of the later individual access applications is soon to occur in Ireland. See J McCarthy, 'Teacher Argues For Libel Court Case to be Televised' *Sunday Times* (Dublin, 13 July 2014). Judge Keane will hear the application on 24 November 2014. The *Pistorius* case is another example, *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>9</sup> *ibid.*

<sup>10</sup> F Gibb, 'Britain Rethinks Cameras in Court' *Times* (London, 16 May 2014).

The thesis will review and analyse the available TCB effects-research. It will find that there is no large body of properly considered and reliable legal-empirical TCB research on the effects issues, and not one sufficient to ensure that today's judges in dealing with TCB can arrive at assured answers and decisions as to particular TCB effect issues. In considering the limited amount of research to date, the thesis will consider and identify many problems with such research, in particular the overreliance on self-reports and opinions which are open to bias and a lack of independent verification. The thesis will suggest the benefit of undertaking more contemporary and normative legal-empirical research of the TCB effect issues. Various models will also be suggested. The thesis will examine the importance of establishing the baselines and parameters and why this should be undertaken over an extended period before TCB cameras are introduced into courtrooms.<sup>11</sup>

One of the central concerns in relation to TCB is that TCB cameras or TCB camera plus operators will distract the various participants in court who are required as part of the judicial courtroom process. This includes witnesses, the jury, judges, lawyers, parties and court staff. This is the concern in relation to TCB distraction-effects.<sup>12</sup> The research effort of the distraction (and other) effects of TCB is problematic and underdeveloped, and by implication the legal, legal-policy and discussion in the popular arguments.<sup>13</sup> A body of normative legal-empirical TCB research, it will be suggested, can seek to address these issues.

The many and varied problems with the existing TCB effects-research will be examined, some for the first time. The issues of the location of the TCB cameras and the location of the courtroom participants, visual cones-of-vision and their importance for effects-research will be identified by the thesis. The thesis will suggest that we need to start recording more TCB effect relevant data than is generally recorded to date. Without such data, it is difficult to be assured in relation to particular conclusions of effects.

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<sup>11</sup> The thesis research ensures that Ireland has started some of the baseline parameter research process which has been missed by other jurisdictions.

<sup>12</sup> While it is not expressly stated in the literature reviewed, there is some recognition that different concerns arise. Essentially many of the effects concerns are graduated concerns relative to the individual categories of courtroom participants. This should be more expressly developed in future normative TCB effects-research.

<sup>13</sup> The research effort and results fall far short of what we should expect. Only by (critically) examining the research to date is it possible to fully appreciate this, and to look at how we might address it. The author therefore undertook an extensive review of the literature and research literature to date. This was wider than the attention given by any of the individual commentators on courtroom broadcasting (CB) generally.

The thesis will explore the common theme within the three US Supreme Court television camera cases,<sup>14</sup> and which remains relevant to normative TCB considerations in the US and elsewhere. Neither the US Supreme Court, nor commentators, have recognised that as broadcasting technology may change, so too can the research tools available. While media technology has changed, the normative research models and legal-empirical research technology has also changed. Today, we have more TCB research technology, research tools and comparative research knowledge than at any time previously. The optimum normative TCB in-court distraction-effects research capabilities today are greater than relying on mere opinion. It is important to identify, as the thesis does, that much of the so-called prior research rests on mere opinion. We are better able to research distraction-effects today than we were in 1965.<sup>15</sup> The thesis suggests that eye-tracking can assist in conducting research of distraction-effects of TCB, and in such way as the US Supreme Court may not have even considered possible. We can now record and see where the individual (mock) courtroom participants are looking. We can begin to see if they are distracted by the TCB cameras or the TCB camera plus camera operator in the courtroom. We can also apply eye-tracking research to different types of TCB and TCB cameras, from small to large, from fixed to moving, etc. The thesis suggests that these graduated-effects need to be considered. L Mulcahy seeks to ‘develop the limited literature on court’<sup>16</sup> architecture and design. The thesis seeks to develop the limited TCB distraction-effects literature, consideration of the concerns and how we may go about better normative legal-empirical research to overcome the problems identified with the previous research (in particular relying on mere opinion). Eye-tracking can be used for conducting in-court distraction-effects research. There are many advantages of eye-tracking, including being able to track distraction effectively and being able to record the results. The thesis will undertake a proof-of-concept demonstration of eye-tracking technology for in-court distraction-effects caused by TCB. Distraction, visual cone-of-vision, participant and observer location data, and graduated-effects need to be incorporated into TCB distraction-effects research, it will be suggested.<sup>17</sup>

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<sup>14</sup> This is the US Supreme Court’s challenge that more legal-empirical research be undertaken to examine the effects implications of TCB. While identifying this challenge for the first time is beneficial, the author goes further. Issues that the US Supreme Court has not yet identified as research concerns are also dealt with by the thesis.

<sup>15</sup> Just because certain TCB now involves miniaturised cameras, does not mean that distraction cannot occur. Indeed, even without actual distraction-effects, there may still be other inhibiting effects, particularly on the non-professional persons whom may be in court.

<sup>16</sup> L Mulcahy, ‘Architects of Justice: the Politics of Courtroom Design’ (2007) 16 *Social & Legal Studies* 383, 385.

<sup>17</sup> Camera-perspective-bias research offers research avenues for TCB research in and of itself, but is also an example of: TCB camera-perspective-bias; and eye-tracking research. Similarly, with camera focus issues. It also exemplifies cross-disciplinary psychology-legal research. Eye-trackers have also been used in another novel legal context, namely, tobacco

Educational TCB issues will also be explored. No form of TCB has been proven to educate. There is very little TCB education-effects research. No validation and replication occurs. Baseline issues are ignored. What is meant by ‘education’ is not properly addressed. The previous studies do not undertake similar research or methodologies.<sup>18</sup> The pressures and changes in the *Estes*<sup>19</sup> and *Pistorius*<sup>20</sup> cases indicate a need for more considered TCB policy and less instant ad hoc ‘pressure cooker’ TCB decision making.

There are potentially many forms of TCB.<sup>21</sup> Researching the different TCB form issues may further assist courts and legal-policymakers in their important considerations and indeed deliberations. This has added importance given the potential for iTCB to potentially be more educational than (some) other TCB forms. The thesis reveals the importance of identifying particular forms. Some forms may be potentially more educational than others. One cannot say (television) courtroom broadcasting per se is educational, without identifying which form of TCB one is discussing. These various issues will be explored in the thesis.

It will be suggested that perhaps the area of iTCB will lead to some of the most important out-of-court effects-research in future. The nuances of the similarities and differences between existing TCB forms and the new iTCB form call for particular research. The thesis suggests that there may be much to commend iTCB arguments to courts and legal-policymakers over current arguments for TCB forms.<sup>22</sup>

Wider comparable research will be suggested as benefiting TCB effects-research, such as media and communications, genres and formats, legal-psychology, camera-perspective-bias, other eye-tracking distraction research and baseline research. The issues of direct central visual cone-of-vision distraction; peripheral visual cone-of-vision distraction; and

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effects litigation and forms of court mandated health advertisements. An important legal article in the Harvard Law Review also undertake empirical inter-disciplinary research.

<sup>18</sup> The limited research available suggests that ‘confidence’ did not increase as a result of TCB (W Petkanas); that there was no ‘change in ‘attitude’ (AR Paddon); no educational-effect nor any enhanced knowledge about the court procedures (K Netteburg); and no enhanced usage of TCB (J Ossinger). (See below).

<sup>19</sup> *Estes v Texas* 381 US [1964] 532.

<sup>20</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>21</sup> See Abbreviations. Consider, for example, streamed internet TCB (iTTCB), entertainment reality TCB (rTCB), etc.

<sup>22</sup> One can envisage that in future certain data protection issues may have to be considered in relation to some iTTCB content.

indirect visual cone-of-vision distraction of courtroom participants are all suggested as needing to be considered in further TCB effects-research.

The thesis will advance the international discussion and policy considerations of TCB, by identifying the US Supreme Court TCB effects-research challenge. It will recommend that the sophistication of research needs to develop. Normative TCB research needs to better define and identify which TCB form, and sub-form, is being investigating, and for which effect. The thesis will recommend the use of eye-tracking technology, not yet considered by the US Supreme Court TCB cases nor the TCB effects-research literature. Eye-tracking will be suggested as most relevant in relation to distraction-effects caused by the TCB cameras (and operators) in the courtroom (ie in-court effects).<sup>23</sup> Eye-tracking will also be suggested as relevant to opening wider research opportunities, such as in relation to education-effects and audience-effects.

The thesis will suggest that is time to advance beyond the criticism that '[s]ocial scientists measure the intelligence of monkeys more effectively than courts have attempted to ascertain the effects of television in the courtroom.' It will also explore the limits of past TCB self-reports and opinion-reports. The thesis will propose a method for addressing some of the US Supreme Courts issues, concerns and challenges (relevant here as well as elsewhere) and in a manner which is structured, defined and comparable across the respective research. It is suggested that in future, we should be able to compare identical TCB effects-research across studies and across jurisdictions.

While each chapter could be deserving of an entire thesis on its own right, the core theme will remain a normative analysis of the legal-policy issues, concerns, challenges and some of the normative opportunities available regarding the TCB effects-research and concerns. A valid contribution involves consideration of what amounts to acceptable 'evidence' for courts and legal-policymakers to consider regarding the TCB question(s). The thesis will explore the legal-empirical research concerns of the US Supreme Court, and relevant beyond the US Supreme Court, in relation to TCB distraction-effects and explores the current opportunity for normative TCB distraction-effects research. Important legal-rights may not be (fully) respected and vindicated without more normative effects-research. Eye-tracking is used to optimise advertising and adverts. It is also used increasingly to optimise safety and safety design. The thesis suggests that TCB eye-

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<sup>23</sup> Eye-trackers allow 'continuous measurement of eye movements.' 'An Affordable Future for Eye-Tracking in Sight' at < [www.physorg.com/news63294534.html](http://www.physorg.com/news63294534.html) > accessed 19 January 2014.



tracking should now be used to optimise the research of TCB distraction-effects and other effects and concerns. This will help to optimise our normative consideration of TCB, TCB access, TCB risks and concerns and, in certain circumstances, to assist better design of TCB. Better TCB design may encompass better choices of TCB models which reduce risk, distraction, etc, and or have greater potential to be educational. That these are all contemporary concerns is reiterated by such things as the *Pistorius*<sup>24</sup> case, a pending Irish TCB access application<sup>25</sup> and the comments from the Lord Chief Justice of England and Wales halting further expanded TCB and calling for more principled effects-research.<sup>26</sup> It will also ensure that we advance beyond the problem with the prior research and popular discussion which relies too heavily on mere opinion over independent verifiable evidence.

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<sup>24</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>25</sup> J McCarthy, 'Teacher Argues For Libel Court Case to be Televised' *Sunday Times* (Dublin 13 July 2014). Judge Keane was scheduled to hear the application on 24 November 2014. There does not appear to have been a successful application.

<sup>26</sup> F Gibb, 'Britain Rethinks Cameras in Court' *Times* (London, 16 May 2014).

### **ACKNOWLEDGEMENTS**

I offer my thanks and appreciation to my mother and late father.

I thank Siobhan, Allison, Stephen, Kitty and Steve O'Connor, Ian, David, Deirdre, Eimear, Vinny, Mal, Sean, Dr John Murray, TJ McIntyre, David Linehan, Bob Clark, Devorah Eisenberg, Elizabeth Loftus, Marie McGonagle, Liam O'Malley, variously for their kind assistance, suggestions, inspiration, vision and or friendship over the years.

I especially and sincerely thank my supervisors for their assistance and support throughout.

‘Mankind has a remarkable interest in sensational legal cases. Television ... devot[es] considerable attention to sensational details of legal cases.’<sup>1</sup>

TCB ‘trivializes the system, ... provides us with our daily dose of shock and fear [and] will always be chosen over the case of [a social justice case].’<sup>2</sup>

‘with the media turning justice into a sporting event, the integrity of the courts is lost.’<sup>3</sup>

‘The purpose of the court is not education and not spectacle or public entertainment, but justice.’<sup>4</sup>

‘Social scientists measure the intelligence of monkeys more effectively than courts have attempted to ascertain the effects of television in the courtroom.’<sup>5</sup>

‘The increasing tendency of criminal justice debate in Ireland to be ill-informed and populist has been discussed by a number of commentators.’<sup>6</sup>

Most of the TCB arguments and discussions are ‘self-serving assertions with next to no evidence to support them,’ and the author ‘sets out a sensible approach to replace hot air with hard evidence.’<sup>7</sup>

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<sup>1</sup> E Hall, in an introduction to McDonnell Bodkin, *Famous Irish Trials* (Blackhall Printing 1997) vii.

<sup>2</sup> G Spence, ‘Justice: The New Commodity’ (March 1992) *ABA Journal* 46, as referred to in RER Stewart, ‘The Changing Relationship between Cameras and Courts’ (MA thesis, Florida Atlantic University 1998) 34.

<sup>3</sup> G Spence, *ibid.*

<sup>4</sup> G Gerber, ‘Courtroom TV Makes for Low-budget Entertainment’ (interview on NPR Morning Edition 12 July 1994), referred to in C Lassiter, ‘Put the Lens Cap Back on Cameras in the Court Room: A Fair Trial in at Stake’ (1994) *Law and Justice* 111, 119.

<sup>5</sup> J Hirschhorn, ‘Cameras in the Courtroom? No’ (1980) 7:3 *Barrister* 7 and 9.

<sup>6</sup> M Coen and L Heffernan, ‘Juror Comprehension of Expert Evidence, A Reform Agenda’ (2010) *Criminal Law Review* 195, at n18, at 78, referring to commentators such as A Hardiman, ‘Weasel Words and Doubtful Meanings: A Study in the Language of Law “Reform”’ (2007) 7 *Judicial Studies Institute Journal* 1; L Campbell, ‘Criminal Justice and Penal Populism in Ireland’ (2008) 28 *Legal Studies* 559.

<sup>7</sup> MM Feeley, Claire Sanders Clements Dean’s Professor Jurisprudence and Social Policy Program, Boalt Hall School of Law, University of California at Berkeley, referring to P Lambert, *Television Courtroom Broadcasting Effects: The Empirical Research and the*

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*Supreme Court Challenge* (University Press of America 2013). Professor Feeley reviewed the book.

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## CHAPTER 1: INTRODUCTION

### Introduction

The thesis relates to a most important and current topic. The UK Crime and Courts Act 2013 was passed through the UK Parliament and potentially enables the recording of court proceedings beyond the single exception of the UK Supreme Court which recently permits TCB. This is part of a recent push or lobby for TCB in the UK. Yet, even after the recent example of the UK Supreme Court TCB, and some Court of Appeal<sup>1</sup> examples, the individualised judicial decision to permit TCB in the *Pistorius*<sup>2</sup> case may ultimately lead to a further<sup>3</sup> setback to the cause of TCB. The Lord Chief Justice of England and Wales has called for a halt to further TCB moves in England and Wales.<sup>4</sup> He says that ‘the *Pistorius* trial has troubled me and I would like to think and see where we are going’ and has commissioned a report on TCB issues. This is reflective of the ongoing and undecided debate surrounding the TCB question. Therefore, the thesis is a welcome addition to the literature. It deals with the issues of open justice and the effects of TCB. In doing so it assesses different types of CB and considers research from different perspectives and jurisdictions. It introduces a very pertinent question for all concerned as to whether technology influences the effect of broadcasting legal proceedings, and ultimately whether TCB is advisable without knowing the effects and whether some forms of TCB are more/less desirable and problematic than others. The issue of TCB raises a number of complex legal issues. It also raises complex legal-policy issues for courts, commentators, participants, lawyers and legal-policymakers. Both issues depend to a large extent on the effect issues, concerns and arguments, be they positive or negative. Many important TCB questions remain live issues of concern.

The idea of opening up courtrooms to TCB is certainly one which interests lawyers, broadcasters and the public in general. The *Simpson*<sup>5</sup> (criminal) case is a particular example. The arguments, for and against TCB, continue for example whether there are in-court distraction-effects; whether there are out-of-court education-effects. The thesis examines the research seeking to back up and address these concerns and arguments. The legal cases which have been most concerned with TCB have been underwhelmed with the

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<sup>1</sup> The first UK Court of Appeal TCB broadcast occurred on 31 October 2013. See S Marshall, ‘“Landmark” Day as TV Cameras Enter Court of Appeal,’ Journalism.co.uk (30 October 2013) < <http://www.journalism.co.uk/news/tv-cameras-permitted-in-court-of-appeal-from-tomorrow/s2/a554617/> > accessed 22 August 2014.

<sup>2</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>3</sup> The OJ Simpson (criminal) case and the many TCB related changes and problems which occurred during the case led to increased reluctance towards embracing TCB and particularly celebrity and entertainment type TCB cases.

<sup>4</sup> F Gibb, ‘Britain Rethinks Cameras in Court’ *Times* (London, 16 May 2014).

<sup>5</sup> The OJ Simpson (criminal) case where he was charged and acquitted of a double murder.

overall lack of considered legal-empirical research with which to inform court considerations of the proposed TCB positive and negative effects arguments. The thesis examines the research which exists and considers it from a normative legal-policy and legal-empirical research perspective. Such a normative modern assessment is able to identify not only the surprising small amount of considered research to date to assist courts and legal-policymakers, but also many of the problems undermining the research studies to date. In fact, the thesis raises questions over the ability of courts and legal-policymakers to rely on and be assured by the body of TCB effects-research to date, which rests on mere opinions. This is unfortunate. More worryingly, it creates problems for the courts and legal-policymakers of today whom may have to consider TCB legal and legal-policy issues, arguments and effects concerns. The thesis will also examine some of the particular effects issues, such as the in-court distraction-effects of the TCB cameras and or TCB cameras plus operator. Today's courts may be legitimately concerned to ask if the legal-empirical research has proven positive and negative TCB effects. Unfortunately, the thesis analysis shows that the body of TCB research is less than optimum and inconclusive. The thesis research goes beyond the problem issues to identify some of the potential normative research solutions to assist courts and legal-policymakers in considering and dealing with the issues as may arise in relation to the TCB effect issues, disputes and concerns.

The headline list of those whom may be (positively or negatively) affected by TCB are lawyers; juries (in-court); prospective juries (out-of-court); judges; defendants; parties; witnesses; court personnel; courtroom participants effects generally; other in-court issues; audience; public at large; and public in-court.

The latter category does not appear to have been considered or discussed in the literature. However, that the judge in the South African *Pistorius*<sup>6</sup> case has had to admonish the public in court for their behaviour<sup>7</sup> signifies that this might need to be further considered and researched. It might potentially become an argument against the use of TCB in celebrity or famous trial situations. The above also indicates that the issues include in-court TCB effect issues and out-of-court effect issues.

### **Considerations of Distraction**

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<sup>6</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>7</sup> The second example of the judge having to so intervene occurred on 17 April 2014. Chief Justice Susan Denham has also commented on some of the challenges for courts arising from social media issues. See N Andersen, 'Chief Justice Warns of Social Media Pitfalls' *Independent* (Dublin, 2 May 2014).



One of the frequent arguments, and indeed concerns, is that some or all of the participants in the courtroom will be adversely distracted by the TCB camera(s) and or TCB camera operator(s) in the courtroom. The thesis leads us to explore and consider the problems. Such an analysis requires looking at the judicial statements, concerns, literature and the studies so far conducted to examine these potential distraction-effect issues and problems. It is also noted that despite miniature cameras, many instances of TCB still use large cameras, and some still use camera operators, in court.

In terms of the in-court effects, the thesis aims to explore the TCB distraction-effects research to date and to assess it on a normative basis and to propose a solution to the problems and gaps in relation to TCB distraction-effects research. The process and research lead to a suggestion that the research models available today, as compared with the past research, offer better ways to research TCB distraction-effects. In some instances they offer exact research evidence, not mere opinion. In a way, therefore, the thesis addresses the continued concerns with TCB distraction-effects by suggesting a new and normative model for examining TCB distraction-effects. This includes using eye-tracking to examine TCB distraction-effects in mock trial situations. These can be in actual courtrooms or in similar representative settings. It is not (presently) being suggested that eye-tracking be used in real or live cases.<sup>8</sup> The thesis suggests, however, that the use of eye-tracking is feasible and overcome many of the problems identified in relation to the TCB distraction-effects research to date. In addition, the thesis provides an actual proof-of-concept demonstration of TCB distraction-effects related eye-tracker usage in a courtroom. This indicates that such use is potentially feasible and also points to important issues in relation to visual cone-of-vision and location-effect issues (see below) in relation to TCB effects, TCB distraction-effects as well as legal-policy issues regarding the design of TCB programmes and TCB courtrooms. The thesis, therefore, refers to normative TCB distraction-effect issues, research and potential normative legal-empirical research solutions to the challenge of addressing the concerns inherent with the TCB question and advancing beyond mere opinion as evidence.

The TCB distraction-effects concerns date from 1965, if not earlier. That was the date of the first US Supreme Court TCB case (*Estes*<sup>9</sup>). When the TCB literature and the effects-research are examined, however, it appears that there is as yet no conclusions to be drawn as to the distraction-effects concerns. Reviewing the literature and research indicates that

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<sup>8</sup> This may be possible in a live case but would first need further detailed analysis and consideration, both legally, practically, ethically and procedure-wise. It is prudent in the first instance to proceed with mock and representative setting TCB eye-tracking research.

there is in fact very little research of the TCB distraction-effect concerns. The thesis focuses on an examination of the various effects concerns, the opinion-problem, the distraction-effects research to date, and draws normative suggestions in relation to future distraction-effects research. Such research is better than the historical research and overcomes some of the problems of the historical research.<sup>10</sup> The thesis, therefore, examines legal cross-disciplinary research which assists in assessing the distraction-effect concerns relating to TCB in court. This is necessary as the concerns have not been answered as yet. The concerns remain and continue to be ventilated.<sup>11</sup> Witness effects may be one of the judicial concerns in the UK following the *Pistorius*<sup>12</sup> case. The thesis deals with the normative issues of dealing with contemporary TCB distraction-effects of TCB. It considers and provides advantages over the distraction-effects research to date, which frequently comprise of self-reports, opinion-reports and observer-reports. Many of the problems with this historical research are reviewed.<sup>13</sup>

The issue of what is CB is seldom if at all considered analytically. The thesis explores an analysis of the nuances of TCB and different TCB forms which may assist judicial and legal-policy consideration of TCB issues in future. These are important issues which deserve more than mere popular discussion and argument which has avoided consideration of normative verifiable legal-empirical research.

## Literature Review

Surprisingly, the issue of distraction-effects of in-court TCB has seldom been researched and no firm conclusions have been drawn. The concerns of commentators and also the US Supreme Court in relation to distraction have not been answered. The body of TCB distraction-effects research is, as yet, too small to draw conclusions. The overall body of TCB effects-research appears limited to just over twenty legal-empirical studies.

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<sup>9</sup> *Estes v Texas* 381 US [1964] 532.

<sup>10</sup> This requires legal cross-disciplinary research, which is potentially one of the reasons why there is so little research directed at the concerns highlighted by the US Supreme Court.

<sup>11</sup> The instances of TCB continue to interest lawyers, the media, the public as well as legal and legal-policymakers. Various arguments for and against TCB continue to be ventilated. The US Supreme Court has also voiced concerns of potential adverse and positive effects.

<sup>12</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>13</sup> Overcoming these problems cannot be assessed purely on a non-cross-disciplinary legal manner. It is also noted that legal-empirical discussion and legal cross-disciplinary research are not unique and are often deserved and required. The Law Reform Commission notes the need to use 'comparative research' when referring to jury research and policy issues, Law Reform Commission, *Consultation Paper, Jury Service* (LRC CP 61-2010) 58, referred to in M Coen and L Heffernan, 'Juror Comprehension of Expert Evidence, A Reform Agenda' (2010) *Criminal Law Review* 195. More detailed legal cross-disciplinary research is also required given that much of the legal discussion to date is assumptive and presumptive in nature and from which no firm conclusions can be drawn.

However, the TCB eye-tracking research proposed by the thesis can lead to such a body of exacting, verifiable and replicated distraction-effects research which is lacking so far.

### **Original Contribution**

The distraction-effect concerns voiced at least as early as 1965 remain real concerns. Unfortunately, neither the commentary nor the small number of studies to date, have been able to answer the TCB distraction-effect concerns of courts and others. Within the studies to date there are problems such as self-reporting, opinion-reporting, observer-reporting, non-replication and non-verification. The suggestion of how eye-tracking may answer the TCB distraction-effects concerns offers a new, novel and original contribution to assist courts.<sup>14</sup> In addition, the thesis also encompasses the first in-court demonstration of eye-tracking research, in this instance for TCB in-court distraction-effects research. The thesis identifies the potential of TCB eye-tracking research, and the related research regarding visual cones-of-vision and location-effects issues, in relation to TCB policy, design and location discussion in future. Just as S Prince<sup>15</sup> has queried the utility of a blanket ban on TCB in the Criminal Justice Act 1925 of England and Wales, one can query the presumption that there is just one form of TCB, and that distraction, education, etc, will be uniform for all forms and instances of TCB. The TCB eye-tracking demonstration, the visual cones-of-vision issues and the location-effects issues highlighted, suggest that TCB is more diverse and nuanced than the discussion to date and that the TCB distraction-effects research, legal-policy discussion and design considerations need to be looked at in the context of today's normative research capabilities.

### **Need for Research**

There is no sufficient body of legal-empirical distraction-effects research of TCB sufficient to answer the concerns.<sup>16</sup> There is not enough research per se. The research to date is frequently limited and unverified.<sup>17</sup> Many arguments are not sufficiently defined, established or verified, whether generally or empirically. The TCB arguments are also

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<sup>14</sup> P Lambert, 'Eyeing the Supreme Court's Challenge: A Proposal to Use Eye Tracking to Determine the Effects of Television Courtroom Broadcasting' (2011) 1:3 Reynolds Courts and Media Law Journal 277; P Lambert, *Courting Publicity, Twitter and Television Cameras in Court* (Bloomsbury 2011).

<sup>15</sup> S Prince, 'Is Court TV A Favourable Proposition: A Normative and Comparative Analysis of the Transmission of Courtroom Proceedings on Television?' (PhD thesis, University of Exeter 2003) 9.

<sup>16</sup> While the thesis is concerned with TCB distraction issues, there are also other significant research concerns also to be addressed. 'Courtroom broadcasting' is generally not defined in the literature. Hence, TCB and other forms of courtroom broadcasting are not defined either. Avenues for definition research might be explored in future.

generally presumptive. One example is the presumption that TCB will be distracting. This has not been properly defined or researched. It has not yet been proven to be correct. The presumption also that there will be no distraction-effects is over-simplistic. Also, there is a general presumption that if there are distraction-effects, these will be short-lived. Eye-tracking can now test, to see if there are distraction-effects; and to see if the distraction-effects are short-lived.

Again, these are new normative research opportunities absent in the historical TCB research. This information was not available to courts and legal-policymakers previously. If there are distraction-effects, and if these are significant, or significant for particular courtroom participants,<sup>18</sup> there may well be merit re-calibrating the legal-policy, arguments and legal rights issues discussed heretofore. There are particular implications for legal-policy to consider if the presumption of short-lived effects is incorrect, or incorrect for certain categories of courtroom participant and courtroom forms. The nuance of graduated effects needs to be better explored.

No one has yet been able to show the full extent of the distraction-effect concerns. Research can consider where and how it may occur. Interested parties need to consider whether it affects all courtroom participants. Parties in legal cases may need to evaluate whether a certain amount of distraction-effects is acceptable and if so, how much. In terms of research, we might examine whether eye-tracking research supports the previous TCB self-reports, opinion-reports and observer-reports. There may be serious implications for legal arguments and legal-policy if TCB distraction-effects are verified by eye-tracking research. Eye-tracking research may impact upon issues such as the visual cones-of-vision of the courtroom participants<sup>19</sup> and the future design and layout of courtrooms for TCB. Detailed analysis can consider whether the location of TCB cameras in future may be impacted by, and benefit from, TCB research of distraction-effects. Technical issues arise such as which TCB cameras are best for TCB. In terms of safety and legal-policy, interested parties can consider which TCB forms distract least or not at all. Legal-policy issues such as whether TCB rules mandate specific TCB, TCB locations and TCB television equipment ultimately arise to be considered in appropriate instances.

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<sup>17</sup> See variously below.

<sup>18</sup> That is, if the effects are graduated as between different courtroom participants. This graduated effects issue is not fully or explicitly considered in the literature to date.

<sup>19</sup> This refers to what an individual courtroom participant can see in the visual range of the courtroom. See below.

There is no proper evidence of positive or negative effects because no ongoing body of legal-empirical research properly defines such effects nor researches for such effects. No body of replicated research has properly set out any particular effect it is seeking to investigate in relation to any particular form of TCB. It is difficult, therefore, to arrive at properly valid, and generalisable, research conclusions. There is a general absence of TCB research which has been subsequently replicated and verified. The debate and research to date is often so basic and limited, that no firm conclusions for courts and judges can be drawn from it.

One consideration is whether TCB will educate. We should be so interested as to examine why it will educate, whom it will educate, what TCB forms will educate and which forms will educate best. Review and analysis raises the important issue of how we might know some, or any, TCB will educate. Nuanced research might consider what amount (or standard) of educative value is required for TCB to be considered as being educational, or alternatively for the countervailing arguments to be outweighed. Research might consider how to define 'education' and to measure 'educational TCB.' Fundamentally, we need to consider how we assess whether the intended policy effect of education in a given TCB pilot period/experiment, is successful or unsuccessful.

If we are considering effects on courtroom participants, we might indicate which participants are being investigated, and how. It is important to say what TCB camera types are involved, where the TCB camera is located, where the participants are located, etc.<sup>20</sup> In most previous research this valuable research data has not been recorded and is absent for future researchers. This has important consequences.

None of the TCB arguments really address the fact that there are different ways to film courtroom proceedings, different TCB camera technology issues, location issues and that there are different ways to present and edit footage. There are also different ways to broadcast it to the public. The varied and diverse effect issues which are involved in TCB have received less than considered analysis. There is clearly scope for TCB effects-

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<sup>20</sup> A review of the literature indicates that even some of these simple points on the map of TCB are absent. This is unfortunate. The implication is that much of the research to date is fundamentally flawed. It is incomplete. We do not know where on the map such research is. We realise also that particularly relevant factors have not been gauged, coded and incorporated into particular research studies. It also means the replication of such research is not possible. A categorisation map of courtroom broadcasting helps to clarify our understanding of the research issues. It can also assist to gauge its quality.

research beyond eye-tracking. It is also important that future research addresses the absence of an overall categorisational map of the different forms of CB and TCB.<sup>21</sup>

### **Out-of-Court Effects-Research**

If we want a full discussion on the many issues and complexities of TCB, we also need to move outside of the courtroom – and bring a robust research focus with us. There is no proper body of research into effects on the viewing (and non-viewing) public.<sup>22</sup> This focuses on the actual TCB audience, as well as the wider audience as may discuss and consider cases covered by TCB. This is relevant for legal and legal-policy reasons. Consider, for example, what the public might learn from a televised celebrity murder case, from a televised commercial law case or from an environmental law case. We may consider whether they are equal. One question may be whether the audience might be equally educated. No CB argument has consistently sought to distinguish the types of cases and legal issues which occur. This thesis critiques the research to date and proposes how we may begin to bridge the research challenges with, for example, definitions, eye-tracking, a suggested categorisation of the forms of TCB and how better to assess the TCB effects evidence for legal and legal-policy purposes.

### **Comparisons and Tools**

Our definitions and methods for researching the effects of TCB can draw on wider research disciplines and methods. Subjects at law schools internationally also suggest avenues for better research of TCB effects. Criminology and legal-psychology are just two examples of cross-disciplinary legal-research. We should not limit ourselves solely to narrow legal pigeon holes, such as a non-specific popular literature, legal Constitutional literature, legal contempt principles, etc, alone when considering TCB. We need to broaden our horizons and embrace normative cross-disciplinary legal research opportunities. The thesis assesses existing legal-psychology research into crimes,

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<sup>21</sup> A map may allow research to identify which particular form of courtroom broadcasting is being researched in any given instance. Within the particular form in question, we can then identify which particular effect we are researching within that form. For example, we could examine and research education-effects of the radio courtroom broadcasting (RCB) form and the education-effects of the TCB form, and then compare them. Such a global map also assists our formation of definitions. No discussion or argument can be sufficiently considered, or compared, unless it identifies the TCB form (and or sub-form) to which it relates. Are trial cases different from appeal cases? Are criminal cases different from civil cases? Does showing brief snippets differ from showing extended coverage? Significant research challenges remain to be addressed.

<sup>22</sup> There are only a limited number of standalone studies. See below and Appendices. Out-of-court research might ideally be located on a map of courtroom broadcasting.

witnesses, eyewitness identification, communications and media research suggests how existing research and research tools in these areas can also aid TCB research.<sup>23</sup>

### **Self-Reports, Opinion-Reports and Observer-Reports**

One of the significant problems of the TCB effects-research is that previous researchers have too frequently relied solely on self-reports, opinion-reports and observer-reports. Self-reports are questions to individual courtroom participants asking them if they themselves were affected by the TCB. In terms of relying on self-reports, and self-report conclusions, these cannot be overly relied upon and are often criticised in general research literature.<sup>24</sup>

Other investigations have asked TCB participants to report on whether they felt other participants were affected. These are opinion-reports. Again, they also suffer from being not neutral, opinion based and coming from possible bias. Self-reports and opinion-reports have been overly relied upon in TCB research. This potentially undermines a substantial amount of the research literature on TCB.

In a very few instances a third method of investigation has been involved. Third party observers have been used to attend TCB cases and report on whether the participants were affected (observer-reports). While better than self-reporting and opinion-reporting, this type of research has been too infrequent. The methodology also differs from one observer study to the next. These TCB studies can also have their own problems. For example, it is not always clear if all possible data has been researched, such as the observer location, the camera location and the respective courtroom participants' locations.<sup>25</sup> These can be very important research and data in assessing and purported conclusions. Judges and researchers today should be able to assess and have available such data.

Overall, these three methods of research have often been basic and simplistic in methodology. The self-report, opinion-report and few observer-report studies also have problems in terms of the results and methodologies not being repeated or replicated in

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<sup>23</sup> See out-of-court related chapters below.

<sup>24</sup> While self-reports can be worth undertaking (if undertaken and recorded properly), sole reliance on self-reports is less than optimum. The replies are personal, non-neutral, are opinion based and can be biased.

<sup>25</sup> See references to visual cones-of-vision post.

subsequent studies. They are, therefore, not validated by peer research. Legal-empirical research often requires repetition and validation by later studies.<sup>26</sup>

While forms of TCB have existed in certain jurisdictions<sup>27</sup> for some time, the amount of research is small. The limited scope of these studies have been described by one commentator as ‘qualitatively inadequate.’<sup>28</sup> It is hoped and suggested that more normative nuanced and comparative research will be used in future in an effort to better consider the full implications of TCB for the legal justice system, the public, and to also address the US Supreme Court (and others’) concerns. This thesis examines some of the avenues and wider research possibilities which are available but ignored thus far eg TCB eye-tracking.

TCB effects-research is almost solely confined to these limited self-reported personal views of certain individuals in the court process.<sup>29</sup> Only certain people are asked and not across all categories of persons in court. The study population is often statistically limited. The quality of the questions vary from study to study. Typically the self-report studies are not repeated and or replicated. They are, therefore, not validated by peer research. Typically the public in court are not asked. Many of the courtroom participants who give self-reports are professionally trained or experienced. Defendants are typically not asked to participate in self-report research studies. Also, such studies generally appear not to be drafted by the persons most qualified to draft them or to appreciate the

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<sup>26</sup> We also need to consider definitions and an overall map of the TCB process. We should identify all of the areas and issues which need to be researched. Only by looking at the whole map can we start to see what particular issues and what particular areas have been researched to date. By doing this we then see how many areas have not been defined and have not been researched. We see how many studies research a particular issue. We can try to compare these and verify these. We can also see what complimentary research and research methods from other disciplines can be applied to the TCB research concerns. When we do this we start to see where existing research can be complimentary, as well comparative research tools. The research effort does not focus on the potential different effects of different forms of courtroom broadcasting and TCB.

<sup>27</sup> Courtroom broadcasting has not occurred (apart from selective background shots) in Ireland albeit the Law Reform Commission briefly commented on the issue of courtroom broadcasting in its *Report on Contempt of Court* (LRC 47-1994) 22-25. K Wood has also called for court and tribunal broadcasting, see for example K Wood, ‘Calls for Live TV of Tribunals’ *Sunday Business Post* (Dublin, 30 April 2000). Note also a paper presented by Hon Mr Justice Carney to Dublin University entitled ‘Restrictions on the Media Other Than Defamation’ (date unavailable). See also, OR Goodenough, ‘Rethorising Privacy and Publicity’ (1997) 1 *Intellectual Property Quarterly* 37, 39.

<sup>28</sup> See D Slater and VP Hans, ‘Methodological Issues in the Evaluation of “Experiments” with Cameras in the Courts’ (1982) 30:4 *Communications Quarterly* 376. Indeed, this is part of the reason for the US Supreme Court challenge. For a non TCB reference see A Evans, ‘Lawyers’ Perceptions of Their Values: An Empirical Assessment of Monash University Graduates in Law, 1980-1998’ (2001) 12 *Legal Education Review* 209.



legal-empirical issues involved. Judges and court personnel (alone) are also arguably not the best qualified to conduct this research, as appears to occur in some instances. They may also be unfamiliar with the ample comparative cross-disciplinary research available to assist. It is hoped that the thesis may assist in this regard.

Most of the research to date is non-empirical, subjective research. It mostly asks a few courtroom participants how they subjectively feel. To rely on self-reports, opinion-reports and limited observer-reports as the sole indicator of, for example, whether there are TCB distraction-effects, is not the optimum research strategy. Regardless of whether it was ever the best research, it is no longer the best normative TCB research strategy today.

### **Little Legal-Empirical Research**

The legal-empirical research of TCB effects is surprisingly small.<sup>30</sup> The volume of such legal-empirical research needs to be increased.<sup>31</sup> Lawyers, legal-policymakers and the judiciary should support and embrace legal cross-disciplinary research if it can assist in addressing the concerns that exist in relation to TCB distraction-effects. Perhaps lawyers, legal-policymakers and the judiciary should not be content to rely upon just over twenty TCB legal-empirical studies since 1953. When important distraction-effect concerns exist, we should not rely on less than optimum research and research methodologies. Given the important legal, liberty and legal rights concerns at stake, we should aspire to the optimum research possible. The thesis explores how we might engage in better TCB distraction-effects research and attempting to assuage the concerns.

### **A Brief History of CB and Research**

While focusing on the effects-research of TCB, some reference to the origins of CB is necessary. Television was first demonstrated in 1928.<sup>32</sup> The first reported TCB broadcast occurred in Oklahoma in 1953, where a camera was placed in a special booth<sup>33</sup> at the

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<sup>29</sup> It is also particularly difficult, for example, to gauge ones own non verbal communications, as noted in T-R Valikoski, *The Criminal Trial as a Speech Communication Situation* (University of Tampere, Finland 2004), and references therein.

<sup>30</sup> There are apparently just over twenty legal-empirical studies of the TCB concerns.

<sup>31</sup> This may be because such research can be complex, time consuming, expensive and cannot be undertaken individually or with only a small number of people. The optimum research expertise may not rest with one individual, one school of research expertise or with lawyers and judges alone. Certain TCB research may best to undertake legal cross-disciplinary research. The media might better highlight some of the media/communications TCB research opportunities.

<sup>32</sup> A Durant and M Lambrou, *Language and Media* (Routledge 2009) 244.

<sup>33</sup> Indeed, one of the criticisms when trying to distinguish one courtroom broadcast form from another, or trying to compare them, is that the rules and procedures which may be applied are ad hoc and not recorded (properly).

back of the courtroom.<sup>34</sup> Courtroom footage was previously filmed and then shown in cinemas for a period (MCB).<sup>35</sup> Despite this, TCB continues to be debated,<sup>36</sup> and is still a ‘controversial and dividing issue,’<sup>37</sup> even in the US. The arguments in relation to effects are still ‘ongoing.’<sup>38</sup> These debates are enhanced during the latest celebrity trials, such as *Simpson*, *Kennedy Smith*, *Menendez*, *Woodward*, *Jackson*, *Dr Murray*, *James Holmes* (Aurora ‘Batman’ case), *Pistorius*<sup>39</sup>, etc.<sup>40</sup>

## Ireland

Popular TCB debate occurs in Ireland on occasion, as it does elsewhere. There was also a recent attempt by a lay litigant to have TCB of his case. TCB arguments receive particular media attention at times of (generally US) celebrity trials.<sup>41</sup> The *Simpson*<sup>42</sup> (criminal) case is a particular example.<sup>43</sup> Regardless of the US experience, people in other countries sometimes consider whether TCB should be permitted there. For

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<sup>34</sup> Referred to in S Barber, above 10.

<sup>35</sup> Cinema courtroom broadcasting would appear to be historic at this stage. It is also beyond the scope of the current work.

<sup>36</sup> See, for example, application for permission to broadcast in the case of *Sony*, *Warner*, *Atlantic*, *Arista* and *UMG*, Court of Appeals For the First Circuit, No 09-1090, Amicus Brief 29 January 2009 < [www.eff.org/files/filenode/inresonybmgetal/CVNMotionOralArgument.pdf](http://www.eff.org/files/filenode/inresonybmgetal/CVNMotionOralArgument.pdf) > accessed 18 January 2014.

<sup>37</sup> PE Thaler, ‘The Impact of the Television Camera on Courtroom Participants: A Case Study of the Joel Steinberg Murder Trial’ (PhD thesis, New York University 1990) 176.

<sup>38</sup> RER Stewart, above 9.

<sup>39</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>40</sup> Most televised cases in the US are under local state rules, not national or Federal rules. These all differ, sometimes vastly. Indeed, a pilot scheme undertaken in Federal courts was discontinued, as was a pilot scheme in New York. See, for example, G Comstock et al, *Television and Human Behaviour* (Columbia University Press 1978), as referred to in D McQuail and S Windahl, above 67; D Stepniak, above 102. Note, however, that there is a more recent second Federal pilot experiment ongoing. See ‘Judiciary Approves Pilot Project for Cameras in District Court,’ < [www.uscourts.gov](http://www.uscourts.gov) > accessed 14 October 2010; and See D Stepniak, above 102; also X O’Brien et al, ‘Chapter Eight: Cameras in the Courts,’ *Media Law Handbook*, < [www.isba.org/newscenter/medialawhandbook/CHAPTER%2008%20-%20Cameras%20in%20the%20Courtroom.pdf](http://www.isba.org/newscenter/medialawhandbook/CHAPTER%2008%20-%20Cameras%20in%20the%20Courtroom.pdf) > accessed 11 September 2010 and also Lee, ‘Cameras in the Courtroom,’ First Amendment Centre, < [www.firstamendmentcenter.org/Press/topic.aspx?topic=cameras\\_courtroom](http://www.firstamendmentcenter.org/Press/topic.aspx?topic=cameras_courtroom) > accessed 11 September 2010.

<sup>41</sup> Most of this media and public attention occurs in the US, partly due to the fact that many US states permit some form(s) of courtroom broadcasting.

<sup>42</sup> The OJ Simpson (criminal) case where he was charged and acquitted of a double murder.

<sup>43</sup> It is arguably unfortunate that examples of popular (‘popular’ is used in its media analysis context eg popular tabloid versus more considered broadsheet. Popular in effect means tabloid dumbed down for mass market. This is one element of the different forms of courtroom broadcasting) and or celebrity TCB, often accused of being ‘voyeuristic entertainment,’ come to represent TCB generally. P Mason, ‘Court on Camera: Electronic Broadcast Coverage of the Legal Proceedings’ < [www.usfca.edu/pj/camera-mason.htm](http://www.usfca.edu/pj/camera-mason.htm) >. Note also references in n 2. Accessed 18 January 2014.

example, should it be permitted in Ireland?<sup>44</sup> The arguments, whether for and against, occur in many jurisdictions. Examples of the arguments include that TCB will be educational (or not) or that TCB will/will not adversely affect the courtroom participants<sup>45</sup> eg distraction of courtroom participants. However, we might consider whether the arguments have been properly defined, researched and proven. This thesis suggests that some of these questions may not yet have ready answers or positive answers. There are many research flaws, gaps and challenges. Significantly, we have too few studies regarding the nuances of TCB.

Ultimately, there is no TCB in Ireland. There is, therefore, no direct legal-empirical research of effects of Irish TCB to examine.<sup>46</sup> The author undertook the first baseline TCB effects related research in Ireland with a judicial attitudes survey. It was described as ‘the only study conducted with regard to the topic in Ireland.’<sup>47</sup> The judicial attitudes survey has been expanded and repeated.<sup>48</sup> In addition, the author undertook the first representative research in Ireland regarding audience/public attitudes.<sup>49</sup> These can act as part of the initial baseline research for future Irish TCB research. The author also successfully undertook a proof-of-concept demonstration of eye-tracking technology for TCB distraction-effects research.

Irish judges agreed that expert psychological testimony can be relevant with regard to eyewitness capability and credibility.<sup>50</sup> This is relevant as this type of comparative research can assist in TCB research. It is important also that the potential for appropriate cross-disciplinary legal-empirical research, including legal-psychology, is recognised. The question of whether TCB is distracting is not yet answered. There is no sufficient and sustained body of legal-empirical research. The author suggests that eye-tracking can pave the way for meaningful and normative TCB distraction-effects research. Eye-

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<sup>44</sup> Indeed, there are some who would argue that there are many positives in the experience elsewhere, and that therefore this is justification for courtroom broadcasting outside of the US, including Ireland. Strictly speaking the arguments on either side are beyond the scope of this work however, as pointed out above.

<sup>45</sup> Sometimes referred to in the general literature as courtroom actors.

<sup>46</sup> However, an examination of the research issues and challenges elsewhere, is still relevant to any discussion of courtroom broadcasting in Ireland, as well as being of wider interest. It is, therefore, useful to refer to some of the research challenges, issues and the landscape in Ireland.

<sup>47</sup> P Newenham, ‘Televising the Courts: An Exploration of Opinions of Irish Media and Legal Professions’ (Masters in Journalism thesis, DCU 2008) 35.

<sup>48</sup> Extensive efforts to expand the survey on a cross-jurisdictional basis involving Northern Ireland, Scotland and England and Wales were unsuccessful. Separate efforts to engage the television and press media in Ireland in relation to their views to TCB were met with limited response.

<sup>49</sup> This was a representative sample of 1,000 adults.

tracking overcomes the shortcomings of the self-reports, opinion-reports and observer-reports. Appreciating the camera locations and participant location-effect issues are also crucial. Comparing TCB locations data systematically can assist us to fully appreciate the TCB camera and distraction-effect issues.

Despite the longstanding debates, there is still no conclusion to the effects-debates, be it in the US or elsewhere. One of the points in terms of this thesis, is that there is no sufficient body of verified research to decide the TCB effect questions. That is because there is no substantive and sufficiently detailed body of legal-empirical effects-research addressing the concerns. That applies to the in-court concerns (such as distraction-effects) and the out-of-court effects concerns regarding the public and audience (such as entertainment, etc).<sup>51</sup> We need much more legal-empirical research of the impact of TCB.<sup>52</sup> The quality of the research can also be enhanced.

No body of research examines audience effects. This is the out-of-court TCB effects arena. We need many more studies to research the impact of TCB content, forms, effects and related audience issues. The only specific legal-empirical audience-effects research appears to be AR Paddon, the New York study, the New Zealand study and in part the first Federal pilot.<sup>53</sup>

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<sup>50</sup> 68.57 percent agreed with this. See Part 2 Question B-1 of the associated judicial attitudinal survey, see Judicial Questionnaire in Appendices.

<sup>51</sup> The only specific empirical audience effects research appears to be AR Paddon plus part the following studies: the first Federal pilot; the New York study; and the New Zealand study. This does not include rating penetration figures. AR Paddon, 'Television Coverage of Criminal Trials with Cameras and Microphones: A Laboratory Experiment of Audience Effects' (PhD thesis, University of Tennessee, Knoxville 1985); MT Johnson and C Krafka, *Pilot Program Involving Electronic Coverage in Six US District Courts and Two Appeal Courts* (Federal Judicial Centre) [in part only]; *New York State Committee to Review Audio-Visual Coverage of Court Proceedings, An Open Courtroom: Cameras in New York Courts* (Fordham University Press 1997) [in part only]; K Allan, Professor J McGregor, S Fountaine (Massey University), *The Impact of Television, Radio and Still Photography Coverage of Court Proceedings, Final Report, A Report for the Department for Courts* (April 1998)(New Zealand).

<sup>52</sup> In terms of many aspects of TCB, there is no effects research at all. There are too many research gaps. The creation of an overall map of courtroom broadcasting and TCB will assist us in revealing the gaps in research. Large amounts of so called 'research' of TCB must be discounted. This includes non-empirical research. There are various reasons. Some: appear no longer available; do not record statistics or sources; do not define a methodology of investigation - or such methodology is unsound; and there is no link between the investigation and the conclusions suggested.

<sup>53</sup> AR Paddon, above; MT Johnson and C Krafka, above; *New York State Committee to Review Audio-Visual Coverage of Court Proceedings, An Open Courtroom: Cameras in New York Courts* above; K Allan, Professor J McGregor and S Fountaine, above.

In terms of many aspects of TCB, there is no research at all.<sup>54</sup> Large amounts of general ‘research’ and popular discussion of TCB is less than optimum. There are various reasons, some being that the research source appears no longer available; it does not record any statistics or source; it does not define its method or methodology of investigation – or such methodology is faulty or unsound; there is no link between the investigation and the conclusions suggested; many rely solely on self-report questions<sup>55</sup> and in many instances no research hypothesis being investigated. Unfortunately, significant amounts of what is purported as ‘research’ of TCB effects cannot be overly relied upon. One of the challenges is to overcome this problem. TCB eye-tracking (see below) may provide one of the solutions. The gathering of research is small in comparison to the issues at stake, the importance of the effects debates over the decades, and in comparison to the length of time that various forms of TCB have existed.<sup>56</sup>

It can be important to distinguish types of research into TCB effects. One can have generally court administered in-court surveys of effects, which are designed, recorded and reported on, to varying degrees of sophistication. Some of these are self-reports and third party opinion-reports. In addition, or alternatively, one can have legal-empirically designed and recorded research of specifically identified effect issues. These latter studies are typically the most rigorous and more considered of effects-research studies. Unfortunately, these type of effects-research studies are the ones least frequently undertaken. For example, there are few legal-empirical research studies into TCB effects. The volume of legal-empirical research can be vastly increased.

That is not the whole research picture however. A small number of previous commentators have from time to time suggested an effect research issue to be researched. Only rarely have they sought to undertake that research or suggested a specific hypothesis to research. The bigger picture is that vast areas of TCB and effects issues have not yet been defined and researched.

One of the points is that we could begin our research study from definitions and a holistic categorisations of the court process and the TCB process. We might do this in order to identify all of the areas and issues within those areas which need to be researched for

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<sup>54</sup> The creation of an overall map of courtroom broadcasting may assist in revealing the gaps in research. See Appendices.

<sup>55</sup> The latter ask individuals if they themselves were affected. In terms of relying on self-reports, and self-report conclusions, this cannot be strongly relied upon and is often criticised. While self-reports of observations of others is worth undertaking (if undertaken and recorded properly), again sole or overreliance on third party self-reports must be considered with caution.

<sup>56</sup> Albeit without definition.

effects and other issues. Looking at a categorisation of TCB assists us to see what particular issues have been researched to date and which have not. We can then see how many studies research a particular issue and can try to compare these; try to verify these; and seek to replicate and validate these studies. No official or officially supported studies have been identified which seek to replicate and or validate any specific previous research.<sup>57</sup> By mapping the issues and the research effort to date, we can also see what complimentary research and research methods from other disciplines can be applied to the TCB research concerns. When we do this we may see where existing research and normative comparative research might also be adapted or applied to TCB.

### **The Law, Research and Arguments Interface**

Without proper and adequate research into TCB, it is not possible to enter a fully informed debate of the advantages, disadvantages, policy, legal issues and the Constitutional ‘legal rights’ principles involved in the TCB question. The basic headline arguments and popular discussion, on both sides, are possibly naive because they have not incorporated proper and full definition and research. For example, they do not consider the different forms of TCB (see below). There is no graduated effects focus to the research. This thesis suggests a significant amounts of research needs to be undertaken to begin a serious consideration of this important topic. Without such research, neither side in the debate can claim justification.<sup>58</sup> Yet, there are many opportunities available for such investigation, and which are evident in various other research fields.<sup>59</sup>

We can only truly appreciate the overarching legal and Constitutional principles once we have asked much more detailed questions. For example, we may consider what the TCB arguments, past and present, tell us about the justifications for and against TCB. The query arises as to which TCB arguments have been defined, validated, or indeed fully researched at all. Legal-policy decisions can arise for the effect concerns and effects-research. The Constitution provides fundamental principles, albeit headline principles. However, these are too general to be instantly applied in every instance. We may ask specific and detailed questions in addition to looking at such headline guiding principles when considering (a) whether TCB can or should be permitted, (b) under what circumstances and in what situations, (c) under what conditions, rules, procedures and or

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<sup>57</sup> See Appendices for some suggested examples.

<sup>58</sup> Ultimately, normative research may reveal implications which are far more complex than the basic research to date.

<sup>59</sup> Such as law-psychology, media, communications, social scientific research and eye-tracking.

regulations, (d) in relation to which TCB forms, locations,<sup>60</sup> etc, and (e) what optimum quantity and quality of legal-empirical research is required.<sup>61</sup> It is also relevant to mandating baseline research, and ongoing research, when it is decided to permit TCB. If there are different forms of TCB (and or different effects for each, and or more/less enhanced effects), the headline policy, legal and Constitutional principles are better informed and the legal debate changes. Courts need to have better evidence available to them when dealing with these questions. The legal rights arguments may have to be recalibrated. We are no longer looking at a provision of the Constitution<sup>62</sup> in isolation. For example, research of whether a publicity rule based on publicity and volume of audience may carry a different weight than a publicity rule based on the quality of the form, content or audience may be useful. It also differs in respect of whether we are talking about so called media publicity-rule rights or public-rights. Legal-policymakers might like to consider whether any TCB audience is good, and the bigger the audience the better. TCB discussion and TCB effects-research is much more detailed and normative than any headline legal principle. Courts and legal-policymakers may need to consider what amount of distraction is too much distraction. A further query is whether any amount of distraction weighs against TCB per se, or only against some forms of TCB. There are different potential effects, different forms and different graduated effects, and which mere opinions are insufficient upon which to base our only evidence assessment of all of the TCB issues. Policy today required better evidence.

### **Need for Research**

The question of whether TCB should be permitted, particularly from an effects and legal-empirical perspective, is not yet answered. There is no sufficient body of legal-empirical research or validation. Of course there are many arguments in favour, and equally against, TCB – but the central point is that too many gaps and concerns remain. Proponents, for or against, do not substantiate their popular arguments with a body of legal-empirical research. None of the arguments are demonstrably verified. Neither is there any replication research, whether by repeat studies or third party studies. Again, the thesis suggests that eye-tracking, eyewitness identification studies, and media and communications studies, may assist more normative TCB effects-research in relation to

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<sup>60</sup> See references to visual cones-of-vision post.

<sup>61</sup> In SL Alexander's TCB research, one of the legitimate research questions addressed was how closely broadcast journalists follow state guidelines for behaviour in courtrooms during criminal trials. SL Alexander, "“Mischievous Potentialities”: A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit, Florida, 1989" (PhD thesis, University of Florida 1990) 41.

<sup>62</sup> Generally, see G Hogan and G Whyte, *JM Kelly: The Irish Constitution* (4th edn, Lexis Nexis, Butterworths 2003).

courtroom participant effects (in-court effects-research).<sup>63</sup> None of the TCB arguments really address the fact that there are different ways to film courtroom proceedings, that there are different ways to present and edit courtroom footage and different ways to broadcast it to the public. The body of TCB arguments has not addressed the different TCB forms.

### **Outcomes**

The thesis suggestion is that more research is needed. The TCB research should be fit for purpose, overcome the problems of historical effects-research and be better and more normative in today's research environment. Courts and judges should be able to rely on more than mere opinions. It can deal with the legal concerns regarding TCB distraction-effects which have not been adequately dealt with since at least 1965. TCB eye-tracking applies better research metrics to a real 'law in action' TCB concern and the 'application of law to issues.'<sup>64</sup> The aim and outcome has been to assist better and more normative TCB distraction-effects research for courts, judges and legal-policymakers. It can also lead to broader research possibilities.

### **Believing the Eyes**

It is important to point out that in developing TCB distraction-effects research studies, we often need a level of accuracy and sophistication which can only be obtained through legal cross-disciplinary research. The research concerns<sup>65</sup> arguably demand this. Legal cross-disciplinary research is not unique. In another example, three distinguished US law professors undertook detailed legal-empirical cross-disciplinary research to address a concern posed as a result of a US Supreme Court case. The results were published in the Harvard Law Review.<sup>66</sup> The research article is described as follows,

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<sup>63</sup> The rules relating to TCB which already exist, suffer from the same flaws, namely, that they do not identify any particular form of TCB and are thus flawed in scope. This is another area deserving of research. Other than referring to the arguments vaguely, there is no systemised analysis or definition. To be effective, the research and definitions needs to be more precise and enumerated.

<sup>64</sup> G Hogan and G Whyte, above.

<sup>65</sup> Which include the rights of parties in legal cases.

<sup>66</sup> DM Kahan, DA Hoffman and D Braman, 'Whose Eyes Are You Going to Believe? *Scott v Harris* and the Perils of Cognitive Illiberalism' (2008-2009) 122 Harvard Law Review 837. The research was funded by the National Science Foundation, and funds at Yale and Temple Universities. The law professors were from Yale, Temple and George Washington universities respectively. They were concerned with legal-empirical issues raised in the US Supreme Court case of *Scott v Harris*. See *Scott v Harris* USSC [26 February 2007] (No 05-1631) 433 F 3d 807 <[http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/05-1631.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/05-1631.pdf)> accessed 18 January 2014. They undertook the legal-empirical research they felt was required in relation addressing the issue they were concerned about. The title and question



‘This Article accepts the unusual invitation to ‘see for yourself issued by the Supreme Court in *Scott v Harris* 127 S Ct 1769 (2007). Scott held that a police officer did not violate the Fourth Amendment when he deliberately rammed his car into that of a fleeing motorist ... in a high-speed chase. The majority did not attempt to rebut the arguments of the single Justice who disagreed with its conclusion that “no reasonable juror” could find that the fleeing driver did not pose a deadly risk to the public. Instead, the Court uploaded to its website a video of the chase, filmed from inside the pursuing police cruisers, and invited members of the public to make up their own minds after viewing it.

We showed the video to a diverse sample of 1,350 Americans. Overall, a majority agreed with the Court’s resolution of the key issues, but within the sample there were sharp differences of opinion along cultural, ideological, and other lines. We attribute these divisions to the psychological disposition of individuals to resolve disputed facts in a manner supportive of their group identities. The Article also addresses the normative significance of these findings. The result in the case, we argue, might be defensible, but the Court’s reasoning was not. Its insistence that there was only one “reasonable” view of the facts itself reflected a form of bias - cognitive liberalism - that consists in the failure to recognize the connection between perceptions of societal risk and contested visions of the ideal society. When courts fail to take steps to counteract that bias, they needlessly invest the law with culturally partisan overtones that detract from the law’s legitimacy.’<sup>67</sup>

The Harvard Law Review article continues and refers to some of the judicial comments and opinions as follows,

“‘Mr Jones,’ Justice Alito started, “I looked at the videotape on this. It seemed to me that [Harris] created a tremendous risk [to] drivers on that road.” “He created the scariest chase I ever saw since ‘The French Connection,’” Justice Scalia immediately chimed in, provoking laughter throughout the courtroom.

Probably even more dispiriting was the exchange that came next with Justice Breyer, whose vote Jones had likely been counting on for affirmance. “I was with you when I read ... the opinion of the court below,” Justice Breyer related. “Then I look at that tape, and I have to say that when I looked at the tape, my reaction was somewhat similar to Justice Alito’s.” As Jones attempted to offer a less damaging interpretation of the tape’s contents, reinforced by an invocation of the jury’s prerogatives as factfinder. Justice Breyer sharply retorted:

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addressed was ‘Whose Eyes Are You Going to Believe?’ DM Kahan, DA Hoffman and D Braman, *ibid.*

<sup>67</sup> *ibid* 839. Footnotes omitted.

JUSTICE BREYER: ... What am I supposed to assume? ... I mean, I looked at the tape and that tape shows he is weaving on both sides of the lane, swerving around automobiles that are coming in the opposite direction with their lights on, goes through a red light where there are several cars that are right there, weaves around them, and there are cars coming the other way, weaves back, goes down the road.

... [A]m I supposed to pretend I haven't seen that? ...

....

MR JONES: But those are not the facts that were found by the court below in this -

JUSTICE BREYER: Well that's, that's what I wonder. If the court says that isn't what happened, and I see with my eyes that is what happened, what am I supposed to do?"

Later, during the rebuttal argument of opposing counsel (at which point a helpless Jones was reduced to watching mute). Justice Breyer continued, "I look at the tape and I end up with Chico Mark's old question with respect to the Court of Appeals: 'Who do you believe, me or your own eyes?'"<sup>68</sup>

While these questions and concerns remain to be fully and properly assessed, there is 'some self-reported instances of witness distraction or inhibition attributed to the presence of cameras in the courtroom.'<sup>69</sup> Unfortunately, 'little factual evidence exists to support either side.'<sup>70</sup> We need more TCB research. The author's exploration of legal cross-disciplinary eye-tracking research in relation to TCB distraction-effects is not entirely without legal comparison. Some examples include,

- *Eye-Tracking, Camera-Perspective-Bias and Legal Confessions*: Eye-tracking has been used to research the effects of videotaped confessions.<sup>71</sup> This legal-psychology research deals with the concern that different ways of filming suspect confessions at police stations can have an effect on how jurors and judges may later evaluate the confession in terms of being voluntary or coerced. The research reveals that a camera-perspective-bias effect exists. It has been suggested as a result of this research that the police officer and the suspect should both be in the same camera frame, and not just the suspect alone;
- *Eye-Tracking and Tobacco Litigation*: Eye-tracking is also proposed in the context of litigation in the US in relation to mandated health warnings on tobacco

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<sup>68</sup> ibid 839-840.

<sup>69</sup> D Shores, above 29.

<sup>70</sup> ibid 37.

products.<sup>72</sup> The suggestion is that eye-tracking be used, or mandated by the court, in relation to finding the optimum method or placement of public health warnings on tobacco products;

- *Eye-Tracking and Safety*: Eye-tracking is being used in relation to vehicle safety. The eye-tracker monitors drivers via safety alert systems as a solution to the problem of drivers becoming drowsy or falling asleep causing road accidents and fatalities.<sup>73</sup> The third most popular use of eye-tracking is safety solutions for driver distraction and drowsiness<sup>74</sup> such as driver fatigue alert systems.<sup>75</sup> Volvo uses eye-tracking to research single vehicle roadway departures (SVRD).<sup>76</sup> In Germany 14.5 percent of accidents are SVRD related.<sup>77</sup> It is understood that US research indicates that up to fifty percent of road accidents arise because of distraction in one form or another. Fatalities occur for thirty five percent of these cases.<sup>78</sup> Mercedes and others have developed commercial applications of eye-tracking.<sup>79</sup> The possibility of steering a car with eye-trackers is also being researched.<sup>80</sup> Eye-tracking is also being used for driver distraction from mobile phones/devices.<sup>81</sup> Mobile telephone usage has recently been restricted in Ireland and elsewhere.

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<sup>71</sup> See, for example, G Lassiter, A Geers, P Munhall, I Handley and M Beers, 'Videotaped Confessions: Is Guilt in the Eye of the Camera?' in M Zanna (ed), *Advances, in Experimental Social Psychology, Vol 20* (Academic Press 2001) 189.

<sup>72</sup> P Smith, 'Evaluating the Corrective Statements Proposed in the Court Case *US Department of Justice vs Philip Morris USA Inc et al*' (MS thesis, State University of New York at Buffalo 2009). See 449 F Supp 2d 1 (DDC 2006).

<sup>73</sup> C Chardinal, 'CES 2006 Video: Delphi Eye-Tracking Distraction System' < [www.gearlive.com](http://www.gearlive.com) > accessed 15 July 2010.

<sup>74</sup> 'Top Five Uses for Eye-Tracking Technology' (Eye com) < <http://eyecomcorp.com/eye-tracking/top-5-eye-tracking-technology/> > accessed 7 July 2012. See also K Kircher, A Kircher and F Claezon, *Distraction and Drowsiness - A Field Study* (VTI 2009) < [www.vti.se/publications](http://www.vti.se/publications) accessed 4 August 2012.

<sup>75</sup> See J Nolan, 'Eye-tracking' < <http://jeffnolan.com/wp/2010/03/25/eye-tracking/> > accessed 3 August 2012. Note also Q Ji and X Yang, 'Real-Time Eye, Gaze, and Face Pose Tracking for Monitoring Driver Vigilance' (2002) 8:5 Real-Time Imaging 357.

<sup>76</sup> J Pohl, W Birk and L Westervall, 'A Driver-Distraction-Based Lane-Keeping Assistance System' (2007) 221 Journal of Systems and Control Engineering 541.

<sup>77</sup> *ibid* 541.

<sup>78</sup> *ibid* 541. One of the existing systems, known as rumble strips, are not common in all countries, are not uniform in terms of noise and standards and involve on-site infrastructure changes. See *ibid*.

<sup>79</sup> J Nolan, 'Eye-Tracking' < <http://jeffnolan.com/wp/2010/03/25/eye-tracking/> > accessed 18 January 2014.

<sup>80</sup> 'Steering a Car With Eye-tracking is the Future - Eye-Tracking Update,' (EyeTrackingUpdate.com) < <http://eyetrackingupdate.com/2010/06/17/steering-car-eye-tracking-future/> > accessed 15 July 2012.

<sup>81</sup> LN Boyle et al researched 53 drivers with a driving simulation, eye-tracking and mobile distraction devices. See H Hickey, 'In-Car Driving Coach to Prevent Driver Distraction,' (Medical News Today) < [www.medicalnewstoday.com/articles/197542.php](http://www.medicalnewstoday.com/articles/197542.php) > accessed 23 August 2010, referring to LN Boyle, B Donmez and J Lee, 'Differences in Off-Road Glances: The Effects on Young Drivers' Performance' (2010) 136 ASCE Journal of Transportation Engineering, Special Issue: Applications of Advanced Technologies in Transportation 403.

There is a growing industry of ‘driver monitoring technology’<sup>82</sup> of driver attention with eye-tracking.<sup>83</sup> Eye-tracking can save lives and improve driver safety.<sup>84</sup> Eye-tracking safety solutions are also being expanded to the mining, oil and gas industries.<sup>85</sup> Many legal rules and research regulate and attempt to address the problem of road safety;

- *Eye-Tracking and Advertising*: The advertising, marketing and market research industries use eye-tracking to evaluate the effectiveness of advertising and to assist in developing optimum advertisements. Google famously uses eye-tracking to continually test its logo, colours, website and services;
- *Eye-Tracking and Out-of-Court Effects-Research*: There has been no sustained body of research into TCB effects on the viewing (and non-viewing) public.<sup>86</sup> Potentially the public may learn different things from televising a celebrity murder case, a commercial case or an environmental law case. A pertinent consideration is whether these are equal. Research might examine whether the audience may be equally educated and whether the educational potential differs across different types of cases. The nuances of the TCB education-effects argument with reference to different types of cases should be explored. Eye-tracking may assist in researching these out-of-court TCB issues.<sup>87</sup> For example, eye-tracking might seek to examine if the audience is distracted when watching different types of cases; whether different cases attract the same level of attention; whether appeal cases and trial cases appeal equally; and whether there may be attentional reception differences by audience members watching civil and criminal cases;
- *Distraction-Effects Concerns and Eye-Tracking*: There are concerns with many potential effects of TCB. The author explores principally the concern of distraction-effects ie the distraction of the participants from the TCB cameras and or TCB camera plus operators in the courtroom. This concern is highlighted in the US Supreme Court cases and the literature. The author suggests and develops a suggested specific solution for normative TCB distraction-effects research in light

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<sup>82</sup> *ibid.*

<sup>83</sup> Q Ji and X Yang, ‘Real-Time Eye, Gaze, and Facial Pose Tracking for Monitoring Driver Vigilance’ (2002) 8 *Real-Time Imaging* 358.

<sup>84</sup> ‘Eye-Tracking Study May Reduce Teen Crash Cates’ *Eye-Tracking Update*, 4 January 2012, accessed 7 July 2012.

<sup>85</sup> ‘Tobii Eye-Tracking Operator to Enhance Safety Solution by Six Safety Systems’ (Tobii) < <http://www.tobii.com/en/group/news-and-events/press-releases/operator-safety-solution-by-six-safety-systems/> > accessed 7 July 2012. Also K Kircher, A Kircher and F Claezon, *Distraction and Drowsiness - A Field Study* (VTI 2009) < [www.vti.se/publications](http://www.vti.se/publications) > accessed 4 August 2012.

<sup>86</sup> There is only a limited number of stand alone studies. See below and Appendices.

<sup>87</sup> While outside the scope of the current research, some of the options will be briefly referred to.

of the problem of past research methods. The author explores eye-tracking technology as a solution to measure eye-focus and in-court TCB distraction-effects. Furthermore, the author undertakes research which incorporates a successful proof-of-concept demonstration of eye-tracking technology in an actual criminal courtroom in Ireland.<sup>88</sup> This suggests that eye-tracking may be used to research, measure and record TCB distraction-effects on participants in the courtroom and similar environments in appropriate studies;

- *Eye-Tracking Elsewhere:* Eye-tracking is already used in many other areas. It has proven itself to be a successful legal cross-disciplinary research tool for academic purposes as well as commercial purposes. It should now be used in relation to TCB. Some examples are referred to below. Eye-tracking is used in a variety of existing legal-psychology related research. One example of legal-psychology related eye-tracking research is eyewitness identification and eyewitness perception research.<sup>89</sup> The weapon-focus research is also an illuminating example of eye-tracking. Another legal-psychology example is camera-perspective-bias research. The legal-psychology research literature can assist future TCB effects-research. Eye-tracking is also used in many fields other than legal-psychology. These include eye-tracking research of safety solutions, internet use, advertising, marketing, security, communications, aircraft design, vehicles, medical, etc. The US Supreme Court was not aware of the possible eye-tracking solution when it considered TCB issues. In addition, some US Supreme Court judges commented that certain TCB effects may be beyond measurable effects investigation. This is no longer the case in terms of the accuracy that eye-tracking can provide. Furthermore, eye-tracking provides a level of recorded and accurate effects related data that is not possible with self-reports, opinion-reports or observer-reports. Eye-tracking overcomes the difficulties of previous TCB distraction-effects research studies. We can now track, record and measure for actual TCB distraction-effects, not mere opinions. The research can be cross referred, replicated and verified, unlike the previous TCB distraction-effects research. It is also a vast improvement upon mere opinions. This also contrasts with the historical TCB distraction-effects research and discussion. New TCB research will vastly improve the useful evidence available for courts and legal-policymakers;
- *Eye-Tracking is Important:* TCB eye-tracking enables us to advance beyond the limits of prior self-reports, opinion-reports and observer-reports. It is important because only sufficiently, properly defined and delineated distraction-effects

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<sup>88</sup> This was a non-live courtroom setting.

research adequately informs our legal understanding, rights vindication and legal-policy discussions in relation to TCB. We have been concerned with the distraction-effects of TCB since TCB started. These concerns still remain today.<sup>90</sup> The research has not yet properly addressed or answered the concerns. This is particularly so with the limited self-reports, opinion-reports and few observer-reports of the past. The amount of legal-empirical research is also limited in number. Our research of distraction-effect concerns can expand its legal-empirical research foundation. It can engage with replication and validation as is the case with other legal-empirical research. The TCB research effort requires a new level of detail, as compared with the basic popular discussion and non legal-empirical literature heretofore. Eye-tracking is important because it can bring a new level of accurate and recorded data to courts and researchers consideration of the TCB distraction-effect concerns. Legal-empirical data, and not unsupported opinion, can better inform our consideration of TCB policy, legal assessment, legal rights arguments, TCB forms, TCB design, TCB location and TCB layout. This is not just an issue of concern for the US. It fundamentally interests and concerns us all.

### **The Cross-Disciplinary Study of Law**

Our consideration of the TCB concerns cannot be limited to narrow legal pigeon holes.<sup>91</sup> The study of law, or at least many aspects of it, are already cross-disciplinary. Eye-tracking provides just another opportunity for legal cross-disciplinary research. It also appears a much better avenue for TCB distraction-effects research. The breath of legal issues studied at universities provide more than ample confirmation of the existing cross-disciplinary consideration of legal matters. Legal-psychology is already a complex mix of the complimentary and co-operative elements of both law and psychology. Three examples of this avenue of research include eyewitness identifications; weapon-focus; and camera-perspective-bias. In addition to being recognised as legitimate legal-psychological research interests, many traditional areas of law have expanded to embrace them. The law of evidence, for example, has had to expand to incorporate these matters. The study of criminology, and indeed criminal law, involve increasing appreciation and reliance upon legal-empirical research. Criminology also relies significantly on the legal-psychology research literature. These are further examples of legal cross-disciplinary

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<sup>89</sup> See, for example, ch 10.

<sup>90</sup> The author disagrees with suggestions eg Stepniak, that the in-court effects discussion is effectively over. It is far from over. We are now able to properly address the distraction-effects concerns with eye-tracking technology and indeed comparative research fields and comparative research tools. D Stepniak, *Audio-Visual Coverage of Courts* (Cambridge University Press 2008).

<sup>91</sup> Whether that be the limited confines of constitutional law, contempt law, etc, alone.

research. The list of legal cross-disciplinary journals is continuing to grow. Some examples include journals for legal-psychology,<sup>92</sup> law and criminology,<sup>93</sup> law and science,<sup>94</sup> law and medicine,<sup>95</sup> law and technology,<sup>96</sup> and law and environment.<sup>97</sup> Increasingly also, law schools are involved in cross disciplinary research and research grouping. One example is the Trinity Long Room Hub, which includes the Trinity Law School.<sup>98</sup> These examples of legal research are of their nature legal and cross-disciplinary. That is not to mention other legal journals which contain articles of a cross-disciplinary nature also. Eye-tracking is clearly a cross-disciplinary research tool. It may now be applies TCB distraction-effects research - which the thesis suggests.

### **Legal Research Does Not Stand Still**

Just as society and law never stand still, neither should the study of law and legal issues. Where appropriate, legal cross-disciplinary research should be followed, especially where

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<sup>92</sup> Examples of journals include Psychology, Public Policy and Law; Law and Human Behavior; Journal of Law and Psychology; Psychology, Crime & Law; Law & Psychology Review; Psychology & Law Journal; Legal and Criminological Psychology; Law & Psychology Review; Psychology & Law Journal; Psychiatry, Psychology and Law; Psychology, Crime and Law.

<sup>93</sup> Examples of journals include Law and Criminological Psychology; Journal of Criminal Law and Criminology; British Journal of Criminology; Journal of Criminal Law & Criminology; African Journal of Law and Criminology; Journal of Quantitative Criminology; Journal of Research in Crime and Delinquency; Social Justice Research; Journal of Contemporary Criminal Justice; Crime Law and Social Change; Punishment & Society-International Journal of Penology; International Journal of Offender Therapy and Comparative Criminology; Crime & Delinquency; Social & Legal Studies.

<sup>94</sup> Examples of journals include Journal of Empirical Legal Studies; Journal of Law Science and Policy; Minnesota Journal of Law, Science & Technology; Albany Law Journal of Science & Technology; Jurimetrics: The Journal of Law, Science, and Technology; Journal of Science & Technology Law; Columbia Science and Technology Law Review; Journal of Philosophy Science and Law; Hastings Science & Technology Law Journal; Stanford Journal of Law, Science, and Policy; Behavioral Sciences & the Law.

<sup>95</sup> Examples of journals include Journal of Law Medicine & Ethics; Medicine, Science and the Law; Journal of Law and Medicine; Medical Law Review; American Journal of Law & Medicine; Yale Journal of Medicine & Law; International Journal of Legal Medicine; Journal of Forensic and Legal Medicine.

<sup>96</sup> Examples of journals include Computers and Law; Digital Investigation; European Intellectual Property Reports; Computer Law and Security Reports; Harvard Journal of Law & Technology; Berkeley Technology Law Journal; ScriptED; European Journal of Law and Technology; Stanford Technology Law Review; International Journal of Law and Information Technology.

<sup>97</sup> Examples of journals include Law, Environment and Development Journal; Journal for European Environmental and Planning Law; Environmental Policy and Law International Journal of Law in the Built Environment; Journal of Planning and Environment Law; Vermont Journal of Environmental Law; Environmental Law Journal.

<sup>98</sup> One example of a cross disciplinary research conference organised by the Trinity Long Room Hub is 'Cyberethics, Cyberlaw, Cyberpsychology and Cyberbullying,' 14 April 2014, Trinity College Dublin, which involved legal and other cross disciplinary expertise. One of the speakers, M Aiken, advocated further cross disciplinary solutions (including technology solutions) to the cyberbullying issue.

it provides better avenues of research and evidence than have occurred previously. Indeed, proper legal-policy consideration should demand better research when the concerns relating to TCB distraction-effects have important significance, but have not yet been addressed adequately. Legal-policymakers are extremely interested in cross-disciplinary research in law and legal-psychology. There is also significant interest in legal-psychology studies. Frequently, research and projects are funded in relation to these areas, officially and from state bodies, universities and other organisations. A Bukoff, for example, refers to a state funded cross-disciplinary legal-psychology project investigating the use of video testimony in courts.<sup>99</sup> There are many examples of cross-disciplinary research and funding involving legal and regulatory issues.<sup>100</sup> A further example of legal cross-disciplinary issues is the review of the copyright legal regime in Ireland.<sup>101</sup> One of the terms of reference is clearly legal, commercial and entrepreneurial.<sup>102</sup> This is more than simply a traditional copyright legal issue. Trinity College is also involved in the research of other legal cross-disciplinary issues.<sup>103</sup>

Potentially, TCB may hinder a fair trial. There might be adverse effects, such as distraction-effects. In seeking answers these questions and concerns, none of the traditional legal pigeon holes alone are fully equipped to find the answer. We cannot seek

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<sup>99</sup> A Bukoff, 'The Effects of Video Camera Techniques on the Pre-Deliberation Judgements and Perceptions of Role-Playing Jurors' (PhD thesis, Kent State University 1984) 8.

<sup>100</sup> The Broadcasting Commission of Ireland, for example fund cross-disciplinary research, such as K Rafter, *Political Advertising: The Regulatory Position & the Public View* (BCI 2009); and K Murphy, *Funding Programmes, Sustaining Broadcasts: A Jurisdictional Analysis of Programme-Making Support Schemes for Community Radio* (BCI).

<sup>101</sup> The Copyright Review Group comprised of academic and practising lawyers and was chaired by Dr Eoin O'Dell of the School of Law, Trinity College.

<sup>102</sup> The terms of reference indicates research to '(1) examine the present national copyright legislation and identify any areas that are perceived to create barriers to innovation; (2) identify solutions for removing these barriers and make recommendations as to how these solutions might be implemented through changes to national legislation; (3) examine the US style "fair use" doctrine to see if it would be appropriate in an Irish/EU context; (4) if it transpires that national copyright legislation requires to be amended but cannot be amended, (bearing in mind that Irish copyright legislation is bound by the European Communities directives on copyright and related rights and other international obligations) make recommendations for changes to the EU directives that will eliminate the barriers to innovation and optimise the balance between protecting creativity and promoting and facilitating innovation.' See 'Consultation on the Review of the Copyright and Related Rights Act 2000' (Department of Jobs, Enterprise and Innovation, 20 March 2014) < [http://www.djei.ie/science/ipr/copyright\\_review\\_2011.htm](http://www.djei.ie/science/ipr/copyright_review_2011.htm) > accessed 5 May 2014.

<sup>103</sup> Examples include a project on Globalisation, Human Rights and the Judiciary in Africa: A Comprehensive Identification, Location and Comparative Law Analysis of the Judgments relating to Human Rights in Sixteen African States, an African Human Rights Judgment Database, African Workshop: The African Judicial and Human Rights Programme, a Centre for Post-Conflict Justice, Women in Law and various issue in relation to Constitutional law review. See < <http://www.tcd.ie/Law/research/projects.php> > accessed 14 August 2012. The Law School is part of the Faculty of Arts, Humanities and Social Sciences at TCD.



to answer these questions without cross-disciplinary legal-empirical research. Legal-psychology research might assist courts and legal-policymakers in such considerations.<sup>104</sup>

## Education

There is frequent popular suggestion of TCB educational-effects. However, there is no indication of what is meant by ‘education,’ ‘educational’ and the ‘message’ conveyed via TCB. For example, the aim could be to educate the public on the details (or result)(or arguments) of a specific case or alternatively it could be to educate generally. We may consider what general principles, issues, etc, the instant TCB form is aiming to educate. The education-effect could perhaps be one of civic information. It could be that offenders will be pursued and prosecuted (eg deterrence). It may relate to victims for example.<sup>105</sup> The aim may be to help inform citizens as to what they will face, or may see, should they ever be in court.<sup>106</sup> It might also be to legitimise or increase confidence in the court system.<sup>107</sup> Unbundling the different strands of the education-effect(s) issues and arguments is not just useful, it is also necessity if we are to properly understand all of the TCB issues.<sup>108</sup>

## Forms of TCB

Despite concerns, there has been no differentiation or investigation of TCB forms thus far. The thesis identifies this issue and contributes a suggested categorisation of TCB

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<sup>104</sup> Even specific legal-psychology investigations of TCB require reliance on more than one field. Donald Shores investigated witness effect issues. However, he had to rely upon other fields, namely, the study of the effects of videotaping or performance and attitudes of speech students, and the effects of communication apprehension on verbal behaviour. See D Shores, ‘The Effects of Courtroom Camera on Verbal Behaviour: An Analysis of Simulated Trial Witness Testimony in Courtrooms Using Television Cameras’ (PhD thesis, University of Florida 1981) 16.

<sup>105</sup> Note the current debates as to victim impact statements and also notification rights for victims. Also note P Lambert, ‘Time to Leave the Monkey Behind?: How Eye-tracking and Psychology Can Contribute to Television Courtroom Broadcasting Effects Research’ (British Psychological Society, BPS Cognitive Psychology Section, Annual Conference, 27th Annual Cognitive Psychology Section Conference, Cardiff University 6-8 September 2010). Also P Lambert, ‘TCB Effects: Eye-tracking and Camera Distraction in Court’ poster regarding the first in-court proof-of-concept demonstration of eye-tracking technology for TCB effects research (Irish Association of Law Teachers, Annual Conference 26-28 November 2010).  
Somewhat like a user’s manual approach.

<sup>107</sup> For example, it might be argued that (new) international tribunals may feel a (greater) need to publicise and legitimise themselves. Generally see, KN Calvo-Goller, *The Trial Proceedings of the International Criminal Court, ICTY and ICTR Precedents* (Martinus Nijhoff 2006); M Cherif Bassiouni, *The Legislative History of the International Criminal Court* (Transnational Publishers 2005); B Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (OUP 2003).

<sup>108</sup> Existing educational and communications research may assist in researching the TCB educational effects argument, the impact of TCB, and whether TCB will be/is educational.

forms.<sup>109</sup> The outcome of any legal and Constitutional argument may well differ depending on what TCB form or forms are being looked at. Equally, depending on research and analysis into the effects of TCB, the policy, legal and Constitutional argument/principle may also differ. The result of such arguments may also differ. New effects-research issues may arise, depending on the TCB form being instantly examined.

The different arguments proposed for and against TCB are potentially affected by the type and form of TCB being discussed. Depending on the form, particular arguments can become stronger or weaker. It may be over-simplistic to suggest that all arguments can apply equally to all forms of TCB. This is one of the problems with the popular TCB discussion, literature and arguments to date. Some forms may lend themselves more to being educational and others may not.<sup>110</sup> It may be possible to carry out research to identify which may be more educational – and critically why. This knowledge could feed into and enhance the level of debate and (political and judicial) policymaking in relation to decisions regarding permissible TCB and permissible TCB forms (if and when so permitted).

There is no overall definitions and categorisation of CB. Neither is there any overall definitions and categorisation of different TCB forms. Within TCB itself, there is no identification of the many issues which impact upon and help to decide which particular form of TCB applies. These are discussed below. The issues include the following, namely, what is the aim and purpose of each particular TCB proposal, how this will be tested to see if the aim is successfully achieved, who grants permission, whether there is an application required, who makes the application, to whom, what (formal) controls or rules may apply, what research data is required, what baseline research applies, what can be filmed by the TCB cameras, what type of programming is involved, who makes the TCB recording, what type of TCB camera(s), what the location and location-effect may be, which media categories apply, etc. There has equally been no proper body of legal-empirical research and examination of the effects of TCB, and different TCB forms, on the courtroom participants.<sup>111</sup>

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<sup>109</sup> Also forms of courtroom broadcasting generally.

<sup>110</sup> Note ch 5.

<sup>111</sup> TCB has always been a contentious and emotive subject. There are many arguments, advanced by either side. It is not necessary in this thesis to report all of the arguments and the related literature, which is significant, but some of these arguments are briefly categorised and summarised in the Appendices. Also see generally S Barber, above; W Freedman, *Press and Media Access to a Criminal Courtroom* (Quorum Books 1988); D Stepniak, above. It is noteworthy that debates seldom refers to the research studies undertaken, nor those which should be undertaken. Definitions are equally lacking and deserving of research.

## **Scope: General**

‘Courtroom broadcasting’ specifically is generally not defined in the literature. TCB and other forms and or subsets of CB are not defined either. Research may benefit if it defines its scope in terms of one form of CB over others, and which then seeks to examine a specific aspect (eg an effects-research concern) in relation to that specific form of CB. This thesis examines the effects-research challenges of the TCB form, and how we might address (some of) the effects-research concerns, in particular TCB distraction-effects. It is felt that there is not a sufficient body of legal-empirical effects-research of TCB effects sufficient to answer the arguments. There does not appear to be enough research per se to assist courts and legal-policymakers. Also, the existing research to date is either limited, opinion-based, problematic and or unverified. Further research might seek to encompass replication and verification issues.<sup>112</sup>

The varied and diverse issues which are involved in TCB have received less than considered analysis. The different forms of CB, and TCB, have not been defined. Effects are generally not defined. The overall body of effects-research into TCB is surprisingly small. This thesis reviews the research from a perspective of the concerns and the pertinent normative avenues for future research into TCB effects issues and what evidence should be available to today’s courts and legal-policymakers. The sophistication of research needs to develop. Further research might define and identify which TCB form, and sub-form, it is investigating, and for which issue or effect.

This thesis highlights some of the main challenges involved in advancing proper TCB effects-research generally, and some of the particular avenues available for particular future TCB effects-research. An example is distraction-effects of in-court TCB. One of the most obvious avenues for effects-research in relation to TCB is through legal-psychology research. A cursory review of the eyewitness identification perception

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<sup>112</sup> The TCB arguments are also generally presumptive. One example, is the presumption that TCB will be educational. This has not been sufficiently defined, researched or established. There is no proper evidence of positive or negative effects because we have not properly defined such effects nor researched for such effects. No body of replicated research has properly set out any particular effect it is seeking to investigate in relation to any particular form of courtroom broadcasting. It is difficult, therefore, to arrive at properly valid, and generalisable, conclusions in relation to effect concerns. There is a general absence of research which has been subsequently replicated and verified. The sometimes popular view that any one of the arguments in favour of, or against, TCB is correct or (more) legitimate (than others) is perhaps questionable. Both sides in this debate are naive in assuming that they have sufficiently defined, examined, researched and verified their own arguments in any properly considered manner. No body of research currently validates the popular arguments.

literature<sup>113</sup> (in legal-psychology), indicates how much we have yet to define and investigate in terms of courtroom participant effects. This points the way for some of the future normative TCB research. The author proposes for the first time, definitions and form categories for TCB. The US Supreme Court research challenge is also identified for the first time. This sets the scene for the research that might be undertaken. The author also identifies for the first time how eye-tracking can be applied to the US Supreme Court research challenge, in particular, TCB distraction-effects. Eye-tracking is already used in many fields, including, law, safety, internet, advertising, marketing, security, psychology, communications, aircraft design, vehicles, etc. The author argues that eye-tracking also points the way for much future research of TCB effects. It is noted that the US Supreme Court was not, and is still not, aware of eye-tracking. Eye-tracking research of TCB will also go beyond the expectations of the US Supreme Court jurisprudence when it said that certain effects may be beyond properly measurable effects investigation. We can now track, record and measure actual distraction-effects in relation to TCB cameras in (non-live) courts and mock courts.<sup>114</sup> In addition, we are now better able to address the distraction-effects challenge with comparative normative research.

### **Scope and CB Forms**

It can also be suggested that there is a benefit to undertaking substantial and ongoing legal-empirical research in relation to the effects of TCB (and TCB cameras).<sup>115</sup> The thesis refers to the normative effects-research issues and challenges. That is TCB effects-research, not commentary or general research in relation to CB per se. The aim is to provide a normative analysis of the legal-policy issues, challenges and opportunities regarding the TCB effects-research in order that we might begin to research the effects issues and challenges more effectively. This may enable us to advance beyond the limited and circumspected 'research' to date. This is important because it appears that more contemporary and normative research is needed to better assist and inform court and legal-policymakers understanding and legal-policy decision making regarding TCB. This thesis seeks to offer an assessment of the research thus far and to make a contribution to our consideration of advancing future TCB research and research issues.

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<sup>113</sup> See, for example, ch 9.

<sup>114</sup> The author disagrees with suggestions that the in-court effects discussion is effectively over. It is far from over. D Stepniak, *Audio-Visual Coverage of Courts* (Cambridge University Press 2008).

<sup>115</sup> Courtroom broadcasting generally is not the focus of the thesis. Nor is the focus directed at TCB generally. Neither is it directed at the TCB arguments.

In focusing on the effects-research issues and challenges, however, a very fundamental question arises. What exactly is CB? What is TCB? Despite the apparent obviousness and simplicity of these questions, they have not been addressed in the literature or research to date. As the research and the review exercise below make clear, however, the answers to these questions require greater analysis than commentators have afforded. Only after considerable research, scoping and baseline parameter setting, was the author able to develop a suggested definition of what TCB is.<sup>116</sup> This defines and delimits what CB actually is and may assist in advancing research which may better be identified and distinguished with particularity. Such attempts at definitions are generally absent from TCB discussion, in particular the popular discussion. A definition assists in scoping what is and is not encompassed within television courtroom broadcasts concerns, such as the effects-research issues and the US Supreme Court research challenge. The benefit of this definition is that it also enables the current research, and future research, to begin distinguishing the different categories within TCB. This is important because once we see that there are different forms of TCB, we may consider whether there are different effects for different categories and forms of TCB. We can also ask what the different effects are for different forms of CB generally. For example, it may be that radio courtroom broadcasting (RCB) differs in many respects from TCB. It may be that one category or form of TCB is better at educating. Consider, for example, the proposition that (television) courtroom broadcasting will educate. We might consider the basis on which we may know this to be the case. We can additionally consider the basis on which we may know which TCB form will educate best. These are all pertinent considerations for courts and judges, not to mention the litigation parties.

Proper scoping, parameters and definitions suggest that we need new normative research and that many concerns, including the US Supreme Court challenge, remain to be addressed. These issues require more enhanced attention than at first meets the eye. Vast amounts of the popular discussion, and what has passed as ‘research’ previously, now appears superficial and without foundation or validation. Our research effort requires a new level of detail, as compared with the basic popular discussion heretofore. It is important to point out that in addressing the TCB research challenges and in developing TCB effects-research studies, we often need a level of sophistication which can only be obtained through cross-disciplinary legal-empirical research. The research questions and the research tasks demand this, as do courts and judges.

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<sup>116</sup> TCB is defined as TCB cameras in the courtroom, filming courtroom proceedings for live and or contemporaneous television push broadcast to the general public.

There are many types of courts, as well as many different types of television programmes. Equally, there are many different styles of presentation, filming and editing which focus on law and the courts. Beyond the courtroom, there are many different ways to view CB footage and many different types of viewing audience. The boundaries of CB are wide.<sup>117</sup> This is the context of this work in relation to TCB<sup>118</sup> effects-research issues. While TCB eye-tracking research can individually focus on distraction-effects, there are also other potential research opportunities arising.

### **Scope and Carveouts**

Some scoping of the parameters of this work is necessary. The overall topic of CB is extensive and emotive. This work cannot cover all aspects of all CB. It is, therefore, necessary to confine it. This work is broadly confined to one aspect of *television* courtroom broadcasting, namely, the effects-research and in particular the legal-empirical effects-research. It is also necessary to set out what aspects will and will not be covered. While there is reference to the general discussion and some of the relevant issues to TCB and Ireland, given that there is no formal TCB in Ireland there is no direct effects-research in Ireland. Equally, given that TCB has not formally occurred, there are no legal cases in Ireland dealing with TCB access issues or effect issues. Indeed, there are no substantial TCB jurisprudence in the US either as yet. The thesis does not advocate the acceptance or rejection of TCB per se.<sup>119</sup> The following are not covered within the scope of this thesis, namely, CB generally; history of TCB; general literature on TCB; general TCB arguments; MCB; RCB; iTCB; CCB; RYCB; ECB; PCB; jTCB; aTCB. Pursuing all issues referred to above, would take this research in a totally different and overbroad direction. The focus remains normative legal-empirical effects-research driven, as a basis for informing court and legal-policymaker decision making. Therefore, such issues are not a primary focus.

### **Summary of Research Methodology and Approach**

The thesis proceeds by examining the TCB effects-research and distraction-effects research. It also examines the detailed comments of the US Supreme Court jurisprudence in relation to TCB and the concerns regarding potential adverse effects of distraction in-

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<sup>117</sup> Arguably the boundaries are still expanding.

<sup>118</sup> Television courtroom broadcasting is abbreviated to TCB throughout.

<sup>119</sup> Indeed, SR Pasternack also makes clear that his is a different research focus, see SR Pasternack, 'The Effects of Perceived Community Pressure on Simulated Juror Guilt Attributions: A Study' (PhD thesis, University of Tennessee, Knoxville December 1982) 2-3.

court and why this is important and necessary. The research found is examined in relation to how useful and normative it is. Unfortunately, there is a lack of legal-empirical effects-research as well as many problems with the existing research. Against this background, the thesis seeks to consider if the literature and related cross-disciplinary literature can assist in advancing better and more normative TCB distraction-effects research today. The eye-tracking proposal for TCB distraction-effects is not mentioned in the caselaw, literature or research to date.

In reaching the TCB eye-tracking distraction suggestions herein, the thesis is assisted by the comparative legal cross-disciplinary research in a variety of areas, from legal cross-disciplinary subjects to cross-disciplinary legal-empirical research. Examples of both are referred to. Criminology is one example, as is legal-psychology. Eye-tracking is used in a large variety of different areas and these are referred to.

Specific details of how eye-tracking can be used for TCB distraction-effects research is considered. In addition, the thesis outlines the details of an eye-tracking proof-of-concept demonstration in an Irish criminal courtroom. Like other TCB legal research, it encompasses ‘aspects of socio-legal studies’<sup>120</sup> by necessity. As is pointed out in the thesis, the best and normative TCB effects-research should be cross-disciplinary.

The research proceeds by identifying the US Supreme Court distraction-effects concerns; exploring and considering the problems with the current research; and suggesting valuable research avenues in relation to TCB distraction-effects, in particular via eye-tracking. By incorporating eye-tracking into TCB research we can hope to proceed to a better and more informed understanding of the distraction-effects issues and hopefully our legal-policy considerations may learn from this. We need to strive for optimum research of these important issues and concerns, given the important legal and rights issues at stake. This is important for courts, judges and legal-policymakers.

The thesis proceeds by proposing, for the first time, the important and significant question as to what TCB is. Only by answering this question; arriving at a definition of TCB; and by defining and scoping its baseline and parameters, are we better informed to proceed to address and conceptualise TCB effects-research. By doing this, we can help to address the TCB concerns including US Supreme Court effects-research challenge. The research, therefore, proceeds with a definition for TCB, which is new; identifying the US Supreme

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<sup>120</sup> *ibid* 10.

Court challenge; identifying and offering categorisation of TCB forms; examining and suggesting valuable research avenues in relation to providing substance to those various arguments, in particular, distraction-effects of eye-tracking. The author also undertakes a proof-of-concept demonstration of eye-tracking technology for in-court distraction-effects research caused by TCB cameras and or TCB camera operators in the courtroom. Eye-tracking also offers opportunities to open up broader research of TCB issues than just the in-court participant effects. In addition, the author also undertook the first representative public survey in Ireland regarding public attitudes to TCB. The author undertook a repeat of his seminal judicial study on TCB issues with the Irish judiciary. The original questionnaire was described as ‘the only study conducted with regard to the topic in Ireland.’<sup>121</sup> The present research builds upon this. The addition of outline models for advancing TCB eye-tracking research adds a further advancement and contribution to the literature. The thesis also incorporates a contemporary comparison of the prevalence of TCB and related issues incorporating many international jurisdictions.

Court proceedings can be made available on the internet, which has occurred in some instances. Again, this can be live or recorded. Internet courtroom broadcasting can be referred to as iTCB. This can also be described and differentiated from TCB as it is a ‘pull’ facility. The public audience can search and look up whatever iTCB they wish (as long as it is uploaded to the internet by, for example, the court service). It is more ‘user’ friendly than TCB which is ‘pushed’ by television broadcasters to the pre-selected audience(s) or pre-selected audience scheduling slots. It can remain available afterwards, unlike most TCB. This issue is new and developing. There is little research available as yet to ascertain the effects and particular issues of iTCB. This is partly reflected in the *Hollingsworth* decision.

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<sup>121</sup> P Newenham, *Televising the Courts: An Exploration of Opinions of Irish Media and Legal Professions* (Masters in Journalism, DCU 2008) 35.



## CHAPTER 2: UK, BACKGROUND AND CONTEXT

### **Introduction**

The ambition of the thesis to contribute to consider and to help determine what counts as relevant ‘evidence’ for the purpose of assessing TCB argument and TCB effects and ultimately how researchers should go about seeking such evidence.

The US Supreme Court effects-research concerns and challenge, and how we go about addressing this challenge, are significant issues for any consideration of TCB. They are relevant in the US as well as elsewhere. In addition, it is relevant to seek better evidence than mere opinion and to advance our understanding policymaking. This is further emphasised by the concerns raised by the Lord Chief Justice on foot of recent TCB examples.

It is also useful, if not necessary, to consider the discussion around and introduction of a limited form of TCB in the UK as this is a new development, but also because there is no significant effects-research in the UK. Also, there is no dedicated baseline research to measure later effect changes and issues. A significant area of evidence is not available heretofore for courts and legal-policymakers. The UK TCB discussion has not considered to the US Supreme Court effects-research challenge.

### **Backdrop**

TCB remains controversial – even in the US. It is also very much a contemporary issue of debate. The TCB playing field in the US is also far from even. It is useful, if not necessary, to make some reference to the US, given that so much TCB occurs there. However, it is also useful to note that even in the US, the US Supreme Court effects-research challenge is ignored. Significant new and ongoing research is required. Having said that, it is insightful to look at what else is happening at the moment in the US and UK. It will, therefore, assist in emphasising the importance of addressing the US Supreme Court research challenge with future research, both for the US courts and judges and those elsewhere, and as a relevant backdrop to consider developments in the UK (as well as Ireland and other jurisdictions).

There have been many attempts to expand TCB to US Federal courts. An initial pilot programme in the US Federal courts was discontinued in 1994, partly because only brief in-court snippets were used on television. However, a second Federal pilot programme has been commenced. The legislative attempts to expand TCB to the US Supreme Court

also continue. In addition, the US Supreme Court was also called upon to deal with a CB case. The court in *Hollingsworth*<sup>1</sup> effectively prevented the form of TCB being proposed. It also referred again to the issue of the lack of sufficient empirical research. The US Supreme Court concerns and challenge remains. Yet, the Supreme Court challenge for a sustained body of legal-empirical effects-research has not been properly addressed. This challenge occurred in the seminal cases of *Estes*<sup>2</sup>, *Chandler*<sup>3</sup> and more recently in *Hollingsworth*.<sup>4</sup> More recently still, the US Supreme Court is reported as refusing to televise a particular case. More recently still, the Lord Chief Justice has halted the expansion of TCB in England and Wales due to the fact that he is ‘troubled’ by aspects of the *Pistorius* case.<sup>5</sup> He has called for a ‘proper, evidence-based assessment about’ UK and other jurisdictions’ TCB endeavours.<sup>6</sup>

### The UK Context

The most recent development in the UK is the introduction of TCB in the recently created UK Supreme Court and expansion in the Crime and Courts Act 2013. TCB previously only occurring in limited once off instances in the UK (England and Wales). There was and is no regularly permitted TCB. Neither is there any extended pilot study with TCB. The general rule in the UK remains that TCB is not permitted (see below). Given the general prohibition and some discussion and debate on the issue,<sup>7</sup> the UK Supreme Court TCB development was arguably somewhat surprising. Until the introduction of TCB in the new UK Supreme Court, it was not at all clear that TCB would be introduced in the UK. It was equally unclear what form any such broadcasting would take. One of the more surprising suggestions was to try and broadcast UK cases in the US before introducing them to UK audiences.<sup>8</sup> Following TCB cameras being permitted in the new

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<sup>1</sup> *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 19 January 2014.

<sup>2</sup> *Estes v Texas* 381 US [1964] 532.

<sup>3</sup> *Chandler v Florida* 449 US [1981] 560.

<sup>4</sup> *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 19 January 2014.

<sup>5</sup> F Gibb, ‘Britain Rethinks Cameras in Court’ *Times* (London, 16 May 2014).

<sup>6</sup> *ibid.*

<sup>7</sup> For example, ‘Television on Trial’ *Economist* (London, 19 December 1998); J Pritchard, ‘Should Cameras be Allowed in the Courtroom?’ (January – February 1992) *Legal Business* 3; J Pritchard, ‘Televising the Courts: Some Second Thoughts’ (May 1995) *Legal Business* 11.

<sup>8</sup> See R Verkaik, ‘Cameras Cross the Atlantic: The USA’s Trial Broadcasters Are Making A Pitch to Televise UK Hearings’ (17 May 1995) *Gazette* 14, referring to a Tru TV (then Court TV) proposal.

UK Supreme Court, there were calls by Sky TV to expand this further.<sup>9</sup> The issues and background to TCB issues in the UK are examined below.

### **The UK Legal Backdrop**

The legal background is the Criminal Justice Act 1925. It prohibits TCB. Section 41 Criminal Justice Act 1925 prohibits the taking of photographs or the making of sketched in or around the court as well as the publishing of such photographs or sketches.<sup>10</sup> This is interpreted as including cinematic and television filming.<sup>11</sup> This is still the current legal position<sup>12</sup> in the UK, notwithstanding the separate position as regards the recent Supreme Court TCB and references to the Court of Appeal in the Crime and Courts Act 2013.

Section 41 of the Criminal Justice Act 1925 is entitled ‘Prohibition on taking photographs, etc, in court.’ It states that no person shall ‘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.’ Section 20 of the Criminal Justice (Northern Ireland) Act 1945 also applies similar restriction in Northern Ireland in relation to prohibiting photography and sketching.<sup>13</sup> Section 9 of the Contempt of Court Act 1981 refers to ‘Use of tape recorders.’ It states that it is a contempt of court ‘to use in court, or bring into court for use, any tape recorder or other instrument for recording sound, except with the leave of the court.’

### **UK Caplan Report**

The Televising the Courts: Report of a Working Party of the Public Affairs Committee of the General Council of the Bar [of England and Wales] in 1989,<sup>14</sup> or Caplan report as it has become known, is often seen as one of the main UK discussions documents and recommendations in the UK on the issue of TCB. The authors of the report travelled to the US for a fact find. However, B McConnell notes that they only travelled to two US

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<sup>9</sup> A Laughlin, ‘Sky News Calls for Courtroom TV Cameras’ (6 December 2010) Digital Spy accessed 18 January 2010.

<sup>10</sup> Department of Constitutional Affairs [UK], *Broadcasting Courts, Consultation Paper* (DCA CP 28/04 - November 2004) 13.

<sup>11</sup> *ibid*, referring to *Re Barber v Lloyds Underwriters* [1987] 1 QB 103, 105; and *R v Loveridge, Lee and Loveridge* [2001] 2 Cr App Rep 29, CA.

<sup>12</sup> M Dockray raises the issue of whether the state and judiciary bound by the Section 41 restrictions. See M Dockray, ‘Cameras at the Door of the Court’ (1990) 20 *New Law Journal* 548.

<sup>13</sup> Department of Constitutional Affairs [UK], *Broadcasting Courts, Consultation Paper* (DCA CP 28/04 November 2004) 13.

states.<sup>15</sup> It recommends TCB pilots in the UK.<sup>16</sup> Recommendations 7.1 (i) and 7.1 (iii) recommends an Advisory Committee to include psychologists.<sup>17</sup> It does not appear that this implicit recommendation toward legal-empirical research was ever advanced in the UK. Recommendation 7.1 (iv) recommends that the Advisory Committee ‘devise and monitor pilot projects involving research and the actual broadcasting of civil and criminal trials and of appellate proceedings.’<sup>18</sup> Baseline research considerations remain absent.

J Caplan is quoted as saying that ‘[i]t is surprising that [TCB] has not been examined before.’<sup>19</sup> One of the other authors, M Kalisher QC, is also reported as agreeing that defendants would suffer from more publicity.<sup>20</sup> The third author, A Speaight, refers positively to the New York study.<sup>21</sup> However, the New York study referred to was subsequently discontinued. B McConnell also separately criticises some of the evidence which the report ignores or fails to find, such as cheque book journalism and TCB in the Steinberg case.<sup>22</sup> This also became an issue in the *Simpson* (criminal) case. A Logan, the solicitor who represented the Guildford Four and Maguires, refers to his visit to the US where he found that judges did not want TCB.<sup>23</sup> B McConnell notes that the judge in the Steinberg case did not prohibit the jurors from watching television reports of the ongoing case.<sup>24</sup> B McConnell states that ‘American justice is not British justice.’<sup>25</sup> He refers also to elected officials, pre-trial prosecution media statements, and media statements made by both sides during the course of US trials.<sup>26</sup> Unfortunately, the Caplan Report has not recommended any effects baseline and effects-research be carried out before any actual pilot filming and or pilot broadcasting.

The Caplan report without discussing or referring to any effects issues or any effects-research, states that in the US ‘the anticipated risks remained, capable of being controlled.’<sup>27</sup> It later acknowledges that it is ‘not aware of any clear empirical evidence

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<sup>14</sup> J Caplan, M Kalisher and A Speaight, *Televising the Courts: Report of a Working Party of the Public Affairs Committee of the General Council of the Bar* [of England and Wales] (Bar Council of England and Wales 1989).

<sup>15</sup> B McConnell, ‘Cameras in Court’ (1990) 16 *New Law Journal* 1622.

<sup>16</sup> *ibid* 50.

<sup>17</sup> *ibid*. The next recommendation is arguably unclear.

<sup>18</sup> *ibid*.

<sup>19</sup> ‘Bar Recommends TV in Courts’ (26 May 1989) *New Law Journal* 706.

<sup>20</sup> *ibid*.

<sup>21</sup> *ibid*.

<sup>22</sup> B McConnell, ‘Cameras in Court’ (16 November 1990) *New Law Journal* 1622.

<sup>23</sup> Referred to in R Verkaik, above 14.

<sup>24</sup> B McConnell, above 1622.

<sup>25</sup> *ibid*.

<sup>26</sup> *ibid*.

<sup>27</sup> J Caplan, M Kalisher and A Speaight, above 26.

which demonstrates the educative value of televising the courts, but that is not perhaps surprising since it might be thought logically to follow.<sup>28</sup> No TCB education-effects research is referred to. It is not explained why education-effects should ‘logically ... follow.’<sup>29</sup> While there are greater nuances to the educational TCB question, the eye-tracking research referred to in the thesis, some broader research avenues also open up, for example in relation out-of-court issues, the audience and the educational TCB question.<sup>30</sup> Overall, there is no body of legal-empirical research in favour of the education argument. The Caplan report does not back up the education argument with successful research or references to same. It does not advance beyond references to mere opinion. It does not refer to a sustained body of repeated research evidence.

The report is emphatic in stating that ‘intrusion and disruption can be *entirely* eliminated’ (emphasis added).<sup>31</sup> This seems somewhat sweeping – especially given the point that the report has not referred to any legal-empirical effects-research to this stage. The report does refer to the apparent self-reports and opinion-reports in *In re Florida in Post-Newsweek*.<sup>32</sup> The Florida Supreme Court is referred to as stating that there was ‘absolutely no adverse effect upon the participants’ performance or the decorum of the proceedings.’<sup>33</sup> However, this is not based upon any legal-empirical effects-research, and rather relies upon opinion-reports and self-reports. The Supreme Court of Florida does also add, however, that the concerns ‘are but assumptions unsupported by any evidence. No respondent has been able to point to any instance during the pilot programme period where these fears were sustained. Such evidence as exists would appear to refute the assumptions. The survey reflects that the assumed influences upon participants during the experimental period were perceived to vary in degree from not at all to slightly.’<sup>34</sup> This points to the possibility of graduated-effects. However, the important point is that

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<sup>28</sup> *ibid* para 4.2 at 28.

<sup>29</sup> *ibid*.

<sup>30</sup> The report does refer to one UK study which the report states found that respondents ‘claimed to have learned from what they saw,’ *ibid* 28, referring to a study by Dr Mallory Wober of the Independent Broadcasting Authority who carried out a viewers survey in relation to an apparent non-court case programme called ‘Case on Camera.’ JM Wober, *Case on Camera: An Audience Verdict* (IBA Research Department February 1986). J Caplan et al, above 28. However, it is unclear what research was undertaken or how applicable it is to TCB effect issues. Indeed the exact numbers of ‘educated’ respondents is not clear. Caplan refer to five hundred viewers being surveyed, one fifth having seen the programme [ie exactly 100], and that ‘those who had seen five or more episodes [no number given]’ claimed an educative effect, *ibid* 28.

<sup>31</sup> *ibid* 29.

<sup>32</sup> *ibid* 31–32, referring to *In re Post-Newsweek Stations* 370 Southern Reporter 2nd Series 766.

<sup>33</sup> *ibid* 32, referring to *In re Post-Newsweek Stations* 766, 769.

<sup>34</sup> *ibid* 32, referring to *In re Post-Newsweek Stations* 766, 775-776.

no body of legal-empirical research is relied upon or outlined. Again, opinions and similar problem evidence is referred to.

The Caplan report refers to a two year study in Massachusetts which was positive but relied upon ‘survey data.’<sup>35</sup> Caplan then refers to the California research, presumably the Short report.<sup>36</sup> Caplan states that the result of this ‘survey demonstrated yet again that the feared adverse effects did not occur. In particular, there was no evidence that the witnesses became more nervous, or that they became less responsive or decisive, when filmed.’<sup>37</sup> However, the legal-empirical research techniques now available were not previously used.

The J Hoyt research appears to be referred to in a footnote on page 33.<sup>38</sup> Caplan refers to a case in New York, but without naming or referencing it, where a witness refused to testify because of TCB cameras.<sup>39</sup> (This is reminiscent of the *Pistorius*<sup>40</sup> case). The Caplan report states that it reviewed ‘hundreds’ of surveys and reports - but only refers to Short and Hoyt as (legal-empirical) effects-research.<sup>41</sup> It states that it only finds one adverse study. It was ‘a report in 1979 of an ad hoc committee of the Bar Association of Greater Cleveland, and we did not find it impressive. It did not state the questions asked in the questionnaires distributed. It did not fully analyse the responses. It was based on only three trials and the participants were very small in number. Yet it claimed ‘a chilling psychological effect’ on all participants, including judges and lawyers.’<sup>42</sup> The report is not referenced or cited in the Caplan report. However, subsequently this is tempered to an ‘absence of adverse conclusions.’<sup>43</sup> While the Caplan report favours TCB, it has been describe as ‘cautious’ in the level of such [TCB] broadcasting to be permitted.<sup>44</sup> Subsequent, and possibly as a result of the Caplan report, a private members Bill was

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<sup>35</sup> ibid 32, referring to *Report of the Advisory Committee to Oversee the Experimental Use of Cameras and Recording Equipment in Courtrooms*, indicated as being available from the National Centre of the State Courts, Williamsburg, Virginia.

<sup>36</sup> ibid 32, the reference given is *Evaluation of California’s Experiment with Extended Media Coverage (1981)*, and available from the National Centre for State Courts.

<sup>37</sup> ibid 32.

<sup>38</sup> ibid 33, referring to J Hoyt, ‘Courtroom Coverage: The Effects of Being Televised’ (1977) 21 *Journal of Broadcasting* 487.

<sup>39</sup> ibid 33.

<sup>40</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>41</sup> ibid 34.

<sup>42</sup> ibid 34.

<sup>43</sup> ibid 34.

<sup>44</sup> D Stepniak, *Audio-Visual Coverage of Courts* (Cambridge University Press 2008) 14.

introduced. This was the Courts (Research) Bill 1991. The bill was not successful however.<sup>45</sup>

### England and Wales Pilot

There appears to have been a TCB study in England and Wales<sup>46</sup> which occurred on or about 16 November 2004.<sup>47</sup> The footage was not broadcast.<sup>48</sup> It appears that the in-court effects-research consisted of questionnaires and no legal-empirical research.<sup>49</sup> The then Lord Chancellor, Lord Falconer, announced at the Edinburgh Television Festival on 29 August 2004 that the Court of Appeal would allow TCB cameras on a demonstration basis.<sup>50</sup> The footage was for internal judicial consideration only.<sup>51</sup> The study used small remote controlled cameras and focused only on judges and counsel only, and apparently with consent required.<sup>52</sup> It is understood that the judges evaluating the project were to be shown mock broadcasts with the in-court footage and ‘traditional’ broadcasts without the footage.<sup>53</sup> A separate report indicates that the pilot lasted six weeks.<sup>54</sup> It is difficult to obtain or find further details. However, such an in-house exercise is also to be welcomed, but as part of an overall planned legal-empirical research effort.

### Broadcasting Courts Consultation Paper 2005

The Department of Constitutional Affairs launched a consultation entitled *Broadcasting Courts*<sup>55</sup> in November 2004.<sup>56</sup> The consultation period closed on 28 February 2005.<sup>57</sup>

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<sup>45</sup> Department of Constitutional Affairs [UK], *Broadcasting Courts, Consultation Paper* (DCA CP 28/04 November 2004) 15. Also M McKeone, ‘Defeat for TV Courts Bill’ (1991) *Law Society Gazette* 88. The McKeone article notes the understanding that Lord Lane opposes TCB while Lord Taylor appears to support TCB, *ibid*. Sir Thomas Bingham, Master of the Rolls, is also reported as having favoured a TCB experiment. Referred to in ‘The Thoughts of Sir Thomas’ (1994) 144 *New Law Journal* 593.

<sup>46</sup> D Stepniak, *Audio-Visual Coverage of Courts* (Cambridge University Press 2008) 60; n 280 at 60; 61; and 56 ff. Also referred to in *Pros and Cons of Courtroom Cameras Set Out* (15 November 2004) < [www.number10.gov.uk/Page6578](http://www.number10.gov.uk/Page6578) > accessed 2 March 2010.

<sup>47</sup> Also referred to in *Pros and Cons of Courtroom Cameras Set Out* (15 November 2004) < [www.number10.gov.uk/Page6578](http://www.number10.gov.uk/Page6578) > accessed 2 March 2010.

<sup>48</sup> D Stepniak, above 60; n 280 at 60; 61; and 56 ff. See also Department of Constitutional Affairs, *Broadcasting Courts, Consultation Paper* (DCA CP 28/0 November 2004) 19-20.

<sup>49</sup> *ibid* 60; n 280 at 60; 61; and 56 ff.

<sup>50</sup> J Morton, ‘Court TV – the Cameras Are Switched on Again’ (2004) 68 *Criminal Law Legislation Update* 451–453.

<sup>51</sup> *ibid* 451.

<sup>52</sup> Grania Langdon-Down, ‘Lights, Cameras, Law’ [30 September 2004] *Law Society Gazette*, < [www.lawgazette.co.uk](http://www.lawgazette.co.uk) > accessed 24 October 2010.

<sup>53</sup> *ibid*.

<sup>54</sup> ‘Why Right to Switch Off Camera Is Central to Granting Court TV’ (LexisNexis News Analysis 2005) but no date given, < [www.lexisnexis.com.elib.tcd.ie/uk/legal/delivery/PrintDoc.do?fromCart=false&dnl...](http://www.lexisnexis.com.elib.tcd.ie/uk/legal/delivery/PrintDoc.do?fromCart=false&dnl...) > accessed 9 May 2009.

<sup>55</sup> Department of Constitutional Affairs [UK], *Broadcasting Courts, Consultation Paper* (DCA CP 28/04 November 2004).

The consultation was unusual. It was not a report, contained ‘no proposals<sup>58</sup> or possible changes. The consultation consists mainly of a seminar (on 10 January 2005) and an online questionnaire.<sup>59</sup> The Lord Chancellor while launching a ‘consultation paper’<sup>60</sup> on 15 November 2004, indicates that there would be no changes adversely affecting victims, witnesses or jurors.<sup>61</sup> While he acknowledges attitudes had changed since the restriction introduced in Section 41 of the Criminal Justice Act 1925, and calling for a public debate, he states that we ‘have to make sure that any such step would *benefit justice, not burden justice*’<sup>62</sup> (emphasis added). There is therefore a need for legal-empirical baseline and pilot research to examine positive and negative effect issues. This has not occurred. The CJA prohibits the taking of photographs in or around the court. In addition, the Lord Falconer states, ‘[n]o change to make our courts more open and accessible should worsen or jeopardise in *any* way the position of witness and victims or make witnesses reluctant to appear’<sup>63</sup> (emphasis added). Lord Falconer also states that he could ‘see no case for televising cases involving children and I think we will need to consider very carefully the question of broadcasting criminal trials.’<sup>64</sup> He also states that he was ‘concerned at overseas research showing that people believe that if their evidence might be televised that would reduce the likelihood of their coming forward as a witness.’<sup>65</sup> The *Pistorius*<sup>66</sup> case is also relevant in this regard. He concludes that ‘[j]ustice should be seen to be done. But our priority must be that justice is done.’<sup>67</sup>

The executive summary refers to the argument of beneficial TCB education-effects and increased ‘confidence in the judicial system.’<sup>68</sup> It also refers to the ‘needs of participants’ especially ‘those most likely to be vulnerable.’<sup>69</sup> ‘If permitting broadcasting was likely to have an impact on people’s willingness to take part in proceedings, or to make participation even more of an ordeal, there would need to be very strong arguments in its

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<sup>56</sup> See < [www.dca.gov.uk/consult/courts/broadcasting-cp28-04.htm](http://www.dca.gov.uk/consult/courts/broadcasting-cp28-04.htm) > accessed 14 December 2009.

<sup>57</sup> *ibid.* Note generally, ‘Cameras May be Allowed in Court: But Safeguards Will Remain’ *Daily Post* (8 February 2005). Also, for example, R Rothwell, ‘Lights, Camera, Court’ [2004] 18 *Law Society Gazette* 5.

<sup>58</sup> *ibid.*

<sup>59</sup> *ibid.*

<sup>60</sup> See summary at < [www.number10.gov.uk/Page6578](http://www.number10.gov.uk/Page6578) > accessed 2 March 2010.

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.*

<sup>63</sup> *ibid.*

<sup>64</sup> Department of Constitutional Affairs, *Broadcasting Courts, Consultation Paper* (DCA CP 28/04 November 2004) 5.

<sup>65</sup> *ibid.*

<sup>66</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>67</sup> Department of Constitutional Affairs, *Broadcasting Courts, Consultation Paper* (DCA CP 28/04 November 2004) 5.

<sup>68</sup> *ibid* para 2 at 6.



favour.<sup>70</sup> No UK legal-empirical effects-research or baseline research is suggested<sup>71</sup> or has sought to adequately research these issues.

The consultation paper notes that ‘the Government are particularly concerned with the role of witnesses ... the potential impact of [TCB] is one of the most important considerations ... and the one which argues most strongly against permitting [TCB] of first instance trials.’<sup>72</sup> ‘[P]otential witnesses may refuse to appear if they know that their testimony is going to be broadcast, which could lead to delays, cracked trials, or miscarriages of justice.’<sup>73</sup> Again, legal-empirical research would assist courts and legal-policymakers in assessing evidence of these important issues.

The consultation document recognises there were potential in-court effects and out-of-court effects.<sup>74</sup> It also recognises that depending on the [TCB] techniques adopted, participants could feel under greater ‘scrutiny.’<sup>75</sup> The graduated-effects of different TCB forms is seldom considered, nor researched. In addition, ‘[t]here are often difficulties in persuading people to testify, for example if they fear intimidation, ... a case being broadcast would be a further obstacle.’<sup>76</sup>

Indeed, it does refer to the professional public opinion poll undertaken as part of the New York study. The consultation paper raises concerns with the findings. The New York public survey ‘indicates that people may be deterred from acting as witnesses by the presence of cameras ... fifty four percent of those surveyed said they would be less willing to testify if cameras were present.’<sup>77</sup> It also refers to New Zealand, where ‘fifty eight percent of respondents in a representative sample of adults said that cameras would have an impact on their willingness to appear as a witness in a criminal trial.’<sup>78</sup> Even where

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<sup>69</sup> ibid para 5 at 6.

<sup>70</sup> ibid.

<sup>71</sup> The highest UK appeal court, by virtue of also being attached to parliament, was televised similar to parliament, ibid para 12 at 15. Clause 37 of the Constitutional Reform Bill proposed amendment to the restriction in Section 41 of the Criminal Justice Act 1925 by adding the carveout of ‘apart from the [new] Supreme Court’ replacing the House of Lords as the final appeal court, ibid paras 13 and 14, at 15.

<sup>72</sup> ibid, para 10 at 44.

<sup>73</sup> ibid para 11 at 45.

<sup>74</sup> Department of Constitutional Affairs, *Broadcasting Courts, Consultation Paper* (DCA CP 28/04 November 2004) para 1 at 43.

<sup>75</sup> ibid para 2 at 43.

<sup>76</sup> ibid para 11 at 45. Indeed, there have been some ‘gangland’ type cases in Ireland where this appears to have been an issue.

<sup>77</sup> ibid para 12 at 45, referring to the Cameras in New York Courtrooms, and the Marxist Institute for Public Opinion Poll (December 1996) contained therein.

<sup>78</sup> ibid para 12 at 45, referring to *UMR Insight Limited, Media Coverage of Court Proceedings: A Summary Report* (February 1998).

witnesses were not discouraged, ‘testifying can be a nerve-racking experience, which the presence of recording equipment could compound. Eighty seven percent of trial and appellate judges surveyed in California reported that witnesses were more nervous or self-conscious when giving testimony before cameras.’<sup>79</sup> The consultation paper also refers to the decision in the Shipman Inquiry decided against TCB cameras based on the additional effect it would have on witnesses.<sup>80</sup>

While the New York study was opinion-report, self-report and questionnaire based, the consultation paper refers to the finding which it finds ‘disturbing’ that ‘thirty seven percent of these [351] judges said that television coverage causes judges to render ruling they otherwise might not issue.’<sup>81</sup> The consultation report does refer to the content analysis undertaken for the Federal study, which found that on average TCB footage examined made up fifty six seconds of the television story.<sup>82</sup> Annex E of the consultation paper refers to other jurisdictions and research.<sup>83</sup> However, most of the references refer to ‘opinion’ reports only.<sup>84</sup> However, research is referred to in New Zealand where a ‘case-by-case evaluation found that most judges were distracted by cameras.’<sup>85</sup> There is a consistent concern as to the adverse witness effects of TCB. This requires further normative evidentially focused research, notwithstanding witness concerns in *Pistorious* and the UK.

## **Broadcasting the Courts Response to Consultation**

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<sup>79</sup> ibid para 13 at 45, referring to *Report Summary of the California Judicial Task Force on Photographing, Recording and Broadcasting in the Courtroom*.

<sup>80</sup> ibid para 14 at 45–46, referring to Decision on Application by Cable News Network (CNN 25 October 2001). The consultation paper also refers to Lord Irvine of Lairg, the then Lord Chancellor, who commented after the Woodward case in the US that there ‘is a serious risk that witnesses might be influenced in the evidence they give, or find undue pressure being placed on themselves or their families as a consequence of live coverage.’ In ‘Reporting the Courts: The Media’s Rights and Responsibilities’ (4th RTE/UCD Media Lecture, University College Dublin 14 April 1999).

<sup>81</sup> ibid para 28 at 49, referring to New York State Committee to Review Audio-Visual Coverage of Court Proceedings.

<sup>82</sup> ibid para 27 at 61, referring to quote of same contained in the New York study (1997).

<sup>83</sup> ibid 100.

<sup>84</sup> ibid 100 ff. This includes the Federal study, the California Task Force report, the New York report in 1996 and Canada, ibid.

<sup>85</sup> ibid 109, referring to UMR Insight Ltd, *Media Coverage of Court Proceedings: Summary Report*, (February, 1998) and *The Impact of Television, Radio and still Photography on Coverage of Court Proceedings – Final Report, A Report Prepared for the Department of Courts by a research team from the Department of Human Management, Massey University* (April 1998). This is the New Zealand research.

The responses to the Consultation Paper were compiled and released on 30 June 2005.<sup>86</sup> Again it is noted that the Consultation paper ‘made no proposals but sought views on the complex and sensitive issues around [TCB].’<sup>87</sup> Again it is noted that there are potentially different forms, including reference to different courts, proceedings and stages of this proceedings.<sup>88</sup> There was a seminar and a website forum used as part of the consultation. However, all of the responses were opinions and responses to a questionnaire and or free comment. ‘[S]upport for widespread broadcasting is limited, and that there is grave concern about the potential impact on participants, especially witnesses and jurors, and on the trial process.’<sup>89</sup> There is no reference to legal-empirical effects-research. Again, there is a strong concern in relation to witness effect issues.

### **UK Privy Council**

It is reported that the Judicial Committee of the Privy Council Pitcairn appeal hearing was videotaped and sent to the islanders, but only to be seen by them.<sup>90</sup> Technically, this is not public TCB.

### **UK Supreme Court**

The UK Supreme Court, taking over from the House of Lords judicial appeal function. TCB is prohibited in England and Wales. In order to (create the Supreme Court and) introduce TCB, the Criminal Justice Act 1925 needed to be amended. The Constitutional Reform Bill introduces a Clause 37 to maintain the current status quo of the currently televised House of Lords/Supreme Court.<sup>91</sup> The section reads,

‘In section 41 of the Criminal Justice Act 1925 (c 86)(prohibition on taking photographs etc. In court), for subsection (2)(a) substitute –

“(a) the expression ‘court’ means any court of justice (including the court of a coroner), apart from the Supreme Court.”’

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<sup>86</sup> *Department of Constitutional Affairs, Broadcasting Courts, Response to Consultation (CP(R) 28/04 30 June 2005), Response to Consultation Carried Out by the Department for Constitutional Affairs.* 259 responses were made in total, see 7.

<sup>87</sup> *ibid* para 1 at 4. Interestingly, one of the consultation criteria was to be clear on the proposals, see parag 2 at 44.

<sup>88</sup> *ibid* para 6 at 5.

<sup>89</sup> *ibid* para 1 at 42.

<sup>90</sup> J Rozenberg, ‘Sending the Right Message’ (2008) 25 Law Society Gazette 8.

<sup>91</sup> Department of Constitutional Affairs [UK], *Broadcasting Courts, Consultation Paper (CP 28/04 November 2004)* 15.

This clause is 'simply to replicate the existing arrangements. It is not an indication of a Government position on the wider issue of courts broadcasting considered.'<sup>92</sup> The new UK Supreme Court was eventually established by the Constitutional Reform Act 2005.<sup>93</sup> The UK Supreme Court has three courtrooms, each with four fixed cameras.<sup>94</sup> J Rozenberg, however, refers to there being two UK Supreme Court courtroom.<sup>95</sup> The UK Supreme Court opened in October 2009.<sup>96</sup>

However, the UK Lord Chief Justice is reported to being concerned with particular aspects of the *Pistorius* case and its potential wider implications, on foot of which he has halted the expansion of UK TCB, commissioned a report and also called for a 'proper, evidence based assessment' of TCB.<sup>97</sup>

### Discussion

The form and effects of UK TCB are valid research issues. There is a constant concern regarding witness issues. Even judicial effect issues remain a valid issue for research. More normative evidence from contemporary legal-empirical research methods is required. The General Counsel for Tru TV when speaking about previous discussion about TCB in the UK in 2004, said that if they got permission to film they 'would be delighted to show interesting cases.'<sup>98</sup> The criteria of Tru TV for filming a case is that there is 'something unique.'<sup>99</sup> The Tru TV editors make a decision as to what is 'newsworthy.'<sup>100</sup> J Morton feels that the public will not be interested in normal cases, which can be mundane and will rather be interested only in 'the English equivalent of the OJ Simpson trial.'<sup>101</sup> There will also be only a 'market' for 'major trials.'<sup>102</sup> He also notes that most cases are 'incomprehensible without a commentator.'<sup>103</sup> A Speaight, a barrister, argues in favour of TCB broadcasting, but without referring to forms or research

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<sup>92</sup> *ibid* 15.

<sup>93</sup> M White, 'New Supreme Court Puts Cases On Camera, British Legal History Has Been Made With the New Supreme Court Taking Over from the House of Lords as the Highest Court in the Land' (Sky 1 October 2009) < <http://news.sky.com> > accessed 16 November 2009.

<sup>94</sup> Details at Chancery Bar Association < [www.chba.org.uk/news/?a=79844](http://www.chba.org.uk/news/?a=79844) > accessed 2 March 2010.

<sup>95</sup> J Rozenberg, 'Sending the Right Message' (2008) 25 Law Society Gazette 8.

<sup>96</sup> 'TV Cameras To Capture New Era For Law Lords' (TimesOnline) < <http://business.timesonline.co.uk/tol/business/law/article6827863.ece> > accessed 13 December 2009. 'UK Supreme Court's Ahead of its American Cousin,' 23 October 2009, < [www.star-telegram.com/242/story/1707301.html](http://www.star-telegram.com/242/story/1707301.html) > accessed 16 November 2009.

<sup>97</sup> F Gibb, 'Britain Rethinks Cameras in Court' *Times* (London, 16 May 2014).

<sup>98</sup> Referred to in G Langdon-Down, 'Cameras In Court: American Lawyers Switch On To Living Life Through A Lens' (30 September 2004) Law Society Gazette 24.

<sup>99</sup> *ibid*.

<sup>100</sup> *ibid*.

<sup>101</sup> J Morton, above 451.

<sup>102</sup> *ibid* 452.

issues.<sup>104</sup> Others argue in favour of criminal case TCB, such as W Harbage QC.<sup>105</sup> Sir Hugh Laddie separately calls for webcam internet TCB<sup>106</sup> (iTCB). Barrister Helena Kennedy is concerned with the implications and effects of recent UK TCB.<sup>107</sup> It seems that official reports, while lacking much legal-empirical evidence, are consistent in raising concern issues.

Without knowing that TCB would later be permitted in the new UK Supreme Court, J Morton states that cases in the precursor to the UK Supreme Court (the House of Lords), would not grab attention, were incomprehensible to most and were a 'switch-off.'<sup>108</sup> Defendants are one of the seldom consulted, or researched, participants. J Morton notes that defendants appear not to have been consulted in the UK official discussion.<sup>109</sup> He also makes the same point in relation to the police.<sup>110</sup> This is particularly relevant as the police seldom feature in TCB research.

There have been calls after the UK Supreme Court development, to expand TCB to other courts. The DPP, interviewed on Channel 4 News, was positive towards TCB subject to appropriate safeguards.<sup>111</sup> M Stephens, a media solicitor, predicts TCB being introduced in stages, such as appellate courts, then civil cases and then finally criminal cases.<sup>112</sup> The Ministry of Justice (in 2009) is reported as saying the Ministers are not convinced of the case for TCB and that there are no plans currently to change current arrangements.<sup>113</sup> The Bar Council is again quoted as saying that the advantages of TCB outweigh the disadvantages and that TCB '*will enhance the public's understanding of and confidence in our legal system*'<sup>114</sup> (emphasis added). This aspect of legal-empirical research has not been advanced yet in the UK. CH Rolph comments that while educational TCB may be one of the stated intentions, this will not occur in practice as the media are more concerned with ratings and profit.<sup>115</sup> It would have been useful to have had a research

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<sup>103</sup> *ibid.*

<sup>104</sup> A Spreaigh, 'Let the Cameras In' (2001) 38 Law Society Gazette 16. See also 'Court TV Deterrent' (1988) 16 New Law Journal 906, referring to deterrent effects.

<sup>105</sup> W Harbage, QC, 'Camera in Court' (February 2005) Counsel 13.

<sup>106</sup> 'Management/IT: Court on Camera' (March 2007) Law Society Gazette 13.

<sup>107</sup> H Kennedy, 'Cameras in Court Are a Threat to Justice, A Veneer of Transparency Covers Up a Damaging Corporate Agenda Based on Voyeurism and Money' *Guardian* (London, 3 November 2013).

<sup>108</sup> J Morton, above.

<sup>109</sup> *ibid* 453.

<sup>110</sup> *ibid.*

<sup>111</sup> Referred to in C Baksi, 'News: Starmer Wades Into TV Trials Debate' (15 January 2009) Law Society Gazette 2.

<sup>112</sup> *ibid.*

<sup>113</sup> *ibid.*

<sup>114</sup> Referred to in CH Rolph, 'In Camera' (1990) 16 New Law Journal 382.

<sup>115</sup> *ibid.*

programme in place to examine these propositions before and during the TCB project in court baselines. It does not appear that the Bar Council countenances any such research nor the normative research possibilities available for gathering better evidence.

Issues not addressed include the issue of costs and such form of any TCB that may be developed or expanded beyond the UK Supreme Court. CH Rolph notes that ‘someone has to provide the apparatus, the know-how, and the hordes of technicians.’<sup>116</sup> This issue has not been discussed or considered. Neither is there any suggestion from the media that they are willing to cover the fit out, running costs or research costs of any of the possible forms of TCB that potentially could be introduced or expanded. Lord Hailsham is also referred to as being concerned about how the media would edit the courtroom footage.<sup>117</sup> M Dockray<sup>118</sup> refers to the basis for the original restriction in the Criminal Justice Act 1925, namely, distraction from the TCB cameras and TCB operators/photographers and to protect courtroom participants.

## **Conclusion**

The thesis highlights the conclusion (interim, at least) that while an ‘evidence-based assessment’ of TCB and TCB effect concerns is needed, and furthermore that no overall or extensive body of such empirical effects research is yet available, courts and legal-policymakers need better evidence than the mere problematic opinions of the past. Even currently in the UK, concerns are voiced in relation to witnesses effects and TCB. In the US concerns remain, as well as debate. The US Supreme Court challenge also awaits better evidence to be advanced to assist courts.

The then UK Lord Chancellor, Lord Falconer, when introducing the UK consultation states that ‘[c]ameras in the courtroom would be a big step. We have to make sure that any such step would benefit justice, not worsen it.’ Detailed reviews of the TCB literature and comparative literature is required. In addition, it is critical that legal-empirical research is properly planned and undertaken. The UK Lord Chief Justice as a direct result of some of the issues which arose in the *Pistorius* case, calls a halt to expanding UK TCB and expressly states that legal-empirical or ‘evidence-based [TCB]assessments’ are required.<sup>119</sup> The Irish case may have to consider such issues as

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<sup>116</sup> *ibid.*

<sup>117</sup> *ibid.*

<sup>118</sup> M Dockray, ‘Cameras at the Door of the Court’ (1990) 20 *New Law Journal* 548.

<sup>119</sup> F Gibb, ‘Britain Rethinks Cameras in Court’ *Times* (London, 16 May 2014).

whether a preferred a pre-enumerated judicial TCB access policy is preferable to individualised judicial access decisions without formal guidance; effect issues; the available legal-empirical research; the Irish judicial attitudes leaning against TCB generally; the suggestion that appropriate data and legal-empirical baseline research should be gathered before any particular TCB pilot experiment should be permitted; etc.

It is unfortunate that the UK did not avail of the opportunity to undertake and arrange for ongoing legal-empirical research once a decision was made to introduce TCB with the new UK Supreme Court. The debate in relation whether to expand TCB in the UK might consider the forms and effects of such broadcasting. It would help to make transparent proposals in relation to what legal-empirical research is being proposed as part of any such study and pilot.

There will undoubtedly be costs involved in researching, rolling out and running TCB. An issue sometimes arises as to who will cover these costs. This issue has yet to be properly discussed and researched, apart from one comment that this offers an opportunity for the media ‘funding’ the courts through charges.<sup>120</sup> Even before the current recession, there was acknowledgement that there was a lack of government funding for court and legal innovations.<sup>121</sup> While there have been calls to roll out court IT which is interactive and remote, such as conferencing, internet, Skype, etc, the focus of IT budgets appear aimed more at cost saving than service provision.<sup>122</sup> Sir Hugh Laddie, speaking to the Society of Computers and Law, states that the UK courts do not do IT well.<sup>123</sup> The Lord Chief Justice also refers to certain court, technology and effect issues recently,<sup>124</sup> as did the Chief Justice of Ireland also.<sup>125</sup> The concerns and issues as researched in the UK can also arise in Ireland.

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<sup>120</sup> ‘[H]as the Lord Chancellor not realized the potential for funding the courts by charging the media for the privilege of obtaining highly marketable footage’ ‘Reality Television’ (2003) *Criminal Law and Justice Weekly* 917.

<sup>121</sup> ‘Management/IT: Court on Camera’ (March 2007) *Law Society Gazette* 13. On court IT generally, note A Oskamp, A Lodder and M Apistola (eds), *IT Support of the Judiciary, Australia, Singaport, Venezuela, Norway, The Netherlands and Italy* (Asser Press 2004). Note also comments of Lord Justice Brooke in ‘Poor [IT] Technology “Lets Down” UK Courts’ *BBC News* (20 June 2002).

<sup>122</sup> *ibid*, referring to statements of Jeremy Barnett, Vice Chairman of the Bar Council IT Panel.

<sup>123</sup> R White, ‘Courts Web-Cam Call’ (2007) *10 Law Society Gazette* 4.

<sup>124</sup> Lord Chief Justice Lord Thomas, ‘IT for the Courts: Creating a Digital Future’ *Society of Computers and Law Annual Conference*, 20 May 2014.

<sup>125</sup> Chief Justice Susan Denham, ‘Media Freedom & the Rule of Law,’ speech to mark United Nations World Press Freedom Day delivered at National Union of Journalists - Seminar on Aspects & Challenges of Media Freedom, Four Courts, Dublin, 1 May 2014.

In relation to courtroom IT generally, there is an acknowledgement that little is known of the effects.<sup>126</sup> The TCB concerns demand better research, data and evidence gathering. As regards the form of TCB, if permitted, Professor J Barnett, advocates that the courts or court services undertake the filming and arrangements.<sup>127</sup> Research is needed to assess whether this trend is in fact increasing.

It is noted that the Caplan report recommends limited TCB with strict rules of coverage, and excludes certain types of proceeding and courtroom participants.<sup>128</sup> The UK Bar Council stresses that it is recommending an experimental period only.<sup>129</sup> A Law Society committee chairman also feels that an experiment may be the ‘best test.’<sup>130</sup> However, any study and test should be based on proper effects-research and effects-research data gathering methodologies. Without legal-empirical research, such evidence as would be available to courts and legal-policymakers would remain less than optimum. The research challenge thus remains – even in the UK. It is interesting that H Hodge, the above Law Society chairman, feels that TCB may well cause changes in how cases are conducted.<sup>131</sup> It is important to address the baseline effects-research issues before TBC is introduced to the courtroom at the same time as making proposals to permit TCB. This important aspect of the debate has been missed.

Discussions such as H Schleiff,<sup>132</sup> where he suggests that TCB in the US has increased public confidence in the justice system, but without referencing any research or statistics whatsoever, are less than helpful to courts and legal-policymakers. Clearly many effect issues arise. Each chapter deserves of an entire thesis in and of itself. In fact, even some of the issues referred to within particular chapters would be desirous of substantial thesis research. While this is true, the focus of this research remains strictly focused upon illuminating and advancing the importance of addressing the research effect-concerns and challenge. Without expanding our research and data gathering methods, our knowledge

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<sup>126</sup> See Court21 Project and home page description, < [www.court21.ac.uk/](http://www.court21.ac.uk/) > accessed 24 October 2010. The Court21 Project is now known as The Center for Legal and Court Technology < [www.legaltechcenter.net/default.aspx](http://www.legaltechcenter.net/default.aspx) > accessed 24 October 2010.

<sup>127</sup> Referred to in ‘Management/IT: Court on Camera’ (March 2007) Law Society Gazette 13. He also voices concern in relation to media editing, *ibid.* In relation to US courts and IT, see one case study, EC Pradao and LS Hyman, ‘Technological Advances in the Courtroom’ (2003) 8 Issues in Democracy: The Changing Face of US Courts 32.

<sup>128</sup> ‘Bar Paves Way for TV Courts’ (1990) Law Society Gazette 87.

<sup>129</sup> *ibid.*

<sup>130</sup> Referring to H Hodge, Chairman of the Law Society Council Courts and Legal service committee, see *ibid.*

<sup>131</sup> *ibid.*

<sup>132</sup> H Schleiff, ‘Cameras in Courts’ (2004) 154 New Law Journal 1745.



and legal-policy decisions regarding effects of TCB may remain limited. Normative legal-empirical research can inform our legal and legal-policy decisions better.

While the UK effects literature is limited, it at least highlights a focus on some of the effect concerns. We need to continue along the line pursuing a ‘proper, evidence-based assessment’ of UK, and other jurisdictions, TCB endeavours and to seek proper answers to the effects issues and concerns, as called for by the UK Lord Chief Justice.<sup>133</sup> This is required in the UK as well as other jurisdictions. It is also clear that this is a live issue and not one as yet having satisfactory evidence to base proper instant or long term assessments.

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<sup>133</sup> F Gibb, ‘Britain Rethinks Cameras in Court’ *Times* (London, 16 May 2014).



## CHAPTER 3: RECENT DEVELOPMENTS

### Introduction

The chapter will highlight some of the more recent developments in relation to the TCB literature and developments. It will also indicate that there is still little engagement with legal-empirical distraction-effects research. This applied equally to the US, UK, Ireland and elsewhere. It also applies to the recent development of iTCB. Notwithstanding, there has been a recent call for TCB in Ireland.<sup>1</sup> This emphasises the necessity of assessing the prior evidence and considering normative developments, in particular that which will enhance the reliable evidence from TCB effects-research.

### Recent Developments in US

The US Supreme Court effects-research concerns are still ignored. Significant ongoing research is required. It is insightful to look at what else is happening at the moment in the US. It will, therefore, assist in emphasising the importance of addressing the US Supreme Court research concerns given that there is currently no large research body of a legal-empirical research nature sufficient to address the concerns or establish positive and negative effects.

In addition, as has been referred to above, the US Supreme Court has recently been called upon to deal with a courtroom broadcasting case. The court in *Hollingsworth*<sup>2</sup> effectively prevented the form of TCB being proposed in advance. US Supreme Court comments also referred to the lack of sufficient legal-empirical research. The US Supreme Court challenge remains, as does the concerns.

It is interesting that the Recording Industry Association of America (RIAA) objected to TCB internet broadcasting of one of its cases via iTCB, fearing that the footage would be manipulated and edited by third parties after broadcast.<sup>3</sup> This concern can also arise with TCB via television. It would be useful to consider recording objection issues in the Federal and other pilots.

### Federal Court Location Issues

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<sup>1</sup> M Foley, 'Oscar Pistorius Trial Signals It's Time to Let Cameras into Irish Courtrooms' *Irish Times* (Dublin, 19 May 2014).

<sup>2</sup> *Hollingsworth v Perry* 558 US (2010) < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 19 January 2014.

<sup>3</sup> 'RIAA Fears "Manipulation" of Courtroom Web Broadcasting' (Privacy Digest 21 January 2009) < [www.privacydigest.com](http://www.privacydigest.com) > accessed 3 April 2009.

Another issue generally ignored in the research to date is location. Generally, the studies do not record where the TCB camera is located in the courtroom, nor where the respective courtroom participants are located. In assessing and comparing effects studies, we need to know exactly where cameras and participants are located. If the camera is at the back of the courtroom, then the lawyers are unlikely to be visually distracted by it, whereas the judge might be. In considering distraction-effects on each respective courtroom participant in a given case, we need to know where they are located and where the camera is located. This allows us to compare one study with another study. Generally, such comparison is not possible with the limited research so far. The location issues need to be incorporated into the data collection in the proposed Federal study and other studies in future.

## UK

It is useful to consider the introduction of the limited form of TCB in the UK. This is a new development. However, there is no significant distraction-effects research in the UK. The UK TCB discussion has not considered to the US Supreme Court effects-research concerns. It previously only occurring in limited once off instances in the UK. There was and is no regularly permitted TCB, generally in Scotland. Neither is there any extended pilot study with TCB. The general rule remains that TCB is not permitted. This is contained in section 41 of the England and Wales Criminal Justice Act. Given the general prohibition and debate on the issue,<sup>4</sup> the UK Supreme Court TCB development was arguably surprising. Until the introduction of TCB in the new UK Supreme Court, it was not at all clear that TCB would be introduced at all. It was equally unclear what form any such broadcasting might take. One of the more surprising suggestions was to try and broadcast UK cases in the US before introducing UK TCB footage to UK audiences.<sup>5</sup> On foot of the new UK Supreme Court TCB, there are calls by Sky TV and others to expand TCB in the UK.<sup>6</sup> The UK Supreme Court website also links to the Sky News website which makes available live iTCB cases from the UK Supreme Court.<sup>7</sup>

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<sup>4</sup> For example, 'Television on Trial' *Economist* (19 December 1998); J Pritchard, 'Should Cameras be Allowed in the Courtroom?' *Legal Business* (January–February, 1992) 3; J Pritchard, 'Televising the Courts: Some Second Thoughts' *Legal Business* (May 1995) 11.

<sup>5</sup> See R Verkaik, 'Cameras Cross the Atlantic: The USA's Trial Broadcasters Are Making A Pitch to Televis UK Hearings' (17 May 1995) *Gazette* 14, referring to a Tru TV (then Court TV) proposal.

<sup>6</sup> A Laughlin, 'Sky News Calls for Courtroom TV Cameras' (6 December 2010) *Digital Spy* accessed 18 January 2010.

<sup>7</sup> See < <http://www.supremecourt.gov.uk/> >, and < <http://news.sky.com/info/supreme-court> > accessed 19 January 2014.

*The UK Legal Backdrop:* The legal background is the Criminal Justice Act 1925.<sup>8</sup> It prohibits TCB. Section 41 Criminal Justice Act 1925 prohibits the taking of photographs in or around the court as well as the publishing of such photographs.<sup>9</sup> This is interpreted as including cinematic and television filming.<sup>10</sup> This is still the current legal position<sup>11</sup> in the UK, notwithstanding the separate position as regards the new UK Supreme Court, which is now specifically exempted.

Section 41 is headed ‘Prohibition on taking photographs, etc, in court.’ It states that no person shall,

‘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.’

Section 20 of the Criminal Justice (Northern Ireland) Act 1945 also applies similar restriction, in Northern Ireland in relation to prohibiting photography and sketching.<sup>12</sup> Section 9 of the Contempt of Court Act 1981 refers to ‘Use of tape recorders.’ It states that it is a contempt of court ‘to use in court, or bring into court for use, any tape recorder or other instrument for recording sound, except with the leave of the court.’

*UK Supreme Court 2009:* The then Lord Chancellor, Lord Falconer, when introducing the UK consultation states that ‘[c]ameras in the courtroom would be a big step. We have to make sure that any such step would benefit justice, not burden it.’<sup>13</sup> Very detailed literature reviews of the courtroom broadcasting literature and comparative literature is required. In addition, it is critical that legal-empirical research is properly planned and undertaken. This includes baseline research and TCB eye-tracking research. It is unfortunate that legislatures and the judiciary did not avail of the opportunity to undertake

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<sup>8</sup> See S Prince in relation to the historical context of the ban contained in section 41 of the Criminal Justice Act 1925 England and Wales, S Prince, ‘Is Court TV A Favourable Proposition: A Normative and Comparative Analysis of the Transmission of Courtroom Proceedings on Television?’ (PhD thesis, University of Exeter 2003) 85 ff.

<sup>9</sup> Department of Constitutional Affairs [UK] *Broadcasting Courts, Consultation Paper*, CP 28/04 (November 2004) 13.

<sup>10</sup> *ibid*, referring to *Re Barber v Lloyds Underwriters* [1987] 1 QB 103, 105; and *R v Loveridge, Lee and Loveridge* [2001] 2 Cr App Rep 29, CA.

<sup>11</sup> M Dockray raises the issue of whether the state and judiciary bound by the Section 41 restrictions. See M Dockray, ‘Cameras at the Door of the Court’ (1990) 20 *New Law Journal* 548.

<sup>12</sup> Department of Constitutional Affairs [UK] *Broadcasting Courts, Consultation Paper* (CP 28/04 November 2004) 13.

<sup>13</sup> *ibid*, 5.

and arrange for ongoing legal-empirical distraction research and baseline research once a decision was made to introduce UK TCB with the new UK Supreme Court. However, the debate in relation whether to expand TCB in the UK needs to consider the forms and effects of such broadcasting. It also needs to make transparent proposals in relation to what legal-empirical research is being proposed as part of such proposed studies and pilots.

It is noted that the Caplan report recommended limited TCB with strict rules of coverage, and excluding certain types of proceeding and courtroom participants.<sup>14</sup> The Bar Council stressed it was recommending an experimental period only.<sup>15</sup> A Law Society committee chairman feels that a study may be the ‘best test.’<sup>16</sup> However, any study and test must be based on proper normative research and research data gathering methodologies. The research opportunities today are significantly better than previously. The research concerns remain - even in the UK. It is interesting that Henry Hodge, a Law Society member, feels that TCB may well cause changes in how cases are conducted.<sup>17</sup> It is, important, therefore to address the research issues at the same time as making any proposal to permit TCB. This aspect of the debate has been wholly missed.

*Sentencing Hearing 2012:* A sentencing hearing was shown on television when Lord Bracadale delivered on 19 April 2012. One commentator notes that the judge’s eye did ‘flicker’ towards the camera twice.<sup>18</sup> The defendant was not allowed to be filmed. However, this occurred in Edinburgh and was therefore outside of the jurisdiction of England and Wales. Critically, there does not appear to be relevant legal-empirical baseline or effects research.

*Crime and Courts Act 2013:* The new Crime and Courts Act 2013 has been passed in the UK (England and Wales). This expands the potential for forms of TCB in the UK. Section 31 provides as follows,

Making, and use, of recordings of Supreme Court proceedings

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<sup>14</sup> ‘Bar Paves Way for TV Courts’ (1990) Law Society Gazette 87.

<sup>15</sup> *ibid.*

<sup>16</sup> Referring to H Hodge, Chairman of the Law Society Council Courts and Legal service Committee, see *ibid.*

<sup>17</sup> *ibid.*

<sup>18</sup> S Levinson, ‘Cameras In Court? Careful, Minister - The Law Thing We Want Is A Ratings War Over A Murder Trial’ MailOnline (20 April 2012) accessed 23 June 2012; also video ‘Cameras In Court: David Gilroy Sentenced in UK’s First Televised High Court Case’ (YouTube) < [www.youtube.com/watch?v=RVtiu6diu0](http://www.youtube.com/watch?v=RVtiu6diu0) > accessed 23 June 2012.

- (1) Section 9 of the Contempt of Court Act 1981 (recording of court proceedings) is amended as follows.
- (2) After subsection (1) insert—
  - “(1A) In the case of a recording of Supreme Court proceedings, subsection (1)(b) does not apply to its publication or disposal with the leave of the Court.”
- (3) In subsection (2) (leave under subsection (1)(a): grant, refusal, conditions, withdrawal and amendment)—
  - (a) after “paragraph (a) of subsection (1)” insert “, or under subsection (1A),”,
  - (b) for “if granted may” substitute “if granted—
    - (a) may, in the case of leave under subsection (1)(a),”, and
  - (c) after “leave; and” insert—
    - “(b) may, in the case of leave under subsection (1A), be granted subject to such conditions as the Supreme Court thinks proper with respect to publication or disposal of any recording to which the leave relates; and”.
- (4) In subsection (1) (activities which are contempt of court) after paragraph (c) insert—
  - “(d) to publish or dispose of any recording in contravention of any conditions of leave granted under subsection (1A).”

Section 32 provides as follows,

Enabling the making, and use, of films and other recordings of proceedings

- (1) The Lord Chancellor may, by order made with the concurrence of the Lord Chief Justice, provide that a section mentioned in subsection (2) or any provision of either of those sections—
  - (a) does not apply in relation to the making of a recording or the making of a prescribed recording;
  - (b) does not apply in relation to the making of a recording, or the making of a prescribed recording, if prescribed conditions are met, including conditions as to a court or tribunal or any other person being satisfied as to anything or agreeing;
  - (c) does not apply in relation to prescribed use of a prescribed recording.
- (2) Those sections are—
  - (a) section 41 of the Criminal Justice Act 1925 (no photography or drawing in court of persons involved in proceedings, and no publication of contravening images);
  - (b) section 9 of the Contempt of Court Act 1981 (no sound recording in court without permission, and no public playing of recordings).
- (3) In the case of any particular proceedings of a court or tribunal, the court or tribunal may in the interests of justice or in order that a person is not unduly prejudiced—
  - (a) direct that a provision disapplied in relation to the proceedings by an order under subsection (1) is, despite the order, to apply in relation to the proceedings, or
  - (b) direct that a provision disapplied in relation to the proceedings by an order under subsection (1) is, despite the order, disapplied in relation to the proceedings only if conditions specified in the direction are met.

- (4) No appeal may be made against—
  - (a) a direction given under subsection (3), or
  - (b) a decision not to give a direction under that subsection.
- (5) In this section—
  - “recording” means a visual or sound recording on any medium, including (in particular)—
    - (a) films and other video-recordings, with or without sound,
    - (b) other photographs, and
    - (c) sketches and portraits;
  - “prescribed” means prescribed by an order under subsection (1).
- (6) The preceding provisions of this section do not apply in relation to Supreme Court proceedings.
- (7) In section 41 of the Criminal Justice Act 1925 after subsection (1) insert—
  - “(1A) See section 32 of the Crime and Courts Act 2013 for power to provide for exceptions.”
- (8) In section 9 of the Contempt of Court Act 1981 after subsection (4) insert—
  - “(5) See section 32 of the Crime and Courts Act 2013 for power to provide for further exceptions.”

Section 33 provides as follows,

Abolition of scandalising the judiciary as form of contempt of court

- (1) Scandalising the judiciary (also referred to as scandalising the court or scandalising judges) is abolished as a form of contempt of court under the common law of England and Wales.
- (2) That abolition does not prevent proceedings for contempt of court being brought against a person for conduct that immediately before that abolition would have constituted both scandalising the judiciary and some other form of contempt of court.

This is significant as being the first major change since the Criminal Justice Act 1925.

### **iTCB Developments**

One of the most interesting developments relates to the advent of internet TCB, or iTCB. This is interesting for a number of reasons. One is that it may differ with television TCB, whereby TCB is push broadcast and iTCB involves audience pull or finding in order to assess the courtroom footage. Potentially, iTCB holds more potential to be educational than TCB. Separately, the design and control of iTCB footage is frequently undertaken by the court or court service, not a television station. Again, this holds potential for more considered, less varies on an individual judicial decision making bases, and less television entertainment focused of course this needs to be assessed by research comprising TCB produced by courts/court service versus broadcaster TCB.



*UK iTCB*: The UK Supreme Court was established in October 2009. The first broadcast was meant to be SkyTV on 16 May 2011, apparently using the court's own footage. Footage is now streamed online on a website.<sup>19</sup> The UK Supreme Court website links to the Sky News website which makes available live iTCB cases.<sup>20</sup> There is also a UK parliamentary cable channel.<sup>21</sup> S Prince also notes how television and online capacity to broadcast parliamentary and courtroom footage is ever increasing.<sup>22</sup> The Shipman Inquiry also has a website in relation its subject matter containing transcripts of witnesses.<sup>23</sup> More recently the Leveson Inquiry relating to phone hacking and press practices has broadcast most of its proceedings and witness testimony live on its website.<sup>24</sup>

*iTCB: US Webcasting Survey*: RL Brown carried out a review of iTCB in the US and found that twenty one US State Supreme Courts were engaged in offering webcasting.<sup>25</sup> Also, the National Television Digital News Association's<sup>26</sup> *Cameras in the Court: A State by State Guide* (an annual survey) indicates that a number the local state Supreme Courts permit webcasting of iTCB. While it is not clear in all instances if the iTCB is organised by the local Supreme Court and webcast via its own website, or whether third party broadcasters are involved, it appears that oral Supreme Court proceedings are broadcast online by 16 local Supreme Courts.<sup>27</sup> One local Supreme Court appears to permit iTCB of selected cases.<sup>28</sup> Four local Supreme Courts appear to permit audio only webcasts.<sup>29</sup> The Court of Appeal permits iTCB in three instances.<sup>30</sup> Some of the other references are unclear.<sup>31</sup>

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<sup>19</sup> J Harris, 'Court on Film: A Nice Idea, But Not For All' *The Lawyer* (23 May 2011) 6.

<sup>20</sup> See < <http://www.supremecourt.gov.uk/> > and < <http://news.sky.com/info/supreme-court> > accessed 19 January 2014.

<sup>21</sup> BBC Parliament Channel, referred to in S Prince, above 96.

<sup>22</sup> *ibid* 96.

<sup>23</sup> See < [www.the-shipman-inquiry.org.uk](http://www.the-shipman-inquiry.org.uk) >, referred to in S Prince, above 420.

<sup>24</sup> See < [www.levesoninquiry.org.uk](http://www.levesoninquiry.org.uk) > accessed 19 January 2014.

<sup>25</sup> RL Brown, 'Just a Matter of Time? Video Cameras at the United States Supreme Court and the State Supreme Courts' (2007) 9 *Journal of Appellate Practice and Process* 1, 2.

<sup>26</sup> (NTDNA) < [http://rtdna.org/article/cameras\\_in\\_the\\_court\\_a\\_state\\_by\\_state\\_guide\\_updated#.U3kgqfldWSo](http://rtdna.org/article/cameras_in_the_court_a_state_by_state_guide_updated#.U3kgqfldWSo) > accessed 18 May 2014.

<sup>27</sup> *ibid*, namely, Arizona, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Minnesota, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Texas, West Virginia.

<sup>28</sup> *ibid*, namely, California.

<sup>29</sup> *ibid*, namely Delaware, Kansas, Utah and Vermont.

<sup>30</sup> *ibid*, Maryland, Mississippi and New York.

<sup>31</sup> For example, the study indicates that the District of Columbia Court of Appeals 'recordings available upon request' but it is not specified if it is audio or TV footage; the section on Massachusetts has a webcasting heading, but does not say that it occurs or is permissible;

Overall, however, the issue of iTCB has been considerably less considered and less researched than TCB generally. While there is a growing body of commentary and literature,<sup>32</sup> the issue of effects - including distraction-effects - does not appear to have any legal-empirical research as yet.

It should not be assumed that just because judges are trained and experienced, they cannot be distracted. Indeed, the author's topographical and eye-tracking proof-of-concept demonstration in court shows that judges are statistically the courtroom participant with most opportunity to be distracted.

In the US it appears that most of the State Supreme Court webcasting is undertaken in-house by or on behalf of the court service.<sup>33</sup> This contrasts with TCB where most frequently the broadcasters themselves are responsible for the footage. Indeed, the broadcasters will own the copyright in the courtroom footage if they film it. Does that mean that courtroom footage becomes inaccessible for archival, historical and public use purposes later on? This does not appear to be considered in the literature. This could become a condition of such broadcaster TCB. The cost of funding iTCB in Florida is reported as \$300,000 in year one and \$135,000 annually.<sup>34</sup> TCB cost is also a policy factor. US States Supreme Court broadcasting does not occur in all states, varies between the states, including the number of cameras, the cost and the location 'configuration' of the cameras.<sup>35</sup>

*iTCB-Courting Publicity*: RC Lee in the Stanford Law Review identifies the troubling temptation for lawyers to blog and post comments online about cases that they have coming up soon as well as the instant cases they are still litigating.<sup>36</sup> It raises a number of problematic ethical issues, such as whether it amounts to unfair or biased pre-trial

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Nebraska 'Appellate Courts' provide webcasts of oral arguments, but does not say which appellate courts; South Dakota has a heading on webcasting but it is not said that webcasting of iTCB occurs; in Wyoming it is indicated that the Supreme Court 'provides audio recordings or oral arguments on its Web site.' It is unclear if this is one, both or a typographical error.

<sup>32</sup> See, for example, M de la Garza, 'The Age of Webcasting: Online Video Broadcasts of Supreme Court Oral Arguments' (2006) 18 *Appellate Advocate* 9; RL Brown, above. More generally, see T Hardman, 'Webcasting and Interactivity: Problems and Solutions' (2011) 17 *Boston University Journal of Science and Technology Law* 290; C Danzig, 'Cameras in the Courtroom: Now With More Internets' *AboveTheLaw.com* (5 May 2011) < <http://abovethelaw.com/2011/05/cameras-in-the-courtroom-now-with-more-internets/#more-70704> > accessed 19 January 2014.

<sup>33</sup> RL Brown, above 7.

<sup>34</sup> *ibid* 9.

<sup>35</sup> *ibid* 11.

<sup>36</sup> RC Lee, 'Ex Parte Blogging: The Legal Ethics of Supreme Court Advocacy in the Internet Era' (2009) 61 *Stanford Law Review* 1535.

publicity, whether it amounts to unauthorised contact with the judiciary (or use by the judiciary), or breaches professional and legal ethics rules.<sup>37</sup> A further point arises in that some such comments could be an infringement upon a defendant's or party's right to a fair trial. In addition, it potentially interferes with the legal principles that justice should be done impartially, but it also that justice should be seen to be done impartially. Such new forms of technology comments and postings could well interfere with these principles of justice. Currently, these are 'not regulated effectively at present.'<sup>38</sup>

This is just an example of how new technological possibilities entice us to engage in ever more frequent comment online. The ease of such publication means that legal commentary, including official and or professional, can be posted without the consideration, checks and gatekeeping that might traditionally be the case.

This temptation to publish and to be seen to be engaging with technology is not immune from TCB. There is an increasing willingness for courts to engage in webcasting or publishing case footage online. Sometimes this are live cases, sometimes it is archival footage of cases. It is sometimes all cases, sometimes it is selected cases. This is a new form of legal communication.

The judiciary might promote iTCB in an effort to embrace technology, education and transparency. However, some courts may also embrace it for another reason, namely publicity. Some judges can be elected.<sup>39</sup> Some courts can also be new and less known to the public. An example is the International Criminal Court (ICC). It is a legitimate query to ask if perhaps sometime judges or courts court publicity.<sup>40</sup> The Chief Justice of California describes TCB as providing 'the best PR that you can imagine.'<sup>41</sup> However, given that the media and politicians sometimes manipulate each other, do 'judges in the United Kingdom and others involved in the legal system, want to enter this potential

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<sup>37</sup> *ibid.*

<sup>38</sup> *ibid* 1541. Generally, also note JL Grantz, 'A Culture Without Consequences? Redefining Purposeful Availment for Wrongful Online Conduct' (2012) 63 *Hastings Law Journal* 1135.

<sup>39</sup> On elected judges generally, note the article PS Karlan, 'Electing Judges, Judging Elections, and the Lessons of Caperton' (2009) 122 *Harvard Law Review* 80.

<sup>40</sup> Note generally P Lambert, *Courting Publicity: Twitter and Television Cameras in Court* (Bloomsbury 2011). Also H Rainie, *Networked, The New Social Operating System* (MIT 2012).

<sup>41</sup> Quoted in RL Brown, above 8.

lion's den?'<sup>42</sup> Recently the Master of the Rolls, Lord Neuberger suggested that judges should be cautious about courting publicity and vigilant when talking publicly.<sup>43</sup>

There is an intertwined problem with iTCB and that is of real-time commentary, whether from blogs, tweets, newspaper websites or even the court's iTCB website. Now, it is not infrequent for individuals viewing, for example, the Leveson Inquiry live online, to also post blog and Twitter comments online simultaneously. Newspaper and aggregator news websites can have open threads of comments and commentary while the legal event is ongoing in real-time. In the previous TCB case study of the Steinberg case conducted by P Thaler, he referred to a TCB feedback loop, whereby the courtroom participant would see and hear about themselves outside of court, and this would change what they said and did once back in court.<sup>44</sup> The judge, for instance, reacted to how his wife said he looked and reacted in the TCB news footage.<sup>45</sup> Jurors too may dress differently on day two and subsequently after seeing that there were cameras and TCB on the initial day of the proceedings, and how they looked on day one. iTCB now may enhance the possibility for further feedback loops and changes upon not just the proceedings and the participants, but also how the proceedings are perceived in the wider community.

In a negative scenario, iTCB may attract unflattering, derogatory and 'trolling' comments, as opposed to enhancing public appreciation and education as to the judicial process.<sup>46</sup> There is an increasing frequency whereby named and unnamed individuals use the internet to criticise and 'vent' about particular items. They can also attack and abuse other individuals online. Many companies have fallen foul of 'sucks' attacks from

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<sup>42</sup> S Prince, above 410.

<sup>43</sup> O Bowcott, 'Senior Judge Cautions Colleagues Over Courting Publicity, Lord Neuberger Says Judges Must Be Vigilant When Talking About Public Matters or Risk Compromising Judicial Authority' *Guardian* (16 March 2012) < <http://www.guardian.co.uk/law/2012/mar/16/judge-courting-publicity> > accessed 19 January 2014. Note also B Wilson, 'Courting Publicity? The Supreme Court's Open Door Policy' *LegalWeek.com* (24 May 2012) < <http://www.legalweek.com/legal-week/blog-post/2179626/courting-publicity-supreme-court-s-door-policy> > accessed 19 January 2014.

<sup>44</sup> P Thaler, 'The Impact of the Television Camera on Courtroom Participants: A Case Study of the Joel Steinberg Murder Trial' (PhD thesis, New York University 1990).

<sup>45</sup> *ibid.*

<sup>46</sup> LM Holson feels that the internet and social networking have become a new court of public opinion, some of which involve death threats. See LM Holson, 'The New Court of Shame is Online' *New York Times* (New York, 26 December 2010) 2. R Enter and S Kohm also found entertainment values to be prominent in TCB footage as presented by television networks. See R Entner, 'The Image of the Judiciary: A Semiotic Analysis of Broadcast Trials to Ascertain its Definition of the Court System' (PhD thesis, New York University 1993); and SA Kohm, 'I'm Not a Judge But I Play One On TV: American Reality Based Courtroom Television' (PhD thesis, Simon Fraser University 2004).

anonymous internet individuals.<sup>47</sup> Numerous sports people, media personalities and non-public figures have suffered harshly at the hands of anonymous online comments.<sup>48</sup> The courts as well as jurors and parties are having to learn how to deal with internet technologies. A juror in the UK was convicted and sentenced in the UK for communicating with parties in a case in which she was a juror.<sup>49</sup> R Fragelle<sup>50</sup> also notes an example of mobile phone footage of a court case that was uploaded to YouTube in a manner which appears critical of the judge in question. It appears the judge was unaware that the case was being filmed via a mobile device. R Fragelle also refers to a heated debate between judges at the Brazilian Supreme Court which was broadcast on the internet on iTCB.

A further point is that there may not be just one identical audience for TCB. We may need to consider different audiences viewing TV-TCB footage, iTCB footage, real-time blogging, posting and online communications footage about the exact same case, and comparisons of these. A research query can be whether the footage is equally received by the particular audiences. How much of the iTCB commentary online will be considered? Is there a danger of less than considered commentary such as trolling and keyboard warriors? Possibly the social media feedback could denigrate from the original intention behind iTCB in an unenvisaged way. A legal-policy consideration is whether certain cases might be more amenable to iTCB, and some not so amenable.

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<sup>47</sup> See, for example, D Frosch, 'Venting Online, Consumers Can Land in Court' (New York Times 6 January 2010) 1. Also note the trolling activities in relation to the Irish case of *McKeogh v Doe and Others*, High Court, unreported, ongoing.

<sup>48</sup> S Fry has been repeatedly dismayed with Twitter abuse. More recently H Skelton of the BBC left Twitter and Olympians such as Tom Daly. See J Halliday, 'Helen Skelton Quits Twitter After Abuse From Trolls' *Guardian* (2 August 2012) < <http://www.guardian.co.uk/technology/2012/aug/02/celebrities-quit-twitter-abuse> > accessed 19 January 2014; J Meikle, 'Teenager Issued With Harassment Warning Over Tweets Sent to Tom Daly' *Guardian* (31 July 2012) < <http://www.guardian.co.uk/sport/2012/jul/31/teenager-arrested-tweets-tom-daley> > accessed 19 January 2014. In Ireland note the case of *McKeogh v Doe and Others* IEHC [2012] unreported, regarding online abuse, and related Norwich Pharmacal orders identifying anonymous internet users. Note also subsequent Norwich orders in the case of Nicola Brooks, see J Swift, 'Bains Cohen Take on Facebook in Internet Bullying Case' *Lawyer* (12 June 2012) accessed 23 July 2012.

<sup>49</sup> J Deans, 'Facebook Juror Jailed for Eight Months' *Guardian* (16 June 2011) <http://www.guardian.co.uk/uk/2011/jun/16/facebook-juror-jailed-for-eight-months?INTCMP=ILCNETTXT3487> > accessed 19 January 2014. Further examples are referred to in P Lambert, *Courting Publicity: Twitter and Television Cameras in Court* (Bloomsbury 2011).

<sup>50</sup> R Fragele, 'Increasing Judicial Transparency: When Brazilian Court TV Officially Meets YouTube' (Proceedings of the 10th European Conference on eGovernment, Limerick 18-9 June 2010). See also 'Chapter 6, Courts On Screen, E-Government and the Increase in Judicial Transparency' (IRMA International) < <http://www.irma-international.org/viewtitle/60075/> > accessed 19 January 2014.

There are also other potential feedbacks. With postings ‘on legal blogs now offering prompt, detailed, and readily accessible analysis of Supreme Court cases, it is time to re-evaluate the ethical standards that govern the interplay between lawyers, the internet, and the Courts.’<sup>51</sup> The lawyers and parties may learn of a new and interesting legal argument to make, or the judge may read the arguments or thoughts of one of the legal sides which is not or has not yet been made in court. Also, a party may feel aggrieved if a judge makes a decision based on his own judicial research of matters not specifically argued by the parties but which s/he learns of from social media. There may potentially be new grounds for an appeal.

The difficulty for iTCB is to examine what the justification for it is and secondly to look at the other potential feedbacks and activities which it may generate because it happens to exist. These issues are potentially more pronounced for iTCB than they were for TCB. Equally, they can be more pronounced for live iTCB than non-live iTCB generally. In another context, commentators have been concerned with the growing prevalence of pharmaceutical information available via online social networking, such as Facebook. This provides a ‘myriad of ethical and legal issues pertaining to social media communications.’<sup>52</sup> The interaction of social media presents many issues for the legal, judicial and regulatory system.

One of the judges replying to the author’s 2010 TCB judicial questionnaire in Ireland indicated that s/he was more circumspect and cautious as a result of what was seen as a misuse and misinterpretation of judicial commentary.<sup>53</sup> The judge felt that a third party has utilised judicial commentary to poke fun at the judiciary. Indeed, that iTCB material might be misused or unflattering footage utilised other than intended has been voiced as a concern for iTCB projects.<sup>54</sup> In fact, one state has sought to ban the use of iTCB audio and film footage for political purposes.<sup>55</sup> One Irish judge has apologised for comments she made. Some of the mainstream media reports have also reported online reactions including Twitter postings.<sup>56</sup>

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<sup>51</sup> RC Lee, above 1536.

<sup>52</sup> J Cain and JL Fink, ‘Legal and Ethical Issues Regarding Social Media and Pharmacy Education’ (2010) 74 *American Journal of Pharmaceutical Education* 184.

<sup>53</sup> See Appendices.

<sup>54</sup> RL Brown, above 13.

<sup>55</sup> *ibid* 13, referring to Texas, Texas Senate, 1385, 80th Reg Sess (6 March 2007). See generally also G Butler, ‘Federal Judged, Courtroom Posters say “No” to Social Media’ (Mar/Apr 2012) 95 *Judicature* 240.

<sup>56</sup> Twitter reaction was reported in ‘Twitter Chatter, For and Against’ *Irish Times* (Dublin, 3 August 2012). Also K Holland, ‘Rights Groups Welcome Judge’s Second Apology’ *Irish Times* (Dublin, 4 August 2012); N Baker, ‘Judge Issues Full Apology After Threat of Garda Complaint’ *Examiner* (Dublin, 3 August 2012); G Carberry, ‘Judge Apologises for Saying

RC Lee also refers to the case of *Kennedy v Louisiana* in which a blog comment and then the mainstream media critiqued a US Supreme Court decision as having made a mistake. Apparently, neither the US Supreme Court nor the party-opponents, were aware of a particular Act when the case was being argued and then decided.<sup>57</sup>

*iTCB Form:* From an analysis perspective, one can observe that iTCB is different from TCB. Traditional TCB, is generally footage filmed by one or more TV stations and which is broadcast to the public on their network. This is push TV broadcasting. One can differentiate iTCB which is often filmed by or on behalf of the court service, and which is uploaded online. It is not push broadcast in the traditional sense. The public audience have to be more engaged than with TV, they have to go and find the court's website and pull down the courtroom footage. Of course there is a point that the media push-pull differences may diminish if live streaming and webcasting become more popular. The TV pipe and internet pipe may become indistinguishable. In some instances, internet film footage is becoming as popular as television footage.

*iTCB, The New Broadsheet:* There have been various comments in relation to TCB and its technological aspects. Many people refer to how television has replaced broadsheet newspapers as the main source of news and information for most of the public. One commentator has called it the 'new epistemology.'<sup>58</sup> However, more recently the number of people relying on the internet as their primary information and news source has increased. Many people view more films online than via traditional television stations or video/DVD.

Others such as D Stepniak and P Mason see iTCB as a necessary judicial reaction to increasing public internet use.<sup>59</sup> They also note the contrast between (some) TCB and iTCB. Sometimes the broadcast media 'will use [TCB] broadcast footage merely to attract the maximum number of viewers, while the courts seek to enhance public access to

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Social Welfare a Polish Charity' *Irish Times* (Dublin, 2 August 2012); C Crawford, 'Judge Says "Sorry" Again Over Polish Dole Remarks' *Irish Independent* (Dublin, 3 August 2012). Indeed, many mainstream media reporting on the Katie Taylor Olympic medal include social media and Twitter reaction as media reports.

<sup>57</sup> RC Lee, above 1536-1538. Referring to *Kennedy v Louisiana* 128 S Ct 2641 (2008), modified on denial of rehearing, 129 S Ct (2008)(mem).

<sup>58</sup> N Postma, *Amusing Ourselves to Death: Public Discourse in the Age of show Business* (Penguin Books 1985) referred to in S Prince, 'Is Court TV A Favourable Proposition: A Normative and Comparative Analysis of the Transmission of Courtroom Proceedings on Television?' (PhD thesis, University of Exeter 2003) 9-10.

<sup>59</sup> D Stepniak and P Mason, 'Court in the Web' (2000) 25 *Alternative Law Journal* 71. They also refer to the case of *AOC/Big Flights Australian Olympic Committee Inc v The Big Fights Inc* [1999] FCA 1042 as being the first Australian Federal case judgement to be broadcast via live audio and video. *ibid* 72.

and understanding of the role of courts, the judicial process and court decisions by permitting the public to observe court proceedings.’<sup>60</sup> Tru TV (previously Court TV) involves drama and entertainment and not just pure TCB cases anymore.<sup>61</sup> ER Osborn contrasts educational aimed iTCB with entertainment or reality TCB.<sup>62</sup> A review of the reality TCB programme *The Peoples Court* is indicated to involve both network television as well as iTCB.<sup>63</sup>

*iTCB and Education:* The Indiana Supreme Court iTCB project is described as a ‘beacon’ for educational iTCB.<sup>64</sup> It began webcasting for educational purposes, in particular for school education. The project is called Courts in the Classroom (CITC). Both live and archive cases are available. More recently the content is searchable, incorporating a database of keywords and phrases. In addition, teaching and information materials are created around specific cases for use by teachers and students. ER Osborn describes the project as follows,

‘Each “Featured Case” has its own home page within the CITC Web site. Once a “Featured Case” is identified, the briefs submitted by the attorneys are scanned, a detailed case summary is provided by the court administrator’s office, a series of lesson plans complete with resource materials and the appropriate standards set by the state for social-studies curriculum is prepared, and a link to the oral argument is created. After the opinion is handed down or the court takes other action, it is posted to the ‘Featured Case’ home page site to close the circle.’<sup>65</sup>

Certain District Courts in Massachusetts are also reported to be experimenting with iTCB through a funded project entitled OpenCourt Project.<sup>66</sup> Interestingly, the Recording Industry Association of America (RIAA) objected to iTCB of one of its case, fearing that the footage would be manipulated and edited by third parties after broadcast.<sup>67</sup> It would be helpful for comparison to record objections issues in the second Federal study and other pilots.

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<sup>60</sup> *ibid* 73.

<sup>61</sup> See reference to it using sponsored drama and entertainment programmes. J Lafayette, ‘Sponsors Take Court TV “Challenge”’ (23 April 2007) 26 *Television Week* 1.

<sup>62</sup> ER Osborn, above at 288.

<sup>63</sup> G Spring, ‘Online Trial for “People’s Court”’ (19 May 1997) *Electronic Media* 16.

<sup>64</sup> RL Brown, above 14-15.

<sup>65</sup> ER Osborn, ‘Courts in the Classroom: Indiana’s Educational Outreach Through the Web’ (2006) 27 *Justice System Journal* 286, 292.

<sup>66</sup> C Danzig, ‘Cameras in the Courtroom: Now With More Internets’ *AboveTheLaw.com* (5 May 2011) < <http://abovethelaw.com/2011/05/cameras-in-the-courtroom-now-with-more-internets/#more-70704> > accessed 19 January 2014.

<sup>67</sup> ‘RIAA Fears “Manipulation” of Courtroom Web Broadcasting’ *Privacy Digest* (21 January 2009) < [www.privacydigest.com](http://www.privacydigest.com) accessed > 3 April 2009.



*iTCB Design:* Just as TCB can take many forms, so too can iTCB. There can be different cameras, some more and less obstructive. There can be moving equipment in the courtroom. There may or may not be zooming in and out and close-ups. There may be a requirement for facial blocking. The footage can be captured by broadcasters or the court service. It can be live or non-live. It can involve all cases or only certain cases. It can be cases in one court or from a number of courts, and across court levels. However, acknowledging that carefully thought out rules can be applied to reduce the potential for disadvantageous effects with iTCB. An editorial in the journal *Judicature* states that,

‘By making proceedings available for gavel-to-gavel broadcast on television or over the internet, we can educate the public about what actually goes on in our courts .... procedural rules can be developed to test whether the concerns can be adequately addressed.’<sup>68</sup>

Again, TCB can be the whole of a case or alternatively just short snippets. As the New Zealand research and the first Federal study found out, that something is filmed in the courtroom does not mean that the visual footage actually broadcast will not be voiced over; or voice over with none of the in-court audio and arguments included in the actual TCB broadcast.

### **Irish TCB Access Application**

There is an Irish TCB access application scheduled for October 2014.<sup>69</sup> The application is being made by the plaintiff in a defamation case. One of the unusual aspects of the application is that the applicant plaintiff is a lay litigant. It appears from media reporting of the case that the plaintiff is in part motivated in seeking TCB by the fact that he wants to use television publicity against the newspaper defendant. The plaintiff was granted leave to make the application but must put the other side on notice, when presumably they will also make representations on the issue. On balance, it is suggested that this may not be the optimum opportunity for Irish TCB and overall TCB should generally only be considered on a proper, planned manner. Instant judicial decision-making under the pressure of an immediate TCB access application hinders the possibility for best legal-policy, decisions and appropriate legal-empirical research. The lay plaintiff element may also perhaps introduce a certain element of uncertainty. In addition, the plaintiff is reported as indicating that he has been influenced in his decision to apply for TCB by the

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<sup>68</sup> ‘Cameras In Our Federal Courts - The Time Has Come’ Editorial (2009-2010) 93 *Judicature* 136.

<sup>69</sup> J McCarthy, ‘Teacher Argues for Libel Court Case to be Televised’ *Sunday Times* (Dublin, 13 July 2014).

*Pistorius*<sup>70</sup> case, which he presumably sees as positive. However, the plaintiff's view is not shared by the Lord Chief Justice of England and Wales who has expressed concerns at aspects of the South African case, halted any expansion of current UK TCB and called for more legal-empirical research and 'evidence' regarding TCB effects.<sup>71</sup> The thesis research also suggests that Irish judges are not in favour of TCB.<sup>72</sup> It remains to be seen what will happen with this Irish application.

## Conclusion

Without expanding our research and data gathering methods, our knowledge and policy decisions regarding effects of courtroom broadcasting remain limited. We should not continue to ignore the US Supreme Court concerns. These are the same types of issues and concerns that face courts, parties and participants today. The *Pistorius*<sup>73</sup> case highlights some of the concerns relating to making changes during a TCB case, witnesses having their image blocked or not being filmed at all, witnesses not attending or being reluctant to attend at all, court decorum, and the new issue of mobile telephones and social media use by the attending public. One can suggest that there is even more reason to pursue research of the US Supreme Court concerns today than previously. Courts are under increasing pressure to accommodate cameras but without the benefit of considered policy and planned legal-empirical research. While the *Pistorius*<sup>74</sup> case and the Irish TCB access application later this year are arguably examples of how not to progress TCB, that is in instant cases, possibly the area of most concern to courts and legal-policymakers will be the arrival of iTCB. iTCB offers something very different to courts, including for example in terms of control, content, less potential for editing, voice overs, short snippets, etc, more public pull activity than television network push, and possibly a greater opportunity for optimum educational TCB than other TCB forms. This raises important and new effect-issues which researchers and planned court initiatives should examine via legal-empirical research. As with all such research, baselines and longitudinal research issues are important. We should be able to compare the evidence of different studies with each other but the prior research makes this difficult if not impossible in many instances. New research needs to deal with this problem.

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<sup>70</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>71</sup> F Gibb, 'Britain Rethinks Cameras in Court' *Times* (London, 16 May 2014).

<sup>72</sup> See Irish judicial attitudinal research below.

<sup>73</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>74</sup> *ibid.*

## CHAPTER 4: IRELAND

### Introduction

There is no regular TCB in Ireland. There is also no effective research into TCB effects issues and concerns, even though some of these concerns have been raised in Ireland, as elsewhere. The research gap and research challenge remains in Ireland as much as it does in other jurisdictions. We must consider whether the Irish cases on, for example, reporting on judicial proceedings contribute effectively to meet the research and concerns challenge. The answer is (on the whole) ‘No.’ Jurisprudence can raise concerns but it alone cannot furnish all of the evidence which contemporary courts and legal-policymakers have regarding TCB issues. Normative evidence based legal-empirical research is needed to address TCB effect-concerns.

Once we consider the relevant Irish materials, we will see that the following chapter analysis is relevant, namely, about the US experience and how it does in some part identify a set of broad criteria that could help demarcate a relevant line of legal-empirical TCB effects inquiry for Irish consideration. In considering the UK, Ireland and ultimately the US individually, and overall in aggregate, it helps to understand why the US Supreme Court challenge must have a prominent place throughout the thesis and in most serious considerations of the TCB concerns and effects-concerns – both today and historically. Unfortunately, while many of the concerns remain consistent throughout the literature (eg witness concerns in the UK), the answers to those concerns (and including those as set out in the US Supreme Courts’ challenge) are no nearer to answer.

We now proceed to consider the most relevant discussion, documentation and caselaw in Ireland to the issues at hand. Ultimately, however, we will need to delve deeper with a body of legal-empirical research.

### Ireland Comparison and Judicial Comments

When Irish judges make comments in relation to the media, it is in the context of so called media excesses and not in relation to TCB per se. An obvious example of this is when the media are accused of contempt of court in particular broadcasts or reports. The media has been criticised for its actions and reports in relation to the reporting of particular cases.<sup>1</sup>

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<sup>1</sup> The following reports are generally taken from a paper presented to the National Crime Forum, P Lambert, ‘Submission to the National Forum on Crime Reporting’ (Dublin 5 March 1998) (references omitted). Details on file with author. In one Irish case a judge

Justice Budd addressing the issue of ‘disparate’ sentencing (at a conference) states that ‘the sentence may appear to be inconsistent if there are aspects of the case which are not fully reported. It is important for all the reasons to be given.’<sup>2</sup> There is no guarantee of this in most forms of TCB. R Kennedy also refers to the wider general issues of extra judicial comments made by judges.<sup>3</sup> While not referring to the topic of TCB either, G Curran highlights certain judicial and journalistic tensions,<sup>4</sup> as does the Right Honourable Lord Irvine of Lairg in the annual RTE/UCD lecture series on broadcasting and law.<sup>5</sup>

Research would also be useful to see if there is an increasing media focus on profiling of judges, and then whether this would be increased by TCB.<sup>6</sup> Academic DG Morgan also criticises the appointment process for judges.<sup>7</sup> Retired High Court Justice Richard Johnson criticises the level of political influence upon the appointment of judges in Ireland.<sup>8</sup>

A retrial was ordered by the Court of Criminal Appeal in the cases of *Warren and Jeffrey Dumbrell* after it was held that remarks of the presiding judge, Justice Carney, at a lecture

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called upon the DPP to monitor media coverage following pictures of a defendant which appeared in the Examiner. The same newspaper previously apologised to the Central Criminal Court for a picture published in another case. A High Court judge felt obliged to forward papers to the Director of Public Prosecution (DPP) after a report by the Irish Independent, the Star and 98 FM - but subsequently recommended against any action after hearing apologies from the respective news organisations. The reports in question were reportedly described by the judge as ‘inaccurate, misleading, untrue and inflammatory.’  
ibid.

<sup>2</sup> ibid.

<sup>3</sup> R Kennedy, ‘Extra-Judicial Comment by Judges’ (2005) 5:1 Judicial Studies Institute Journal 199-212.

<sup>4</sup> G Curran, ‘Journalists and Judges: Tension and Distortion’ (2001) 2:1 Judicial Studies Institute Journal 11-24.

<sup>5</sup> L Irvine, ‘Reporting the Courts: The Media’s Rights and Responsibilities’ (1999) 34:1 JUR 1-12. Other issues which are the subject of judicial comments are media accuracy, leaks, media contempt, decisions on when and what the media might report contemporaneously, the demise of the practice of not visibly portraying accused persons in handcuffs, newspaper competition, competition between media forms, and the intensive competition facing public service broadcasting, etc. See the *Report of the Commission on the Newspaper Industry* (Dublin: Government Publications, 1996).

<sup>6</sup> One example is the profile Judge Kelly in ‘Legal Maverick Who Courts Public Favour’ *Sunday Times* (Dublin, 18 July 2010) 15. Also P Leahy and I Kehoe, ‘Commercial Court: Nowhere to Run to, Nowhere to Hide’ *Sunday Business Post* (Dublin, 25 April 2010) n9.

<sup>7</sup> DG Morgan, ‘Selection Shows Poor Judgement, We Should Improve the Way Our Judges are Appointed’ *Sunday Times* (Dublin, 9 May 2010) 15. PA McDermott also criticises a political proposal for a more ‘popular’ basis for reforming the constitution and asks ‘what next, a people’s jury to rewrite the 10 commandments?’, in PA McDermott, ‘Don’t Stop Our Constitutional Cup Overflowing’ *Sunday Times* (Dublin, 25 April 2010) 15. Also, M Tighe, ‘Former Judge Attacks Political Appointment’ *Sunday Times* (Dublin, 18 July 2010).

<sup>8</sup> M Tighe, ‘Former Judge Attacks Political Appointments’ *Sunday Times* (Dublin, 18 July 2010).

during the trial could give rise to the possibility of the jury being biased against the two accused.<sup>9</sup> It is also reported that a previous Chief Justice objected to another judge who was preparing to give a lecture on the basis that judges should not comment in public on cases over which they have presided.<sup>10</sup> The *Irish Times* has called for the Judicial Council to regulate in relation to the circumstances judges express their views on legal issues of public interest.<sup>11</sup> In the first TCB judicial study, the author found that the majority of respondent judges felt that coverage of crime should be more than just snippets.<sup>12</sup> It remains an open question as to how much TCB is of a short snippet variety, in particular across the number of cases and forms of TCB concerned.

The US Sixth Amendment refers to legal rights in relation to criminal prosecutions, speedy and public trial, an impartial jury, to be informed of the case, to witnesses and to legal representation. The US Fourteenth Amendment which refers to the right of due process can be relevant in TCB discussion and litigated TCB cases, including the US Supreme Court. The US First Amendment also prohibits the making of laws which infringe on the freedom of the press. US TCB cases refer to the Constitutional issues. If and when Irish TCB access comes to be litigated, there is no reason to think that similar legal issues will not be argued in the Irish context. There are potential comparisons which might be drawn to particular Irish Constitutional legal issues. As in the US, Irish courts may come to consider and raise legal-empirical research evidence questions. Jurisprudence alone remains insufficient to fully guide courts and legal-policymakers nor answer the questions regarding effects. It is important to consider the US Supreme Court concerns, and challenges for more evidence and research. Ultimately, Irish courts and legal-policymakers will have to look for normative evidence at some stage in the future.

If and when TCB issues come to be considered and or litigated in Ireland the following Constitutional provisions may come to be considered,

Article 34.1:	refers to the courts;
Article 34.1:	refers to the independence of the judicial function;
Article 34.1:	refers to the courts, judges and publicity;
Article 38:	refers to trial of offences;

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<sup>9</sup> Reported in Editorial, 'Judicial Comment' *Irish Times* (Dublin, 7 July 2010).

<sup>10</sup> *ibid.* The Law Reform Commission has also published a consultation paper in relation to jury reform. Law Reform Commission, *Jury Service* (LRC CP 61-2010). Note also M Coen, 'Elephants in the Room: The Law Reform Commission Consultation Paper on Jury Service – Part 1' (2010) 20:3 *Irish Criminal Law Journal* 1.

<sup>11</sup> *ibid.*

Article 40.1:	refers to equality before the law;
Article 40.6.1.i:	refers to freedom of expression;
Article 40.6.2:	refers to non-discrimination in regulatory laws.

Article 34 refers to the Constitutional position of the courts in Ireland. Naturally, there is a general caselaw surrounding such issues.<sup>13</sup> It refers specifically to the independence of the judicial function in Ireland. This encompasses issues and caselaw on such matters as independence and impartiality<sup>14</sup>; speedy trial<sup>15</sup>; judicial function.<sup>16</sup> There must be both judicial and jury impartiality and independence.<sup>17</sup> Article 34.1 refers to the courts, judges and publicity. M Forde and D Leonard indicate that '[o]ne of the few specific criminal procedure legal rights expressly mentioned by the Constitution is to a public trial.'<sup>18</sup> Article 34.1 states that '[j]ustice ... save in such special and limited cases as may be prescribed by law, shall be administered in public.' Article 6(1) of the European Convention also stipulates that a public hearing and decision is required. However, the judgement 'shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the prosecution of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.' EU

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<sup>12</sup> P Lambert, 'Judicial Questionnaire on Courtroom Broadcasting' (1997) 15:2 Irish Law Times 50.

<sup>13</sup> *State (Killian) v Minister for Justice* [1954] 1 IR 207; *State (Boyle) v Neylon* [1986] 1 IR 551; *O'T v B* [1998] 2 IR 321; *Grimes v Owners of SS Bangor Bay* [1948] 1 IR 350; *State (DPP) v MS* [2003] 1 IR 606; *Minister for Labour v Costello* [1988] 1 IR 235; *People (DPP) v Dougan* [1996] 1 IR 544; *State (AG) v Mangan* [1961] Ir Jur 17; *State (Llewellyn) v Ua Donnchadha* [1973] 1 IR 151; *Grealis v DPP* [2001] 3 IR 144; *People (AG) v Conmey* [1975] 1 IR 341; *Jackson Way Properties Ltd v Minister for the Environment* [1999] 4 IR 609, including in relation to appeals on constitutional and non-constitutional grounds, the later of which may require High Court certification. Also see, for example, *Ellis v O'Dea* [1989] 1 IR 530; *Todd v Murphy* [1999] 2 IR 1; *HSE v SS (a minor)* [2008] 1 IR 594 *RD Cox Ltd v Owners of MV Fritz Raabe* (1 Aug 1974 Unrep) IESC; *Tormey v Ireland* [1985] 1 IR 289; *State (Hunt) v O'Donovan* [1975] 1 IR 39; *CAB v Hunt* [2003] 2 IR 168; *R v R* [1984] 1 IR 296; *Ward v Kinahan Electrical* [1984] 1 IR 292; *Barraclough v Brown* [1897] 1 AC 615; *State (Sheerin) v Kennedy* [1966] 1 IR 379.

<sup>14</sup> M Forde and D Leonard, *Constitutional Law of Ireland* (Bloomsbury 2013) 520; *Bula v Tara Mines (No 6)* [2000] 4 IR 412. Also T O'Malley, *The Criminal Process* (Round Hall Thomson Reuters 2009) 172.

<sup>15</sup> *Doran v Ireland* (2006) 42 EHRR 13; *O'Reilly v Ireland* (2005) 49 EHRR 40; *Donnelly v Ireland* [1998] 1 IR 321.

<sup>16</sup> M Forde and D Leonard, above 505

<sup>17</sup> See M Forde and D Leonard, above 481; T O'Malley, *The Criminal Process* (Round Hall Thomson Reuters 2009) 172 and 61; *People v Singer* [1975] 1 IR 408; *People v Tobin* [2001] 3 IR 469; M Coen, 'Apprehending Bias: The Case of Jurors' (2010) 32 DULJ 121; *Sander v UK* [2000] 31 EHRR 44; *Hanif and Khan v UK* [20012] 55 EHRR 16.

<sup>18</sup> M Forde and D Leonard, above 475. See also T O'Malley, *The Criminal Process*, above 604; C Lysaght, 'The Publicity of Court Proceedings' (2003) 36 Ir Jur 34; J Jaconelli, *Open Justice: A Critique of the Public Trial* (OUP 2002).

Charter Article 47 also requires public hearing. This also compares to the US Sixth Amendment and also Article 14(1) of the UN Convention.

Naturally, there are is analogous commentary<sup>19</sup> and a number of cases<sup>20</sup> including in relation to the judiciary,<sup>21</sup> judicial independence,<sup>22</sup> in camera hearings,<sup>23</sup> restrictions on publication.<sup>24</sup> Other related issues include contempt<sup>25</sup> and the courts inherent jurisdiction.<sup>26</sup> Justice Henchy states that the ‘ultimate responsibility for the setting, and the application, of the standards necessary for the due administration of justice must rest with the judges.’<sup>27</sup> M Forde and D Leonard state,

‘Restricting publication of what occurs in the criminal courts gives rise to questions of freedom of expression, especially of the press, and balancing those liberties against the interests of a fair trial, privacy or national security, as the case may be. There are restrictions on publishing any matter that might reveal the identity of a complainant after a person is charged with any sexual assault offence, of the accused in a rape prosecution or of any victim in proceedings for human trafficking, or where an accused or a witness has a “medical condition,” any matter that would identify them as having that condition. In

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<sup>19</sup> For example, O Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press 2008), chapter 13 relating to the judicial power and the courts; J Casey, *Constitutional Law in Ireland* (Round Hall Sweet and Maxwell 2000), chapter 11 which relates to constitutional issues and the courts; DG Morgan, *Constitutional Law of Ireland, The Law of the Executive Legislature and Judicature* (Round Hall Press 1990). Chapter 12 refers generally to judicial issues, and also the judicial control of administrative action; JM Kelly, *Fundamental Rights in the Irish Law and Constitution* (Figgis 1967). Part XI deals with issues of the administration of justice and the rule of law. Publicity of court proceedings is also referred to, *ibid* 261; H Delaney, *Judicial Review of Administrative Actions, A Comparative Analysis* (Roundhall Thomson Reuters 2009); A Kenneally and J Tully, *The Irish Legal System* (Clarus Press 2013). Issues regarding the administration of justice are referred to in Section E; B Farrell (ed), *DeValera’s Constitution and Ours* (Published for Radio Telefis Eireann by Gill and MacMillan 1988); O Doyle and E Carolan, *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008); DG Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall Sweet and Maxwell 1997); T Murphy and P Twomey (eds), *Ireland’s Evolving Constitution, 1937-97: Collected Essays* (Hart 1998); F Litton (ed), *The Constitution of Ireland 1937-1987* (Institute of Public Administration 1988); E Carolan (ed), *The Constitution of Ireland: Perspectives and Prospects*, (Bloomsbury 2012).

<sup>20</sup> See M Forde and D Leonard, above 531; also see 475; *Al Rawi v Security Service* [2012] 1 AC 531; *Salinas de Gotari v Smithwick* [1999] 4 IR 223; *MP v AP* [1996] 1 IR 144; *RM v DM* [2000] 3 IR 373; *Re R* [1989] 1 IR 126; *Eastern Health Board v Fitness to Practice Committee* [1998] 3 IR 399; *Miggin v HSE* [2010] 4 IR 338; *EHB v E (No 2)* 1 IR 451; *HSE v McAnaspie* [2002] 1 IR 548; Protecting anonymity, M Forde and D Leonard, *Constitutional Law of Ireland* (Bloomsbury 2013) 535; *Rose v Blood Transfusion Service Board* [1996] 3 IR 67; *Re Ansbacher (Cayman) Ltd* [2002] 2 IR 517.

<sup>21</sup> M Forde and D Leonard, above 170 ff.

<sup>22</sup> *ibid* 177.

<sup>23</sup> *ibid* 475.

<sup>24</sup> *ibid* 476

<sup>25</sup> *ibid* 554.

<sup>26</sup> *ibid* 555.

<sup>27</sup> *State (DPP) v Walsh* [1981] 1 IR 412 at 440.

District Court proceedings where the accused seeks to have his trial on indictment stopped, only very limited information concerning those proceedings may be published.’<sup>28</sup>

M Forde and D Leonard state that,

‘[a]lthough there is no general statutory provision authorising judges in specified circumstances to bar or limit reporting, it was held by the Supreme Court in *Irish Times Ltd v Ireland* that, under the inherent jurisdiction, a trial judge has a discretion to impose reporting restrictions for the purpose of ensuring a fair trial. But this is a power that should only be exercised in extreme circumstances. Press reporting is a vital medium for the public to be aware of how justice is being administered, and there always is the possibility that potential witnesses would learn of the proceedings in the press and then come forward and give evidence. Further, potentially adverse contemporaneous reporting of trials ordinarily can be countered by giving appropriate directions to the jury. In those exceptional circumstances where the judge is not confident that a jury will understand and follow his directions, discharging the jury and ordering a re-trial is preferable to severe restrictions on reporting the proceedings. It is only where contemporaneous reporting would pose a real risk to a fair trial, which cannot be redressed by instructing a jury appropriately, that restrictions may be imposed. The Circuit Court judge trying a major drugs trafficking case ordered that there should be no contemporaneous media reporting of the proceedings other than that the trial was proceeding in open court, where it was taking place, the names and addresses of the accused and the nature of the offences involved. While the circumstances there warranted the judge being apprehensive about how the case might be reported, it was held that they did not pose so obvious a threat to a fair trial to justify that embargo. For these reasons, in *Independent Newspapers (Ireland) Ltd v Anderson*, involving child pornography, it was held that the trial judge should not have ordered that there should not be disclosure of an **accused’s** identity. Frequently trial judges prohibit publication of evidence given in a voir dire, until the trial judges prohibit publication of evidence given in a voir dire, until the trial has concluded, in order to ensure that members of the jury do not become aware of evidence tendered that has been ruled inadmissible’<sup>29</sup> (original emphasis).

The same authors note that it,

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<sup>28</sup> M Forde and D Leonard, above 476 ff, and referring to *Toronto Star Newspapers Ltd v Canada* (2010) 320 DLR 4th 64; *Hogan v Hitch* [2011] 243 CLR 506; *Re Times Newspapers Ltd* [2009] 1 WLR 1015; Criminal Law (Rape) Act 1981, s7 (as amended) and s8; *LK v Independent Star Ltd* [2011] 2 ILRM 272; Criminal Law (Human Trafficking) Act 2008, s11; Criminal Justice Act 2006, s181; Criminal Procedure Act 1967, s41.

<sup>29</sup> M Forde and D Leonard, above 477, referring to *Irish Times Ltd v Ireland* [1998] 1 IR 359; *Irish Independent Star Ltd v O’Connor* [2002] 4 IR 166; *Independent Newspapers (Ireland) Ltd v Anderson* [2006] 3 IR 341.



‘does not seem to have been contemplated in the *Irish Times* case that, unless press reporting of criminal trials in particular circumstances is prohibited in circumstances “prescribed by law,” ie by an Act of the Oireachtas or, possibly, pre-1937 legislation, there is no lawful power to ban or to restrict reporting, no matter how desirable the ban would be. Criminal justice being “administered in public” appears to have been considered as meaning a trial in a court that is open to the public and no more; that reporting of the proceedings is an entirely different matter, involving an appropriate balance between the rights to a free trial and to freedom of the press. Accordingly, it would seem that restrictions on reporting, not authorised by statute, also can be imposed for other compelling reasons.’<sup>30</sup>

M Forde and D Leonard state that ‘it appears that there is an inherent jurisdiction in the courts to direct that the parties’ or witnesses’ anonymity should be protected in the interests of privacy.’<sup>31</sup> Privacy is also generally considered.<sup>32</sup> In relation to confidence and privacy, there is significant recent litigation regarding freedom of expression and privacy.<sup>33</sup> Privacy is an implied Constitutional right and also protected under the European Convention, UN Convention and EU Charter.<sup>34</sup> ‘[U]nder their inherent jurisdiction, courts may enjoin publication of events occurring in open court, the disclosure of which significantly encroaches on a person’s private life.’<sup>35</sup> Compulsory TCB including over party objection may draw comparisons with compelled disclosure.<sup>36</sup> The literature and jurisprudence does not appear to engage with the nuances and potential effects of a party objecting to TCB occurring over the objection, particularly for witness and jury members.

The presumption of innocence is also crucially important.<sup>37</sup> Prejudicial publicity<sup>38</sup> raises important Constitutional matters. ‘Where it is shown that publicity before or during the

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<sup>30</sup> M Forde and D Leonard, above 477; and referring to *Siemer v Solicitor-General* [2012] 3 NZLR 43.

<sup>31</sup> *ibid*, 674, and referring to *Re Guardian News & Media Ltd* [2010] 2 AC 697.

<sup>32</sup> *ibid*, 653 ff. See also *Hanahoe v Hussey* [1998] 3 IR 69; *Herrity v Associated Newspapers (Ireland) Ltd* [2009] 1 IR 316.

<sup>33</sup> M Forde and D Leonard, above 580.

<sup>34</sup> *ibid*, 580-581.

<sup>35</sup> *ibid*, 581, and referring to *Re British Broadcasting Corp* [2010] 1 AC 145; *Re Guardian News & Media* [2010] 2 AC 697. But see also *M v Drury* [1994] 2 IR 8; *AG for England and Wales v Brandon Book Publishers Ltd* [1987] ILRM 135; *Commonwealth of Australia v John Fairfax Ltd* [1980] 147 CLR 39.

<sup>36</sup> See *ibid*, 490; *Environmental Protection Agency v Swalcliffe Ltd* [2004] 2 IR 549; *Coogan v News Group Newspapers Ltd* [2012] 2 WLR 848; *People v Cummins* [1972] 1 IR 312; *R v White* [1999] 174 DLR 4th 111; *National Irish Bank (No 1)* [1999] 3 IR 145; *Dunnes Stores Ireland Co v Ryan* [2002] 2 IR 60; *Saunders v UK* [1979] 23 EHRR 313; *O’Halloran v UK* [2001] 46 EHRR 21.

<sup>37</sup> *ibid*, 485; Art 6(2) European Convention, Art 14(2) UN Convention, Art 48(1) EU Charter; C Hamilton, *The Presumption of Innocence in Irish Criminal Law: Whittling the Golden Thread* (Irish Academic Press 2007).

trial is likely to significantly influence the jurors against the accused, it will not be allowed to proceed, either at the time scheduled or at all.<sup>39</sup> The ‘accused’s right to a fair trial takes precedence over the State’s interest in prosecuting those believed to have committed offences. It is principally for the trial judge to decide whether in all of the circumstances the trial should proceed, in view of the publicity.’<sup>40</sup> This decision can also be challenged by way of judicial review.<sup>41</sup> In *Z v DPP* the fact that there was publicity was held not to be a reason to stop the trial, with particular emphasis given to the ability of the trial judge to appropriately direct the jury and the jury’s ability to act impartially.<sup>42</sup> The pre-trial publicity cases are indicated by M Forde and D Leonard to ‘turn very much on their own facts.’<sup>43</sup> However, in any jurisdiction where TCB and TCB access comes to be considered, the issue of effects, legal-empirical research, jurisprudence, laws (including Constitutional laws) and legal-policy might also be considered. The considered research of TCB effect issues is something which will illuminate better the sometimes difficult considerations, and indeed balancing of legal rights, which courts and legal-policymakers sometimes have to engage in. T O’Malley, for example, notes that the criminal justice system ‘consists of a set of rules, principles, practices and institutions the content and operation of which vary across time and space to reflect prevailing social and legal values.’<sup>44</sup>

Television links are permitted in Ireland for the giving of witness evidence in the context of certain sexual offence prosecutions per the Criminal Evidence Act 1992.<sup>45</sup> This was amended and expanded in 2001 to include criminal and extradition proceedings.<sup>46</sup> These are issues which may be compared and explored in future in the context of considering potential Irish TCB pilots and experiments.

Jury trial<sup>47</sup> is also a Constitutional issue. Court and jury functioning may also be considered.<sup>48</sup> M Forde and D Leonard note that a ‘matter of some concern is the ability of jurors to obtain information which is not given in evidence, about the accused, a

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<sup>38</sup> *ibid*, 484. T O’Malley, *The Criminal Process* (Round Hall Thomson Reuters 2009) 603.

<sup>39</sup> M Forde and D Leonard, *ibid*.

<sup>40</sup> *ibid*.

<sup>41</sup> *ibid*.

<sup>42</sup> See *Z v DPP* [1994] 2 IR 476.

<sup>43</sup> At 485; *D v DPP* [1994] 2 IR 465; *DPP v Haugh (No 2)* [2001] 1 IR 162; *People v Davis* [2001] 1 IR 146.

<sup>44</sup> T O’Malley, *The Criminal Process* (Round Hall Thomson Reuters 2009) Preface.

<sup>45</sup> See M Forde and D Leonard, *Constitutional Law of Ireland* (Bloomsbury 2013) 496. Also *Donnelly v Ireland* [1998] 1 IR 321.

<sup>46</sup> See Extradition (European Union Conventions) Act 2001, s 24.

<sup>47</sup> M Forde and D Leonard, *above* 478.

witness or the underlying events, by accessing the internet.’<sup>49</sup> This is by no means limited to Ireland. TCB (and social media) potentially complicates the difficulty of these issues, as also acknowledged by the Chief Justice recently.<sup>50</sup>

Article 40.6.1.i refers in particular to freedom of expression.<sup>51</sup> The ‘scope of Art 40.6.1<sup>o</sup>.i has received little judicial consideration.’<sup>52</sup> Similar to other jurisdictions this can lead to heated [legal-]policy discussions as well as courtroom contention in terms of restricting freedom of expression. Particular examples can relate to restrictions (and also injunctions).<sup>53</sup> M Forde and D Leonard state that ‘[a]nother ground that can justify interference with free expression is safeguarding the due administration of justice.’<sup>54</sup> Article 10(2) of the European Convention also permits restrictions upon freedom of expression for ‘maintaining the authority and impartiality of the judiciary.’<sup>55</sup> M Forde and D Leonard indicate that ‘[a]nother ground that can justify interference with free expression is safeguarding the due administration of justice; art 10(2) of the European Convention permits restrictions on freedom of expression aimed at “maintaining the authority and impartiality of the judiciary.” Similar powers can be perhaps inferred from the Constitution’s provisions that the court’s function is to administer justice and those persons accused of criminal charges shall be tried in due course of law. The principal source of authority for restricting expression is in the interests of maintaining the courts’ authority is the inherent power of the courts to punish for contempt.’<sup>56</sup>

Regarding the prejudicing of a fair trial, it ‘depends on the circumstances of each particular case whether the publicity is indeed seriously prejudicial and whether any

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<sup>48</sup> *ibid*, 482; *de Burca v AG* [1976] 1 IR 38; *People v O’Shea* [1982] 1 IR 384; *O’Callaghan v AG* [1993] 2 IR 17.

<sup>49</sup> *ibid*, 483; referring also to *AG v Dallas* [2012] 1 WLR 991; *Byrne v DPP* [2011] 2 IR 461. P Lambert, *Courting Publicity, Twitter and Television Cameras in the Courtroom* (Bloomsbury 2011); P Lambert, *Social Networking, Law, Rights and Policy* (Clarus 2014). N Andersen, ‘Chief Justice Warns of Social Media Pitfalls’ *Independent* (Dublin, 2 May 2014).

<sup>50</sup> Chief Justice Susan Denham has also commented on some of the challenges for courts arising from social media issues. See N Andersen, ‘Chief Justice Warns of Social Media Pitfalls’ *Independent* (Dublin, 2 May 2014).

<sup>51</sup> E Barendt, *Freedom of Speech* (OUP 2005); M McGonagle, *Media Law* (Thomson Round Hall 2003); T Daly, ‘Strengthening Irish Democracy: A Proposal to Restore Free Speech to Art 40.6.1(1) of the Constitution’ (2009) 31 DULJ 263; M Forde and D Leonard, above 559.

<sup>52</sup> M Forde and D Leonard, *Constitutional Law of Ireland* (Bloomsbury 2013) 560.

<sup>53</sup> *Cullen v Tobin* [1984] ILRM 577; *Axel v Springer* [2012] 55 EHRR 6; *Murray v Newsgroup Newspapers* [2011] 1 IR 156; *R v Keegstra* [1990] 3 SCR 697; *Murphy v IRTC* [1999] 1 IR 12; *Colgan v ITRC* [2000] 2 IR 490. However, the issue of Super Injunctions has received less plaintiff popularity in Ireland than in the UK.

<sup>54</sup> M Forde and D Leonard, above 568.

<sup>55</sup> *O’Kelly v O’Neill* [2000] 1 IR 3.

prejudice caused may be alleviated by appropriate directions to the jury, or by the “fade factor” arising from the passage of time. Those who publish prejudicial material before or during a trial risk being punished for contempt, and that risk exists even if there is no jury involved in the proceedings or in the particular stage of the proceedings. As was observed, “it would be unwise to assume that judges are totally immune from frailties commonly held to afflict jurors.”<sup>57</sup> The issue of TCB fade factor for participants broadcast on TCB has not been considered, nor the potentially greater publicity and longevity of iTCB broadcast footage. Could the right to forget include TCB and iTCB for instance?<sup>58</sup>

The Criminal Justice Act 1999 also prohibits the publication of anything other than the name, charge, application for dismissal, information that the judge permits to be published in relation to the early stage of certain cases.<sup>59</sup> Generally a restriction sometimes ‘depends on all the circumstances whether particular disclosures and commentary would be regarded as likely to prejudice a fair trial.’<sup>60</sup> There are also other Constitutional provisions that may be considered in a potential TCB context. Article 40.1 refers to equality before the law<sup>61</sup> and Article 40.6.2 refers to non-discrimination in regulatory laws. Other aspects referred to include the right and need for a speedy trial,<sup>62</sup> criminal processes and procedures,<sup>63</sup> personal autonomy,<sup>64</sup> contempt, criticism of judges, free speech,<sup>65</sup> mandatory in camera hearings,<sup>66</sup> anonymous witnesses<sup>67</sup> and the protecting of anonymity is also considered important.<sup>68</sup>

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<sup>56</sup> M Forde and D Leonard, above 568.

<sup>57</sup> *ibid*; *Cullen v Toibin* [1984] ILRM 577.

<sup>58</sup> See, for example, *Google Spain, Google Inc v Agencia Española de Protección de Datos (AEPD) and González* (C-131/12, CJEU, 13 May 2014) < <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&dclang=EN&mode=req&dir=&occ=first&part=1&cid=457078> > accessed 17 May 2014.

<sup>59</sup> *ibid*, 569; Criminal Procedure Act 1967 s4J as inserted by the Criminal Justice Act 1999.

<sup>60</sup> *ibid*, 569; *Kelly v O’Neill* [2000] 1 IR 354.

<sup>61</sup> Fair procedures, in *ibid*, 549; G Hogan and DG Morgan, *Administrative Law in Ireland* (Round Hall 2010), Chs 12 and 13.

<sup>62</sup> M Forde and D Leonard, above 473.

<sup>63</sup> *ibid* ch 17.

<sup>64</sup> *ibid* 677.

<sup>65</sup> *ibid*, 570; *Kennedy and McCann, Re* [1976] 1 IR 382; *Queen v M’Hugh* [1901] 2 IR 569; *State v Mamabolo* [2001] 10 BHRC 493; *King v Freeman’s Journal* [1902] 2 IR 82; *AG v O’Ryan and Boyd* [1946] 1 IR 70; *In re Kennedy and McCann* [1976] 1 IR 382; *Hibernia National Review Ltd Re* [1976] 1 IR 388; *AG v Connolly* [1947] 1 IR 213; *State (DPP) v Walsh* [1981] 1 IR 412; *Desmond v Glackin (No 1)* [1993] 3 IR 1; *R v Commissioner of Police, ex p Blackburn (No 2)* [1968] 2 QB 150.

<sup>66</sup> M Forde and D Leonard, above 532.

<sup>67</sup> *ibid*, 539; *CAB v PS* [2009] 3 IR 9.

<sup>68</sup> *Roe v Blood Transfusion service Board* [1996] 3 IR 67; *Ansbacher (Caymen) Ltd* [2002] 2 IR 517; *Doe v Revenue Commissioners* [2008] 3 IR 328; *Attorney General v X* [1992] 1 IR 1; *Eastern Heath Board v E (No 1)* [2000] 1 IR 430; *MR v An tArd Charaitheoir* [2013] 1

## The Publicity Rule

One of the primary principles of justice in Ireland, as in most jurisdictions, is the principle that justice should be done and be seen to be done in public. This principle is enshrined in the Constitution, namely Article 34. It requires court hearings to be held in public.<sup>69</sup> Only when justice would be defeated by public presence or public knowledge should a case be permitted otherwise than in public.<sup>70</sup> Article 38 preserves the integrity of the trial process so as to ensure that it was held in due course of law. Obviously, there might be other legal rights to consider also, such as privacy.<sup>71</sup>

Article 34.1 of the Constitution provides that all cases may be heard in public,<sup>72</sup> the rationale being to provide public scrutiny of the judicial system.<sup>73</sup> It provides that ‘[j]ustice ... shall be administered in public.’ Justice Keane states that the right of the public to know what is happening in our courts is a right clearly recognised and guaranteed in Article 34.<sup>74</sup> The reasons for the publicity requirement in Article 34 were referred to by Justice Walsh in *Re R Ltd*<sup>75</sup> as follows ‘[t]he actual presence of the public is never necessary, but the administration of justice in public does require that the doors of

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ILRM 449; *In re BBC* [2010] 1 AC 145; *In re Guardian News and Media Ltd* [2010] 2 AC 697.

<sup>69</sup> Article 6(1) of the European Convention, similar to Article 34, provides in relevant part that ‘Judgment shall be pronounced publicly but the press and the public may be excluded from all or part of the trial in the interest 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 necessary in the opinion of court in special circumstances where publicity would prejudice the interests of justice.’

<sup>70</sup> See Denham J, *Irish Times v Ireland*, judgment, 3, referring to Walsh J’s judgement in *In Re R Ltd* [1989] IR 126. *Irish Times v Ireland* [1998] 1 IR 359.

<sup>71</sup> One Irish text on privacy in Ireland is H Delany and E Carolan, *The Right to Privacy, A Doctrinal and Comparative Analysis* (Thomson Round Hall 2008). Also B Walsh, ‘The Judicial Power and the Protection of the Right of Privacy’ (1977) 1 Dublin University Law Journal 3-10; F O’Hannrachan, ‘Privacy and Broadcasting’ (17 July 1971) Irish Law Times 225. One can also think of wider issues. Are there, for example, corporate privacy/proportionality rights?, see generally D McHugh, *Public Relations and Corporate Communications Law in Ireland* (Firstlaw 2006). The issue for fair trial also arises. Gerard McCormack refers to sensationalism and fair trial issues, G McCormack, ‘Corrupting the Criminal Process’ (1985) 1 Irish Law Times 6. One privacy case in Ireland is referred to in ‘Woman Loses Defamation, Breach of Privacy Case Against “Sunday World”’ *Irish Times* (Dublin, 9 October 2010) < www.irishtimes.com > accessed 9 October 2010.

<sup>72</sup> ‘Save in such special and limited cases as many be prescribed by law.’ For present considerations we shall be leaving such special and limited cases aside.

<sup>73</sup> Law Reform Commission, *Consultation Paper on the Consolidation and Reform of the Courts Acts* (LRC CP 46-2007) 132.

<sup>74</sup> Keane J, *Irish Times v Ireland*, 3 and 4 of judgement. *Irish Times v Ireland* [1998] 1 IR 359.

<sup>75</sup> *Re R Ltd* [1989] IR 126. As referred to in G Hogan and G Whyte, *JM Kelly: The Irish Constitution* (4th edn, Lexis Nexis, Butterworths 2003) 731. Also M Forde, *Constitutional Law* (First Law 2004). In relation to legal interpretation, note D Dodd, *Statutory Interpretation in Ireland* (Tottel 2008).

the courts must be open so that members of the general public may come and see for themselves that justice is done.’

Justice Walsh also states that ‘in the courts, justice is administered in public on behalf of all of the inhabitants of the State.’<sup>76</sup> G Hogan and G Whyte<sup>77</sup> note that similar views were also expressed by both Chief Justice Hamilton and Justice Keane in *Irish Times*.<sup>78</sup> The Chief Justice observed that,

‘Justice is best served in an open court where the judicial process can be scrutinised. In a democratic society, justice must not only be done, but be seen to be done. Only in this way, can respect for the rules of law and public confidence in the administration of justice, so essential to the workings of a democratic state, be maintained.’

The courts adopt a policy which accepts that the effects of prejudicial publicity can frequently be adequately safeguarded against. The judiciary has recognised that certain adverse publicity can occur and that the media can on occasion overstep the boundary between impartial reporting and prejudicial publicity.<sup>79</sup>

In *State v Clifford*<sup>80</sup> a photographer was held in contempt by a trial judge. The discretion of the judge to do so was upheld in *Ex Parte Sturm*.<sup>81</sup> There are generally only certain limitations to exceptions to a publicity type rule.<sup>82</sup> The statute exceptions are referred to in G Hogan and G Whyte.<sup>83</sup>

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<sup>76</sup> G Hogan and G Whyte, above 731.

<sup>77</sup> *ibid* 732.

<sup>78</sup> *Irish Times* [1998] 1 IR 359.

<sup>79</sup> However, such cases may be the exception, and the defendant faces an onus of having to show actual prejudice. Some of the arguments used by the judiciary in relation to such a policy are that the defendant bears the onus of proving that the jury was actually prejudiced and without overcoming this threshold (which would be quite difficult to establish generally), the original verdict must remain; and jurors do not have to be totally ignorant or unaware of what is going on outside of the courtroom and that such knowledge in and of itself, without actual prejudice, is insufficient to prevent or overturn a verdict.

<sup>80</sup> *State v Clifford* 118 NE 2d 853 (Ohio Ct App 1954) *aff'd* 123 NE 2d 8 (Ohio Sup Ct 1954), *cert denied* 349 US 929 (1955). Referred to in S Barber, above 46.

<sup>81</sup> Referred to in S Barber, above 2.

<sup>82</sup> There may be restrictions on publicity, but these are understood to be permitted in ‘special and limited cases’ only. See G Hogan and G Whyte, above 732 ff. The number and examples of such ‘special and limited cases’ are few, *ibid*. Such exceptions may only be prescribed or set by law, *ibid* 733 and cases referred therein. For example, the accused’s constitutional right to trial in due course of law means that the media are not free to report contemporaneously evidence excluding as inadmissible subsequent upon a ‘trial within a trial.’ A similar restraint may apply in cases of persons jointly indicted, but separately tried. The court may also exercise its inherent jurisdiction to order an *in camera* hearing only where (a) there is a real risk of an unfair trial if contemporaneous reporting is permitted and (b) the damage which reporting would cause could not be remedied by giving appropriate directions to the jury or otherwise. See above.

<sup>83</sup> This, however, is subject to the court’s inherent jurisdiction to direct that a particular case (or portion thereof) be heard *in camera* where necessary to protect the constitutional rights of accused in criminal trials, parties in civil cases or to prevent the indirect circumvention

### Publicity Rule Requires Contemporaneous Reporting

Contemporary media reporting is permitted. In the *Irish Times* case it was rejected that a trial was held in public if the public were present but detailed contemporaneous reporting by the media was prohibited.<sup>84</sup> The Supreme Court held<sup>85</sup> that the requirements of Article 34.1 were not satisfied in respect of proceedings where the public were admitted but there was in force an order prohibiting the media from contemporaneous reporting of the proceedings. Article 34.1 was designed to protect the *public's* interest<sup>86</sup> in the open administration of justice and that right. It '[w]ould be eroded almost to vanishing point if the public had not to depend on the account which might be transmitted to them by such people as happened to gain admission to the court room for the trial in question.'<sup>87</sup> This arguably enhances the case for TCB. What would be more real and contemporary than TCB?<sup>88</sup> This is an argument. However, the Irish popular discussion to date ignores legal-empirical research and effects issues, nor is jurisprudence alone adequately informed given the lack of evidence and legal-empirical research.

### TCB as a Natural Extension

There has been a long standing argument that, due to a variety of factors, such as work patterns, physical court capacity, etc, very few people can indeed attend courts. Therefore, the argument that we should be embracing TCB to extend the reach of the television courtroom to the public. The suggestion is that it could be more democratic and

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of the in camera rule. See G Hogan, G and Whyte, above 735 ff. The principal exception to public trial in criminal matters is provided by section 4J-(1) of the Criminal Procedure Act 1967 (as inserted by section 9 of the Criminal Justice Act 1999). The publicity rule in Article 34.1 only applies where justice is being administered and, to that extent, it may have a somewhat narrower ambit than Article 6(1) of the European Convention, as noted by G Hogan and G Whyte, above 735 ff. Although Tribunals of Inquiry do not, of course, constitute courts established under the Constitution, it may be noted that s 2(a) of the Tribunals of Inquiry (Evidence) Act 1921 provides that a Tribunal shall not refuse 'to allow the public or any portion of the public to be present at any of the proceedings of the tribunal unless in the opinion of the tribunal it is in public interest expedient so to do for reasons connected with the subject matter or the inquiry or the nature of the evidence to be given...'. Other examples include sexual offence cases, official secrets, bail and previous convictions, family law (recently amended to a certain extent by way of introducing, for example, an official reporter), etc. See above. Broadcasting and TCB are not explicitly mentioned in any of the statute exceptions. It may be argued by some people that, therefore, TCB is permitted, if not required, by the Constitution and in particular the publicity rule. However, TCB issues have not been directly considered in any legal case in Ireland.

<sup>84</sup> See Keane J, *Irish Times v Ireland* 2 and 3 of judgement. *Irish Times v Ireland* [1998] 1 IR 359.

<sup>85</sup> [1998] 1 IR 359.

<sup>86</sup> G Hogan and G Whyte, above 734. This authors own emphasis.

<sup>87</sup> Keane J, *Irish Times* [1998] 1 IR 359 at 409 as referred to in G Hogan and G Whyte, above 734.

<sup>88</sup> However, ignoring the point for the moment that there are separate forms of live, delay, relay and recorded courtroom broadcasting forms.

more contemporaneous in terms of meeting the obligations and requirements of the Constitution. This extension of research is somewhat similar to educational arguments – but the research does not exist to establish such positive effects.

Justice Keane repeats the point made by Justice Walsh in *Re R Limited*<sup>89</sup> that the public presence is not strictly required, but to satisfy the requirement that justice be administered in public does require that the doors of the courtroom may be open. That only a small section of the public can, in practice, attend means that it is ‘all the more imperative that the media should have the widest possible freedom to report.’<sup>90</sup> Cameras in courts surely permits wider reporting, proponents argue. One judgement (before modern communications) even stated that ‘publication has the effect of increasing, as it were, the size of justice.’<sup>91</sup> Yet, no one has validated the suggestion that TCB will, for example, educate the public or educate the public to any greater degree.<sup>92</sup> Nor is it established that the reach of justice or size of justice is increased, actually or otherwise.

Media and communications technologies are increasingly a part of our everyday lives. Forms of television which were once taboo are now present. This includes parliamentary broadcasting and jurisdictions permitting TCB. It may be that TCB in Ireland is a taboo subject. However, some feel it is Constitutionally valid to expand current understanding and practice to encompass, and thus permit, TCB. In expanding the debate, the author commends that TCB effects-research issues be included in such considerations in Ireland and elsewhere.

Justice Keane in *Irish Times* already recognises the importance of the media being the eyes and ears of the public, not just as a mechanical device by which to inform or transmit information of current courtroom activities and proceedings. The media were, or at least could not be divorced from, the public. It can be argued, therefore, that we might consider not just the media right of access and reporting, but also the legal rights of the public as well. Ultimately, however, the *Irish Times* case did not arise in relation to, or even refer directly to, TCB. The issues involved in TCB were not considered or addressed by the Supreme Court, nor in particular the TCB concerns, etc.

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<sup>89</sup> Walsh J, *Re R Limited* [1989] IR 126.

<sup>90</sup> Keane J, *Irish Times v Ireland*, judgment, 3. *Irish Times v Ireland* [1998] 1 IR 359.

<sup>91</sup> *Rex v Clement* [1821] 4B and ALD 218, at 225. Referred to by O’Flaherty J, *Irish Times v Ireland*, judgment, 11. *Irish Times v Ireland* [1998] 1 IR 359.

<sup>92</sup> See chs 18 and 19 in relation to flaws and presumptions with the educational courtroom broadcasting argument.



## The Cost of Justice

There is a ‘heavy onus proof’ on a litigant seeking a hearing otherwise than in public.<sup>93</sup> The whole issue of trials and the fair trial legal rights<sup>94</sup> of accused persons, publicity of victims<sup>95</sup> and witness are each topics deserving of extensive commentary themselves. In order for in camera proceeding restrictions to apply, the damage would have to outweigh the court’s ability to provide a just remedy.<sup>96</sup> It is a difficult task for an accused to have a case other than in public. This may be even harder in the context of, for example, TCB where the potential ill effects have not been properly or adequately researched and therefore has not been shown to exist, or to probably exist, in particular circumstances. This is also relevant in considering whether a strategy of a considered policy on TCB is preferable than an ad hoc arrangement of individual judicial decisions in instant applications for TCB.

In Justice Keane’s analogy of the eyes and ears of the public<sup>97</sup> media age, one argument may be that it is appropriate to permit enhanced publicity of court proceedings. However, the query arises whether the maximum amount of publicity of court proceedings may be required. We often insist upon individuals having to reveal all about themselves as a price of litigation. The cost of litigation is not always financial. Sometimes people have to reveal their personal histories, sexual histories, salary, employment and other personal details. It is as if all about them is or potentially can be an open target. Revealing everything, no matter how personal is, in a sense, a condition of litigation. Already in practice the effect of proceedings is that one’s personal and employment details are fully disclosed and dissected in the media. Already the potential of media scrutiny is a cost to be considered in the balancing decision of whether to embark upon litigation. All is laid bare, to use a phrase, warts and all. Some might ask if that intrusion is allowed, then why not permit TCB? Litigation privacy issues and proportionality issues can also arise. The Court of Justice relies heavily on proportionality issues in deciding the Irish case of *Digital Rights Ireland* and struck down an EU Directive primarily on the grounds that it was disproportionate.<sup>98</sup> In this context, the issue arises as to when TCB may become

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<sup>93</sup> G Hogan and G Whyte, above 749.

<sup>94</sup> See, for example, B Banaszak (ed), *Fair Trial Rights of the Accused* (Greenwood 2002).

<sup>95</sup> General legal commentary includes T O’Malley, *Sexual Offences: Law Policy and Punishment* (Round Hall Sweet & Maxwell 1996); R Card, A Gillespie and M Hirst, *Sexual Offences* (Jordans 2008); P Infield and G Platford, *The Law of Harassment and Stalking* (Butterworths 2000); M Hall, *Victims of Crime, Policy and Practice in Criminal Justice* (Willan 2009).

<sup>96</sup> G Hogan and G Whyte, above 745, referring inter alia to Finlay CJ in *Irish Press v Ingersoll Publications* [1994] 1 IR 176.

<sup>97</sup> Keane J, *Irish Times v Ireland*, 4 of judgement. *Irish Times v Ireland* [1998] 1 IR 359.

<sup>98</sup> *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others* (C-293/12, CJEU, 8 April 2014).

overbearing and dis-proportionate and or adversely effects other legitimate rights and interests, be they legal or legal-policy. The interface of TCB, iTCB and the Right to be Forgotten might need to be considered.<sup>99</sup>

TCB may enhance TCB ‘labelling’ type arguments, known in the criminology, legal-psychology, media and communications fields, may be considered in wider legal and justice fields. This has received less than considered analysis in TCB discussion.

J Bentham, referred to by the Law Reform Commission, states that ‘where there is not publicity there is no justice.’<sup>100</sup> This does not mean that maximum publicity creates maximum justice. Even J Bentham expressly recognises at least some form of proportionality is necessary.<sup>101</sup> Separately the Law Reform Commission raise the issue and proportionality of wiping clean certain (minor) conviction records after a particular period.<sup>102</sup> In certain circumstances TCB may underscore this desire. The Right to be Forgotten emphasises these issues.

Careful consideration of how this may be balanced with the defendants’ legal rights arise. Indeed, the later may be argued to take a precedence. The judge in the *Pistorius*<sup>103</sup> case admonished that laughter and entertainment were not part of the case. It may also be the case that additional legal rights in addition to due process may exist and have to be considered. These issues are not yet properly considered.

### **A TCB Case Analogy**

The *Irish Times*<sup>104</sup> case has been suggested as a possible avenue for the introduction of TCB in Ireland, due in particular to the various media friendly comments made by the court. While specifically recognising media rights, the court went further by recognising public rights – public rights which exist or are manifested in the activities/reports of the

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<sup>99</sup> See, for example, *Google Spain, Google Inc v Agencia Española de Protección de Datos (AEPD) and González* (C-131/12, CJEU, 13 May 2014) < <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&dclang=EN&mode=req&dir=&occ=first&part=1&cid=457078> > accessed 17 May 2014.

<sup>100</sup> Law Reform Commission, *Consultation Paper on the Consolidation and Reform of the Courts Acts* (LRC CP 46-2007) 131 ff.

<sup>101</sup> *ibid.*

<sup>102</sup> Law Reform Commission, *Report on Spent Convictions* (LRC-2007).

<sup>103</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>104</sup> To give it its full title, *The Irish Times Limited, Examiner Publications (Cork) Limited, Independent Newspapers Ireland Limited, News Group Newspapers Limited and Radio Telefis Eireann, Applicants, v Ireland, The Attorney General and His Honour Judge Anthony G. Murphy, Circuit Court Judge of the Cork Circuit, County Cork, Respondents; The Director of Public Prosecutions and Howard Charles Millar, James Noel, Roman Smolen, Theresa Bernadette da Silva Roy* [1998] 1 IR 359.

media. Some commentators<sup>105</sup> feel that this is a move towards TCB. The case involved restrictions on media reporting of a major drugs trial in Cork. The trial judge made a number of orders imposing restrictions on the contemporaneous reporting of the trial by the press and broadcasters. However, it is not a TCB case. The issue of TCB was not an issue and neither was it mentioned *obiter* in the case. There are no TCB case decisions in Ireland. Neither are there any express extra-judicial comments from any judges that the author is aware of, which refer, to TCB legal-empirical research issues. However, it is useful to consider the case in greater detail as it at least forms part of the Irish backdrop.

### **The *Irish Times* Case**

Justice Keane emphasised that ‘[j]ustice must be administered in public, not in order to merely satisfy the prurient or mindlessly inquisitive, but because, if it were not, an essential feature of a truly democratic society would be missing. Such a society could not tolerate the huge void that would be left if the public had to rely on what might be seen or heard by casual observers, rather than on a detailed daily commentary by the press, radio and television.’<sup>106</sup> The Supreme Court in the *Irish Times* case held that a trial preventing contemporaneous reporting was not ‘in public’ within the meaning of Article 34.1.<sup>107</sup> There were no circumstances in the case to ‘justify so extreme a step as the banning of detailed, and, it must be assumed, accurate contemporaneous reporting of the trial.’ Nor was there ‘any established and overriding necessity to preserve the integrity of the trial process so as to ensure that it was held in due course of law in accordance with Article 38.’<sup>108</sup> These judicial statements, while not explicitly referring to TCB, may be utilised in arguing in favour of liberal public (and media) access to courtrooms. Other statements in the *Irish Times* case equate media access as a public right and also emphasising the increasing importance of the media as the eyes and ears of the public.<sup>109</sup>

The Law Reform Commission in its Report on Contempt of Court recommend that an advisory committee be established and that a pilot project involving (civil and criminal)

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<sup>105</sup> See, for example, K Wood, ‘Recent Judgement Could Lead to TV Cameras in the Court Rooms’ (May 1998) *Law Society Gazette* 7.

<sup>106</sup> *Irish Times v Ireland* [1998] 1 IR 359 at 409, referred to in Law Reform Commission, *Consultation Paper on the Consolidation and Reform of the Courts Acts* (LRC CP 47-2007) 132-133.

<sup>107</sup> *Irish Times v Ireland* [1989] IR 126.

<sup>108</sup> Both Keane J [1998] 1 IR 359 at 411, as referred to in G Hogan and G Whyte, above 734. Hogan and Whyte therefore suggest the reasoning in the *Irish Times* case has ‘the potential possibly to create major non-statutory exceptions to the publicity rule where such exceptions are thought judicially necessary to safeguard other constitutional rights.’ G Hogan and G Whyte, above 734-735. Might courtroom broadcasting, or particular forms of courtroom broadcasting, become one such example?

<sup>109</sup> Keane J, *Irish Times v Ireland*, 4 of judgment. *Irish Times v Ireland* [1998] 1 IR 359.

TCB be undertaken.<sup>110</sup> This was not only in relation to appeal proceedings but also in relation to trials.<sup>111</sup> The suggestions are therefore wider than some of the UK proposals. Appeals are often assumed to be safer for TCB as they focus more on legal arguments than witness evidence and or jury issues. There is a perceived lesser risk of adverse effects on (certain) courtroom participants.

Unfortunately there is no research comparing jurisdictions which permit TCB of appeals only, versus appeals and trials. Equally, there is no body of research comprising TCB civil cases versus criminal cases. The recent development of TCB in the new UK Supreme Court is a form of limited appeal TCB.

### **Supreme Court Appeal**

In *Irish Times* the media appealed the restrictions unsuccessfully to the High Court. The Supreme Court, however, granted the appeal. It was held by the Supreme Court that there is a fundamental right under Article 34.1 of the Constitution for the people to have access to the courts to hear and see justice being done, save in a few limited exceptions. Orders restricting contemporaneous reporting were argued to be a curtailment of the right of access of the public to the administration of justice.

Article 34.1 can be limited by parliament and the courts to protect the Constitutional right to fair trial, which was a superior Constitutional right. One may balance the right of access to the courts, to information about the hearing and the administration of justice against the competing legal rights of a trial in due course of law and a trial with fair procedures. Restrictions on contemporaneous reporting can only be applied in exceptional circumstances where the trial judge has applied the appropriate test and process. Prior to ordering a ban the trial judge must be satisfied that (a) there is a ‘real risk of an unfair trial’ if contemporaneous reporting is permitted; and (b) the damage could not be remedied by the trial judge with appropriate rulings and directions to the jury or otherwise. This test was endorsed by the Supreme Court. The trial judge should also first hear evidence and submissions from the relevant parties and any relevant representatives when a ban is being considered.<sup>112</sup> This means that before implementing a ban, a trial judge should first hear arguments from media representatives.

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<sup>110</sup> Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994) 66. Generally, note, D Eady, Sir, and ATH Smith, *Arlidge, Eady & Smith on Contempt* (Sweet & Maxwell 2005); CJ Miller, *Contempt of Court* (OUP 2000); F Quinn, *Law for Journalists* (Pearson Longman 2007).

<sup>111</sup> *ibid* 66. For a US perspective, see J Goldschmidt, J “‘Order in Court!’: Constitutional Issues in the Law of Courtroom Decorum” (2008) 31:1 Hamline Law Review 1.

<sup>112</sup> Justice Denham, *ibid*.

In this case, there was no evidence, the Supreme Court found, of a real risk of an unfair trial from contemporaneous reporting, nor could the trial judge assume that such reporting would be other than fair and accurate. The trial judge it was pointed out, could have dealt with the matter adequately under contempt procedures and directions to the jury (and also by discharge of the jury if necessary, or also by postponing the publication of evidence). While making an order banning contemporaneous reporting is within the jurisdiction of the trial judge, he erred, in the test he applied and its application. The blanket ban exceeded his jurisdiction. He failed to have regard to the right of the public to be informed of proceedings, the right of the accused to have the case reported, and the freedom of the press (Article 40.6.1). The trial judge was held to have made no attempt to see if the Constitutional right of the press to report proceedings could be reconciled with the accused's right to a fair trial.<sup>113</sup>

It will be necessary in future to assess how defendant's legal rights, for example, and the media reporting rights, may be recalibrated or be rebalanced once proper TCB effects-research is embarked upon and once we categorise TCB arguments,<sup>114</sup> forms<sup>115</sup> and graduated effects. In addition, rights and legal rights arguments may potentially be recalibrated by the massive amplification of television audience that certain forms of TCB can bring, in particular for defendants, jurors and witnesses.

Chief Justice Hamilton states that the obligation providing for the administration of justice in public is not discharged by conducting a trial to which the public, including the media, are admitted if there is an order prohibiting contemporaneous media reporting. Such an order deprives the wider public, who did not have access to the court, of knowledge of the proceedings. Knowledge of the proceedings was limited to those who were able to be present in the courtroom. As justice is required to be administered in public on behalf of citizens, such inhabitants are entitled to be informed of the proceedings in the court and to be given a fair and accurate account of such proceedings and the media are entitled to give such an account to the wider public. It may, however, be limited, as provided in Article 34.1 itself, in such special and limited cases as may be prescribed by law.<sup>116</sup> It is the function and role of a trial judge, according to Chief Justice Hamilton,<sup>117</sup> to hold the trial in public and not to interfere or in any way restrict the right

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<sup>113</sup> Justice O'Flaherty, *ibid.*

<sup>114</sup> The arguments, and listing all of the arguments, however, is not the focus of this work.

<sup>115</sup> See chs 18 and 19 (educational issues).

<sup>116</sup> *above.*

<sup>117</sup> *Irish Times* case, *above.*

of the media to publish a fair and accurate report of the proceedings publicly heard before the court unless such publication is prohibited by law or would interfere with or prejudice an accused person's right to a fair trial. He does not refer to any educational functions or educational related legal rights.<sup>118</sup>

The trial judge was held not entitled on the evidence before him to assume that the reporting of the proceedings in the course of the trial would be other than fair and accurate or that such reporting would in any way prejudice the administration of justice or the accused person's right to a fair trial and lead to an abortion of the trial. Neither was he entitled to assume at that stage that even if the reporting proved to be inaccurate or unfair and that if such inaccuracy or unfairness came to the attention of the jury, the situation could not be avoided by appropriate directions to the jury.<sup>119</sup>

In *Z v DPP*,<sup>120</sup> Chief Justice Hamilton states that 'I share in the confidence that our judicial system has in juries to act with responsibility in accordance with the terms of their oath, to follow the directions given by the trial judge and a true verdict give in accordance with the evidence.' It is inevitably that we will have to reconsider jury issues in the context of social media and also TCB. Justice Denham states that we are,

'not living in ancient times or in a city state. We live in a modern democracy in the age of information technology. It is entirely impractical for all people to attend all courts. Nor is that required. What is required is that information of the hearings in court are in the public domain. However, does this require maximum actual or potential publicity? In a modern democracy this information is brought into the public domain by many routes, but in reality most people learn of matters before the courts from the press. Thus any curtailment of the press may be viewed as a curtailment of the access of the people to the administration of justice and should be analyzed accordingly.'<sup>121</sup>

Justice Keane also points out that nowadays very few citizens have the time to attend court.<sup>122</sup> He also referred to the press as being in effect being the eyes and the ears of the public. It is an important protection to accused persons that their case be heard in public. It is also important to the citizens in general that anything eccentric, unusual, or unfair

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<sup>118</sup> *ibid.* It is hard to envisage any circumstances (other than a 'trial within a trial') in which fair and accurate reporting in or by the media of such evidence could in any way interfere with or in any way prejudice this right or compromise the proper administration of justice, according to the Supreme Court.

<sup>119</sup> *ibid.*

<sup>120</sup> *Z v DPP* [1994] 2 IR 476.

<sup>121</sup> *Irish Times*, above.

<sup>122</sup> *Irish Times* case, above.

which happens in the courts should be drawn to their attention. It is also important to all engaged in the administration of justice that justice should not only be done but should be seen to be done.<sup>123</sup>

The trial judge took the view that the most important issue was the right of the accused to a fair trial. He does not appear to have assessed correctly the requirement of Article 34 of the Constitution that justice ‘shall be administered in public.’ He does not appear to have at all considered the fact that the applicants had a Constitutional right to report the court proceedings. For that reason he made no attempt to see if the applicants Constitutional right to report the proceedings could be reconciled with the accused’s right to a fair trial. In the context of TCB additional and other ‘rights’ may have to be considered, and which may differ depending on the form of TCB being contemplated.

### **TCB After the *Irish Times* Case**

This case,<sup>124</sup> because of the media friendly comments contained throughout it (as is evident above), because of its recognition for media opinions to be heard before a complete ban is imposed and because of the deference to a media role in vindicating public rights, assists the view that TCB may have been thought to be a step closer in Ireland. The Supreme Court judgment recognised a clear and strong fundamental right for public access – but because this may not be possible, the media are in effect the medium of delivery of such access, or rather *information* to the public. In effect, it arguably diminishes the traditional concept of ‘physical’ access (or the possibility of such access) and replaces it with the ability of the public to be informed of proceedings via the media. This is potentially an interesting extension of the interpretation of Constitutional legal rights. This may mean that the media has enhanced its role, as it already has its own rights, but now has additional rights in terms of being the means of delivery of public rights, or the vindication on these.

Interesting issues arise in terms of whether the public being informed requires TCB, and if so, which TCB forms. TCB may be different from other media reporting and media broadcasting. As the effects potentially change between different forms of TCB, the legal rights arguments may be recalibrated, rebalanced or even decided differently. The argument(s) in some way may depend upon the form and effects of TCB at issue. Some judges have referred to education as being a valid aim (or requirement) of the judicial

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<sup>123</sup>     ibid.  
<sup>124</sup>     ibid.

process. Many others have not, even in the context of TCB.<sup>125</sup>

Furthermore, the *Irish Times* judgment while recognising certain superior legal rights, said that a balancing exercise and test may be undertaken prior to a ban. Conceivably therefore, if ever there was a possibility of TCB being introduced, a particular judge before banning the cameras would have to enter into such a balancing exercise and formatting and appropriate test. This raises the issue of differentiating, if not discriminating, between media forms.<sup>126</sup> Arguably also, a high burden is placed upon such a judge given other parts of the Supreme Court judgment. The Supreme Court states that the judge may be satisfied that the particular publication *would* interfere with the right to fair trial.<sup>127</sup> In the context of TCB, we may better assist courts and legal-policymakers with more normative TCB effects-research. It is also suggested that such issues be dealt with in an advanced and considered legal-empirical discussion, rather than in an ad hoc pressured individual situation without opportunity of appropriate (normative) evidence and research.

The Supreme Court also states that the trial judge was not entitled ‘on the evidence before him’ to assume the reporting would be other than fair and accurate or would prejudice the administration of justice or the right to a fair trial. In terms of TCB, many of the arguments and concerns may not become evident in an instant case like this. If they do, they are frequently going to be after this event and hence dealt with by way of contempt – which is not dissimilar to newspaper reporting. However, some may ask whether contempt is sufficiently wide enough or suitable enough to deal with all of the TCB issues which may arise. Much of the potential evidence in relation to TCB effects comes from legal-empirical effects-research and, therefore, may not be immediately evident in a particular contemporaneous case.<sup>128</sup> Contempt considerations alone are insufficient to properly inform courts in relation to TCB legal-empirical issues.

It is also conceivable that an overly broad approach or interpretation of media rights may curtail the ability of judges to implement procedures and rules for TCB. Equally, one may consider whether a judge would be permitted to distinguish between different forms

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<sup>125</sup> For example *Estes*. There is also the interesting issue of whether refusing an instant request for TCB access amounts to a ban per se.

<sup>126</sup> A judge may seek to ban TCB but the other media representatives are not restricted.

<sup>127</sup> Emphasis added.

<sup>128</sup> In addition, there is the issue highlighted elsewhere that the amount and depth of research is not yet as comprehensive as it should be. Having said that, we do have the benefit of comparative research, studies and tests and therefore do not have to start in a complete vacuum.



of TCB. The media may argue against such differentiation. Yet, even in the *Pistorius*<sup>129</sup> example, it was an individual ad hoc form of TCB in that instant case (without advance legal-empirical guidance and evidence), and various restrictions were applied, such as whom could be filmed and broadcast. (However, this appears not to have extended to the public in-court audience, the victims family and ‘reaction-shots’ of the victims mother which were broadcast).

Currently, the only in-court shots in Ireland are infrequent before proceedings, such examples of a courtroom, a judge in chambers, a judge entering a courtroom and or sitting down before a case. These examples are infrequent. It does not appear that any empirical related research exists, nor any planned assessment of the issues, be it educational or otherwise.

The US, while not in any way definitive, assists in offering avenues to consider in term of potential future effects, baseline and challenge research questions which may arise here. As such the consideration of the US research issues (including the US Supreme Court) are relevant for consideration in the Irish context. In addition, given the problems with the US in terms no definitive answers, the suggestions and options presented in the thesis are relevant in Ireland as well as elsewhere. The US literature and the US experience helps to inform these suggestions and hence, the US situation is also relevant to Ireland. The US challenges are informative.

### **First Principles May Be Insufficient**

Examining the issues and arguments for TCB purely from Constitutional first principles may be insufficient. As Justice Denham notes,<sup>130</sup> Article 34.1 does not exist in a vacuum, nor indeed does any Constitutional provision or right. There are also countervailing Constitutional legal rights which can in certain circumstances come into play, such as free expression (Article 40.6.1) and that a person shall not be tried other than in accordance with law (Article 38.1). Apparently, neither of these were required to be considered by Justice Keane.<sup>131</sup> Other provisions include the right to fair procedures and right to communicate (Article 40.3). It is also recognised that Constitutional legal rights are rarely if at all absolute and frequently also have to be balanced against countervailing Constitutional legal rights and interests.

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<sup>129</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>130</sup> Denham J, *Irish Times v Ireland*, judgment, 5. *Irish Times v Ireland* [1998] 1 IR 359.

<sup>131</sup> Keane J, *Irish Times v Ireland*, judgment, 5 and 6. *Irish Times v Ireland* [1998] 1 IR 359.

Only when justice would be defeated by public presence or public knowledge would a case be permitted otherwise than in public.<sup>132</sup> ‘Justice is administered in public on behalf of all the inhabitants of the state.’<sup>133</sup> However, there are countervailing arguments and issues such as witness rights, defendant rights and possibly even juror rights. Also, lawyers may have rights too. For example, might a lawyer have a right to object to, prevent or ensure that they are not shown in the TCB. Procedures for and regulation of TCB is arguably very different from *in camera* proceedings<sup>134</sup> and would not be such as to infringe the publicity rule. The public can attend as normal. The media can attend and report contemporaneously and as normal. Interesting Right to be Forgotten issues potentially arise.

### Comparison

While there is no Irish TCB per se, some of the potentially relevant literature and materials are reviewed. Ireland has no TCB. Therefore, there is no research of actual TCB effects.<sup>135</sup> The only legal-empirical research in relation to TCB effect issues in Ireland was that of the author in 1996.<sup>136</sup> This was in the form of a judicial survey regarding TCB issues.<sup>137</sup> P Newenham<sup>138</sup> undertook interview research on the general subject of TCB in 2008, albeit not specifically addressing effects-research issues. In terms of the judiciary specifically, the current research has found that judicial attitudes in Ireland have not become any more favourable towards permitting TCB. While the author repeats and expands the judicial research (thus the first replicated research in Ireland or the UK), the judicial research is also compared with relevant research from New York. The author, therefore, introduces a comparative element to the current research. It is also

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<sup>132</sup> Denham J, *Irish Times v Ireland*, judgment, 3, referring to Walsh J’s judgement in *In Re R Ltd* [1989] IR 126. *Irish Times v Ireland* [1998] 1 IR 359.

<sup>133</sup> Walsh J, *In re R Limited* [1989] IR 126 at 135.

<sup>134</sup> Note article relating to certain *in camera* issues, E O’Reilly, ‘In Camera Rule Must Not Obscure Child Rights, Why Does the HSE Foil Child Death Inquiries by Slavishly Hiding Behind a Rule to Which Legal Exemption for the Greater Good Exists?’ *Irish Times* (Dublin, 1 June 2010) 13.

<sup>135</sup> Discussion occasionally occurs in Ireland in relation to whether TCB should or should not be permitted. A recent example is M Foley, ‘Oscar Pistorius Trial Signals It’s Time to Let Cameras into Irish Courtrooms’ *Irish Times* (Dublin, 19 May 2014). This is arguably most emphasised at the time of the US celebrity cases. However, The South African Pistorius TCB case provides an exception.

<sup>136</sup> P Newenham, ‘Televising the Courts: An Exploration of Opinions of Irish Media and Legal Professions’ (Masters in Journalism, DCU 2008) 35.

<sup>137</sup> P Lambert, ‘Judicial Questionnaire on Courtroom Broadcasting’ (1997) 15 *Irish Law Times* 50; also P Lambert, ‘Courtroom Television Broadcasting’ (1997) 2:5 *Communications Law* 180.

<sup>138</sup> P Newenham, above.

beneficial in terms of beginning to establish baselines and parameters for future research in Ireland.<sup>139</sup>

In order to begin addressing the audience baseline issue in Ireland, the author undertook the first representative public attitudinal research in Ireland in relation to TCB. This is detailed below.<sup>140</sup> The author makes the point that baseline and parameter research is beneficial. Such data should be undertaken over an extended period *before* TCB cameras are introduced into courtrooms.<sup>141</sup>

There is no regular practice or policy of TCB in Ireland. Relatively little legal-policy debate had occurred in relation to the Irish courts and TCB. While the issue appears in media commentary from time to time, this is generally as a result of some particularly high profile case elsewhere which involves TCB issues.<sup>142</sup> In Ireland as elsewhere there are proponents and opponents of TCB. As elsewhere, however, there has been little consideration of the legal-empirical effects-research issues involved in TCB.<sup>143</sup> In addition, the author undertakes the first public research relating to TCB effects and opinion issues in Ireland. The other point is the suggestion of eye-tracking technology for in-court TCB effects-research by the author. This suggestion, as well as the proof-of-concept demonstration, are seminal in terms of TCB and TCB effect discussion in Ireland. Notwithstanding that there is no policy or caselaw in Ireland in relation to TCB, and this is not the focus of the research, it is worthwhile to examine some of the wider issues and literature in Ireland by way of background setting.

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<sup>139</sup> It was also the intention of the author to expand the research to include the television media and the print media in Ireland. Future research should expand the judicial research to Northern Ireland, Scotland and England and Wales. The level of responses was deemed insufficient to include as part of this thesis. This is unfortunate. The author also sought to expand the judicial research to the judiciary in Northern Ireland. Unfortunately, the court services in Northern Ireland indicated that this would not be possible. Details with author.

<sup>140</sup> The real benefit of this particular research will be when repeating this public TCB research.  
<sup>141</sup> As pointed out at the very beginning, however, the author is neither advocating nor rejecting CB or TCB per se.

<sup>142</sup> For a introduction to some of the media and individual constitutional issues in the US, see for example, AF Camp, 'Cameras, Courts, and the Constitution' (1981) 9 *Pepperdine Law Review* 165; JA Barron, 'Creating a New First Amendments Right: Miami Herald Publishing Co v Tornillo and the Story of Access to the Media' chapter in J Russomanno (ed), *Defending the First: Commentary on the First Amendment Issues and Cases* (Erlbaum 2005). For the avoidance of doubt, this thesis is not about the constitutional or legal issues pertaining to courtroom broadcasting, or TCB, per se. Focusing on these issues whether in Ireland, the US or elsewhere would divert from the actual focus of this thesis, which is the effects-research issues, challenges and implications of TCB.

<sup>143</sup> The only effects related research is the author's research of Irish judicial attitudes to courtroom broadcasting and expanded again in 2010. There is, in addition, an unpublished masters dissertation of P Newenham (DCU) and the commentary and limited recommendation of the Law Reform Commission while dealing with a separate topic, namely, contempt of court.

*Other Irish TCB Materials:* Radio Telefis Eireann (RTE),<sup>144</sup> the Irish national broadcaster, looked at the issue of TCB in a 1995 discussion paper. However, there is no discussion of effects, research issues, definitions or forms. The US Supreme Court research challenge is not referred to. P Newenham<sup>145</sup> undertook a masters dissertation in relation to exploring select media and legal profession opinions in relation to TCB in 2008. Overall her thesis favours TCB. Effects and legal-empirical research issues are not the core focus of her thesis. However, a number of interviews of a media and legal personnel are recorded. K Murphy, Law Society Director General, feels that it is doubtful that the educational potential of TCB would be met (if TCB were to be permitted in Ireland) and that the cases shown would be sensational and unrepresentative.<sup>146</sup> However, the President of the Association of Garda Sergeants and Inspectors (AGSI), P Feeney, is reported as favouring the televising of certain criminal trials,<sup>147</sup> referring to manslaughter, murder and kidnapping cases.<sup>148</sup> The then Director of Public Prosecutions (DPP), J Hamilton, refers to some of the potential benefits of TCB, but stops short of recommending TCB in Ireland.<sup>149</sup>

*Law Reform Commission:* The Law Reform Commission<sup>150</sup> undertakes research, drafting and publication of consultation papers and reports on specific legal and legislative issues. It published a Consultation Paper in relation to the issue of contempt of court.<sup>151</sup> As such,

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<sup>144</sup> K Wood, *Televising the Courts: A Radio Telefis Eireann Discussion Paper* (RTE 1995). Prepared by Kieron Wood, the then RTE Legal Affairs Correspondent. The document discusses the feasibility and some of the issues which may be encountered in terms of introducing TCB in Ireland. It also draws some comparisons with other countries, notable certain Common Law jurisdictions.

<sup>145</sup> P Newenham, above.

<sup>146</sup> P Newenham, 'Televising of Trials Would Boost Public Access to Legal Process' *Irish Times* (Dublin, 27 December 2008) at 4 < [www.irishtimes.com](http://www.irishtimes.com) > accessed 8 January 2011.

<sup>147</sup> *ibid.* The AGSI position is reiterated in another story, 'Lawyers Dismiss Calls for Televised Court Proceedings' *Irish Independent* (Dublin, 9 March 2008) < [www.independent.ie](http://www.independent.ie) > accessed 14 September 2010.

<sup>148</sup> See *ibid.*

<sup>149</sup> *ibid.* This is despite the otherwise suggestive newspaper heading that 'Televising of trials would boost public access to legal process – DPP.' *ibid.*

<sup>150</sup> The Law Reform Commission is an independent body established (pursuant to the Law Reform Commission Act 1975) to keep the law under review and to make recommendations for legal reform.

<sup>151</sup> Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP 1991). Also, D Conlon, 'Contempt of Court – An Issue for Reform?' (1992) *Irish Student Law Review* 53. D O'Donnell also writes in relation to contempt of court issues, see D O'Donnell, 'Some Reflections on the Law of Contempt' (2002) 2:2 *Judicial Studies Institute Journal* 87. Note also PA McDermott, Dr, 'Contempt of Court and the Need for Legislation' (2004) 4:1 *Judicial Studies Institute Journal* 185.

the work of the Law Reform Commission is not directly focusing upon TCB effects. It only briefly refers to TCB generally.<sup>152</sup> It appears to favour a TCB pilot study.

The Consultation Paper comments indirectly on some of the issues relevant to TCB. The Law Reform Commission states that its primary worry about tape recorders<sup>153</sup> in courtrooms and the interference which the actual running of the equipment may cause. US Supreme Court oral cases have been recorded since 1955, at the direction of then Chief Justice Warren.<sup>154</sup> The Oyez Project<sup>155</sup> is now making these available online. Conceivably, if the court sessions were also filmed (which they were not) they might for historical or research purposes, and also be retrospectively made available. Many Irish courts are also now recorded via digital audio recording (DAR). Potentially, some of these may become available in future for non-judicial purposes, research, as well as TCB baseline research (or at least the relevant statistical data as regards lengths of cases in the designated court for a TCB pilot or experiment).

Similar arguments are also used in relation to camera equipment in the TCB debate. In principle this worry (about the sound and size of TCB cameras) is somewhat diminished given present technology. (That is, not to say there are no TCB camera issues. There are.) At present there are minute unobtrusive TCB cameras which can be worked electronically from another room.<sup>156</sup> This is the case with parliamentary broadcasting. In practice, however, the networks frequently continue to use large hand held cameras for TCB, with the TCB camera operator moving about in the courtroom (where permitted), notwithstanding miniature cameras. There is no research in relation to the prevalence of each, or comparing the effect of each. This should be an important line of TCB effects research.

The (only) advantage the Law Reform Commission puts forward for ‘exposing’ the general public to courtroom activities, by way of TCB, is that it would help reduce ‘the remoteness of court proceedings ... and the sense of alienation which many feel from that

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<sup>152</sup> Neither does the Law Reform Commission identify or refer to the US Supreme Court challenge. None of the TCB form issues are referred to. There is also no definition of TCB or TCB forms. Therefore, the Law Reform Commission does not address TCB effect issues.

<sup>153</sup> The use of which has been banned in the UK, except where the judge gives express permission, Section 9, Contempt of Court Act 1981. Such a recording may not then be broadcast. Note generally, C Courtney, D Newell, and S Rasaiah *The Law of Journalism* (Butterworths 1995). Also Y Murphy, *Journalists and the Law* (Round Hall Sweet & Maxwell 2000).

<sup>154</sup> P Irons and S Guitton (eds), *May It Please The Court* (The New Press 1993).

<sup>155</sup> See < [www.oyez.org](http://www.oyez.org) > accessed 19 January 2014.

process.’<sup>157</sup> However, no research or evidence of such effects is proffered. The Law Reform Commission does not expand on the educational argument.

Other matters arise from the Law Reform Commission’s statement. The first is that it may not actually do this, ie reduce public alienation with the judicial process. Earlier chapters highlight concerns with the TCB educational argument and the presumption of education-effects. TCB discussion is also very vague on what is meant by ‘education’ and the educational function of TCB. There are no definitions. It also does not clarify or distinguish between an educational function and an informative function. No particular educational benefits are specifically referred to nor shown to exist. TCB is still awaiting sustained and repeated educational-effect research which seeks to verify any particular educational impact. Some legal-empirical research suggests there is no actual educational benefit, at least those individual studies.<sup>158</sup>

The Law Reform Commission has not considered the existence, level or cause of the ‘alienation’ that people may feel. Courts and legal-policymakers might like to consider whether this is an issue, and how to gauge if the TCB results are a success. Where TCB has been permitted, Irish courts may be interested to learn of what impact assessment legal-empirical effect-research studies have been undertaken. Courts and legal-policymakers might also be interested to review research monitoring conditions and the establishment of the baselines and parameters prior to TCB cameras being introduced. Unfortunately, the courts and legal-policymakers of today (whether in Ireland, UK or the US Supreme Court) have less than optimum TCB effects-research available to them.

One of the reasons for permission being granted in Scotland for BBC programme ‘The Trial’ which permitted documentary style TCB was ‘the perception that most non-lawyers are deeply ill-informed about how the legal system works that prompted Scotland’s Lord President to invite cameras into the Scottish court.’<sup>159</sup> Nothing was to be broadcast until proceedings were completed.<sup>160</sup> Therefore, there was no live TCB (ITCB). Only Appeal Court cases were permitted<sup>161</sup> (aTCB). Ultimately, negotiated guidelines were issued which prohibited filming without consent of the courtroom participants.<sup>162</sup> Advance

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<sup>156</sup> Also note references at Section 4.48, Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994) 24.

<sup>157</sup> Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994) 24.

<sup>158</sup> See chapter on education below.

<sup>159</sup> N Catliff, ‘On Camera Not In Camera’ [1994] 144 *New Law Journal* 1597.

<sup>160</sup> *ibid.*

<sup>161</sup> *ibid.*

<sup>162</sup> *ibid.*

consent letters, in a form officially agreed, were sent to witnesses.<sup>163</sup> Consent could be withdrawn up to twenty four hours before filming.<sup>164</sup> The producers of the BBC documentary only sought consent of certain witnesses, the lawyers and the judge.<sup>165</sup> There does not appear to have been any data gathering before, during or after the filmed cases or the broadcast. No legal-empirical research appears to have been undertaken in Scotland. In terms of ‘results’ from *The Trial*, the producer states that ‘the Lord President feels that the educational and informational qualities of these programmes vindicate his original decision to allow the cameras into court. The BBC meanwhile is confident that each programme contains the necessary narrative and drama to attract a large audience.’<sup>166</sup> However, there is no reference to any validation, education or content analysis research. Unfortunately, the opportunity for valuable legal-empirical research was missed.<sup>167</sup>

The Law Reform Commission in its Report on Contempt of Court is aware of the slippery slope argument and ‘a gradual slide towards trial by newspaper or television.’<sup>168</sup> It may only be appeal courts which would permit courtroom cameras, but it may be difficult to resist calls to extend this to other courts. Apparently, this may be the developing position in the UK.<sup>169</sup> The Law Reform Commission appears to have concluded that a committee be established to help set up and monitor pilot TCB projects in Irish courts. Yet, there is no reference to the US Supreme Court challenge or any of the legal-empirical research issues – in particular the baseline research issues before TCB occurs. The Law Reform Commission omits reference to form issues.

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<sup>163</sup> *ibid.*

<sup>164</sup> *ibid.*

<sup>165</sup> *ibid.* What happened in relation to party consent is unclear. In total, there were thirty hours of filming in court. *ibid.*

<sup>166</sup> *ibid.*

<sup>167</sup> Other possible research avenues are also referred to. For example, the Law Reform Commission also comments on what is known as dissonance theory. ‘[T]he way in which first impressions are created assumes great significance.’ Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP 1991) 293 ff. IRL Freckelton, Australian Law Reform Commission, *Prejudicial Publicity and the Courts* (Research Paper No 4 1986) 10-11, referred to in Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP 1991) 293. External effect issues may also arise. Judge Ito was asked by the acting Secretary of State Tony Miller to recess the Simpson (criminal) case so that people would come out and vote in an election. ‘Official Wants *Simpson* Trial Shut Down For Election’ San Francisco Chronicle (San Francisco, 9 August 1994).

<sup>168</sup> *Report On Contempt of Court*, above, Section 6.20, at 39, quoting Cross L in *AG v Times* [1974] AC 273.

<sup>169</sup> Sky TV in the UK is (successfully) calling to expand TCB in the UK beyond the Supreme Court. J Ryley, ‘Sky News Chief Renews Call for Cameras in Courtroom’ Guardian (London, 6 December 2010) < <http://www.guardian.co.uk/media/2010/dec/06/john-ryley-sky-news-courts> > accessed 19 January 2014.

*Possible Judicial Effects & Arguments:* One issue is whether a judge or judges can be affected by the media, as was the issue in *Magill*.<sup>170</sup> It is not altogether surprising to find judicial statements claiming judges to be less, if not completely, immune.<sup>171</sup> That such effect is less probable is a view with much to recommend it. However, it is not so certain as to suggest media influence can never exist. In addition, it is not definite that after a decision that a further jury trial is excluded. Substantial risk also exists it may be thought, if the (prejudicial) publicity occurs before sentencing. The trial still remains ‘active’ albeit, there exists an argument for less restriction. One superior judge notes that the intense publicity surrounding the case of *People (DPP) v Z*, was a factor in the level of sentence, which was later reduced on appeal.<sup>172</sup> Fifty nine percent of judges in one survey agreed that TCB holds the potential for an increase in contempt of court.<sup>173</sup> There are views in various cases that judges can be prejudiced, or that at least it is unwise to assume they are completely immune from prejudicial influence.<sup>174</sup> Such caselaw decisions are, of course, reluctant to commit themselves to saying judges are affected by media publicity. They do say that it would be foolish to completely discount such possibility. Judicial training inevitably reduces the potential for this, but judicious caution may suggest that we cannot be sure that it never occurs. Much research exists on the fallibility and malleability of human memory.<sup>175</sup> People are particularly prone to being ‘tricked’ when new information is introduced of a complex nature. This problem is potentially common to everyone, whether judicially/professionally trained or otherwise. The success of such reconstruction of memory is due to our inability to detect the influences of such information.<sup>176</sup> Ultimately the Supreme Court in *Magill*<sup>177</sup> was strongly dismissive of the possible effect on judges. To what extent this is a general statement of the law remains to be seen. It should be borne in mind that no case in Ireland has explicitly referred to TCB. Indeed, as there is no TCB in Ireland, no case has had the opportunity to consider the issues, including the legal-empirical effects-research

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<sup>170</sup> *Cullen v Toibin and Magill* [1984] ILRM 577.

<sup>171</sup> See *Weeland v RTE* [1987] IR 662; *Wong v Minister Justice* HC 30 July 1992; *Desmond v Glackin (No 2)* [1992] ILRM 490.

<sup>172</sup> *People (DPP) v Z* CCA IE 14 March 1996.

<sup>173</sup> P Lambert, ‘Judicial Questionnaire on Courtroom Broadcasting’ (1997) 15:2 Irish Law Times 50.

<sup>174</sup> See generally *Doherty v DPP* HC 6 February 1993; *People v Davies ex p Delbert-Evans* [1954] 2 All ER 167, 172, 445; *Re Learho* [1990] 2 AC 165, Bridge L; *AG v Channel 4*, referred to in ‘Contempt: Prohibition of TV Broadcast – Inherent Power of Court’ (1988) Criminal Law Review 237; *AB v BBC* [1981] AC 303, 335; *Cullen v Toibin and Magill*, [1984] ILRM, 577 Barrington J, HC.

<sup>175</sup> E Loftus, *Eyewitness Testimony* (Harvard University Press 1996). See also A Heaton-Armstrong, E Shepard, GH Gudjonsson and D Wolchover (eds), *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (OUP 2006).

<sup>176</sup> *ibid.*

<sup>177</sup> *Magill*, above.



concerns. G Borrie and N Lowe<sup>178</sup> suggest that judicial statements suggesting that there are no (adverse) judicial effects, are based more on policy than on conviction. It may be more difficult to uphold the law, and appear to be so doing, if such an admission is made. They also state that what is really being said in these cases is that judges are not actually immune from prejudicial influence but rather that they had not actually been ‘improperly’ so influenced.<sup>179</sup> It still remains necessary to explicitly recognise the right to fair trial and presumption of innocence. Only once the stream of justice has ceased and concluded does the possibility of so poisoning it also cease.<sup>180</sup> These are all issues of potential relevance to sustained TCB legal-empirical effect related research and to courts and legal-policy.

*Media Arguments:* Media TCB access arguments include freedom of the press, and provisions requiring that justice should be administered in public, not least the publicity rule contained in Article 34 of the Constitution, particularly in light of the *Irish Times*<sup>181</sup> case. In modern practice, the media may well be the eyes and ears of the public, and the ordinary citizen may almost entirely be dependent on the media for their knowledge of what goes on in court.<sup>182</sup> This does not mean, however, that the media should be left entirely to their own devices in determining the style, forms, nature of and entire parameters of whatever TCB, if any, is to occur. Courts and legal-policymakers will be particularly interested to consider all relevant legal-empirical effects-research. As of yet, however, neither television access nor TCB access pursuant to Article 34 have been judicially considered in Ireland. While it may well be interesting to investigate, and indeed speculate upon, how these issues may or may not evolve in Ireland, such a path is significantly beyond the scope and direction of the instant research, which is focused on normative legal-empirical effect issues and legal-policy issues. The media may not be obliged to report everything, or every case and often decline to cover certain cases and types of cases. That Article 34 of the Constitution only permits the non-public administration of justice in ‘special and limited cases,’ does not mean that the types of TCB media access and content cannot be scrutinised or indeed regulated. In the context of the Constitutional parameters, Justice Keane recognises that the media cannot be

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<sup>178</sup> G Borrie and N Lowe, *The Law of Contempt* (Butterworths 1996) 125.

<sup>179</sup> *ibid*, they also say (at 166) that what is really being said in these cases is that judges are not actually immune from any prejudicial influence but rather that they shall not be ‘improperly’ so influenced.

<sup>180</sup> To use the analogy of Wills J in *R v Parke* [1903] 2KB 432, at 438.

<sup>181</sup> *Irish Times v Ireland* [1998] 1 IR 359. Supreme Court. The High Court judgement is at *Irish Times v Ireland* [1997] 2 IRLM 541.

<sup>182</sup> Keane J, *Irish Times v Ireland*, judgment, at 4. *Irish Times v Ireland* [1998] 1 IR 359.

deprived of the ability to make contemporaneous reports ‘completely.’<sup>183</sup> However, regulation whether by way of laws, procedures, applications, forms and formatting, etc, is certainly permissible and indeed is evident in many of the examples of TCB elsewhere. Indeed, there is at least some evidence that the types of regulation of and procedures governing TCB (where permitted) elsewhere are increasingly sophisticated in certain instances.<sup>184</sup> Parliamentary broadcasting is also regulated. Live parliamentary broadcasting in Ireland may only occur if broadcast in full, as opposed to snippets. Judges and legal-policymakers have already taken a keen interest in media reporting in terms of contempt issues, coverage issues, quotas, advertising, etc. This may also potentially extend to TCB in Ireland in future.

*Judicial Discretion and TCB:* It appears to be generally accepted in Ireland at the present time, that the ultimate discretion as to whether TCB cameras should be permitted into courtrooms is left to the presiding judge and or Chief Justice and or collective judicial policy. However, without a direction from the Chief Justice or the Supreme Court, it is unlikely that courts in Ireland would permit formal TCB. Indeed the author previously surveyed the judiciary and found that a majority of the judiciary were not in favour of TCB in Ireland.<sup>185</sup> This appears to be reflected in the opinions of the current judiciary (see the judicial survey results in Appendices). There has been no survey of the respective legal professions, namely, solicitors and barristers. However, it is felt that such opinions, if gauged, would not be overly dissimilar to that of the judiciary. The traditional and commonly accepted view is that judges have an inherent judicial discretion in relation to ensuring the proper functioning of their courts. In the context of TCB, issues have arisen in relation to this discretion. For example, some US states which permit TCB seek to place restrictions on such discretion. Some of these, for example, do not permit a judge any discretion to refuse access to TCB cameras if access is considered. It is more general, however, for judges to maintain a discretion to permit or forbid access to cameras. When access is permitted there is still some discretion in relation to maintaining a proper court even with TCB cameras in place. In *State v Clifford*<sup>186</sup> a

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<sup>183</sup> *ibid* judgement 4.

<sup>184</sup> That is not to underscore one of the main points of the thesis, which is that there is overall, both where courtroom broadcasting is permitted and elsewhere, a manifest lack of research of all of the issues and actual research into the effects and potential effects on the arguments for and against courtroom broadcasting, the courtroom participants and on the public audience.

<sup>185</sup> See P Lambert, ‘Judicial Questionnaire on Courtroom Broadcasting’ Irish Law Times, above. This is the initial research on these issues in Ireland. This survey has been repeated and expanded by the author in 2010 as part of this work.

<sup>186</sup> *State v Clifford* 118 NE 2d 853 (Ohio Ct App 1954) *aff’d* 123 NE 2d 8 (Ohio Sup Ct 1954, cert denied 349 US 929 (1955)). Referred to in S Barber, above 46.

photographer was held in contempt by a trial judge. The Appeal Court upheld the contempt finding and states that,

‘A judge is at all times during the sessions of the court empowered to maintain decorum and enforce reasonable rules to ensure the orderly and judicious disposition of the court’s business ... It is therefore impossible for this court to hold that the trial court, in promulgating the rule against photographers ... abused its discretion ....When the court is in session it is under the complete control of the judge whose discretions, reasonably necessary to maintain order and prevent unnecessary disturbance and distraction must be obeyed. Deliberate disobedience of such orders constitutes a contempt of court punishable under statutes of this State.’

In a trial held in Maryland in 1927 the trial judge found photographers in contempt. The discretion of the judge to do so was upheld in *Ex Parte Sturm*.<sup>187</sup> The judge in the *Scopes* trial permitted both TCB cameras and radio (RCB).<sup>188</sup> RCB appears to have fallen off the radar for most CB discussion.

*Prospects of TCB in Ireland:* It is felt that the prospects for TCB, or at least extensive, full trial and or regular TCB in Ireland is remote. This is at least in the short to medium term. There have been a number of comments, mostly non-judicial, in relation to the prospects of TCB in Ireland (and other issues<sup>189</sup>). One optimistic commentator<sup>190</sup> for example, in an article in the Law Society Gazette, suggests that the Supreme Court ruling in the *Irish Times*<sup>191</sup> case may eventually prove the gateway for Irish TCB.<sup>192</sup> This article was written by one of the main Irish proponents of TCB. It has transpired not to be the case, at least thus far. It should be noted, however, that the *Irish Times* case does not refer to nor consider TCB. It also does not address TCB effects issues or the US Supreme Court effects-research challenge. The article referred to above does not deal with effects-research issues. A High Court judge announced at a conference that he was in favour of TCB, only to receive a retort from another High Court judge (then retired).<sup>193</sup> Judges who answered the original research study of the author, published in the Irish Law Times,

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<sup>187</sup> *Ex Parte Sturm* 152 Md 114, 136A 312 (Ct App 1927). Referred to in S Barber, above 2.

<sup>188</sup> Referred to in S Barber, above 1-2.

<sup>189</sup> For example, R Kennedy, ‘Extra-Judicial Comment by Judges’ (2005) 5:1 Judicial Studies Institute Journal 199.

<sup>190</sup> K Wood, ‘Recent Judgement Could Lead to TV Cameras in the Court Rooms’ (May 1998) Law Society Gazette 7.

<sup>191</sup> *Irish Times and Ors v Judge Anthony Murphy*. The case related to media restrictions imposed by the trial Judge. 1 IR [1998] 359.

<sup>192</sup> See P Lambert, ‘In Camera: the Case Against Courtroom TV’ (June 1998) Law Society Gazette 6; K Wood, above 7.

were not in favour of TCB.<sup>194</sup> There has been no dramatic change in relation to TCB in Ireland amongst the judiciary. If anything, attitudes have hardened against TCB.<sup>195</sup> It should also be noted that extra-judicial comments may be affected by reports in the area of establishing a judicial council.<sup>196</sup> It has been stated above that there has been no regular TCB in Ireland as yet. This is correct. However, the Supreme Court had permitted television cameras into the Supreme Court to film background shots during a limited number of important Constitutional cases. However, the cameras had to leave the court before the substantial arguments in the case began. It is understood that no sound was broadcast during those instances. Television cameras have also been allowed into the superior courts, when the court was not sitting, for the purpose of an interview with a legal commentator in relation to the then retiring Chief Justice. TCB cameras were also permitted into the administrative Master's Court on one occasion. There does not appear to be any formal recording of these instances. It is understood from the Courts Service that TCB cameras were also allowed into the first sittings of the Central Criminal Court in Limerick and Cork for limited footage recording.<sup>197</sup> The camera shots were tightly focused and could not focus on the public or on the jury.<sup>198</sup> Graduation ceremonies, the Master's Court (administrative), a county registrar's list sitting, openings prior to cases commencing, courts without cases sitting and background stock photos are examples of TCB cameras being allowed into Irish courts.<sup>199</sup> As indicated above, the opportunity for extensive or extended TCB appears limited in Ireland.<sup>200</sup>

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<sup>193</sup> See P Lambert, 'Cameras in the Courtroom: Incitement to Act Up?' (April 2000) *Law Society Gazette*, 4.

<sup>194</sup> See P Lambert, 'Judicial Questionnaire on Courtroom Broadcasting,' above.

<sup>195</sup> See Appendices.

<sup>196</sup> See for example *Irish Times* editorial referring to it, 'Judicial Comment' *Irish Times* (Dublin, 7 July 2010).

<sup>197</sup> Personal correspondence with the Courts Service during December 2010–January 2011, correspondence with author.

<sup>198</sup> *ibid.* In relation to RTE generally, see F Corcoran, *RTE and the Globalisation of Irish Television* (Intellect Books 2004). In relation to public service broadcasting, note, for example, ME Price and M Raboy (eds), *Public Service Broadcasting in Transition: A Documentary Reader* (Kluwer 2003).

<sup>199</sup> *ibid.*

<sup>200</sup> M Kealey said at a meeting in the National University of Ireland Galway a number of years ago that he is one of the few lawyers in Ireland who is in favour of permitting TCB. Year unavailable unfortunately. One of his points was that people already do get their reports of court proceedings from the media. These reports are already edited. Arguably the media are already selective in the sensational trials they cover. It is not clear that the media will portray a broad section of cases on TCB that could prove educational. (Importantly education-effects need to be researched and considered at a micro and macro level.) The media may seek to edit and or be selective in the cases and details they choose. We might consider how we assess such suggestions. A similar view appears in JB Lemert, *Criticising The Media - Empirical Approaches* (Sage 1989) 79 ff. HR Farzer states that '[a] glance at past media conduct is less than encouraging that broadcasters, if allowed, will not abuse the privilege to the prejudice of the criminal defendant or to the desecration of the judicial system and principles upon which a willingness to forego the "big scoop" because someone

*Irish Broadcasters:* As noted elsewhere herein, the author sought to measure national television organisation and national broadsheet newspaper attitudes towards TCB. Such research while undertaken, did not elicit sufficient responses from the media to report here. While unfortunate, future research should still be directed towards the media. It is noted, however, that the current broadcasting regime in Ireland has a limited number of television stations, some of which are public broadcasters. This may mean that there is no prospect of an Irish television station dedicated solely to TCB and legal issues. If such broadcasting was ever permitted in Ireland, which is unlikely in the immediate future, it would be with one of the existing television stations. It would also be within their current broadcasting model(s). This discussion also pre-supposes that one of the broadcasters would be actually interested in TCB. While the former court correspondents to the main channel (RTE)<sup>201</sup> has indicated their support for TCB, it is unclear if RTE itself is officially interested. Interestingly, a representative of TV3 in Ireland indicated that television is about entertainment; its role is to entertain; and that it is ratings driven.<sup>202</sup> It is also worth mentioning that there was quite widespread criticism of certain media reporting in recent cases such as the *Lillis* case where, for example, concern has been expressed at certain media concentration on one of the witnesses and upon the victim's

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else might be harmed.' HR Fatzer, 'Cameras in the Courtroom: The Kansas Opposition' *Washburn Law Journal* (1978-1979) 230, 242-243, quoted in TH Tongue and RW Lintott, 'The Case Against Television in the Courtroom' (1980) 16 *Williamette Law Review* 790. *ibid.* See also A O'Meara and K O'Meara, *Headlines and Deadlines* (Blackwater 1995); N Fairclough, *Media Discourse* (Edward Arnold 1995) 168; M Kirby, 'The Globalisation of Media and Judicial Independence' (1996) 1:3 *Communication Law* 115, 121; G Robertson, *Freedom, the Individual and the Law* (6th edn, Penguin 1989) 293; *Cullen v Toibin and Magill* [1984] ILRM 577; See *Weeland v RTE* [1987] IR 662; *Wong v Min Justice, HC* 30 July 1992; *Desmond v Glackin (No 2)* [1992] ILRM 490; P Lambert, 'Judicial Questionnaire on Courtroom Broadcasting' *Irish Law Times*, above; *Doherty v DPP, HC*, 6 February 1993; *People v Davies ex p Delbert-Evans* [1954] 2 All ER 167, 172, 445; *Re Learho* [1990] 2 AC 165, Bridge L; *AG v Channel 4*, referred to in 'Contempt: Prohibition of TV Broadcast- Inherent Power of Court' (1988) *Criminal Law Review* 237; *AB v BBC* (1981) AC 303, 335; E Loftus, *Eyewitness Testimony*, above; Borrie and Lowe, *The Law of Contempt*, above, 125. Also P Lambert, 'Monkey Magic: Problems With Effects Research of Television Courtroom Broadcasting' (2010) 18 *Irish Law Times* 278. G Carey also refers to the conflicts of interest which can arise with reporting (G Carey, 'The Performative Character of Media Presentation of Crime' (1999) 9 *Irish Criminal Law Journal* 47). Media issues such as ownership, control and competition are frequently referred to in the media and communications literature, see various chapters in J Downing, A Mohammadi and MA Sreberny-Mohammadi, *Questioning the Media* (2nd edn, Sage 1995). With regard to concentration of media ownership, see Schlesinger and H Tumber, *Reporting Crime: the Media Politics of Criminal Justice* (Clarendon, 1994) n 10 at 7; B Bagdikian, 'The Empire Strikes Back' in RE Hiebert (ed), *The Impact of Mass Media: Current Issues* (Longman 1995) 153. Note also E Barendt, *Broadcasting Law: Comparative Analysis* (Clarendon Press 1995) 121-143 and M McGonagle, *A Textbook on Media Law* (Gill and MacMillan 1996) 52-53, 278-281 (and further new edition); B Bagdikian, *The New Media Monopoly* (Beacon Press 2004).

<sup>201</sup> K Wood and M Wilson respectively.

family.<sup>203</sup> The presiding judge, Justice White, also had comments of criticism as did some victim impact statements.<sup>204</sup> There was also separate criticism in relation to media reports and sensationalism on the release of a certain convicted sex offender after serving his sentence.<sup>205</sup> iTCB considerations would also be deserving of research consideration in Ireland. If properly considered, baseline issues could be scoped in advance of any determinations.

*Judicial TCB Rules:* If TCB was ever permitted in Ireland it is felt that some form of judicial/legal rules or code of conduct would apply to the broadcasting. These could, for example, provide restrictions, or require that the type of TCB that is permitted may be a form which is likely to achieve the most amount of public educational/informative

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<sup>202</sup> Interviewed on the F Davenport show *Newstalk* (26 November 2010).

<sup>203</sup> There were also subsequent discussions between media representatives with the Garda authorities after media criticism of the Garda practice of shielding one witness from certain media attention. Note, for example, C Coulter, 'Measures for Witness in Lillis Case Defended' *Irish Times* (Dublin, 9 February 2010); *NNI Statement Following Meeting With Garda Commissioner*, National Newspapers of Ireland press release < [www.nni.ie](http://www.nni.ie) > accessed 10 March 2010. Also Statement by Commissioner Murphy on the 8 February 2010, *Statement by Garda Commissioner Fachtina Murphy Regarding Witness Access to a Recent Trial* (8 February 2010) < [www.garda.ie/Controller.aspx?Page=4995](http://www.garda.ie/Controller.aspx?Page=4995) > accessed 19 January 2014.

<sup>204</sup> K Sheridan, 'Outside Court, A Dignified Cawley Family Say "Celine, We Love You"' *Irish Times* (Dublin, 6 February 2010) < [www.irishtimes.com/newspaper/ireland/2010/0206/1224263879810.html](http://www.irishtimes.com/newspaper/ireland/2010/0206/1224263879810.html) > accessed 1 February 2011.

<sup>205</sup> Irish Prison Chaplains Report 2010, < [www.dublindiocese.ie](http://www.dublindiocese.ie) > accessed 30 November 2010. Also reported on the RTE Six One News on 29 November 2010. Even mainstream newspapers and television media have been criticised from time to time for exaggeration, speculation and sometimes fabrication. The Newsweek 'artists impression' cover of OJ Simpson being an instant example. See also S Faludi, *Backlash, The Undeclared War Against American Women* (Anchor 1991). Less than ten percent believe that traditional media aid the course of justice, K Netteburg, 'Does Research Support the Estes Ban On Cameras in the Courtroom?' in LS Wrightsman, C Willis and SM Kassin (eds), *On The Witness Stand: Controversies in the Courtroom* (Sage 1987) 287. Also see the means to manufacture one particular story used by the *Sunday Independent*, and on invasions of privacy and ineffectiveness of, and the failings of, the journalists' own code of conduct, M Foley, 'Invasions of Privacy Likely to Bring Calls for Press Curbs' *Irish Times* (Dublin, 30 December 1994) (M Foley was referring to a story in the *Sunday Independent* which used a Christmas letter from a fictitious single mother sent seeking money from public figures to take her child to see Santa. The article printed the replies and the amounts received. See 'Dear Mary' *Sunday Independent* (Dublin, 18 December 1994) 1L and 6L. See also follow up story, inter alia, defending the original article, 'Dear Santa' *Sunday Independent* (Dublin, 25 December 1994) 8. Also P Findlay and M Duff, *The Jury Under Attack* (Butterworths 1988) 133. Smolla recounts that a Pulitzer prize story in the *Washington Post* was complete fiction. Reporters are constantly seeking what the editor of the *Washington Post* describes as the 'holy shit' story, RA Smolla, *Suing the Press, Libel, Media and Power* (OUP 1986) 185, 196 respectively. Also, D Kiberd (ed), *Media in Ireland, the Search for Ethical Journalism* (Open Air 1999); J Horgan, *Irish Media: A Critical History Since 1922* (Routledge 2001); J Horgan, B O'Connor and H Sheehan (eds), *Mapping Irish Media, Critical Explorations* (University College Dublin Press 2007).

value.<sup>206</sup> This may not be attractive to many broadcasters. In the Irish context it may be more suitable to public broadcasters. However, this is research and a discussion which has yet to occur. There could of course be many other forms of restriction, regulation or TCB rules. If any of these restrictions or requirements meant that the broadcaster did not feel that it had sufficient freedom to broadcast what it wanted to, it may decide not to broadcast, or rather may not take up the opportunity of TCB. Indeed, this has already occurred in one TCB study in New York. TCB was permitted over a period of ten years. However, it was not continued. This is understood to be partly because the media did not take up the opportunity in most instances nor broadcast a cross section of cases.<sup>207</sup> This also appears to have been a problem for the first US Federal experiment. Obviously there is an argument that this is less likely in the context of public broadcasting. However, this emphasises the points made elsewhere, that in considering the subject of TCB, and in considering the effects of TCB, it is necessary to recognise and examine the type of broadcaster and the type of TCB form being utilised. Ireland has not yet had this discussion.<sup>208</sup> According, extensive legal-empirical research is absent.

*Parliamentary Broadcasting in Ireland:* The existence of parliamentary broadcasting is often referred to in arguments in favour of TCB. The broadcasting of Irish parliamentary proceedings is permitted. Parliamentary committees are also broadcast.<sup>209</sup> Televising of the daily proceedings of Dáil Éireann, the upper house of parliament, commenced in October 1990.<sup>210</sup> Seanad Éireann (the second house) followed suit by televising proceedings in December 1990. The televising of parliamentary committees began in July 1993. The introduction of parliamentary broadcasting was based upon the rationale that the medium of television would enable the public to have greater access to the

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<sup>206</sup> Quite apart from there being large flaws in the research to date, no one has sought to define what is meant by using the terms ‘educational’ nor what would amount to educational courtroom broadcasting. Nor has anyone designated any form or forms of courtroom broadcasting as being the most desirous in terms of delivering educational courtroom broadcasting.

<sup>207</sup> See for example, New York State Committee to Review Audio-Visual Coverage of Court Proceedings, *An Open Courtroom, Cameras in New York Courts* (Fordham University Press 1997); MT Johnson and C Krafka, *Pilot Program Involving Electronic Coverage in Six US District Courts and Two Appeal Courts* (Federal Judicial Centre); P Lambert, ‘Cameras in the Courtroom: Incitement to Act Up?’ above 4. See also < [www.courtstv.com/national/diallo/teresi\\_profile\\_ctv.html](http://www.courtstv.com/national/diallo/teresi_profile_ctv.html) > accessed 19 January 2014; J Sarner, ‘Justice, Take Two: The Continuing Debate Over Cameras in the Courtroom’ (1999–2000) 10 *Seton Hall Constitutional Law Journal* 1053.

<sup>208</sup> It is also worth mentioning that two Irish television programmes which relate to the topic of courts generally. One incorporates short footage of courtroom broadcasting and interviews in courtroom settings out of session. The other was a current affairs programme relating to inconsistent sentencing. See Appendices.

<sup>209</sup> See < [www.gov.ie/oireachtas/leaflet/comm.html](http://www.gov.ie/oireachtas/leaflet/comm.html) > accessed 19 January 2014.

<sup>210</sup> See < [www.irlgov.ie/oireachtas/a-misc/tv.html](http://www.irlgov.ie/oireachtas/a-misc/tv.html) > accessed 19 January 2014. This is the official Irish government website.

workings of parliament. There are also suggestions of a dedicated channel to parliamentary broadcasting.<sup>211</sup> The then Minister for Justice, Dermot Ahern, criticises the media for concentrating more on political personalities than on the actual role and workings of parliament.<sup>212</sup> The parliamentary broadcasting system consists of an in-house system and the continuous supply (push) of the signal to the national public broadcaster (RTE). This in-house system is also fed to politicians in their offices (relayed parliamentary broadcasting). This form is similar to parliamentary broadcasting elsewhere and also the international tribunals which permit a form of courtroom broadcasting. The actual broadcasting is undertaken by means of miniaturised cameras which are operated silently by remote control. That miniaturised cameras are used, means that this is quite different from many forms of TCB, where sometimes TCB camera operator can walk into courts, move about with a large camera on their shoulder or set up a tripod.<sup>213</sup>

*The Courts Service:* The Court Service Act 1998 provides for the functions of the Court Service. These include to ‘manage the courts’<sup>214</sup>; to provide information on the courts system to the public<sup>215</sup>; and to provide facilities for users of the courts.<sup>216</sup> This may in future involve the Courts Service in decisions in relation to CB. For example, it may include providing facilities to broadcast certain forms of CB. However, no function conferred on or power vested in the Court Service shall be exercised so as to interfere with the conduct of that part of the business of the courts required by law to be transacted by or before a judge.<sup>217</sup> Conceivably the Courts Service would have to be consulted and/or involved in any decision permitting or implementing TCB in Ireland. This may involve the allocating of judges, courts, personnel, and fitting equipment in courts. For example, if remote cameras were to be installed as part of TCB, these may be installed by or under the direction of the Courts Service. This is also relevant in the context of iTCB.

*Tribunals in Ireland:* In Ireland there are, and have been, a number of formal official tribunals. These are established to investigate various events of public importance. The broadcasting of these tribunal proceedings is generally not permitted. There is no practice of broadcasting these tribunals of inquiry. However, at least one tribunal has permitted cameras in to film preliminary or background footage. Generally the tribunals, while

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<sup>211</sup> See for example, S Hegarty, ‘Drama and Intrigue, Vanity and Hysteria – It’s “Oireachtas Report”’ *Irish Times* (20 February 2010).

<sup>212</sup> A Healy, ‘Ahern Criticises Media’s Oireachtas Coverage’ *Irish Times* (Dublin) < [www.irishtimes.com](http://www.irishtimes.com) > accessed 27 May 2010.

<sup>213</sup> Note the forms issues above.

<sup>214</sup> Section 5 (a).

<sup>215</sup> Section 5 (c).

<sup>216</sup> Section 5 (e).



established by statute, have the power to set their own procedures in relation to publicity and attending the tribunal hearings. The Tribunal of Inquiry (Evidence)(Amendment) Act 2002, Section 2 amends the Tribunal of Inquiry (Evidence) Acts 1921–1998 to provide a power for tribunals to exclude the public. Section 2(a) of the principal legislation is amended by the insertion of ‘and, in particular, where there is a risk of prejudice to criminal proceedings’ after ‘the evidence to be given.’ The Hepatitis Compensation Tribunal Act 1997 provides that, subject to the Act, ‘the Tribunal shall determine its own procedures and, in so doing, shall as far as is practicable adopt procedures which are informal.’<sup>218</sup> It also states that the Tribunal shall conduct its hearings otherwise than in public.<sup>219</sup> The Tribunal of Inquiry (Evidence)(Amendment) Act 1979 sets out that a Tribunal ‘may make such orders as it considers necessary for the purposes of its functions, and it shall have, in relation to their making, all such powers, rights and privileges as are vested in the High Court or a judge of that Court in respect of the making of orders.’<sup>220</sup> As such, it may be possible to argue that as part of inherent judicial/chairperson discretion, tribunals may permit TCB. While there are restrictions in the UK in relation to TCB, the statutory provisions do not expressly encompass UK tribunals and non-statutory inquiries.<sup>221</sup>

### Forms and Processes

At no stage has discussion in Ireland referred to TCB definitions or format issues. R Maynard<sup>222</sup> in the *Encyclopaedia of International Media and Communications* refers to television formats. He states that ‘[i]nternational television formats are changing on a continual basis.’<sup>223</sup> Some of the influencing factors include technical issues, politics and economics.<sup>224</sup> Referring to technical formats specifically, he states that each format has its strengths and weaknesses.<sup>225</sup> He also comments on the separate issue of smaller audiences. He confirms that from the ‘1980s onwards these audiences began to splinter

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<sup>217</sup> *ibid* Section 9.

<sup>218</sup> Section 3(11).

<sup>219</sup> Section 3(12).

<sup>220</sup> Section 4.

<sup>221</sup> See ‘Broadcasting the Courts’ *JUSTICE Submission to Consultation by the Department of Constitutional Affairs* (February 2005) 2.

<sup>222</sup> R Maynard, ‘Television Formats’ in DH Johnston (ed), (2003) 4 *Encyclopedia of International Media and Communications* 409.

<sup>223</sup> *ibid* 409.

<sup>224</sup> *ibid*.

<sup>225</sup> *ibid* 410. One could expand upon this to say that all formats and format issues have their advantages and weaknesses. Incidentally, it is noted that he also refers in passing to the ‘digital format.’ *ibid* 411.

into niche groups to be served by sports networks, shopping channels, 24-hour weather, and hundreds more choices.’<sup>226</sup>

R Maynard also refers to the process and stages of television news, namely acquisition, editing, playback and archives.<sup>227</sup> T Atwater researches the ‘news format’ in a case study of network evening news coverage of the TWA hijacking.<sup>228</sup> He states that analysing new formats can be useful for understanding content and also news processes.<sup>229</sup> It can also be relevant to policy decisions, or in the context legal-policy decisions. Again, there is no relevant research of news forms in Ireland relates to the TCB debate. DL Atwater<sup>230</sup> refers to DL Altheide and RP Snow<sup>231</sup> as providing a theoretical framework that is useful in recognising the potential impact of news format on the production and presentation of television programs. The researchers observed that format is the ‘grammar’ of television. IE Fang<sup>232</sup> describes formats as being the ‘framework’ of a programme independent of the content element of the programme. TCB broadcast programmes may also have a framework. Yet, research does not appear to examine and document the format and framework of TCB. No body of research has sought, for example, to examine and document any individual TCB programmes - other than the initial case studies in the *Steinberg* case by P Thaler,<sup>233</sup> which partly examined media content, and the examination of two Reality TCB programmes by SA Kohm.<sup>234</sup> Much research remains to be undertaken in order to inform courts’ and legal-policy decisions.

We should begin research of TCB forms. TCB forms may have significant consequences. For example, television ‘news formats operate independently of specific content in ways that potentially distort information ... [n]ews stories often extract major events from their historical, social and organizational context, massage them by the news format and subsequently “recontextualize” the events ... [o]ther researchers have suggested that news format may influence how network television coverage contextualizes the crisis.’<sup>235</sup> Some TCB may be preferable over others. Some TCB forms may be less preferable. Some forms may be potentially educational, others less so, and others not at all.

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<sup>226</sup> ibid 412.

<sup>227</sup> ibid 413. In Ireland there does not appear to be comparable research.

<sup>228</sup> T Atwater, ‘News Format in Network Evening News Coverage of the TWA Hijacking’ (1989) 33 *Journal of Broadcasting and Electronic Media* 293. He examines consonance across news reports for the same event in the context of the news format(s).

<sup>229</sup> ibid 293.

<sup>230</sup> ibid 294.

<sup>231</sup> DL Altheide and RP Snow, *Media Logic* (Sage 1979).

<sup>232</sup> IE Fang, *Television News, Radio News* (Rada Press 1985).

<sup>233</sup> P Thaler, ‘The Impact of the Television Camera on Courtroom Participants: A Case Study of the Joel Steinberg Murder Trial’ (PhD thesis, New York University 1990).

<sup>234</sup> SA Kohm, ‘I’m Not a Judge But I Play One On TV: American Reality Based Courtroom Television’ (PhD thesis, Simon Fraser University 2004).

While T Atwater's study 'does not provide conclusive evidence that [the] news format guided ... network coverage of the [news] event. ... format ... influence[s] network newsgathering and news presentation practices.'<sup>235</sup> We can begin examining TCB forms, formats, court processes and procedures and the process of TCB programme production.<sup>237</sup> A broad, cross-disciplinary body of ongoing research is required. B Van Gorp et al<sup>238</sup> provide an example of where a research study seeks to build upon some specific earlier research study. TCB effects-research needs to be able to rely upon prior research studies.<sup>239</sup>

A Hill also refers to the point that there can be different audiences, and audience reflections, to news and current affairs, documentaries and reality programmes.<sup>240</sup> TE Nelson et al provide one example of research showing that how a story is framed, can impact upon the understanding of the audience.<sup>241</sup> SP Nicholson and RM Howard also research frame issues in the context of a particular legal case study.<sup>242</sup> The 'classification and evaluation of different types of'<sup>243</sup> TCB is overdue. A Hill also indicates that there are different reality formats of television.<sup>244</sup> She also refers to different viewing modes and different modes of engagement by the audience.<sup>245</sup> A Hill identifies reality television

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<sup>235</sup> T Atwater, above 194. References omitted.

<sup>236</sup> *ibid* 302.

<sup>237</sup> This would not be a once off task and would not be possible in one single research study.

<sup>238</sup> B Van Gorp, PH Vettehen and JWJ Beentjes, 'Challenging the Frame in the News, The Role of Issue Involvement, Attitude, and Competing Frames' (2009) 21 *Journal of Media Psychology* 161, 166.

<sup>239</sup> Confidence issues are not always clear cut, as some proponents of TCB may otherwise feel. For example, the result of the US Supreme Court decision in *Bush v Gore* is interpreted and framed by parties on either side of the case, and depending upon their views of the election, the result and the result of the US Supreme Court case, see SP Nicholson and RM Howard, 'Framing Support for the Supreme Court in the Aftermath of *Bush v Gore*' (2003) 65 *Journal of Politics* 676, 676-677. There is no one single level of appreciable confidence to measure or to seek to improve via TCB. Prior knowledge and experience of the audience is also important, see A Hill, *Restyling Factual TV, Audiences and News, Documentary and Reality Genres* (Routledge 2007) 84, 86.

<sup>240</sup> A Hill, *ibid* 85.

<sup>241</sup> TE Nelson, RA Clawson and ZM Oxley, 'Media Framing of a Civil Liberties Conflict and Its Effect on Tolerance' (1997) 91 *American Political Science Review* 567. B Van Gorp et al provide one recent example of frame research. B Van Gorp, PH Vettehen and JWJ Beentjes, 'Challenging the Frame in the News, The Role of Issue Involvement, Attitude, and Competing Frames' (2009) 21 *Journal of Media Psychology* 161, 166.

<sup>242</sup> SP Nicholson and RM Howard, 'Framing Support for the Supreme Court in the Aftermath of *Bush v Gore*' (2003) 65 *Journal of Politics* 676.

<sup>243</sup> To use the words of A Hill, *Restyling Factual TV, Audiences and News, Documentary and Reality Genres* (Routledge 2007) 89. She was writing in relation to genres.

<sup>244</sup> A Hill, *Restyling Factual TV, Audiences and News, Documentary and Reality Genres*, (Routledge 2007) 89.

<sup>245</sup> *ibid* 95, 110.

as a genre, the reality genre (consider the issue of reality-TCB).<sup>246</sup> The applicability for TCB legal-empirical effects-research might be considered.

Annette Hill also discusses ‘subgenres.’<sup>247</sup> We might consider how sub-forms may apply to TCB. I Bondebjerg identified three ‘sub-forms of reality TV’ namely, docu-soap; reality magazine; and reality show.<sup>248</sup> TCB awaits such examination.

‘Television thrives on new formats.’<sup>249</sup> Sky TV produces more and more ‘in-house reality formats.’<sup>250</sup> Programmes such as *Police Camera Action!* are described as being self contained programmes, and therefore, the audience can dip in and out.<sup>251</sup> A Hill also refers to established familiar formats and ‘newer formats.’<sup>252</sup> A Criswell<sup>253</sup> refers to various factors which contribute to ‘newsworthiness.’ There is an issue to be addressed in terms of identifying if there are different genres and or formats of TCB. This issue itself is worthy of a thesis. Significant TCB research is required. Courts and legal-policymakers both today and in future will benefit from a greater body of research in relation to the important effect issues, some of which are highlighted above.

### **Contempt and TCB**

Contempt of court issues arise in terms of TCB from many perspectives. Contempt of court rules empowering judges to protect the court, the judicial process and the participants against physical disruption in court. This includes disruption caused by TCB, equipment and personnel. However, old contempt rules<sup>254</sup> may or may not be fully

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<sup>246</sup> ibid 41 ff. There are a variety of styles and particular techniques associated with the reality television genre, ibid. The genre has also changed over time, ibid. In 2003 BBC changed its reference of genres to list documentaries and contemporary factual; specialist factual; current affairs and investigative; arts and culture; life skills; and new media. Referred to in ibid 42. Different stations can categorise programming in an alternative manner across different stations, ibid. In terms of the US Academy of Television, Arts and Sciences which awards the Emmys, a genre may have at least fourteen television series to become a genre category. Referred to ibid 45.

<sup>247</sup> ibid 49.

<sup>248</sup> I Bondebjerg, (1996) referred to ibid 47-48.

<sup>249</sup> A Hill, *Reality TV, Audiences and Popular Factual Television* (Routledge 2005) 41.

<sup>250</sup> ibid 44.

<sup>251</sup> ibid 52.

<sup>252</sup> ibid 53.

<sup>253</sup> A Criswell, *A Study of Modern Television, Thinking Inside the Box* (Palgrave MacMillan 2006) 49.

<sup>254</sup> Indeed, G Robertson, a notable advocate of liberties himself, points out that some contempts remain unchanged following the Contempt Act 1981 (England and Wales), as a direct result of certain media conduct. Lord Hailsham is quoted giving the example of a lady losing an appeal for divorce. She was seeking a divorce on the grounds that her husband was refusing to engage in certain nocturnal activity more than twice weekly. One journalist contacted the spouse of each Appeal Court judge involved in the case inquiring

appropriate to dealing with (all) modern in-court media issues. The issue of contempt and related rules has been limited to television equipment, cables, etc, and not the process of courtroom TCB per se. The whole contempt issue has arguably been bypassed now. Many commentators feel that modern camera equipment is so significantly smaller, quieter and user friendly that it overcomes the concerns relating to large and noisy equipment. The largest contempt concerns, some may say, are now moot. That remains to be seen.

Contempt rules, an inherent judicial discretion, remains one of the few fundamental protections a court can offer a litigant and in terms of preserving the court environment. The media has great power and influence, inside and outside of court. Given such influence, some may query whether we should assume contempt issues are moot, without undertaking proper research of the previous and contemporary (TCB) contempt issues.<sup>255</sup>

Courtroom cameras of themselves may not be scandalous (in terms of the ‘scandalising the court’ form of contempt). Advances in technology mean that potentially issues are not as important as was the case in the past. However, there may be more subtle effects of TCB. Yet it may have the same end result as was argued originally in relation to camera equipment, which the Law Reform Commission notes as,

‘weakening the efficacy in general of judicial decrees, hav[ing] the more insidious effect of encouraging the public gradually to lose confidence in the fairness or the abilities of judges, and thus slowly to abandon their trust in the administration of justice. The long term result may be to transform a system of law into a system of mere orders, and to transform a public sentiment of having an obligation to obey the law into one of being merely obliged to do so.’<sup>256</sup>

It will not be immediately apparent what the extended effects of TCB are. It takes a long time for proper evaluation and replication. This is an aspect of research that has been ignored so far, but deserves research attention, where permitted.

### **Increasing Media Attention**

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how often they thought was reasonable. G Robertson, *Freedom, the Individual and the Law* (6th edn, Penguin 1989) 293. There is also a later edition in 1993.

<sup>255</sup> One might argue that in times past judges would be less hesitant to acknowledge the extent of such protections – even where no jury may be prejudiced. Note generally also, J Goldschmidt, “‘Order in the Court!’: Constitutional Issues in the Law of Courtroom Decorum’ (2008) 31 *Hamline Law Review* 1.

<sup>256</sup> Law Reform Commission, *Consultation Paper On Contempt of Court* (LRC CP 1991) 157.

There is arguably increased media attention on legal figures and legal issues in Ireland. V Brown is just one example of a media report criticising and questioning legal fee issues.<sup>257</sup> I Gibney<sup>258</sup> states that a ‘no comment’ response from a lawyer is no longer adequate and advocates a media strategy for lawyers. A Taxing Master has also received uncomplimentary media attention.<sup>259</sup> There is more pressure on lawyers (and judges) to respond to media criticism and or to comment on a particular case. Arguably, TCB enhances the pressure.

## **Education**

There are important differences between the ability of different media to educate. Television with its shorter attention span arguably discourages people from having to think at all. There exists a whole field of research into societal consumption of media, decoding and appreciation of media texts and images by the audience, and their later effect, if any. Moral panics, agenda setting as a result of crime reporting, etc, are all particularly relevant in the context of TCB. Other specific areas for research include media sources, the role of the media (in Ireland), the role of crime reporting, the global picture of real crime, different varieties of crime reporting in Ireland, crime reporting and media discourse, text and image, the influence on society/interest groups/public policy/government policy/the individual which also need to be studied. Media reporters may have no formal understanding of the law or legal process. Often the legal issues involved in a particular case can be quite complex. This may be one reason why there are increasing instances of judges being willing to talk to the media about their cases or to offer summaries either themselves or through court media relationship officers.<sup>260</sup>

## **Eye-Tracking**

One of the arguments often cited is that the courtroom participants will be affected by the TCB cameras. Modern eye-tracking technology can help to research part of this concern. Eye-trackers monitor and record where a person is actually looking, and for how long. The thesis examines eye-tracking in order to assist courts and legal-policymakers is looking for better evidence in relation to in-court TCB camera effects such as distraction.

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<sup>257</sup> V Browne, ‘For Lawyers the Best Thing in Life is Still Fee’ *Irish Times* (Dublin, 7 July 2010) 16.

<sup>258</sup> I Gibney, ‘Trial by Media’ (August/September 1997) *Law Society Gazette* 12. Note also, generally, DF Hahn, *Political Communication, Rhetoric, Government, and Citizens* (Strada 2003).

<sup>259</sup> M Tighe, ‘Taxing Master in Cost Row a Quarter as Productive as Colleague’ *Sunday Times* (Dublin, 1 June 2014).

<sup>260</sup> Having said that it is almost a truism that it is ‘very difficult to tell legal stories within the limitations of news discourse.’ See CE Greek, ‘Lecture 9, Shadow Justice: Courts and the Media’ (1996) 3 at < [www.fsu.edu/~crimdo/lecture9.html](http://www.fsu.edu/~crimdo/lecture9.html) > p 7.

We can use eye-trackers to see if mock courtroom participants in real non-live and simulated courtrooms, are distracted by the TCB cameras (and TCB camera operators where present). Eye-trackers are already used successfully in the legal, internet, marketing, advertising, medical, aeronautics and automobile industries, to name but a few. There is no insurmountable reason why they should not be used for TCB camera effects-research.

## Conclusion

The US Supreme Court challenge is relevant here as much as it is in the US. While research can be pursued in Ireland, it is important to consider these issues prior to a formal TCB pilot in Ireland (if one is ever to be so considered). The broad principles laid down in the caselaw of the US Supreme Court provides a key yardstick for evaluating proposals for TCB and helps frame some of the key research questions in designing and conducting legal-empirical research in this area.

In many respects while the *Irish Times*<sup>261</sup> case opens up interesting issues in the TCB legal rights debate, it was not at any stage dealing with or considering the TCB issues. Any suggestion that it opens the doors of the courts to TCB are overstated. The Law Reform Commission recommendation is also less than considered as it is promoting a pilot project without even referring to the different forms of TCB, how it might be regulated and what legal-empirical mandated research may be required. Unfortunately also, it has failed to recognise that there is no substantiation of any of the various TCB arguments given that the research to date is less than optimum. The Law Reform Commission is also somewhat assuming problems, and a potential TCB solution. The US Supreme Court research challenge has yet to be considered in Ireland. If TCB was ever considered in Ireland it may require an impact assessment, regulatory impact assessment, proper consideration of legal-empirical research issues and how to implement and record effects data *before*, during and after an initial study. The various options and form issues would need careful consideration. While certain issues, such as criminal law and policy,<sup>262</sup> presumption of innocence,<sup>263</sup> courts,<sup>264</sup> criminal procedure,<sup>265</sup> sentencing,<sup>266</sup>

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<sup>261</sup> See above.

<sup>262</sup> A sample of the literature includes, T O'Malley, above; I Bacik and M O'Connell, *Crime and Poverty in Ireland* (Round Hall Sweet and Maxwell 1998); P O'Mahony, *Criminal Chaos, Seven Crisis in Irish Criminal Justice* (Round Hall Sweet and Maxwell 1996); P O'Mahony, *The Irish War on Drugs, The Seductive Folly of Prohibition* (Manchester University Press 2008). Also, P Charleton, PA McDermott and MA Bolger, *Criminal Law* (Butterworths 1999).

<sup>263</sup> C Hamilton, *The Presumption of Innocence in Irish Criminal Law, 'Whittling the Golden Thread'* (Irish Academic Press 2007).

victims and victimology,<sup>267</sup> justice and justice theory,<sup>268</sup> legal rights and due process,<sup>269</sup> family court issues such as family law agreements,<sup>270</sup> scientific evidence,<sup>271</sup> the procedure,<sup>272</sup> form<sup>273</sup> and substance of law, etcetera, have received increasing research attention, TCB and TCB baseline issues also require research – even in Ireland. The US Supreme Court challenge is relevant here as much as it is in the US. Indeed, it may be more important to do baseline research in Ireland than the US, as the baseline may have become contaminated to some extent at least in the US.

The US experience should be examined having eliminated the possibility that those requirements (setting standards of assessment for TCB and, importantly, designing experiments to provide legal-empirical data as the basis for applying such standards) could be met by applying some of the very general principles set out in the Irish cases. It is necessary to look to the US experience, given its predominance and history on the TCB issue, but particularly in the absence of sufficient guidance from the Irish cases on TCB

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<sup>264</sup> One example is FF Davis, *The History and Development of the Special Criminal Court 1922–2005* (Four Courts Press 2007); C Costello (ed), *The Four Courts: 200 Years, Essays to Commemorate the Bicentenary of the Four Courts* (Incorporated Council of Law Reporting for Ireland 1996); KPE Lasok, *The European Court of Justice, Practice and Procedure* (Butterworths 1994).

<sup>265</sup> For example, D Walsh, *Criminal Procedure* (Thomson Round Hall 2002).

<sup>266</sup> ISIS, Irish sentencing website < [www.irishsentencing.ie](http://www.irishsentencing.ie) >; A Von Hirsche and A Ashworth, *Proportionate Sentencing, Exploring the Principles* (OUP 2005); A Von Hirsch, A Ashworth and J Roberts, *Principled Sentencing, Readings on Theory and Policy* (OUP 2009); A Lovegrove, *The Framework of Judicial Sentencing, A Study in Legal Decision Making* (CUP 1997); J Fionda, *Public Prosecutors and Discretion, A Comparative Study*, (Clarendon, 1995).

<sup>267</sup> A Crawford and J Goodey, *Integrating a Victim Perspective Within Criminal Justice, International Debates* (Ashgate 2000). T O'Malley has also been interested in this specific topic.

<sup>268</sup> BA Hudson, *Understanding Justice, An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory* (OUP 2003).

<sup>269</sup> G Hogan and G Whyte, above; M Forde, above; DJ Galligan, *Due Process and Fair Procedures, A Study of Administrative Procedures* (Clarendon 1996); DG Morgan and G Hogan, *Administrative Law in Ireland* (Round Hall Sweet & Maxwell 1998); DG Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall Sweet & Maxwell 1997); RA Primus, *The American Language of Rights* (CUP 1999).

<sup>270</sup> E Mahon and E Moore, *Post Separation Parenting: A Study of Separation and Divorce Agreements Made in the Family Law Circuit Courts in Ireland and their Implications for Parent-Child Contract and Family Lives* (January 2011), Office of the Minister for Children and Youth Affairs < [www.omc.gov.ie](http://www.omc.gov.ie) >.

<sup>271</sup> L Heffernan, *Scientific Evidence: Fingerprints and DNA* (First Law 2006).

<sup>272</sup> For example, B O Floinn, *Practice and Procedure in the Superior Courts* (Tottel 2008); H Delaney and D McGrath, *Civil Procedure in the Superior Courts* (Thomson Round Hall 2005); K Dowling, *Civil Procedure in the Circuit Court* (Round Hall Thomson Reuters 2008); K Dowling, *Civil Procedure in the District Court* (Round Hall Thomson Reuters 2009); JV Woods, *District Court Practice and Procedure in Civil, Licensing and Family Law Proceedings* (Woods); JV Woods, *District Court Practice and Procedure in Criminal Proceedings* (Woods 2010); H Delaney, *The Courts Acts 1924–1997, Including the Courts Service Act 1998* (Round Hall, 2000).

<sup>273</sup> RS Summers, *The Jurisprudence of Law's Form and Substance* (Ashgate 2000).



effects research issues, and how to examine, research and answer TCB effects concerns. The US cases, research and research problems are relevant to the discussion in Ireland, and if anything emphasise the need for better evidence and legal-empirical research.



## CHAPTER 5: THE US SUPREME COURT CHALLENGE

### Introduction

Given the concerns about potential effects of TCB, one of the obvious starting points is to consider the main legal TCB cases. There is no TCB in Ireland. Nor are there any Irish decisions referring to TCB effect issues, legal-policy and arguments. Given that there is no Irish TCB jurisprudence, there is no direct Irish comparison of TCB Constitutional, caselaw or broadcasting issues.<sup>1</sup> The thesis therefore examines the primary legal jurisprudence in relation to TCB, which primarily comes from the US Supreme Court. The effects concerns were heavily canvassed in these cases, and in more detail than in any other cases. The TCB effects discussion (from a legal-policy and caselaw perspective) in terms of legal-empirical research of the effects concerns is most considered in the US Supreme Court jurisprudence<sup>2</sup> and hence we must look there more so than Ireland, or any closer jurisdiction. It is also evident that the various legal arguments for and against TCB before the US Supreme Court are heavily influenced, if not reliant, on the potential answers coming from the legal-empirical research of the TCB concerns.

Three US Supreme Court cases consider TCB issues, and while they vary substantially on fact, precedent and *ratio decidendi*, sometimes generating much discussion, there is a common theme.<sup>3</sup> The common theme in the three cases, is that they all refer to the effects concerns and recognise that there is a need for more legal-empirical research in order to provide answers and a better evidential basis for legal-policy decision making. This common theme is not analysed heretofore in the literature. The cases variously highlight a lack of any and or enough legal-empirical research to answer the various concerns raised in the three cases. The extent to which the US Supreme Court details concerns, and aspires for more legal-empirical research and answers than is available, can be considered to be a call or challenge that more such research be pursued to assist courts and legal-policymakers. This is evident across the three cases. The thesis describes this as the US Supreme Court legal-empirical research challenge. Unfortunately, the overall research

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<sup>1</sup> Direct comparative legal case analysis is difficult given this absence. While Article 34.1 of the Irish Constitution may come to be relevant in relation to TCB cases and arguments in future, such discussion is separate to this thesis. However, the thesis and the effect research issues herein may well have influence on Article 34.1, and other issues of debate, in relation to TCB in Ireland in future.

<sup>2</sup> There are few disputed lower court TCB cases dealing extensively with effect issues and effects-research.

<sup>3</sup> One could argue that they do not decide or establish any legal rule per se.

concerns and research challenge of the US Supreme Court has not been analysed as a separate issue in the literature.<sup>4</sup>

The US Supreme Court analysis also needs to be situated in the broader context. There may be examples of specific judicial reticence to TCB.<sup>5</sup> For example, the attitude of the US Supreme Court towards the televising of its own proceedings may perhaps relate to some extent to how it has repeatedly highlighted concerns with the lack of legal-empirical effects-research regarding TCB and what may be called the US Supreme Court research challenge. At its essence, without carrying out legal-empirical research into the TCB and TCB legal concerns, we are no nearer to providing informed answers to those concerns. This applies equally to the US Supreme Court concerns as to the various popular questions raised. Also, while the US Supreme Court details concerns and a need for research, it is not per se setting limits, parameters or methods for specific research. It is highlighting the general TCB effects concerns facing it, and indeed wider courts and legal-policymakers. This applies in Ireland, the UK as well as the US. The TCB legal-empirical research could better inform and assist courts. The US Supreme Court is highlighting particular concerns which legal-empirical research should seek to find answers to. The thesis seeks to highlight and to advance this discussion.

### **The US and TCB Issues**

Some of the US TCB issues are reviewed below.

*Legislative Efforts:* US Federal Rule of Criminal Procedure 53, adopted in 1946, prohibits photography in courtrooms. There have been various attempts to enact legislation which would mandate TCB in US Federal courts.<sup>6</sup> A number of politicians are strong advocates

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<sup>4</sup> One exception is the extent to which SL Alexander referred to and quotes one of the effects and research concerns in one of the US Supreme Court cases in order to come up with his specific thesis research. See SL Alexander, “‘Mischievous Potentialities’: A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit, Florida, 1989” (PhD thesis, University of Florida 1990) 1.

<sup>5</sup> See, for example, G Stohr, ‘TV Cameras Rejected in US Supreme Court Health-Care Case’ Bloomberg.com, 16 March 2012. This relates to the Obama health care legislation.

<sup>6</sup> See, for example, ‘Glassley Pushes for Cameras in Federal Courts’ Des Moines News (20 March 2009) < [www.kcci.com/news/18975176/detail.html](http://www.kcci.com/news/18975176/detail.html) > accessed 16 October 2010; < [www.opencongress.org/bill/110-s352/show](http://www.opencongress.org/bill/110-s352/show) > accessed 16 October 2010. ‘Grassley Pushes for Cameras in Federal Courts’ (KCCI8) < [www.kcci.com/news/18975176/details.html](http://www.kcci.com/news/18975176/details.html) > accessed 5 April 2009. ‘Cameras in Courtroom Bill Moves in Senate’ The Third Branch < [www.uscourts.gov/ttb/2008-04/article07.cfm](http://www.uscourts.gov/ttb/2008-04/article07.cfm) > accessed 22 April 2009. ‘110th Congress Acts on Judiciary Initiatives’ (2008) 40 The Third Branch, < [www.uscourts.gov](http://www.uscourts.gov) > accessed 22 April 2009. Also, Sunshine in the Courtroom Act of 2009, S 657, 111th Congress (2009) < [www.govtrack.us/congress/bill.xpd?bill=s111-657](http://www.govtrack.us/congress/bill.xpd?bill=s111-657) > accessed 22 August 2014; Sunshine in the Courtroom Act of 2009, HR 3054, 111th Congress (2009) available < [www.govtrack.us/congress/bill.xpd?bill=h111-3054](http://www.govtrack.us/congress/bill.xpd?bill=h111-3054) > accessed 22 August 2014; S 405:

of legislating for Federal TCB.<sup>7</sup> Obviously others oppose it, which explains in part the failure of such US legislative proposals to date.<sup>8</sup> The Judicial Conference also opposes the Federal legislative proposals.<sup>9</sup> A representative of the Judicial Conference, Chief Judge Edward R Becker, US Courts of Appeals, Third Circuit, conveyed the judiciaries' opposition to TCB and Bill S721.<sup>10</sup> He refers to the report after the initial Federal pilot study, where sixty four percent of participating judges reported that, to some extent, the cameras make witness more nervous than they would otherwise be, make witness less willing to appear in courts and further that forty one percent (of judges) found that to some extent witnesses were distracted.<sup>11</sup> In a content analysis of ninety stories covered by TCB in the pilot, there was an average of fifty six seconds of courtroom footage per court case story and most footage was voiced over.<sup>12</sup> Justice Tunhein also spoke for the Judicial Conference in opposition to the proposed Federal legislation.<sup>13</sup> The judiciary feel that the 'perceived benefit for allowing [TCB] is outweighed by the potential for harm to an individual involved in the litigation process.'<sup>14</sup> The effects and concerns 'are far from hypothetical.'<sup>15</sup> He also indicates that the proposed legislation does not address the complexities of TCB.<sup>16</sup> The US National Association of Criminal Defense Lawyers states

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Sunshine in the Courtroom Act of 2013; HR 917: Sunshine in the Courtroom Act of 2013, available <  
<https://www.govtrack.us/congress/bills/browse#text=sunshine+in+the+courtroom> >  
 accessed 22 August 2014.

<sup>7</sup> *ibid.* Generally note, for example, EM Hodgkins, 'Throwing Open a Window on the Nation's Courts by Lifting the Ban on Federal Courtroom Television. (The Impact of the Mass Media Revolution)' (1995) *Kansas Journal of Law & Public Policy* 89.

<sup>8</sup> See, for example, D Hatch, 'Focus is on Courtroom Cameras' (2000) 19 *Electronic Media*, 2, referring to Orrin Hatch, Chairman of the Senate Judiciary Committee. Also, D Hatch, 'Cameras in Court' (1998) 17 *Electronic Media* 38.

<sup>9</sup> 'Judicial Conference Opposes Bill to Bring Cameras into Federal Courts' News Release, Administrative Office of the US Courts (6 September 2000) <  
[www.uscourts.gov/Press\\_Releases/press\\_090600.html](http://www.uscourts.gov/Press_Releases/press_090600.html) > accessed 24 April 2009.

<sup>10</sup> Referred to *ibid.*

<sup>11</sup> Referred to *ibid.*

<sup>12</sup> *ibid.*

<sup>13</sup> Justice Tunhein, Judicial Conference of the United States, Statement of the Honorable John R Tunheim, Judge, United States District Court for the District of Minnesota, For the Committee on the Judiciary of the United States House of Representatives, Hearing on Cameras in the Courtroom: The 'Sunshine in the Courtroom Act of 2007' HR 2128, 27 September, 2007 (Washington: Administrative Office of the US Courts 2007). Also, S 405: Sunshine in the Courtroom Act of 2013; HR 917: Sunshine in the Courtroom Act of 2013, available <  
<https://www.govtrack.us/congress/bills/browse#text=sunshine+in+the+courtroom> >  
 accessed 22 August 2014.

<sup>14</sup> *ibid* Introduction, ii.

<sup>15</sup> *ibid* 2.

<sup>16</sup> *ibid* 14-15. This is ignoring funding issues, *ibid* 14.

that any TCB should be subject to the consent of the parties.<sup>17</sup> This was in a presentation in relation to proposed Federal TCB legislation.

One of the legislative proposals is Bill S829 To Allow Media Coverage of Court Proceedings.<sup>18</sup> The bill makes no reference to effects-research or the mandating of legal-empirical research, nor to the form of such TCB broadcasting.<sup>19</sup>

Another Senate hearing witness, Law Professor LD Wardle, is introduced as having ‘done extensive research on media coverage of court proceedings.’<sup>20</sup> He states that the ‘experience’ of forty eight courts with TCB, thirty five allowing criminal TCB, cannot be ignored.<sup>21</sup> However, he does not address the issue of effects nor legal-empirical research. He does not refer to validation of the suggested positive effects.

The author R Goldfarb also testified at the Senate hearing.<sup>22</sup> He states that ‘in every one of those studies, the result ... found that the presence of the [TCB] camera, generally unseen, had no impact.’<sup>23</sup> This is not fully correct. The studies are not legal-empirical, do not record or research for effects, position or otherwise via legal-empirical methods. Nor are these studies comparable nor are they replaced. Most studies do not document and record the camera location. The Short report is the main study that does record the camera location in some of the cases studies recorded. This is quite an old report. In terms of the studies Goldfarb refers to, these are not cited. The empirical studies referred to in his book, which he cites as his main source, *TV Or Nor TV*, only identifies eight TCB legal-empirical studies. That is eight studies in forty five years. The suggestion that all of the studies, or specific studies if they were cited, ‘found’ that there was ‘no

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<sup>17</sup> BE Bergman, Written Statement of Barbara E Bergman, on Behalf of the National Association of Criminal Defense Lawyers, Before the Senate Committee on the Judiciary, Re: ‘Cameras in the Courtrooms’ (9 November 2005) 2.

<sup>18</sup> Proposed by Senator Grassley on 18 April 2005. Cited as the Sunshine in the Courtroom Act of 2005, 109th Congress 9 (2005). S 405: Sunshine in the Courtroom Act of 2013; HR 917: Sunshine in the Courtroom Act of 2013, available < <https://www.govtrack.us/congress/bills/browse#text=sunshine+in+the+courtroom> > accessed 22 August 2014.

<sup>19</sup> When Judge Becker pointed out at one of the US Senate hearings that the first Federal pilot research found that the average footage use by the media was fifty six seconds, one of the panellists asked if the Federal study was civil or criminal cases, and when he found out it was civil cases only, this explained why only fifty six seconds were used by the media. *Allowing Cameras and Electronic Media in the Courtroom*, Wednesday, September 6 2000, US Senate, Subcommittee on Administrative Oversight and the Courts, Committee on the Judiciary, Washington, DC, at 38, referring to testimony and questions of Judge Zobel. He stated that there ‘are very few civil cases that draw much attention.’ *ibid.*

<sup>20</sup> *ibid* 40 and 46.

<sup>21</sup> *ibid.*

<sup>22</sup> *ibid* 55 ff.

<sup>23</sup> *ibid.*

[adverse] impact' is incorrect. It does not alert courts and legal-policy makers in relation to the problematic over-reliance on prior research and reports on self-reports and opinions. It ignores that some adverse effects have been found, and also that even the self-report, opinion-report and observer-reports do refer to some adverse effects. It also makes a generalisation that there are no adverse effects whatsoever. R Goldfarb continues that the consensus is that cameras are forgotten within 'thirty or forty seconds.'<sup>24</sup> No research study is cited for this. There is also no research quantifying how many TCB experiments use seen and unseen TCB cameras. Overall, Goldfarb is making headline references to the prior studies as opposed to assessing the problems with the research and how better to advance the evidence available to courts and others.

Courtroom View Network (CVN) argues that all of the studies are 'consistent and unambiguous: electronic coverage of trial court proceedings – not merely oral argument, but trials, including jury trials – simply does not impede the fair administration of justice, compromise the dignity of the court, or impair the orderly conduct of proceedings.'<sup>25</sup> The studies cited<sup>26</sup> were unavailable from the law firm representing CVN, and in some instances from court offices.<sup>27</sup> The general studies rely on self-reports, opinion-reports and questionnaires. If one is testing an effect hypothesis, that the effect is not shown in an instant study does not allow one to generalise from that test that there is conclusively and generally no such effect at all. It only means one study did/did not find the hypothesis effect. Repeat studies are always necessary prior to more general conclusions. The general research, and the CVN Memorandum fail to identify research in relation to each potential effect, and list the studies pertinent to that effect, and compare the results and methodologies of those particular studies. It is interesting also, that the CVN Memorandum highlights effect issues such as administration of court and dignity of the court, and omits or backgrounds reference to courtroom participant effects, including defendant effects.<sup>28</sup> CVN also misinterprets the California Short report finding by saying that Short answered the 'effect' questions negatively.<sup>29</sup> In fact the Short report did find adverse answers in some of its research. None of the problems, carveouts or cautions present in the Short report are referred to. The Memorandum also refers to the first

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<sup>24</sup> *ibid.*

<sup>25</sup> J Sherman and D Kawamoto, Boies, Schiller & Flexner LLP, Memorandum: Prepared for the Committee on Court Administration and Case Management (Hon John R Tunheim, Chair), The Judicial Conference of the United States, submitted on behalf of Courtroom View Network, 6 June 2009, at 9.

<sup>26</sup> Footnote 8, page 10.

<sup>27</sup> Correspondence with author.

<sup>28</sup> J Sherman and D Kawamoto, above, see 8-10 for example.

<sup>29</sup> *ibid* 12.

Federal pilot study as ‘a success,’<sup>30</sup> but without referring to the actual media usage of the footage and content analysis highlighted in the Federal report, and noted as one of the factors leading to the discontinuance.

One paper states that many of the *Estes*<sup>31</sup> statements in relation to the impact upon the courtroom participants ‘have since been debunked by empirical research.’<sup>32</sup> No studies or legal-empirical research is cited. The only support for the statement is M Cohn and D Row’s book at pages sixty two – sixty four.<sup>33</sup> Cohen and Dow refer to four legal-empirical studies between 1953 and 2002.<sup>34</sup> This is not a significant body of research, and certainly not sufficient to reach firm general conclusions. Nor is it entirely legal-empirical. The first Federal study was only partly empirical, namely the outsourced audience research and content analysis. This was partly responsible for the discontinuance of the first Federal study. The Federal study did not undertake any in-court empirical effects-research.

*Hollingsworth*: The US Supreme Court decision preventing the CB in *Hollingsworth*<sup>35</sup> has been criticised.<sup>36</sup> It has been suggested that the *Hollingsworth* decision raises the bar for future TCB, and is a return to the *Estes*<sup>37</sup> position.<sup>38</sup> A senior judge is reported to have criticised the US Supreme Court decision. Justice Alex Kozinski, Chief Judge of the Ninth US Circuit Court of Appeals, is reported to have said that TCB will increase public

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<sup>30</sup> ibid 15.

<sup>31</sup> *Estes v Texas* 381 US [1964] 532.

<sup>32</sup> LJ Myers, ‘*Hollingsworth v Perry*: The Supreme Court’s Renewed Hostility Toward Cameras in the Courtroom’ (Michigan State University College of Law Spring 2010) < [www.law.msu.edu/king/2009-2010/Myers.pdf](http://www.law.msu.edu/king/2009-2010/Myers.pdf) > accessed 19 January 2014, at 27.

<sup>33</sup> M Cohn and D Dow, *Cameras in the Courtroom: Television and the Pursuit of Justice*, (Rowman & Little 2002).

<sup>34</sup> EH Short and Associates, ‘Evaluation of California’s Experiment with Extended Media Coverage of Courts’ (1981) [California]; Federal Judicial Centre, ‘Pilot Program Involving Electronic Coverage in Six US District Courts and Two Appeal Courts’ (1994); J Hoyt, ‘Courtroom Coverage: The Effects of Being Televised’ (1977) 21 *Journal of Broadcasting* 489 [Wisconsin]; E Borgida, K Debono and L Buckman, ‘Cameras in the Courtroom: The Effects of Media Coverage on Witness Testimony and Juror Perceptions’ (1990) 14 *Law and Human Behavior* 489 [Minnesota].

<sup>35</sup> *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 19 January 2014.

<sup>36</sup> One academic example is LJ Myers, ‘*Hollingsworth v Perry*: The Supreme Court’s Renewed Hostility Toward Cameras in the Courtroom’ *ibid*. Media example include Editorial, ‘Discrimination on Trial, But Not on TV’ *New York Times* (New York, 14 January 2010), < [www.nytimes.com/2010/01/14/opinion/14thu3.html?\\_r=1](http://www.nytimes.com/2010/01/14/opinion/14thu3.html?_r=1) > accessed 19 January 2014; D Lithwick, ‘How the Supreme Court Managed to Insult Both the Law and the Public’ *Sodahead* (16 January 2010) < [www.sodahead.com](http://www.sodahead.com) > accessed 24 February 2010.

<sup>37</sup> *Estes v Texas* 381 US [1964] 532.

<sup>38</sup> LJ Myers, ‘*Hollingsworth v Perry*: The Supreme Court’s Renewed Hostility Toward Cameras in the Courtroom’ *ibid* 23.



respect for the justice system and possibly also improve trials.<sup>39</sup> No baseline research is identified to indicate (a) a lack of respect, or (b) to measure a subsequent increase in respect as a result of TCB being introduced. The points reported by Justice Kozinski do not appear to refer to any evidence,<sup>40</sup> and are typical of popular arguments. However, while criticising the US Supreme Court and being a ‘fierce advocate of cameras in the courtroom,’<sup>41</sup> Justice Kozinski implicitly reflects different forms of TCB. He is reported as advocating (1) stationary TCB cameras; (2) no zooming in and out; and (3) TCB which does not dramatize the courtroom events.<sup>42</sup> If a jurisdiction decides to permit TCB, it has legal and legal-policy choices to make in relation to which form of TCB it wishes to allow. It does not appear that any US jurisdictions expressly recognise the TCB forms and choices available. The thesis hopes to contribute to the literature in this regard.

*Federal Courts: The First Pilot:* There is a divergence between many different forms of TCB in the US. There is then further divergence between many state courts which allow some form of TCB or TCB experimentation on the one hand, and the Federal courts on the other which generally prohibit TCB.<sup>43</sup> The US Federal courts undertook a three year study with certain TCB in civil cases, which began in 1991 and ended in December 1994.<sup>44</sup> The Federal circuits which participated in the pilot study all volunteered.<sup>45</sup> It is often overlooked that criminal cases were not included in the study.<sup>46</sup> Commenting on the Federal experimental report, Justice Tunheim states that the report may even have

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<sup>39</sup> Reported in B Egeilko, ‘Let Cameras in Courts, Chief Judge Says’ *San Francisco Chronicle* (8 October 2010) C-3. It refers to an article in the *Fordham University Law Review* co-authored by Judge Kozinski. A Kozinski, Judge, and R Johnson, ‘Of Cameras and Courtrooms’ (2010) 20 *Fordham Intellectual Property Media & Entertainment Law Journal* 1107-1134.

<sup>40</sup> A Kozinski and R Johnson, above 1110. Reported in B Egeilko, ‘Let Cameras in Courts, Chief Judge Says’ *San Francisco Chronicle* (San Francisco, 8 October 2010) C-3. It refers to the article in this journal.

<sup>41</sup> K Hill, ‘A New Argument in Favor of Cameras in the Courtroom: Bloggers Suck’ *Above the Law.com* < <http://abovethelaw.com/2010/04/a-new-argument-in-favor-of-cameras-in-the-courtroom-bloggers-suck/> > accessed 19 January 2014.

<sup>42</sup> Referred to *ibid*.

<sup>43</sup> See general description section, Section 3: ‘Federal Courts Articulate the Cons: Bases for Opposition to Cameras in the Courtroom,’ in ‘Cameras in the Courtroom, Part 1: Louisiana Approach (Introduction)’ < [www.louisianainsurancelitigation.com/2008/03/cameras\\_in\\_the\\_courtroom.html](http://www.louisianainsurancelitigation.com/2008/03/cameras_in_the_courtroom.html) > accessed 19 January 2014.

<sup>44</sup> HJ Reske, ‘No More Cameras in Federal Courts: Judicial Conference Ends Experiment Despite Few Complaints from Judges’ (November 1994) *ABA Journal* 28. Also HJ Reske, ‘Rally for Court Cameras Falls Short: Judicial Conference Committee Rejects Judge’s Plea to Keep Broadcasting’ (March 1995) *ABA Journal* 30; D Kiesel, ‘Federal Court Ban Requests’ (November 1984) *ABA Journal* 29.

<sup>45</sup> HJ Reske, ‘Cameras Experiment One Year Old: Retired Justice Marshall Among the Judges Who Refused Broadcast Requests’ (July 1992) *ABA Journal* 28. Also J Tunheim, above, n 1 at 4.

<sup>46</sup> See J Tunheim, above 4, 17.

downplayed some of the negative TCB evidence, including distraction-effects, making courtroom participants more nervous.<sup>47</sup> The study in the US Federal Courts was discontinued by Federal judges deciding by a margin of 2-1 against continuing or permitting TCB. This was reported to be on the basis that generally only snippets of court proceedings were used by the media and there was no, or not enough, educational TCB.<sup>48</sup> This was on the basis of legal-empirical research. The pilot review researchers initiated professional outsourced research of audience issues. It is noted that the official review was initiated near the end of the study, and there was no baseline research. In terms of the footage that was filmed and broadcast, at least one commentator refers to it as being boring.<sup>49</sup>

*Federal Courts: A Second Pilot:* Justice Sentelle of the US Federal courts announced on 14 September 2010 that there was a decision made by the Federal judges in the US to initiate a second period of pilot experimentation.<sup>50</sup> It appears that the parties may object in a given case.<sup>51</sup> The second pilot, approved by the Judicial Conference of the Federal judges of the United States is national and will last three years, with ‘interim’ and final reports.<sup>52</sup> What is interesting in term of TCB form issues is that the pilot will encompass recording by the court, and not third parties, such as television networks.<sup>53</sup> It would be beneficial to gauge these particular effect issues. In terms of iTCB, it appears to be the case.<sup>54</sup> The decision of the US Judicial Conference is reported as being to ‘evaluate the effects of cameras in Federal courtroom.’<sup>55</sup> There does not appear to be any consideration of baseline issues and effects-research. Baseline research is identified by the thesis as being important for all future TCB research and evidence based assessments. The

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<sup>47</sup> *ibid* 17-19.

<sup>48</sup> SF Chance, ‘Considering Cameras in the Courtroom’ (1995) 39 *Journal of Broadcasting and Electronic Media* 555, 559. Also, E Rodriquez and R Schmidt, ‘US Judicial Conference Tries a Little Openess: From Cameras to Protective Orders to Itself’ *Legal Times* (27 March 1995) 1, referred to in SF Chance, *ibid*. The judges were also concerned by potential jury and witness effects, see HJ Reske, ‘No More Cameras in Federal Courts: Judicial Conference Ends Experiment Despite Few Complaints from Judges’ *ibid*. D Kiesel, ‘No To Cameras: Federal Ban Remains’ (November 1984) *ABA Journal* 29.

<sup>49</sup> HJ Reske, ‘Ground-Breaking But Boring: Few Cameras Expected in Federal Courts as Broadcast Experiment Gets Underway’ (September 1991) *ABA Journal* 26.

<sup>50</sup> Associated Press, ‘US Judges Agree to Pilot Study of Cameras in Court’ *First Amendment Centre*, < [www.firstamendmentcenter.org/news.aspx?id=23378](http://www.firstamendmentcenter.org/news.aspx?id=23378) > accessed 18 October 2010.

<sup>51</sup> See *ibid*.

<sup>52</sup> ‘Judiciary Approves Pilot Project for Cameras in District Court’ < [www.uscourts.gov](http://www.uscourts.gov) > accessed 14 October 10.

<sup>53</sup> *ibid*.

<sup>54</sup> One factor may be that the cost of iTCB may have decreased, at least in terms of computer technology and hardware. However, certain media and audiovisual materials may remain high.

announcement by Justice Sentelle that the Federal courts are planning a second experimental period is fortuitous. If properly planned, it could allow for sustained legal-empirical effects-research to begin addressing the US Supreme Court challenge. The vast majority of studies are inadequate as they are ill planned, leave unrecorded data and are non-empirical. Those planning the current Federal courts study should bear in mind a number of legal-empirical issues. Most previous effects studies fail to record any baseline data. Once it is decided to introduce TCB to specific courtrooms, a period of data collection should be undertaken prior to TCB being allowed. This allows us to compare for effects before and after TCB cameras are introduced. This has been ignored in the general and legal-empirical studies to date. Interestingly also, Justice O’Scannlain also speaking against legislated Federal CB, makes a statement which hints at more legal-empirical research. He states that even modern miniature technology and cameras ‘does nothing to reduce the significant and *measurable* negative impact that cameras coverage can have on the trial participants themselves’<sup>56</sup> (emphasis added).

## US States

While a few US states allow TCB even without judicial review, most states that permit TCB upon application, are in accordance with official procedures or guidelines.<sup>57</sup> In theory, courts are required to consider effect and legal rights issues.<sup>58</sup> Just cause objection,<sup>59</sup> at least in theory, is possible. Various states also regulate what can and cannot be filmed.<sup>60</sup> However, in reality, legal-empirical effects-research of the US Supreme Court challenge does not appear to be dealt with seriously or to all. Significant research remains in order to be able to assist the US Supreme Court and other courts the next time TCB issues come to be considered. This is relevant to Ireland and to the US.

## Location

Another issue generally ignored in the research to date is location-effects. Generally, the studies do not record where the TCB camera is located in the courtroom, nor where the

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<sup>55</sup> R Longley, ‘Judiciary Approves Cameras in Courtroom Test’ (Robert’s US Government Info Blog 21 September 2010) < [www.usgovinfo.about.com](http://www.usgovinfo.about.com) > accessed 14 October 10.

<sup>56</sup> D O’Scannlain, J, *Statement of Judge Diarmuid O’Scannlain on Behalf of the Judicial Conference of the United States Regarding S 829 as Applied to Federal Trial Courts*, 9 November 2005, Exhibit 4 at 48. (Online copy available at < [http://judiciary.senate.gov/hearings/testimony.cfm?id=1672&wit\\_id=4799](http://judiciary.senate.gov/hearings/testimony.cfm?id=1672&wit_id=4799) > accessed 31 October 2010). He also states that the judges feel that the proposed law, S829, fails to adequately protect the right to a fair trial. *ibid* 50.

<sup>57</sup> D Smallman, ‘Cameras in Courtrooms: Revisiting the Experiment’ (May/June 2001) *The IRE Journal* 15, 32, at 15.

<sup>58</sup> *ibid*.

<sup>59</sup> See *ibid*.

<sup>60</sup> *ibid*.

respective courtroom participants are located. In assessing and comparing TCB effects studies, we need to know exactly where TCB cameras and participants are located. If the TCB camera is at the back of the courtroom, then the lawyers are unlikely to be visually distracted by it, whereas the judge might be. In considering TCB distraction-effects on each respective courtroom participants in a given case, we need to know where they are located and where the TCB camera is located. This helps us to compare one study with another study. Generally, this is not possible with the limitations of the research so far. The location issues might be incorporated into the data collection in the proposed Federal study as well as other studies. (Also see eye-tracking diagrams and images below).

### **US Footage Material for Research**

In the first Federal study it appears that not all of the requests for broadcast footage were satisfied by the media. This was requested so as to undertake content analysis. It might be an idea to formalise access to such copy during the study design and permission stage. Otherwise, broadcasters may not assist or contribute to legal-empirical research efforts.

### **US Supreme Court**

There are also attempts to enact legislation to begin TCB in the US Supreme Court.<sup>61</sup> The *Hollingsworth*<sup>62</sup> decision, and certain comments by US Supreme Court judges,<sup>63</sup> could be viewed as an indicator that US Supreme Court TCB will not happen any time soon. In the general discussions there is no reference to TCB forms and undertaking legal-empirical effects-research.<sup>64</sup> K Aho asks if such coverage would be delivered seriously by the media.<sup>65</sup> Other commentators argue strongly for access,<sup>66</sup> but say nothing in terms

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<sup>61</sup> T Romm, 'Judiciary Panel Advances Bill to Compel Supreme Court to Televisе Proceedings' The Hill.com, available at < <http://thehill.com> > accessed 11 May 2010. Also, EF Daniels, 'Cameras May Yet Cover the Supremes' Multichannel News (20 November 2000) 84; 'Can Congress Mandate Cameras in the Courtroom?' Scotus, Supreme Court of the United States Blog < [www.scotusblog.com/wp/can-congress-mandate-cameras-in-the-courtroom/](http://www.scotusblog.com/wp/can-congress-mandate-cameras-in-the-courtroom/) > accessed 19 January 2014.

<sup>62</sup> *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 19 January 2014.

<sup>63</sup> E Svenson refers to comments of Chief Justice Roberts and Judge Souter against TCB, in E Svenson, 'Cameras in the Courtroom?' Between Lawyers < <http://betweenlawyers.corante.com> > accessed 15 May 2010. Justice Brennan was also in favour of TCB, while Justice Marshall was against. See S Stern, 'Brennan's Conversation on Cameras in Court' The Justice Brennan Blog < <http://justicebrennan.com/blog/?p=312> > accessed 19 January 2014.

<sup>64</sup> An example of the general discussion is RL Brown, 'Essay: Just A Matter of Time?, Video Cameras at the United States Supreme Court and the State Supreme Courts' (2007) 9 Journal of Appellate Practice and Process 1. An example of arguments is M Cohn, 'Let the Sun Shine on the Supreme Court' (2008) 35 Hastings Constitutional Law Quarterly 161.

<sup>65</sup> K Aho, 'TV and the Supreme Court: Broadcasters Want Access, But Will They Deliver Serious Coverage?' (September/October 2003) Columbia Journalism Review 63.

of the TCB forms and effects and which TCB form (if any) which is best. US Supreme Court Justice Kennedy also made a presentation to senators at a Senate Judiciary Committee calling for no TCB legislation for the US Supreme Court.<sup>67</sup> One commentary in relation to proposals for US Supreme Court TCB notes the ‘lack of depth of studies’ and the fact that ‘most studies focus on TCB effects on jurors and witnesses. The [US] Supreme Court, of course, has neither. No research seems to focus solely on the effects of camera coverage on appellate arguments’<sup>68</sup> and issues. This is another research challenge. Just as DK Sloviter notes that the *Estes*<sup>69</sup> court realised that that case was not the ‘the last word on this issue’<sup>70</sup> it is now suggested that we have not reached the last word on the large variety of research issues that need to be addressed. Both proponents and opponent of TCB,<sup>71</sup> as well as other interested parties (whether in the US or elsewhere), might begin TCB effects-research in support of their arguments. There is also a US Supreme Court case which while not adding to the TCB effects jurisprudence, held that the Supreme Court would not accede to a request to televise the case.<sup>72</sup>

### **We (Still) Need Answers**

We still do not have more definitive answers to the various TCB concerns eg the TCB distraction concerns. Legal commentators even today are still referring to potential distraction-effects that TCB cameras and TCB camera operators may cause to the participants in TCB cases. If a further US Supreme Court TCB case was to occur today, the challenge to have sufficient and considered legal-empirical research available to it, such as in relation to whether there are distraction-effects, education-effects, what the implications are generally, and what the implications are in relation to specific cases and or forms of TCB still remain.

One of the problems for judges, lawyers and others today, is that when they do seek to examine what research there is to date, they are broadly confined to a small number of self-reports, opinion-reports and observer-reports. These are limited and undermined by

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<sup>66</sup> Example being ‘Why Have Cameras Been in Katie Couric’s Colon But Not the Supreme Court?’ (Reason 4 August 2010) < <http://reason.com/blog/2010/08/04/reason-tv-why-have-cameras-been> > accessed 19 January 2014. Generally, see also T Mauro, ‘Court, Cameras, Action!’ *USA Today* (27 May 2009); D Wolf and B Guttentag, ‘Cameras in Camera’ *Wall Street Journal* (9 July 2003) A14.

<sup>67</sup> J Biskupic, ‘Justice Pleads with Senate: No Cameras in High Court’ *USA Today* (15 February 2007).

<sup>68</sup> ‘Would Cameras Change the Court?’ *The News Media & The Law* (1 May 2006) 22.

<sup>69</sup> *Estes v Texas* 381 US [1964] 532.

<sup>70</sup> DK Sloviter, ‘If Courts Are Open, Must Cameras Follow?’ (1998) 26 *Hofstra Law Review* 873, 883.

<sup>71</sup> *ibid* 889.

the fact that they are opinion based only. There is no independent validity research. Issues of subjectivity and bias and other influencing factors cannot be ruled out. Frequently, issues arise which suggests that specific TCB self-report and opinion-report studies have research gaps or method problems indicating that they may be less than optimum. Unfortunately, there is an impression that we cannot rely on such research. Overall, these limited studies are all stand alone and therefore no body of valid research is being built up which replicates, verifies and builds upon specific prior TCB effects-research. As yet, we are no closer to a body of TCB legal-empirical effects-research answering even some of the concerns raised by the US Supreme Court. Some might consider this to be troubling, given the legal and rights issues at stake. This is also potentially an issue for those proposing/opposing TCB whether generally or case specifically.

It is suggested that once we start building a proper body of TCB legal-empirical effects-research, we will start to answer and better understanding TCB, what it does do and what it does not do. These will all be important in the considerations which judges, lawyers, litigants and legal-policymakers may have to make. They will be important in considering existing laws and Constitutional provisions. Specific judges, lawyers and litigants will be more informed and considered in any of the legal arguments and points which they may wish to make when it comes to whether they wish to invite, accept or oppose the introduction of TCB for individual cases.

More generally, courts and legal-policymakers will become better informed of the legal-effects and legal-policy effects of introducing TCB, and even specific forms of TCB over other TCB forms. It may become important as a result of research findings to, for example, only use specific types of TCB cameras, not to use TCB camera operators in court, to stream online (iTCB) versus straight to broadcast television. Where TCB cameras may be located in the courtroom, may become a legal-policy issue depending on the results of particular effects-research. For example, it may be important to locate TCB cameras only in particular courtroom locations and not others. Other legal and legal-policy issues may be better informed by research in relation to moving, tilting and zooming TCB cameras. The issue of shared or pooled TCB footage has been a concern raised from the earliest days of TCB, yet appears to still be an issue in at least some of the

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<sup>72</sup> G Stohr, 'TV Cameras Rejected in US Supreme Court Health-Care Case' Bloomberg.com, 16 March 2012.

scenes emerging from the *Pistorius*<sup>73</sup> court in South Africa where we see perhaps dozens of media personnel with various types of cameras in the courtroom.

### **No US Supreme Court Definitions**

TCB is not defined by the US Supreme Court nor by the general academic or popular commentary.<sup>74</sup> There are no frame baseline or parameter factors established. Clearly there are high level concerns voiced by the US Supreme Court, and others. However, a lot of nuanced and considered effects-research is needed to address specific TCB research challenges and the concerns. The thesis seeks to examine considerations of the research avenues available to advance evidence and legal-empirical research and answers to the effects concerns of the US Supreme Court and others.<sup>75</sup>

TCB has occurred more frequently in the US than anywhere else, albeit in different forms and frequencies. For example, even the *Simpson* (criminal) case and Judge Judy are quite different. Despite the apparent popularity, the debate in relation to the various TCB effects issues continues even in the US. While the issues surrounding TCB are always topical, they have been given added impetus of late with legislative efforts to introduce TCB cameras into US Federal courts,<sup>76</sup> into the US Supreme Court, the advent of TCB in the new UK Supreme Court,<sup>77</sup> and the *Pistorius*<sup>78</sup> trial in South Africa. There are also calls to expand TCB in the UK beyond the UK Supreme Court, in particular by Sky TV.<sup>79</sup>

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<sup>73</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>74</sup> There are no frames, baselines or parameter factors established.

<sup>75</sup> This included the language, definitions, baseline and parameters of such TCB effects research. Developing definitions and form descriptions for TCB may assist in this direction.

<sup>76</sup> The proposed ‘Sunshine in the Courtroom’ is a bill to provide for television coverage access of Federal court proceedings in the United States. It was introduced for the first time in the 105th Congress (1997-1998), and has been reintroduced in the 109th (2005-2006), 110th (2007-2008) and 111th Congress (2009-2010), and since, such as those in 2013, HR 3054 and S 657 (111th Congress), S 405: Sunshine in the Courtroom Act of 2013, HR 917: Sunshine in the Courtroom Act of 2013. See HR 1280 (105th Congress), S 829 (109th Congress), HR 2128 and S 352 (110th Congress), and HR 3054 and S 657 (111th Congress), S 405: Sunshine in the Courtroom Act of 2013, HR 917: Sunshine in the Courtroom Act of 2013, all available at < [www.govtrack.us/congress/bill.xpd?bill=s111-657&tab=related](http://www.govtrack.us/congress/bill.xpd?bill=s111-657&tab=related) > accessed 22 August 2014.

<sup>77</sup> See, for example, UK Department for Constitutional Affairs in Great Britain consultation ‘Broadcasting Courts’ (2004), consultation paper < [www.dca.gov.uk/consult/courts/broadcasting-cp28-04.pdf](http://www.dca.gov.uk/consult/courts/broadcasting-cp28-04.pdf) > accessed 18 January 2014.

<sup>78</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>79</sup> See, for example, J Ryley, ‘Justice Must Be Televised, Allowing TV Cameras in Court Would Greatly Help to Restore Public Faith in Criminal Proceedings’ (Guardian online) < [www.guardian.co.uk/commentisfree/2010/dec/05/justice-television-cameras-court-mps-expenses](http://www.guardian.co.uk/commentisfree/2010/dec/05/justice-television-cameras-court-mps-expenses) > accessed 18 January 2014.

David Cameron and Kenneth Clark have reacted positively to extending TCB<sup>80</sup> in England and Wales beyond the UK Supreme Court. UK TCB proposals include the Court of Appeal and certain other UK (England and Wales) courts. These are now encapsulated in the Crime and Courts Act 2013. However, in all of the popular discussion and arguments, there are still no proposals as to how to advance legal-empirical research and answers to the continuing concerns regarding positive and negative effects of TCB. The UK Lord Chief Justice has only recently endorsed the call for more legal-empirical research of TCB and TCB effects.<sup>81</sup>

### The US Supreme Court Cases

Despite the importance of the effects issues raised, it is perhaps surprising that the US Supreme Court has only referred to TCB issues on three occasions, in *Estes*,<sup>82</sup> *Chandler*<sup>83</sup> and *Hollingsworth*.<sup>84</sup> However, it is clear from these cases that the US Supreme Court was and is aware that behind the legal and effects concerns, there are substantial knowledge gaps in relation to TCB effects. The common theme through these cases is that there are concerns and that legal-empirical research is needed to address these concerns by producing greater knowledge.<sup>85</sup> Each case notes that more legal empirical-research is needed to address the TCB effects concerns.<sup>86</sup> (This includes distraction-effects).

### The Jurisprudential Facts

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<sup>80</sup> P Lambert, 'Cameron Courting Limited Cameras in Court' [9 September 2011] Computers and Law. The sentencing of David Gilroy in a Scottish court was broadcast on television, which some say as an extension on TCB in the UK. Strictly speaking it was not, as Scottish proceedings have previously been permitted. See S Brocklehurst, 'Filming in Court "Not a Precedent"' (BBC Online 18 April 2012) < <http://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-17745584> > accessed 19 January 2014.

<sup>81</sup> See F Gibb, 'Britain Rethinks Cameras in Court' *Times* (London, 16 May 2014).

<sup>82</sup> *Estes v Texas* 381 US [1964] 532.

<sup>83</sup> *Chandler v Florida* 449 US [1981] 560.

<sup>84</sup> *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 18 January 2014. See 'US Judge Overturns Gay Marriage Ban' *Irish Times online* < [www.irishtimes.com](http://www.irishtimes.com) > accessed 5 August 2010, regarding ultimate trial decision.

<sup>85</sup> Despite the Supreme Court identifying the need for proper research of these issues, the research challenge has not yet been fully taken up by empirical researchers, the media nor the courts themselves. The gaps, concerns and effects are not addressed.

<sup>86</sup> It can be argued that the US Supreme Court has set an empirical research challenge. It is also necessary to point out that while the US Supreme Court has said that more empirical research is necessary, it never defined or scoped how this research should occur. TCB is not defined. There are no frames, baselines or parameter factors established for such research.



The *Estes*<sup>87</sup> case decided against TCB and effectively barred cameras from US courts for decades. It held that TCB infringes the defendant's legal rights to a fair trial.<sup>88</sup> The facts of the case relate to the defendant being charged with a fraud related offence in Texas. The pre-trial and trial stages were televised. The defendant objected to TCB. Ultimately, he appealed his conviction on the basis of the TCB which the judge had permitted. He prevailed in the US Supreme Court. The TCB was held to prejudice him.

The *Chandler*<sup>89</sup> case involved two police officers in Florida being charged with burglary of a restaurant. Part of their trial was televised. Again they objected. In this instance their appeal to overturn the conviction on the basis of the TCB was unsuccessful. One factor to note was that the local state Supreme Court had recently become more positively inclined towards TCB in Florida. The US Supreme Court appeal was unsuccessful. It said that the states were permitted to experiment with TCB. It did not say there was a media right to TCB nor that all forms and formats of TCB would be permitted. The issue of permissible and non-permissible TCB experimentation in the judgement has yet to be explored in the literature. Equally, the different permitted forms of TCB in such experimentation remains to be dealt with.

*Hollingsworth*,<sup>90</sup> the most recent US Supreme Court case, occurred in early 2010. The US Supreme Court was asked to stay the television broadcast of a Federal trial. The Californian District Court had issued an order permitting broadcasting live via streaming video to a number of courts.<sup>91</sup> The defendants objected.<sup>92</sup> They sought a stay, which was granted by the US Supreme Court.<sup>93</sup> The origin of the case is a same sex marriage law proposal in California (known as Proposition 8 or Prop 8). Those supporting the proposed law submitted that they had been harassed as a result of their support. The harassment included death threats.<sup>94</sup> They feared these threats continuing or increasing if the case was televised via TCB. *Hollingsworth*<sup>95</sup> also avoids giving a definitive TCB judgement, as the majority focused its main decision on procedural issues. Indeed, one of

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<sup>87</sup> *Estes v Texas* above 532.

<sup>88</sup> *ibid* 535.

<sup>89</sup> *Chandler v Florida* 449 US [1981] 560.

<sup>90</sup> *Hollingsworth v Perry* above. See 'US Judge Overturns Gay Marriage Ban' Irish Times < [www.irishtimes.com](http://www.irishtimes.com) > accessed 3 August 2012, regarding ultimate trial decision.

<sup>91</sup> *Hollingsworth v Perry* above 1. In a sense, the form of TCB in dispute was a relayed TCB form.

<sup>92</sup> *ibid* 2.

<sup>93</sup> *ibid*.

<sup>94</sup> *ibid*.

<sup>95</sup> *Hollingsworth v Perry* above.

the statements in *Hollingsworth* states that the US Supreme Court was reserving its view in relation to the iTCB form.<sup>96</sup>

The majority opinion in *Estes*<sup>97</sup> (in 1965) clearly came out against TCB and referred extensively to effects concerns, including distraction-effects. The majority opinion in *Chandler*<sup>98</sup> (in 1981) has been accepted as permitting US states to experiment with TCB.<sup>99</sup> It held that *Estes*<sup>100</sup> did not rule that there was a Constitutional rule that *all* television coverage of *criminal* trials was inherently a denial of due process<sup>101</sup> (emphasis added). The states could, therefore, experiment with TCB. Indeed, the variety and forms of TCB has varied greatly since *Chandler*.<sup>102</sup> However, the variety, forms and effects of TCB remain a live legal, effects-research and legal-policy issue. Interestingly, there is as yet no analysis of TCB in the context of permissible criminal trials, non-permissible criminal trials, permissible and non-permissible civil trials, forms, etc.

*Hollingsworth*<sup>103</sup> differs from the other two cases in that the trial hearing had not yet occurred. The US Supreme Court in *Hollingsworth* decided in advance that TCB was not to be permitted before the trial occurred. In the other two cases, the appeal reached the US Supreme Court after the trial had occurred. However, it remains to be seen if pre-trial TCB objections may increase.

### **The US Supreme Court Concerns and Research**

The first reported TCB case occurred earlier in 1953.<sup>104</sup> The most recent US Supreme Court case was in January 2010 (*Hollingsworth*<sup>105</sup>) while the other two were in 1965 and 1981 respectively.<sup>106</sup> One would have thought that in the forty nine years since the first substantive case in the US Supreme Court, that substantial legal-empirical research would have occurred to answer the US Supreme Court's concerns. Such research could have

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<sup>96</sup> *ibid.*

<sup>97</sup> *Estes v Texas* above.

<sup>98</sup> *Chandler v Florida* above.

<sup>99</sup> However, on a careful reading of *Chandler*, it is arguably less pro-camera than camera advocates might feel, *ibid.* See RK Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (The University of Chicago Press 2000).

<sup>100</sup> *Estes v Texas* above.

<sup>101</sup> *Chandler v Florida* above. Headnote (a).

<sup>102</sup> *Chandler v Florida* 449 US [1981] 560.

<sup>103</sup> *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 19 January 2014.

<sup>104</sup> Referred to by Barber as being the case of Billy Eugene Manley in Oklahoma City which occurred in 1953, see S Barber, *News Cameras in the Courtroom: A Free Press - Fair Debate* (Ablex 1987) 10-11. It appears cinema or movie courtroom broadcasting occurred before TCB. There does not appear to be any effects research however.

<sup>105</sup> *Hollingsworth v Perry* above.

enhanced our knowledge and understanding of TCB and legal and legal-policy decision making. This has not occurred.<sup>107</sup> Indeed, it is ironic that while some of the US Supreme Court's comments focused on how television technology may change in future, neither the US Supreme Court nor commentators since, have recognised that legal-empirical research and research tools may also change. Indeed, the legal-empirical research tools have improved vastly since 1953. In the case of eye-focus and eye-tracking, the research, models and technology has significantly advanced. Today's technology and eye-trackers have advanced to the extent that we can begin to legally-empirically address the research concerns of the US Supreme Court in relation to TCB in a better and more optimum manner. TCB eye-trackers are most relevant to in-court research of TCB distraction-effects on courtroom participants. However, the potential also arises from such eye-tracking to proceed to even broader scope and wider research, particularly out-of-court related effects-research.

The US Supreme Court can be argued to set a challenge in these three cases to conduct more research and to look for answers to the concerns. Each of the cases refer to research issues. In each case it is clear that there are no readily available legal, policy and research answers on the TCB question. Some of the judicial comments point to a lack of legal-empirical research and variously point to concern issues. Certain comments can also be seen as referring to some of the various research gaps. The cases collectively call for more, if not particular, legal-empirical research. Unfortunately, despite the US Supreme Court's concerns originating as far back as 1965, there are relatively few isolated attempts to address the research concerns and to seek answers. Nor do we have a considered, verified, repeated and holistic body of such research to assist judges, lawyers, litigants, academics, legal-policymakers, the media and the general public. It is hoped that the thesis can in some small way assist in advancing the position of properly seeking normative answers to the legal-empirical effects-concerns of the TCB question. Now, the thesis considers what the US Supreme Court specifically said in relation to the lack of legal-empirical research, some of the specific research gaps, and the challenges and concerns.<sup>108</sup>

### **The *Estes* Case**

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<sup>106</sup> *Estes v Texas* above; *Chandler v Florida* above.

<sup>107</sup> There appears to have been only just over twenty legal-empirical studies of TCB effect issues identified in the literature (see below).<sup>107</sup> These are welcome, but obviously insufficient. There are various research problems. For example, there are many research gaps. Many studies are non-empirical. Too many rely on self-reports, opinion-reports and questionnaires only.

<sup>108</sup> See Appendices.

The *Estes*<sup>109</sup> case decided against TCB and effectively barred TCB in the US for decades. It held that TCB infringes the defendant's legal rights to a fair trial.<sup>110</sup> It referred to in-court and out-of-court effects issues.<sup>111</sup> The in-court-effects are also the most relevant to eye-tracking distraction-effects research. Justice Clark delivers the main opinion. It sets out many of the areas that should be addressed by a sustained body of legal-empirical effects-research.<sup>112</sup> Distraction-effects are of course one of the main in-court effect concerns. Set out below are some of the effects comments of the US Supreme Court as regards the concerns and legal-empirical research.

Justice Clark states that 'our [legal-]empirical knowledge of [TCB's] full effect on the public, the jury or the participants in a trial, including the judge, witnesses and lawyers, is limited.'<sup>113</sup> This recognises that there is a distinct lack of legal-empirical research, and a sustained body of such research.<sup>114</sup> He notes that the 'State would dispose of all these observations with the simple statement that they are for psychologists because they are purely hypothetical.'<sup>115</sup> However, he indicates that just 'because these factors are difficult of ascertainment in particular cases, [does not mean] they must be ignored.'<sup>116</sup> Indeed, he continues that they are not "purely hypothetical."<sup>117</sup>

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<sup>109</sup> *Estes v Texas* above.

<sup>110</sup> *ibid* 535.

<sup>111</sup> The comments in relation to in-court-effects are more extensive.

<sup>112</sup> It should be noted, however, that not all potential effects issues were identified and set out in *Estes* and the other US Supreme Court judgements. The research and literature does not appear to refer to or acknowledge this point. This is an area deserving of research itself, but if all possible issues for research is beyond this present thesis.

<sup>113</sup> *Estes v Texas*, above 541 (Clarke J).

<sup>114</sup> By referring to the public and the courtroom participants, the US Supreme Court also acknowledges in-court effects research gaps and out-of-court effects research gaps. (It is not clear, however, if the reference to 'public' means the viewing audience or whether the US Supreme Court has considered potential effects on the viewing audience, as separate from potential effects on other groups or the public at large).

<sup>115</sup> *Estes v Texas* *ibid* 550 (Clarke J). Obviously certain equipment matters have changed over time. However, this is the context of the challenge, the challenge still remains nonetheless, and was in fact reiterated in the most recent case of *Hollingsworth v Perry*, above, in 2010.

<sup>116</sup> *Estes v Texas* *ibid* 550 (Clarke J). Obviously certain equipment matters have changed over time. However, this is the context of the challenge, the challenge still remains nonetheless, and was in fact reiterated in the most recent case of *Hollingsworth v Perry*, above, in 2010.

<sup>117</sup> Justice Clarke states that 'They are no more hypothetical than were the considerations deemed controlled in *Tumey*, *Murchison*, *Rideau* and *Turner* [*Tumey v Ohio* 273 US 510 [1927] [year omitted in original]; *In re Murchison* 349 US 133 [1955]; *Rideau v Louisiana* 373 US 723 [1963]; *Turner v Louisiana* 379 US 466 (1965)]. They are real enough to have convinced the Judicial Conference of the United States, this Court and the Congress that [TCB] should be barred in Federal trials by the Federal Rules of Criminal Procedure; in addition they have persuaded all but two of our States to prohibit [TCB]. They are effects that may, and in some combination almost certainly will, exist in any case in which television is injected into the trial process.' *Estes v Texas* *ibid* 550 (Clarke J). Obviously certain equipment matters have changed over time. However, this is the context of the challenge, the challenge still remains nonetheless, and was in fact reiterated in the most recent case of *Hollingsworth v Perry*, above, in 2010. Chief Justice Warren referring to

It is interesting that Justice Clark notes that these concerns ‘exist “in any case.”’ However, the author’s review of the academic and popular discussion and limited legal-empirical effects-research suggests that the research has not been undertaken to differentiate one type of TCB case from another nor to find out which TCB form may have most (positive and effects) effects and which may have least effects. The thesis suggests that more TCB form-research is needed to inform TCB legal and legal-policy discussion. This can also inform more considered decision making in relation to TCB.<sup>118</sup>

That the US Supreme Court felt that some effects may be difficult to ascertain is important. Normative eye-tracking now allows us to undertake legal-empirical TCB distraction-effects research. The thesis also develops a proof-of-concept demonstration of TCB in a courtroom for research purposes as well as proposing models for same.

The ABA Committee on Professional Ethics and Grievances, quoted by the US Supreme Court fears that TCB ‘would impose undue police duties upon the trial judge ... adverse psychological effect[s] upon trial participants, judges, lawyers, witnesses and juries ... [and] ... influence public opinion which in turn might influence trial results.’<sup>119</sup> The ABA House of Delegates refers to the need for ‘further studies ... including ... a body of reliable factual data on the experience of judges and lawyers in those courts where either photography, televising or broadcasting, or all of them, are permitted. ... The fundamental objective [is to] preserve the right of fair trial.’<sup>120</sup> Unfortunately, this refers to self-reports and opinion-reports. Perhaps more significant, however, is the reference to ‘a body of reliable factual data’ and research. A consistent, repeated, verified and replicated body of

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*Tumey* states that ‘the Court found the procedure so inconsistent with the conception of what a trial should be and so likely to produce prejudice that it declared the practice unconstitutional even though no specific prejudice was shown.’ Referred to in *Estes v Texas* *ibid* 562.

<sup>118</sup> Texas, in defending TCB, argued that no prejudice has been shown by *Estes*, that there were no distractions and that ‘psychological considerations are for psychologists, not courts, because they are purely hypothetical.’ Referred to at *Estes v Texas* *ibid* 541 (Clarke J). It also argued that the defendant had not established any ‘isolatable prejudice.’ *ibid* 542 (Clarke J). Therefore, to show effects and a sufficient quantity of effects to amount to (potential) prejudice, a party needs to be aware of when and where effects can occur. He or she can seek to find such effects in an instant case. However, are they properly trained and equipped to do this? Can they focus on finding effects and dealing with the core of their case at the same time? What can researchers and interested parties do in terms of general empirical research? Unfortunately, despite the challenge set by the US Supreme Court, and indeed Texas itself, the various research challenges are not yet properly addressed. However, eye-tracking now allows us to properly research distraction-effects in a legally-empirical verifiable manner.

<sup>119</sup> Referred to *ibid* 599. At 645 in (1956) 42 ABA Journal. Also (1958) 83 ABA Rep 790-791 (Harlan J).

<sup>120</sup> *ibid* 599, referring to (1958) 83 ABA Rep 284 (Harlan J).

TCB legal-empirical effects-research is not available even today to lawyers, judges, courts, legal-policymakers and others considering important TCB issues.

Justice Harlan feels that TCB will,

‘carry grave potentialities for distorting the integrity of the judicial process bearing on the determination of the guilt or innocence of the accused, and ... for casting doubt on the reliability of the fact-finding process ... such distortions may produce no telltale signs, but in a highly publicized trial the danger of [TCB] is substantial, and [the] effects may be far more pervasive and deleterious than the physical disruptions which all concede would vitiate a conviction.’<sup>121</sup>

Telltale distraction-effects are no longer beyond examination with TCB eye-tracking research. The telltale signs of TCB distraction can be examined with exacting detail. A body of such research may well advance the legal and legal-policy consideration of TCB issues in a more direct and considered manner than any of the research and popular discussion to date. TCB eye-tracking distraction-effects research offers a normative modern verified manner to examine one of these ‘grave potentialities’ and to answer one of the TCB questions that has undermined the ability of judges, lawyers, litigants and others to confidently deal with the legal-policy and legal rights issues which arise.

Justice Harlan’s reference to ‘grave potentialities’ appears to be the only express reference and concern of the US Supreme Court which has been the direct focus of one of the legal-empirical studies. SL Alexander considers Justice Harlan’s concern of grave potentialities in developing his research and research strategy.<sup>122</sup> This involves a stand alone case study of the TCB media process and TCB related guidelines.<sup>123</sup>

Chief Justice Warren emphasises that ‘our condemnation of [TCB] criminal trials is not based on generalities or abstract fears. The record in this case presents a vivid illustration

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<sup>121</sup> *ibid* 592 (Harlan J). An interesting area of research may consider how modern judges may perhaps be more tolerant of disruption. A further issue is whether legal rights considerations are less effected by TCB distraction today than they may have been in the past. For example, we might consider whether TCB distraction is less of a legal issue now than previously. If so, it could possibly be suggested that litigant or defendant rights and interests may have diminished, while other considerations have arguably increased.

<sup>122</sup> SL Alexander, “‘Mischievous Potentialities’”: A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit, Florida, 1989’ (PhD thesis, University of Florida 1990) 1.

<sup>123</sup> Ultimately, he also calls for further effects-research, including validation legal-empirical effects-research, ie follow on repeat TCB research, *ibid*.

of the inherent prejudice of [TCB] and supports our conclusion that this is the appropriate time to make a definitive appraisal of [TCB].<sup>124</sup> Chief Justice Warren also states that TCB, ‘violates the Sixth ... and ... Fourteenth Amendment ... [on] three grounds: (1) ... inevitable impact on all trial participants; (2) ... gives the public the wrong impression about the purpose of trials; and (3) ... singles out [TCB] defendants and subjects them to trials under prejudicial conditions not experienced by others.’<sup>125</sup>

### **Cross-Disciplinary Issues**

O Doyle and E Carolan’s work in relation to the Irish Constitution includes various aspects, such as ‘a historical perspective and philosophical perspective on particular Constitutional issues ... the structure of government ... the fundamental rights provisions.’<sup>126</sup> They comment on the variety of contributions which ‘both enrich scholarship and provide a guide for future Constitutional law-making.’<sup>127</sup> Professor DG Morgan in referring to his particular Constitutional analysis comments that, ‘[i]t is curious that ... no comprehensive work has yet appeared dealing exclusively with the institutions of government established by Bunreacht na hEireann, the Constitution of Ireland, 1937.’<sup>128</sup> Justice Hogan<sup>129</sup> (extra-judicially) states that the ‘Constitution clearly vests the High Court and Supreme Court with considerable powers in this area although it provides little guidance as to how these powers should be exercised.’<sup>130</sup> It is necessary to research behind these headline provisions in order to examine nuances and effects.

Chief Justice Warren continues that,

‘It is common knowledge that “television ... can ... work profound changes in the behaviour of the people it focuses on.”<sup>131</sup> The present record provides ample support for scholars who

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<sup>124</sup> *ibid* 552 (Warren CJ). One could suggest with hindsight that the definitive time is when all of the proper research is in to answer the TCB question and concerns. For example, we have not yet undertaken the body of TCB legal-empirical research needed to examine the telltale distraction-effects which the US Supreme Court refers to. TCB eye-tracking distraction-effects research can begin the process of arriving at real, considered and verified answers, not mere popular ‘generalities or abstract fears.’ *ibid*.

<sup>125</sup> *ibid* 565 (Warren CJ).

<sup>126</sup> O Doyle and E Carolan, *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008) Preface.

<sup>127</sup> *ibid*.

<sup>128</sup> DG Morgan, *Constitutional Law of Ireland, The Law of the Executive Legislature and Judicature* (Round Hall Press 1990) Preface.

<sup>129</sup> Now Hon Mr Justice Hogan.

<sup>130</sup> H Hogan, ‘Constitutional Interpretation’ in F Litton (ed), *The Constitution of Ireland 1937-1987* (Institute of Public Administration 1988) 173.

<sup>131</sup> *ibid* 569, referring to Keating, [first name not given], ‘Not “Bonanza,” Not “Peyton Place,” But the US Senate’ *New York Times Magazine* (New York, 25 April 1965) 67, 72. Keating

have claimed that awareness that a trial is being televised to a vast, but unseen audience, is bound to increase nervousness and tension, cause an increased concern about appearances, and bring to the surface latent opportunism that the traditional dignity of the courtroom would discourage. Whether they do so consciously or subconsciously, all trial participants act differently in the presence of [TCB]. And, even if all participants make a conscientious and studied effort to be unaffected by the presence of [TCB], this effort in itself prevents them from giving their full attention to their proper functions at trial. Thus, the evil of [TCB], as demonstrated by this case, lies not in the noise and appearance of the cameras, but in the trial participants' awareness that they are being televised. To the extent that [TCB] has such an inevitable impact it undercuts the reliability of the trial process.<sup>132</sup>

The dissenting opinions state that,

'[w]e deal here with matters subject to continuous and unforeseeable change - the techniques of public communication. In an area where all the variables may be modified tomorrow, I cannot at this time rest my determination on hypothetical possibilities not present in the record of this case. There is no claim here based upon any right guaranteed by the First Amendment. But it is important to remember that we move in an area touching the realm of free communication, and for that reason, if for no other, I would be wary of imposing any per se rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights.'<sup>133</sup>

The US First Amendment prohibits the making of any law infringing on the freedom of the press. Article 34.1 of the Irish Constitution refers to the courts, judges and publicity. If and when TCB is litigated in Ireland this Article provision and any comparisons with the US First Amendment and its related caselaw may come to be considered here.

Neither the US Supreme Court, other courts, popular commentators nor legal-policymakers, have recognised that as broadcasting technology may change, so too can the legal-empirical research tools available. One example of an advanced research tool is

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commented in relation to a stockholders meeting that '[s]ome stockholders seemed very much aware that they were on camera.' *ibid* n 24 at 569 (Warren CJ).

<sup>132</sup> *ibid* 569-570. Chief Justice Warren. Footnote omitted. In n 24 at 569, he refers to RP Tinkham, [first name not given in original] 'Should Canon 35 be Amended? A Question of Proper Judicial Administration' (1956) 42 ABA Journal 843-845, and 884, at 845, who refers to examples of how people react when they know they are on television. He also refers to Gould, [no first name given], *New York Times* (New York, 11 March 1956) S2, X 11, col 2, who states that even experienced performers can be affected, and that this 'psychological and emotional burden must not be placed on a layman whose testimony may have a bearing on whether, in a murder trial, another human being is to live or die.' Referred to *ibid* 569 (Warren CJ).

<sup>133</sup> *Estes v Texas* *ibid* 603-604 (Stewart J). Minority opinion.



an eye-tracker. Eye-tracking research can enhance our knowledge of and inform our legal-policy considerations regarding TCB.

Justice Stewart states that criminal trial TCB ‘invites many serious Constitutional hazards. The very presence of photographers and [TCB] cameramen ... might be ... disruptive and distracting as to make a fair trial impossible ... even if ... concealed as to be hardly perceptible ... there are risks of Constitutional dimensions that lurk in the very process of [TCB].’<sup>134</sup>

Justice White, dissenting, states that,

‘the currently available materials assessing the effect of [TCB] are too sparse and fragmentary to constitute the basis for a Constitutional judgment permanently barring any and all forms of television coverage. As was said in another context, “we know too little of the actual impact ... to reach a conclusion on the bare bones of the ... evidence before us.” *White Motor Co v United States* 372 US 253, 261. It may well be, however, that as further experience and informed judgment do become available, the use of [TCB], as in this trial, will prove to pose such a serious hazard to a defendant’s rights that a violation of the Fourteenth Amendment will be found without a showing on the record of specific demonstrable prejudice to the defendant.’<sup>135</sup>

This aspect of the judgement does not appear to be examined. It indicates that research materials are too ‘sparse and fragmentary.’ In addition, it suggests that the research materials are the necessary ‘basis for [the legal and] Constitutional judgement[s].’ The TCB question, and the legal and legal-policy decisions and considerations, need to be informed by a body of legal-empirical TCB research. The thesis commends such research. The TCB question and the effects concerns of the US Supreme Court are still awaiting the appropriate body of TCB legal-empirical effects-research. The judge is reiterating that there is not enough TCB effects-research for the US Supreme Court, or others, to reach firm conclusions. Such research is important for the US and other jurisdictions.<sup>136</sup>

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<sup>134</sup> ibid 611-612 (Stewart J). Minority opinion.

<sup>135</sup> ibid 616 (White J). Minority opinion.

<sup>136</sup> By de-coupling the research issue from a showing of research/prejudice in an instant case, this judgement is also important for encouraging general and ongoing legal-empirical TCB effects research. The thesis suggests that this can occur in a variety of manners and does not have to be always located in an actual courtroom with live TCB being introduced.

Justice White also refers to ‘further opportunity for intelligent assessment of the probable hazards ... of [TCB] at criminal trials.’<sup>137</sup> He adds that ‘[s]erious threats to Constitutional legal rights in some instances justify a prophylactic rule dispensing with the necessity of showing specific prejudice in a particular case.’<sup>138</sup> Justice White also acknowledges that ‘our [TCB] experience is inadequate and our judgment correspondingly infirm.’<sup>139</sup> He also refers to ‘further meaningful study of ... [TCB] at criminal trials.’<sup>140</sup> Again, there is a recognition of there being a lack of research, as well as a suggestion that ‘further meaningful study’ with legal-empirical TCB effects-research is positive, if not a necessary pursuit. Justice Harlan states that ‘we are concerned here only with a criminal trial of great notoriety, and not with criminal proceedings of a more or less routine nature.’<sup>141</sup> While not explicit, this appears to acknowledge that there are different forms of TCB. Justice Harlan states that TCB,

‘undeniably has mischievous potentialities for intruding upon the detached ... judicial process.’<sup>142</sup> However, he seems to also suggest that TCB ‘procedural experimentation’<sup>143</sup> may be welcome. His ‘conclusion is that there is no Constitutional requirement that [TCB] be allowed ... and [in] a notorious criminal trial such as this one, the considerations against allowing [TCB] so far outweigh the countervailing factors ... as to require a holding that [TCB] infringed the fundamental right to a fair trial.’<sup>144</sup>

Again, legal-empirical effects-research such as ‘procedural experimentation’ is canvassed. Ironically, eye-tracking can produce exacting studies, results and answers. With TCB distraction-effects eye-tracking we can tell exactly if a mock courtroom participant looks at the TCB cameras, how frequently and for how long. By its nature such legal-empirical research offers more certainty than any TCB distraction-effects research method to date. This is important for courts and legal-policymakers alike to consider.

Justice Harlan further states,

‘at its worst, [TCB] is capable of distorting the trial process so as to deprive it of fundamental fairness. Cables, kleig lights, interviews with the principal participants,

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<sup>137</sup> *Estes v Texas* 616 (White J). Minority opinion.

<sup>138</sup> *ibid.*

<sup>139</sup> *ibid* 616 (White J). Minority opinion.

<sup>140</sup> *ibid.*

<sup>141</sup> *ibid* 587 (Harlan J).

<sup>142</sup> *ibid.*

<sup>143</sup> *ibid.*

<sup>144</sup> *ibid* 587 (Harlan J).

commentary on their performances, “commercial” at frequent intervals, special wearing apparel and makeup for the trial participants - certainly such things would not conduce to the sound administration of justice by any acceptable standard.<sup>145</sup>

These are all issues which a considered body of TCB legal-empirical research can examine. In addition Justice Harlan states that ‘the only relevant Constitutional consideration is ... a fair trial. If ... [TCB] substantially detracts from that goal, due process requires that its use be forbidden.’<sup>146</sup> Again, TCB eye-tracking can examine how such distraction or distraction-effects may occur.

Justice Stewart for the minority states that even the pre-trial motion hearing (to determine whether TCB be permitted at the trial), was broadcast live and with ‘considerable disruption.’<sup>147</sup> Justice Stewart states that ‘I cannot say at this time that it is impossible to have a Constitutional trial ... [with TCB]. I cannot now hold that the Constitution absolutely bars [TCB] from every criminal courtroom, even if they have no impact upon the jury, no effect upon any witness, and no influence upon the conduct of the judge.’<sup>148</sup> The court again alludes to the problem of there being an absence of a sufficient body of suitably considered legal-empirical effects-research regarding TCB to assure the court.

### ***Estes Effects/Actual Effects***

The US Supreme Court states that in the proceedings at hand there had been adverse effects and prejudice. For example, it states that,

- ‘The videotapes of these hearings clearly illustrate that the picture presented was not one of that judicial serenity and calm to which the petitioner was entitled.’<sup>149</sup> There were 12 camera men with television and photographic cameras<sup>150</sup>;
- It was conceded that their activities ‘led to considerable disruption of the hearings’<sup>151</sup>;
- ‘[T]he circumstances and extraneous influences intruding upon the solemn decorum of court procedure in the televised trial are far more serious than in cases involving only newspaper coverage’<sup>152</sup>;

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<sup>145</sup> ibid 588 (Harlan J).

<sup>146</sup> ibid 589 (Harlan J).

<sup>147</sup> ibid 604 (Stewart J). Minority opinion.

<sup>148</sup> ibid 615 (Stewart J). Minority opinion.

<sup>149</sup> Clarke J, in *Estes* ibid 536.

<sup>150</sup> ibid 536 (Clarke J).

<sup>151</sup> ibid.

<sup>152</sup> ibid 548 (Clarke J).

- The witnesses and jury ‘were undoubtedly made aware of the peculiar public importance of the case by the press and television coverage being provided, and the fact that they themselves were televised live and their pictures rebroadcast on the evening show’<sup>153</sup>;
- ‘When [the defendant] finally made his way into the courthouse it was reasonable for him to expect that he could have a respite from his merciless badgering and to have his case adjudicated in a calm atmosphere. Instead, the carnival atmosphere of the September hearing served only to increase the publicity surrounding petitioner and to condition further the public’s mind against him.’<sup>154</sup> There may be interesting comparators perhaps in relation to the *Pistorius*<sup>155</sup> TCB case in South Africa.

### Juror Effects

The US Supreme Court refers to various TCB effect issues. One of these is juror effects. It states that ‘[t]he potential impact of [TCB] on the jurors is perhaps of the greatest significance.’<sup>156</sup> In addition, Justice Clark states that,

‘[t]he conscious or unconscious effect that this may have on the juror’s judgement cannot be evaluated, but experience indicates that it is not only possible but highly probable that it will have a direct bearing on his vote as to guilt or innocence. Where pre-trial publicity of all kinds has created intense public feeling which is aggravated by the [TCB] of the trial the televised jurors ... feel the pressures of knowing that friends and neighbours have their eyes upon them. If the community be hostile to an accused a televised juror, realizing that he must return to neighbours who saw the trial themselves, may well be led ‘not to hold the balance nice, clear and true between the State and the accused.’”<sup>157</sup>

Justice Clark also states that,

‘while it is practically impossible to assess the effect of [TCB] on jury attentiveness, those of us who know juries realize the problem of jury “distraction.” The State argues that this is *de minimis* since the physical disturbances have been eliminated. But we know that distractions are not caused solely by the physical presence of the camera and its telltale red lights. ... not only will a juror’s eyes be fixed on the [TCB] camera, but also his mind will be preoccupied with the telecasting rather than with the testimony.’<sup>158</sup>

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<sup>153</sup> *ibid* 536–537 (Clarke J).

<sup>154</sup> *ibid* 578 (Warren CJ). Note also the analysis of Sherwin of the differing judicial intentions behind the *Estes* and *Chandler* cases. See RK Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (University of Chicago Press 2000) 140 ff, and 247-248; and RK Sherwin, ‘The Jurisprudence of Appearances’ (1999-2000) 43 *New York Law School Law Review* 821.

<sup>155</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>156</sup> *Estes v Texas* *ibid* 545 (Clarke J).

<sup>157</sup> *ibid* 545 (Clarke J).

<sup>158</sup> *ibid* 546 (Clarke J).

### Normative TCB Research Tools

Justice Clark could not have known that today, normative TCB eye-tracking legal-empirical effects-research can definitively show whether a courtroom participant such as a (mock) juror looks are these TCB camera(s), how frequently and for how long. It is no longer ‘practically impossible to assess’ (mock) jury ‘attentiveness [and] distraction.’ We can now start moving to answer the TCB concerns and questions. With such research we can also examine with accuracy whether these ‘physical [TCB] disturbances have been eliminated.’ We can examine specific nuances of different TCB cameras, different locations, differences between TCB cameras versus TCB cameras plus operators, TCB cameras moving, ‘telltale red lights,’ and other issues.

TCB eye-tracking research also offers other advantages. We can also compare and validate each (mock) juror’s self-report of TCB distraction/non-distraction-effects. The US Supreme Court could not have envisaged that our normative legal-empirical research methods would have improved to the extent that they have today. We no longer have to rely solely on problematic opinion based self-reports when considering TCB effects. Might it be suggested that with such knowledge, the US Supreme Court today (and other interested parties) might expect and ask that such a body of TCB eye-tracking distraction-effects research be undertaken and made available to it, in particular when they have to consider TCB legal-policy and Constitutional legal rights issues the next time.

Justice Clark states that,

‘jurors would ... turn on the TV ... to see how they appeared upon it. They would also be subjected to re-enactment and emphasis of the selected parts of the proceedings ... and would be subconsciously influenced ... they would be subjected to the broadest commentary and criticism and perhaps the well-meant advice of friends, relatives and inquiring strangers who recognised them on the streets.’<sup>159</sup>

One can now foresee a scenario where third parties may seek out jury members on social media and send them social network ‘friend’ invitations.<sup>160</sup> These types of concerns may

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<sup>159</sup> *ibid* 546. Footnote omitted. (Clarke J).

<sup>160</sup> That is without examining in detail the separate issue of online abuse and trolling of jurors (or other courtroom participants). See generally, P Lambert, *Courting Publicity, Twitter and Television Cameras in the Courtroom* (Bloomsbury 2011); P Lambert, *Social Networking, Law, Rights and Policy* (Clarus 2014); T O’Malley, *The Criminal Process* (Round Hall Thomson Reuters 2009) 630 referring to the challenge of technology and prejudicial publicity.

well have escalated when we have examples such as members of the public taking ‘selfies’ with the defendant with mobile telephone cameras in court, such as happened in the *Pistorius*<sup>161</sup> case,<sup>162</sup> where the *Pistorius* judge has to ban Twitter in court,<sup>163</sup> and a UK juror was dismissed for asking Facebook friends how to vote in a real jury case.<sup>164</sup> At least two Australian jurisdictions have amended jury laws to ensure an offence for jurors conducting investigations about the accused during trial.<sup>165</sup> Indeed, it is interesting that one of the issues not addressed by the US Supreme Court nor popular discussion of TCB is the potential effects on the public in court whom attend a TCB case. It seems that this could well become a more pressing issue requiring research. More recently the New Zealand Law Commission published an issues paper, entitled *Contempt in Modern New Zealand*, which deals, inter alia, with courts and modern media issues such as new media contempt, juror contempt, publication restrictions and takedown orders.<sup>166</sup> It talks in terms of contemporary issues and changing boundaries. TCB, TCB effects and iTCB all fit within this general discussion. The Law Commission seeks an ‘approach that proactively manages the risk that jurors will see or look for extraneous material.’<sup>167</sup> The thesis suggests that we also need to consider TCB access issues and similarly managing TCB best to reduce risks where it occurs. However, the thesis goes further in suggesting that as part of this we can only begin to assess the TCB risk issues once we develop a multi-streamed body of TCB effects research. As part of any such risk management and proper research strategy, courts and legal-policymakers also need to mandate prior baseline research in individual courts which may be chosen for TCB pilot experiments.

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<sup>161</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>162</sup> D Joynson, ‘Young Man “Tried to Capture Oscar Pistorius Selfie in Court” SportsMole (6 March 2014) < [http://www.sportsmole.co.uk/off-the-pitch/news/young-man-tries-to-snap-pistorius-selfie\\_142782.html](http://www.sportsmole.co.uk/off-the-pitch/news/young-man-tries-to-snap-pistorius-selfie_142782.html) > accessed 17 March 2014.

<sup>163</sup> ‘Twitter Banned from Pistorius Court’ HTXT.Africa, (10 March 2014) < <http://www.htxt.co.za/2014/03/10/twitter-banned-pistorious-court/> > accessed 17 March 2014.

<sup>164</sup> U Khan, ‘Juror Dismissed from a Trial After Using Facebook to Help Make a Decision, A Juror Has Been Dismissed After Asking Friends on Facebook to Help Make a Decision’ *Telegraph* (London, 28 November 2008) < <http://www.telegraph.co.uk/news/newstoppers/lawreports/3510926/Juror-dismissed-from-a-trial-after-using-Facebook-to-help-make-a-decision.html> > accessed 17 March 2014.

<sup>165</sup> Queensland Jury Act 1995, s69A inserted in 2002, referred to in T O’Malley, *The Criminal Process* (Round Hall Thomson Reuters 2009) 630, and other references therein. Also *People (DPP) v Cunningham* [2007] IECCA 49; *R v Thakrar* [2008] EWCA Crim 2359, [2009] Crim LR 357; *R v Marshall* [2007] EWCA Crim 35 [2007] Crim LR 562; *Dawson v Irish Brokers’ Association* Unrep IESC 6 November 1998, [1999] ICLY 247; *D v DPP* [1994] 2 IR 465, [1994] 1 ILRM 435; *Z v DPP* [1994] 2 IR 476, [1994] 2 ILRM 481.

<sup>166</sup> M Lark, ‘Codification of Contempt,’ ADLSI (8 August 2014) < <http://www.adls.org.nz/for-the-profession/news-and-opinion/2014/8/8/codification-of-contempt/> > accessed 22 August 2014. Note also the Scottish consultation on texting from courtrooms, Judicial Office for Scotland on Behalf of the Lord President and the Review Group, *Cameras and Live Text-Based Communication in the Scottish Courts: A Consultation* (25 October 2013).

<sup>167</sup> *ibid.*

Without baselines, much if not all subsequent research will be potentially flawed and methodologically undermined in terms of the conclusions, if any, which it can reach.

Justice Clark also states that ‘new trials plainly would be jeopardized in that potential jurors will often have seen and heard the original trial [on TCB].’<sup>168</sup> A further issue is ‘illustrated in this case where the court, due to the defendant’s objections, permitted only the State’s opening and closing arguments to be broadcast with sound to the public.’<sup>169</sup>

Justice Stewart states that the question before the court asks ‘four separate Constitutional claims. We declined to review three of them, among which was the claim that ... the jury “had received through the news media damaging and prejudicial evidence ...”’.<sup>170</sup> This is potentially no less a complex TCB effect issue for consideration today. There could be an argument that not only has potential media publicity increased but also that of micro-media and social media. In addition, Justice Stewart states that,

‘Some of those risks are catalogued in the *amicus curiae* brief filed in this case by the American Bar Association: “[P]otential or actual jurors, in the absence of enforceable and effective safeguards, may arrive at certain misconceptions regarding the defendant ... by viewing televised pre-trial hearings and motions from which the jury is ordinarily excluded. Evidence otherwise inadmissible may leave an indelible mark ... Once the trial begins, exposure to nightly rebroadcasts of selected portions of the day’s proceedings will be difficult to guard against ... The obvious impact of witnessing repeated trial episodes and hearing accompanying commentary, episodes admittedly chosen for their news value and not for evidentiary purposes, can serve only to distort the jurors’ perspective ... Despite the court’s injunction not to discuss the case ... jurors will be subject to the pressure of [TCB]-watching family, friends and, indeed, strangers. ... Additionally, the jurors’ daily [TCB] appearances may make them recognizable celebrities, likely to be stopped by passing strangers, or perhaps harried by intruding telephone calls ...” Constitutional

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<sup>168</sup> *Estes* above 546-547 (Clarke J).

<sup>169</sup> *Estes* above 546-547 (Clarke J). The US Supreme Court also refers to the following Four jurors had seen the earlier (pre-trial) TCB broadcasts, referred to *ibid* 551 (Clarke J); Pre-trial hearings can hold difficulties for defendants, *ibid* 536 (Clarke J); ‘The presence of [TCB] would certainly emphasize to the trial participants that the case is something “special”’, *ibid* 592 (Harlan J); ‘To increase the possibility of influence and the danger of a “popular verdict” by subjecting the jurors to the view of a mass audience whose approach to the case has been conditioned by pretrial publicity can only make a bad situation worse. The entire thrust of rules of evidence and the other protections attendant upon the modern trial is to keep extraneous influences out of the courtroom,’ *ibid*; ‘The knowledge on the part of the jury and other trial participants that they are being televised to an emotionally involved audience can only aggravate the atmosphere created by pre-trial publicity,’ *ibid* 593 (Harlan J).

<sup>170</sup> *ibid* 609-610 (Stewart J). Minority opinion.

problems of another kind might arise if a witness or juror were subjected to being televised over his objection.’<sup>171</sup>

This raises research queries no less relevant to today’s courts and legal-policymakers as to what are the potential effects, threats and ‘effective safeguards.’ TCB eye-tracking research can assist courts, legal-policymakers and others in dealing with TCB access issues, and if, when and where to permit specific types of TCB cameras. It may also be relevant in relation to the wider consideration of different forms of TCB. The above paragraph from Justice Stewart again draws parallels with modern micro-media and social media. Legal empirical effects-research can also better inform effective TCB safeguards. TCB safeguards is an issue under developed and under researched but is an important consideration for future courts and legal-policymakers.

### **Witness Effects**

The US Supreme Court also refers to TCB witness effects. Justice Clark states that the,

‘quality of the testimony in criminal trials will often be impaired. The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable ... demoralized ... frightened ... cocky ... overstatement; memories may falter ... and accuracy of statements may be severely undermined. Embarrassment ... overdramatization. Furthermore, inquisitive strangers and “cranks” might approach witnesses on the street with jibes, advice or demands for explanations.’<sup>172</sup>

Recent events of online abuse and death threats to both private and public individuals via social media raises the possibility of TCB related discussion and attacks regarding TCB participants to a level above (mere) ‘jibes.’ Justice Clark states that,

‘witnesses would be able to ... view [TCB] broadcasts of the day’s trial proceedings, notwithstanding the fact that they had been admonished not to do so. They could view and hear the testimony of preceding witnesses, and so shape their own testimony as to make its impact crucial ... influences ... on the attitude ... toward testifying, his frame of mind ... or his apprehension of withstanding cross-examination defy objective assessment. Indeed, the mere fact [of TCB] might render witnesses reluctant to appear and thereby impede the trial as well as the discovery of the truth.’<sup>173</sup>

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<sup>171</sup> ibid 612-613 (Stewart J). Minority opinion.

<sup>172</sup> ibid 547 (Clarke J).

<sup>173</sup> ibid 547 (Clarke J).



While referring to issues other than in-court participant distraction, eye-tracking now permits ‘examination’ and ‘objective assessment’ of TCB distraction-effects. Eye-tracking can research these distraction issues. Attention and distraction are no longer beyond normative exacting research. Today, we can better overcome the problems of the historic TCB research such as self-reports and opinion-reports.

### **Judge Effects**

The US Supreme Court also acknowledges TCB effects on judges, namely,

- ‘the additional responsibilities the presence of [TCB] places on the trial judge. His job is to make certain that the accused receives a fair trial. This most important task requires his undivided attention ... when [TCB] comes into the courtroom he must also supervise it.’<sup>174</sup> This issue is very seldom recognised, recorded or researched;
- ‘Judges are human beings also and are subject to the same psychological reactions as laymen.’<sup>175</sup> The issue appears underrepresented in the TCB research. This might be considered in future;
- ‘[TCB] is particularly bad where the judge is elected, as is the case in all save a half dozen of our States. [TCB] becomes a political weapon, which, along with other distractions inherent in [TCB], diverts his attention from the task at hand – the fair trial of the accused’<sup>176</sup>;
- ‘[I]t is difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly and through the shaping of public opinion.’<sup>177</sup>

TCB eye-tracking research can include judges and mock judges, just as other courtroom participants. Just because ‘these factors are difficult of ascertainment in particular cases’ does not mean they should be ignored.<sup>178</sup> ... They are effects that may, and in some combination almost certainly will, exist in any case [of TCB].<sup>179</sup> TCB ‘offers the temptation to judges to use the bench as a vehicle for their own ends, but offers the same temptation to every participant in the trial, be he defense counsel, prosecutor, witness or juror.’<sup>180</sup> Justice Stewart states that ‘frequent interruptions and inconsistent rulings communicated to the jury ... that the judge was unable to concentrate on protecting the defendant and conducting the trial in a fair manner, in accordance with the State and Federal Constitutions ... one ... question - whether the Fourteenth Amendment ... prohibits

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<sup>174</sup> *ibid* 548 (Clarke J).

<sup>175</sup> *ibid*.

<sup>176</sup> *ibid*.

<sup>177</sup> *ibid* 548–549 (Clarke J).

<sup>178</sup> *ibid* 550 (Clarke J).

<sup>179</sup> *ibid*.

<sup>180</sup> *ibid* 565 (Warren CJ).

all ... criminal trial [TCB].'<sup>181</sup> However, the case record is no guarantee that there are no effects. This applies both in an individual case and across all case records. This is one of the reasons for conducting mock trial TCB research (including eye-tracking). One of the other main reasons is that it may be problematic to get access to a real case with eye-tracking, for example. Issues of consent and ethics may also have to be considered. If real case eye-tracking or other TCB research is being considered, it may be beneficial to have a body of other research such as mock TCB case research undertaken initially. Interestingly, research in New Zealand involving a 'case-by-case evaluation found that most judges were distracted by cameras.'<sup>182</sup> This appears to have involved a certain element of self-reporting. Eye-tracking was not considered, but as the thesis points out, it would offer verifiable research results as well as improve upon the limitations of TCB opinions in self-reports.

### **Defendant Effects**

The US Supreme Court also refers to TCB defendant effects. Generally, defendant effects are one of the least considered areas of TCB in both the general popular discussion and the legal-empirical studies. Justice Clark states that,

'we cannot ignore the impact of [TCB] on the defendant. Its presence is a form of mental – if not physical – harassment ... The inevitable close-ups of his gestures and expressions ... might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before him – sometimes the difference between life and death – dispassionately, freely and without 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 area. The heightened public clamour resulting from radio and television coverage will inevitably result in prejudice. Trial by [TCB] is, therefore, foreign to our system. Furthermore, [TCB] may also deprive the accused of an effective counsel. The distractions, intrusions into confidential attorney-client relationships and the temptation offered by [TCB] to play to the public audience might often have a direct effect not only upon lawyers, but the judge, the jury and the witnesses.'<sup>183</sup>

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<sup>181</sup> *ibid* 614 (Stewart J). Minority opinion.

<sup>182</sup> Department of Constitutional Affairs [UK], *Broadcasting Courts, Consultation Paper*, CP 28/04, November 2004, at 109, referring to UMR Insight Ltd, *Media Coverage of Court Proceedings: Summary Report* (February 1998) and *The Impact of Television, Radio and Still Photography on Coverage of Court Proceedings – Final Report, A Report Prepared for the Department of Courts by a research team from the Department of Human Management, Massey University* (April 1998). This is the New Zealand research. It appears opinion related.

<sup>183</sup> *ibid* 549 (Clarke J).

TCB eye-tracking research can address some of these distraction concerns. The US Supreme Court notes that the original trial judge initially imposed no restrictions.<sup>184</sup> However, as matters progressed,

‘the trial judge himself was harassed ... he ... decided that a booth should be built at the broadcasters’ expense to confine its operations; he then decided to limit the parts of the trial that might be televised live; then he decided to film testimony of the witnesses without sound in an attempt to protect those under the rule; and finally he ordered that defense counsel and their argument not be televised, in light of their objection. Plagued by his original error – recurring each day of the trial – his day-to-day orders made the trial more confusing to the jury, the participants and the viewers. Indeed it resulted in a public presentation of only the State’s side of the case.’<sup>185</sup>

Numerous changes and issues occurred during the *Pistorius*<sup>186</sup> case.

Chief Justice Warren notes that the defendant had objected to televising, but that the motion hearing actually had at least twelve cameramen and equipment present, and photographers roaming about and taking pictures from all angles.<sup>187</sup> The TCB cameras were fully visible to all present.<sup>188</sup> There does not appear to be a diagram of the courtroom for researchers today to consider or compare, for example, normative location-effect issues. Chief Justice Warren states that it is ‘not to say that all participants ... would ... [be] deliberately playing to the [TCB] audience, but some undoubtedly would.’<sup>189</sup> The more serious danger is that the judge, counsel, jurors or witnesses would be ‘considering the effect of their conduct on the viewing public.’<sup>190</sup> Chief Justice Warren states that,

‘Our decisions in *White v Maryland*, 373 US 59, and *Hamilton v Alabama* 368 US 400, clearly hold that an accused is entitled to procedural protections at pre-trial hearings as well as at actual trial and his conviction will be reversed if he is not accorded these protections. In addition, in *Pointer v Texas* 380 US 400, we held that a pre-trial hearing can have a profound effect on the trial itself and effectively prevent an accused from having a fair trial. Petitioner clearly did not have a fair determination of his motion to exclude [TCB]. The very presence of the cameras at the [pre trial] hearing tended to impress upon the trial judge

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<sup>184</sup> *ibid* 551 (Clarke J).

<sup>185</sup> *ibid*.

<sup>186</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>187</sup> *ibid* 552-553 (Warren CJ).

<sup>188</sup> *ibid* 555 (Warren CJ).

<sup>189</sup> *ibid* 566-567 (Warren CJ).

<sup>190</sup> *ibid*.

the power of the communications media and the criticism to which he would have been subjected if he had ruled that the [TCB] was inconsistent with the ... right to a fair trial. The prejudice ... did not end here. Most of the trial participants were present at the [pre trial] hearing – the judge, defence counsel, prosecutor, prosecution witnesses and defendant himself – and they saw for themselves the desecration of the courtroom. After undergoing this experience it is unrealistic to suppose that they would come to the ... trial unaware that court procedures were being sacrificed ... for the convenience of [TCB]. The manner in which the ... proceedings were conducted only intensified this awareness. It was impossible for any of the trial participants ever to be unaware of the presence of [TCB] ... The ... four [TCB] cameras protruded through the opening on the booth, and the cameras and their operators were not only readily visible but were impossible to ignore by all ... in ... [the] courtroom. No one could forget that he was constantly in the focus of the “all-seeing eye.” Although the law of Texas purportedly permits witnesses to object to being televised, it is ludicrous to place this burden on them. They would naturally accept the conditions of the courtroom as the judge establishes them, and feel that it would be as presumptuous for them to object to the court’s permitting [TCB] as to object to the court reporter’s recording their testimony. Yet, it is argued that no witnesses objected to being televised. This is indeed a slender reed to rely on, particularly in view of the trial judge’s failure ... to advise the witnesses or the jurors that they had the right to object to being televised. Defence counsel, however, stated forcefully that he could not concentrate on the case because of the *distraction* caused by the cameras. And the trial judge’s attention was distracted from the trial since he was compelled to make seven extensive rulings concerning [TCB] during the ... proceedings ... when he should, instead, have been concentrating on the trial itself.’<sup>191</sup>

The issue of the court and court personnel having to deal with TCB applications and TCB camera issues is seldom researched or recorded at all. Neither is the issue of witness ability to object. This issue is apparent in the most recent popular TCB case, namely *Pistorius*<sup>192</sup> in South Africa. The thesis recommends further research.

### **Out-of-Court Effects-Research**

The US Supreme Court also refers specifically to out-of-court issues.<sup>193</sup> It states,

‘[TCB] would cause the public to equate the trial process with the forms of entertainment regularly seen on television and with the commercial objectives of the television industry ... In addition, [with TCB, there] would be a natural tendency on the part of broadcasters to develop the personalities of the trial participants, so as to give the proceedings more of an

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<sup>191</sup> *ibid* 567-569 (Warren CJ). Italic emphasis added.

<sup>192</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>193</sup> Albeit not identifying them under this category description, and devoting significantly less consideration to it.

element of drama. This tendency was noticeable in the present case. [TCB] commentators gave the viewing audience a homey, flattering sketch about the trial judge, obviously to add any extra element of viewer appeal to the trial.<sup>194</sup>

The research and the literature seldom refer to the out-of-court-issues. It is really only in the seminal work by S Barber<sup>195</sup> that there is a call for out-of-court effects research. Chief Justice Warren states that,

‘[TCB] would give the television industry an awesome power to condition the public mind either for or against the accused. By showing only those parts of its films or tapes which depict the defendant or his witnesses in an awkward or unattractive position, [TCB] directors could give the community, state or country a false and unfavourable impression of the man on trial. Moreover, if the case should end in a mistrial, the showing of selected portions of the trial, or even of the whole trial, would make it almost impossible to select an impartial jury for a second trial ... To permit this powerful medium to use the trial process itself to influence the opinions of vast numbers of people, before a verdict of guilt or innocence has been rendered, would be entirely foreign to our system of justice.’<sup>196</sup>

He continues to state that ‘[t]he sense of fairness, dignity and integrity that all associate with the courtroom would become lost with its commercialization. [TCB] would not only have an effect on those participating ... but also on those who observe the trials and later become trial participants.’<sup>197</sup>

### **Out-of-Court Effects: Education**

The US Supreme Court also refers to out-of-court educational issues. This is often suggested in official and popular discussion, but is seldom researched. The courts and the arguments do not properly consider this nuanced issue. Chief Justice Warren states that,

‘It is argued that [TCB] not only entertains, but also educates the public. But the function of a trial is not to provide an educational experience; and there is a serious danger that any attempt to use a trial as an educational tool will both divert it from its proper purpose and lead to suspicions concerning the integrity of the trial process ... This divided effort undercut confidence in the guilt-determining aspect of the procedure, and, by so doing, rendered the educational aspect self-defeating.’<sup>198</sup>

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<sup>194</sup> *ibid* 571 (Warren CJ).

<sup>195</sup> S Barber, *News Cameras in the Courtroom: A Free Press – Fair Trial Debate* (Ablex 1987).

<sup>196</sup> *Estes v Texas* above 547 (Warren CJ).

<sup>197</sup> *ibid* 574 (Warren CJ).

<sup>198</sup> *ibid* 575 (Warren CJ).

Justice Harlan seems more accommodating to the educational argument but states that,

‘Many trials are newsworthy, and [TCB] might well provide the most accurate and comprehensive means of conveying their content to the public. Furthermore, [TCB] is capable of performing an educational function by acquainting the public with the judicial process in action. Albeit, these are credible policy arguments in favour of [TCB], they are not arguments of Constitutional proportions.’<sup>199</sup>

The ‘propriety of closed circuit television for the purpose of making a court recording or for limited use in educational institutions obviously presents markedly different considerations.’<sup>200</sup> The Irish *Anglo Three* criminal case<sup>201</sup> and the *Hollingsworth*<sup>202</sup> trial case as originally suggested, are examples of courtroom footage being relayed live to another courtroom.<sup>203</sup>

Chief Justice Warren notes,

‘Finally, if [TCB] of criminal proceedings were approved, trials would be selected for ... reasons having nothing to do with the purpose of trial. A trial might be televised because a particular judge has gained the fancy of the public by his unorthodox approach; or because the district attorney has decided to run for another office, and it is believed his appearance would attract a large audience; or simply because a particular courtroom has a layout that best accommodates [TCB] ... the most important factor that would draw [TCB] would be the nature of the case. The alleged perpetrator of the sensational murder, the fallen idol, or some other person who ... has attracted the public interest would find his trial turned into a vehicle for [TCB]. Yet these are the very persons who encounter the greatest difficulty in securing an impartial trial, even without the presence of [TCB]. This Court would no longer be able to point to the dignity and calmness of the courtroom as a protection from outside influences ... [TCB] penetrates this protection, and brings into the courtroom tangible evidence of the widespread interest in a case - an interest which has often been fanned by

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<sup>199</sup> *ibid* 589 (Harlan J).

<sup>200</sup> *ibid* 590 (Harlan J).

<sup>201</sup> The case relates to allegation of unlawful financial assistance during the banking crisis and recession. Those accused are Sean Fitzpatrick, Patrick Whelan and William McAteer, all previous executives of Anglo Irish Bank. See, for example, ‘Prosecution Begins Setting Out Case in Anglo Trial’ *RTE News* (Dublin, 5 February 2014) < <http://www.rte.ie/news/2014/0205/502315-anglo-trial/> > accessed 17 March 2014.

<sup>202</sup> *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 19 January 2014.

<sup>203</sup> Strictly speaking this is not TCB in the sense of being pushed to a public audience on TV or uploaded to an iTCB website for pull by members of the public, is focused upon in the thesis.

exhaustive reports in the newspapers, television and radio for weeks before trial. The present case presents a clear example of this danger.<sup>204</sup>

Chief Justice Warren states that '[w]e must take notice of the inherent unfairness of [TCB], and rule that its presence is inconsistent with the "fundamental conception" of what a trial should be.'<sup>205</sup> The TCB effect on the process of the trial has not been systematically researched to date. Justice Harlan states that,

'It is said that the [TCB] will serve to educate the public as to the nature of the judicial process. Whatever force such arguments might have in run-of-the-mill cases, they carry little weight in cases of the sort before us, where the public's interest in viewing the trial is likely to be engendered more by curiosity about the personality of the well-known figure who is the defendant (as here), or about famous witnesses or lawyers who will appear on the [TCB], or about the details of the particular crime involved, than by innate curiosity to learn about the workings of the judicial process itself. Indeed it would be naive not to suppose that it would be largely such factors that would qualify a trial for commercial television 'billing,' and it is precisely that kind of case where the risks of permitting [TCB] are at their greatest.'<sup>206</sup>

## Forms

The US Supreme Court also implicitly refers to form issues, but without explicitly differentiating different forms of TCB. Unfortunately, the research does not develop or scope different forms of TCB. This should be undertaken as it may be that, for example, some TCB forms are more preferable than others and or have graduated effects on different courtroom participants. This is a real legal and legal-policy consideration. The US Supreme Court said the following,

- 'The probable impact of [TCB] on the fairness of a trial may vary according to the particular kind of case'<sup>207</sup>;
- 'When the issue of [TCB] in a non-notorious trial is presented it may appear that no workable distinction can be drawn based on the type of case involved, or that the possibilities for prejudice, though less severe, are nonetheless of Constitutional proportions ... The resolution of those further questions should await an appropriate case' and research.<sup>208</sup>

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<sup>204</sup> *Estes* 576-577. Footnote omitted. (Warren CJ).

<sup>205</sup> *ibid* 580 (Warren CJ).

<sup>206</sup> *ibid* 594-595 (Harlan J).

<sup>207</sup> *ibid* 590 (Harlan J).

This highlights the contention that there is a need for further examination and research of the TCB differences, and advantages and disadvantages, of different forms of TCB. These can be both legal and legal-policy issues. Justice Harlan adds,

‘I do not deem the Constitutional inquiry in this case ended by the finding ... that no isolatable prejudice was occasioned by the manner ... [of TCB] ... [TCB] introduces into the conduct of a criminal trial the element of professional “showmanship,” ... there is certainly a strong possibility that the timid or reluctant witness, for whom a court appearance even at its traditional best is a harrowing affair, will become more timid or reluctant when he finds that he will also be appearing before a “hidden [TCB] audience” of ... large dimensions. ... the “cocky” witness having a thirst for the limelight will become more “cocky” under the influence of [TCB]. And who can say that the juror who is gratified by having been chosen for a front-line case, an ambitious prosecutor, a publicity-minded defense counsel, and even a conscientious judge will not stray, albeit unconsciously, from doing what ‘comes naturally’ into pluming themselves for a satisfactory [TCB] “performance”?’<sup>209</sup>

A High Court judge in Ireland also refers to distraction-effects of media typing in court.<sup>210</sup> Eye-tracking can potentially be applied to researching wider issues than TCB cameras and in-court effects.

### **Subtle and Discrete Effects**

The US Supreme Court recognised that there may be subtle and or discrete effects. It states,

‘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>211</sup> [TCB] ‘amounts to the injection of an irrelevant factor into court proceedings. In addition experience teaches that there are numerous situations in which it might cause actual unfairness – some so subtle as to defy detection by the accused or control by the judge.’<sup>212</sup>

In terms of TCB eye-tracking, such effects are now no longer so subtle as to defy detection. The eye movements of simulated courtroom participants in test settings, mock

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<sup>208</sup> ibid 590 (Harlan J).

<sup>209</sup> ibid 591. Footnote omitted. (Harlan J).

<sup>210</sup> Peart J. Hearing at the Bridewell Court, in *McKeogh v Doe and Others* IEHC [2012] unreported. There was a large media presence and interest in the case.

<sup>211</sup> ibid 544 (Clarke J).

<sup>212</sup> ibid 545 (Clarke J).



courtroom and in actual non-live court settings, can be examined and recorded. There are many potential areas of courtroom participant eye-tracking research that can now be carried out. Even subtle effects can be researched. The US Supreme Court's concerns are no longer beyond optimum normative effects-research and answers.

Justice Harlan states that we,

'should not be deterred from making the Constitutional judgment which this case demands by the prospect that the 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. At the present juncture I can only conclude that [TCB], at least in cases like this one, possess such capabilities for interfering with the even course of the judicial process that they are Constitutionally banned. On these premises I concur in the opinion of the Court.'<sup>213</sup>

Today, courts and legal-policymakers may be interested to know what the current effects may be from TCB, whether it educates, whether it distracts, graduated-effects, the nuances and differences between differing forms and models of TCB, and particularly how reliable past TCB research is and how more normative TCB research may deal with the TCB effect questions and issues.

### **The *Chandler* Case: Legal-Empirical Data/Effect Shown**

The US Supreme Court in *Chandler*<sup>214</sup> again refers to legal-empirical evidence research as follows,

- It was held that 'at present no one has presented [legal-]empirical data sufficient to establish that the mere presence of [TCB] media in the courtroom inherently has an adverse effect on that process under all circumstances. Here, the appellants have offered nothing to demonstrate that their trial was subtly tainted by [TCB] – let alone that all [TCB] trials would be tainted'<sup>215</sup>;
- 'No evidence of specific prejudice was tendered'<sup>216</sup>;
- 'Absent a showing of prejudice of Constitutional dimensions to these appellants, there is no reason for this Court either to endorse or to invalidate Florida's experiment'<sup>217</sup>;

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<sup>213</sup> ibid 595-596 (Harlan J).

<sup>214</sup> *Chandler v Florida* above 560–589.

<sup>215</sup> ibid 561.

<sup>216</sup> ibid 568.

- ‘Nor have the appellants shown either that the media’s coverage of their trial – printed or [TCB] – compromised the jury’s ability to judge them fairly or that the [TCB] coverage of their particular trial had an adverse impact on the trial participants sufficient to constitute a denial of due process’<sup>218</sup>;
- ‘One is entitled to wonder if such a statement would be made in a court of justice by any state trial judge except as an appeal calculated to gain the favour of his viewing audience’<sup>219</sup>;
- As technology has changed since the *Estes*<sup>220</sup> case, it was argued that ‘many of the negative factors found in *Estes* ... are less substantial factors today than they were at that time’<sup>221</sup>;
- The US Supreme Court notes in a footnote that in the original experiment permitted by the Supreme Court of Florida, that court acknowledged that the research was ‘limited’ and ‘non-scientific’<sup>222</sup>;
- ‘Nonetheless, it is clear that the general issue of the psychological impact of [TCB] upon the participants in a trial, and particularly upon the defendant, is still a subject of sharp debate’<sup>223</sup>;
- ‘Comprehensive [TCB legal-]empirical data are still not available – at least on some aspect of the problem’<sup>224</sup>;
- It also adds that ‘at present no one has been able to present [legal-]empirical data sufficient to establish that the mere presence of the [TCB] media inherently has an adverse effect on that process’<sup>225</sup>;
- Even the amici briefs supporting Florida in the US Supreme Court case, admit that more experimentation is needed to evaluate the potential psychological prejudice<sup>226</sup>;
- ‘To demonstrate prejudice in a specific case a defendant must show something more than juror awareness that the trial is such as to attract the attention of broadcasters’<sup>227</sup>;
- ‘The appellants have offered no evidence that any participant in this case was affected by the presence of [TCB] cameras’<sup>228</sup>;
- Eye-tracking can be used to record and show when TCB distraction-effects occur, and in what circumstances.

### **The Hollingsworth Case**

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<sup>217</sup> ibid 560-589.

<sup>218</sup> ibid.

<sup>219</sup> ibid 566. Chief Justice Warren.

<sup>220</sup> *Estes v Texas* above 532-616.

<sup>221</sup> See *Chandler v Florida* above 576.

<sup>222</sup> ibid n11 at 576, referring to *In re Petition of Post-Week Stations, Florida, Inc* 370 So 2d 764, 781 [1979].

<sup>223</sup> ibid 578.

<sup>224</sup> ibid.

<sup>225</sup> ibid 559-560.

<sup>226</sup> See ibid n 12 at 560.

<sup>227</sup> ibid 560.

<sup>228</sup> ibid 581.

The Californian District Court had issued an order permitting broadcasting live via streaming video to a number of Federal courts.<sup>229</sup> The defendants objected.<sup>230</sup> They sought a stay, which was granted by the Supreme Court.<sup>231</sup> The case involved a new legal Bill in California. Those supporting it submitted that they had been harassed as a result of their support, which included death threats.<sup>232</sup> The Californian courts had envisaged this case as an experiment of TCB in California's Federal courts.<sup>233</sup> This necessitated changing a local law which banned such broadcasting.<sup>234</sup>

### ***Hollingsworth: Camera and Effects Issues Avoided***

The US Supreme Court, however, resolved the 'question without expressing any view on whether such trials should be broadcast. We instead determine that the broadcast in this case should be stayed because it appears the courts below did not follow the appropriate procedures set forth in Federal law before changing their rules to allow such broadcasting.'<sup>235</sup> The US Supreme Court majority did not expressly consider the broader TCB argument or effect issues. The case,

'is confined to a narrow legal issue: whether the District Court's amendment of its local rules to broadcast this trial complied with Federal law. We conclude that it likely did not and that applicants have demonstrated that irreparable harm would likely result from the District Court's actions. We therefore stay the court's ... order to [which] permits the live streaming of court proceedings to other Federal courthouses. We do not address other aspects of that order, such as those related to the broadcast of court proceedings on the internet, as this may be premature.'<sup>236</sup>

It is different from the other cases in that it was not an appeal after a trial where TCB has occurred. The US Supreme Court hearing was in advance of the proposed trial and TCB camera issues arising.

### ***Hollingsworth: Reference to Camera Issues***

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<sup>229</sup> *Hollingsworth v Perry* above 1.

<sup>230</sup> *ibid* 2.

<sup>231</sup> *ibid*.

<sup>232</sup> *ibid*.

<sup>233</sup> *ibid* 4. As opposed to its State courts which already permit certain TCB broadcasting.

<sup>234</sup> *ibid* 9. It is interesting that the transmission was to other courthouses – and appears not a push television broadcast to a public audience. Strictly speaking, therefore, it falls outside of the definition of push or pull TCB, and is rather an example of court to court relay.

<sup>235</sup> *ibid*.

<sup>236</sup> *ibid* 7. Neither does this research, given the time and resources available, the wider issues of courtroom broadcasting and is rather limited to television courtroom broadcasting, in particular the research and effect issues. Therefore, arguably, the case does not have a wider significance for TCB.

However, while not being of any wider significance, the case does refer in part to TCB issues. The US Supreme Court, for example, referred to the Judicial Conference, which it said has a restrictive position on the broadcast of court proceedings.<sup>237</sup> That the US Supreme Court again referred to effect issues, it can be seen that the research challenge is reiterated and remains. No ultimate conclusion on the TCB effects was possible in this case. More recently the UK Lord Chief Justice emphasises the need for more legal-empirical research when considering the TCB question.<sup>238</sup> This serves to confirm the ongoing debates and concerns with TCB issues generally, particularly at a judicial and legal-policy level. That, as remains elsewhere, also means that research is required in Ireland when coming to consider the TCB question.

### ***Hollingsworth: Reference to Witness Effects Issues***

The US Supreme Court refers to witnesses,

‘Applicants ... *have shown* [emphasis added] that irreparable harm will likely result from the denial of the stay. Without a stay, the District Court will broadcast the trial. It would be difficult - if not impossible - to reverse the harm from those broadcasts ... This Court has recognized that witness testimony may be chilled if broadcast<sup>239</sup> ... Some of the applicants’ witnesses have already said that they will not testify if the trial is broadcast, and they have substantiated their concerns by citing incidents of past harassment ... (71 news articles detailing incidents of harassment related to people who supported Proposition 8). These concerns are not diminished by the fact that some of applicants’ witnesses are compensated expert witnesses. There are qualitative differences between making public appearances regarding an issue and having one’s testimony broadcast throughout the country. Applicants may not be able to obtain adequate relief through an appeal. The trial will have already been broadcast. 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>240</sup>

### ***Hollingsworth: Evidence of Harm/Effects***

It is interesting that the US Supreme Court said that the applicants against broadcast, had established effects and harm if broadcast. Perhaps more noteworthy is the comment that the TCB proponent respondents have not demonstrated any harm if there was no proposed broadcast. The court states that the ‘balance of equities favours applicants.

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<sup>237</sup> ibid 11. Note, however, proposals for the second Federal pilot experiment.

<sup>238</sup> See F Gibb, ‘Britain Rethinks Cameras in Court’ *Times* (London, 16 May 2014).

<sup>239</sup> ibid 12-13, referring to *Estes v Texas* above; ibid 591 (Harlan J concurring).

<sup>240</sup> ibid 12-13.

While applicants have demonstrated the threat of harm they face if the trial is broadcast, *respondents have not alleged any harm if the trial is not broadcast*. [Emphasis added] The issue, moreover, must be resolved at this stage, for the *injury likely cannot be undone once the broadcast takes place*<sup>241</sup> (emphasis added). This also contrasts with assessments which rely on contempt or appeal as the appropriate remedy is. In time courts and legal-policymakers may come to consider that those proposing TCB might have a responsibility to furnish positive research from prior legal-empirical research prior to and after TCB. They also may have to report on the research to date, undertake detailed, specific legal-empirical research in particular pilot study, and to advance the normative TCB research in a meaningful, recorded, verified and ongoing manner. They could also be required to assist the research effort. This could include distraction-effects and education-effects.

### ***Hollingsworth: Considered Rules Are Required***

In terms of court rules, the US Supreme Court reiterates that the,

‘Court’s interest in ensuring compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes. The District Court here attempted to revise its rules in haste, contrary to Federal statutes and the policy of the Judicial Conference of the United States. It did so to allow broadcasting of this high-profile trial without any considered standards or guidelines in place. The arguments in favour of developing procedures and rules to allow broadcast of certain cases have considerable merit, and reasonable minds can surely differ over the general and specific terms of rules and standards adopted for that purpose. Here, however, the order in question complied neither with existing rules or policies nor the required procedures for amending them.’<sup>242</sup>

Even if the local law in the case had been validly amended, that was not the end of the matter. The US Supreme Court feels that even if it ‘had been validly revised, questions would still remain about the District Court’s decision to allow broadcasting of this particular trial, in which several of the witnesses have stated concerns for their own security.’<sup>243</sup> On a more general level, the increase in online abuse, trolling and social media issues will arguably not diminish safety and security concerns of certain examples of proposed TCB.

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<sup>241</sup> ibid 13.

<sup>242</sup> ibid 14.

<sup>243</sup> ibid 15.

### **Hollingsworth: Publicity Effects**

The US Supreme Court also notes that,

‘courts ... have allowed the broadcast of their proceedings on the basis that those cases were not high profile,<sup>244</sup> ... or did not involve witnesses,<sup>245</sup> ... Indeed, one District Court did not allow the broadcasting of its proceedings because the case “involv[ed] very sensitive issues.”<sup>246</sup> ... This case, too, involves issues subject to intense debate in our society. The District Court intends not only to broadcast the attorneys’ arguments but also witness testimony ... *Sony BMG* 564 F 3d at 11 ... (distinguish[ed] broadcast of attorneys’ arguments from other parts of the trial). This case is therefore not a good one for a pilot program. Even the studies that have been conducted thus far have not analyzed the effect of broadcasting in high-profile, divisive cases.’<sup>247</sup>

### **Hollingsworth: No Legal-Empirical Data**

The dissent opinion could,

‘find no basis [that] the applicants would suffer irreparable harm. Certainly there is no evidence that such harm could arise in this nonjury civil case from the simple fact of transmission itself ... Neither the applicants nor anyone else “has been able to present [legal-]empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect on [the judicial] process,” *Chandler v Florida* 449 US 560, 578–579 (1981). Cf M Cohn & D Dow,<sup>248</sup> *Cameras in the Courtroom: Television and the Pursuit of Justice* 62–64 (1998) (canvassing studies, none of which found harm, and one of which found that witnesses “who faced an obvious camera, provided answers that were more correct, lengthier and more detailed”). And, in any event, any harm to the parties, including the applicants, is reparable through appeal.’<sup>249</sup>

Eye-tracking research may potentially produce such TCB legal-empirical evidence. The author recommends that TCB eye-tracking studies be designed and carried out in future TCB effects-research. The dissent minority do not cite the studies it refers to. In any event, M Cohen and D Dow<sup>250</sup> refer to four legal-empirical studies<sup>251</sup> between 1953 and

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<sup>244</sup> ibid 15, referring to *E\*Trade Financial Corp v Deutsche Bank AG* 582 F Supp 2d 528, 535 (SDNY 2008).

<sup>245</sup> ibid 15, referring to *Marisol A v Giuliani* 929 F Supp 660, 661 (SDNY 1996); *Katzman v Victoria’s Secret Catalogue* 923 F Supp 580, 586–587 (SDNY 1996).

<sup>246</sup> ibid 15, referring to *Schoeps v Museum of Modern Art* 599 F Supp 2d 532, 534 (SDNY 2009).

<sup>247</sup> ibid 16.

<sup>248</sup> Referring to M Cohn and D Dow, *Cameras in the Courtroom: Television and the Pursuit of Justice* (Rowman & Little 1998 and 2002).

<sup>249</sup> *Hollingsworth v Texas* above dissent 6–7.

<sup>250</sup> Referring to M Cohn and D Dow, above.

2002. The literature and searches of the author identifies just over twenty TCB legal-empirical studies.<sup>252</sup> Of course, while welcome, this too is not a sufficient body of research to be determinative of TCB effects issues and concerns in TCB. Few studies refer to distraction-effects. Eye-tracking is not considered.<sup>253</sup> Eye-tracking allows us to monitor distraction in legal-empirical studies, and as the research data is built up, we can then generalise for different TCB scenarios. Court and legal-policy can be better informed.

The *Hollingsworth* dissent further states that the,

‘applicants also claim that the transmission will irreparably harm the witnesses themselves, presumably by increasing the public’s awareness of who those witnesses are. And they claim that some members of the public might harass those witnesses. But the witnesses, although capable of doing so, have not asked this Court to set aside the District Court’s order ... And that is not surprising. All of the witnesses supporting the applicants are already publicly identified with their cause. They are all experts or advocates who have either already appeared on television or internet broadcasts, already toured the State advocating a “yes” vote on Proposition 8, or already engaged in extensive public commentary far more likely to make them well known than a closed-circuit broadcast to another Federal courthouse. The likelihood of any “irreparable” harm is further diminished by the fact that the court order before us would simply increase the trial’s viewing audience from the occupants of one courtroom in one courthouse to the occupants of five other courtrooms in five other court-houses (in all of which taking pictures or retransmissions have been forbidden). By way of comparison literally hundreds of national and international newspapers are already covering this trial and reporting in detail the names and testimony of all of the witnesses. ... I see no reason why the incremental increase in exposure caused by transmitting these proceedings to five additional courtrooms would create any further risk of harm, as the Court apparently believes ... Moreover, if in respect to any particular witness this transmission threatens harm, the District Court can prevent

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<sup>251</sup> ibid 62 ff. These four are EH Short and Associates, *Evaluation of California’s Experiment with Extended Media Coverage of Courts, submitted to Administrative Office for the Courts; the Chief Justice’s Special Committee on the Courts and the Media, and the California Judicial Council* (1981); MT Johnson and C Krafka, *Pilot Program Involving Electronic Coverage in Six US District Courts and Two Appeal Courts* (Federal Judicial Centre 1994); J Hoyt, ‘Courtroom Coverage: The Effects of Being Televised’ (1977) 21 *Journal of Broadcasting* 489; E Borgida, K Debono and L Buckman, ‘Cameras in the Courtroom: The Effects of Media Coverage on Witness Testimony and Juror Perceptions’ (1990) 14 *Law and Human Behavior* 489.

<sup>252</sup> See Appendices.

<sup>253</sup> In addition, to the above studies, there were also additional non-TCB peripherally related studies, such as, Kornil Swaroop Kumar and Tarika Daftary-Kapur. Kornil Swaroop Kumar, ‘Murder and the News Media’ (PhD thesis, Temple University 1993); Tarika Daftary-

that harm. Chief Judge Walker has already said that he would keep the broadcast “completely under the Court’s control, to permit the Court to stop it if [it] proves to be a problem, if it proves to be a distraction, [or] if it proves to create problems with witnesses.” ... The Circuit Council confirmed in a press release that the District Court “will fully control the process” and that “Judge Walker has reserved the right to terminate any part of the audio or video, or both, for any duration” or to terminate participation in the pilot program “at any time.”<sup>254</sup> ... Surely such firm control, exercised by an able district court judge with 20 years of trial-management experience, will be sufficient to address any possible harm, either to the witnesses or to the integrity of the trial.’<sup>255</sup>

### ***Hollingsworth: Education***

The dissent refers to ‘the public’s interest in observing trial proceedings to learn about this case and about how courts work’<sup>256</sup> ... [and the] statement of Chief Judge Walker ... “[I]f the public could see how the judicial process works, they would take a somewhat different view of it.” “I think the only time that you’re going to draw sufficient interest in the legal process is when you have an issue such as the issues here, that people think about, talk about, debate about and consider.”<sup>257</sup> It is unclear if the US Supreme Court was attempting to refer to education issues and education-effects. Equally, it is unclear if there is a difference between educational and informative TCB, an issue which might be taken up in further research.

### ***Hollingsworth: Dissent - No Harm Identified***

The dissent felt that the ‘majority ... identifies no real harm, let alone “irreparable harm,” to justify ... this stay ... And the public interest weighs in favour of providing access to the courts.’<sup>258</sup> There is only ‘potential harm to witnesses - harm that is either nonexistent or that can be cured through protective measures by the District Court as the circumstances warrant.’<sup>259</sup> Eye-tracking provides an opportunity for courts and legal-policymakers to be better informed on these points with normative research.

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Kapur, ‘The Effects of Pre- and Post-Venire Publicity on Juror Decision Making’ (PhD thesis, City University of New York 2009).

<sup>254</sup> *Hollingsworth v Texas* above 7–8, referring to News Release, Federal Courthouses to Offer Remote Viewing of Pro-position 8 Trial (8 January 2010) < [www.ca9.uscourts.gov/datastore/general/2010/01/08/Prop8\\_Remote\\_Viewing\\_Locations.pdf](http://www.ca9.uscourts.gov/datastore/general/2010/01/08/Prop8_Remote_Viewing_Locations.pdf) > (referred to as visited 19 January 2014, and referred to as available in Clerk of Court’s case file).

<sup>255</sup> *Hollingsworth v Texas* *ibid* 7-8.

<sup>256</sup> *ibid* 7-8, referring to *Nebraska Press Assn v Stuart* 427 US 539, 587 [1976] (Brennan J concurring in judgment); see also Exh 2 at 42, Application To Petition.

<sup>257</sup> *ibid* 7-8. Referring to Walker CJ in *Nebraska Press Assn v Stuart* 427 US 539.

<sup>258</sup> *ibid* 7-8.

<sup>259</sup> *ibid* 7-8.



### Some Other Cases and Legal-Psychology

While the thesis is not about the arguments or the caselaw per se, given that the focus relates to TCB effects-research issues, there are some cases other than the three US Supreme Court TCB cases we can refer to. The New Hampshire Supreme Court in *Petition of WMUR Channel 9* suggests that the ‘psychological effects on participants in the trial of having [TCB] is not greater than where reporters wait on the courthouse steps with cameras.’<sup>260</sup> The Court is also reported as saying that the studies found that a courtroom camera ‘improves public perceptions of the judiciary and its processes, improves the trial process for all participants and educates the public about the judicial branch of government.’<sup>261</sup> However, upon examination, the court opinion does not identify or cite the actual studies and findings it refers to.<sup>262</sup> In *State v Langley*<sup>263</sup> the defendant was unsuccessful in appealing his trial verdict, arguing in part that he was prejudiced and had objected to the taking of photographs during the trial. The appeal court felt that the issue was ‘whether the record discloses that the taking of the photographs during the trial of this case influenced the jury.’<sup>264</sup> This was despite various rules having been broken in the process of allowing such photography.<sup>265</sup> However, the issue of TCB broadcasting over a person objections to TCB appears not to have been researched thus far. It also ignores whether it is tenable for an active party to research and record affects in their own case. There is also a German case<sup>266</sup> which barred cameras on the basis of awareness of the significant wider television audience and the psychological effects.<sup>267</sup> Overall, however, there is no TCB comparative effects-research.

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<sup>260</sup> New Hampshire Supreme Court, *Petition of WMUR Channel 9* (13 December 2002) < [www.courts.state.nh.us/opinions/2002/0212/wmur156.htm](http://www.courts.state.nh.us/opinions/2002/0212/wmur156.htm) > as referred to in D Stepniak above 101. Accessed by author on 8 June 2010.

<sup>261</sup> Referred to *ibid* 101.

<sup>262</sup> Referred to *ibid* 101. Page 8 of court opinion. The opinion refers to the *Chandler* case, above, n 5 at 565.

<sup>263</sup> *State v Langley* 214 Ore 445, 323 P2d 301 [1958] as referred to in *The Special Committee on Radio and Television of the Association of the Bar of the City of New York, Radio, Television, and the Administration of Justice: A Documented Survey of Materials* (Columbia University Press 1965) 99-100. This appeal was decided by the Supreme Court of Oregon. Also referred to *ibid* 179. There are no definitions, forms or TCB legal-empirical research referred to.

<sup>264</sup> *Hollingsworth v Texas* above, at 320-321 at 323 of judgement, and as referred to *ibid* 98. Note also E Greene, ‘Media Effects on Jurors’ (2005) 14 *Law and Human Behavior* 439-450.

<sup>265</sup> *ibid* 99-100, 179.

<sup>266</sup> Albeit in 1964.

<sup>267</sup> German Fed Ct, 19 BGHSt 45; see also 10 BGHSt 202 and BGHSt 111, as referred to in A Biondi, ‘TV Cameras Access into the Courtroom: A Comparative Note’ *Yearbook of Media and Entertainment Law (YMEL)* (1996) 140. It held that ‘the awareness that filming will be used to produce a programme which will be seen by an audience of thousands of people creates in the parties and witnesses a sort of psychological state that will induce them to restrain their statements or to make a declaration more suited for a theatre performance than a trial. This distorting effect could impair the main purpose of the trial: to obtain evidence and ascertain the truth.’

The New York study of TCB issues, claimed, in part, that while the distraction-effects issues ‘have been laid to rest,’ and what ‘remains very much alive are the concerns about the psychological impact of the camera: how will the realization that their every word or gesture is being transmitted to a vast, unseen audience the behaviour of trial participants.’<sup>268</sup> This is incorrect, as is demonstrated for example, by the continued existence of the US Supreme Court concerns and challenge, the limited legal-empirical effects-research available, and indeed the author’s research in relation to distraction-effects the witness effect issues. The New York study is generally presumptive and opinion based. It did not address the US Supreme Court concerns and challenge. One aspect of the study which was potentially legal-empirical was an outsourced public survey.<sup>269</sup> It ignores the lack of TCB legal-empirical effects-research evidence thus far. Eye-tracking is not referred to.

### **Why the Challenge is Not Properly Addressed**

While the primary focus is directed to TCB research and effect issues, and not to examining the reasons why the US Supreme Court concerns and challenge are not yet properly addressed, we can briefly suggest some of the potential reasons. One reason is that while the US Supreme Court has referred to its concerns, it is not necessarily the case that it is feasibly for it to fully engage in the necessary research itself. Indeed, the amount of research required is significant. There is also a financial cost, both generally and specifically for individual legal-empirical TCB effects-research. Another factor is that no single discipline or expertise alone is sufficient to address the concerns, and cross-disciplinary research is needed. In certain instances there has been a heavy amount of media lobbying and it can sometimes possibly divert attention from the need for legal-empirical effects research. Similarly so in terms of politicians whom may sometimes be focused on issues other than the effects research needed. As indicated above, quite often TCB receives attention in a TCB access application in an instant case. Such applications are not the most considered situations to create optimum legal-policy with regard to TCB and the TCB effect-concerns.

### **Conclusion**

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<sup>268</sup> The Special Committee on Radio and Television of the Association of the Bar of the City of New York, *Radio, Television, and the Administration of Justice: A documented Survey of Materials* (Columbia University Press 1965) 53, as referred to in D Stepniak, above 366.

<sup>269</sup> ‘Television Cameras in the Courts, A Survey of New York State, December, 1996,’ Marist Institute for Public Opinion Poll, as contained in New York State Committee to Review Audio-Visual Coverage of Court Proceedings, *An Open Courtroom, Cameras in New York Courts* (Fordham 1997) 113-123.

We see that the three US Supreme Court cases refer to a large number issues and concerns relating to TCB, and which should be the focus of sustained legal-empirical research of TCB and TCB effect issues. The full TCB effect issues identified by the US Supreme Court are summarised elsewhere.<sup>270</sup> Eye-tracking is one of the options to research the distraction-effect issues identified by the US Supreme Court.

TCB effect issues are not researched or answered in the small number of legal-empirical studies to date. No effect issue has received a sustained legal-empirical research focus. The concerns of the US Supreme Court still remain. They are not properly addressed in the small number of legal-empirical studies nor in the general popular discussion thus far. There is no baseline research to measure for any changes that may occur. Very few studies have sought to examine in-court effects with observers and sophisticated coded measurements. Eye-tracking research offers the potential for examining some of the effect concerns raised by the US Supreme Court, in particular distraction and divided attention. It is recorded. It is verifiable. It is better than self-reports, opinion-reports and observer-reports. There is also potential to examine some of the other effects raised by the US Supreme Court concerns. Such research would better inform the legal, Constitutional, legal-policy and legal rights consideration of courts, lawyers, litigants, the media and legal-policymakers generally.

The author highlights the importance of TCB camera-location and participant-location in carrying out effects-research and its potential impact on legal and legal-policy discussion. Courts and legal-policymakers have not yet recognised the potential significance raised by location-effect issues to researching the effects of TCB. Effects may depend upon where the TCB cameras are located and where the courtroom participants are located.<sup>271</sup>

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<sup>270</sup> The full set of effects concerns are seldom mentioned in the literature, which is why it is useful to list these in full in the P Lambert, *Television Courtroom Broadcasting Effects: The Empirical Research and the Supreme Court Challenge* (University Press of America 2013). 419. The headline effects categories include: lawyers; juries (in-court); prospective juries (out-of-court); judges; defendants; parties; witnesses; court personnel; courtroom participants effects generally; and public in-court (but not mentioned by US Supreme Court). Other in-court issues include: audience; public; and other effects issues.

<sup>271</sup> The author also refers to location issues at P Lambert, 'Effects Research Issues in Television Courtroom Broadcasting: Getting Past Monkey' (10th European Conference on eGovernment, University of Limerick 17-18 June 2010); P Lambert, 'Time to Leave the Monkey Behind?: How Eye-tracking and Psychology Can Contribute to Television Courtroom Broadcasting Effects Research' (British Psychological Society, BPS Cognitive Psychology Section Annual Conference, 27th Annual Cognitive Psychology Section Conference, Cardiff University 6-8 September 2010); P Lambert, 'Eye-Tracking Technology and Television Courtroom Broadcasting' (11 August 2010) Computers and Law < [www.scl.org/site.aspx?i=ed16965](http://www.scl.org/site.aspx?i=ed16965) > accessed 19 January 2014; P Lambert, 'TCB Effects: Eye-Tracking and Camera Distraction in Court' (Irish Association of Law Teachers Annual Conference, Strand Hotel, Limerick 26-28 November 2010); P Lambert, 'Monkey Magic: Problems With Effects Research of Television Courtroom Broadcasting' (2010) 18

This is not identified as being part of the US Supreme Court challenge but is important in terms of designing adequate and robust TCB effects-research.

It is important to point out that in addressing the TCB research challenges and in developing TCB effects-research studies, we often need a level of sophistication which can only be obtained through cross-disciplinary research. The research questions and the research tasks demand this. While parts of the current research may well be novel, the recommendation of cross-disciplinary research is not unique.<sup>272</sup> The author proposes that eye-tracking technology be used for effects-research of the distraction-effects on courtroom participants caused by TCB cameras in the courtroom. Such cross-disciplinary research is not without comparison. Eye-tracking has been used to research the effects of videotaped confessions.<sup>273</sup> Legal-psychology such as eyewitness identification, weapon-focus and camera-perspective-bias are also cross-disciplinary. Eye-tracking has been used as part of such legal effects-research.<sup>274</sup> Eye-tracking is also the focus of litigation mandated health advertisements/warnings on tobacco products.<sup>275</sup> The list of legal courses and legal journals of a cross-disciplinary nature is continually increasing.

Outside of possibly SL Alexander (see below) this appears to be the only analysis to consider in detail to research concerns, and implications, of the US Supreme Court. These concerns remain even today and it is in this context that we may suggest that the aspirations of the US Supreme Court for more tangible legal-empirical research to assist them (and indeed others) in dealing with TCB legal arguments have not yet been fulfilled. To the extent that the US Supreme Court expressed its disappointment at the lack of research and the lack of answers available to it, this concern for more research and answers remain a challenge today. Interestingly, research might also consider, for example whether this challenge relates in some way to the attitude of the US Supreme

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Irish Law Times 278; P Lambert, 'A Candid Camera, Eye-tracking Technology Could Transform Courtroom Broadcasting' (10 December 2010) *New Law Journal* 1699.

<sup>272</sup> In one example, three distinguished US law professors undertook detailed legal-empirical interdisciplinary research to address an issue posed as a result of a US Supreme Court case. DM Kahan, DA Hoffman and D Braman, 'Whose Eyes Are You Going to Believe? *Scott v Harris* and the Perils of Cognitive Illiberalism' (2008-2009) 122 *Harvard Law Review* 837. The research was funded by the National Science Foundation, and funds at Yale and Temple Universities.

<sup>273</sup> See, for example, G Lassiter, A Geers, P Munhall, I Handley and M Beers, 'Videotaped Confessions: Is Guilt in the Eye of the Camera?' in M Zanna (ed), *Advances, in Experimental Social Psychology, Vol 20* (Academic Press 2001) 189.

<sup>274</sup> See, for example, G Lassiter, A Geers, P Munhall, I Handley and M Beers, 'Videotaped Confessions: Is Guilt in the Eye of the Camera?' in M Zanna (ed), *Advances, in Experimental Social Psychology, Vol 20* (Academic Press 2001) 189.

Court regarding the televising of its own proceedings. The US Supreme Court has refused requests to televise its proceedings.<sup>276</sup> It is only comparatively recently that this particular issue has arisen. To that extent, it will be interesting to see if this new pressure might lead to an even renewed interest by the US Supreme Court in its original concerns, the wish and indeed challenge for legal-empirical answers and the possible conclusion that it might draw in the next US Supreme Court TCB case that there is still not enough research and answers for courts to be assured that there are positive effects and no negative effects. We might speculate as to whether the next US Supreme Court challenge might be more emphatic and expressly stated in requiring legal-empirical research and evidence. However, the thesis suggests that we may not have to wait for the next such case before positively advancing more normative TCB effects related research to assist courts and legal-policymakers.

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<sup>275</sup> P Smith, 'Evaluating the Corrective Statements Proposed in the Court Case *US Department of Justice vs Philip Morris USA Inc et al*' (MS thesis, State University of New York at Buffalo 2009). See 449 F Supp 2d 1 (DDC 2006).

<sup>276</sup> See, for example, G Stohr, 'TV Cameras Rejected in US Supreme Court Health-Care Case' Bloomberg.com, 16 March 2012.



## CHAPTER 6: DEFINING TCB

### Introduction

As it currently stands today, no assured answers can be identified by courts and legal-policymakers in relation to the TCB effect issues. There are no recognised TCB classifications or global definitions, certain concerns are not addressed, and there is no replication research.<sup>1</sup> There were three US Supreme Court camera cases, yet the issues and concerns remain without answers. Currently there is no UK or Irish case on the TCB issues.<sup>2</sup> UK and Irish courts and legal-policymakers as well as those in the US could benefit from normative legal-empirical effect-research for the different TCB forms. One consideration may be suggested categorisation of CB/TCB forms, one such suggestion being included in the Appendices herein. Future research might define and examine the different forms of TCB.<sup>3</sup> If there are different forms of TCB, the legal and Constitutional arguments<sup>4</sup> in relation to the permissibility, or necessity, of TCB may differ accordingly. If there are different forms (and the thesis suggests there are), it may be queried why TCB proponents are not promoting particular or nuanced TCB forms over others. E Slotnick and J Segal while calling for the televising of US Supreme Court cases, caution that ‘this should be accomplished on a limited and experimental basis. There are many ways, of course, in which such a major change could be implemented.’<sup>5</sup> The nuances and import of these may be particularly important to judicial and legal-policy decision making once properly researched.

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<sup>1</sup> The thesis recommend the benefit of sophisticated levels of baseline research prior to TCB cameras being introduced, and then sophisticated research once TCB cameras are introduced. We might consider different forms, and sub-forms, of TCB; the effects of TCB; whether all forms and sub-forms of TCB are the same; if not, why not; whether different sub-forms of TCB may have different quality and content of information; and different effect considerations.

<sup>2</sup> One of the reasons for this may be that no one has ever sought to properly consider the courtroom broadcasting (CB) form issues. Neither has anyone sought to distinguish the different TCB form issues; and differing consequent effect issues.

<sup>3</sup> Research might examine effects on the TCB courtroom participants (in-court effects) for each of the different TCB forms. Another set of effects-research should examine effects on the audience or audiences (out-of-court effects). Strictly speaking, out-of-court effects can be wider than just the viewing audience for a particular case. Possibly different TCB forms have different audience and or the public effects. Different TCB forms and sub-forms may have different audiences.

<sup>4</sup> The legal and constitutional issues are not the focus, and are beyond the scope, of the current work. The arguments are also beyond the scope of this current work.

<sup>5</sup> EE Slotnick and JA Segal, *Television News and the Supreme Court: All the News That's Fit to Air?* (Cambridge University Press 1998) 242. Emphasis added.

Given the limited research available there is no global picture of all of the potential TCB issues and effects. Neither does it describe how each of these may be examined and researched at a global level.<sup>6</sup>

### **Validation of Arguments**

Many of those who are proponents and opponents of TCB state their arguments in favour or against in absolutist terms eg it will be educational; it will enhance democracy; it will have adverse effects on courtroom participants; it will not have adverse effects on courtroom participants; it will educate; it will not seek to educate, it will only seek to entertain; it will be an extra pictorial facility to pre-existing news programming forms; etc. All of these statements, and others, indicate that something definitive is the case or that something definitive will be the case. No one states that it is their view that ‘if permitted TCB may have the effect of “X”’ and that if permitted, they will seek to demonstrate this by adopting particular (recognised and tested) research methodologies to support or prove their proposition. New normative legal-empirical research is needed given the important matters at stake. Existing research is limited. It is one dimensionally focused purely on certain courtroom participants’ opinions. Such research alone is not capable of proving proponent or opponent arguments. Validity also needs to be considered in TCB effects-research discussion. This is an accepted issue in the wider research.<sup>7</sup>

### **Generalisation Ignores Forms**

While both proponents and opponents of TCB are frequently absolute in the arguments they propose, they are also being overly generalistic. For example, in saying that TCB will be educational, such proponents are implying that all TCB will be educational. There is no regard or differentiation being made for different TCB forms, different effects of different forms, and different messages and effects within each form. One form may, for instance, have its primary effect of education, and have information or entertainment as its second effect. Another may have information as its primary aim and effect, while

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<sup>6</sup> That is not to suggest that each and every study has to examine and research all potential issues and effects. Equally, it would be foolish and blinkered to discontinue conducting (limited) courtroom participant self-report effects type research. However, relying on such a limited approach alone in the future could be a serious mistake and would call into question the seriousness, if not the integrity, of those requesting TCB access. Also generally ignored is a focus on those permitting TCB, and the tasks of administering the daily procedure of TCB. In relation to eye-tracking, the thesis suggests particular models for consideration in future research.

<sup>7</sup> For example, V Stodden, ‘Enabling Reproducible Research: Licensing for Scientific Innovation’ (2009) 13 *International Journal of Communications Law and Policy* 1, 2.



another still may have information as its only effect. Furthermore, the form which may be most educational may have the least audience.

Therefore, we have issues in terms of identifying and classifying the potentially most educational and most informative forms of TCB. It may be advantageous to consider whether it is optimum to have the TCB form with the greatest audience, even though education-effects are back-grounded or minor in comparison to other TCB forms. New research would be beneficial in assisting better and more informed legal-policy debate.

We can consider these types of issues when developing new research studies and methodologies for TCB. Otherwise TCB research will continue to suffer the problem of being behind the times in terms of the results which it produces. Respect for TCB, and its methodologies and integrity, may be diminished. Legal-rights issues and legal-policy considerations may also be diminished.<sup>8</sup> Without identifying and incorporating TCB form issues into the research and discussion, arguably no validated conclusions may be achievable. It can be difficult for courts and legal-policymakers to make proper and considered conclusions without sustained normative legal-empirical research.

### **Forms of TCB**

This thesis identifies and summarises many of the different TCB forms.<sup>9</sup> This is a novel and necessary contribution. No sustained research appears to have identified, and defined, that there may indeed be different categories and forms TCB which we need to appreciate globally and in detail. There are also different arguments, different justifications and different forms and sub-forms of TCB. It is curious to suggest and presume, as proponents and opponents do, that all types of TCB are the same and that they all have the same effects on everyone. This is an issue which the TCB discussion to date ignores.<sup>10</sup>

### **Importance of Identifying Particular Forms**

Some TCB forms may be potentially more educational than others. This is important to courts and legal-policymakers because they have to make decisions and give

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<sup>8</sup> See for example S Barber, *News Cameras in the Courtroom* (Ablex 1997), which is one of the more detailed books on this topic, and yet which does not distinguish or categorise different courtroom broadcasting forms.

<sup>9</sup> See Appendices.

<sup>10</sup> The form diagrams and descriptions are not complete. It is the first effort in the literature to document and map the forms of courtroom broadcasting (CB) and TCB. TCB discussions, arguments and research should incorporate, define and reference these forms in future.

recommendations in relation to TCB. It can be queried whether we can yet say (television) courtroom broadcasting per se is educational, without identifying which form of TCB one is discussing. Equally, it may be questioned whether we can properly research educational TCB without identifying in advance the form of TCB. It may be queried whether a suggestion that CB generally is educational if, for example, one was researching RCB only. Arguably one would not have researched anything whatsoever about iTCB, for example.

One cannot assess the overall issues of TCB without understanding that there is no one single form of TCB. Categorising TCB can assist research as well as courts and legal-policymakers. Discussion could refer to which TCB form in particular it is proposed to research, how, and why. Not every argument may apply to every TCB form (and or equally). The research of TCB and TCB effects is much more complex than the general literature suggests. However, some of the problems and challenges can be addressed.<sup>11</sup>

### **Forms and the TCB Literature**

Generally none of the CB literature or cases explicitly indicate that there are different TCB forms and, therefore, potentially different effects. No research or commentary to date suggests that we can only properly consider and understand the TCB effect issues once we understand the forms from a global holistic level and then the nuances of the form in question. The courts have sometimes alluded to certain effects. The Short report states that electronic media coverage of courts ‘does not occur in a singular manner. Rather, the ‘amount’ of coverage occurs across a broad range.’<sup>12</sup> D Stepniak acknowledges that there are differences to consider in terms of the manner of introducing TCB, by whom, and ‘the basis upon which it is regulated and controlled.’<sup>13</sup> D Stepniak’s book is described as relating to ‘[TCB] camera recording and broadcast of courtroom proceedings,’ but he acknowledges other issues such as still photography, audio recording by radio broadcasters and courts’ own webcasting.<sup>14</sup> He interchangeably uses the term ‘courtroom televising,’ ‘broadcasting of proceedings,’ ‘audio-visual coverage,’ etc. Stepniak acknowledges that there are ‘factors distinguishing various forms of media, nature of recordings and broadcast formats.’<sup>15</sup> ‘For example, live broadcasts may be

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<sup>11</sup> See suggestions below to address some of the apparent problems in the research to date.

<sup>12</sup> EH Short and Associates, *Evaluation of California’s Experiment with Extended Media Coverage of Courts*, Submitted to: *The Administrative Office for the Courts, The Chief Justice’s Special Committee on the Courts and the Media and The California Judicial Council* (September 1981) 53.

<sup>13</sup> D Stepniak, *Audio-Visual Coverage of Courts* (Cambridge University Press 2008) 6.

<sup>14</sup> *ibid* 9.

<sup>15</sup> *ibid* 9.

distinguished from delayed transmissions; audio recordings and broadcast from video recordings; civil proceedings from criminal proceedings; first instance hearings from appeal hearings; overlay footage from actual excerpts of hearings; the recording and broadcast of segments of hearings from “gavel to gavel” [G2G] coverage; edited from unedited broadcasts; and broadcast from commentary from broadcasts without commentary.’<sup>16</sup> While D Stepniak favours TCB, he ‘does not advocate a particular minimum level of access.’<sup>17</sup> Indeed, ‘the impact of audio-visual recordings and broadcasts may warrant additional restrictions with respect to certain categories of cases, or segments of proceedings.’<sup>18</sup>

## News

Some research distinguishes different news types. This is relevant to TCB form issues. SA Esposito in his research, refers to television news and to three ‘subgenres’ within television news.<sup>19</sup> The three subgenres are nightly news; television networks primetime news magazines (eg ABC’s PrimeTime Live); and syndicated tabloid television programmes.<sup>20</sup> These subgenres can be focused on the same case, yet each can ‘tell the same story in potentially different ways.’<sup>21</sup> Close-ups, wide shots, graphics, music, length of shots, editing styles also create potential impacts.<sup>22</sup>

Television news incorporates ‘a complex process of visual and narrative presentation.’<sup>23</sup> It should not be assumed, as many TCB arguments appear to, that the same programming and effects apply equally across all footage broadcast. Choosing the image, language, camera locations, lights and story line all potential impact upon the footage which is eventually broadcast.<sup>24</sup> The raw in-court footage is also moulded. ‘[P]resenting events exactly as they occur does not fit with the requisites of television news.’<sup>25</sup> Television news programming must generally adhere to and fit within specific time frames and schedules.<sup>26</sup> Narrative examination research reveals that ‘the taken-for-granted “language” of television empowers television journalists to “objectively” present the

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<sup>16</sup> ibid 9-10.

<sup>17</sup> ibid 10.

<sup>18</sup> ibid 47-48.

<sup>19</sup> SA Esposito, ‘OJ TV: A Narrative Analysis of Television’s Pretrial Coverage of the OJ Simpson Case’ (PhD thesis, Graduate School of Wayne State University, Detroit, Michigan 1996) 27.

<sup>20</sup> ibid 27.

<sup>21</sup> ibid 33.

<sup>22</sup> ibid 34. He also highlights differences between ‘real and represented’ time, where real time is ‘collapsed into two or three micro-narratives.’ ibid 35.

<sup>23</sup> ibid 54.

<sup>24</sup> ibid 55.

<sup>25</sup> ibid.

*Simpson* story in a sometimes biased, judgemental, often prejudicial manner.<sup>27</sup> Television tabloid news programmes use shock, close-ups, drama, entertainment, which ‘do little more than excite, anger, and titillate viewers with a heavy dose of sex, violence, and celebrity.’<sup>28</sup> It contains little factual information and acts to trivialise.<sup>29</sup>

Critics feel that the TCB snippets of fifteen – thirty seconds are chosen for ‘high visual intensity, rather than of legal significance,’<sup>30</sup> effectively ‘entertainment news.’<sup>31</sup> Murder or homicide is ‘relatively rare, but the seriousness of the crime and sensationalism by the press’<sup>32</sup> can give a disproportionate impression.

SA Esposito identifies footage items which are negative for the defendant, including close ups, linking to weapons and an out-of-court crime scene videos.<sup>33</sup> News types are relevant to TCB form issues because the type of broadcast news (and news documentaries) can potentially influence what may be filmed in court, how it is filmed, how it may be edited and produced and ultimately the end product that may be pushed out to the viewing audience. These aspects may be important for courts and legal-policymakers to consider.

### **Entertainment, Daytime TV, Etc**

The *Simpson* (criminal) case shown on prime time television news magazine programmes is entertainment, and involves dramatic angles and themes.<sup>34</sup> The way in which certain programmes are produced, with music, still photographs, zoom-ins, lighting, and camera angles and space, create bias and infer guilt.<sup>35</sup> They ‘shed no factual light’<sup>36</sup> and trivialise the proceedings.<sup>37</sup> The three sub-genres ‘all structure their narratives from a particular

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<sup>26</sup> ibid 59.

<sup>27</sup> ibid 62.

<sup>28</sup> ibid 204.

<sup>29</sup> ibid 220.

<sup>30</sup> To use the words of P Thaler, ‘The Impact of the Television Camera on Courtroom Participants: A Case Study of the Joel Steinberg Murder Trial’ (PhD thesis, New York University 1990) 7. Note also the first Federal study, which also refers to short snippets.

<sup>31</sup> ibid 8.

<sup>32</sup> JG Peterson-Manz, ‘Copycats: Homicide and the Press’ (2002) 63 (Dissertation Abstracts International: Section B: The Sciences and Engineering) 591 ff. For a more historical discussion see D Domke, ‘The Press, Race Relations and Social Change’ (2001) 51 Journal of Communication 317.

<sup>33</sup> SA Esposito, above 85-87, 129.

<sup>34</sup> ibid 198.

<sup>35</sup> ibid 274. See also W Petkanas, ‘Cameras on Trial: An Assessment of the Educational Affects of News Cameras in Trial Courts,’ (PhD thesis, New York University 1990) 68 regarding different types of filming shots used.

<sup>36</sup> ibid.

<sup>37</sup> ibid 275. There is also a tendency towards exclusives, hype and self promotion. ibid 276.

perspective that reinforces a set of preferred meaning.<sup>38</sup> Of the three news subgenres, tabloid television devotes most coverage to the *Simpson* (criminal) case.<sup>39</sup> Certain programmes also incorporate re-enactments.<sup>40</sup> These may or may not be correct. They are also created with out-of-court material. SA Esposito adds that '[s]pecific attention should be given to the stylistic influences that "trash TV" has had on traditional television news' pretrial coverage. Such an application could provide an answer to the question of whether television news is becoming more of a threat to a defendant's Constitutional rights.<sup>41</sup>

We might also consider and distinguish between forms of TCB, for example, to determine which forms best protect existing legal rights, advance education, etc. Courts and legal-policymakers may be interested to know which TCB form may best safeguard the respective legal rights and interests at stake. SA Esposito calls for research comparing the *Simpson* (criminal) case with other non-televised celebrity cases to compare effects, such a length and stages of the cases.<sup>42</sup> There may well be 'options' as to which 'best serves' the defendant's Constitutional legal rights.<sup>43</sup> The Short report finds that its surveys did not point to 'a single, overall attitude; rather there were attitudes towards'<sup>44</sup> TCB. There is no research of what, if any, form(s) of TCB courtroom participants and the public prefer. Therefore, a single general question such as, are you in favour of TCB, does not help us to distinguish between attitudes between the forms.<sup>45</sup> In terms of the screen footage, A Bukoff refers to different screen formats and differentiates between full-screen formats and spit-screen formats.<sup>46</sup>

SA Esposito also refers to increasing entertainment and infotainment. He states that types of coverage are converging and that TCB must generally be 'presented within [media] themes, formats, and explanations originally found solely in entertainment programs.'<sup>47</sup> Dramatic and out-of-court extralegal issues are frequently highlighted.<sup>48</sup> A representative of TV3 in Ireland has indicated that television is about entertainment, its role is to

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<sup>38</sup> *ibid* 271. On the separate topic of courtroom sketches, note K Krupp, 'Journalism Meets Art' (1998) *Media Studies Journal* 71.

<sup>39</sup> SA Esposito, *ibid* 278.

<sup>40</sup> *ibid* 273-274.

<sup>41</sup> *ibid* 303.

<sup>42</sup> *ibid* 304.

<sup>43</sup> *ibid*.

<sup>44</sup> EH Short and Associates, above 173.

<sup>45</sup> The author carried out the first baseline audience/public research in Ireland as part of this thesis. See below.

<sup>46</sup> A Bukoff, 'The Effect of Video Camera Techniques on the Pre-Deliberation Judgements and Perceptions of Role-Playing Jurors' (PhD thesis, Kent State University 1984).

<sup>47</sup> SA Esposito, above 19.

entertain and is ratings driven.<sup>49</sup> RK Sherwin offers a critical assessment of the blurring of law, film, television and entertainment in *When Law Goes Pop, The Vanishing Line Between Law and Popular Culture*.<sup>50</sup> He asks ‘[w]hat happens when law becomes just like film and TV?’<sup>51</sup> He also refers to a *feedback loop*, whereby actions inside the courtroom are influenced by the media footage outside.<sup>52</sup> When law goes pop, the normal procedural and institutional rules break down or fail to function.<sup>53</sup>

RK Sherwin highlights how Tru TV (previously Court TV) competes with CNN and afternoon soaps.<sup>54</sup> The images on Tru TV are ‘disproportionately violent and eroticized.’<sup>55</sup> Lawyers have also taken part in docudramas.<sup>56</sup> A Law Society Gazette (UK) article refers to an impromptu survey in the US which found that six out of thirty afternoon shows were “‘People’s Court’ – type programmes.”<sup>57</sup>

Given that certain TCB is often scheduled as or at the same time as, daytime television, this is a topic deserving of research. The ‘format of all of these [daytime TV] shows is essentially the same.’<sup>58</sup> Sports news<sup>59</sup> is also deserving of analysis to the extent that it can be shown at the same time as CB. The representation of witnesses and parties is generally not researched in terms of TCB proceedings filmed and broadcast.<sup>60</sup> HA

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<sup>48</sup> *ibid.*

<sup>49</sup> Interviewed on the Fionn Davenport show on Newstalk, on 26 November 2010.

<sup>50</sup> Sherwin also offers an insightful and critical analysis of the differing intentions behind the *Estes* and *Chandler* cases. See RK Sherwin, above 140 ff, and 247-248. Also RK Sherwin, ‘The Jurisprudence of Appearances’ (1999-2000) 43 *New York Law School Law Review* 821. He identifies, in particular the rule whereby whatever the media highlights will bear the mark of the reality/fiction confusion, and the corollary of the rule that once one enters into the jurisprudence of appearances it is difficult to control how the image will be spun. See *ibid.*

<sup>51</sup> RK Sherwin, above 17.

<sup>52</sup> *ibid.* 27.

<sup>53</sup> *ibid.* 36.

<sup>54</sup> *ibid.* 163.

<sup>55</sup> *ibid.* 165.

<sup>56</sup> One such docudrama, *Born With Two Mothers*, is referred to in ‘Lawyers Keep It Real in Court Battle’ (28 April 2005) *Law Society Gazette* < [www.lawgazette.co.uk](http://www.lawgazette.co.uk) > accessed 24 October 2010.

<sup>57</sup> ‘The Verdict Is In: And You’re Out’ (4 August 2006) *Law Society Gazette* < [www.lawgazette.co.uk](http://www.lawgazette.co.uk) > accessed 24 October 2010. The same article also refers to a programme called *The Law Firm* which is similar to *The Apprentice* format for young lawyers. *ibid.*

<sup>58</sup> WB Carney, ‘Prime Time Law in America’ (1997) 147 *New Law Journal* 1845.

<sup>59</sup> One reference is B Hutchins and D Rowe, ‘Reconfiguring Media Sport for the Online World: An Inquiry Into “Sports News and Digital Media”’ (2010) 4 *International Journal of Communication* 696.

<sup>60</sup> One article along this theme is HA Shugart, ‘Ruling Class: Disciplining Class, Race, and Ethnicity in Television Reality Court Shows’ (2006) 17 *Howard Journal of Communications* 79.

Shugart refers to the genre of popular television reality shows.<sup>61</sup> Few studies appear to examine how the media frame the courts in their coverage.<sup>62</sup> S Gallant and J Epsworth refer to different forms of editing for specific types of media.<sup>63</sup> D Goldberg, G Sutter and I Waden also refer to television formats.<sup>64</sup> Live broadcasting of media events<sup>65</sup> is also relevant as certain TCB can be live. However, it does not yet seem to have been legal-empirically researched in detail. K Creech also refers to the lack of legal-empirical research and evidence of the concerns.<sup>66</sup> One media book states that ‘oral arguments on appeal are seldom well suited to broadcast news.’<sup>67</sup> A question arising is whether this affects what is selected for filming or broadcast from the court. Research can be directed to examine what occurs in courts normally and then how TCB uses and portrays this on to the audience. This has only received limited examination.<sup>68</sup>

### **Categorising the Forms of CB**

The author’s proposed categorisation for the various CB and TCB forms is detailed in the Appendices.<sup>69</sup> TCB categorisation can assist courts and legal-policymakers to gain an overall appreciation of the TCB issues and also to be able to assist the process of co-ordinated normative TCB effects-research.<sup>70</sup>

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<sup>61</sup> *ibid.*

<sup>62</sup> RA Clawson, HCN IV Strine, EN Waltenburg, ‘Frame Supreme Court Decisions: The Mainstream Versus the Black Press’ (2003) 33 *Journal of Black Studies* 784.

<sup>63</sup> S Gallant and J Epsorth, *Media Law, A Practical Guide to Managing Publication Risks* (Sweet and Maxwell 2001) 344 ff.

<sup>64</sup> One particular issue centres on intellectual property protection for the formats of certain television programmes. D Goldberg, G Sutter and I Walden, *Media Law and Practice* (OUP 2009) 194 ff. The main UK cases of *Green v Broadcasting Corporation of New Zealand* [1989] RPC 469; and appeal at [1989] RPC 700; and *Norowzian v Arks* (No 2) [2000] FSR 363, were each unfavourable to IP format protection in those particular cases. See *ibid.* Note also 224, *ibid.*, referring to IP trade mark protection issues for programme name formats.

<sup>65</sup> D Dayan and E Katz, *Media Events: The Live Broadcasting of History* (Harvard University Press 1992).

<sup>66</sup> K Creech, *Electronic Media Law and Regulation* (Focal Press/Elsevier 2007) 396.

<sup>67</sup> DM Gillmor, JM Barron and TF Simon, *Mass Communication Law, Cases and Comment* (Wadsworth 1998) 415.

<sup>68</sup> For example, the first Federal courts pilot.

<sup>69</sup> While the author chose the term wheel of justice in relation to this first representation of the forms of television courtroom broadcasting, the author subsequently found the following reference, ‘[t]he wheels of justice must not stop merely because as accused is of such prominence that he and his alleged misdeeds have been publicized throughout the state,’ unreported decision of Texas Court of Criminal Appeals [1964], apparently in *Estes v Texas*, referred to in KL Netteburg, ‘Cameras in the Courtroom: Is a Picture Worth a Thousand Words?’ (PhD thesis, University of Minnesota 1980) 17. Set out in the Appendices is a more detailed forms wheels or sub components of TCB.

<sup>70</sup> While, the following are not the focus of the thesis, it assists to appreciate the different forms of CB, and the nuances which research, courts and legal-policymakers may need to consider, namely, CB generally; MCB; RCB; iTCB; CCB; RYCB; ECB; PCB; jTCB (this could potentially be a sub-form of TCB); aTCB (This could potentially be a sub-form of TCB).

There are also challenges outside of the US Supreme Court challenge.<sup>71</sup> Some of the specific forms of TCB, and form issues include, reality entertainment eg *Judge Judy*, *People's Court* (rTCB); news (nTCB), documentary (dTCB); entertainment soap; entertainment fiction; others. We also need to consider whether it is a dedicated TCB channel (TCB TV) or a TCB programme (TCB-P) on a different channel, or a part of a programme (programme segment TCB). In terms of news (nTCB) above, we might consider full length broadcasts of cases or gavel to gavel (G2G-TCB); live TCB (ITCB); non-live TCB (nTCB). In terms of specific news segment TCB, we can consider whether the court segment is a headline story or a background story. In terms of each the court story segments, the broadcast can have no court pictures (-P TCB); pictures and no in-court sound (P- TCB); or pictures and in-court sound recordings (P+ TCB).

CB stories can also have pictures/sound only; or out-of-court pictures (oocp TCB); interviews or statements from parties (ip TCB); interviews with correspondents (ICs TCB); interviews with experts (ie TCB). TCB footage on news (nTCB) can also be long or short. These can be a long story or a short story (eg measured per seconds). As indicated above there can be live TCB (ITCB). In terms of the non-live TCB, these can include after the event; current pictures; file pictures; time of broadcast; channel; type of services, location of cameras; etc. In addition, and as referred to below, there can be TCB in different levels of courts eg appeal court or appeal TCB (aTCB). In terms of the justification and arguments, the prototypical argument is that TCB is or will be educational. The argument may be that it will enhance confidence (in the trial/court process). We can identify these as for public education (peTCB), for public information (piTCB) and for public confidence (pcTCB).

### **The Reality TCB Form**

The Reality TCB (rTCB) form may be the most constant form of TCB. SA Kohm identifies one of the most obvious but seldom discussed, forms of TCB, namely US reality-based TCB.<sup>72</sup> SA Kohm examines the *Judge Judy* and *People's Court* reality programmes. This form of TCB programming is found to be entertainment, or a 'use of

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<sup>71</sup> The author seeks to overcome the lack of definition to date, by proposing a definition of TCB. This thesis is limited to the author's definition of TCB: television courtroom broadcasting as such relates to TCB cameras in the courtroom, filming courtroom proceedings for live and or contemporaneous television push broadcast to the general public.

<sup>72</sup> SA Kohm, 'I'm Not A Judge But I Play One On TV: American Reality-Based Courtroom Television' (PhD thesis, Simon Fraser University 2004). While this identification is useful



judgement as a form of entertainment.<sup>73</sup> Interestingly, while we frequently have commentators saying that TCB is real and shows exactly what goes on in the courtroom, SA Kohm notes that reality based TCB [rTCB] also claims to be ‘real.’<sup>74</sup> However, reality television may be the ‘most unrealistic of all television genres.’<sup>75</sup>

These reality based courtroom programmes are also different and distinct from fictional drama courtroom programmes, in that they claim to portray reality, real people and not participants.<sup>76</sup> The essential features of reality television are an emphasis on real, non participants and a focus on the unusual or extraordinary.<sup>77</sup> He also describes the ‘close cousin’ of reality TCB as trash television shows such as *Oprah* and *Jerry Springer*.<sup>78</sup> Other day time television programmes include soap operas, game shows and television tabloid talk shows.<sup>79</sup> Reality TCB (rTCB) competes with these. SA Kohm refers to mainstream news genres, documentary genres,<sup>80</sup> and the reality television genre.<sup>81</sup> He also refers to the ‘tabloid [television] talk show format’<sup>82</sup> and the elements making up the talk show television genre.<sup>83</sup> He adds that programmes ‘featuring elements of real cases, real lawyers and the re-enactments of participants would be akin to the recreated crime scenes of *America’s Most Wanted*. However, just as *America’s Most Wanted* is less “real” than the video verite style of *COPS*, courtroom programs that mix actors and real lawyers and judges clearly lean more toward the fictional end of our continuum of reality.’<sup>84</sup> SA Kohm, while referring to N Rafter and CA Hahn, refers to a general ‘courtroom film genre.’<sup>85</sup>

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from the point of view of supporting the forms thesis, the TCB Reality Courtroom Broadcasting Form is not the core focus of this thesis.

<sup>73</sup> ibid iv.

<sup>74</sup> ibid 4.

<sup>75</sup> ibid 26.

<sup>76</sup> ibid.

<sup>77</sup> ibid 42.

<sup>78</sup> ibid 16.

<sup>79</sup> ibid 407.

<sup>80</sup> ibid 30.

<sup>81</sup> ibid 32.

<sup>82</sup> ibid 64, referring to JM Shattuc, *The Talking Cure: TV Talk Shows and Women* (Routledge 1997).

<sup>83</sup> ibid 65, again referring to Shattuc, above. ibid 65, 408, 409.

<sup>84</sup> ibid 82.

<sup>85</sup> ibid referring to N Rafter and CA Hahn, ‘Courtroom Files’ in N Rafter, *Shots in the Mirror: Crime Films and Society* (Oxford University Press 2000). However, this includes practically all courtrooms contained in moving pictures. Significantly smaller, albeit no less complex, is what is referred to herein as TCB, and audience is the focus of this thesis. There is a ‘dearth’ of research on reality based TCB – despite it being around for decades.

While referring to the website iCourthouse.com, SA Kohm acknowledges ‘the reality-based courtroom TV format.’<sup>86</sup> He also refers to ‘media forms.’<sup>87</sup> He acknowledges that there is overlap and borrowing of ‘formats and structures among ... reality court TV shows.’<sup>88</sup> He labels *People’s Court* as the progenitor of ‘the reality-based courtroom television format.’<sup>89</sup> His content analysis of *Judge Judy* indicates that it ‘follows a consistent and predictable format.’<sup>90</sup> It is ‘a highly visual, commercially driven media format.’<sup>91</sup> Later Kohm states that more research is required in relation to the audience(s) of reality-based courtroom television broadcasting ‘genre.’<sup>92</sup> J Ossinger<sup>93</sup> indicates that Tru TV is infotainment programming. J Ossinger also contrasts Tru TV with public service broadcasting.<sup>94</sup> She also refers to drama and fictional court programming such as *Judge Judy* and *Law & Order*.<sup>95</sup>

## US

The US popular commentary also supports the forms thesis. While RL Goldfarb is in favour of TCB, he is not advocating a free for all where the media is able to choose and undertake any and all potential forms of TCB. Rather he seeks to ‘find a sensible solution to ... “How can we best blend new media technologies with our traditional and revered commitment to democracy and justice?”’<sup>96</sup> RL Goldfarb concludes that TCB in the US should be a ‘publicly run, non commercial channel’ run according to strict legal rules and procedures.<sup>97</sup> He is clearly favouring more considered forms of TCB, and not the more entertainment leaning forms.

S Kohm<sup>98</sup> refers to *People’s Court* and *Judge Judy* as two ‘models’ of ‘American’ rTCB. He sees significant difference between each of these programme styles.<sup>99</sup> C-SPAN, the

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<sup>86</sup> ibid 100.

<sup>87</sup> ibid 118.

<sup>88</sup> ibid 123.

<sup>89</sup> ibid 126, 190.

<sup>90</sup> ibid 137.

<sup>91</sup> ibid 138.

<sup>92</sup> ibid 398.

<sup>93</sup> J Ossinger, *Electronic Access to Courtrooms: Television as an Educational Socializing Agent on the Judiciary* (MA thesis, University of Maine 2006) 1. But note carveouts at 24 as regards unrealistic infotainment and its effect of creating low confidence in the court system. That is ‘educational programming told through an entertainment medium.’ ibid.

<sup>94</sup> ibid 31–32.

<sup>95</sup> ibid 37.

<sup>96</sup> Referred to in book review, RP Matsch, ‘Television in the Courtroom: Mightier Than The Pen?’ (1999) 97 *Michigan Law Review* 2037. Referring to RL Goldfarb, *TV or Not TV: Television, Justice, and the Courts* (New York University Press 1998).

<sup>97</sup> RP Matsch ibid.

<sup>98</sup> SA Kohm, ‘The People’s Law Versus Judge Judy Justice: Two Models of Law in American Reality-Based Courtroom TV’ (2006) 40 *Law and Society Review* 693.

<sup>99</sup> ibid.

US cable network has a standing offer to cover cases in full if permitted to televise Supreme Court cases.<sup>100</sup> Courtroom View Network (CVN) provides gavel to gavel (G2G) coverage of cases.<sup>101</sup> It does not use commentators or editing techniques.<sup>102</sup> CVN covers civil cases almost exclusively.<sup>103</sup> Therefore, it is quite a different type of TCB than that under Tru TV (formerly Court TV). Justice Tunheim refers to state rules in the US, and describes that while most US states,

‘permit some use of cameras in their courts, such access by the media is not unlimited. The majority of states have imposed restrictions on the use of cameras in the court or have banned cameras altogether in certain proceedings. Although it is somewhat difficult to obtain current information, it appears that approximately 31 states that permit cameras have restrictions of some kind written into their authorizing statutes, such as allowing coverage only in certain courts, prohibiting coverage of certain types of proceedings or of certain witnesses, and/or requiring the consent of the parties, victims of sex offenses, and witnesses. Thirteen states, including the District of Columbia, do not allow coverage of criminal trials. In nine states, cameras are allowed only in appellate courts. The District of Columbia prohibits cameras altogether. Utah allows only still photography at civil trials. In fact, only 19 states appear to provide the presiding judge with the type of broad discretion over the use of cameras contained in this [proposed] legislation.’<sup>104</sup>

He also states that ‘[p]resently, two of the 13 appellate courts, the Second and Ninth Circuits, have decided to permit coverage in appellate proceedings. This decision was made by the judges of each court. As for cameras in district courts ... the district court in that circuit already have such a prohibition.’<sup>105</sup> The judge concludes that it ‘is clear from the widely varying approaches to the use of cameras that the state courts are far from being of one mind in the approach to, or on the propriety and extent of, the use of cameras in the courtroom.’<sup>106</sup>

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<sup>100</sup> See EF Daniels, ‘Cameras May Yet Cover the Supremes’ *Multichannel News* (20 November 2000) 84.

<sup>101</sup> J Herman and D Kawamoto, *Memorandum, Prepared for the Committee on Court Administration and Case Management (Hon John R Tunheim, Chair), the Judicial Conference of the United States, submitted on Behalf of Courtroom View Network* (6 June 2009) 22.

<sup>102</sup> *ibid.*

<sup>103</sup> *ibid.*

<sup>104</sup> Judicial Conference of the United States, *Statement of the Honourable John R Tunheim, Judge, United States District Court for the District of Minnesota, For the Committee on the Judiciary of the United States House of Representatives, Hearing on Cameras in the Courtroom: The ‘Sunshine in the Courtroom Act of 2007’ HR 2128* (27 September 2007) 6-7.

<sup>105</sup> *ibid* 6.

<sup>106</sup> *ibid* 7.

Justice Diarmuid O’Scannlain refers to the *Simpson* (criminal) case, and suggests that no one ‘believes that the presence of cameras in that courtroom did not have an impact on the conduct of the attorneys, witnesses, jurors, and judge – almost universally to the detriment of the trial process.’<sup>107</sup> He also distinguishes trial and appellate courts.<sup>108</sup> R Goldfarb also indicates that there are different ‘forms’ of TCB and TCB permission.<sup>109</sup> Goldfarb states that ‘[e]very State before they adopted their rule had a press-bar-media-wiseman/wise woman committee that ran for from a year to 3 years to study all of the perceived problems of the impact or potential impact of television on witnesses, on jurors, on lawyers, and all the participants to the administration of justice.’<sup>110</sup> ‘[I]n every one of those studies, the result was once sceptical lawyers and judges found that the presence of the TCB camera, generally unseen, had no impact, and that the real disturbances in the justice system were what went on outside the courtroom as opposed to what went on in the courtroom.’<sup>111</sup> No definitions and no body of legal-empirical research are referred to. Goldfarb continues, ‘[i]n addition to the studies by the States and the Federal Judicial Centre, I went to the Lexis-Nexis machinery and found every study that had ever been made by sociologists, pollsters, and other social scientists to try and determine scientifically, such as you can under these circumstances, whether there really is something to be said for the fact that the presence of an unseen eye would somehow or other disrupt the participants.’<sup>112</sup> ‘[A]fter thirty or forty seconds one failed to even notice’ the TCB cameras.<sup>113</sup> He does not refer, for example, to in-court distraction-effects. Nor does he refer to methodologies such as eye-tracking. However, R Goldfarb is not in favour of uncontrolled TCB forms, rather, he is in favour of gavel to gavel (G2G) coverage.<sup>114</sup>

E Thompson also confirms that TCB cameras ‘continue to be banned in most American courtrooms – state and Federal.’<sup>115</sup> E Thompson also refers to the *Simpson* (criminal) case ‘backlash.’<sup>116</sup> In 1989, forty four US states permitted video and or audio coverage

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<sup>107</sup> O’Scannlain J, (Exhibit 4) *Statement of Judge Diarmuid O’Scannlain On Behalf of The Judicial Conference of the United States Regarding S892 As Applied to Federal Courts*, 63.

<sup>108</sup> *ibid* 64-65.

<sup>109</sup> R Goldfarb, in *Statement of Ronald Goldfarb, Allowing Cameras and Electronic Media in the Courtroom, US Senate Subcommittee on Administrative Oversight and the Courts, Committee on the Judiciary* (Washington DC Wednesday 6 September 2000) 55.

<sup>110</sup> *ibid*.

<sup>111</sup> *ibid*.

<sup>112</sup> *ibid* 56.

<sup>113</sup> *ibid*.

<sup>114</sup> *ibid* 58, and 59.

<sup>115</sup> E Thompson, ‘Courtroom Cameras: issue Moves in and Out of Focus’ *Quill Magazine* (September 2004) 7.

<sup>116</sup> *ibid* 7, 8. Also, MA Franklin, DA Anderson and LB Lidsky, *Mass Media Law, Cases and Materials* (Foundation Press 2005) 702.

on a permanent or experimental basis.<sup>117</sup> Federal courts were also experimenting with videoing for record keeping purposes.<sup>118</sup> In 1998 one media text refers to thirteen states requiring defendant consent for TCB.<sup>119</sup> Ohio and Iowa adopted more restrictive forms of TCB after the study periods.<sup>120</sup> Other media texts confirm that the rules are ‘diverse’<sup>121</sup> and the ‘laws vary from state to state.’<sup>122</sup> DM Gillmore et al suggest the following legal-policy queries, namely,

‘many difficult questions remain unanswered, they are not mainly legal questions. How does editing of proceedings affect the perceptions of the audience? Does broadcast coverage actually educate the public about the judicial system, as broadcasters have argued when seeking camera coverage? Does broadcast coverage affect the fairness of trials? Can photojournalists function with quiet dignity? Did televising of the *OJ Simpson* (criminal) trial turn out to be a setback for cameras in the courtroom?’<sup>123</sup>

Photographers or photojournalists were very evident during the *Pistorius*<sup>124</sup> case, for example.

## UK

While never explicitly mentioned, some of the UK literature also supports the forms categorisation. H Schleiff states that the prospect of a ‘British model following that of Court TV is highly unlikely.’<sup>125</sup> The same article quotes Lord Falconer when he announced a UK TCB pilot, which states that the form of the pilot will be in non-jury courts, with few witnesses, and a right to object to the TCB.<sup>126</sup> Witnesses will not be filmed.<sup>127</sup> These types of issues also arose in *Pistorius* where some witnesses did not want to be filmed and some witnesses were reported as not attending because of the TCB. Lord Falconer continues that ‘[w]e don’t want our courts turned into US-style media circuses. We will not have *OJ Simpson*-style trials in Britain.’<sup>128</sup> H Schleiff, who was Chairman and CEO of Court TV (as it then was) suggests that in the US, cameras in the

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<sup>117</sup> DM Gillmor, JM Barron and TF Simon, *Mass Communication Law, Cases and Comment* (Wadsworth 1998) 416.

<sup>118</sup> *ibid.*

<sup>119</sup> *ibid* 417.

<sup>120</sup> DM Gillmor, JM Barron and TF Simon, *ibid* 417.

<sup>121</sup> *ibid.*

<sup>122</sup> RL Sadler, *Electronic Media Law* (Sage 2005) 367.

<sup>123</sup> DM Gillmor, JM Barron and TF Simon, *ibid* 419.

<sup>124</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>125</sup> H Schleiff, ‘Cameras in Courts’ (2004) 154 *New Law Journal* 1745.

<sup>126</sup> *ibid.*

<sup>127</sup> *ibid.*

<sup>128</sup> *ibid.* Lord Falconer concluded that ‘[j]ustice should be seen to be done. But our priority must be that of justice.’ *ibid.*

courtroom are becoming the norm.<sup>129</sup> This is a misrepresentation, as it ignores the different forms of TCB in the US and also suggests that there is uniform and general adoption of TCB. Neither of these is the case. H Schleiff makes the interesting point that trials have a wider impact on the public than in previous years.<sup>130</sup> However, there are many counter arguments to this, such as enhanced fragmentation of the media and ever increasing numbers of channels, including news channels. An article in the New Law Journal agrees that there is no uniform TCB or guidelines in the US.<sup>131</sup> The same article also implicitly acknowledges the point that there are different audiences.<sup>132</sup> While the UK official consultation does not expressly refer to the form issues, it provides ample evidence that form issues exist and are live concerns. The UK Department of Constitutional Affairs consultation entitled *Broadcasting Courts*,<sup>133</sup> launched in November 2004<sup>134</sup> distinguishes different TCB issues, in particular, text only, sound only, still pictures and moving pictures plus sound.<sup>135</sup> The consultation is therefore relevant in relation to the forms issue. Also, Lord Falconer in the statement launching the consultation document, clearly sees differences between different types of cases. He sees ‘no case’ for TCB ‘involving children’ and also feels the issue of whether TCB should include criminal cases requires careful consideration.<sup>136</sup> The position of witnesses should not be worsened or ‘jeopardise[d].’<sup>137</sup> Very little legal-empirical research refers to witness issues, and none of which appears to be replicated research. The *Pistorius*<sup>138</sup> case highlights that sensitive TCB witness issues are still an important issue.

The executive summary states that the ‘complexity of the [TCB] issues is increased by the number of different types of proceedings which would be affected, the stages each case go through, and the different participants involved.’<sup>139</sup> This refers to *form* issues, *process* issues and participant effect issues. It adds that ‘[i]nternational experience, and the experience of televising Parliament, offer various models.’<sup>140</sup> It points out that an option

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<sup>129</sup> *ibid.*

<sup>130</sup> H Schleiff, ‘Cameras in Courts’ (2004) 154 *New Law Journal* 1745.

<sup>131</sup> ‘Court TV Deterrent’ (1988) 138 *New Law Journal* 906.

<sup>132</sup> *ibid.*

<sup>133</sup> Department of Constitutional Affairs [UK], *Broadcasting Courts, Consultation Paper* (CP 28/04 November 2004).

<sup>134</sup> See < [www.dca.gov.uk/consult/courts/broadcasting-cp28-04.htm](http://www.dca.gov.uk/consult/courts/broadcasting-cp28-04.htm) > accessed 14 December 2009.

<sup>135</sup> Department of Constitutional Affairs [UK], *Broadcasting Courts, Consultation Paper* (CP 28/04 November 2004) 41.

<sup>136</sup> *ibid.* 5.

<sup>137</sup> *ibid.*

<sup>138</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>139</sup> *ibid.* 6.

<sup>140</sup> *ibid.* 7. Also 20.

could be to proceed with RCB, as occurred with initial Parliamentary broadcasting.<sup>141</sup> The consultation further refers to and distinguishes TCB, internet iTCB and even a dedicated TCB channel.<sup>142</sup>

The Protocol Governing Pilot Filming in the Appellate Jurisdiction of England and Wales, Royal Courts of Justice 2004 also refers to forms, where it states that ‘[t]he audio-visual images made during the appellate pilot filming project may **only** be used in a format laid down by the heads of division in support of the pilot project’<sup>143</sup> (original emphasis). The consultation also states that ‘Section Three gives details of the different types of court proceedings, and information relevant to the question whether they might be broadcast.’<sup>144</sup> Section Three refers, inter alia, to different types of hearings in criminal courts, civil courts, family courts, coroners’ courts and also tribunals.<sup>145</sup> It also differentiates the many different potential participants in the different court settings.<sup>146</sup> It also differentiates some of the different parts of the respective cases, such as opening statements, closing statements, cross examination of witnesses, judicial summing up of the case, decision delivery, and sentence delivery.<sup>147</sup> It also refers to the press and public as attendees in court proceedings,<sup>148</sup> which does not appear to be referred to in any of the US research. This reiterates (implicitly) the point made by the author that different issues and different considerations arise depending on each respective form of court and form of TCB.

The thesis highlights that there is not just one all encompassing form of TCB. This is implicit in the UK consultation when it states that ‘broadcasting’ covers ‘a range of options.’<sup>149</sup> It adds that ‘[b]efore any decision could be taken whether to change current provisions, close attention needs to be paid to the needs of the participants in court proceedings – particularly ... witnesses and litigants in person ... impact on people’s willingness to take part in proceedings ... more of an ordeal.’<sup>150</sup> It is unclear if any UK witness research has been undertaken.

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<sup>141</sup> *ibid* 6.

<sup>142</sup> *ibid*, see 42 for example.

<sup>143</sup> Referred to *ibid* 99.

<sup>144</sup> *ibid* 6.

<sup>145</sup> *ibid* 21 ff.

<sup>146</sup> *ibid*.

<sup>147</sup> *ibid* and 23.

<sup>148</sup> *ibid* 24.

<sup>149</sup> *ibid* 6. Also 40 ff.

<sup>150</sup> *ibid*.

It is notes that various arguments can vary depending on the form.<sup>151</sup> A large issue is how any proposed TCB would be regulated and controlled.<sup>152</sup> ‘Most jurisdictions where broadcasting ... [TCB] is allowed apply strict rules.’<sup>153</sup> The rules, the consultation points out, can govern what may be recorded, what may be shown, allocating control decisions, etc.<sup>154</sup> It also refers to different stages of the proceedings, different types of media, the amount of editing, editing and mandated minimum content amounts, broadcasting delays, subsequent follow on use of footage, etc.<sup>155</sup>

Many organisations could be responsible for undertaking the TCB filming.<sup>156</sup> This is seldom considered or researched, nor its effects. The UK consultation notes that the Scottish Practice Note of Lord Hope prohibited live TCB (ITCB).<sup>157</sup> As regards the first TCB broadcast from Scotland, it notes that *The Trial* documentary, was a ‘dramatic and educative entertainment’ form.<sup>158</sup> No substantial body of educational TCB research appears to have been undertaken. While the UK consultation implicitly agrees with different forms of TCB, and indeed CB, it falls short. For example, it implies an acceptance of the view that TCB in the US states (with the exception of New York) is the same.<sup>159</sup> However, there is huge variety between US states, and even within states, and between states and Federal courts.

### **Additional Form Considerations**

Once we delve into the different forms, we also need to consider additional issues which can potentially influence legal, rights and legal-policy discussions.

- *Criminal/Civil*: The New York study found that ninety four percent of applications for camera access were for criminal trials.<sup>160</sup> A subset was analysed to show a further breakdown, fifty nine percent violent crime, seven percent sex crimes, thirty four percent non-violent crimes.<sup>161</sup> The research to date does not seek to distinguish effects as between civil and criminal TCB;

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<sup>151</sup> Note para 6, *ibid* 7.

<sup>152</sup> *ibid* 7.

<sup>153</sup> *ibid*.

<sup>154</sup> *ibid*.

<sup>155</sup> *ibid* 67.

<sup>156</sup> *ibid* 7.

<sup>157</sup> *ibid* 18. 6 August 1992.

<sup>158</sup> *ibid*, referring to L Green in the *Australian Law Journal*. Full citation not given. (1995) 69 *Australian Law Journal* 477.

<sup>159</sup> *ibid* para 38 at 20.

<sup>160</sup> New York State Committee to Review Audio-Visual Coverage of Court Proceedings, *An Open Courtroom: Cameras in New York Courts* (Fordham University Press 1997) 37 and 37, n 43.

<sup>161</sup> *ibid*.



- *Presentation:* The order of presentation is very important. The framing and sequential presentation of questions and evidence are as much a part of the legal process and advocacy<sup>162</sup> as the importance of the legal concepts at play.<sup>163</sup> Courts and legal practitioners appreciate the dangers of bias and ‘leading questions.’ It is recognised that it is legitimate to have rules and procedures to address what, and how, matters may be presented in court. This order of presentation at trial has equivalent parallels in both print journalism and media programming. It is difficult, therefore, to convincingly argue that the different forms of TCB should not be issues for consideration and research. In addition, it cannot reasonably be argued that there should be no rules in place influencing the final TCB product;
- *Rules:* SL Alexander in the observational part of the research, notes that the media covering trials had a ‘great deal of freedom.’<sup>164</sup> The amount of freedom, the restrictions, the predefined rules or regulations, and what a particular judge may impose, all combine to ensure that the form of gathering broadcast footage can differ significantly. In one case the judge indicated in an interview afterwards that he granted more flexibility to the media because there was no jury and because he understood that the case may have national interest.<sup>165</sup> The rules and regulations governing TCB have an important impact on what is ultimately broadcast. W Petkanas agrees that in the US the various state laws relating to TCB are ‘extremely diverse.’<sup>166</sup> EH Short and Associates also refer to the state rules as being ‘diverse.’<sup>167</sup> Many states are ‘still formulating policies.’<sup>168</sup> KL Netteburg also acknowledges ‘the wide variation in types of coverage’ rules.<sup>169</sup> The literature does not recognise how the rules change and impact the form of in-court filming and also the end product footage that is broadcast. Neither does it recognise that the forms of in-court filming and rules each impact upon the gatekeeping, selection, production and editing processes. Netteburg does acknowledge, however, three themes of variation, namely, types of courts covered; how access rules are changed; and whether courtroom participant consent is needed.<sup>170</sup> One theme refers to camera access to trial courts only; appeal courts only; or both<sup>171</sup>;

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<sup>162</sup> However, there are also critics of the Common Law adversarial system of justice. See JD Jackson, ‘Law’s Truth, Lay Truth and Lawyers’ Truth: The Representation of Evidence in Adversary Trials’ (1992) III *Law and Critique* 29-49.

<sup>163</sup> See, for example, L Walker, J Thibaut and V Andreoli, ‘Order of Presentation at Trial’ [1972] 82 *Yale Law Journal* 216. This work also involved an interesting and insightful experiment.

<sup>164</sup> SL Alexander, above 115.

<sup>165</sup> Referred to *ibid* 115.

<sup>166</sup> W Petkanas, above 41.

<sup>167</sup> EH Short and Associates, above 1 n 3.

<sup>168</sup> SR Pasternack, above iv.

<sup>169</sup> KL Netteburg, ‘Cameras in the Courtroom: Is a Picture Worth a Thousand Words?’ (PhD thesis, University of Minnesota 1980) 4.

<sup>170</sup> *ibid* 4-5.

<sup>171</sup> *ibid* 5.

- *Gavel to Gavel (G2G)*: EH Short and Associates found that full or gavel to gavel (G2G) cases were seldom shown.<sup>172</sup> The original Florida study uses gavel to gavel (G2G) cases.<sup>173</sup> Sometimes television programmes will broadcast the testimony of certain witnesses gavel to gavel (wG2G).<sup>174</sup> In the Steinberg case in New York, WCBS broadcast the case gavel to gavel (G2G), while competing stations WABC and WNBC broadcast hours of coverage but not full gavel to gavel (extended but selected)<sup>175</sup>;
- *Live/Recorded*: Cases can also be included for later programming or televised live. The first live broadcast occurred as far back as 1955 (*Washburn* case in Waco, Texas).<sup>176</sup> No research appears dedicated to effects of live TCB broadcasting (ITCB);
- *Footage Angles/Shots/Zooms*: R Enter notes that TCB visual content involves two elements, namely, the event and how it is filmed.<sup>177</sup> The television director ‘guides’ the audience through the camera angles and perspectives they choose.<sup>178</sup> The camera angles and camera distance are significant.<sup>179</sup> Zooming is also important<sup>180</sup>;
- *Closed Circuit CB*: It is surprising that there was a closed circuit trial relay as long ago as the 1950’s, when a relay was permitted from the courtroom to an auditorium in the Oklahoma case of GL Hart.<sup>181</sup> No research appears dedicated to this issue, albeit not the direct focus of the thesis;
- *Tribunal Forms*: While tribunals are not the direct focus of this thesis, there have been various tribunals in Ireland and the UK. There is generally no televising of such proceedings but there has been interest to do so<sup>182</sup>;
- *New Forms*: K Erjavec and MP Kovacic make two points in relation to genres.<sup>183</sup> They argue for a more expansive understanding of genre forms.<sup>184</sup> Also, they categorise mobi news (or news using mobile phone cameras) as a new genre.<sup>185</sup> They also refer to the process of production issues,<sup>186</sup> as well as produce a mobi new [production] genre chain.<sup>187</sup> TCB genre issues need to be researched;

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<sup>172</sup> EH Short and Associates, above 54.

<sup>173</sup> P Thaler, above 9.

<sup>174</sup> *ibid* 103, giving the example of the testimony of Hedda Nussbaum in the Steinberg case in New York.

<sup>175</sup> *ibid* 116.

<sup>176</sup> R Enter, ‘The Image of the Judiciary: A Semiotic Analysis of Broadcast Trials to Ascertain Its definition of the Court System’ (PhD thesis, New York University 1993) 15.

<sup>177</sup> *ibid* 26.

<sup>178</sup> *ibid* 27.

<sup>179</sup> *ibid* 28.

<sup>180</sup> *ibid* 78.

<sup>181</sup> P Thaler, above 21, referring to S Barber, above, but without page citation.

<sup>182</sup> One of the few general texts is C Vismann and Ogger trans, S, ‘Tele-Tribunals: Anatomy of a Medium’ (2003) 10 Grey Room 32, 5-21. This is an MIT Press Journals publication.

<sup>183</sup> K Erjavec and P Kovacic, ‘A Discursive Approach to Genre, Mobi News’ (2009) 24 European Journal of Communication 147.

<sup>184</sup> *ibid*.

<sup>185</sup> *ibid*.

<sup>186</sup> *ibid* 148.

<sup>187</sup> *ibid* 153.

- *Permission:* We can consider who/what grants TCB access permission. There is no uniform form of TCB. In terms of access, this can vary between a number of access situations. A judge can allow an access request on a case by case basis within their own decision making power and discretion (so long as there is no higher rule preventing them). On the other hand, courts or higher courts can establish the ground rules which permit and provide for TCB. The latter may have more to commend it<sup>188</sup>;
- *Application:* Legal-policymakers coming to these issues first time may be interested to know if the media have to apply for access in each instance. If so, the next issue to consider is to whom they apply. We have no clear understanding if most instances of TCB are conditional on a prior application by the media. If there is an application, we can examine whether these apply under some predefined procedures set out by a superior court, judges, the court services, or legal-policymakers. Other issues include whether the procedure, application form, and decision recorded; the ultimate result of the filming and broadcasting; if this also recorded; the trends and implications; if there are frequent instances where judges individually are being asked to permit TCB, in the absence of a superior ruling or policy on the issue, how beneficial is it to permit such undocumented practices. Where there are application procedures, these may not be sufficient or easily documented for interested parties whom wish to consider them. For example, they may wish to see if there a reference to the type and style of programming to be used; if there a reference to what can and cannot be done with the footage for the intended courtroom broadcast; if there a reference to secondary uses of the footage; the area of access applications is an area ripe for research and comparison, and partly because in some instances we can identify some application procedures;
- *Control Rule:* Interested parties may well be concerned to understand what procedures, controls or restrictions apply. There are TCB controls and restrictions which may be imposed eg safety of jurors; application procedures. Equally there have been many TCB broadcasts where there has been no predetermined formal procedural controls in place, such as where a judge is asked to permit access and grants the request. While such a judge may (or may not) provide certain limited and loose formalities, they are seldom if at all documented. Such ad hoc case by case TCB is undesirable in that it contributes to uncoordinated TCB and TCB practice. Equally, it is much more difficult to document and to research the issues involved in such instances. In terms of where there are some controls, these may be very basic and general, or may be more considered and involved, for example, associated research;
- *Restrictions/Control Imposed By:* We can consider who and what can control or restrict the access and filming. Not all TCB has had documented procedures. In those that have, there

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<sup>188</sup> It is also possible for politicians as legislators to provide a statutory framework permitting and providing for TCB. There is an example of such a measure at the moment where some US politicians are trying to introduce a law allowing for television cameras in Federal courts. See ‘Glassley Pushes for Cameras in Federal Courts’ (Des Moines News 20 March

is again a disparity. Some can be imposed by individual judges, higher courts or higher judges, or alternatively by a legal statute. Differences are also apparent between court codes and legal statutes which are TCB specific, media specific or more general<sup>189</sup> with, for example, an amendment added to cater for TCB or media reporting. Obviously depending on the basis of the primary document permitting TCB, the level of consideration and or detail involved may vary. Also, the more detailed the document and the more consideration given to its drafting, the more considered will be its provisions, and in particular any associated research and also the restrictions and regulations encompassed within it<sup>190</sup>;

- *Length/Time*: Many different things are permitted/required to be filmed and or broadcast on TCB. The examples of TCB to date vary considerably. However, it appears that some are broadcast on a full length of the case basis, known as gavel to gavel (G2G). Sometimes this has been required by the judge or the rule or statute catering for TCB. Other television courtroom broadcasts can vary according to what the broadcast producer decides in a particular instance. Effectively the case is edited according to the decisions of the television station. The length of broadcast footage can also vary according to the broadcast use/form (see below) in a given instance. In each form the television producer decides what they want to leave in or leave out and accordingly on the length of the broadcast footage ultimately used. Sometimes also, a judge may impact upon the length of a case. For example, judges sometimes are able to delay the feed of a court broadcast if they decide something needs to be edited or redacted out from the footage actually broadcast to the public.<sup>191</sup> Similarly a judge may need to halt footage, which again impacts on the length of the case. In the *Simpson* (criminal) case Judge Ito halted footage when jurors were shown on television, which was not permitted. The *Pistorius*<sup>192</sup> footage was also halted on at least one occasion. It is unclear if anyone has undertaken research into how frequently such issues arise and or the amount of (additional) administrative efforts required. Where the full length of a case must be shown, whether live or relayed subsequently, this can impact on whether the case is shown at all, or indeed where it is shown eg peak or off peak times;
- *Relay and Filming Form*: How court scenes are captured on film varies considerably across a number of scenarios. It can be live, recorded, delayed, edited by court, etc. Again there

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2009) < [www.kcci.com/news/18975176/detail.html](http://www.kcci.com/news/18975176/detail.html) > accessed 16 October 2010). Also see < [www.opencongress.org/bill/110-s352/show](http://www.opencongress.org/bill/110-s352/show) > accessed 19 January 2014).

<sup>189</sup> An example of general rules is the California Rules of Court (Revised 1 January 2009).

<sup>190</sup> The Michigan Model Guidelines, would be an example of court rules and procedures for CB which is more considered and thoughtful. It would be difficult for a judge, on his own, to be expected to think of all of the issues in, and upon which, the Michigan Model Guidelines are based, see below. However, there are many more issues and considerations which even the *Michigan Model Guidelines* need to encompass. NT Gardner, 'Cameras in the Courtroom: Guidelines for State Criminal Trials' (1985) 84:3 Michigan Law Review 475.

<sup>191</sup> For example, some of the international tribunals and courts which are broadcast. Indeed this also occurred as far back as 1962 in the case of *State v Manley* Docket Number 22092, Oklahoma County District Court, as referred to in W Freedman, above 42-43.

<sup>192</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

appears no categorisation, definition and research across the instances of TCB, thus preventing an overall appreciation and understanding of TCB per se. Legal-policy, rights, research and policy may well be better informed by considering the different types of filming TCB;

- *Programme-Use Form*: An issue we can consider is what the style of programme that the TCB footage is used for. There are many instances of TCB broadcasting and many different programmes which use TCB footage. Yet, we still do not know what these are or their individual prevalence. It is very clear that we need to start research into all of the different types of programmes, and channels, which use TCB footage. This is required so that we can properly see the extent of TCB and which forms predominate. Such research also interfaces with consideration of the various arguments used in relation to TCB. Of these, the most important is possibly the education arguments and issues. To better consider the use of the court footage in each of the possible TCB programmes, we should consider the different forms of TCB programmes that many exist;
- *Broadcast Content Use*: Often overlooked is the issue of how the TCB broadcast content is used. The broadcast use and broadcast forms of TCB is perhaps where we get most differences. There as many uses and forms of TCB as there are forms of broadcasting and forms of television programming. These can vary from a number of parts of a case relayed as part of a headline news programme item (which differs from something backgrounded or shown later in the broadcast) to, for example, still shots taken from courtroom film used as a backdrop to a news story on a case, to current affairs programmes to documentaries. Across these multitude of forms of TCB there is also a variety in scope for presenters to make comments and or introduce the case, or alternatively for a third party (eg expert, witness, party, police, etc) to comment on the case also.<sup>193</sup> In any discussions and research of TCB we need to be cognisant of the form employed and thereby appreciate the potentially different issues and different effects pertinent to that form. Not all forms are the same, and we should not presume that they are. Equally we should not presume that all effects of TCB are the same. Research should be specific and tailored to the form of TCB involved, including the TCB usage;
- *Broadcaster/Producer*: We can also consider potential issues regarding who broadcasts the courtroom footage. Just as much as TCB forms can have effects, or different effects, so too can different television courtroom broadcasters. Indeed, certain broadcasters may be more/less inclined towards certain TCB forms. The main traditional broadcasters are public<sup>194</sup> and commercial broadcasters.<sup>195</sup> However, we also have to consider the programme makers. These may be in house or independent programme makers.<sup>196</sup> In addition, the programme maker can be a dedicated regular court programmer or on occasion

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<sup>193</sup> The later is particularly evident in dedicated channel courtroom broadcasting in the US.

<sup>194</sup> Such as the BBC in the UK or RTE in Ireland.

<sup>195</sup> Examples being TV3 in Ireland and Tru TV in the US.

<sup>196</sup> The recent *The Barristers* programme and *Legal Eagles* appear to be examples of independent producers.

also a court dedicated courtroom broadcast channel. No research appears dedicated to this issue as yet;

- *Film Capture Form*: In the context of TCB there is an additional category whereby sometimes the actual court staff will be responsible for the courtroom filming. They will then relay this to the interested television networks. More frequently however, it will be filmed by the broadcaster themselves when they have been permitted access. Other filming forms include filming by each television station which is interested or which has requested access. On other occasions the permitted form may require a single camera or a single operator and their film footage will be pooled<sup>197</sup> or given to other television networks, thus reducing the number of cameras and television operates in the actual courtroom. No research appears dedicated to this issue as yet;
- *Camera Form*: It is difficult for courts, researchers and legal-policymakers to identify and consider which rules apply without considering the type of TCB camera(s) used. One of the obvious areas where different forms are visible is when different forms of TCB camera are involved. In forms where the court personnel are involved in organising the footage, the filming may be more regular and may permit wall mounted cameras. These may or may not be fixed in that they may be permitted to move or pan about. They may also be allowed or forbidden from zooming in and out. In media focused forms, the cameras can vary between hand held (on shoulder) and fixed locations. Obviously a TCB camera operator may feel more inclined to move about in the courtroom when they are not limited to a fixed camera or fixed location. On occasion, courts have said that a camera can be present but that it must be at the back of the court, in a special booth or even on a balcony<sup>198</sup>;
- *Locus*: We do not generally know where a TCB camera can/must be in the courtroom, nor across courtrooms. There are different types of cameras and sometimes these have been specifically referred to by the court or court procedures. Location-effects and recording location data in effects-research is important. We do not have any general or overall impression or understanding of when, how or why TCB cameras must be located in particular locations, and the reasons and justifications. There is no research and also no guidance to other courts or interested parties. In future these legal and legal-policy discussion might be better informed by reference to definitions, location, forms and eye-tracking research;

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<sup>197</sup> See the example of State of Connecticut Judicial Branch, protocol for Broadcasting, Televising, Recording or Photographing Appellate Court Oral Arguments < [www.jud.state.ct.us/EXTERNAL/supapp/protocol\\_ap\\_oral\\_argu.htm](http://www.jud.state.ct.us/EXTERNAL/supapp/protocol_ap_oral_argu.htm) > accessed 19 January 2014.

<sup>198</sup> Indeed, some of the camera footage from the Irish courts is from a balcony. *State v Manley* [1962] also has a special booth, as referred to in W Freedman, *Press and Media Access to a Criminal Courtroom* (Quorum Books 1988) 42-43.

- *Equipment:* There is no overall picture of what equipment is and is not allowed across the various examples of TCB. Ideally, we should be recording this and referencing it in an overall perspective of TCB to inform researchers, courts and legal-policymakers;
- *Purpose/Aim of CB Form:* Across different TCB projects, pilots and experiments, we should consider what is the purpose of the TCB. There have been many arguments in favour of TCB and equally many legal arguments and judicial comments in relation to TCB. However, there are no definitions, comparisons, analysis or research of these. By continuing to ignore the gap in research in this regard we are condemning our discussion and consideration of TCB to repeat these flaws and gaps. There is no definitive compendium of all of the various proponent and opponent arguments, nor of the judicial and legal-policymaker justifications for permitting or refusing, as the case may be, TCB. This is certainly needed and called for. We equally need a means by which we can understand TCB, and trends in TCB, by which we easily see and compare the various categorised decisions for allowing and refusing access in individual cases. This needs to be referenced according to location, location-effects, level, type of court, type of case and the justifications and evidence relied upon. We should expand this also, across national boundaries to get an overall understanding also;
- *Broadcast Time:* There are many forms of TCB. One item which distinguishes them is scheduling. Factors include when the TCB programme, or the programme with some TCB footage, is actually shown. The ultimate TCB broadcast aired, may depend on whether the TCB filming is live or relayed for later use. For example, certain forms are viewed as more media friendly or attractive to broadcasters. In an instance where a court case may only be permitted to be broadcast on TCB where it is shown live, certain broadcasters may decide or feel there is no programming slot available for it. It is therefore ignored. Similar issues may arise if there is a requirement that the case can only be broadcast in full – even if relayed later. This has a number of potential implications as to the form of TCB, its effects, its audience, etc. It also potentially impacts on what type of presentation and trailers will be used for the TCB footage. These very important legal, policy and effect issues have not been researched or analysed;
- *Broadcast Audience:* Some of the arguments and discussions in relation to TCB refer to the audience. Yet there is a distinct lack of research into who the TCB audience is. Equally, we do not know how the audience, or audiences, differ across different TCB forms, TCB programmes, jurisdictions, times, etc. Critical to many of the proponents' arguments in favour of TCB, is the view that it is or will be educational. Yet, proponents never go into any detail on why or how the audience, or the wider public, will be educated. We do not know how viewers use TCB. The audience needs to be considered and involved in the examination and research of TCB issues generally, and in particular in terms of legal rights arguments, legal-policy, education, effects, motivation, learning, recall, usage, etc. Particular eye-tracking can assist in some of this;

- *Court Form*: We do not currently know in detail what courts and types of courts are accessible to TCB. There is no overall recording and comparison of which courts across the US, and across other jurisdictions, allow or restrict TCB according to courts, judges, per individual decision and under a predetermined legal-policy document of some sort. We do not even have simple comparisons such as whether it is appeal courts, trial courts, what exclusions may apply, etc, across the instances of TCB that may occur. (The thesis also incorporates an international TCB research survey);
- *Case Form*: What types, forms and segments of cases that can be shown on TCB all potentially have influence. In terms of considering legal rights and legal-policy issues, we should be incorporating research of these issues in our considerations. The literature on TCB indicates that there is a very uneven field in terms of what cases and types of cases are, and are not, amenable to TCB broadcasts. It is disappointing that these are not compared. A full, proper and ethical understanding and appreciation for TCB generally, and its implication for legal rights, arguments and legal-policy suggests that we should be undertaking TCB form comparisons;
- *Consent Form*: *Consent*: The original Florida study proceeded on the basis of allowing filming even over the objections of the defendants.<sup>199</sup> The case of *Zamora v Florida* is one such example.<sup>200</sup> The New York experimental law also provided for filming over participant objections.<sup>201</sup> The US National Association of Criminal Defence Lawyers advocates for TCB being subject to consent of the parties in a presentation in relation to proposed legislation for Federal TCB.<sup>202</sup> Some of the consent issues which should be considered, and compared, include what consent(s), if any, is required; how they are obtained; when; and from whom. These nuances of the consent issue are calling out to be considered in more detail and in the different potential situations and forms of TCB. There is no obvious research directed at comparing cases involving defendant TCB consent issues. This includes, for example, research directed at any differing effects which might arise between TCB cases with and without defendant consent. An obvious area for research is those defendants whom have objected and TCB did not occur at all, and also where TCB (of them) did not occur but the case itself was covered. On some occasions in the US, TCB has occurred without consent of witnesses. There appears to be no comparative research of

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<sup>199</sup> SL Alexander, “‘Mischievous Potentialities’: A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit, Florida, 1989” (PhD thesis, University of Florida 1990) 18, 22, 23, 13, 136.

<sup>200</sup> *Zamora v Florida* 372 So 2d 473, 1979, 1979; 77; 77-25123-A, 11/30/77, referred to SL Alexander *ibid* 82.

<sup>201</sup> W Petkanas, above 16-17. In terms of broadcasting the jury, SR Pasternack’s legal-empirical research found that there could be adverse community pressure on jurors if they were broadcast, and therefore recommended that states should prohibit the broadcast of jurors, SR Pasternack, ‘The Effects of Perceived Community Pressure on Simulated Juror Guilt Attributions: An Experimental Study’ (PhD thesis, University of Tennessee, Knoxville, 1982) iv. Considerations include whether the jury are asked to consent in advance and whether their consent should be required.



how witnesses are informed of a right to consent or object to TCB, or being filmed or broadcast on TCB, so it is not possible to evaluate how fair, ethical or transparent these rules may be. It is not possible to say that witness testimony will differ or be inhibited or exaggerated between TCB and non-TCB cases without proper research. It may be interesting, to say the least, to research and gather data on whether witnesses are made aware of a witness objection right; how transparent it is; whether it is advised to them in a considered manner in advance of a case, or whether it is a last minute thing just before case commencement or their particular testimony,<sup>203</sup> and the potential differing effects; whether a witness objection right is advised to witnesses in writing or verbally; etc. Overall, it is disappointing that there are no records or comparison of consent issues. Consent raises many important issues in term of permission, ultimate forms(s) of TCB, etc, and needs to be properly documented, compared, researched and considered. It also has impacts in terms of the content of TCB programmes and the technologies used. This will advance our legal knowledge as well as our legal-policy and legal rights discussions regarding TCB. We know from the *Pistorius*<sup>204</sup> case in South Africa that witnesses can and do elect not to be filmed/broadcast on TCB. Particular witness effect issues are meant to have arisen. Yet, even today, we still do not have a body of considered legal-empirical research of the many TCB consent issues;

- *Research:* We might consider what if any research occurs, and more importantly what would be sufficient research and how much of this has occurred and is planned and occurring presently eg US Federal pilot experiment. Very few of the cases broadcast are compared, nor the justification for broadcasting. There is also little comparison of the different procedures, rules and restriction across different courts, jurisdictions and forms. There is also little comparison between countries. We do not have a clear picture of who imposes rules and for what purpose. Wherever there is TCB, the forms, details and justifications vary. Critically, there is no forms matrix by which we can begin to locate and compare different CB and different jurisdictions. Undermining TCB discussion is the lack of definition, research and sustained sophisticated legal-empirical research. We should address this. We also need to consider the issue of requiring or mandating research in all instances of TCB and certainly in all pilot trials of TCB.

## Conclusion

There are many TCB form issues. In the first instance, we need to define and categorise the different types of TCB in order to properly research and code them, and to undertake

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<sup>202</sup> BE Bergman, *Written Statement of Barbara E Bergman, on Behalf of the National Association of Criminal Defense Lawyers, Before the Senate Committee on the Judiciary, Re: 'Cameras in the Courtrooms'* (9 November 2005) 2.

<sup>203</sup> The potential for bias issues could be considered in relation to the later example.

<sup>204</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

properly considered legal-empirical effects-research. The US Supreme Court concerns<sup>205</sup> have not been addressed to date. The highlights the importance of undertaking research in relation to identifying and categorising different TCB forms. It is difficult to arrive at any firm conclusions regarding TCB-effects, positive and negative, without separating out different TCB forms and form issues. Courts and legal-policymakers can only really make informed legal and policy decisions once they have sufficiently segregated and nuanced legal-empirical research results available to them. Normative legal-empirical research is better positioned to begin addressing the effect concerns and the US Supreme Court challenge. Even beyond the US Supreme Court challenge, many effects-research gaps need to be considered and addressed. We also see from issues such as the *Pistorius*<sup>206</sup> case, the Lord Chancellor's concerns<sup>207</sup> and the arrival of a new form of TCB, namely iTCB, that new TCB issues can arise requiring new research. All of the literature on TCB indicates that there is a very uneven field in terms of what cases and types of cases are and are not amenable to current TCB broadcasts. These are not generally compared and considered. In order to get a proper understanding and appreciation for TCB overall, and its nuances and effects, we should be undertaking normative comparative TCB and TCB broadcast content research. Comparing different TCB forms will assist courts and researchers in developing normative TCB research.

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<sup>205</sup> See ch 5.

<sup>206</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>207</sup> F Gibb, 'Britain Rethinks Cameras in Court' *Times* (London, 16 May 2014).

## CHAPTER 7: TCB GENRE(S) & FORMAT(S)

### Introduction

The context of this chapter is whether there are TCB genres and formats categorisation following from media/communications genres and formats categorisations of television content. This may have implications to be considered by court and legal-policymakers, as well as those researching TCB effect issues. Potentially TCB may align itself with particular existing media categorisations. If so, this may assist researchers to examine the meaning and effects of TCB content eg entertainment effects, education effects. We can consider the important question of how the media and court services may communicate the law via TCB.<sup>1</sup>

### TCB Genres/Formats

One issue for courts, legal-policymakers and court services to consider is whether TCB fits within any of the pre-existing forms of media genres and formats. This can potentially have implications in terms of considering TCB, particular forms of TCB and legal-policy as regards TCB. Further form issues arise, in particular those arising from the media and communications literature. A question which arises is whether there is a 'genre' or a 'format' of TCB.<sup>2</sup> RK Sherwin emphasises the need to educate ourselves in relation to media consumption.<sup>3</sup> M Foley, in a stronger tone, states that the public has a right to know how news organisations make their decisions.<sup>4</sup> He also asks if we 'adequately appreciate how TV formats skew political and legal matters toward exaggerated and simplistic ("stereotypical") meanings for ease of assimilation and heightened emotional impact?"<sup>5</sup> These comments highlight the need for increased media literacy.<sup>6</sup> This applies also in relation to our understanding of TCB and TCB forms. T-R Valikoski<sup>7</sup> refers to a process model for research of communications in-court, including six different stages of in-court criminal hearing communications.<sup>8</sup> While there does not appear to be any process-research in relation to TCB, there are some articles from a

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<sup>1</sup> Additional issues can arise in terms of the ethics of the proposal and the need for research.

<sup>2</sup> Indeed, research might consider if there are 'genre(s)' and or 'format(s)' of TCB.

<sup>3</sup> RK Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (The University of Chicago Press 2000). DM Gillmor, JM Barron and TF Simon, *Mass Communication Law, Cases and Comment* (Wadsworth 1998) 415.

<sup>4</sup> M Foley in a radio interview on 'Lunchtime with Eamon Keane' (Newstalk 28 December 2009). M Foley more recently advocated Irish TCB on foot of the Pistorius TCB case in South Africa, see M Foley, 'Oscar Pistorius Trial Signals It's Time to Let Cameras into Irish Courtrooms' *Irish Times* (Dublin, 19 May 2014).

<sup>5</sup> RK Sherwin, above 251.

<sup>6</sup> *ibid* 252.

<sup>7</sup> T-R Valikoski, *The Criminal Trial as a Speech Communication Situation* (University of Tampere, Finland 2004) 199, and throughout.

conference in Ireland in relation to trial venue process issues.<sup>9</sup> There is also a study in Cork in relation to domestic violence and the criminal process.<sup>10</sup>

In terms of media attention and CB, A Biondi refers to two categories of trial, namely the sensational trial and the general interest trial.<sup>11</sup> He defines sensational trials as being those involving famous people, sex offence cases, violence and ‘cruel acts’ cases. He defines general interest cases in terms of their wide social interest and relevance for the whole community. The first category of trials frequently involve the disclosure or examination of very personal details. There is an argument that CB of such details can violate individuals legal rights (including human rights), not to be humiliated, disadvantaged or caricatured.<sup>12</sup> Yet, we know very little about how TCB process works in-court and out-of-court. Proper consideration of TCB and TCB policy such an increased media literacy in terms of TCB issues could benefit courts and legal-policymakers better. This includes how TCB media decisions are made; how TCB is made; and the different filming processes and communication processes in TCB courtrooms. It also applies across the different TCB forms. Consideration of whether the courtroom communications process is changed by the introduction of TCB is warranted. This ideally requires building up baseline research prior to TCB cameras being introduced.

### **Genres and Formats: A Possible TCB Genre**

Media and communications studies recognise many categories of TCB programming/content. The main categories are television genres and television formats. Yet, no overall categorisation has been proposed in the literature for TCB or TCB effects categorisation. Media and communications research may assist in understanding and categorising TCB forms to the benefit of the general as well as court and policy understanding of TCB issues. A media genre ‘means a kind or type and is often loosely

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<sup>8</sup> ibid 150.

<sup>9</sup> The second session of the Conference on Criminal Jurisdiction in November 2002 related to The Criminal Trial Process. See the (2002) 3:1 Judicial Studies Institute Journal 39. See also articles in relation to ‘Trial Venue and Process: the Victim and the Accused’ by I O’Donnell, Dr (103); M O’Briain (113); and K Mulkerrins (120). Note also R Horgan, ‘Domestic Violence and Civil Harassment: Some Issues Which Arise When the Case Comes to Court’ (2004) 4:1 Judicial Studies Institute Journal 79.

<sup>10</sup> See C Fennell and A Ryan, ‘A Cork Study on “Domestic” Violence and the Criminal Process: Tentative Conclusions from the Policing Perspective’ (2004) 4:1 Judicial Studies Institute Journal 79.

<sup>11</sup> A Biondi, ‘TV Cameras Access into the Courtroom: A Comparative Note’ (1996) Yearbook of Media and Entertainment Law (YMEL) 133, 146.

<sup>12</sup> Regardless of it being for educational purposes. See J Pritchard, Editorial, ‘Should Cameras be Allowed in the Courtroom?’ Legal Business magazine (1992) 3, referred to in A Biondi, above 146.

applied to any distinctive category ... In relation to most mass media content ... the concept of genre is useful .... Genre can refer to any category of content that has [different] ... characteristics.’<sup>13</sup>

Under another definition, genres ‘refers to a type of text and ... “can be defined as patterns/forms/styles/structures which transcend individual ... products, and which supervise both their construction ... and their reading by audience.”’<sup>14</sup> The audience uses genres to categorise programmes.<sup>15</sup> On the other hand ‘[f]ormat ... describes a particular variant on a generic form; it is also used to describe ... [particular] technology.’<sup>16</sup>

### **Why This Is Important**

It helps us to understand TCB, how TCB is formed, what it may mean, and how it might be used by the public. It might also help us to understand how courtroom participants may use TCB. It assists us in understanding effects. The author recommends further research into whether TCB genres and formats exist. N Lacey emphasises that it is important to identify which genres apply to a media text, and furnishes a model and matrix to assist genre categorisation.<sup>17</sup> With the possible limited exception of SA Kohm in relation to Reality TCB (rTCB), this has not been attempted for TCB. Further research is recommended. This is important because this helps us to understand and appreciate TCB and its effects. Genres (and sub-genres)(and formats) are recognised categories of media programming and are also referred to in communications research.<sup>18</sup> It is also possible that there may be genres and sub-genres of TCB. Potentially there may be different effects across different genres and formats of TCB. The question arises as to whether some may be more preferable. This is a crucial question for courts, legal-

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<sup>13</sup> D McQuail, *McQuail's Mass Communication Theory* (5th edn, Sage 2005) 370. The four characteristics are ‘[i]ts collective identity is recognized more or less equally by its producers (the media) and its consumers (media audiences); this identity (or definition) relates to purposes (such as information, entertainment or subserviants), form (length, pace, structure, language, etc) and meaning (reality reference); the identity has been established over time and observes familiar conventions; cultural forms are preserved, although these can also change and develop within the framework of the original genre; a particular genre will follow an expected structure of narrative or sequence of action, draw on a predictable stock of images and have a repertoire of variants of basic themes,’ *ibid.*

<sup>14</sup> *ibid.* 132.

<sup>15</sup> *ibid.* 134.

<sup>16</sup> For example, the VHS format. N Lacey, *Narrative and Genre, Key Concepts in Media Studies* (MacMillan Press 2000) 206. Therefore, some format definitions are technology specific, while others are programme style specific and or the intellectual property rights aspects which are protectable.

<sup>17</sup> *ibid.* 136-137. It relies on identifying the setting, character, narrative, iconography, style and stars (participant) of television content, *ibid.* 137.

<sup>18</sup> See JH Power, ‘On the Intellectual Structure of the Human Communication Discipline’ (1995) 44 *Communication Education* 191, 198, where he refers to genres and formats in the context of complex, multi-unit discourse.

policymakers and others. The additional importance of this, is that there is not just one constant form of TCB. Nor is there one single constant effect of TCB across all forms (and genres/formats) of TCB. Ideally, such research avenues should be pursued. We need to be much more active in our approach to the research of TCB. The detail and volume of research should increase in order to better assist courts and legal-policymakers. Recent research also examines blogging and blawging (legal blogs) under the categories of genres and sub genres.<sup>19</sup>

### Television Genres

Let us look at television genre issues and how they may apply to TCB. Genre simply means a type or category of television programme.<sup>20</sup> A fundamental issue is definition and what constitutes a ‘genre’ in television.<sup>21</sup> Detailed research of whether TCB is a genre may be of assistance to research of TCB effect issues as well as courts and legal-policymakers more generally. Genres ‘are metalanguages, they “suggest” to an audience how to read a text.’<sup>22</sup> The scheduling of a programme can also affect how the audience will receive and understand it.<sup>23</sup> Genres refers to ‘shared understandings between producers and audiences about forms and the purposes they serve.’<sup>24</sup> At a general level, genre ‘means a sort, or type, of text: horror movie, musical, autobiography, tragedy, etc.’<sup>25</sup> If something can be categorised into an existing genre category it means we can then see what other texts it resembles<sup>26</sup> competes with and ultimately its potential meaning and effects. We can also more easily distinguish it from other genres.<sup>27</sup> The audience can also have ‘expectations’<sup>28</sup> about a programme once we know what genre category it may fit within. Additional considerations can include what we (including courts, participants, legal-policymakers, audience) expect of TCB; what we may expect from particular TCB forms; what we may expect from particular TCB programmes.<sup>29</sup>

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<sup>19</sup> JM Cornett, ‘The Ethics of Blawging: Genre Analysis’ (2009) 41 *Loyola University Chicago Law Journal* 221.

<sup>20</sup> G Creeber (ed), *The Television Genre Book* (2nd edn, Palgrave MacMillan 2008) 3. See also M Briggs, *Television, Audiences and Everyday Life* (Open University Press and McGraw Hill) foreword, xiii.

<sup>21</sup> See *ibid* 5.

<sup>22</sup> *ibid* 248.

<sup>23</sup> N Lacey, above 245.

<sup>24</sup> M Montgomery et al, above 26-27, as referred A Durant and M Lambrou, *Language and Media* (Routledge Taylor & Francis Group 2009) 78.

<sup>25</sup> A Durant and M Lambrou, *Language and Media* (Routledge Taylor & Francis Group 2009) 21.

<sup>26</sup> *ibid*.

<sup>27</sup> See *ibid*.

<sup>28</sup> See *ibid* 22.

<sup>29</sup> Genres can be classified according to the ‘properties that distinguish different text types’ such as classification on the basis of ‘formal arrangement ... theme or topic ... mode of

These are important areas of research for TCB programming. M Gillespie and J Toynbee add that,

‘We never engage with media in a vacuum. Rather, we enjoy and make sense of particular media texts in relation to other texts of a similar type. In media studies these types of a text are known as genres (from the French for “type” or “kind”). They include westerns, comedy, sci-fi, horror, thrillers, soaps, news and “reality TV.” Of course, we can classify media texts according to different criteria: by director, participant, style or some other system of categorisation. But genre is one of the principal ways in which audiences, producers and critics routinely classify media. Our cultural knowledge of media genres is woven into the very texture of our everyday lives and shapes the media choices we make, as well as the expectations and assumptions that we bring to understanding and enjoying media texts.’<sup>30</sup>

Issues arise as to how we classify TCB, and different forms of TCB. One issue is whether TCB may classify as a genre and or a sub-genre. Each can have implications and effects, and ultimately for courts and legal-policymakers in their considerations. Genres help us to recognise and distinguish different programmes from each other.<sup>31</sup> We can also consider genres as ‘maps.’<sup>32</sup> We do not have an overall map of TCB. Media classification systems also serve to ‘establish hierarchies of values.’<sup>33</sup>

Genres ‘are characterized by their own ... formats and languages.’<sup>34</sup> This implies that genres are wider than and or superior to media formats. The crime series has for decades been one of the most popular television genres.<sup>35</sup> The ‘news interview’ genre is also ‘familiar and readily recognizable.’<sup>36</sup> G Creeber<sup>37</sup> variously refers to numerous examples

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address: genre is identified by how the text addresses its audience ... attitude or anticipated response.’ M Montgomery et al, above 23.

<sup>30</sup> M Gillespie and J Toynbee, *Analysing Media Texts* (Open University Press and McGraw Hill 2006) 44.

<sup>31</sup> See *ibid* 44.

<sup>32</sup> *ibid* 47.

<sup>33</sup> See *ibid* 48. In addition, ‘[g]enre labels (... news, etc) are used to categorise media by: media audiences seeking the pleasures of the familiar and the reassurance involved in knowing broadly what might happen in a particular media text; media industries aiming to avoid risk and ensure profitable differences; media critics, and others with power to classify media, in establishing.

<sup>34</sup> See Figure Box 14.1, in D McQuail, above 374.

<sup>35</sup> See G Creeber, above 29.

<sup>36</sup> A Durant and M Lambrou, above 204.

<sup>37</sup> G Creeber refers to the following genres, namely, drama; *news*; comedy; science fiction; melodrama; talk shows; religious; variety; situational comedy; television programme; television series; docusoap; *reality TV*; soap opera; crime drama; crime series; gangster genre; police series; police drama; hospital drama; westerns; action series; spy genre; reality

of genres.<sup>38</sup> One source describes television genres as ‘a way of classifying TV programs by format or type of content.’<sup>39</sup> In terms of TCB, the potentially most relevant genres include (in particular the categories highlighted in italics),

*Reality Television; News; Documentary* (eg *Police, Camera, Action!*; *Great Crimes and Trials*; *COPS*; *Crime Invasion: Britain’s New Underworld*; *Police Stop*; *The Police Tapes*; *Crime’s Children: Crime’s Carousel*); *Live Television; News Broadcasting; News Program; Current Affairs; Educational Television; Evening News*; True Crime; Docudrama; Legal Drama; Police Procedural; Police.<sup>40</sup>

Research would be welcome to help understand how closely TCB, and TCB forms, fit within these structures.

### Genre Elements

Genres also have a large repertoire of different elements and a programme with a given genre combines some of the elements from that genre.<sup>41</sup> Some of the elements of the cinema and television include audio-visual elements; narrative; and ideological relations.<sup>42</sup> Audio visual elements include stars, personalities, presenters, set, camera style, lighting, edited style, music, voices and other sound effects are associated with particular genres.<sup>43</sup> N Lacey states that the elements which constitute and identify a genre are character types, setting, iconography, narrative and style.<sup>44</sup> With one exception, these are generally ignored in TCB research. Infotainment also suggests that news is moving beyond ‘serious, sober remit into the area of entertainment ... using elements of entertainment, celebrities or film clips ... often seek to make headlines more exciting by triggering genre resonances.’<sup>45</sup> Research can consider how TCB may fit within this classification. A further issue is whether TCB may be evolving also.

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television; horror; detective; thriller; docudrama; *documentary*; sport; mini series; costume drama; postmodern drama; music; childrens television; *infotainment; educational; reality TV*; animation; popular entertainment; quiz show; celebrity talk show; confessional talk show; talk show; *daytime TV*. The categories highlighted in italics are the ones potentially most relevant to analysing TCB content or programmes. G Creeber, above 29 and throughout.

<sup>38</sup> There are 222 television genres listed on one website. See Freebase, < [www.freebase.com/view/tv/tv\\_genre](http://www.freebase.com/view/tv/tv_genre) > accessed 19 January 2014.

<sup>39</sup> *ibid.* Some genres will be shared with other media (such as science fiction); others are specific to television.’ See *ibid.* Sometimes genres and formats are used interchangeably, as in the above quotes.

<sup>40</sup> See *ibid.*

<sup>41</sup> See M Gillespie and J Toynbee, above 52.

<sup>42</sup> *ibid* 52-53.

<sup>43</sup> *ibid* 52.

<sup>44</sup> N Lacey, above 133, as referred to in G Creeber, above 5.

<sup>45</sup> M Gillespie and J Toynbee, above 74.



It appears that courts and legal-policymakers seldom consider audience research<sup>46</sup> of TCB whether at a given point in time, nor conducted on an ongoing basis. Audience research, including the TCB audience, does not begin and end with ratings. After a genre is assigned, we can also carry out discourse analysis to examine the different types of meaning in each.<sup>47</sup> Considerations include whether meaning differs across TCB forms. Some literature refers to how ‘time’ is structured on television and in news television.<sup>48</sup> We might consider how this may occur in a TCB context. ‘Narratives organise and represent time in different ways, and it is important to analyse how they do so.’<sup>49</sup> The order of events ‘can shape, in quite powerful ways, the build up of dramatic tension, the climax and the closure of a narrative.’<sup>50</sup>

We can begin similar research for TCB. The ‘narrative ... is designed to engage imaginatively.’<sup>51</sup> ‘When we think of different types of media discourse, such as those found in tabloid newspapers, adverts, television soaps, or gossip magazines, we are thinking about different genres or text types.’<sup>52</sup> So genres are categories of text type.<sup>53</sup> Let us proceed to look at some specific genre examples in a little more detail.

### **Station Genres**

A cable television or pay television channel itself can be named after the genre.<sup>54</sup> ‘The development of pay TV, in fact, has been structured around niche-marketing to audience genre preferences for sports, music video, lifestyle programming, documentary and so on.’<sup>55</sup> G Creeber<sup>56</sup> states that television genres create an order or index of television content. Genre categories help us to make sense of the volume of television content.<sup>57</sup> Genre and format research of TCB will help us to make sense of and understand TCB. If

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<sup>46</sup> See, for example, *ibid* 154.

<sup>47</sup> See *ibid* 153.

<sup>48</sup> See comments in *ibid* 93.

<sup>49</sup> *ibid* 93.

<sup>50</sup> *ibid* 93. Viewers put the story narrative together by formulating, testing and revising hypotheses based on incoming information; making causal connection and inferences; reconstructing the temporal order and duration of the events; gap filling in narrative time or logic; assessing the spatial frame of reference in which the story occurs; considering how space, décor, lights, framing and the other elements of style express human relationships, *ibid* 102

<sup>51</sup> G Creeber, above 127-128.

<sup>52</sup> See A Durant and M Lambrou, above 8.

<sup>53</sup> ‘Each type is identifiable because of specific features commonly associated with both its form and function.’ *ibid*.

<sup>54</sup> G Creeber, above 7.

<sup>55</sup> *ibid* 7.

<sup>56</sup> *ibid* 1.

<sup>57</sup> *ibid*.

we are looking to laugh, we may go to the Comedy Channel; if we want news updates, we might go to CNN/BBC; or if we want music, we may go to MTV.<sup>58</sup> These are examples of channel genres or categories of types of television content. Further research may therefore consider whether TCB channels may be genres.<sup>59</sup> Genre categorisation ‘enables us to make sense of a large number of choices by separating them into smaller and easily recognisable generic categories.’<sup>60</sup> Generic channels include Comedy Central, Sci-Fi Channel, MTV, CNN News.<sup>61</sup> Therefore, we could say that Tru TV (previously Court TV), like CNN or MTV, is a television genre of television. None of the literature identified to date has categorised Tru TV as a television genre. Further research may be of assistance.

### **Programme Genres**

We can also look at individual programmes after we look at channels. Genres are ‘conceptual categories used to link together a number of television programmes, but they also articulate a range of cultural assumptions that become linked to the category beyond the programme itself.’<sup>62</sup> That content may be legal-subject-based does not equate to a legal genre. If we say court or court programming is the content, we might say that there is a genre of courtroom programming or a CB genre. However, ‘[n]early every television programme is explicit in its genre identity, clearly branded by its channel, promotional campaign, narrative form and iconography.’<sup>63</sup> Therefore, we need to consider the programme and the content, not just the channel. The programme can have a genre, not just the channel. This is more complex. Individual Tru TV programmes, for example, could be examples of a courtroom television broadcasting genre, depending on their form and style. The audience, critics, networks as well as the programme text also help to define the genre of a particular programme or channel.<sup>64</sup> Programmes and genres can also be interpreted differently in different communities and cultures.<sup>65</sup> F Maguire of TV3 refers to ‘an American format.’<sup>66</sup> Interesting research can consider whether US TCB content, formats and genres translate and transfer to other countries. These are relevant issues to be considered in terms of TCB research for courts and legal-policymakers.

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<sup>58</sup> *ibid.*

<sup>59</sup> If we are not sure of what exactly we want to see, there are ‘mixed genre’ channels such as the BBC which contain a variety of different genre programming. *ibid.*

<sup>60</sup> *ibid.*

<sup>61</sup> *ibid.* 6.

<sup>62</sup> See G Creeber, *ibid.* 12 and referring to J Mittell, *Genre and Television: from Cop Shows to Cartoons in American Culture* (Routledge 2004).

<sup>63</sup> See G Creeber, *ibid.* 10. It lists the programme *Lost*, *Twin Peaks* and *Buffy the Vampire Slayer* as rare exceptions.

<sup>64</sup> See G Creeber *ibid.* 10.

<sup>65</sup> *ibid.* 12-13.

## News Genre

TV news is recognised as a genre.<sup>67</sup> The news genre is ‘widely understood; and instances of broadcast news are instantly identifiable as such to audiences. Indeed, news has claims to be the most widely ... understood ... genre ... However, even within this genre, there are ... subgenres such as the news report, the news interview, or the news headline.’<sup>68</sup> When we begin to analyse the news we are initially ‘required’ to understand the process which is involved in the making of television news.<sup>69</sup> The producers of news make decisions in relation what news to cover and what not to cover.<sup>70</sup> The court process and the TCB making process ideally need to be researched.<sup>71</sup> Similar issues may arise in TCB considerations.<sup>72</sup> Various avenues for TCB research arise.

## TCB As News

Overall there are a remarkably small number of themes which dominate the news.<sup>73</sup> In addition, the genesis of most news stories is limited to the symbiotic relationship between journalists and official sources.<sup>74</sup> Much of modern newsprint and programming comes from official sources and even officially printed copy. Arguably, less and less independent investigation and writing are carried out, thus limiting the number of topics and agendas covered in the news. The advent of continuous rolling news and world news

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<sup>66</sup> F Maguire, interviewed on O Barry, ‘The Green Room’ *Newstalk* (15 November 2010).

<sup>67</sup> See D McQuail, above 37 ff. A Durant and M Lambrou, above, 224. G Creeber, above.

<sup>68</sup> M Montgomery, *The Discourse of Broadcast News: A Linguistic Approach* (Routledge 2007) 26–27, as referred to in A Durant and M Lambrou, above 77.

<sup>69</sup> G Creeber, above 108.

<sup>70</sup> *ibid.* In commercial and non commercial television stations there is also constant pressure to get, maintain an increase ratings, for example, to justify funding. Creeber *ibid.*

<sup>71</sup> ‘Since TV news is still one of the prime sources of information in the process of democratic decision-making, the study of the genre remains a critical issue,’ according to G Creeber. *ibid.* 111.

<sup>72</sup> Again, there can be genre/format crossover. For example, ‘news and current affairs formats [are] inevitably hybridised. Editors tried to make their talking heads appealing ... The format was occasionally revamped to maintain viewer interest.’ See *ibid.* 117. ‘[N]ews circulates mainly through moving images, let alone where news circulates mainly through moving images, let alone where news is subject to ratings pressures in an entertainment filled environment yet these fictional shapings may angle our feelings about events in quite powerful ways, so it is important to be aware of how these processes occur.’ [See M Gillespie and J Toynbee, above 74. See generally, HM Beville, Jr, *Audience Ratings: Radio, Television, and Cable* (Erlbaum 1988)]. However, the globalisation of television news [See G Creeber, above 117 ff] and the arrival of continuous rolling news and rolling updates [See for instance *ibid.* 119] makes research and categorisation more difficult.’ ‘In current affair shows the gravitational pull of infotainment was much more pronounced. Emotional scenes, such as a sporting victory or a homecoming, might be rendered with music and slow motion. Private conflicts were dramatised (often literally via “re-enactments”) to produce public narratives. Facts were still routinely respected, but their status was subordinated to the mythic or symbolic resonance of a story.’ *ibid.* 117.

<sup>73</sup> This is also pointed out by WL Bennett, LA Gressett and W Haltom, ‘Repairing the News: A Case Study of the News Paradigm’ (1985) 35 *Journal of Communications* 50, 52.

stories means that the same content is repeated over and over and that the actual quality of what is shown arguably diminishes. Television genres, styles and forms vary significantly. For example, one study presented the same content to research groups which differed in terms of fragmentation of spaces, logical gaps, close-ups and zooming in and out.<sup>75</sup> No one has focused on these potential effect issues as they may relate to TCB. More research is needed to provide more assured legal and legal-policy answers. It is necessary to be aware of and differentiate between messages, codes and forms used by television news broadcasting and TCB in particular. Zooming in and out has potentially different effects on the audience. The changing of cameras may have effects, as may decoupling camera footage and audio footage. Long and short shots and different angle shots also have potential impacts. One may query how much we know about the make up of TCB programmes, and the potential effects. More nuanced research is commended.

The form of the presentation of news stories has been found to have a strong impact upon news information retention.<sup>76</sup> This should be considered when asking what is the purpose and effect of TCB in more focused and nuanced TCB effects-research.<sup>77</sup>

Often TCB research may be criticised for involving only basic and cursory research methodologies, in particular self-reports. Frequently, no aim or underlying hypothesis is identified or established. This means that the research effort overall is varied and unfocused. The amount and types of data gathered in many cases is limited. Few TCB studies can be easily directly compared. There is no sustained reception analysis or research of the effects of TCB on the audience or study of content or content types of TCB. It is difficult to answer what information is portrayed in TCB and how is this comprehended by the TCB audience based on the current research literature. Studies are rare and rarely carried out in a systematic manner. Frequently, TCB research does not identify an aim or purpose in advance. Obviously, this diminishes the capacity for meaningful results to assist courts and legal-policymakers. The studies that do exist often

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<sup>74</sup> ibid 50-51. See also M Schudson, 'The Sociology of New Reporting,' above 271.

<sup>75</sup> See G Solomon and AA Cohen, 'Television Formats, Mastery of Mental Skills, and the Acquisition of Knowledge' (1977) 69 *Journal of Educational Psychology* 612.

<sup>76</sup> B Findahl and O Hoijer, above 392, and *passim*.

<sup>77</sup> S Hall writes that '[j]ournalists speak of "the news" as if events select themselves. Further, they speak as if which is the "most significant" news story, and which "news angles" are most salient are divinely inspired. Yet of the millions of events which occur every day in the world, only a tiny portion ever become visible as potential news stories; and of this proportion, only a small fraction are actually produced as the day's news in the news media. We appear to be dealing, then, with a "deep structure" whose function as a selective device is un-transparent even to those who professionally most know how to operate it.' S Hall, 'The Determination of News Photographs' in C Cohen and J Young, *The Manufacture of*

rely on untrained court personnel to carry them out and only focus upon limited observational or self-report questionnaires.<sup>78</sup>

The way in which people form news information is extremely complex.<sup>79</sup> This is true about news broadcasting as it is about TCB research. The structure of events on TCB may play a role in our comprehension.<sup>80</sup> This is one of the reasons why further research is required. We might ask who produces media texts, why and for whom.<sup>81</sup> Consideration of how the TCB media may create ‘expectations’ and assumptions in the audience is researched. Further research issues include how the media may sell, advertise and promote TCB. These potentially differ across TCB forms.<sup>82</sup> The literature seems to suggest that TCB media related research has been limited, thus limiting the information available to courts and legal-policymakers.

### **TCB News Content**

One point also overlooked in most TCB discussion is that regardless of news TCB, most information the public gets about the justice system is from entertainment programming.<sup>83</sup> This needs to be researched and considered from a TCB perspective eg educational TCB.

### **News Snippets and SoundBits**

Time is critical in news selection, and the importance varies across the different types of news, namely, hard news, soft news, spot news, developing news and continuing news.<sup>84</sup> Obviously there are other factors involved in news selection.<sup>85</sup> However, that the media will only broadcast the briefest of snippets of actual in-court footage is often argued as a reason against TCB, or against particular forms of TCB. The first Federal pilot study found that there was an average broadcast length of fifty six seconds of courtroom footage per court story.<sup>86</sup> Not all of this includes courtroom audio. In New Zealand<sup>87</sup>

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*News: a Reader* (Sage 1983), referred to in M Schudson, ‘The Sociology of News Production’ (1989) 11 *Media, Culture and Society* 263, 277.

<sup>78</sup> See *ibid.*

<sup>79</sup> This point is made by B Findahl and O Højjer, above 292.

<sup>80</sup> *ibid.* 390.

<sup>81</sup> Question posed by A Hart, above 5.

<sup>82</sup> See discussion in relation to expectations and research in social cognition in JJ Skowronski, AL Betz, CB Thompson and L Shannon, ‘Social Memory in Everyday Life: Recall of Self-Events and Other-Events’ (1991) 60 *Journal of Personality and Social Psychology* 831.

<sup>83</sup> DA Harris, ‘The Appearance of Justice: Court TV, Conventional Television, and the Public Understanding of the Criminal Justice System’ (1993) 35 *Arizona Law Review* 785, 797.

<sup>84</sup> See D McQuail, above 314 ff.

<sup>85</sup> *ibid.* 318.

<sup>86</sup> MT Johnson and C Krafka, *Electronic Media Coverage of Federal Civil Proceedings, An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeal* (Federal Judicial Centre 1994) 34.

what was broadcast was a mix of courtroom footage, out of court footage and re-cut file footage.<sup>88</sup> There was also editing, splicing, re-ordering and a ‘mixture of visual elements.’<sup>89</sup> This ‘has implications if a purpose of the [TCB] pilot was to promote public understanding of the court procedure and the justice system.’<sup>90</sup> The study found that ‘[n]one of the 149 stories evaluated contained film continuously shot in the court. Instead stories were generally a mixture of visual film gathered inside the court, outside the court and re-cut with file footage.’<sup>91</sup> There can, therefore, be a large difference between what is filmed and what may be broadcast. As pointed out by the author, research of the courtroom process and the process of making TCB programmes would be advantageous. In 1968 the average sound bite was 43.1 seconds.<sup>92</sup> Television provides adults with at least seventy percent of their news.<sup>93</sup> However, if content is reduced to snippets and sound bites, there are potentially real effect issues to be considered in relation to the effect of this on the possible education and informative value of TCB. Ideally, this should be the focus of normative research from a TCB perspective. The question arises as to what impact the competing media environment may have on TCB and the effort to produce educative form TCB. Courts and legal-policymakers may need to consider the TCB research issues.

### **News Scheduling**

News scheduling restraints and practices in relation to television programming are factors which do not exist to the same extent for popular broadsheet newspapers.<sup>94</sup> This is another fact which exemplifies the difference between print and broadcasting. There are also different scheduling arrangements between different forms of print and broadcasting. These differences affect the form of material which is presented to the reader or audience. These impacts upon the eventual form of TCB. Part of this may be referred to as filtering or gatekeeping in media research.

### **News Production, Sources and Process**

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<sup>87</sup> Media Coverage of Court Proceedings Pilot Evaluation Committee, *Media Coverage of Court Proceedings, Introduction and Research Findings* (August 1998) 8.

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.*

<sup>90</sup> *ibid.*

<sup>91</sup> *ibid.* 12.

<sup>92</sup> J Caplan, ‘Televising the Courts - Case For Reform’ (1992) 13:2 *Media Law and Practice* 176. This figure is also used by J Caplan, M Kalisher and A Speaight, *Televising the Courts: Report of a Working Party of the Public Affairs Committee of the General Council of the Bar* [of England and Wales] (Bar Council of England and Wales 1989). By 1988 it was reduced to 8.9 seconds, *ibid.*

<sup>93</sup> *ibid.*

<sup>94</sup> *ibid.* 409.

Obtaining other people's opinions is also an exercise in creating supportive evidence. We tend to seek opinions which assist our pre-existing theories. G Tuchman<sup>95</sup> also writes that reporters choose between competing facts subjectively when making 'news judgements' about particular facts. They are deciding what is 'more important or interesting to highlight and this reflects the content of the story and also those stories which are actually printed.'<sup>96</sup> A related but similar issue is research of witnesses who were asked and consented to TCB, and witnesses who had no choice, were not asked or even objected.<sup>97</sup> There is an issue deserving to be researched for TCB.

Context and importance attached to news items can often depend upon where items in the story are presented. A charge placed at the beginning of the story (because it appears more newsworthy or important) might receive more attention than the denial placed towards the bottom of the story.<sup>98</sup> As P Haldar states in a different context, 'the frame ... becomes just as much of a sign as the [content] itself.'<sup>99</sup> P Haldar continues that 'what the camera frames, and what the law frames, it controls and configures - but what may also be understood is that the question of form (con-conformion) cannot be separated from the question of the frame.'<sup>100</sup> Generally, newspaper writers seeking to justify their 'reports' rely on,

- present conflicting possibilities in relation to truth claims;
- present supplementary evidence to support a 'fact';
- using quotation marks to indicate that the reporter is not making a true claim;
- before presenting the most 'material facts' first;
- carefully separating the facts from opinions by using the labels analysis.<sup>101</sup>

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<sup>95</sup> G Tuchman, 'Objectivity as Strategic Ritual: Examination of Newsmen's Notions of Objectivity' (1972) 77:4 *American Journal of Sociology* 660, 663.

<sup>96</sup> *ibid* 670. See also G Millerson, *The Technique of Television Production* (Focal 1989, 1990).

<sup>97</sup> The presentational style of journalism relies overwhelmingly on 'official sources' without serious challenge. JP Isralowitz, 'Reporter as Citizen: Newspaper Ethics and Constitutional Values' (1992) 141 *University of Pennsylvania Review* 242.

<sup>98</sup> G Tuchman, above n 9, p 665.

<sup>99</sup> P Haldar, 'The Evidencer's Eye: Representations of Truth In the Laws of Evidence' (1991) 2 *Law and Critique* 171, 181.

<sup>100</sup> *ibid* 181-182.

<sup>101</sup> G Tuchman, above 676. JP Isralowitz notes that the issues of subjective decisions, JP Isralowitz, above 241 (references omitted). He states 'process of reporting and writing news entails subjective decisions such as choosing the lead and angle of the story, selecting individuals to interview and quote, and assigning value laden adjectives to events and institutions. These decisions "are all influenced by the personal history [the reporter] brings to this work." Ironically, the techniques associated with objectivity may provide a means of cover for reporters who seek to promote a certain viewpoint in their accounts. For example, several editors and reporters have acknowledged the practice of "shopping" for opinions consistent with their own. In the course of this process, "[information] that is inconsistent

The process, sources and production values in TCB have yet to be examined. There has been various research of the communication process and of the process of selecting and producing a media story. Indeed there are calls for more knowledge and research in this area. M Foley, the Head of Journalism at the Dublin Institute of Technology (DIT) indicates that the public should know how news organisations make their decisions.<sup>102</sup> E Slotnick and J Segal call for better understanding of the flow of information between judicial elites and the public,<sup>103</sup> as does N Emerson.<sup>104</sup> However, there is no body of research of how a TCB story has been selected, produced, created, edited and ultimately broadcast. In considering the meaning and effects of TCB, we can begin the research of the legal and justice process and where TBC fits within that process and the process of and how TCB stories are created as effect issues. News denotes events but is also used to describe ‘a constructed representation of such events or actions ... Language in news media structures how whatever goes on in the world is represented, [h]ow stories are selected, [h]ow they are organised, and [h]ow they are presented.’<sup>105</sup> TCB categorisation and normative research is important to enhance our understanding of effects.

A Durant and M Lambrou write as follows,

‘It might seem that “news” (as media presentation) should simply reflect “news” (as actions and events). Such reflection would give news objectively and truthfulness. If, on the other hands, you consider that reported “news” reshapes news events and actions to a significant extent, then “news” appears not so much direct reporting of events as the output of a media agenda for news-making. In between the events and reports or stories, there would be a set of creative and editorial processes for giving form to whatever events and actions are depicted. News, in this second view, serves an agenda. It can use its own framing and storytelling techniques to highlight issues, to campaign, to criticise, to celebrate, to promote forthcoming events, or to attract attention to or distrust attention from *other* events. This view of news is essentially that news language serves rhetorical purposes as much as it reflects how things are or what has happened. News, in such a perspective, may even offer only a distorted and distorting account of how the world is. To understand the language of

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with the slant of their stories is discarded.” This practice illustrates how an article that purports to be free from a reporter’s personal biases may subtly embody those biases.’  
<sup>102</sup> M Foley in a radio interview on ‘Lunchtime with Eamon Keane’ *Newstalk* (Dublin, 28 December 2009).  
<sup>103</sup> EE Slotnick and JA Segal, *Television News and the Supreme Court: All the News That’s Fit to Air?* (Cambridge University Press 1998) 2-3.  
<sup>104</sup> N Emerson, ‘The Importance of Being Able to Spot a Calculated Media Story’ *Irish Times* (Dublin, 8 September 2010).  
<sup>105</sup> A Durant and M Lambrou, *Language and Media* (Routledge Taylor & Francis Group 2009) 85. Bullets removed.



news, accordingly, would be to understand its capability for bias, manipulation and possibly deception as well as its potential to inform.’<sup>106</sup>

Numerous potential TCB issues arise. One can examine what constitutes TCB news<sup>107</sup> and what the meaning of TCB newsworthiness may be.<sup>108</sup> A Durant and M Lambrou refer to news categories by reference to two lists, namely, a list of news topics and newsworthiness features.<sup>109</sup> Courts and legal-policymakers may consider the implications for TCB.

There can be many news sources.<sup>110</sup> TCB courts may be considered by some as a new news ‘source.’ ‘With respect to production, it is important to be aware that what we read in a newspaper or see on the television screen is not a simple and transparent representation of the world, but the outcome of specific professional practices and techniques, which could be and can be quite different with quite different results.’<sup>111</sup> ‘With respect to consumption, important issues are the ... potential for divergent interpretations and uses of any given text by different sections of a readership or audience.’<sup>112</sup> Again, courts and legal-policymakers may be interested in the implications for TCB and more nuanced TCB research.

## Narrative Genres

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<sup>106</sup> ibid 85–86. Emphasis in original.

<sup>107</sup> ibid 86.

<sup>108</sup> ibid 88.

<sup>109</sup> ibid 89. The two lists ‘represent two dimensions of the genre of a news story: its field (what it’s about) and its function (here, the function of gaining attention, having an impact, or achieving some other effect such as entertaining, frightening or shocking). A news story is always about *some* particular area. Its language is adapted to expectations associated with that area (eg a sport of personal interest story will differ from an international news story is also adapted to *highlight* its newsworthiness (in this way, it justifies or maximises the attention it will be given).’ ibid.

<sup>110</sup> See ibid 89.

<sup>111</sup> N Fairclough, *Media Discourse* (Arnold 1995) 201-205, referred to in A Durant and M Lambrou, above 215.

<sup>112</sup> ibid. ‘Part of critical media literacy is an overall sense of the practices of media and of the media order of discourse, and a sensitivity to significant tendencies of change. This question assumes that any given media text will shed some light upon these issues, in that it will be a product of a particular state and evolution of the order of discourse. Particular questions here include, is the text indicative of stable or unstable relationships, fixed or shifting boundaries, between discursive practices within the order of discourse, and between the media order of discourse and socially adjacent orders of discourse?; what particular choices (inclusions/exclusions, of genres or discourses) in this text associated with?; what chain relationships across the media order of discourse and/or socially adjacent orders of discourse in this text situated within?; what particular tendencies of change (eg commodification or conversationalization of media discourse) does this text exemplify?’, N Fairclough, *Media Discourse* (Arnold 1995) 201-205, referred to in A Durant and M Lambrou, above 216.

N Lacey refers to game shows as an example of narrative genres. They can be defined with reference to a standard setting (television studio), standard set of characters (eg studio audience and host), narrative (prize questions or prize tasks), iconography (eg 'glitzy set') and style ('basic "live" television').<sup>113</sup> News programmes can also be examples of 'non-narrative genres.'<sup>114</sup>

### Sub-Genres

There can also be 'subgenres.'<sup>115</sup> D McQuail states further that '[o]ne of the strengths of the genre idea is its capacity to adapt and extend to cope with dynamic developments ... [eg] "talk show" genre, which began as entertainment interviews with celebrities and as "breakfast television" format and has expanded ... in manifestations that range from the sensationalist knockabout to very serious occasions for political participation.'<sup>116</sup> Future research may possibly lead to a conclusion in relation to a new TCB genre.

Martin Montongomery adds,

'broadcast news interviews are themselves not all of a single type. We may distinguish four principal sub-genres: (1) interviews with correspondents (reporting and commenting); (2) interviews with ordinary people affected by, or caught up in, the news (witnessing, reacting and expressing opinion); (3) interviews with experts (informing and explaining); and (4) interviews with "principles" – public figures with some kind of responsible role in relation

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<sup>113</sup> N Lacey, above, 206, as referred to in G Creeber, above 5.

<sup>114</sup> For example, JG Butler, *Television: Critical Methods and Applications* (Belmont: Wadsworth 1994), as referred to in G Creeber (ed), above 5. Note also JG Butler, *Television: Critical Methods and Applications* (3rd edn, Routledge 2006). However, the use of genre is not always easy to describe. 'Not all categories are easily identifiable, genres do not always remain the same and some ... are ... hybrid ... genres,' G Creeber, above 1. Genre hybrids or 'generic hybrids' [see *ibid* 4–5. Generally also note W Hawes, *Television Performing: News and Information* (Focal 1991)] can combine a number of styles or elements. Yet in one of the more important media books in the US, there is no mention of the word or term 'genre.' See *ibid* 7, referring to ET Vane and LS Gross, *Programming for TV, Radio and Cable* (Focal Press 1994). Often '[t]elevision genres and programming formats are notoriously hybridised ... [and are] becoming more so.' See *ibid* 8 and references therein. Increasingly today it could be said that it is almost impossible to think of a programme without more than one genre. See *ibid* 11. Yet genres remain the 'primary framework to create and understand new programming.' See *ibid*. Increased hybridisation and 'additions with ongoing formats, also means audiences are subject to increasingly complicated generic content.' See *ibid* 137. Altman also refers to a 'generic audience' to identify those sections of the public 'sufficiently familiar with the genre to participate in a fully genre-based viewing,' and also about 'generic frustration' when 'the emotion generated by ... a failure to respect generic norms.' R Altman, 'Cinema and Genre' in G Nowell-Smith (ed), *The Oxford History of World Cinema* (Oxford University Press 1996) 280, as referred to in G Creeber, above 3. So there might be more than one genre category of TCB.

<sup>115</sup> See G Creeber, *ibid* 28. See D McQuail, above, for example, 372.

<sup>116</sup> See D McQuail, above 372.

to news event (accounting). The four sub-genres may be defined – as here – by characterising the social identity and role of the person being interviewed and their characteristic contribution to the interview; but they could really be described in terms of the kinds of lead-in that set the agenda of the interview or the kinds of questions that form its spine. For instance, a prototypical question to a correspondent is “Can you tell us more about what is going on?” ... A prototypical question to an ordinary witness or bystander is “What could you see ...?,” or “What did/does it feel like ...?” And the question to an expert explores the implications of a situation: “Given X, can you explain its implications?”<sup>117</sup>

In addition M Montgomery also provides a news interview matrix.<sup>118</sup> There is a ‘repertoire’ of different types of news interviews.<sup>119</sup> Bulletin news programmes routinely use edited fragments, thus providing ‘perspectival sound-bites.’<sup>120</sup> A Durant and M Lambrou refer to M Montgomery’s news interview matrix and indicate that similar models can be created for features of related media genres.<sup>121</sup> One possibility is that this could include, or be expanded to, TCB. Specific TCB research would be needed. Also,

‘Studying the news interview requires a distinctive mode of analysis appropriate to its distinctive character. To clarify this point, it is useful to begin by considering, by way of contrast, how news is typically analyzed when it appears in story form. Traditional content analyses tend to focus on matters such as the themes that predominate within a given range of stories, and the balance and diversity of viewpoints represented therein. For example, studies of election news are concerned with the proportion of coverage devoted to each candidate, and the tendency for stories to concentrate on the theme of the horse race (eg who’s ahead, campaign strategy, publicity efforts, etc) to the exclusion of more substantive matters (eg the candidates’ qualifications, issue positions, policy proposals, etc). Studies of political news beyond the confines of the campaign have revealed a similar emphasis on political strategy over policy substance.’<sup>122</sup>

We can see that many TCB research avenues remain to be explored. For example, also,

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<sup>117</sup> M Montgomery, *The Discourse of Broadcast News: A Linguistic Approach* (Routledge 2007) 145-148, as reprinted in A Durant and M Lambrou, above 201-202.

<sup>118</sup> *ibid* 145-148, as reprinted in A Durant and M Lambrou, above 203. A Durant and M Lambrou add that despite the matrix classification, sometimes an interview starts as one type but finishes as another, and can also be a hybrid of matrix types, A Durant and M Lambrou, above 203.

<sup>119</sup> M Montgomery, above 145-148, as reprinted in A Durant and M Lambrou, above 202.

<sup>120</sup> *ibid*.

<sup>121</sup> A Durant and M Lambrou, above 203.

<sup>122</sup> *ibid* 204.

‘[E]verything which is seen on TV screen arrives there only after a complex process of mediation involving many people and institutions and a great deal of technology and artifice. TV news is expected to provide a window which is more transparent than most, but it is no different from other TV genres in these respects. Its transparency and perceived factuality is a testament to the extent to which its conventions of representation have been naturalized. Understanding the semiotics of factuality is perhaps one of the most important literacy skills required by readers and viewers in the modern industrial world. But the ways in which information and entertainment have become inextricably linked in most TV genres means that the task of identifying and evaluating claims to factuality has become more complex than ever before.’<sup>123</sup>

### Formats

Television formats provide a ‘framework of understanding.’<sup>124</sup> In addition, formats help to show how news is constructed.<sup>125</sup> D Altheide and R Snow<sup>126</sup> develop a ‘mode’ of media analysis which utilised the terms ‘media logic’ and ‘media format.’ Media formats are described by D McQuail as ‘essentially subroutines for dealing with specific themes within a genre.’<sup>127</sup> D Altheide<sup>128</sup> provides the example of a ‘format for crisis’ in television news. The main condition for regular news handling of a crisis are accessibility, visual quality, drama and action, relevance to audience and thematic unity.<sup>129</sup> D Graber<sup>130</sup> also states that ‘television journalists have developed repertoires – another possible term for frames, logic or sub-genre formats of highly stereotyped cues for many specific situations in politics.’ She makes the point also that there is an essential difference between encoding and decoding of audiovisual language from verbal language. It is more associational, connotative and unstructured and less logical, clearly defined and delimited.<sup>131</sup> D McQuail also adds that the ‘systematic analysis of audiovisual languages is, nevertheless, still at an early stage.’<sup>132</sup> It would be premature to say there can be no TCB genres and or no TCB formats, or that none will develop. The above comments again supports the contention that TCB research of effects of TCB audiovisual [non spoken] language needs further research, and in particular, as regards

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<sup>123</sup> D Graddol, ‘The Visual Accomplishment of Factuality’ in D Graddon and O Boyd-Barrett (eds), *Media Texts: Authors and Readers* (Multilingual Matters/Open University 1994) 136-142, reprinted in A Durant and M Lambrou, above 222-223.

<sup>124</sup> To use the words of G Creeber, above, 110.

<sup>125</sup> *ibid.*

<sup>126</sup> See DL Altheide and RP Snow, *Media Logic* (Sage 1979), as referred to in D McQuail, above 374.

<sup>127</sup> See D McQuail, above 374.

<sup>128</sup> DL Altheide, *Media Power* (Sage 1979).

<sup>129</sup> See D McQuail, above 374.

<sup>130</sup> D Graber, ‘Political Language’ in D Nimmo and KR Sanders (eds), *Handbook of Political Communication* (Sage 1981).

<sup>131</sup> As referred to in D McQuail, above 374.

effects of audiovisual language. It is not possible to say there are no effects in a particular area when one has not sufficient begun research of that area.

The following reference further suggests that ‘format’ relates more to content specifically while overall style is referring to genre, namely that ‘[i]n some cases, the cumulative effect of repeated tweaking of the format and content amounts to a change in genre ... Often this shift is accompanied by a move downmarket, both in storylines and production values.’<sup>133</sup>

Functional media research is used particularly in relation to the ‘media in new forms.’<sup>134</sup> Yet it has not been considered in relation to TCB. Most media categorisation is undertaken with the descriptive term genre. However, formats is also used. G Creeber refers to formats as ‘in some ways [a] competing, term’ to genres.<sup>135</sup> ‘[U]nlike genre, format is widely used within the industry and among consumers as a way of describing the kind of programme they are watching. Formats can be original and thus copyright, franchised under licence, and traded as a commercial property. Genres, by definition, are not original. Format is a production category with relatively rigid boundaries that are difficult to transgress without coming up with a new format.’<sup>136</sup> It could be premature to suggest that there is no TCB format, or that there can be no TCB formats. While *People’s Court* and *Judge Judy* are entertainment form TCB (eTCB), one question is whether there is sufficient differences for one of them to be protectable under intellectual property law or to be a format. There is scope for specific categorisation and effects-research of TCB genre and format issues.

G Creeber adds that ‘[g]enre is the product of a text – and audience-based negotiation activated by the viewer’s expectations. Genre is the larger, more inclusive category and can be used to describe programmes that use a number of related formats, such as the game show.’<sup>137</sup> In addition, ‘some television formats actively challenge the idea of genre. The “liveness” of television, its investment in immediacy and provisionality, is in direct conflict with the regulated production imperatives implied by genre and format.’<sup>138</sup> The series *24* is described as changing things with the action series by ‘changing “the rules of

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<sup>132</sup> ibid 374.

<sup>133</sup> See G Creeber, above 6, 8.

<sup>134</sup> See, for example, N Luhmann, *The Reality of the Mass Media* (Polity 2000), as referred to in D McQuail, *McQuail’s Mass Communication Theory* (5th edn, Sage 2005) 97.

<sup>135</sup> G Creeber, above 9.

<sup>136</sup> ibid.

<sup>137</sup> ibid.

<sup>138</sup> ibid.

television making format central to a drama” and its real-time nature.<sup>139</sup> The *Walking With Dinosaurs* series ‘format’ is indicated to follow the educational television genre.<sup>140</sup> Yet it seeks to be entertaining too. It merges traditional nature documentary and the spectacle effect of film.<sup>141</sup> Programmes and styles change so we cannot think of a genre as being static and ‘stable elements.’<sup>142</sup> This also emphasises how there is more than meets the eye, in terms of TCB effects and media research issues to be considered in research.

### Information Formats

Television developed ‘information formats along the following lines,’<sup>143</sup>

**Television Information Formats**

A talking medium	Words were heard one at a time, so a given current affairs show could only contain so many words, as opposed to a newspaper, where many more words could be printed, even if only a minority of them were read by any one reader
A video medium	Moving pictures were more telegenic than talking heads. Having videotape of an event to hand tended to determine its inclusion in a news show, over and above any assessment of its overall importance in a news story. Conversely, events of great significance for which there was no footage were less likely to reach the top of the news agenda.
A hybridised medium	TV was very prone to evolution by spin off. Successful formats were compulsively copied. In this very active semiotic environment, ‘information’ could never be ‘pure’ – it would always be presented via the techniques and generic formats that were regarded as most appealing at the time.
A porous medium	TV contained an unusual mixture of incommensurable types of progressing, especially fact and fiction, rubbing up against each other. Its formats were very porous to each other. News was constantly borrowing generic characteristics from non-news formats.

Adapted from Creeber<sup>144</sup>

<sup>139</sup> See *ibid* 26.

<sup>140</sup> See *ibid* 132.

<sup>141</sup> See *ibid*.

<sup>142</sup> See M Gillespie and J Toynbee, above 52.

<sup>143</sup> G Creeber, above 116.

<sup>144</sup> *ibid*.

### Infotainment Formats (Examples)

1	Lifestyle	Cooking, gardening, travel, house improvement, antiques
2	Reality	Traffic camera shows, home video shows, neighbours from hell, street interviews. This format has evolved into “survival” shows
3	Tabloid	Consumer stories, crime, celebrities, scandal, hidden cameras and chequebook journalism
4	Investigative	Most popular where the reporters put themselves in physical danger of assault by the subjects of the investigation
5	Talk	Including celebrity chat shows, Oprah and Springer, late night variety shows [eg confessional]
6	Animal	Vet shows, nature documentaries; environmental stories

Adapted from Creeber<sup>145</sup>

These issues have not been considered in effects-research of TCB.

### Drama/Documentary/Docudrama Formats

Television forms include documentaries. These include ‘fly-on-the-wall formats’<sup>146</sup> of documentaries. “Drama-documentary” is the label most often used in Britain and parts of Europe to indicate the combination of dramatic and documentary elements in a programme. In the USA, the term “docudrama” has been the preferred term. Rather than a distinct subgenre of programme, it is best to see the classification as pointing to a very wide range of different mixtures.<sup>147</sup> Some also see the development of categories such as drama-documentary” as blurring boundaries and misinforming the public.<sup>148</sup> Increasingly television drama seeks to portray its programme content as being (more) realistic.<sup>149</sup> This might assist in the researching TCB forms other than entertainment (eTCB).

### Reality TV

Reality TCB may be the most popular and identifiable TCB format, or at least certain programme formats within Reality TCB eg *Judge Judy*. Reality television is an example of ‘factual’ television.<sup>150</sup> It is a hybrid version taking many aspects from other styles and is now often generically described as infotainment, a combination between information and entertainment.<sup>151</sup> Originally in the 1990’s it was used to describe ‘the particular genre of magazine-format programmes based on crime, accident and health stories, what we might call “trauma TV.”’<sup>152</sup> Some examples listed for this type of programming include *Unsolved Mysteries*, *Rescue 911*, *Cops*, *America’s Most Wanted*, *Emergency 999*,

<sup>145</sup> ibid 117.

<sup>146</sup> See ibid 123.

<sup>147</sup> See ibid 42.

<sup>148</sup> See commentary in ibid 43, 44.

<sup>149</sup> See comments and references in ibid 33, and 30-36.

<sup>150</sup> ibid 134.

<sup>151</sup> See ibid.

*Crimewatch UK, Police Camera Action, Blues and Twos*.<sup>153</sup> The makeup of reality TV is referred to below.

**Characteristics of Reality TV**

1	Camcorder, surveillance or observational 'actuality footage'
2	First-person participant or eyewitness testimony
3	Reconstructions that rely upon narrative fiction styles
4	Studio or to-camera links and commentary from 'authoritative' presenters
5	Expert statements from emergency services personnel or psychologists

Adapted from Creeber<sup>154</sup>

Like a 'magazine format' such programming will have a set number of scripted stories per programme episode.<sup>155</sup> The content is carefully packaged. '[T]he disparate elements are strongly narrativised in ways that conform to conventional fictional police dramas or ... melodrama ... stories are structured within an overarching public service narrative ... In the case of "trauma TV" we are given to understand that our viewing pleasures are safely contained by an explicit appeal to ... security (that is to say, how to avoid becoming a victim of crime or how to participate in crime-detection processes) ... argued that this narrative structure is reflected strongly in audience responses to reality TV programmes based in the work of the emergency services.'<sup>156</sup> The 'fear occasioned by exposure to crime or ill health is balanced by the resolution offered in the outcomes of the featured cases.'<sup>157</sup> Sometimes, 'the "public service" utility of the programme is often awkwardly at odds with the entertainment-based drive of the narrative structure.'<sup>158</sup>

The range of reality and factual programming has also expanded.<sup>159</sup> Reality TV is a 'genre description of any factual programme based on [a] ... style of apparent "zero-degree realism" ... a direct, unmediated account of events, often associated with the use of video and surveillance-imaging technologies. ... to have produced a greater hunger than ever before for an astringent aesthetic of visual realism.'<sup>160</sup>

Reality TV describes a variety of 'hybrid genres – particularly factual entertainment content. It is a useful term that instantly says this television programme is a hybrid of

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<sup>152</sup> *ibid* 134.

<sup>153</sup> See *ibid*.

<sup>154</sup> *ibid*.

<sup>155</sup> See *ibid*.

<sup>156</sup> *ibid* 135-136.

<sup>157</sup> *ibid*.

<sup>158</sup> *ibid*.

<sup>159</sup> See *ibid* 136.

<sup>160</sup> *ibid* 136.



non-fiction and entertainment elements. Reality TV is also a value-laden term, and its association with entertainment, information, authenticity, performance and other conceptual values ensures it means different things to different people.<sup>161</sup> ... Reality TV ... [includes] series “and formats that follow real people and celebrities and their everyday or out of the ordinary experiences. Reality TV subcategories include infotainment about crime or emergency services; docusoaps about institutions or groups of people; lifestyles, often about how to do gardening, or making over someone’s home or personal appearance; life-experiment programmes where people experiment with different social experiences; reality game shows where a game element is introduced to a group of people in a controlled situation; reality talent shows where members of the public or celebrities audition for and perform music, or other artistic endeavours; and the reality hoax, a mock situation that usually mocks those deceived by an elaborately staged set-up. There are other emergent categories within reality TV, such as reality business series like *The Apprentice* ... and the wide range of formats shows how all-encompassing this type of hybrid content can be.”<sup>162</sup>

Reality TV also has audience interactive elements, such as giving opinions, voting,<sup>163</sup> texting, tweeting, etc. The Reality TV form is also disruptive and interferes with the scheduling, and programming, of other television genres and formats.<sup>164</sup> It also uses ‘fast paced editing.’<sup>165</sup> It can also include ‘observational documentaries.’<sup>166</sup> Again, this type of analysis has not been extensively applied to TCB issues.

### **Educational Programmes**

The Roper Starch Global Consumer asked respondents what were most important attributes of television programmes they watched.<sup>167</sup> The first was ‘interesting’ and the second was ‘educational.’ However, what is educational and educational television in particular, is not ‘as self-explanatory as it seems.’<sup>168</sup> The ‘whole conception of education has changed over the years along with television itself.’<sup>169</sup> If the genres and formats of television are changing, it may be unwise to assume that the education values and forms of what are educational television programmes are not also changing. Public service

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<sup>161</sup> See *ibid.*

<sup>162</sup> *ibid* 137.

<sup>163</sup> See, for example, *ibid* 138.

<sup>164</sup> *ibid.*

<sup>165</sup> Using the words of G Creeber *ibid.*

<sup>166</sup> Phrase used in *ibid* 139.

<sup>167</sup> Roper Starch 1995 Global Consumer Survey, as referred to in G Creeber *ibid* 131.

<sup>168</sup> See G Creeber *ibid* 131.

<sup>169</sup> See *ibid.*

broadcasting 'rests partly'<sup>170</sup> on the principle of education. It is generally recognised that the US has less public service broadcasting (PBS) than Europe.<sup>171</sup> It also appears to be clear that most examination of educational programming refers to childrens' television programmes<sup>172</sup> and not adult 'educational' programming. '[E]ducational television has always targeted children.'<sup>173</sup> When we think of adult educational programming, there is in fact very little. It is in the main Open University type programmes. These programmes are mostly scheduled at non popular hours eg 'graveyard slots.'<sup>174</sup> In addition, the content of educational TCB programming needs to be considered. '[T]he proliferation of "infotainment" has increasingly become the preferred form of educational television, or informational television at the turn of the millennium.'<sup>175</sup> The Discovery Channel moved away from a traditional 'education' form to 'merge learning and enjoyment.'<sup>176</sup> G Creeber adds,

'Educational programmes that court a general audience, of both adults and children, have adopted the modes of "infotainment," marking the union of informational and entertainment programming. Programmes are made as engaging as possible, and in an audiovisual language that spectacularises what a few years earlier might have been fairly dry discourses of information. The final product is educational television that uses an audiovisual language originally associated with mainstream entertainment television, such as sensationalism, fast pace, spectacle, enhancing music and narrativisation.'<sup>177</sup>

### **Genre/Format of TCB**

N Lacey refers to various elements and components of the game show genre, in particular, setting, characters, narrative, iconography and style.<sup>178</sup> This breakdown has not been undertaken for the different forms of TCB. 'However, game shows are also formats.'<sup>179</sup> This 'format' can be commercialised through licensing to other jurisdictions.<sup>180</sup> DA Harris describes Tru TV as a 'twenty-four hour a day format.'<sup>181</sup> Not

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<sup>170</sup> See *ibid.*

<sup>171</sup> See for example *ibid.* While there is limited public service broadcasting (PSB) in the US, there have been some calls for PBS to be disbanded. See references in *ibid.*

<sup>172</sup> See, for example, comments in *ibid* 131.

<sup>173</sup> *ibid.*

<sup>174</sup> See *ibid* 132.

<sup>175</sup> See *ibid* 131.

<sup>176</sup> See *ibid* 132.

<sup>177</sup> *ibid.*

<sup>178</sup> N Lacey, above 206.

<sup>179</sup> *ibid.*

<sup>180</sup> *ibid.*

<sup>181</sup> DA Harris, 'The Appearance of Justice: Court TV, Conventional Television, and the Public Understanding of the Criminal Justice System' (1993) 35 *Arizona Law Review* 785, 805.

all genres are actually researched in depth or for any length of time.<sup>182</sup> We could examine the texts of TCB programmes. Focus can also be placed on how it is promoted and described. In addition, we can also focus on media commentary to ask the following questions,<sup>183</sup> namely, what TCB programmes mean; how we define TCB; how we define TCB programmes; what TCB programmes mean; what TCB broadcasts mean for a specific community; what the audience is. If we are considering TCB, we can examine the category of the channel and the programme.

### **Need for Research**

Companies undertake communications audits.<sup>184</sup> One could suggest that we need an audit or analysis of TCB communications. Researching a television genre category requires analysis of the way in which institutions and people talk about and how they use genre categories, and then to chart the shifts in discourse about a particular genre category through historical contexts.<sup>185</sup> Even media studies have and continue to be interdisciplinary, using for example social studies.<sup>186</sup> G Creeber notes that,

‘formal markers that confirm to us that what we are watching (which might be a “fly-on-the-wall” documentary or a sequence from, say, a current affairs programme) is a record of an ongoing, and at least partly media-independent, reality. Important here will be a sense of spontaneity of action and a movement of camera that presents us with something which is perceptually coherent but which is following developments beyond the control of the crew. Some observational sequences will be shot in a “raw” style, gaining their realism from their lack of smoothness and of immediate significance when compared with television fiction. However, others may be shot in such a way television fiction. However, others may be shot in such a way as to imitate at least some of the scopic range and lucid continuity of fictional sequences.’<sup>187</sup>

The flow of documentary production has been summarised as follows: planning, shooting, editing, transformation/reception by audience.<sup>188</sup> Fly-on-the-wall documentaries are described as ‘real people in undirected situations.’<sup>189</sup> One can ask

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<sup>182</sup> G Creeber, above 4, referring to comedy drama.

<sup>183</sup> See Mittell, above, 14, as referred to in G Creeber, above 12.

<sup>184</sup> Horizontally and vertically. to examine what is transmitted, passivity, direction (one way or two way), technologies, purpose, etc. A Durant and M Lambrou, above 127. It is less common to undertake individual mass communication audits, *ibid* 128.

<sup>185</sup> See G Creeber, above 12, and references therein.

<sup>186</sup> See for example, *ibid* 123.

<sup>187</sup> *ibid* 127.

<sup>188</sup> See *ibid* 125.

<sup>189</sup> S Mamber, ‘Cinema Verite in America’ (1972) 13:2 Screen 79, as referred to in G Creeber, above 128.

whether TCB is different. For example, one can consider whether extended TCB is just another documentary. Unfortunately, the content of and what is communicated by TCB, and TCB forms, has received less than a considered body of legal empirical research.

### **Summary**

In terms of assessments of TCB which must be made by courts, legal-policymakers, participants, lawyers, researchers and the public generally, the effect issues need to be fully considered. In order to do so we need research which is sufficiently capable of distinguishing forms and effects of different categories of TCB. We cannot continue to assume, or accept, that there is just one single form and effects are identical across all types of TCB. Normative research is needed to advance our understanding and our decisions. While normative research tools exist, we can also look at established bodies of research in related fields. The media and communications field is one such area. There are media and communications forms and sub-form issues which can be considered in TCB discussions and research. The TCB research can incorporate these form distinctions in the design of normative research studies. This may assist to address the problems in the TCB arguments which currently exist. We really know very little about TCB and its effects. In considering any of the arguments, whether for or against, we see that they do not seek to base themselves in any particular style or forms and sub-forms of TCB, thus assuming that all such broadcasting is the same, regardless of court, type of case, the legal rights issues, broadcaster, programme forms, scheduling, etc. Such an assumption and approach is no longer tenable. Equally, different legal rights arguments may be recalibrated depending on the TCB forms being considered. It is timely, therefore, for the Lord Chief Justice of England and Wales to call for more legal-empirical research of the TCB issues.<sup>190</sup> Such research should begin to distinguish the nuances of different TCB forms and categories, and in order to identify and compare different effects as between them.

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<sup>190</sup> F Gibb, 'Britain Rethinks Cameras in Court' *Times* (London, 16 May 2014).

## CHAPTER 8: TCB EFFECTS-RESEARCH

### Introduction

The first TCB broadcast occurred in 1953.<sup>1</sup> TCB and the arguments in relation to the effects of TCB are important legal, legal-policy and societal issues. We would expect a significant amount of research from 1953 to date. Most of the TCB literature instead refers to very little research directed at determining the TCB effects and which is not determinative either way.<sup>2</sup> When considering 'research' of TCB, the literature may be distinguished between references to popular non-methodical, unempirical and general research studies (typically opinion based) and more considered legal-empirical research studies. Overall, there are a relatively small number of both general studies and legal-empirical studies.<sup>3</sup> The lack of detailed studies and the problems with research to date are considered below and which face courts when they come to be consider TCB issues. This will highlight the need for a normative re-assessment of the general and popular TCB literature to date which does not really answer any of the concerns regarding the effects of TCB. It equally emphasises the need for more considered normative legal-empirical research and research models directed to the TCB issues in order to assist courts and legal-policymakers. It assists to consider the popular and general (ie non legal-empirical) research available and a review follows below as well an assessment of some of the pertinent issues arising.

### Literature and General Research

S Barber<sup>4</sup> lists the TCB research to 1987 as consisting of seventeen general studies.<sup>5</sup> In 1994 RA Strickland and RH Moore<sup>6</sup> makes no distinction between popular general and legal-empirical research.<sup>7</sup> A legal brief (promoting TCB access) in 2009 on behalf of Courtroom View Network<sup>8</sup> makes no distinction between general and legal-empirical

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<sup>1</sup> Listed by S Barber, *News Cameras in the Courtroom: A Free Press – Fair Trial Debate* (Ablex 1987), as being the case of Billy Eugene Manley in Oklahoma City which occurred in 1953, see S Barber, above 10-11. See also W Freedman, *Press and Media Access to the Criminal Courtroom* (Quorum 1988) 42-43.

<sup>2</sup> The Appendices list the general or non-empirical studies referred to in the general literature.  
<sup>3</sup> See Appendices.

<sup>4</sup> S Barber, above.

<sup>5</sup> *ibid*, in particular 70 ff.

<sup>6</sup> RA Strickland and RH Moore, 'Cameras in State Courts: A Historical Perspective' (1994) 78 *Judicature* 128, n 52 at 135.

<sup>7</sup> They do, however, refer to the Short report and the New York research.

<sup>8</sup> Boies, Schiller and Flexner LLP, *Memorandum, Prepared for the Committee on Court Administration and Case Management (Hon John R Tunheim, Chair), The Judicial Conference of the United States, Submitted on Behalf of Courtroom View Network*, 6 June 2009. Available <  
[www.google.ie/url?sa=t&source=web&cd=1&ved=0CBMQFjAA&url=http%3A%2F%2F](http://www.google.ie/url?sa=t&source=web&cd=1&ved=0CBMQFjAA&url=http%3A%2F%2F)

research in the eighteen studies or sources referred to. W Freedman<sup>9</sup> does not address any specific legal-empirical research studies of TCB participants and effects. Neither A Hiber<sup>10</sup> nor contributors examine the effects-research. A Dershowitz,<sup>11</sup> one of the lawyers involved in the *Simpson* (criminal) case, refers to TCB generally<sup>12</sup> but not the effects-research. RK Sherwin,<sup>13</sup> while referring to *Simpson*, *Estes*,<sup>14</sup> *Chandler*<sup>15</sup> and important media issues, does not directly refer to TCB effects-research. A New York report, *Radio, Television, and the Administration of Justice: A Documented Survey of Materials*<sup>16</sup> refers extensively to court reporting issues, including TCB, but it did not refer to effects, effects-research, models, definitions nor forms of TCB. Radio Telefis Eireann (RTE), the Irish national broadcaster, refers to the issue of TCB in a discussion paper.<sup>17</sup> However, there is no discussion of research issues, effects-research nor forms of TCB.

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<www.courtroomview.com%2Fnews%2FCVN%2520White%2520Paper%2520(6%25206%252009)%2520(with%2520exhibits).pdf&ei=Gb2MTOuSFMOV4gbL2uWnCG&usg=AFQjCNEdysCcE\_qaIIKgbw3EvomZW\_7DTg&sig2=UJyaEtrpo493UfAhGO9kSw >  
 accessed 12 September 2010. Also *ibid* 10 ff, n 8 at 10.

- <sup>9</sup> W Freedman, *Press and Media Access to the Criminal Courtroom* (Quorum 1988), apart from referring to an incompletely referenced audience questionnaire study, which was carried out by a university, at 46. W Freedman, does refer to empirical research being referred to in *Post-Newsweek Stations, Florida, Inc v US* (370 So2d 764 (Fla 1979) at 768-760, but Freedman does not identify, cite or consider such purported research. See W Freedman *ibid* 83. There is a reference to a 1987 questionnaire sent to one thousand television subscribers. Of the twenty five percent whom responded, ninety four percent watched a particular trial on television. Eighty four percent of the twenty five percent agreed with the guilty verdict. See Study by Journalism Department at the University of Arizona (30 November 1987) *New Law Journal* 13 ff, as referred to in W Freedman *ibid* 46.
- <sup>10</sup> A Hiber (ed), *Should Cameras be Allowed in Courtrooms?* (Gale 2008). Chapters include *Cameras Should/Should Not be Allowed in Courtrooms*; *Cameras Should be Allowed in Criminal Trials with Consent of All Parties*; *Cameras Should/Should Not be Allowed in the Supreme Court*; *Supreme Court Proceedings Should be Recorded but Not Televised*; *Cameras in Courtrooms Would Lead to a More Educated Public*; *Cameras Should/Should Not be Allowed at High Profile Trials*. *ibid*.
- <sup>11</sup> A Dershowitz, *Reasonable Doubts: The Criminal Justice System and the OJ Simpson Case* (Touchstone 1996, 1997). A Dershowitz is also a notable legal academic in the US.
- <sup>12</sup> For example, *ibid* 27, 29, 32, 33, 145, 146, 147, 148, 203.
- <sup>13</sup> RK Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (University of Chicago Press 2000). Note C Parker, 'What Do They Learn When They Learn Legal Ethics?' (2001) 12 *Legal Education Review* 175.
- <sup>14</sup> *Estes v Texas* 381 US [1964] 532.
- <sup>15</sup> *Chandler v Florida* 449 US [1981] 560.
- <sup>16</sup> The Special Committee on Radio and Television of the Association of the Bar of the City of New York, *Radio, Television, and the Administration of Justice: A Documented Survey of Materials* (Columbia University Press 1965) 99.
- <sup>17</sup> K Woods, *Televising the Courts: A Radio Telefis Eireann Discussion Paper* (RTE 1995). Prepared by Kieron Wood, the then RTE Legal Affairs Correspondent.

The UK Televising the Courts: Report of a Working Party of the Public Affairs Committee of the General Council of the Bar [of England and Wales]<sup>18</sup> (Caplan report) states that it reviewed ‘hundreds’ of surveys and reports - but only possibly refers to Short and Hoyt as legal-empirical effects-research.<sup>19</sup> The UK Department of Constitutional Affairs launched a consultation paper entitled *Broadcasting Courts*<sup>20</sup> in November 2004<sup>21</sup> consisted mainly of a seminar and an online questionnaire<sup>22</sup> and no legal-empirical research relating to TCB.

EE Slotnick and JA Segal<sup>23</sup> refer to the television news media and US Supreme Court in their book *Television News and the Supreme Court: All the News That’s Fit to Air?* They acknowledge that there is only very ‘limited research’ in relation to the wider issue of the courts, the judiciary and media reporting.<sup>24</sup> There is still less in relation to the narrower issue of TCB. While not primarily directed to the issue of TCB, Slotnick and Segal note that media court reporting ‘has received somewhat mixed evaluations, ranging from very poor to, at best, adequate.’<sup>25</sup> In terms of general media court reporting there is only a ‘smattering of [legal-]empirical research conducted on this relationship as well as on the nature of the coverage television affords the Court.’<sup>26</sup> Some of the research finds that the media reported reactions to US Supreme Court decisions, rather than what the US Supreme Court said or the details of its decision, and that some reports differed between the newspaper types.<sup>27</sup> Part of chapter 5 refers to ‘The Issue of Cameras in the Supreme Court.’<sup>28</sup> The TCB arguments, issues and some interviews are referred to. However, the legal-empirical research to date nor the extent of the research is referred to.<sup>29</sup>

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<sup>18</sup> J Caplan, M Kalisher and A Speaight, *Televising the Courts: Report of a Working Party of the Public Affairs Committee of the General Council of the Bar* [of England and Wales] (Bar Council of England and Wales 1989).

<sup>19</sup> *ibid* 34. The Hoyt research may possibly referred to indirectly in a footnote on page 33.

<sup>20</sup> Department of Constitutional Affairs [UK], *Broadcasting Courts, Consultation Paper* (CP 28/04 November 2004).

<sup>21</sup> See < [www.dca.goc.uk/consult/courts/broadcasting-cp28-04.htm](http://www.dca.goc.uk/consult/courts/broadcasting-cp28-04.htm) > accessed 14 December 2009.

<sup>22</sup> On 10 January 2005. *ibid*.

<sup>23</sup> EE Slotnick and JA Segal, *Television News and the Supreme Court: All the News That’s Fit to Air?* (Cambridge University Press 1998).

<sup>24</sup> *ibid* 2.

<sup>25</sup> *ibid* 8.

<sup>26</sup> *ibid* 8.

<sup>27</sup> *ibid* 10 ff and references therein.

<sup>28</sup> *ibid* 54 ff.

<sup>29</sup> The authors also provide very useful examination and case studies of media reporting of the US Supreme Court as well as analysis of some of the types of cases covered by the court. See *ibid* 89 ff. Part of the media reporting analysis revealed that 82 percent of stories in the sample of particular types/stages of cases were ‘inaccurate.’ *ibid* 209. ‘The picture that

One of the most recent TCB books is *Audio-Visual Coverage of Courts*.<sup>30</sup> D Stepniak states that over forty US states have ‘formally assessed the effect of courtroom televising’<sup>31</sup> yet he does not distinguish which of these are general and which are legal-empirical studies, nor which studies can be relied upon. He also refers to ‘countless’ and ‘vast’ studies, experiments and literature on effects.<sup>32</sup> The author found just over twenty, which, it is suggested, is hardly a reliable body of evidence. Stepniak only refers to a limited number of legal-empirical studies in a footnote.<sup>33</sup> He later refers to the New York report,<sup>34</sup> and the first Federal pilot study report.<sup>35</sup> The New York report is only legal-empirical to the extent that there was a professional public opinion survey incorporated into it and that there was limited content analysis of certain TCB footage. There is no reference to S Barber’s book nor the legal-empirical studies referred to by her. He, therefore, refers to only three studies and two part studies which are legal-empirical studies. He notes that early TCB, with lots of equipment, bulky cameras, television personnel and novelty, was ‘undoubtedly disruptive and distracting to participants.’<sup>36</sup> However, it assumes ‘[t]echnological advances have ensured that audio-visual recording of court proceedings need not distract nor disrupt proceedings.’<sup>37</sup> This is not backed up and is much more complex and nuanced than is suggested.<sup>38</sup>

Unfortunately, the general research relies almost entirely on opinions and ‘experiences.’<sup>39</sup> In the first Federal courts pilot study, ‘most participants *believe*’ there are no, or minimal, effects<sup>40</sup> (emphasis added). In addition, pilot studies and experiments are generally only conducted after a particular jurisdiction is persuaded on the desirability of proceedings

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emerges of network news coverage of Supreme Court docketing decisions is not a very happy one.’ *ibid*.

<sup>30</sup> D Stepniak, *Audio-Visual Coverage of Courts* (Cambridge University Press 2008).

<sup>31</sup> *ibid* 353.

<sup>32</sup> *ibid* 69.

<sup>33</sup> *ibid* 69. These are: SL Alexander, ‘Cameras in the Courtroom: A Case Study’ [1991] 74 *Judicature* 307; E Borgida, K Debono and L Buckman, ‘Cameras in the Courtroom: The Effects of Media Coverage on Witness Testimony and Juror Perceptions’ [1990] 14 *Law and Human Behaviour* 489; EH Short and Associates, *Evaluation of California’s Experiment with Extended Media Coverage of Courts, submitted to Administrative Office for the Courts; the Chief Justice’s Special Committee on the Courts and the Media, and the California Judicial Council* (1981); Judicial Council of California, *Report of Task Force on Photographing, Recording and Broadcasting in the Courtroom* (February 1996). [Arguably this is not empirical].

<sup>34</sup> *ibid* 102 ff.

<sup>35</sup> *ibid* 130 ff.

<sup>36</sup> *ibid* 1.

<sup>37</sup> *ibid* 3.

<sup>38</sup> There are other potential effects apart from equipment distraction. The ‘mere knowledge of being recorded may still have an effect on participants.’ *ibid* 3.

<sup>39</sup> *ibid* 8.

<sup>40</sup> D Stepniak, *Audio-Visual Coverage of Courts* (Cambridge University Press 2008) 100–101.



with television coverage.<sup>41</sup> The ‘function of such experiments is ... to reassure those unconvinced of the desirability of such coverage, to acclimatise courtroom participants and the public, and to determine the most appropriate and effective methods of regulation.’<sup>42</sup>

Overall, the effects-research is ‘inconclusive.’<sup>43</sup> There is an ‘inconclusiveness of ... effect[s] ... on participants.’<sup>44</sup> This applies equally to ‘detrimental and beneficial effects.’<sup>45</sup> D Stepniak does not assess the quality, level and amount of general and legal-empirical research undertaken. He only acknowledges that the ‘methodology and conclusiveness of the findings’ have been questioned.<sup>46</sup> The section ‘Inconclusiveness of research findings’ states that ‘the extensive evaluation of experiments and courts’ experiences with audio-visual coverage has not produced a consensus on the beneficial or detrimental effects of audio-visual coverage.’<sup>47</sup> ‘[D]etrimental and beneficial effects ... [are equally] incapable of being established conclusively.’<sup>48</sup> The author’s eye-tracking proof-of-concept demonstration suggests that this is not correct. D Stepniak argues that the ‘inconclusiveness’ is due in part to ‘the fact that the effects which are being evaluated have been shown not to be capable of conclusive scientific evaluation as they rely on the subjective perceptions of courtroom participants and observers.’<sup>49</sup> The effects are, he feels, ‘incapable of being established conclusively.’<sup>50</sup> They are ‘intrinsically incapable of being conclusively established.’<sup>51</sup> He states that the research and studies are ‘inevitably deemed inconclusive.’<sup>52</sup> He seems to accept that opinions and self-reports can be the only effects-research. It is, he suggests, an ‘inescapable fact that effects can only be measured in terms of perceptions.’ In contrast, this thesis commends the utility of

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<sup>41</sup> *ibid* 8–9.

<sup>42</sup> *ibid* 9. A New Hampshire case is noted as referring to state studies finding no or little adverse psychological effects, and instead finding certain positive effects. However, upon examination, the studies are not cited in the case and there is no distinction between general opinion studies and legal-empirical studies. The California studies he refers to in 1996 and 2000, each appear based on opinions and questionnaires only. See New Hampshire Supreme Court, *Petition of WMUR Channel 9* (13 December 2002) < [www.courts.state.nh.us/opinions/2002/0212/wmur156.htm](http://www.courts.state.nh.us/opinions/2002/0212/wmur156.htm) > as referred to in D Stepniak, above 101. Accessed by author 8 June 2010. D Stepniak, above 114 ff, referring to Administrative Office of the Courts of California, *Task Force on Photographing, Recording and Broadcasting in the Courtroom*, Report Summary (1996), and Administrative Office of the Courts, *Cameras in the Courtroom: Report on Rule 980* (May 2000).

<sup>43</sup> *ibid* 351.

<sup>44</sup> *ibid* 4.

<sup>45</sup> *ibid* 8.

<sup>46</sup> *ibid* 100. Also 403–405.

<sup>47</sup> D Stepniak, above 403.

<sup>48</sup> *ibid* 8.

<sup>49</sup> D Stepniak, above 403.

<sup>50</sup> *ibid* 6.

<sup>51</sup> *ibid* 6.

undertaking considered and normative legal-empirical research.<sup>53</sup> D Stepniak does not refer to research categories, models, definitions or forms of TCB. Eye-tracking technology is suggested herein in terms of its potential for addressing part of the US Supreme Court concerns and challenge, which includes in particular TCB disruption and distraction-effects and related issues.

One of the most influential studies was the 1997 New York State Committee to Review Audio-Visual Coverage of Court Proceedings report, entitled *An Open Courtroom: Cameras in New York Courts*.<sup>54</sup> There was a majority report (in favour of TCB) and a minority report (against TCB). However, the report generally comprises opinion survey and was non legal-empirical.<sup>55</sup>

While Stepniak compliments the level of endeavour and research involved in the report<sup>56</sup> he fails to note that the report did not seek to evaluate legal-empirical evidence, or otherwise, what it was tasked to do by the legislature, namely, examining if, inter alia, there is enhanced public understanding, familiarity and benefits with the courts.<sup>57</sup> This intended research did not occur. The original intention was that the following legal-empirical research would occur,

‘The Legislature directed this Committee to evaluate the efficacy of the experimental program and to assess whether:

1. Any public benefits accrue from the experimental program;
2. Any abuses occurred during the program;
3. The extent to which and the way in which the conduct of participants in court proceedings changes when audio-visual coverage is present;
4. The degree of compliance by trial judges and the media with the requirements of Section 218 of the Judiciary Law;
5. The effect of audio-visual coverage on the conduct of trial judges both inside and outside the courtroom.’<sup>58</sup>

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<sup>52</sup> *ibid* 70.

<sup>53</sup> See graduated-effects, eye-tracking, legal-psychology and communications research references herein.

<sup>54</sup> *New York State Committee to Review Audio-Visual Coverage of Court Proceedings, An Open Courtroom: Cameras in New York Courts* (Fordham University Press 1997).

<sup>55</sup> With the exception of professional public opinion survey and content research.

<sup>56</sup> D Stepniak, above 103.

<sup>57</sup> See New York State Committee to Review Audio-Visual Coverage of Court Proceedings, above, xv-3; and D Stepniak, above 105.

<sup>58</sup> *New York State Committee to Review Audio-Visual Coverage of Court Proceedings, An Open Courtroom: Cameras in New York Courts* (Fordham University Press 1997) 1-2.

Apart from engaging a third party professional firm to undertake public polling and interviews and limited content analysis, all of the ‘comprehensive’<sup>59</sup> research was opinion based. While extensive, the research was generally not comprehensive, was not legal-empirical and did not do what it was tasked to do. D Stepniak states that the report ‘records studies undertaken to ascertain perceptions as to the effects of televising.’<sup>60</sup> He also describes the minority report as being ‘the most comprehensive and persuasive case against televising of trial proceedings.’<sup>61</sup> The minority report states that the ‘experiment has failed to prove that cameras in the courts provide a public benefit, significantly enhance public understanding of the judicial process or help to maintain a high level of public confidence in the judiciary.’<sup>62</sup> D Stepniak states that the New York study ‘revealed substantial evidence of both beneficial and detrimental effects’ including on victims and witnesses.<sup>63</sup>

### **Problems With the General (Non Legal-Empirical) Research**

There are numerous problems in the general TCB research to date ie non legal-empirical research such as self-reports. This undermines our ability to rely upon individual studies but more importantly our ability to rely on a confirmed wide body of established research which answers the TCB effects-concerns. Future normative research may seek to address these problems. For this reason, the thesis explores some of the research avenues which could be pursued in future. The basis for many of these suggestions comes from extensive research in law and related disciplines.<sup>64</sup> The problems with the general TCB

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<sup>59</sup> D Stepniak, above 105.

<sup>60</sup> *ibid* 103.

<sup>61</sup> *ibid* 103. Also 107.

<sup>62</sup> *New York State Committee to Review Audio-Visual Coverage of Court Proceedings, An Open Courtroom: Cameras in New York Courts* (Fordham University Press 1997) 206, as referred to in D Stepniak, above 108.

<sup>63</sup> *ibid*, n 25 at 58, 39-40, 61, as referred to in D Stepniak, above 369.

<sup>64</sup> See generally P Lambert, ‘Courtroom Television Broadcasting’ (1997) 2:5 *Communications Law* 180; P Lambert, ‘Courtroom Television Cameras and the Media’ (1995) 16:4 *Journal of Media Law and Practice* 139 as examples. On the context of open justice and court reporting generally see M McGonagle, *A Textbook on Media Law* (Gill and MacMillan 1997), and the follow up *Media Law* (Sweet and Maxwell 2006); W Freeman, *Press and Media Access to the Criminal Courtroom* (Quorum 1988); NT Gardner, ‘Cameras in the Courtroom: Guidelines for State Criminal Trials’ (1985) 84:3 *Michigan Law Review* 475; and references throughout this present work. Also P Lambert, ‘Effects Research Issues in Television Courtroom Broadcasting: Getting Past Monkey’ (10th European Conference on eGovernment, University of Limerick, 17-18 June 2010); P Lambert, ‘Time to Leave the Monkey Behind?: How Eye-tracking and Psychology Can Contribute to Television Courtroom Broadcasting Effects Research’ (British Psychological Society, BPS Cognitive Psychology Section Annual Conference, 27th Annual Cognitive Psychology Section Conference, Cardiff University 6-8 September 2010); P Lambert, ‘Eye-Tracking Technology and Television Courtroom Broadcasting’ (11 August 2010) *Computers and Law* < [www.scl.org/site.aspx?i=ed16965](http://www.scl.org/site.aspx?i=ed16965) > accessed 19 January 2014; P

research, which are many and varied, are referred to below. Many of these are not even considered in the legal and popular discussion in relation to TCB.

The general research (ie non legal-empirical) does not address or answer the concerns that arise in relation to TCB and TCB effects. The general research is infrequent and limited in not being sufficiently legal-empirical to answer the research effects and concerns relating to TCB. This review indicates at least that there are more issues to be considered than the basic presumptive type arguments to date, would have us believe. The literature and general research is also arguably remiss in not suggesting models of research, definitions and differentiating different forms of TCB.<sup>65</sup>

- *Problem of Different Forms of TCB*: Different forms of TCB are not distinguished in the literature and research. Nor are there definitions to distinguish the different forms of TCB. It is difficult for courts and legal-policymakers to say which forms and patterns across those forms, are more desirable. Generally the studies do not distinguish TCB from other potential forms of TCB. The timelines and histories of TCB are not located and compared with the developments, phases, genres and formats of television, television programming and television content generally.<sup>66</sup> An overall classification of TCB forms and sub-forms could assist ongoing normative research, courts and legal-policymakers in future. SA Kohm notes surprise at the lack of research of reality based courtroom television broadcasting (rTCB), despite the first show of this kind, *Peoples Court*, dovetailing the California Judicial Council's decision to permit TCB in the late 1970's.<sup>67</sup> K Podlas also notes the lack of research into the impact of rTCB, in particular *Peoples Court* and *Judge Judy*.<sup>68</sup> K Podlas used surveys of those attending for jury service regarding their viewing habits of reality based syndicated TCB.<sup>69</sup> She found that reality TCB (rTCB) viewing influenced the jurors views and expectations of how active and proactive judges would be,

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Lambert, 'TCB Effects: Eye-Tracking and Camera Distraction in Court' (Irish Association of Law Teachers Annual Conference, Strand Hotel, Limerick 26-28 November 2010); P Lambert, 'Monkey Magic: Problems With Effects Research of Television Courtroom Broadcasting' (2010) 18 Irish Law Times 278; P Lambert, 'A Candid Camera, Eye-Tracking Technology Could Transform Courtroom Broadcasting' (10 December 2010) New Law Journal 1699.

<sup>65</sup> Definitions could be a basic requirement for effects research in future, whether in relation to courtroom broadcasting or TCB.

<sup>66</sup> Note references to some of the different period and developments of television generally in SA Kohm, 'I'm Not a Judge But I Play One on TV: American Reality-Based Courtroom Television' (PhD thesis, Simon Fraser University 2004) 87 ff.

<sup>67</sup> SA Kohm, above 90. Also K Podlas, 'Please Adjust Your Signal: How Television's Syndicated Courtrooms Bias Our Juror Citizenry' (2001) 39 American Business Law Review 1.

<sup>68</sup> K Podlas, 'Please Adjust Your Signal: How Television's Syndicated Courtrooms Bias Our Juror Citizenry' (2001) 39 American Business Law Review 1.

<sup>69</sup> *ibid* 1-2.

and in addition influenced views of what opinions judges may have.<sup>70</sup> Frequent viewers tended to look for clues as to the judge's opinion, including interpreting judicial silences.<sup>71</sup> K Podlas also refers to TCB mis-education effect issues.<sup>72</sup> It would seem that 'there is a marked difference between sensational trials such as OJ *Simpson's* [criminal] "trial of the century" and the more mundane kinds of disputes shown on a typical episode of *Peoples' Court* of "Judge Judy."<sup>73</sup> RE Reeves Stuart refers to legal-empirical studies (supporting TCB) but does not cite them.<sup>74</sup> While she states that results are overall positive, both civil and criminal media case coverage showed 'small side effects.'<sup>75</sup> These are not expanded upon<sup>76</sup>;

- *Self-Report Problem*: One of the major problems with the TCB effects-research to date is the nature of the studies themselves, in that they are broadly restricted to opinion self-report studies. (Particular) courtroom participants are asked to indicate whether they themselves have been affected, or sometimes adversely affected, by TCB in a particular case that they were just involved in. The nature of such questions may mean that courtroom participants are going to say that they themselves have not been affected. They are personal opinions. These are not independently verified or validated. Sometimes they will say that it is their opinion that certain others have been affected, but certainly not them. Similarly, an eyewitness<sup>77</sup> may be very confident, even certain, but still be wrong in a correct identification. They may equally be unaware of the factors involved. Perhaps courts and legal-policymakers may also be unaware or less informed as to the nuances and factors potentially involved with in-court distraction involving TCB. Another inherent problem is that even when relying on such self-reports, there does not appear to be a cross comparison done between the answers on the effects on a person and the effects perceived by other people on the same person;
- Many studies today employ various methodologies and techniques of observing and documenting actual effects and reactions on particular individuals to stimuli. Sometimes these stimuli involve a particular scene, a film, a video clip, a photograph, a written description, story, etc. In these instances it is possible to observe and test effects. Employing similar methodologies and techniques could improve TCB legal-empirical research. These methodologies and techniques can be used to test effects of TCB on courtroom participants and on the general viewing audience. However, they can also be utilised in the context of validating or contradicting opinion self-report studies. The new methodologies and techniques can be used to see, for example, whether a particular

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<sup>70</sup> *ibid* 2.

<sup>71</sup> *ibid*.

<sup>72</sup> *ibid*.

<sup>73</sup> SA Kohm, above 90-91.

<sup>74</sup> RER Stuart, above 47-48.

<sup>75</sup> *ibid* 47.

<sup>76</sup> Given that this has not occurred before, the author therefore seeks to begin distinguishing different TCB forms in order to assist legal and policy stakeholder and the general population. See Appendices.

<sup>77</sup> See eye-tracking proof-of-concept demonstration and related issued referred to in ch 12.

courtroom participant actually was distracted by or looked over at a TCB camera, while in their answer to the questionnaire they may have indicated that they were not so affected, or did not look. There could be implications as regards the overall veracity of certain past TCB general research and popular TCB suggestions;

- No account is taken of self-report issues, and particularly over time.<sup>78</sup> It might be thought surprising, perhaps, how the Florida study for example ‘concluded’ that there were few adverse effects.<sup>79</sup> At best, the most that could have been said, despite the faulty research, is that no or few adverse effects were found to be shown. This is a significant difference. T Keller points out that Florida presented the first long term opportunity to research the effects of TCB.<sup>80</sup> The pilot programme was established in 1975.<sup>81</sup> This would mean that between 1953–1975 various TCB occurred, but without seeking to examine any long term effect<sup>82</sup>;
- One of the main arguments of critics of TCB is that it (may) adversely affect courtroom participants. However, self-report studies alone are not the optimum normative research method available. That no one has sought to expand research beyond these limited studies is noteworthy. Therefore, the thesis seeks to consider how we may advance certain normative effects-research which can help to overcome the self-report opinion problem. This is most evident in the author’s research and proposals in relation to TCB distraction-effects issues;
- *Opinion-Report Problem:* The official state and other studies rely too ‘heavily’<sup>83</sup> on opinion surveys and questionnaires alone. Yet ‘[e]ven with the self-reported system and its inherent bias, these studies all revealed that a significant minority of jurors, attorneys, and witnesses reported that [TCB] had significant impact on their role in the trial. This finding alone points to the indisputable point that a trial cannot be conducted fairly if all of the participants are unable to properly perform their parts.’<sup>84</sup> The 1991 Criminal Justice Section of the New York Bar Association is also criticised for having a ‘limited self-report’ methodology and ‘self-reporting flaws.’<sup>85</sup> When ‘examining psychological impact it may be necessary to abandon the simplistic self-reporting surveys and delve deeper into the issues.’<sup>86</sup> The surveys are also described as ‘subjective’ and are ‘based solely on the trial participant’s viewpoints as to their personal opinions and feelings ... Self-diagnosis is by its

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<sup>78</sup> See E Borgida, K DeBona and LA Buckman, ‘Cameras in the Courtroom, The Effects of Media Coverage on Witness Testimony and Juror Perceptions’ (1990) 14:5 Law and Human Behaviour 489, 491.

<sup>79</sup> *ibid.*

<sup>80</sup> T Keller, *Cameras in Courtrooms: An Analysis of Television Court Coverage in Virginia* (PhD thesis, University of Tennessee 1992) 52.

<sup>81</sup> *ibid* 52.

<sup>82</sup> In fact the Florida study only really began in 1977, *ibid.*

<sup>83</sup> P Thaler, above 34.

<sup>84</sup> RER Stuart, *The Changing Relationship Between Camera and the Courts* (MA thesis, Florida Atlantic University 1998) 57.

<sup>85</sup> *ibid* 58.

<sup>86</sup> *ibid* 60.

very nature problematic and distorted.<sup>87</sup> In addition, the courtroom participants ‘are set up to be impartial and truthful and when asked if effected by the influence of television, they are apt to remind the sceptical and themselves that they are indeed impartial’<sup>88</sup> and not affected.<sup>89</sup> Opinions and self-reports are often based on ‘intuitive judgements’<sup>90</sup>;

- *Other Self-Reports/Opinion-Report Problems*: The perceptions of individuals as recorded in interviews often provide conflicting views.<sup>91</sup> In addition to the self-report problem with respondents, one is not sure if replies are being made honestly.<sup>92</sup> A further problem is that replies may be made which the respondent hopes will please the questioner.<sup>93</sup> SM Kassin also notes the self-report problems and the fact that it is widely referred to in the legal-psychology literature.<sup>94</sup> He also refers to a manifest example of the problem in a CB survey in a Florida Supreme Court study. The jurors, witnesses and lawyers all reported their belief that the cameras had a greater effect on the other courtroom participants than on themselves.<sup>95</sup> D Shores also refers to the self-report bias of the research to date.<sup>96</sup> He further states that ‘[m]any of the responses are personal estimations and speculations about contexts in which no variables were experimentally controlled.’<sup>97</sup> ‘Warden’<sup>98</sup> note[s], “A survey of judges and lawyers on their opinion of the validity of the Pythagorean Theorem would not change its true nature.” Opinion must give way to fact, and propositions must be tested against reality.<sup>99</sup> The thesis suggests that our normative legal and TCB effects-research should expand further;
- *Mixed Experience Opinions*: Some of the studies when they gauge opinions of judges, include some judges with experience of TCB and some without such direct experience. T Keller raises this as an issue.<sup>100</sup> Also, the ‘concentration on fear [of effects] ... has diverted attention from other important questions pertaining to the presence of [TCB]’<sup>101</sup>;
- *Courtroom Participants’ Distraction, Attention and Other Effects*: One theme in many surveys is that courtroom participants may see and notice the TCB cameras, but will soon

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<sup>87</sup> ibid 56.

<sup>88</sup> ibid 56-57.

<sup>89</sup> ibid 60.

<sup>90</sup> To use the words of JR Weisberger, above 305.

<sup>91</sup> See Short Report, E Short and Associates, above 19.

<sup>92</sup> W Petkanas, *Cameras on Trial: An Assessment of the Educational Affects of News Cameras in Trial Courts* (PhD thesis, New York University 1990) 113.

<sup>93</sup> ibid 113.

<sup>94</sup> S Kassin, ‘TV Cameras, Public Self-Consciousness, and Mock Juror Performance’ (1984) 20 *Journal of Experimental Social Psychology* 336, 337.

<sup>95</sup> ibid 336, 337, with references to N Davis, ‘Television in Our Courts: The Proven Advantages, The Unproven Dangers’ (1980) 64 *Judicature* 85; and also J Wisenand, ‘Florida’s Experiment’ (1978) 64 *ABA Journal* 1860.

<sup>96</sup> D Shores, ‘The Effects of Courtroom Camera on Verbal Behavior: An Analysis of Simulated Trial Witness Testimony in Courtrooms Using Television Cameras’ (PhD thesis, University of Florida 1981) 29.

<sup>97</sup> ibid 29.

<sup>98</sup> KP Warden, ‘Canon 35: Is There Room for Objectivity?’ (1965) 4 *Washburn Law Journal* 211.

<sup>99</sup> K Netteburg, above 473.

<sup>100</sup> T Keller, above 24.

<sup>101</sup> ibid 26.

forget about them.<sup>102</sup> However, if a witness for example notices the TCB camera(s) but says they forgot about the TCB camera(s) once they began to be questioned, there could still remain a subconscious effect. The general research does not properly investigate these points. TCB eye-tracking could disprove or validate some of these popular concerns. In K Netteburg's research, fifty nine percent incorrectly remembered that the defendant was guilty of both charges, only five percent correctly recalled that the defendant was found guilty of only one charge,<sup>103</sup> which was described as disturbing.<sup>104</sup> He suggests further research of defendants who are acquitted in televised trials.<sup>105</sup> He finds 'little evidence to support' some of the *Estes*<sup>106</sup> decisions; '[o]ther research fails to confirm ... detrimental effects ... survey data ... in Washington, Ohio, Florida and Wisconsin have failed to demonstrate [distraction-effects]'<sup>107</sup> (emphasis added). Therefore, such research is not saying that effects do not exist. It is unfortunate, therefore, that so many commentators make the incorrect assumption that these and other studies have concluded that there are no effects or no adverse effects. Such assumptions misrepresent the research and incorrectly advance conclusions which are in fact not founded. The thesis proposes and advances some clear normative avenues for measuring the distraction-effect issues of the courtroom participants in the TCB courtroom. Such research can have the advantage of exact measurement and without having to rely on mere opinion and self-reports;

- *No Recorded Research*: Possibly the first reference to 'research' was the observations and comments of Justice Bartlett in a televised case in 1955.<sup>108</sup> However, it appears that there was no formal documented research, overall classification, models, definitions, questionnaires, interviews, coding or analysis.<sup>109</sup> D Shores refers to the introduction of TCB cameras to Colorado courts, and notes that there was no controlled research, experiments or surveys.<sup>110</sup> The Rhode Island research pilot refers to various research being undertaken, but none appears to be listed, nor the methodologies.<sup>111</sup> While the study is meant to include a political science academic and a legal-psychology academic, no record is

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<sup>102</sup> See, for example, E Einsiedel, 'Television in the Courtroom: An Ohio Experiment,' (Association for Education in Journalism August 1978), as referred to in Netteburg, above 470.

<sup>103</sup> K Netteburg, above 474.

<sup>104</sup> *ibid* 475.

<sup>105</sup> *ibid*.

<sup>106</sup> *Estes v Texas* 381 US [1964] 532.

<sup>107</sup> *ibid*.

<sup>108</sup> AE Blashfield, 'The Case of the Controversial Canon' (1962) 48 ABA Journal 429, as referred to in D Shores, 'The Effects of Courtroom Camera on Verbal Behavior: An Analysis of Simulated Trial Witness Testimony in Courtrooms Using Television Cameras' (PhD thesis, University of Florida 1981) 19.

<sup>109</sup> AE Blashfield, *ibid*.

<sup>110</sup> D Shores, 'The Effects of Courtroom Camera on Verbal Behavior: An Analysis of Simulated Trial Witness Testimony in Courtrooms Using Television Cameras' (PhD thesis, University of Florida 1981) 19.

<sup>111</sup> JR Weisberger, 'Cameras in the Courtroom: The Rhode Island Experience' (1983) XVII:2 Suffolk University Law Review 299.



- provided. There appears to be no record (or publically available record) of a written report or record of the Washington research, the questions asked, nor the interviews undertaken<sup>112</sup>;
- *No Analysis of Data*: Sometimes certain details may be collected in a given study, but the researchers do not undertake any analysis of the data. This occurred in Virginia. The Virginia Association of Broadcasters research report on a broadcasting study included thirty five interview data report sheets, but did not undertake or furnish any analysis of these.<sup>113</sup> There were no legal, policy or research findings based on such analysis;
  - *No Record Still Available*: Sometimes there are references to general research, but copies of same are not available to researchers today. In one instance the relevant court office and the judge who is referred to as the author of a particular general report cannot find a copy of the report. This occurred with the author's request in relation to the Baker report in Florida.<sup>114</sup> The court office was unable to locate this report for the author, even after contacting the judge;
  - *Sometimes Research Starts After the Event*: On occasion research may only occur after the changes have been introduced and after the events in question have occurred. This may not be the best way of undertaking research of important TCB effect issues. One Florida study only commissioned (certain) courtroom participant surveys after the study period ended.<sup>115</sup> Florida<sup>116</sup> sought to collect responses from courtroom participants sometimes up to a year after the case and made no account of the time differences.<sup>117</sup> It also appears that at least some of the Rhode Island research occurred after the pilot period expired.<sup>118</sup> Legal-empirical research and evidence, including baseline research, needs to be planned in advance;
  - *Methodological Problems*: The general research can also have methodological flaws. The Florida study is criticised for being extremely simplistic.<sup>119</sup> It is separately referred to as

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<sup>112</sup> There are apparently recorded interviews on film. As referred to in N Netteburg, above 470 and n 1 at 470.

<sup>113</sup> VAB Assessment Report to the [Virginia] Supreme Court, 1989, as referred to in T Keller, above 12.

<sup>114</sup> The Baker Report was instrumental in Florida's move to allow cameras. It reported that there were no physical disruptions, which appears based on Judge Baker's views as the trial judge in a particular case (Zamora). See P Thaler, above 26. It also concluded that jurors were not hindered in their ability to follow the case, based on his interviews with them. See *ibid*, 26.

<sup>115</sup> A Sample Survey of the Attitudes of Individuals Associated with Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts between July 5, 1977 and June 30, 1978, available from the Florida Supreme Court, as referred to in K Netteburg, 'Does Research Support the *Estes* Ban on Cameras in the Courtroom' (1980) 63 *Judicature* 467, 472.

<sup>116</sup> Courts of Florida (1978). Referred to *ibid* 491.

<sup>117</sup> Referred to in E Borgida, K DeBona and LA Buckman, 'Cameras in the Courtroom, The Effects of Media Coverage on Witness Testimony and Juror Perceptions' (1990) 14:5 *Law and Human Behaviour* 489, 491.

<sup>118</sup> R Weisberger, 'Cameras in the Courtroom: The Rhode Island Experience' (1983) XVII:2 *Suffolk University Law Review* 302.

<sup>119</sup> K Netteburg, 'Does Research Support the *Estes* Ban on Cameras in the Courtroom' (1980) 63 *Judicature* 467, 472.

having methodological flaws.<sup>120</sup> The effects debate is still ongoing<sup>121</sup> and in some respects the popular arguments and basis for propositions has not changed much since *Estes* in 1965.<sup>122</sup> Unfortunately, the better more normative research methods of today are not always employed to deal with the TCB distraction-effects and other concerns. Practically all of the US states' research involves unrepresentative samples and 'anecdotal evidence.'<sup>123</sup> Too frequently, reliance is placed solely upon self-report, opinion-report and observer-report studies – even today. It has been argued that US states have made 'policy decisions'<sup>124</sup> that there are no adverse effects, rather than actual research findings, or rather than undertaking proper, controlled, replicated and validated TCB research. It is suggested that more normative research may assist the introduction of validation and repeat study methods to TCB research. Studies are sometimes limited in only adopting one method of study. Only the EH Short study is referred to as adopting a multimodal method.<sup>125</sup> In one instance a law firm was engaged to assess effects of certain in-court effects.<sup>126</sup> DP Killian also recognised the flawed methodology of certain general research.<sup>127</sup> CM Boggs undertook a review of the research in 1981 and of seventy two studies at least twenty had methodological flaws undermining their reliability and validity.<sup>128</sup> E Einsiedel did not attend the case she was researching, relying on interviews.<sup>129</sup> K Netteburg criticises one of the early Florida studies, and which criticism is quoted in the Short report, as having 'methodological flaws, including extreme simplicity in instrumentation and the rush which the Florida's court deadline imposed on the researchers.'<sup>130</sup> The general studies lack proper

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<sup>120</sup> SL Alexander, "'Mischievous Potentialities": A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit, Florida, 1989' (PhD thesis, University of Florida, 1990) 83.

<sup>121</sup> *ibid* 9.

<sup>122</sup> *ibid*.

<sup>123</sup> E Borgida, K DeBona and LA Buckman, 'Cameras in the Courtroom, The Effects of Media Coverage on Witness Testimony and Juror Perceptions' (1990) 14:5 *Law and Human Behaviour* 489, 491.

<sup>124</sup> *ibid* 489, 492.

<sup>125</sup> As referred to *ibid*, 489, 491.

<sup>126</sup> D Shores, referring to a one year experiment approved by the California Supreme Court beginning in June 1980, D Shores, 'The Effects of Courtroom Camera on Verbal Behavior: An Analysis of Simulated Trial Witness Testimony in Courtrooms Using Television Cameras' (PhD thesis, University of Florida 1981) 26.

<sup>127</sup> DP Killian, above as referred to in SL Alexander, "'Mischievous Potentialities": A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit, Florida, 1989' (PhD thesis, University of Florida 1990) 72.

<sup>128</sup> CM Boggs, 'Television Cameras in the Courtroom: An Examination of Studies and Their Value to Court Policy-Making' (MA thesis, University of Pennsylvania 1981), as referred to in SL Alexander, "'Mischievous Potentialities": A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit, Florida, 1989' (PhD thesis, University of Florida 1990) 90.

<sup>129</sup> E Einsiedel, 'Television in the Courtroom: An Ohio Experiment' (Association for Education in Journalism, Seattle 1978), as referred to in SL Alexander, "'Mischievous Potentialities": A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit, Florida, 1989' (PhD thesis, University of Florida 1990) 87.

<sup>130</sup> K Netteburg, 'Does Research Support the *Estes* Ban on Cameras in the Courtroom?' (1980) 63 *Judicature* 467, 472, as referred to in the Short Report, above 12.

methodology and have ‘no controls, disproof, or evaluation.’<sup>131</sup> T Keller acknowledges that there is no clear methodology referred to in the Terry research.<sup>132</sup> The general research is also frequently unscientific and unmethodical. Therefore, little reliance can be placed upon much of the research in terms of making any general legal or legal-policy conclusions or determinations;

- *Rushed Research*: Professional and academic researchers are infrequently invited to be involved in TCB research studies. On the few occasions where they are, such researchers can be given very tight deadlines to undertake research. This can undermine the capacity for undertaking the best research possible. Florida research, for example, imposed a short deadline of the researchers.<sup>133</sup> Optimum TCB research involves adequate time and planning, including an adequate extended period for baseline research;
- *No Longitudinal Research*: There is almost no TCB longitudinal research over any extended period of time. Obviously, it undermines the possibility for any long term assessments of effects. It means that such research is therefore limited to a single point in time only. There is limited if no scope for making assessments or assessing TCB trends over time. This means that it is difficult if not impossible to make any overall conclusions or determinations regarding the extended effects of TCB;
- *Non-Defined Specific Effect/Hypothesis and Non-Specific Studies*: Many popular TCB effect arguments exist.<sup>134</sup> Yet the general studies overall are not specific in researching and testing individual effects arguments, nor in a manner which ensures each potential effect is isolated, nor in ensuring that a specific ‘result’ is not influenced by some other factor.<sup>135</sup> Many ‘research’ studies purport to research TCB, but do not define what they are specifically researching, nor how the proposed research method will test for a particular effect. It can be difficult or impossible to demonstrate, therefore, that the hypothesis or proposed effect is the result of the ‘cause’ identified (eg camera; a camera filming; a camera operator, etc) or some other cause;
- *Small Samples*: Sometimes the subject population in particular TCB research is criticised for being too low for significant or wider general conclusions.<sup>136</sup> Two thirds of participants in a Florida study refused to respond.<sup>137</sup> Many of the state research studies rely on ‘a very small sample.’<sup>138</sup> Virginia had fifty seven responses, California fifty six, Nevada thirty one and New Jersey only ‘a relatively small number of respondents surveyed.’<sup>139</sup> JL Hoyt’s

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<sup>131</sup> G Gerbner, ‘Trial by Television: Are We At The Point Of No Return?’ (1980) 63 Judicature 416, 426, as referred to in T Keller, above 70-71.

<sup>132</sup> T Keller, above, 52.

<sup>133</sup> K Netteburg, ‘Does Research Support the *Estes* Ban on Cameras in the Courtroom?’ (1980) 63 Judicature 467, 472, as referred to in the Short Report, above 12.

<sup>134</sup> P Thaler, above 27.

<sup>135</sup> *ibid* 27.

<sup>136</sup> SL Alexander, *ibid* 84.

<sup>137</sup> Referred to in E Borgida, K DeBona and LA Buckman, ‘Cameras in the Courtroom, The Effects of Media Coverage on Witness Testimony and Juror Perceptions’ (1990) 14:5 Law and Human Behaviour 491.

<sup>138</sup> RER Stuart, above 57.

<sup>139</sup> *ibid* 57.

study, while often cited, had twelve subjects in each of the three video groups.<sup>140</sup> The courtroom participants surveyed for the Short report were limited to judges, attorneys and jurors.<sup>141</sup> Only a subset of these were then interviewed<sup>142</sup>;

- *Low Response Rates:* One of the other problems is that there has been a low response rate for some of the post case survey questionnaires.<sup>143</sup> D Shores refers to one survey of five TCB trials in Florida which only had responses from nine witnesses (two of whom referred to detrimental effects).<sup>144</sup> The response rate for judges in the Florida and Wisconsin TCB studies is indicated to be low.<sup>145</sup> The methodical witness studies to date also have relatively small subject numbers and responses.<sup>146</sup> P Thaler refers to a New York study by the Office of Court Administration after the Steinberg case. However, of the 1,095 people, only thirty two were witnesses, of which only one witness was from New York City – the location of the events and the TCB trial. He also criticises the fact that no convicted TCB defendant was included in the survey or interviews<sup>147</sup>;
- *Research Controls:* All of the general studies, with possibly one exception, failed to have adequate controls.<sup>148</sup> This undermines the possibility of strong research conclusions being available to courts and legal-policymakers, and hence the suggestion for ongoing normative TCB effects-research. It also undermines the potential for such research to have wider and more general benefit;
- *Misinterpreting Results:* Many general studies are generalised beyond the validity of the data.<sup>149</sup> ‘Reports’ claim, for example, that particular research ‘demonstrated that audio-visual coverage does not adversely affect judicial proceedings.’<sup>150</sup> However, this is incorrect. A research proposition may be that there is Y affect on person(s) A from cause X. If no positive result is demonstrated, or statistically demonstrated (or proven), then established research methods dictate that the conclusion is only that Y effect was not demonstrated. The research proposition was not established. It may also be that even if there is a minor Y effect shown in results, this may be so statistically insignificant that even still, the research proposition is not proven. Many possible suggestions of ‘conclusions’ that there are no effects are, therefore, incorrect;

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<sup>140</sup> JL Hoyt, above 487, 493.

<sup>141</sup> Short Report, above 19.

<sup>142</sup> *ibid* 21.

<sup>143</sup> D Shores, ‘The Effects of Courtroom Camera on Verbal Behavior: An Analysis of Simulated Trial Witness Testimony in Courtrooms Using Television Cameras’ (PhD thesis, University of Florida 1981) 22-23.

<sup>144</sup> In 1977-1978. B Pryor, D Strawn, R Buchanan and M Meeske, ‘The Florida Experiment: An Analysis of the On-the-Scene Responses to Cameras in the Courtrooms’ (1979) 45 *Southern Speech Communications Journal* 12-26, as referred to in D Shores, above 22.

<sup>145</sup> N Netteburg, above 472.

<sup>146</sup> D Shores, above 29.

<sup>147</sup> P Thaler, above 178.

<sup>148</sup> E Borgida, K DeBona and LA Buckman, above 489, 491.

<sup>149</sup> T Rimmer, *Electronic Media in the Courtroom: Legal and Social Science Perspectives* (American Association for Education in Journalism and Mass Communication 1988); SL Alexander, above 90.

- *Research Presented as More Than It Is*: K Netteburg identifies the first effects-research as being the Washington study of TCB.<sup>151</sup> A recording was made and shown to judges without being broadcast publically.<sup>152</sup> However, making a recording is not the same as legal-empirical research for effects of TCB. As there appears to be no written record of the details of the research (which is meant to involve questions and interviews) today's researchers cannot assess it.<sup>153</sup> D Shores refers to (possibly the same) Washington study with cameras in 1974, saying that it only had an 'informal survey' of witnesses.<sup>154</sup> The Washington TCB study, therefore, appears to be largely opinion-report and self-report in focus<sup>155</sup>;
- *Little Analysis*: 'Early efforts included reactions from judges and surveys of participants. These methods continue, joined by more experimental methods.'<sup>156</sup> To the extent that this suggests that there is significant and frequent study research, the record shows otherwise;
- *Comparisons Needed*: Few studies are compared with each other. Therefore, the literature (whether legal, legal-policy or popular), arguably has insufficient basis to draw generalisable conclusions or trends regarding TCB issues;
- *Absence of Replication*: The studies generally do not attempt to replicate and/or verify the results of earlier studies. Therefore, there is a point that the research has not been conducted in a meaningful manner to deal with the concerns that have been raised by courts and others;
- *Limited Funding*: The Rhode Island research study of its pilot refers to a political science and legal-psychology academics being involved. However, they are indicated to be involved only on a limited 'volunteer'<sup>157</sup> basis, and thus presumably without any research funding;
- *Confidence*: There is no evaluation of confidence issues in the general research.<sup>158</sup> We do not know how TCB effects public confidence in individual courtroom participants, courts and the justice process generally. Pursuing measurement of confidence over an extended period prior to introducing TCB could be a valuable baseline measure for effects as regards the public, potential audiences, judges and other courtroom participants;

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<sup>150</sup> M Crosson, chief administrator of the courts in New York State, public report, as referred to in P Thaler, above 30.

<sup>151</sup> There are apparently recorded interviews on film. As referred to in N Netteburg, above 470 and n 1 at 470.

<sup>152</sup> *ibid.*

<sup>153</sup> *ibid.*

<sup>154</sup> S Shores, above 20.

<sup>155</sup> See K Netteburg, above 470.

<sup>156</sup> T Keller, above 51.

<sup>157</sup> *ibid* 302.

<sup>158</sup> J Ossinger, 'Electronic Access to Courtrooms: Television as an Educational Socializing Agent on the Judiciary' (MA thesis, University of Maine 2006) 21.

- *Contamination*: In one instance at least, participants in a given case were interviewed on their experience of TCB but while being videotaped.<sup>159</sup> The interviews elicited ‘glowing testimonials to the journalistic prowess of the media.’<sup>160</sup> There does not appear to be any consideration of whether the interview filming, or questions may have had an effect on the process and responses;
- *Judicial Process/Procedure for TCB*: T Keller states that until the time of her study in 1992 the research has focused ‘primarily on whether courtroom decorum and the defendant’s right to a fair trial are adversely affected. Repeatedly surveys, experiments and legal analyses fail to find clear evidence that the judicial procedure is harmed.’<sup>161</sup> However, there is no sustained research into court processes and TCB processes;
- *Pooling of TCB Footage*: Where pooling arrangements have been in place, it does not appear that there has been any comparative research of the final programme footage from the different networks<sup>162</sup>;
- *Camera Shots*: There is generally no comparison or research of the effects of different types of camera shots in TCB footage.<sup>163</sup> This could be useful for normative research across different TCB forms;
- *Case Studies*: Case studies are useful but individually might not be generalised.<sup>164</sup> They have a ‘lack of generalisability.’<sup>165</sup> In terms of considering case studies and general conclusions from these, the Short report points out that a ‘representative sample of cases within an experimental period must be studied before general conclusions may be drawn.’<sup>166</sup> ‘Simply because one trial can be conducted fairly under the camera’s scrutiny does not mean that others can’<sup>167</sup> (emphasis added). As the thesis suggests, sustained and co-ordinated TCB research is needed. ‘While the [Florida<sup>168</sup> and Wisconsin<sup>169</sup> study]

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<sup>159</sup> See T Keller, above 52, referring to the JG Graham trial and the research reported in HB Terry, ‘Electronic Journalism in the Colorado Courts’ (1957) 34 *Journalism Quarterly* 341, 354.

<sup>160</sup> HB Terry, above 348.

<sup>161</sup> T Keller, above 71.

<sup>162</sup> Note comments in Petkanas, regarding same in one jurisdiction, W Petkanas, ‘Cameras on Trial: An Assessment of the Educational Affects of News Cameras in Trial Courts’ (PhD thesis, New York University 1990) 63.

<sup>163</sup> W Petkanas, ‘Cameras on Trial: An Assessment of the Educational Affects of News Cameras in Trial Courts’ (PhD thesis, New York University 1990) 68, regarding different types of camera angles.

<sup>164</sup> See Short Report, above 11.

<sup>165</sup> K Netteburg, above 471.

<sup>166</sup> See Short Report, above, 11.

<sup>167</sup> K Netteburg, above 471. ‘A one time survey ... cannot support the inference that television causes prejudice and such was not the purpose of this study.’ *ibid* 471. Original emphasis. ‘[A] survey of public opinion cannot establish causal inference, either; we cannot prove that TV causes prejudice simply because people believe it does.’ K Netteburg, above 471.

<sup>168</sup> *A Sample Survey of the Attitudes of Individuals Associated with Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts between July 5, 1977 and June 30, 1978*, available from the Florida Supreme Court, as referred to in K Netteburg, above 472.

<sup>169</sup> *Report of the Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom* (1 April 1979), as referred to in K Netteburg, above 472.

surveys are more generalisable than case studies, they still cannot be used as evidence to draw causal conclusions. For instance, we might argue that the juror who has participated in only a televised trial has no knowledge of courtroom decorum in a non-televised trial setting and little basis for deciding whether the new situation is more fair or unfair<sup>170</sup>;

- *Privacy*: Privacy, even in the courtroom setting, has been ignored in terms of research and evaluation, and is only addressed in comment and argument only. One issue is whether TCB infringes upon privacy legal rights. Within privacy we have subsets of defendant privacy,<sup>171</sup> party privacy, juror privacy, witness privacy, lawyer privacy, judge privacy, court personnel privacy, public attendee privacy.<sup>172</sup> The potential significance of this particular issue is enhanced with the possibility of internet push and streaming of TCB footage over iTCB. This may also cross over with issues such as the Right to be Forgotten<sup>173</sup>;
- *Courtroom Participants–Defendants*: Very few of the general questionnaires and interviews involve the defendants.<sup>174</sup> This is a large omission in the research. Equally, there appears no legal-empirical research of definition issues;
- *Courtroom Audience*: S Barber highlights the need to focus on audience effects of TCB.<sup>175</sup> There is little audience effects-research of TCB;
- *California/Short Report*: P Thaler indicates that ‘[o]ne of the most comprehensive studies was the year-long California survey-study in 1981, which adopted a diversified data collection method. In that experiment, researchers combined data from interviews from participants in specific trials, with general attitudinal responses gathered from questionnaires. They also confirmed interview responses with observations made by researchers attending a trial. Changes in participants’ attitudes before being involved in a televised trial as well as during and after a trial were also noted.’<sup>176</sup> There were even issues with the Short report study.<sup>177</sup> The Short report acknowledges the importance of where the television equipment is located in the courtroom as well as the placement of the television personnel,<sup>178</sup> yet these are frequently ignored and not recorded in most studies. The Short report concludes that the relatively positive results ‘thus far should not be taken as licence

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<sup>170</sup> K Netteburg, above 472-473.

<sup>171</sup> See P Thaler, above 159.

<sup>172</sup> By comparison, for example, personal data is protected by the data protection legal regime well beyond the boundaries of the home and include even personal data in the public sphere.

<sup>173</sup> See, for example, *Google Spain, Google Inc v Agencia Española de Protección de Datos (AEPD) and González* (C-131/12, CJEU, 13 May 2014) < <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&dolang=EN&mode=req&dir=&occ=first&part=1&cid=457078> > accessed 17 May 2014.

<sup>174</sup> *ibid* 92.

<sup>175</sup> *ibid* 95 ff.

<sup>176</sup> P Thaler, *The Impact of the Television Camera on Courtroom Participants: A Case Study of the Joel Steinberg Murder Trial* (PhD thesis, New York University 1990) 178.

<sup>177</sup> Some of which are referred to in E Borgida, K DeBona and LA Buckman, above 489, 492.

<sup>178</sup> EH Short and Associates, *Evaluation of California’s Experiment with Extended Media Coverage of Courts, Submitted to: The Administrative Office for the Courts, The Chief*

to grant carte blanche access by extended media or to ignore the guidelines in the rules.’<sup>179</sup> It continues that ‘California’s experiment thus far with cameras in the courts has not been tainted by an *Estes* or a *Hauptman*,’<sup>180</sup> which is arguably prophetic in terms of the subsequent *Simpson* (criminal) case. It also adds that there should be no general access, and also that any access ‘should be done carefully’<sup>181</sup>;

- The Members of the Chief Justice’s Special Committee on the Courts and the Media, The Judicial Council of California expressly did not adopt or agree with the Short report, its finding or conclusions.<sup>182</sup> E Margolin’s Memorandum dated 16 October 1981, attached to the above Memorandum of The Members of the Chief Justice’s Special Committee, adds that ‘any report which fails to evaluate or even consider the use made by the media of the coverage obtained from observation of the courts leaves us with only a partial evaluation insufficient for a final determination of the wisdom of the project.’<sup>183</sup> Indeed, few legal-empirical studies seek to review the media use of TCB footage. The media and communications references above also highlight how further normative research is needed;
- The *Cameras in the Courtroom: Report on Rule 980 Reports of 2000* does not refer to any effects-research carried out. It does gather statistics on types of cases the media applied to cover, as well as responses questionnaires. However, it is noted that many media applications contained incomplete information.<sup>184</sup> The rule provisions in relation to the media being responsible for increased court costs do not appear to have been developed or used in practice<sup>185</sup>;
- *TCB Question Not Answered*: There is substantial literature and popular commentary in relation to concerns and effects of TCB. The issues and concerns in the three US Supreme Court cases still remain. A majority of judges in the Rhode Island research felt that the pilot period ‘produced insufficient [legal-]empirical experience upon which to base a permanent conclusion.’<sup>186</sup> K Netteburg (in 1980) acknowledges that many effects questions are not answered.<sup>187</sup> He continues that ‘[p]erhaps the most crucial question yet unanswered is whether the surveys and case studies conducted ... can be replicated with greater controls. ... [Also,] what types of trials if any should be excluded from coverage ... the frequency with which courts will be covered and the long-term effects on the court

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*Justice’s Special Committee on the Courts and the Media and The California Judicial Council* (September 1981)(Short Report), above 22.

<sup>179</sup> *ibid* 244.

<sup>180</sup> *ibid*.

<sup>181</sup> *ibid* 244-245.

<sup>182</sup> See *Memorandum to Members of the Court Management Committee from Administrative Office of the Courts, Michael A Fisher, Attorney regarding Cameras in Court Experiment* (Rule 980.2) 11.

<sup>183</sup> *ibid*.

<sup>184</sup> Administrative Office of the Courts, Research and Planning Unit, *Cameras in the Courtroom, Report on Rule 980* (May 2000) 3. The report later says that ‘[e]very media request form received was missing at least one piece of requested information’ *ibid* 13.

<sup>185</sup> *ibid* 9.

<sup>186</sup> JR Weisberger, above 303.

<sup>187</sup> K Netteburg, ‘Does Research Support the *Estes* Ban on Cameras in the Courtroom’ (1980) 63 *Judicature* 467, 469.



system.<sup>188</sup> Overall, the concerns and indeed challenges of the US Supreme Court are not yet answered and neither the US Supreme Court nor other courts are in a position, because of lack of research information, to be able to give definitive answers to difficult TCB issues should another TCB case arise tomorrow. More nuanced and normative TCB legal-empirical research could better assist courts and legal-policymakers. Normative TCB effects-research can provide many of the greater ‘controls’ referred to above;

- K Netteburg notes that while research is beginning, many specific themes have not yet been researched, including some of the specific themes referred to in *Estes*.<sup>189</sup> No research addresses all issues and concerns. A follow on point is that research should be categorised and therefore specific research on specific issues can then be compared, tested and improved upon. As the author points out, there are no definitions or description of forms. This is important because courts and legal-policymakers will not have sufficient verified materials available to them to assist in answering and dealing with these considerations when they arise, and in particular the next time a TCB case comes to be considered at a superior level;
- The ‘arguments about the effect ... on the judicial process continues.’<sup>190</sup> The issue of different effects is still ‘unresolved.’<sup>191</sup> The research that is there is ‘[i]nconclusive.’<sup>192</sup> Evidence in relation to the various arguments ‘has not been systematically produced.’<sup>193</sup> ‘Crucial questions still remain’<sup>194</sup> and the debate continues.<sup>195</sup> In terms of benefits, SA Kohm notes that we are still referring to only ‘*presumed* benefit[s]’<sup>196</sup> (emphasis added). SL Alexander argues that the (general) research to date still leaves only ‘speculation’ and no conclusions on the effects issues<sup>197</sup>;
- S Barber<sup>198</sup> has written one of the few books on this topic. In it she examines the available US studies into TCB.<sup>199</sup> Having carried out her examination, she concludes that a number of fundamental questions remain unresolved and unanswered. Some of the questions she raises<sup>200</sup> are included in the following questions, namely,

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<sup>188</sup> *ibid* n 11 at 469.

<sup>189</sup> *ibid* 469.

<sup>190</sup> P Thaler, above 16, referring also to W Freedman, *Press and Media Access to the Criminal Courtroom* (Quorum 1988). Thaler does not refer to any page numbering in Freedman.

<sup>191</sup> P Thaler, above 68.

<sup>192</sup> *ibid* 34.

<sup>193</sup> JL Hoyt, ‘Courtroom Coverage: The Effects of Being Televised’ (1977) *Journal of Broadcasting* 487, 489.

<sup>194</sup> P Thaler, above 70.

<sup>195</sup> D Shores, *The Effects of Courtroom Camera on Verbal Behavior: An Analysis of Simulated Trial Witness Testimony in Courtrooms Using Television Cameras* (PhD thesis, University of Florida 1981) 1.

<sup>196</sup> SA Kohm, above 357.

<sup>197</sup> SL Alexander, ‘“Mischievous Potentialities”: A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit, Florida, 1989’ (PhD thesis, University of Florida 1990) 39-40.

<sup>198</sup> S Barber, above.

<sup>199</sup> These studies were carried out during the period between 1975 and 1981.

<sup>200</sup> *ibid* 92-93.

- Does television, as opposed to print [journalism], better inform the public about a particular case?
- Can gavel to gavel (G2G) broadcasts educate the public about the administration of justice? [or better educate the public?]
- Do time constraints imposed on many broadcast news stories mean that a case is treated either unfairly or inadequately?
- Does the public get a distorted picture of the judicial system, or a biased view of a particular trial, if stories are edited to highlight sensational testimony, cross-examination, or simply the opening and closing arguments?
- How does the public's understanding of courts and specific cases differ when broadcast rather than print is the medium of communication?
- What type or form of news coverage has consistently provided the most balanced coverage of legal issues, trial participants and court administration?

These and many other questions still remain to be addressed in any meaningful, considered, logical and legal-empirical manner as part of an examination of TCB and TCB effects. There is insufficient research to assist courts and legal-policymakers. *Estes*,<sup>201</sup> *Chandler*<sup>202</sup> and *Hollingsworth*<sup>203</sup> also note the lack of legal-empirical effects-research.<sup>204</sup> S Esposito also describes televised justice as being 'relatively unexplored.'<sup>205</sup> S Pasternack, for example, notes the 'lack of data' and calls for not just more research but an 'ongoing program of research.'<sup>206</sup> AR Paddon also calls for ongoing research.<sup>207</sup> Hence, there is a suggestion for more normative TCB related effects-research to assist today's courts and legal-policymakers, and on an ongoing basis;

- *Not Enough Research*: There has been far too little research carried out into this important subject (ie TCB effects). The existing research is less than comprehensive. There is perhaps surprising given the important issues at stake. D Shores agrees that 'little factual

<sup>201</sup> *Estes v Texas* 381 US [1964] 532.

<sup>202</sup> *Chandler v Florida* 449 US [1981] 560.

<sup>203</sup> *Hollingsworth v Perry* 558 US [2010] <  
www.supremecourt.gov/opinions/09pdf/09A648.pdf > accessed 19 January 2014.

<sup>204</sup> S Kassin, 'TV Cameras, Public Self-Consciousness, and Mock Juror Performance' (1984) 20 *Journal of Experimental Social Psychology* 336, 337.

<sup>205</sup> SA Esposito, 'OJ TV: A Narrative Analysis of Television's Pretrial Coverage of the OJ Simpson Case' (PhD thesis, Wayne State University, Detroit, Michigan 1996) 26. See also DP Killian, 'The Propriety of Restrictive Guidelines for Cameras in the Court' (1987) 9 *Communications and the Law* 27, as described in SL Alexander, "'Mischievous Potentialities": A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit, Florida, 1989' (PhD thesis, University of Florida 1990) 72.

<sup>206</sup> ST Pasternack, 'The Effects of Perceived Community Pressure on Simulated Juror Guilt Attributions: An Experimental Study' (PhD thesis, University of Tennessee, Knoxville 1982) 3.

<sup>207</sup> AR Paddon, 'Television Coverage of Criminal Trials with Cameras and Microphones: A Controlled Experiment of Audience Effects' (Radio-television Journalism Division, AEJMC Montreal, Que, Canada 7 August 1992) 14. Also, AR Paddon, 'Television Coverage of Criminal Trials with Cameras and Microphones: A Controlled Experiment of Audience Effects' (PhD thesis, University of Tennessee 1985).

evidence exists to support either side of the question as to what effects the camera has' on witnesses communication behaviour.<sup>208</sup> 'The effects of cameras on witnesses will never be known until systematic research efforts probe the question.'<sup>209</sup> Justice Burger in *Chandler*<sup>210</sup> says that '[f]urther experimentation is necessary to evaluate the potential ... prejudice associated with broadcast coverage of trials.'<sup>211</sup> The impact is 'unknown' according to another judge.<sup>212</sup> The literature acknowledges that the effects-research is 'sparse.'<sup>213</sup> More normative legal-empirical research directed to TCB effects should therefore be of benefit.

### **Need for TCB Legal-Empirical Research**

We need more research and in particular normative legal-empirical research in order to deal with the legal and legal-policy issues regarding TCB and TCB effects. TCB research, and indeed legal research generally, has frequently ignored highly relevant literature and research from other (related) disciplines for too long. TCB issues cannot remain isolated and considered only in terms of conventional or traditional legal pigeon holes, or mere opinions.<sup>214</sup> TCB expands beyond any single legal discipline or pigeon hole, beyond legal considerations alone and even beyond any one field of cross-disciplinary research. Of course conventional legal materials remain relevant to the topic being discussed but the legal community and the general public should be aware of the wider research opportunities available. To do otherwise would be to remain precluded from better understanding how and why the courtroom operates in the context of (television) media attention.<sup>215</sup> Research in other disciplines should be allowed to assist our understanding and assessment of TCB generally. We should strive for optimum normative research answers, not rest on less than optimum research from the past, given the real legal issues and concerns at stake.

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<sup>208</sup> D Shores, above 37.

<sup>209</sup> *ibid.*

<sup>210</sup> *Chandler v Florida* 449 US [1981] 560.

<sup>211</sup> J Berger, in *Chandler v Florida*, at 4146, as referred to in D Shores, above 38.

<sup>212</sup> Fatzer J, former Chief Justice of Kansas Supreme Court, in HR Fatzer, 'Cameras in the Courtroom: The Kansas Opposition' [1978] 18 Washburn Law Journal 230, as referred to in D Shores, above 38.

<sup>213</sup> D Shores, above 39, and references to the general literature therein.

<sup>214</sup> Note an interesting chapter by R Cranston, 'The Rational Study of Law: Social Research and Access to Justice' which discusses changing legal course subjects, in AAS Zuckerman and R Cranston, *Reform of Civil Procedure: Essays on Access to Justice* (Clarendon 1995) 31-59.

<sup>215</sup> One should also note that the Law Reform Commission has explored the separate (but related) area of contempt of court. See Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP 1991) and the subsequent Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994).

Courts should base their judgement and assessment of TCB on the greatest amount of research, and best research, into the issues involved. We should not ignore areas which may offer a greater potential for understanding the effects of TCB. The issues of legal rights, fairness and legal-policy are too important to leave unanswered. Decisions on TCB in the past were sometimes based upon the level of knowledge and research, if any, available at that time. Currently, there are significantly more avenues for research, many of which provide a legal-empirical basis for assessing actual effects on courtroom participants and on the general audience of TCB.<sup>216</sup> Such avenues should not continue to be ignored. The author's proof-of-concept demonstration of eye-tracking technology in a courtroom to research TCB camera distraction-effects, assists in this direction. This is also developed in terms of suggesting real proposals and models for such research.

### **Distraction and New Research**

D Stepniak in his section entitled 'Inconclusiveness of research findings,' states that 'the extensive evaluation of experiments and courts' experiences with [TCB] audio-visual coverage has not produced a consensus on the beneficial or detrimental effects of audio-visual coverage.'<sup>217</sup> '[D]etrimental and beneficial effects ... [are equally] incapable of being established conclusively.'<sup>218</sup> The author's eye-tracking proof-of-concept demonstration indicates that this is no longer correct. We can measure exactly where courtroom participants are looking. D Stepniak argues that the 'inconclusiveness' is due in part to 'the fact that the effects which are being evaluated have been shown not to be capable of conclusive scientific evaluation as they rely on the subjective perceptions of courtroom participants and observers.'<sup>219</sup> This is now incorrect in terms of visual distraction-effects. Eye-tracking distraction-effects studies can record and verify these effects. The effects are, Stepniak feels, "incapable of being established conclusively."<sup>220</sup> They are 'intrinsically incapable of being conclusively established.'<sup>221</sup> He states that the research and studies are 'inevitably deemed inconclusive.'<sup>222</sup> He seems to accept that opinion-reports and self-reports can be the only distraction-effects research. It is, he suggests, an 'inescapable fact that effects can only be measured in terms of perceptions.' The author respectfully disagrees with the apparent dismissal of undertaking contemporary normative legal-empirical research. TCB eye-tracking can be an effective

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<sup>216</sup> See comments of K Mannheim, *Ideology and Utopia* (Routledge and Keegan Paul 1936), regarding meaning and reference frames (within which to contextualise meaning and content) being historically located.

<sup>217</sup> D Stepniak, above 403.

<sup>218</sup> *ibid* 8.

<sup>219</sup> D Stepniak, above 403.

<sup>220</sup> *ibid* 6.

<sup>221</sup> *ibid* 6.

<sup>222</sup> *ibid* 70.

improvement on existing distraction-effects research. Both D Stepniak and the US Supreme Court are unaware of the opportunities that eye-tracking could bring.<sup>223</sup> They are also unaware of the benefits of eye-tracking over self-reports, opinion-reports and observer-reports. R Goldfarb states that in-court effects and changed behaviour are ‘unprovable.’<sup>224</sup> This is not correct. Modern eye-tracking technology can track and record exactly where mock and real courtroom participants are looking. Visual distraction-effects of TCB can be researched legal-empirically. However, independent research in New Zealand did find distraction-effects. A ‘case-by-case evaluation found that most judges were distracted by cameras.’<sup>225</sup> This was based on report type research. Eye-tracking can be used to supplement our research in a more exact and verifiable manner.

### **Disruptive Assumptions: Distraction, Attention and Other Effects**

One of the most recent TCB books is *Audio-Visual Coverage of Courts*<sup>226</sup> notes that the early TCB proceedings, with lots of equipment, bulky cameras, television personnel and novelty, were ‘undoubtedly disruptive and distracting to participants.’<sup>227</sup> However, it assumes ‘[t]echnological advances have ensured that [TCB] audio-visual recording of court proceedings need not distract nor disrupt proceedings.’<sup>228</sup> The author respectively disagrees. There is no evidence to suggest that the potentially least disruptive forms of TCB camera and TCB are used most frequently. The author found no research or studies on this issue.

D Stepniak refers to other problems. There are other potential effects apart from equipment distraction. The ‘mere knowledge of being recorded may still have an effect on participants.’<sup>229</sup> Unfortunately, the general research relies almost entirely on opinions and ‘experiences.’<sup>230</sup> In the first Federal courts pilot study, ‘most participants *believe*’

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<sup>223</sup> See P Lambert, *Television Courtroom Broadcasting, Distraction-effects and Eye Tracking* (Intellect 2012).

<sup>224</sup> R Goldfarb *ibid* n 3, p 162, as referred to in D Stepniak, *Audio-Visual Coverage of Courts* (Cambridge University Press 2008) 365.

<sup>225</sup> Department of Constitutional Affairs [UK], *Broadcasting Courts, Consultation Paper*, CP 28/04, November 2004, at 109, referring to UMR Insight Ltd, *Media Coverage of Court Proceedings: Summary Report* (February 1998) and *The Impact of Television, Radio and Still Photography on Coverage of Court Proceedings - Final Report, A Report Prepared for the Department of Courts by a research team from the Department of Human Management, Massey University* (April 1998). This is the New Zealand research.

<sup>226</sup> D Stepniak, above.

<sup>227</sup> *ibid* 1.

<sup>228</sup> *ibid* 3.

<sup>229</sup> *ibid* 3. This refers to cognitive distraction-effect issues.

<sup>230</sup> *ibid* 8.

[emphasis added] ... no effects, or minimal effects.<sup>231</sup> In addition, pilot studies ... are often only conducted after a particular jurisdiction is persuaded on the desirability of [TCB] coverage.<sup>232</sup> The aim 'is ... to reassure ... to acclimatise courtroom participants and the public.'<sup>233</sup> A New Hampshire Supreme Court case refers to state studies finding no or little adverse ... effects, and instead finding certain positive effects.<sup>234</sup> However, upon examination, the studies are not cited in the case and there is no distinction between general opinion studies and legal-empirical studies. The California studies D Stepniak refers to each appear based on opinions.<sup>235</sup>

Overall, the effects-research is 'inconclusive.'<sup>236</sup> There is an 'inconclusiveness of ... effect[s] ... on participants.'<sup>237</sup> This applies equally to 'detrimental and beneficial effects.'<sup>238</sup> D Stepniak does not assess the quality, level and amount of general and legal-empirical research undertaken. He only acknowledges that the 'methodology and conclusiveness of the findings' have been questioned.<sup>239</sup> The benefit that eye-tracking can bring to TCB distraction-effects research is a quality and verifiable methodology that has thus far not been considered by legal commentators, courts and legal-policymakers.

The 'arguments about the effect ... on the judicial process continues.'<sup>240</sup> The issue of different effects is still 'unresolved.'<sup>241</sup> The research that is there is '[i]nconclusive.'<sup>242</sup> Evidence in relation to the various arguments 'has not been systematically produced.'<sup>243</sup> 'Crucial questions still remain'<sup>244</sup> and the debate continues.<sup>245</sup> In terms of benefits, S

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<sup>231</sup> D Stepniak, above 100-101. Emphasis added.

<sup>232</sup> *ibid* 8-9.

<sup>233</sup> *ibid* 9.

<sup>234</sup> New Hampshire Supreme Court, Petition of WMUR Channel 9 (13 December 2002) < [www.courts.state.nh.us/opinions/2002/0212/wmur156.htm](http://www.courts.state.nh.us/opinions/2002/0212/wmur156.htm) > as referred to in D Stepniak, above 101. Accessed by author 8 June 2010.

<sup>235</sup> In 1996 and 2000, D Stepniak, above 114 ff, referring to Administrative Office of the Courts of California, Task Force on Photographing, Recording and Broadcasting in the Courtroom, Report Summary (1996), and Administrative Office of the Courts, Cameras in the Courtroom: Report on Rule 980 (May 2000).

<sup>236</sup> D Stepniak, above 351.

<sup>237</sup> *ibid* 4.

<sup>238</sup> *ibid* 8.

<sup>239</sup> *ibid* 100. Also 403-405.

<sup>240</sup> T Thaler, above 16, referring also to W Freedman, *Press and Media Access to the Criminal Courtroom* (Quorum 1988). Thaler does not refer to any page numbering in Freedman.

<sup>241</sup> P Thaler, above 68.

<sup>242</sup> *ibid* 34.

<sup>243</sup> JL Hoyt, 'Courtroom Coverage: The Effects of Being Televised' (1977) *Journal of Broadcasting* 487, 489.

<sup>244</sup> P Thaler, above 70.

<sup>245</sup> D Shores, 'The Effects of Courtroom Camera on Verbal Behavior: An Analysis of Simulated Trial Witness Testimony in Courtrooms Using Television Cameras' (PhD thesis, University of Florida 1981) 1.

Kohm notes that we are still referring to only ‘presumed benefit[s].’<sup>246</sup> SL Alexander argues that the (general) research to date still leaves only ‘speculation’ and no conclusions on the effects issues.<sup>247</sup> Eye-tracking can advance beyond this speculation and opinion in terms of investigating the visual distraction-effect concerns.

One theme in many discussions is that courtroom participants may see and notice the cameras, but will soon forget about them.<sup>248</sup> However, a witness may say that they forgot about the TCB camera(s) but an eye-tracker may demonstrate that they actually have looked, or have looked frequently. The general TCB research does not properly investigate these points.

### **Case Studies and Generalising**

Case studies are useful but should not be over generalised.<sup>249</sup> They often have a ‘lack of generalisability.’<sup>250</sup> In terms of considering case studies and general conclusions from these, the Short report points out that a ‘representative sample of cases within an experimental period must be studied before general conclusions may be drawn.’<sup>251</sup> ‘Simply because one trial can be conducted fairly under the camera’s scrutiny does not mean that others can.’<sup>252</sup> Courts need more information in relation to TCB generally (eg forms and classifications of TCB) and effects issues (eg distraction, education, etc). ‘A one time survey ... cannot’ be generalised.<sup>253</sup> ‘[A] survey ... cannot establish causal inference [or] prove that [an effect] simply because people believe it does.’<sup>254</sup> Sustained and co-ordinated normative TCB effects-research is needed. Normative TCB distraction research can discern actual participant gaze. There is more advanced normative research potential than the TCB distraction-effects research to date.

K Netteburg states that,

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<sup>246</sup> SA Kohm, above 357.

<sup>247</sup> SL Alexander, ‘“Mischievous Potentialities”: A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit, Florida, 1989’ (PhD thesis, University of Florida 1990) 39-40.

<sup>248</sup> See, for example, E Einsiedel, ‘Television in the Courtroom: An Ohio Experiment,’ (Association for Education in Journalism, August 1978), as referred to in Netteburg, above 470.

<sup>249</sup> See Short report, above 11.

<sup>250</sup> K Netteburg, above 471.

<sup>251</sup> See Short report, above 11.

<sup>252</sup> K Netteburg, above 471.

<sup>253</sup> *ibid* 471. Original emphasis.

<sup>254</sup> K Netteburg, above 471.

‘[w]hile the [Florida<sup>255</sup> and Wisconsin<sup>256</sup> study] surveys are more generalisable than case studies, they still cannot be used as evidence to draw causal conclusions. For instance, we might argue that the juror who has participated in only a televised trial has no knowledge of courtroom decorum in a non-televised trial setting and little basis for deciding whether the new situation is more fair or unfair.’<sup>257</sup>

Eye-tracking provides a potentially vast improvement in normative research methodology and assurance in the research which courts and legal-policymakers may wish to be better informed in relation to.

### **Limited Effects-Research, Problems, Limitations, Solutions**

TCB effects-research has been ‘hampered.’<sup>258</sup> There is too much general non legal-empirical research, not enough legal-empirical research, popular acceptance without uncritical assessment, lack of definitions and an overall general classification of TCB forms, a need for normative TCB distraction-effects research, etc. While originally some effects may not be ‘easily detectable,’<sup>259</sup> this is no longer the case given the normative capabilities of TCB eye-tracking. Researching the effects issues, particularly in the courtroom environment, is also very complex.<sup>260</sup> Generally, more sophisticated effects-research is required. Eye-tracking can produce a new level of research data and sophistication in relation to distraction-effects. Comparatively, more detailed legal-empirical research does exist. S Prince,<sup>261</sup> for example, has undertaken research in relation to mediation processes. E Clark et al<sup>262</sup> research online alternative dispute

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<sup>255</sup> *A Sample Survey of the Attitudes of Individuals Associated with Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts between July 5, 1977 and June 30, 1978*, available from the Florida Supreme Court, as referred to in K Netteburg, above 472.

<sup>256</sup> *Report of the Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom* (1 April 1979), as referred to in Netteburg, above 472.

<sup>257</sup> K Netteburg, above 472-473.

<sup>258</sup> P Thaler, ‘The Impact of the Television Camera on Courtroom Participants: A Case Study of the Joel Steinberg Murder Trial’ (PhD thesis, New York University 1990) 34.

<sup>259</sup> *ibid* 68.

<sup>260</sup> *ibid* 34.

<sup>261</sup> SJ Prince, ‘Institutionalising Mediation? An Evaluation of the Exeter Court Small Claims Mediation Pilot’ (2007) 5 *Web Journal of Current Legal Issues* < <http://webjcli.ncl.ac.uk/2007/issue5/prince5.html> > accessed 14 July 2012. Also S Prince, *An Evaluation of the Effectiveness of Court-Based Mediation Processes in New Family Civil Proceedings at Exeter and Guildford County Courts, Final Report Prepared for the Department of Constitutional Affairs* (revised September 2006).

<sup>262</sup> E Clark, G Cho and A Hoyle, ‘Online Dispute Resolution: Present Realities, Pressing Problems and Future Prospects’ (2003) 17 *International Review of Law Computers and Technology* 7. In relation to general arbitration in Ireland note the work of B Hutchinson, for example, B Hutchinson, *Commercial Arbitration and ADR in Ireland: Law and Practice* (Tottel 2011).



resolution. T-R Valikoski<sup>263</sup> undertook research in relation to in-court prosecutors and the legal speech communications process in the courtroom. J Conley and W Barr also undertook a linguistic ethnographic examination of small claims courts in the US.<sup>264</sup>

## Conclusion

Despite the first TCB broadcast occurring in 1953,<sup>265</sup> the literature reveals a scant amount of overall general research being carried out. It is particularly concerning also, that there is even less references to quality or legal-empirical research identified in the literature on the topic. One would have expected significantly more, given the general interest in the judicial and court process and in particular in terms of the justice issues at stake. Upon examination, a number of problems and shortcomings can also be identified. These include,

- Not all of the research is available and or easily accessible. Hence it is difficult to review and is difficult for researchers in future to consider in their own research;
- Not all of the research is properly cited which hinders its availability to future researchers;
- Some of the research is not properly documented or methodical in terms of, for example, identifying who in particular undertook the research, their qualifications and expertise to do so, the exact numbers of people who were interviewed, what if any statistical data recording and or analyses was undertaken;
- There is no systematisation of research such that it may be compared with other research;
- There is no accurate or scientific recordal of such a nature as to make any wider conclusions as to TCB generally;
- Generally, we cannot tell what the courtrooms looked like and where exactly the camera(s) were located, thus making comparisons impossible;
- There is no clear theory or hypothesis presented and thus examined in the general studies, so while some of them are indeed interesting, it is unclear what, if anything, they prove;
- Eye-tracking is not identified in previous TCB discussion and research.

Indeed, some of the existing TCB studies are not even questionnaires, contain no quantifiable data and do not even indicate how many people participated.<sup>266</sup> Generally there appears to be little research, and where there is it is generally non-comparative and

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<sup>263</sup> T-R Valikoski, 'The Criminal Trial as a Speech Communication Situation' (thesis, University of Tampere, Finland 2004) 178.

<sup>264</sup> J Conley and W O'Barr, *Rules Versus Relationships: The Ethnography of Legal Discourse* (University of Chicago Press 1990), referred to in SA Kohm, 'I'm Not a Judge But I Play One On TV: American Reality Based Courtroom Television' (PhD thesis, Simon Fraser University 2004) 406.

<sup>265</sup> Listed by S Barber, as being the case of Billy Eugene Manley in Oklahoma City which occurred in 1953, see S Barber, above 10-11.

non-longitudinal. Again S Barber<sup>267</sup> notes that certain types of case tend to predominate in TCB, in particular ‘notorious or sordid’ cases. Few trials are broadcast ‘in any substantial detail’ and fewer still gavel to gavel (G2G) over the whole length of the case.<sup>268</sup>

Overall, given the issues and problems with the general research of the past, as well as the relatively small body of such investigation, we should ideally investigate and progress a volume of more normative TCB and TCB effects-research today. The popular arguments and discussions continue, most recently with the *Pistorius*<sup>269</sup> case. The concerns and challenges of the US Supreme Court also remain. More normative legal-empirical research would assist courts and legal-policymakers more generally when assessing TCB issues, and more specifically when they may have to deal with TCB contested cases regarding TCB. Such cases may be appeals of decided TCB cases, or as we have seen in *Hollingsworth*,<sup>270</sup> appeals or injunctions prior to TCB being permitted in an instant case. TCB normative research can be directed at developing a universal classification of TCB, TCB research models, TCB definitions, consideration of TCB forms and such issues as education-effects, in-court distraction and optimum preferable forms of TCB as opposed to TCB forms which may perhaps be less desirable. Such normative research may also raise questions for the integrity and veracity of some of the past research which some popular discussion appears to accept without question. When assessing TCB per se, the arguments and legal arguments are in many respects leaning on the side of conjecture and opinion as opposed to being backed up with considered and verified research. Normative TCB research can begin to address this balance.

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<sup>266</sup> See S Barber, above 68.

<sup>267</sup> *ibid* 80-81.

<sup>268</sup> *ibid* 81.

<sup>269</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>270</sup> *Hollingsworth v Perry* 558 US [2010] <  
[www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf)> accessed 19 January 2014.

## CHAPTER 9: LIMITED LEGAL-EMPIRICAL RESEARCH

### Introduction

The issues and concerns raised in the US Supreme Court cases are significant. Despite the importance of the TCB debate and the US Supreme Court cases referring to TCB and its concerns, we are still not at a stage where conclusive answers can be proffered. The limited general research and the associated problems are highlighted above. Yet, the concerns are also not being addressed by a substantial body of more optimum legal-empirical research. This is despite the fact that the first of these US Supreme Court cases occurring in 1965. For example, there is no body of repeated and verified legal-empirical research directed at any of particular issues of concern to the US Supreme Court. There are too few legal-empirical studies overall. The questions and concerns regarding TCB still remain. The thesis highlights the different TCB legal-empirical effect studies below. This emphasises the limited number of legal-empirical studies and the lack of verification (eg via repeat studies) undertaken to assist courts and legal-policymakers. Furthermore, the three US Supreme Court cases and the effects and research issues highlighted in those cases, also emphasise that there are significant issues and areas of concern which are not researched adequately. It helps to appreciate how much has been done to deal with the US Supreme Court concerns, and to begin assessing how much we have yet to do to properly engage with these legitimate concerns and ultimately to assist the development of more normative and directed legal-empirical effects-research of the TCB effect issues.

### The US Supreme Court Concerns

The US Supreme Court in *Estes*,<sup>1</sup> *Chandler*<sup>2</sup> and *Hollingsworth*,<sup>3</sup> referred to a large number TCB effect issues and concerns. Each of these should be the focus of sustained legal-empirical research. In particular the US Supreme Court identified, in its words, the following TCB effect concerns, namely,

distraction; distortion; disruption; general distraction; participant distraction; psychological effects; adverse psychological effects on judges, lawyers, witnesses, jurors; duties of the trial judge; influence on public opinion; influence on verdicts; further studies; body of reliable factual data; experience effects-research; the integrity of judicial process; highly publicised trials; criminal trials; prejudice; diverting the trial; impacting on all participants; giving the public the wrong impression about the trial process; singling out certain defendants; prejudicial conditions not experienced by other defendants; changing behaviour because of awareness; increasing nervousness; increasing tension; opportunism; acting differently; effort of trying not to be effected; not giving full attention; noise of cameras; appearance of cameras; awareness of being televised; undercutting reliability of the trial process; techniques of public communication; future technology; process of televising; probable hazards; criminal trial with notoriety versus a routine trial; effects on the normal detached atmosphere; distorting the trial

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<sup>1</sup> *Estes v Texas* 381 US [1964] 532.

<sup>2</sup> *Chandler v Florida* 449 US [1981] 560.

process; effects of commercials and intervals; detracting from the trial, justice and Constitutional functions; undermining or effecting the serenity, calm and decorum of the court; decorum; witnesses and jury awareness; no longer calm; increasing publicity; conditioning the public; prejudicing the public; prejudice of actual and potential jurors; inadmissible evidence leakage; juror television viewing during trial; editing; commentary; peer pressure; courtroom participant objections ignored; conscious or unconscious effects; voting decisions; pre-trial publicity; community pressure; awareness; focus; attention; TV viewing; re-trial effects; pre-trial effects; emphasising that the case is special; popular verdicts; pre-trial publicity; bias; extraneous influence; knowledge of being televised; emotional audience; aggravation/escalation; jury prejudice by media; witness effects; witness TV viewing; amending testimony; attitude to testifying; apprehension; reluctance; quality of the testimony; impact of being filmed and broadcast; demoralized; frightening; cocky; overstatement; public speaking; accuracy; over dramatization; public recognition/harassment of witnesses; judge effects; additional responsibility; undivided attention; politics and elected judges; diversion; psychological effects and reactions; direct news media pressure; influence of public opinion by news media; psychology research; various effects; personal acting up; interruptions; rulings; inconsistency; concentration; defendant effects; harassment; close ups; sensibilities; dignity; concentration; wide publicity; heightened publicity; effective counsel; intrusions; acting up; restrictions; objection by defendant; acting up; awareness; prejudice; out-of-court effects; entertainment; commercial objectives; developing the personalities of the courtroom participants; dramatisation; conditioning the public against the defendants; edited and selected programming; make an impartial jury for a re-trial impossible; influencing opinions before verdict; undermining fairness; effects on courtroom participants; effect of the audience who may become jurors, witnesses; effects in re education; entertain; diverting the process; leading to suspicions concerning integrity of trial process; dividing participant efforts; undercutting integrity of trial process; television as the most accurate and comprehensive means of conveying to the public; educational by acquainting with the judicial process; educational institutions; only selected trials; only courts with amenable layouts selected; sensational cases predominate; dignity and calmness; effects on other media; act differently; acting up; more lenient; playing to audience; playing to potential clients; change attitudes; editing; biasing editing; effects even on unedited film footage; wrong impression; television cannot cover everything and all actions in court, only where focused; lawyers will look to see if they can confer with their client without, or out of, close-ups; unfairness; educate as to nature of judicial process; personality, famous and celebrity; kind of case; non-notorious trial; subtle effects; effect on timid or reluctant witness; unconscious effects; effect of television performance; effects of Constitutional dimensions; prejudice; jury ability to judge fairly; limited and non scientific research; prejudice; something more than juror awareness; threats; harassment; death threats; harm irreparable harm; live streaming; internet; effect of witness testimony chilling; unwillingness to testify; qualitative differences; adequate remedies to effects through an appeal; altered testimony; unwillingness to cooperate with future cases; integrity of trial process; high profile trials; considered standards and guidelines; witness security; non high profile cases; cases with witnesses; cases without witnesses; sensitive issue cases; all or parts of cases being broadcast; good and bad cases for TCB experiments; high profile publicly divisive cases; effects of harm in non jury cases; adverse effects from presence of camera; all harm rectifiable on appeal; effect of increasing public awareness of witnesses; reasonable or feasible for witnesses to object; trial management; integrity of trial; protective measures; actual prejudice; subtle prejudice; slippery slope; coerced confession; jury influence.<sup>4</sup>

This is obviously a wide breath of issues and concerns. Now let us consider how extensive and considered the legal-empirical research is.<sup>5</sup>

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<sup>3</sup> *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 19 January 2014.

<sup>4</sup> The above issues are referred to variously in the *Estes*, *Chandler* and *Hollingsworth* cases. See *Estes v Texas* 381 US [1964] 532; *Chandler v Florida* 449 US [1981] 560; *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 19 January 2014.

<sup>5</sup> Obviously some would appear to be repeated, or at least very similar. However, no one has researched whether there is actual duplication, or whether the US Supreme Court may have

## Legal-Empirical Research

S Barber indicates that there are only two legal-empirical research studies between 1953 and 1987.<sup>6</sup> In the thirty four years of CB to 1987, we only have two attempts to seriously research (particular) effects of TCB in a recorded legal-empirical manner. R Goldfarb<sup>7</sup> is frequently referred to in discussions regarding TCB. His book indicates that during the period 1953-1998 there were eight legal-empirical studies in relation to TCB.<sup>8</sup> That is only eight studies in forty five years. The first two of these are already listed in Barber, so he only lists an additional six studies. R Goldfarb states that in-court effects and changes in behaviour are ‘unprovable.’<sup>9</sup> This is not necessarily correct. To take one example, modern eye-tracking technology can track and record where courtroom participants are looking in relation to particular distraction-effects. Distraction-effects can be researched in a legal-empirical manner. R Goldfarb does not refer to definitions, nor expressly recognise different forms of TCB.

M Cohen and D Dow<sup>10</sup> only refer to four legal-empirical studies.<sup>11</sup> Therefore, between 1953–2002 they can only find four legal-empirical studies. No models, definitions or

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been variously differentiating some various discrete points. If the court was, then we should be reluctant to delete perceived duplication.

<sup>6</sup> ibid 71. These are JL Hoyt, ‘Courtroom Coverage: The Effects of Being Televised’ [1977] 24 *Journal of Broadcasting* 487; EH Short and Associates, *Evaluation of California’s Experiment with Extended Media Coverage of Courts, submitted to Administrative Office for the Courts; the Chief Justice’s Special Committee on the Courts and the Media, and the California Judicial Council* (1981).

<sup>7</sup> RL Goldfarb, *TV or Not TV: Television, Justice, and the Courts* (New York University Press 1998), in particular 116 ff.

<sup>8</sup> ibid 116-123. These are: JL Hoyt, ‘Courtroom Coverage: The Effects of Being Televised’ [1977] 24 *Journal of Broadcasting* 487; EH Short and Associates, *Evaluation of California’s Experiment with Extended Media Coverage of Courts, submitted to Administrative Office for the Courts; the Chief Justice’s Special Committee on the Courts and the Media, and the California Judicial Council* (1981); DL Shores Jr, ‘The Effects of Courtroom Cameras on Verbal Behaviour: An Analysis of Simulated Trial Witness Testimony in Courtrooms Using Television Cameras’ (PhD thesis, University of Florida 1981); SR Pasternack, ‘The Effects of Perceived Community Pressure on Simulated Juror Guilt Attributions: A Study’ (PhD thesis, University of Tennessee, Knoxville December 1982); SM Kassin, ‘TV Cameras, Public Self-Consciousness, and Mock Juror Performance’ (1984) *Journal of Experimental Psychology* 336; AR Paddon, ‘Television Coverage of Criminal Trials with Cameras and Microphones: A Laboratory Experiment of Audience Effects’ (PhD thesis, University of Tennessee, Knoxville 1985); E Borgida, K Debono and L Buckman, ‘Cameras in the Courtroom: The Effects of Media Coverage on Witness Testimony and Juror Perceptions’ (1990) 14 *Law and Human Behavior* 489 [Minnesota]; A Punches, ‘The Cognitive Effects of Camera Presence on the Recall of Testimony in a Simulated Courtroom Setting’ (PhD thesis, Colorado State University, Fort Collins 1991).

<sup>9</sup> ibid n 3 at 162, as referred to in D Stepniak, *Audio-Visual Coverage of Courts* (Cambridge University Press 2008) 365.

<sup>10</sup> M Cohn and D Dow, *Cameras in the Courtroom: Television and the Pursuit of Justice* (Rowman & Little 2002).

forms are referred to. SL Alexander's literature review in 1990 also finds few legal-empirical studies, particularly regarding coverage of actual trials, and only a 'handful' of out-of-court studies.<sup>12</sup> Cohen also concludes that more legal-empirical research is needed.<sup>13</sup> *Estes*,<sup>14</sup> *Chandler*,<sup>15</sup> *Hollingsworth*, Hughes, Cohen, Gerbner and others lament the lack of legal-empirical research, case studies, etc.<sup>16</sup>

D Shores describes some of the psychological arguments as having an element of 'abstractness.'<sup>17</sup> There is a need, therefore, for more normative research of all of these issues. D Shores continues that 'methodical investigation is needed to determine what effects cameras have on witnesses.'<sup>18</sup> Sophistication is needed because 'the discovery and the objective measurement of this possible distortion'<sup>19</sup> requires more detailed research than has been planned and undertaken previously. D Shores identifies two particular fields which are relevant to TCB.<sup>20</sup> These fields are the effects of videotaping on the oral performance and attitudes of individuals; and the effect of communication apprehension on verbal behaviour.<sup>21</sup> D Shores notes that there is little TCB effects-research, but also that when choosing a particular aspect of CB to research, one should look at similar and related fields.<sup>22</sup> 'By conducting carefully-controlled experimental research, the media, jurists, and the general public can begin to perceive what effects cameras have on trial participants.'<sup>23</sup>

The thesis also identifies additional studies,

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<sup>11</sup> *ibid* 62 ff. These are: EH Short and Associates, *Evaluation of California's Experiment with Extended Media Coverage of Courts*, submitted to Administrative Office for the Courts; the Chief Justice's Special Committee on the Courts and the Media, and the California Judicial Council (1981); Federal Judicial Centre, Pilot Program Involving Electronic Coverage in Six US District Courts and Two Appeal Courts; JL Hoyt, 'Courtroom Coverage: The Effects of Being Televised' (1977) 21 *Journal of Broadcasting* 489 [Wisconsin]; E Borgida, K Debono and L Buckman, 'Cameras in the Courtroom: The Effects of Media Coverage on Witness Testimony and Juror Perceptions' (1990) 14 *Law and Human Behavior* 489 [Minnesota].

<sup>12</sup> SL Alexander, above 54.

<sup>13</sup> J Cohen, 'Cameras in the Courtroom and Due Process: A Proposal for a Qualitative Difference Test' (1982) 57 *Washington Law Review* 277, as referred to in SL Alexander, above 69.

<sup>14</sup> *Estes v Texas* 381 US [1964] 532.

<sup>15</sup> *Chandler v Florida* 449 US [1981] 560.

<sup>16</sup> As referred to in SL Alexander, above 85.

<sup>17</sup> D Shores, 'The Effects of Courtroom Camera on Verbal Behavior: An Analysis of Simulated Trial Witness Testimony in Courtrooms Using Television Cameras' (PhD thesis, University of Florida 1981) 2.

<sup>18</sup> *ibid* 5.

<sup>19</sup> *ibid*.

<sup>20</sup> *ibid* 16.

<sup>21</sup> *ibid*.

<sup>22</sup> *ibid*.

<sup>23</sup> *ibid* 39.

- *New York State Committee to Review Audio-Visual Coverage of Court Proceedings, An Open Courtroom: Cameras in New York Courts*, (New York: Fordham University Press, 1997) [in part only];
- KL Netteburg, 'Cameras in the Courtroom: Is a Picture Worth a Thousand Words?' (PhD thesis, University of Minnesota 1980);
- A Bukoff, 'The Effects of Video Camera Techniques on the Pre-deliberation Judgements and Perceptions of Role-Playing Jurors' (PhD, Kent State University 1984);
- SL Alexander, "'Mischievous Potentialities": A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit, Florida' (PhD, University of Florida 1989);
- SA Esposito, 'OJ TV: A Narrative Analysis of Television's Pretrial Coverage of the OJ Simpson Case' (PhD, Wayne State University 1996);
- W Petkanas, 'Cameras on Trial: An Assessment of the Educational Affect of News Cameras in Trial Courts' (PhD, New York University 1990);
- PE Thaler, 'The Impact of the Television Camera on Courtroom Participants: A Case Study of the Joel Steinberg Murder Trial' (PhD, New York University 1990);
- TD Keller, (Cameras in Courtrooms: An Analysis of Television Court Coverage in Virginia (PhD, University of Tennessee 1992);
- R Enter, 'The Image of the Judiciary: A Semiotic Analyse of Broadcast Trials to Ascertain its Definition of the Court System' (PhD, New York University 1993);
- KS Kumar, 'Murder and the News Media' (PhD, Temple University 1993);
- S Kohm, 'I'm Not a Judge But I Play One On TV: American Reality Based Courtroom Television' (PhD, Simon Fraser University 2004);
- T Daftary-Kapur, 'The Effects of Pre- and Post-Venire Publicity on Juror Decision Making' (PhD, City University of New York 2009);
- K Allan, Professor McGregor, S Fountaine, *The Impact of Television, Radio and still Photography Coverage of Court Proceedings, Final Report, A Report for the Department for Courts* (Massey University April 1998) (New Zealand);
- Hon N Braverman, Chair, Hon KQ Alves, Hon JS Baron, Hon TC Groton III, Hon DO Leasure, Hon EA Plitt Jr, *Report of the Committee to Study Extended Media Coverage of Criminal Trial Proceedings in Maryland, Committee to Study Extended Media Coverage, a Subcommittee of the Legislation Committee of the Maryland Judicial Conference.*

### **The Issues Covered in the Legal-Empirical Research**

The legal-empirical studies identified in the literature are listed above. However, the issues and questions being examined in the limited number of legal-empirical studies appears less than overwhelming. The table below highlights the different effect concerns in the above legal-empirical studies. The number of blanks indicates, for example,

- the limited number of legal-empirical studies;
- the many gaps that exist; and
- the lack of verification via repeat studies of the actual studies being undertaken.

Furthermore, the three US Supreme Court cases and the effects and research issues highlighted in those cases, also emphasise that there are significant issues and areas of concern which are not researched adequately. This includes in particular distraction-effects. The following issues have been pursued in the TCB legal-empirical research identified to date.

**Legal-Empirical Studies and Issues Covered**

<b>EFFECT</b>	<b>EFFECT SUBJECT/RECIPIENT</b>	<b>IN-COURT EFFECT</b> [Research study number]	<b>OUT-OF-COURT EFFECT</b> [Research study number]
<b>Disruption</b>	General	-	-
	Court personnel	-	-
	Judge	-	-
	Jury	-	-
	Lawyers	-	-
	Witness	-	-
	Defendant	-	-
	Parties	-	-
	Public in-court	-	-
<b>Distraction</b>	General	[S16], [S12]	-
	Court personnel	-	-
	Judge	-	-
	Jury	-	-
	Lawyers	-	-
	Witness	-	-
	Defendant	-	-
	Parties	-	-
	Public in-court	-	-
<b>Role/Speech</b>	General	-	-
	Court personnel	-	-
	Judge	-	-
	Jury	-	-
	Lawyers	-	-
	Witness	[S3]	-
	Defendant	-	-
	Parties	-	-
	Public in-court	-	-



<b>Role/Activity</b>	General	-	
	Court Personnel	-	
	Judge	-	
	Jury	[S5]	
	Lawyers	-	
	Witness	[S7]	
	Defendant	-	
	Parties	-	
	Public in-court	-	
<b>Role/Encoding</b>	General	-	-
	Court personnel	-	-
	Judge	-	-
	Jury	-	-
	Lawyers	-	-
	Witness	-	-
	Defendant	-	-
	Parties	-	-
	Public in-court	-	-
<b>Role/Memory</b>	General	-	-
	Court personnel	-	-
	Judge	-	-
	Jury	[S8]	-
	Lawyers	-	-
	Witness	-	-
	Defendant	-	-
	Parties	-	-
	Public in-court	-	-
<b>Being Filmed</b>	General	-	-
	Court personnel	-	-
	Judge	-	-
	Jury	-	-
	Lawyers	-	-
	Witness	-	-
	Defendant	-	-
	Parties	-	-
	Public in-court	-	-
<b>Being Broadcast</b>	General	-	-
	Court personnel	-	-
	Judge	-	-
	Jury	-	-
	Lawyers	-	-
	Witness	-	-
	Defendant	-	-

	Parties	-	-
	Public in-court	-	-
<b>Pressure</b>	General	-	-
	Court personnel	-	-
	Judge	-	-
	Jury	[S4]	-
	Lawyers	-	-
	Witness	-	-
	Defendant	-	-
	Parties	-	-
	Public in-court	-	-
<b>Camera location</b>		-	-
<b>Camera height</b>		-	-
<b>Camera type</b>		-	-
<b>Rules</b>		[S3]	-
<b>Forms</b>	Reality	[S19]	[S19]
	Push TV	-	-
	Radio	-	-
	Internet (iTCB)	-	-
<b>Education</b>	General	-	[S15]
	Audience	-	-
	Public	-	-
	Educational re who	-	-
	Judge	-	[S21]
<b>Information</b>	General	-	[S6]
	Audience	-	-
	Public	-	-
	Judge	-	[S18]
<b>Confidence</b>	General	-	
	Audience	-	
	Public	-	
<b>Consent</b>		-	[S17]
<b>Narrative Analysis</b>		-	[S14]

Coding:

S1 JL Hoyt, 'Courtroom Coverage: The Effects of Being Televised' (1977) 21 Journal of Broadcasting 487

- S2 EH Short and Associates, *Evaluation of California's Experiment with Extended Media Coverage of Courts*, submitted to Administrative Office for the Courts; the Chief Justice's Special Committee on the Courts and the Media, and the California Judicial Council (1981)
- S3 DL Shores Jr, 'The Effects of Courtroom Cameras on Verbal Behaviour: An Analysis of Simulated Trial Witness Testimony in Courtrooms Using Television Cameras' (PhD thesis, University of Florida 1981)
- S4 SR Pasternack, 'The Effects of Perceived Community Pressure on Simulated Juror Guilt Attributions: A Study' (PhD thesis, University of Tennessee, Knoxville 1982)
- S5 SM Kassir, 'TV Cameras, Public Self-Consciousness, and Mock Juror Performance' (1983/4) *Journal of Experimental Psychology* 336
- S6 AR Paddon, 'Television Coverage of Criminal Trials with Cameras and Microphones: A Laboratory Experiment of Audience Effects' (PhD thesis, University of Tennessee, Knoxville 1985)
- S7 E Borgida, K Debono and L Buckman, 'Cameras in the Courtroom: The Effects of Media Coverage on Witness Testimony and Juror Perceptions' (1990) *14 Law and Human Behaviour* 489
- S8 A Panches, 'The Cognitive Effects of Camera Presence on the Recall of Testimony in a Simulated Courtroom Setting' (PhD thesis, Colorado State University, Fort Collins 1991)
- [S9] MT Johnson and C Krafka, *Pilot Program Involving Electronic Coverage in Six US District Courts and Two Appeal Courts* (Federal Judicial Centre 1994) [in part only]
- [S10] *New York State Committee to Review Audio-Visual Coverage of Court Proceedings, An Open Courtroom: Cameras in New York Courts* (Fordham University Press 1997)[in part only]
- S11 KL Netteburg, 'Cameras in the Courtroom: Is a Picture Worth a Thousand Words?' (PhD thesis, University of Minnesota 1980)
- S12 A Bukoff, 'The Effects of Video Camera Techniques on the Pre-Deliberation Judgements and Perceptions of Role-Playing Jurors' (PhD thesis, Kent State University 1984)
- S13 SL Alexander, "'Mischievous Potentialities': A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit' (PhD thesis, University of Florida 1989)
- S14 SA Esposito, 'OJ TV: A Narrative Analysis of Television's Pretrial Coverage of the OJ Simpson Case' (PhD thesis, Wayne State University 1996)
- S15 W Petkanas, 'Cameras on Trial: An Assessment of the Educational Affect of News Cameras in Trial Courts' (PhD thesis, New York University 1990)
- S16 PE Thaler, 'The Impact of the Television Camera on Courtroom Participants: A Case Study of the Joel Steinberg Murder Trial' (PhD thesis, New York University 1990)
- S17 TD Keller, 'Cameras in Courtrooms: An Analysis of Television Court Coverage in Virginia' (PhD thesis, University of Tennessee 1992)
- S18 R Enter, 'The Image of the Judiciary: A Semiotic Analyse of Broadcast Trials to Ascertain its Definition of the Court System' (PhD thesis, New York University 1993)
- S19 S Kohm, 'I'm Not a Judge But I Play One On TV: American Reality Based Courtroom Television' (PhD thesis, Simon Fraser University 2004)
- S20 RE Reeves Stewart, 'The Changing Relationship Between Camera and the Courts' (MA thesis, Florida Atlantic University 1998)
- S21 J Ossinger, 'Electronic Access to Courtrooms: Television as an Educational Socializing Agent on the Judiciary' (MA thesis, University of Maine 2006);
- S22 K Allan, Professor J McGregor and S Fountaine, *The Impact of Television, Radio and Still Photography Coverage of Court Proceedings, Final Report, A Report for the Department for Courts* (Massey University April 1998)(New Zealand);
- S23 Hon N Braverman, Chair, Hon KQ Alves, Hon JS Baron, Hon TC Groton III, Hon DO Leasure, Hon EA Plitt Jr, Report of the Committee to Study Extended Media Coverage of Criminal Trial Proceedings in Maryland, Committee to Study Extended Media Coverage, a Subcommittee of the Legislation Committee of the Maryland Judicial Conference.

The legal-empirical studies, as identified above suggest that only the following issues raised by the US Supreme Court have had any examination in the legal-empirical research, namely, two distraction studies of a limited courtroom participants; the role of select courtroom participants; the memory/recall of one category of courtroom participant; pressure issues on one courtroom participant; one study relating to form type issues; two studies relating to education issues. It appears, therefore, that the legal-

empirical research attempts are few and have left many areas not yet addressed. The studies that have occurred are not followed by a body of research, repeat studies and validation. As such, they remain almost isolated stand alone studies. The concerns and challenge of the US Supreme Court still remains. The lack of validation and replication is a serious issue. The distraction-effects have received less than fully considered analysis. The above table visualising also helps to highlight how many gaps there are in the TCB research literature available to today's courts and legal-policymakers, and how little verification has occurred.

### Themes and Issues

The first television courtroom broadcast was in 1953.<sup>24</sup> S Barber indicates that there were only seventeen (general non-empirical) studies. Worse, she indicates that there are only two legal-empirical research studies between 1953 and 1987. In those particular thirty four years of CB, therefore, we only have two attempts to seriously or properly analyze (certain) issues and effects of CB.

The US Supreme Court in both *Estes*<sup>25</sup> and *Chandler*,<sup>26</sup> the main US cases in relation to TCB, 'lamented the absence of hard data.'<sup>27</sup> 'The overall controversy about [TCB] is unusual for the lack of specific data which have been brought to bear on the questions raised.'<sup>28</sup> 'In view of the practical importance of this problem for the judiciary and the Supreme Court's repeated plea for behavioural research on the matter, it is surprising that, to date, the only relevant data available are anecdotal case studies, public opinion surveys, and the verbal reports of those who had participated in television trials.'<sup>29</sup>

Since 1953 R Goldfarb is only able to identify six additional studies to Barber. S Barber lists JL Hoyt's study in 1977<sup>30</sup> as the first legal-empirical study of TCB. The Hoyt study was 'attempting to experimentally test [the] speculation, to determine if, in fact, individuals are affected by the awareness that they are being televised.'<sup>31</sup> The study,

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<sup>24</sup> Listed by S Barber as being the case of BE Manley in Oklahoma City which occurred in 1953, see S Barber, *News Cameras in the Courtroom: A Free Press – Fair Trial Debate* (Ablex 1987) 10-11.

<sup>25</sup> *Estes v Texas* 381 US [1964] 532.

<sup>26</sup> *Chandler v Florida* 449 US [1981] 560.

<sup>27</sup> SM Kassin, 'TV Cameras, Public Self-Consciousness, and Mock Juror Performance' (1984) *Journal of Experimental Social Psychology* 337.

<sup>28</sup> JL Hoyt 'Courtroom Coverage: The Effects of Being Televised' (1977) *Journalism of Broadcasting* 487, 489.

<sup>29</sup> SM Kassin, above 337.

<sup>30</sup> JL Hoyt, above 487.

‘simulated some of the pressures placed on witnesses in the courtroom setting while at the same time maintaining experimental control so that the results could be meaningfully analyzed. Subjects were shown a brief film containing rather detailed information, then were asked specific questions about the content of the film. While answering the questions they were either facing a conspicuous [TCB] camera purportedly recording their answers to be viewed by a large number of people, or an unobtrusive camera hidden being a mirror, or no camera at all. ... Based on the assumption obvious in the reasoning of Justices Clark and Warren [in *Estes*<sup>32</sup>] it was predicted that they were televised (whether by an obtrusive or unobtrusive camera) the participants would recall significantly less correct information about the film than when they were not being televised. Because a number of the recent proposals for courtroom coverage by television have mentioned that cameras would be camouflaged, the unobtrusive camera condition was included to determine the effects of hiding the camera.’<sup>33</sup>

- *Eye-Tracking*: The distraction-effects studies to date do not incorporate nor refer to eye-tracking. The advantages and more normative potential of eye-tracking to TCB is not discussed;
- *Forms*: None of the research studies identify or refer to the different forms of TCB, at least explicitly, nor an overall map or framework for CB, nor TCB. Only one (S19) can be identified as a specific type or form of TCB, namely, American reality TCB (rTCB). Without identifying an overall categorisation matrix, it is difficult to fully contemplate the full breath and landscape of CB sector issues.<sup>34</sup> Neither is it possible to identify easily, what research has been undertaken so far, what has been replicated and fundamentally, what remains to be researched;
- *Type*: A categorisation or map of CB also assists us to see what types of research have been undertaken and where existing research compliments TCB research of the same type. The present review indicates that in the above studies there were nine experiments; nine surveys (S16 (case study)); four reviews; five incorporated interview; four observations of court (live case); one Court (not live/real case);
- *Recorded/Quantified*: Twenty studies were recorded or quantified, thus enabling further analysis and potential follow on studies by other researchers;
- *Aim/Hypothesis*: Fifteen studies set out aims or hypothesis which were being tested or investigated;
- *Controls/Conditions*: Eleven had some controls and conditions, thus trying to ensure that specific effects were being tested for or quantified;

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<sup>31</sup> ibid 490-491.

<sup>32</sup> *Estes v Texas* 381 US [1964] 532.

<sup>33</sup> JL Hoyt, above 490. Internal footnote reference omitted.

<sup>34</sup> As with any categorisation matters, this may change and be expanded upon over time.

- *Validation/Replication Possible*: It appears that in at least eighteen cases, there is insufficient detail to be able to try and retest, replicate and validate<sup>35</sup> these studies;
- *Number of Subjects*: Eighteen identify how many subjects were being tested, which was a flaw present in much of the non-legal-empirical research previously;
- *Subject Description*: Eighteen referred to or identified the type of subjects involved, which is frequently important in assessing research;
- *Method*: Twenty referred to and set out the method and detail of study undertaken, thus ensuring it can be properly assessed and hopefully replicated subsequently;
- *Effects*: Sixteen referred to one or more effects;
- *Camera Location*: Only six referred in any specific detail to where the camera was located, some with a courtroom map;
- *Rules*: Only one referred to or incorporated an examination of rules and rule effect issues;
- *Education*: Only two referred to or any meaningfully investigated education-effect issues and arguments;
- *Questionnaires*: Fifteen used questionnaires. This emphasises the need to blend questionnaires with additional normative legal-empirical research methods;
- *Audience Effect Focus*: Only six undertook research with an audience-effect focus;
- *Eyewitness Research*: None referred to or incorporated the literature and research in the eyewitness field<sup>36</sup>;
- *Agenda Setting*: Only one referred to or undertook media agenda setting type research in the context of TCB.

## Discussion

This section sets out some of the questions and issues which could be addressed in future TCB research studies.<sup>37</sup> Then it will highlight some of the various research tools and methodologies that can be used, and are being used in other fields of research. It will also outline at a headline level suggestions for specific TCB research projects in future. This is on foot of the backdrop of having identified problems with TCB arguments and TCB research up to this point. There are significant gaps in our knowledge and appreciation of many nuanced aspects of TCB. However, that does not have to remain the position indefinitely. We can and should advance our knowledge of TCB to assist courts and legal-policymakers. Even without TCB, important baseline research can and should occur.

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<sup>35</sup> For example, V Stodden, 'Enabling Reproducible Research: Licensing for Scientific Innovation' (2009) 13 *International Journal of Communications Law and Policy* 1, 2.

<sup>36</sup> See A Heaton-Armstrong, E Shepard, GH Gudjonsson and D Wolchover (eds), *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (OUP 2006).

<sup>37</sup> Even in S Barber, only Part 3 of the book is devoted to research issues, and even that does not recognise different forms of courtroom broadcasting. See S Barber, above.

What we also have to do in future is address the research gaps and research problems that currently exist. While many of these have been highlighted, so too have some of the comparators and tools we may adopt and utilise for more considered research of TCB in future. That we can have the benefit of other research and other research fields is of great assistance, as it means we do not have to start entirely anew. Neither do we have to proceed with research which is without comparative research results. We can consider some of the various research issues which arise for TCB, some of the comparative research and research tools we can utilise, and develop specific legal-empirical research for TCB.

- *Less Than Optimum TCB Research:* There are numerous problems in the TCB research to date. These problems are many and varied. This includes distraction-effects concerns. There has been far too little research carried out into this important subject. The existing research is less than comprehensive, which is perhaps surprising given the important liberty and justice issues at stake. For this reason, the author outlines some of the distraction-effects research avenues which could be pursued in future. The basis for some of these suggestions comes from extensive research in related disciplines.<sup>38</sup> Particular focus is directed to eye-tracking. There are far too few legal-empirical research studies. The existing research is not comprehensive. The research is also frequently non legal-empirical. Seldom do research studies extend over a long period of time. It is difficult if not impossible to make any overall conclusions or determinations regarding the extended effects of TCB. Few studies are compared with each other. None apparently attempt to replicate and or verify the results of earlier studies. The overall legal-empirical research dedicated to TCB effects currently available is less than optimum;

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<sup>38</sup> See generally P Lambert, 'Courtroom Television Broadcasting' (1997) 2:5 Communications Law 180; P Lambert, 'Courtroom Television Cameras and the Media' (1995) 16:4 Journal of Media Law and Practice 139 as examples. On the context of open justice and court reporting generally see M McGonagle, *A Textbook on Media Law* (Gill and MacMillan 1997), and the follow up *Media Law* (Sweet and Maxwell 2006); W Freeman, *Press and Media Access to the Criminal Courtroom* (Quorum 1988); NT Gardner, 'Cameras in the Courtroom: Guidelines for State Criminal Trials' (1985) 84: 3 Michigan Law Review 475; and references throughout this present work. Also P Lambert, 'Effects Research Issues in TCB: Getting Past Monkey' (10th European Conference on eGovernment, University of Limerick 17-18 June 2010); P Lambert, 'Time to Leave the Monkey Behind?: How Eye-tracking and Psychology Can Contribute to TCB Effects Research' (British Psychological Society, BPS Cognitive Psychology Section Annual Conference, 27th Annual Cognitive Psychology Section Conference, Cardiff University, 6-8 September 2010); P Lambert, 'Eye-Tracking Technology and TCB' (11 August 2010) Computers and Law < [www.scl.org/site.aspx?i=ed16965](http://www.scl.org/site.aspx?i=ed16965) > accessed 3 August 2012; P Lambert, 'TCB Effects: Eye-Tracking and Camera Distraction in Court' (Irish Association of Law Teachers Annual Conference 26-28 November 2010); P Lambert, 'Monkey Magic: Problems With Effects Research of TCB' (2010) 18 Irish Law Times 278; P Lambert, 'A Candid Camera, Eye-Tracking Technology Could Transform Courtroom Broadcasting' (10 December 2010) New Law Journal 1699.

- *Many Questions Exist Which Need to be Answered:* A number of authors, and S Barber in particular, identifies a number of concerns in relation to (television) courtroom broadcasting but which also serve as areas for future research.<sup>39</sup> Unfortunately, TCB research and debate has not advanced since the initial broadcasts. D Slater and VP Hans state that while continued use of attitude surveys is beneficial, other methods of legal-empirical study also exist. They also state that comparing trials in which broadcast access is granted with trials where no media interest is present, is insufficient. Comparisons may also be made among the subset of trials for which request for TCB access occurs. These trials may be randomly assigned to ‘extended coverage’ and ‘conventional coverage’ groups.<sup>40</sup> Overall, they suggest that the heretofore use of surveys should continue but only in conjunction with observational and legal-empirical research.<sup>41</sup> This emphasises the point that the research conducted to date in relation to TCB effects, is limited both in volume but also in its scope and methodology;
- *Inadequate Research:* There is practically no meaningful research into any of the many aspects of TCB. There have been very few legal-empirical studies of TCB which can actually be described as research or qualitative research as we know it. Most of it amounts to study, reviews, observations, arguments and opinions. In terms of what might be described as qualitative research, it is limited in its scope and focus. For example, it examines only some of the courtroom participants actually present. The above table shows many gaps. Many courtroom participants are ignored in current research. This means that this research is per se limited in scope. The audience are not researched in terms of watching, effects or adverse effects. In addition, almost invariably effects type research is based upon survey type research. This utilises and relies solely upon the opinions of certain courtroom participants. Sometimes these courtroom participants may be interviewed but generally the courtroom participants are requested to fill in a questionnaire asking them for their opinions to various pre-defined issues. As with any survey or questionnaire, the questions asked can vary in number and sophistication. However, the main flaws with this approach are twofold. This is not the most reliable means of gauging effects of TCB on

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<sup>39</sup> She asks: if the public is better informed, or even adequately informed, by electronic versus conventional media coverage of a case? Can gavel to gavel broadcasts serve to educate the public about the administration of justice in general? Do time constraints imposed on many broadcast news stories mean that a case is treated either unfairly or inadequately? Does the public get a distorted picture of the judicial system, or a biased view of a particular trial, if stories are edited to highlight sensational testimony, cross-examination, or simply the opening and closing arguments? How does public understanding of the courts and specific cases differ when broadcast versus printed news is the medium of communication. Which type of news coverage has consistently provided the most balanced coverage of legal issues, trial participants, and court administration? What kinds of legal news coverage are ‘educationally’ valuable to the public at large? Do viewers primarily perceive televised trials as a form of entertainment programming? Are televised trials viewed primarily for their voyeuristic value? What kind of attitudes about defendants and other trial participants are generated by televised trial coverage and are these attitudes different from those formed by print coverage? *ibid* 92-93.

<sup>40</sup> D Slater and VP Hans, above 379.

<sup>41</sup> *ibid* 379.



courtroom participants. Other more accurate methods are available. These studies are also once off. Therefore, there are no external checks or validations;

- *TCB Effects-Research*: Since its inception TCB has been highly controversial, not least due to what is at stake at each court hearing. Much of the debates have centred on perceived dangers such as adverse effects upon witnesses, lawyers and jury members. It has to be admitted that no definitive body of evidence of these effects has emerged. This, however, is due more to the small amount of the research effort and the limits of the studies themselves. One commentator has said that '[s]ocial scientists measure the intelligence of monkeys more effectively than courts have attempted to ascertain the effects of television in the courtroom.'<sup>42</sup> S Barber also makes this point in relation to the research available.<sup>43</sup> She also raises questions which should be addressed in any future research<sup>44</sup>;
- *Lack of Legal-Empirical Research*: The Short report in 1981 identifies only two legal-empirical studies, namely K Netteburg and Hoyt.<sup>45</sup> However, the Short report acknowledges that both of these are narrowly defined and 'focus on specific issues' only.<sup>46</sup> According to the Short report by 'mid-1980, not enough research had been published to formulate comprehensive conclusions.'<sup>47</sup> AR Paddon in her study is referring to and relying on research in information processing theory.<sup>48</sup> The normative research needs to expand and incorporate other disciplines. *Chandler*<sup>49</sup> called for stringent guidelines and more legal-empirical effects-research.<sup>50</sup> The caselaw 'speculates' on the effects and calls for legal-empirical research.<sup>51</sup> There has been 'little gathering of [legal-]empirical data regarding actual behaviour of broadcast journalists.'<sup>52</sup> The US Supreme Court research challenge has not yet been addressed;
- In the Californian study, incorporating the Short report research, it was recognised as 'essential to gather observational data in the courtroom.'<sup>53</sup> Surprisingly few other studies have sought to do likewise. In addition, the Short report while conducting certain observational research was limited to two areas of focus only, namely, obstrusiveness

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<sup>42</sup> J Hirschhorn, 'Cameras in the Courtroom? No' (1980) 7:3 Barrister 6 and 8.

<sup>43</sup> S Barber, above.

<sup>44</sup> Referred to above.

<sup>45</sup> EH Short and Associates, *Evaluation of California's Experiment with Extended Media Coverage of Courts, Submitted to: The Administrative Office for the Courts, The Chief Justice's Special Committee on the Courts and the Media and The California Judicial Council* (September 1981) 12-13. (Short Report).

<sup>46</sup> *ibid* 12.

<sup>47</sup> *ibid* 13.

<sup>48</sup> AR Paddon, 'Television Coverage of Criminal Trials with Cameras and Microphones: A Controlled Experiment of Audience Effects' (Radio-television Journalism Division, AEJMC Montreal, Que, Canada 7 August 1992) 1. Also AR Paddon, 'Television Coverage of Criminal Trials with Cameras and Microphones: A Controlled Experiment of Audience Effects' (PhD thesis, University of Tennessee 1985).

<sup>49</sup> *Chandler v Florida* 449 US [1981] 560.

<sup>50</sup> SL Alexander, "'Mischievous Potentialities': A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit, Florida, 1989" (PhD thesis, University of Florida 1990) 19.

<sup>51</sup> *ibid* 39.

<sup>52</sup> *ibid*.

(disruption, distraction) and participant behavioural changes.<sup>54</sup> It acknowledges that ‘there still exists little scientific research responding to Justice Clark’s observations’ [in the *Estes*<sup>55</sup> case].<sup>56</sup> Eye-tracking research can improve on this;

- There are various references in the *Chandler*<sup>57</sup> case to legal-empirical research and the need or utility for such research.<sup>58</sup> ‘How else are we to discover what is and is not fact about the effects of electronic and photographic court coverage?’ asks the Short report.<sup>59</sup> The Short report reiterates that ‘little systematic and rigorous evaluation of electronic and photographic coverage of court proceedings had been carried out.’<sup>60</sup> While there was scientific evaluation in parts of the Short report, this was conducted concurrently with the pilot study,<sup>61</sup> thus without any baseline analysis or statistical gathering prior to the introduction of TCB. The Short report indicates that up to its study in 1981, only two other US States undertook statewide evaluations of their own pilot experiments, and each of these ‘relying on after-the-fact surveys.’<sup>62</sup> Thus they appear to rely entirely or heavily upon past self-reports. The research prior to the Short report is described as being of ‘varying degrees of methodological soundness and generalisability.’<sup>63</sup> The Short report<sup>64</sup> refers to certain prior studies on page eleven but does not properly cite these;
- *TCB Legal-Empirical Research Design*: ‘Research into the [TCB] debate has also been criticized for “the lack of well-planned, comprehensive survey instruments” and for “unstructured data collection methods”’ ... S Barber, a leading investigator in the field, calls for new research that uses a ‘qualitative difference test’ to measure two types of variables within a courtroom setting that are potentially prejudicial. Her methodology is similar to the type proposed by Slater and Hans ... Field experiments using randomly selected trials have been proposed. They compare the behaviour of participants in trials covered only by “traditional” media with those involved in “electronic” media coverage.’<sup>65</sup> TCB research needs to be better designed and can incorporate more normative and robust design measures;
- *Little Legal-Empirical Research on Each TCB Concern*: D Shores for example, seeks to examine camera effects on verbal behaviour of witness, and states that the only similarly focused research was Hoyt<sup>66</sup>;

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<sup>53</sup> Short report, above 22.

<sup>54</sup> *ibid.*

<sup>55</sup> *Estes v Texas* 381 US 533 [1965].

<sup>56</sup> Short Report, above 5.

<sup>57</sup> *Chandler v Florida* 449 US 560 [26 January 1981].

<sup>58</sup> See Short report, above 5.

<sup>59</sup> *ibid* 5.

<sup>60</sup> *ibid* 5.

<sup>61</sup> *ibid* 5 and 19.

<sup>62</sup> *ibid* n 9 at 5.

<sup>63</sup> See *ibid* 11.

<sup>64</sup> See *ibid*, above 11.

<sup>65</sup> P Thaler, ‘The Impact of the Television Camera on Courtroom Participants: A Case Study of the Joel Steinberg Murder Trial’ (PhD thesis, New York University 1990) 177.

<sup>66</sup> D Shores, above 27.

- *Legal-Empirical Controls:* JL Hoyt's study failed to provide controls for important variables affecting the responses of subjects.<sup>67</sup> Various issues could have contaminated his results.<sup>68</sup> There were also issues raised with the SM Kassin study.<sup>69</sup> Significant opportunity exists for research;
- *Replication Research:* Proponent and opponent of TCB do not support their arguments with direct research and which research has been replicated by subsequent research, or that the research they rely upon is supported by any other form/methodology of research (other than self-reports/questionnaires). This is a significant research flaw. Generally, research propositions are not accepted until they are defined, outlined and researched, and subsequent research (generally by others) replicates and verifies it;
- *Validation Research:* The research to date is not comprehensive. It is not legal-empirical and methodologically based. It is not replicated in secondary studies. All of the studies to date appear to be stand alone studies. In other areas, methodological research may be validated<sup>70</sup> which means that a subsequent or follow up studies may validate or at least support the results of the study. This does not happen with the TCB studies. Without this, while each study is interesting of course, no definitive conclusions as to the TCB effects can be drawn from the research. The research is so limited that one cannot say, on the basis of such research to date, that there is any conclusive evidence of adverse effects upon courtroom participants, or on the opposite side, that there are any positive effects. One means of validating and supplementing research conclusions is to carry out a study over a period of time. Sometimes such studies can continue over decades with results being published on an interim ongoing basis. This does not mean that all TCB studies need to continue for years. However, it is recommended that some of the studies be carried out over an extended period other than the once off, brief moment in time studies as are presently carried out;
- *Longitudinal Research:* Regardless of what methodology is used in a specific research study, one of the tools used for verification and to enhance the global picture of the overall body of research is to conduct research over a long period of time. This means examining similar studies carried out over a considerable period of time. It also means that some of the studies should be longitudinal in nature or be repeated over the course of a specific period or TCB project. In addition, there can be follow up studies on the same courtroom and/or experimental participants as well as replication studies (on new subjects). TCB research has not sought to use this accepted method of research;

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<sup>67</sup> *ibid* 28.

<sup>68</sup> D Shores, above 28–29, again referring to Hoyt. Borgida et al also refer to shortcoming in the Hoyt study, E Borgida, K DeBona, K and LA Buckman, 'Cameras in the Courtroom, The Effects of Media Coverage on Witness Testimony and Juror Perceptions' (1990) 14:5 *Law and Human Behaviour*, 489, 490.

<sup>69</sup> E Borgida, K DeBona and LA Buckman, 'Cameras in the Courtroom, The Effects of Media Coverage on Witness Testimony and Juror Perceptions' (1990) 14:5 *Law and Human Behaviour* 489, 491.

<sup>70</sup> For example, V Stodden, 'Enabling Reproducible Research: Licensing for Scientific Innovation' (2009) 13 *International Journal of Communications Law and Policy* 1, 2.

- *Courtroom Participant Research*: In terms of courtroom participant effects there are many research tools which can be used. Obviously one of these is self-reports and questionnaires. However, given the inherent limits with such research we have to use other research tools in addition. As with any research, before we decide on a specific tool or tools we have to define carefully what it is we are researching. In terms of TCB we have to define what we mean by effects, and decide what amounts to a significant effect. This can be in terms of a significant effect upon an individual courtroom participant and/or over a statistical mean. One of the most obvious effects to test for is whether courtroom participants are distracted by and look at the courtroom cameras.<sup>71</sup> There are many other effects to test for, however. For example, Justice Clark in the *Estes*<sup>72</sup> case described four examples of how TCB could prejudice a jury. It is possible to conduct research studies to examine each of these separate effects.<sup>73</sup> This is why it is important to define in advance what is being tested for;
- *Defendants*: Defendants may have more at stake than anyone else involved in the court process but they seem to be asked less frequently than other participants for their views regarding TCB. This can be better addressed in future research. There are also other considerations. Defendant research may be addressed before court hearings but also at other non adversarial stages. One reason for this is to obtain their views at a time less stressful than at a court appearance. A decision as to whether to consent to TCB access or a decision in relation to the principle of TCB access may be more thoughtful and considered, if not less pressured, in a situation where there is no imminent court appearance<sup>74</sup>;
- *Different Restrictions*: We might consider how practical or possible it may be to differentiate between different broadcasting or newspaper organisations in terms of access. Even if not, this does not mean that those permitting TCB cannot legislate or provide in some way for differentiations between different TCB forms. This already occurs invariably through the different types of rules, restrictions and guidelines which apply to TCB. Parliament also made a distinction. In Ireland, for example, it is only possible to have live broadcasts of parliament if it is presented in full. This has obvious implications in terms of the types of broadcasters interested in TCB, as well as the forms of TCB produced. The point is that TCB forms can be influenced by the broadcasting rules which apply. This can affect broadcasters differently. Indeed in the Irish context the parliamentary rules applicable to parliamentary broadcasting only permit certain uses of the material filmed. It may not be used for light entertainment, political satire, party political broadcasts or advertising. Therefore, parliament can discriminate between what parliamentary proceedings footage is used for. This too can be managed in the TCB context. As

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<sup>71</sup> Obviously these are not necessarily the same thing.

<sup>72</sup> 381 US 532 (1965), referred to in W Freedman, *Press and Media Access to a Criminal Courtroom* (Quorum Books 1988) 82.

<sup>73</sup> The examples he gave include pressure to conform to a community verdict; distraction by cameras resulting in missing the case details; and non-sequestered juries seeing courtroom broadcasts.

<sup>74</sup> Here appearance is used generally and can include appearing at the hearing of a case.

indicated elsewhere, certain courts also discriminate (indirectly) by having an accreditation/application process for broadcasters;

- *Out-of-Court TCB Effects – The TCB Audience:* The sustained out-of-court effects on society are generally ignored by legal-empirical research.<sup>75</sup> There is little content analysis of actual TCB footage.<sup>76</sup> In the *Simpson* (criminal) case S Esposito states that the general media buildup to the case contained the ‘underlying message of this avalanche of pretrial coverage was that Simpson was guilty.’<sup>77</sup> What expectations<sup>78</sup> are set by TCB and presenters is not investigated. There is little examination of how television, nor TCB, contributes to pre-trial publicity.<sup>79</sup> Courts and legal-policymakers might consider how accurate TCB is, and indeed the different forms of TCB.<sup>80</sup> P Thaler also notes that audience effects-research is also neglected.<sup>81</sup> He suggests that further studies should research the relationship between media coverage and public opinion and effects on the court process.<sup>82</sup> He refers to S Barber who describes the audience research to date as anecdotal<sup>83</sup>;
- *TCB Administration:* When studies are being undertaken it would be beneficial to specify within the terms of reference, that the amount of time taken up by the court itself in administering TCB should be recorded. This would include preparatory work, applications for access, as well as supervision at the hearing itself. It might be useful also to document the instances where a judge uses his or her discretion,<sup>84</sup> if any, to prohibit coverage. Other statistics to be recorded are the number of applications to broadcast, the cases, type of cases applied for, objections, etc. Such statistics would prove immensely useful in painting a more complete picture of the issues involved;
- *Media Effects:* Few studies indicate what rules and local media landscape exist, and which are relevant in considering any TCB research study. However, K Netteburg does indicate that the media at that stage enjoyed greater freedom in Wisconsin courtroom ‘than in almost any other jurisdiction.’<sup>85</sup> Other studies do not seek to commence comparative research;

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<sup>75</sup> E Borgida, K DeBona and LA Buckman, ‘Cameras in the Courtroom, The Effects of Media Coverage on Witness Testimony and Juror Perceptions’ (1990) 14:5 Law and Human Behaviour 489, 490.

<sup>76</sup> See comments of SA Esposito, ‘OJ TV: A Narrative Analysis of Television’s Pretrial Coverage of the OJ Simpson Case’ (PhD thesis, Wayne State University, Detroit, Michigan 1996) 34 ff.

<sup>77</sup> *ibid* 63.

<sup>78</sup> *ibid* 67.

<sup>79</sup> *ibid* 269.

<sup>80</sup> SA Esposito, for example asks if it is accurate or an ‘optical illusion of truth.’ See SA Esposito *ibid* 53.

<sup>81</sup> P Thaler, above 179.

<sup>82</sup> *ibid*.

<sup>83</sup> *ibid*.

<sup>84</sup> That is, where such a discretion exists. This is because not all systems allow judicial discretion in relation to permitting broadcasting. Other systems limit the discretion to an extent.

<sup>85</sup> K Netteburg, above 469.

- *TCB Education-Effects*: There is no proof that TCB is educational.<sup>86</sup> If there is an argument that education, information, the public impression of the courts or judges will be improved or enhanced, then it is necessary to examine in the first instance how the court system informs, educates or creates an impression currently.<sup>87</sup> Yet these baseline points do not appear to have been examined in the general TCB research and popular discussion. Generally the positive education-effects argument is not examined or validated. The research does not test the confidence of the public and the audience before and after TCB. While it would appear to be a critical and legitimate consideration in any pilot study of TCB, and TCB forms, there appears little available literature and research for courts and legal-policymakers to consider as regards public perceptions having changed in relation to the courts after TCB being introduced;
- *Little TCB Footage Content Analysis*: There are now significant amounts of TCB trial footage. However, little has been analysed and used for effects-research purposes. No proper research goes into content and production details such as how each courtroom participant is represented in courtroom footage; camera distance; camera angle(s); how the elements of the frame are used and arranged; if and how the TCB camera(s) move; what type of editing are involved; if and how the subjects move; if and how facial expressions and close up appears; courtroom participants; details of the sequence of shot; etc<sup>88</sup>;
- *Parliamentary Broadcasting*: There are generally no detailed TCB comparisons with parliamentary broadcasting;
- *Other Media Reports*: There is generally no comparison of newspaper and TCB reports. S Nevas also called for effects-research to see if print and television coverage differ.<sup>89</sup> A separate problem of media court reporting research is that it examines in most instances print media and not television.<sup>90</sup> It has been suggested that television can be more damaging to a defendant than newspaper media<sup>91</sup>;
- *TCB Media Process and TCB Footage Use*: The research ignores questions such as how television news departments approach TCB. For example, if TCB access influences whether a story is actually covered; how does access change courtroom coverage; and whether coverage increase because of access.<sup>92</sup> Previous research has not extensively examined how the media use courtroom footage and the meaning of and signs within such coverage.<sup>93</sup> No research appears to indicate how much media lobbying occurs nor on how

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<sup>86</sup> See W Petkanas, 'Cameras on Trial: An Assessment of the Educational Affects of News Cameras in Trial Courts' (PhD thesis, New York University 1990) 3.

<sup>87</sup> Entner makes a similar point, see R Entner, 'The Image of the Judiciary: A Semiotic Analysis of Broadcast Trials to Ascertain its Definition of the Court System' (PhD thesis, New York University 1993) 25.

<sup>88</sup> See R Entner *ibid* 38-39.

<sup>89</sup> S Nevas, 'Case for Cameras in the Courtroom' (Winter 1981) *Judges Journal* 22-24, and 49-50, as referred to in SL Alexander, above 66, but title and page range omitted.

<sup>90</sup> SA Esposito, 'OJ TV: A Narrative Analysis of Television's Pretrial Coverage of the OJ Simpson Case' (PhD thesis, Wayne State University, Detroit, Michigan 1996) 24-25.

<sup>91</sup> *ibid* 24-25, and 269.

<sup>92</sup> T Keller, above 72.

<sup>93</sup> R Entner, above, see Abstract, 4 and 12.

many occasions the media have litigated in an effort to obtain TCB access and or to enhance such access;

- *Media Process*: There is no study of the conventions<sup>94</sup> used by TCB footage. Significant avenues for research in this area exist;
- *TCB and Media Selection*: There appears to be no research of why the media choose certain cases over others to use TCB. Again, significant research opportunities exist. This also links with the educational arguments and educational effects;
- *Comparative Research*: Studies also need to be compared to each other (and replicated). Without doing so, it is arguable that no individual study can be relied upon as giving a genuine answer or reflection of whatever research proposal is studied. This is particularly so in terms of effects-research. Cross referencing is also one of the methods of discovering mistakes in research and also of finding opportunities for further research. A potentially important area of study is a cross comparison of the various restrictions which apply in each jurisdiction (where TCB is permitted), and a comparison of the restrictions and rationales which apply in each jurisdiction;
- *TCB Comparison Programming*: One also has to attempt to ascertain whether the court process is trivialised in some way because of TCB or the manner of such broadcasting. For instance, whether because of TCB being scheduled against programmes of lesser seriousness or even entertainment value and thus forced to compete with them. Therefore, the competing programmes may influence the style of TCB. It may also influence viewers expectations. The apparent increase in the use made by lawyers of the media should also be looked at.<sup>95</sup> It has also been suggested that a study should be designed to compare trials which do have cameras and trials covered by the traditional media.<sup>96</sup> While there may be difficulties in such a proposal, in theory such a study could go a long way towards indicating whether or not the effects are advantageous or otherwise. Another comparison would be cases covered by the press (television, radio and newspaper) and those cases not covered at all. This would of course involve a tremendous amount of work. But these are the issues which may be considered before properly evaluating and examining the whole question of TCB. Another study might inquire into what issues place stress upon the various courtroom participants, both in situations with courtroom cameras and without cameras present.<sup>97</sup> Equally, the (mock) courtroom participants could be tested for their accurate recall of events and details both with and without cameras present. Sometimes TCB is contingent upon courtroom participant consent. One wonders what the effect may be when a participant does object but, as in some US States, broadcasting is permitted over such an objection. There does not appear to be any comparative research of when, where

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<sup>94</sup> SA Esposito, above 62.

<sup>95</sup> While this may indeed be so, some may point out that far more apparent is the use of lawyers by the media, be it print, radio or television.

<sup>96</sup> D Slater and VP Hans, 'Methodological Issues in the Evaluation of "Experiments" with Cameras in the Courts' (1982) 30:4 Communications Quarterly 376.

<sup>97</sup> See S Spacapan and S Cohen, 'Effects and After Effects of Stressor Expectations' (1983) 45:6 Journal of Personality and Social Psychology 1243.

and in what circumstances consent is and is not an issue for TCB. Such comparative research would be very useful. A number of people make arguments in favour of TCB in countries where such broadcasting is not presently permitted or is permitted only on an insignificant scale. Such people frequently make the same generic popular headline level arguments as are always made. They do not make legal comparisons and contrasts between their own country and other countries. Neither do they examine the existing effects-research in any great detail.<sup>98</sup> We might consider what important outcomes may be learnt from such research. There may be a need for further consideration of those jurisdictions which permit some form of TCB. If TCB is considered in a new jurisdiction, research resources should ideally be dedicated to baselines, effects, monitoring, etc, research to inform and assist courts and legal-policymakers.

### **Conclusion**

Even today, there is little legal-empirical research available to courts and legal-policymakers which addresses the various concerns raised in the US Supreme Court jurisprudence. This may partly be because so much of the debate occurs in relation to instant TCB cases and instant access applications. These are necessarily less amenable to considered policy discussion and considered research. The literature that the research directed to TCB effects is smaller than expected as well as revealing specific research problems with the research literature and its methods. For example, certain past research is not available, easily accessible, cited, have methodologies documented or analysed. It is difficult to compare one study with another. There is no generalisable conclusions possible. Valuable data is not recorded, thus making comparisons difficult if not impossible. Normative eye-tracking is not previously considered or analysed. This suggests the need for more normative TCB legal-empirical and distraction-effects research. It is important to bear in mind that there are significant justice and liberty issues at stake in the TCB question.

Despite the problems there are other potential avenues for more exacting TCB effects-research. This thesis is not meant to be a complete and comprehensive examination of all those areas which provide models for research into TCB broadcasting and the effects thereof. This would be a significant exercise in and of itself.<sup>99</sup> However, it introduces

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<sup>98</sup> This point is even more pronounced when those advocating TCB emanate from the media. At no stage do media advocates stop and ask what are the issues and flaws with the research to date.

<sup>99</sup> Neither does the thesis profess any view on the arguments in favour of or against TCB in the first instance – other than that both are inadequate.



areas which can assist future TCB research. These have been unduly ignored for too long by the broadcasting, legal and judicial communities.

We now examine one the specific research concerns, namely TCB distraction-effects, to see how we may produce better legal-empirical research. While eye-tracking cannot solve all of these problems, it can assist in improving our knowledge and legal-empirical research of the distraction concerns. Just as other legal research may investigate mediation for example, and with the aim of contributing to the emerging body of research and knowledge on court-based mediation issues and practice,<sup>100</sup> very important issues remain to be addressed in terms of TCB distraction-effects. Eye-tracking can assist in contributing to a new and better body of knowledge regarding this important topic.

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<sup>100</sup> See SJ Prince, 'Institutionalising Mediation? An Evaluation of the Exeter Court Small Claims Mediation Pilot' (2007) 5 Web Journal of Current Legal Issues < <http://webjcli.ncl.ac.uk/2007/issue5/prince5.html> > accessed 14 July 2012. Also S Prince, *An Evaluation of the Effectiveness of Court-Based Mediation Processes in New Family Civil Proceedings at Exeter and Guildford County Courts*, Final Report Prepared for the Department of Constitutional Affairs (revised September 2006), Executive Summary, Methodology, and Introduction.



## CHAPTER 10: LEGAL-EMPIRICAL RESEARCH AND COMPARISONS

### Introduction

The study and research of TCB and the interaction of courts, judges, lawyers and other participants with TCB is a legitimate avenue of study. There is a genuine interest and concern. The effects-research available for courts, legal-policymakers and the general public is significantly less than that which might have been expected. Unfortunately, the level of effects-research has not advanced much since 1965 (*Estes*<sup>1</sup>). Furthermore, it contains many problems. Overall, the answers to the TCB concerns are not sufficiently researched, nor answered, including the concerns referred to by the US Supreme Court. More nuanced and normative TCB effects-research may unlock answers to the continuing concerns and questions. The use of TCB eye-tracking, for example, holds the potential to advance our knowledge and understanding of some of these issues. Normative TCB effects-research involves cross-disciplinary legal-empirical research. However, this would not be unique or the first time that the law and the legal justice system, nor legal researchers, have embraced cross-disciplinary legal-empirical research. The amount and areas of cross-disciplinary legal research are continually expanding.

### The Need for TCB Cross-Disciplinary Research

There is a clear need for engaging in discussion, research and studies of TCB distraction-effects. Similar to S Prince and other researchers in their studies, issues such as TCB ‘raises questions about the correct relationship between the media and the courts.’<sup>2</sup> While the thesis focuses on a different question, the benefit of the research remains. J Hoyt refers to ‘systematic data bearing on the significant overall question of the effects of cameras coverage of courtroom trials.’<sup>3</sup> Given that there is still no consistency between and advancement upon the varying self-reports, opinion-reports and observer-reports, further research is required.

Many of the studies suffer from not being generalisable.<sup>4</sup> Cross-disciplinary distraction research can benefit in many ways from eye-tracking. In relation to his case study research, P Thaler asks if there are changes, ‘what are the implications of such perceived

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<sup>1</sup> *Estes v Texas* 381 US [1964] 532.

<sup>2</sup> S Prince, ‘Is Court TV A Favourable Proposition: A Normative and Comparative Analysis of the Transmission of Courtroom Proceedings on Television?’ (PhD thesis, University of Exeter 2003) 8.

<sup>3</sup> JL Hoyt, ‘Courtroom Coverage: The Effects of Being Televised’ (1977) 21 *Journal of Broadcasting* 495.

<sup>4</sup> K Netteburg ‘Cameras in the Courtroom: Is a Picture Worth a Thousand Words?’ (PhD thesis, University of Minnesota 1980) 471-472.

changes to the fair and efficient administration of justice?’<sup>5</sup> The questions and concerns remain. P Thaler refers to one of the participants saying that the ‘jury came in the first day, looked at the camera maybe for ten seconds ... It’s a box with a man standing at it. I Think after the first day, they were so used to it, they didn’t give it a second look.’<sup>6</sup> Eye-tracking can check the veracity of such claims. No research to date has.

K Netteburg states in relation to TCB that ‘the question of whether a televised trial can also be a fair trial becomes momentous. Studying this question demands a blending of legal and social methodologies.’<sup>7</sup> In addition, ‘systematic examination of the impact of cameras on judicial fairness becomes imperative.’<sup>8</sup> A Bukoff acknowledges that legal-psychology and psychologists ‘can assist the legal system with their research skills.’<sup>9</sup> He continues that legal-psychology and psychologists ‘are involved in many areas of the legal system.’<sup>10</sup> Referring to J Monahan and EF Loftus, he cites how they identify,

‘three areas of law-related research: research on substantive law, research on the legal process, and research on the legal system. Research in the area of substantive law examines the fundamental assumptions of legal codes and convention. Issues in substantive law investigated by psychologists include the following: research on the competence of children and the psychologically disordered to consent to treatment ... and the effectiveness of sanctions (eg punishments) in both deterring criminal behaviour ... and rehabilitating the criminal ....

Research in the area of legal process focuses on the formal and official legal process. For psychologists this has primarily meant the courtroom trial ... The two courtroom participants receiving the most attention have been jurors ... and defendants ... Research on trial procedure has investigated the components of evidence, alternative procedures for resolving disputes, and juror decision-rules. The components of evidence investigated include the medium in which evidence and testimony is presented ... and the effects of inadmissible evidence ... and the accuracy of eyewitness testimony ... Research comparing various forms of dispute resolution has examined preferences for and opinions about fairness of various procedures. The ‘adversarial’ form of dispute resolution, typical of the most US legal processes, is generally preferred by research participants to ‘more objective’ or ‘inquisitorial’ procedures in providing justice ... research on juror decision-making has

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<sup>5</sup> P Thaler, ‘The Impact of the Television Camera on Courtroom Participants: A Case Study of the Joel Steinberg Murder Trial’ (PhD thesis, New York University 1990) 10.

<sup>6</sup> *ibid* 63.

<sup>7</sup> K Netteburg, above, abstract.

<sup>8</sup> *ibid* 7-8.

<sup>9</sup> A Bukoff, ‘The Effects of Video Camera Techniques on the Pre-Deliberation Judgements and Perceptions of Role-Playing Jurors’ (PhD thesis, Kent State University 1984) 1.

<sup>10</sup> *ibid*.

included investigations of the formal decision-making rules which a judge instructs a jury to use ... as well as the informal decision-making and attribution processes of jurors ...

In contrast to research on the formal aspects of the courtroom process, research in the legal system area has investigated the more informal, less-public decision-making that occurs through all phases of the system. The majority of this research has focused on incarceration related decisions in the criminal justice system and on the involuntary hospitalization decisions in the mental health system ... Psychologists have investigated pre-trial bail-setting decisions ... post-verdict sentencing decisions ... and parole board decisions ... The decision-making of psychologists, attorneys, and judges in civil commitment proceedings has also received considerable research attention ... Psychologists have also investigated decisions concerning competency to stand trial and the insanity defence.’<sup>11</sup>

### **Normative TCB**

For those jurisdictions interested in TCB, the safeguards that they may need to employ can be assisted by TCB eye-tracking research. It can assist in identifying the optimum non-distracting/least distraction design, locations, location-effects and forms of TCB. Of course other considerations arise such as education and transparency. However, these are separate issues. In relation to one category of courtroom participant, SR Pasternack states that ‘[p]ressure of community upon juror[s] simply cannot be ignored; nor can it be downplayed.’<sup>12</sup> Optimum TCB also means the safest TCB. Eye-tracking may assist us in getting to that point. Otherwise ‘jurors in televised trials might become subject to unwelcome attention, harassment and even coercion’<sup>13</sup> - an increasing worry in Ireland in relation to certain gangland type criminal cases.<sup>14</sup> The ‘real world of jurisprudence is not a university classroom; instead it is an arena where the stakes can be very high.’<sup>15</sup> TCB eye-tracking research can assist to identify, eliminate or reduce adverse effects, thus assisting the courts, legal-policymakers and those involved to better ensure the respective legal rights and interests at stake generally are protected and vindicated.

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<sup>11</sup> ibid 2-4. Referring to J Monahan and EF Loftus, ‘The Psychology of Law’ (1982) 33 Annual Review of Psychology 441. Unfortunately perhaps, some legal-psychology research is not published widely enough for some legal-policymakers. See Bukoff above at 7.

<sup>12</sup> ibid 31.

<sup>13</sup> ibid.

<sup>14</sup> Generally, note L Campbell, ‘Responding to Gun Crime in Ireland’ (2010) 50 British Journal of Criminology 414; E Davey, ‘Organised Crime in Ireland: A Policy Analysis of the Introduction of Organised Crime to the Statute Book’ (MA Criminology, DIT 2008); Note also various works of Dr P O’Mahony in relation to crime and criminal justice in Ireland.

### **Diminishing Distraction**

There have been claims that even if there are TCB distraction-effects, the courtroom participants will become habituated and forgetful of the TCB cameras.<sup>16</sup> This has not been properly researched however.<sup>17</sup> TCB eye-tracking can measure this exactly over the course of a research case study. We will be able to tell, for example, if a mock witness starts to look less frequently at the distractor TCB camera over time. In addition, we can examine this in relation to different TCB camera types; different TCB camera locations; location-effects and across TCB cameras and TCB cameras plus operators.

These are real concerns. A Punches states in relation to his research that it provides ‘cautious evidence that camera presence does serve to inhibit recall of trial testimony to some small degree, especially if the subject already harbours the tendency to become easily self-conscious anyway. Nor does this inhibition subside with time.’<sup>18</sup> As A Punches<sup>19</sup> puts it, legal-psychology research should ‘yield some relevant and provocative perspective to’ TCB.

### **Informed Policy and Rights**

AR Paddon in relation to audience issues states that audience ‘effects studies could give [legal-]empirical support for the hopes or warn of the pitfalls expected from news cameras and microphones in the courtrooms, but unfortunately few of these have been done.’<sup>20</sup> Equally TCB eye-tracking can assist in informing legal-policy in the area of distraction, design, location, location-effects and the safeguarding of the respective participants’ legal rights and interests.

E Borgida et al say that while many state jurisdictions have ‘made policy decisions about [TCB], the [legal-]empirical data base has not and does not scientifically support

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<sup>15</sup> SR Pasternack, ‘The Effects of Perceived Community Pressure on Simulated Juror Guilt Attributions: A Study’ (PhD thesis, University of Tennessee, Knoxville, December 1982) 70.

<sup>16</sup> It is not clear if TCB proponents make the same claim in relation to TCB cameras plus operator.

<sup>17</sup> See SM Kassin, ‘TV Cameras, Public Self-Consciousness, and Mock Juror Performance’ (1984) *Journal of Experimental Psychology* 336, 338.

<sup>18</sup> A Punches, ‘The Cognitive Effects of Camera Presence on the Recall of Testimony in a Simulated Courtroom Setting’ (PhD thesis, Colorado State University, Fort Collins 1991) iv.

<sup>19</sup> *ibid* 17.

<sup>20</sup> AR Paddon, ‘Television Coverage of Criminal Trials with Cameras and Microphones: A Laboratory Experiment of Audience Effects’ (PhD thesis, University of Tennessee, Knoxville 1985).

conclusions concerning the causal impact of TCB.<sup>21</sup> Eye-tracking now offers legal-empirical avenues for obtaining exact and scientific data in relation to TCB distraction-effects. Such data would be of benefit to courts, legal-policymakers and those interested in, if not involved in, TCB cases.

Some of the previous research has been criticised as it refers to or involves certain types of cases eg criminal, crime, etc, and as such limits its applicability outside of those categories.<sup>22</sup> However, eye-tracking can be utilised in all types of case scenarios, and a body of TCB eye-tracking can be generalised across these. We are all better informed if we properly and legally-empirically assess the arguments and assumptions regarding TCB.

SL Alexander states that ‘the question of whether broadcast journalists actually do disrupt judicial proceedings, until now only a matter of speculation, would be an important subject of study.’<sup>23</sup> Unfortunately, legal-empirical research ‘has been strangely lacking in the gathering of [legal-]empirical data regarding to question of TCB.’<sup>24</sup> The ‘justices in *Estes*<sup>25</sup> and *Chandler*<sup>26</sup> and writers such as Hughes, Cohen and Gerbner lamented the lack of [legal-]empirical research.’<sup>27</sup> TCB eye-tracking research can produce data from which it is possible to generalise. This has been a flaw in a lot of the TCB literature, reviews and studies to date.<sup>28</sup> High profile cases, and possibly other cases, test ‘the delicate balance between the Sixth Amendment right to a fair trial and the First Amendment right to a free press.’<sup>29</sup> The distinction between effects in differing types of cases is not properly explored in the literature. TCB eye-tracking also has the advantage that it provides quantitative data not just subjective opinion or speculation as is some of the respective less rigorous, experiential and opinion research previously. The added advantage is that quantitative research is better able to be validated and replicated, and

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<sup>21</sup> E Borgida, K Debono and L Buckman, ‘Cameras in the Courtroom: The Effects of Media Coverage on Witness Testimony and Juror Perceptions’ (1990) 14 *Law and Human Behavior* 489, 492 [Minnesota].

<sup>22</sup> *ibid* 506.

<sup>23</sup> SL Alexander, ‘“Mischievous Potentialities”: A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit, Florida, 1989’ (PhD thesis, University of Florida 1990) 39.

<sup>24</sup> SL Alexander, *above* 73.

<sup>25</sup> *Estes v Texas* 381 US [1964] 532.

<sup>26</sup> *Chandler v Florida* 449 US [1981] 560.

<sup>27</sup> *ibid* 85.

<sup>28</sup> See discussion *ibid* 90.

<sup>29</sup> SA Esposito, ‘OJ TV: A Narrative Analysis of Television’s Pretrial Coverage of the OJ Simpson Case’ (PhD thesis, Graduate School of Wayne State University, Detroit, Michigan 1996) 292.

also to be compared with other similar research on other occasions, other courts and now other jurisdictions.

### **Cross-Disciplinary Legal Research**

The legal journals referred to earlier exemplify some of the many aspects of cross-disciplinary legal research. Other examples of cross-disciplinary related legal research include research in marketing and law,<sup>30</sup> online sexual exploitation,<sup>31</sup> electronic recording of evidence and interrogations,<sup>32</sup> judges and career satisfaction,<sup>33</sup> family law,<sup>34</sup> disability and equal access,<sup>35</sup> legal education and the internet.<sup>36</sup> RL Marcus<sup>37</sup> and legal writers such as R Susskind<sup>38</sup> focus their research on the interaction and use by legal professionals of technology. Various legal-empirical research examples are referred to below.

- *Criminology*: Criminology research is an obvious example of cross-disciplinary legal research. It is almost routine for researchers to be investigating courts and collecting research data in courts. This sometimes involves collecting data from the court staff. One example is B Sever and R Reisner collecting perspective data from court staff in relation to criminal courts.<sup>39</sup> Research is continually undertaken in relation to sentencing issues,

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<sup>30</sup> See W Vetter and J Hill, 'Marketing and the Law: the Hunt for Online Trademark Infringers: The Internet, Gray Markets, and the Law Collide' (2006) 34 *Journal of the Academy of Marketing Science* 85.

<sup>31</sup> G Urbas, 'Protecting Children from Online Predators: The Use of Covert Investigations Techniques by Law Enforcement' (2010) 26 *Journal of Contemporary Criminal Justice* 410; KJ Mitchell, J Wolak and D Finkelhor, 'Police Posing as Juveniles Online to Catch Sex Offenders: Is It Working?' (2005) 17 *Sexual Abuse: A Journal of Research and Treatment* 241.

<sup>32</sup> TP Sullivan, 'A Compendium of Law Relating to the Electronic Recording of Custodial Interrogations' [March/April 2012] 95 *Judicature* 212.

<sup>33</sup> JM Jensen, 'Career Satisfaction and State Trial Court Judges Plans to Keave the Bench' (2011) 95 *Judicature* 116.

<sup>34</sup> 'A Collective Evaluation Example: Survey of Professional Stakeholders Regarding the One Master, One Family Docketing System' (2011) 95 *Judicature* 36. Also KL Grant, 'Deserving of Further Attention: A Case Streaming Approach to Child Custody and Access in the Context of Spousal Violence' [2005] 22 *Canadian Journal of Family Law* 57.

<sup>35</sup> A Peryea and A Ellington, 'Ensuring Equal Access to the Courts for People with Disabilities' (2006) 60 *Washington State Bar News* 18. Dr G Quinn at the Centre for Disability Law and Practice carries out a variety of legal cross-disciplinary legal research.

<sup>36</sup> HH Perritt Jr, 'The Internet Is Changing the Face of American Law Schools' (1999) 33 *Indiana Law Review* 253.

<sup>37</sup> RL Marcus, 'The Impact of Computers on the Legal Profession: Evolution or Resolution?' (2008) 102 *Northwestern University Law Review* 1827.

<sup>38</sup> R Susskind, *The Future of Law* (Oxford University Press 1996, 1998); R Susskind, *The End of Lawyers?* (Oxford University Press 2008).

<sup>39</sup> B Sever and R Reisner, 'Collecting Data from the Criminal Courts: Perspectives of Court Staff Members - A Research Note' (2008) 19 *Criminal Law Policy Review* 103. Also note LS Nored and PE Carlan, 'Success of Drug Court Programs: Examination of the Perceptions of Drug Court Personnel' (2008) 33 *Criminal Justice Review* 329.



effectiveness and policy, such as drug courts and sentencing.<sup>40</sup> Rates of crime, rates of recidivism and similar issues are regularly being gauged and studied across many jurisdictions.<sup>41</sup> This is an example of lawyers, legal academics and other researchers investigating important issues in the legal justice system. Existing recorded TCB programmes may possibly be studied in terms of victims and accused to examine if the TCB content further stigmatises or alienates the victims and participants. Whether TCB content assists in further alienating outgroups in society or amplifying and labelling their behaviour or attitudes may also be considered.<sup>42</sup> Whether TCB may enforce existing consensus and opinions on particular issues eg crime, sentencing, etc, is also worthy of considered research<sup>43</sup>;

- *Sentencing*: The law of sentencing alone may not encapsulate the whole of the subject. We may consider a much wider literature. Equally, sentencing law (and the wider considerations), is not a neat box to be ticked. The issues and ‘quest for justice’<sup>44</sup> are more complex. Legal consideration now come to involve, if not rely upon, Constitutional considerations, mitigating factors, how imprisonment is experienced, etc, which involve more than just neat legal principle.<sup>45</sup> Sentencing is not limited to the law of criminal procedure<sup>46</sup> and sentencing law. The rationale and principles of sentencing<sup>47</sup> are increasingly a concern to wider society, researchers and legal scholars, as well as practitioners, the judiciary and legal-policymakers. Race and sentencing<sup>48</sup> is a highly popular area of legal cross-disciplinary research as well as policy discussion. Sentencing is

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<sup>40</sup> See for example AL Galloway and LA Drapela, ‘Are Effective Drug Courts an Urban Phenomenon?: Considering Their Impact on Recidivism Among a Nonmetropolitan Adult Sample in Washington State’ (2006) 50 *International Journal of Offender Therapy and Comparative Criminology* 280; C Heck and A Rouseil, ‘State Administration in Drug Courts: Exploring Issues of Authority, Funding and Legitimacy’ (2007) 18 *Criminal Justice Policy Review* 418; SR Senjo and LA Leip, ‘Testing and Developing Theory in Drug Court: A Four-Part Logit Model to Predict Program Completion’ (2001) 12 *Criminal Justice Policy Review* 66; ‘New Resource on Using Risk and Needs Assessment Information at Sentencing’ (2011) 95 *Judicature* 140.

<sup>41</sup> For example, see WT Pizzi, ‘Understanding the United States’ Incarceration Rate’ (March/April 2012) 95 *Judicature* 207.

<sup>42</sup> See S Cohen, *Folk Devils and Moral Panics* (Paladin 1973); any of the works of Thomas Szasz; and, for example, D Stenson and K Cowell, *The Politics of Crime Control* (Sage 1991) 9, 130. Also see C Hamilton, ‘Moral Panic Revisited: Part One’ (2005) 15 *Irish Criminal Law Journal* 8 ff (part 1), and 15 ff (part 2). Amplification research or deviance amplification is referred to by Lemert in 1951, referred to in C Hollin, *Psychology and Crime* (Routledge 1989) 12. This is part of labelling theory.

<sup>43</sup> See studies referred to in K McQuail and N Windahl, above 29. Also see 47.

<sup>44</sup> S Easton and C Piper, *Sentencing and Punishment, The Quest for Justice* (Oxford University Press 2005).

<sup>45</sup> *ibid* for example ch 12.

<sup>46</sup> On procedure, see for example, I Bing, *Criminal Procedure and Sentencing in the Magistrates’ Court* (Sweet and Maxwell 1999). Also R Ward, *Criminal Sentencing, The New Law* (Jordan 1997).

<sup>47</sup> A Von Hirsch, A Ashworth and J Roberts (eds), *Principled Sentencing, Readings on Theory and Policy* (Hart 2009). This includes rehabilitation, deterrence, incapacitation, deserts, restorative justice. In addition issues such as structured sentencing discretion, young offenders, etc, also arise. *ibid*.

also arguably becoming more structured, and its various aspects enumerated, from guidelines, discretions, limits, mandated parameters and sentences, and national and regional norms.<sup>49</sup> Financial penalties<sup>50</sup> are increasingly considered. Sentencing as punishment, involves societal as well as legal and legal-policy issues.<sup>51</sup> The theories of punishment<sup>52</sup> are not pure law, but rather the law incorporating and relying on outside, but related study. Increasingly, legal-empirical research is applied to many aspects of sentencing and the ‘science of sentencing.’<sup>53</sup> There is also research of public knowledge and appreciation and opinions in relation to sentencing.<sup>54</sup> There are increasing calls for greater understanding, research and sometimes reform of sentencing.<sup>55</sup> A Lovegrove undertakes study and research of the framework for judicial sentencing decisions.<sup>56</sup> Involuntary detention and therapeutic justice ideals<sup>57</sup> involves law, legal-psychology, criminology, medicine, psychiatry and psychology;

- *Justice and Punishment*: The very concept of law and justice, from justifications, theories, penal theory, punishment perspectives, the aims and justifications of punishment are all theories borrowing from sociological, political, philosophical, jurisprudential as well as legal perspectives.<sup>58</sup> Legal discussion may, and does, borrow from these wider perspectives. Equally, society as well as legal personnel and politicians continually debate issues of punishment and (personal) responsibility.<sup>59</sup> These concepts and debate also change over time. There are also schools of traditional or old penal strategy and new and developing penal strategies.<sup>60</sup> Other issues are also researched and considered, such as police practices and the role of the police, crime displacement and pre-trial decisions<sup>61</sup>;

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<sup>48</sup> R Hood, *Race and Sentencing, A Study in the Crown Court, A Report for the Commission for Racial Equality* (Clarendon 1992).

<sup>49</sup> A Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press 2010).

<sup>50</sup> For example, R Powell, with R Spink and A Roveri, *Sentencing* (Emis 2003) chs 5 and 12.

<sup>51</sup> On sentencing and punishment, see M Bagaric, *Punishment and Sentencing: A Rational Approach* (Cavendish 2001).

<sup>52</sup> *ibid* 33 ff.

<sup>53</sup> J Davis, ‘The Science of Sentencing: Measurement Theory and von Hirsh’s New Scales of Justice’ in C Tata and N Hutton (eds), *Sentencing and Society, International Perspectives* (Asgate 2002) 329.

<sup>54</sup> M Hough and JV Roberts, ‘Public Knowledge and Public Opinion of Sentencing’ in C Tata and N Hutton (eds), *Sentencing and Society, International Perspectives* (Asgate 2002) 157.

<sup>55</sup> Note, for example, M Tonry and K Hatlestad, *Sentencing Reform in Overcrowded Times, A Comparative Perspective* (Oxford University Press 1997).

<sup>56</sup> A Lovegrove, *The Framework of Judicial Sentencing, A Study in Legal Decision Making* (Cambridge University Press 1997).

<sup>57</sup> K Diesfeld and I Freckelton, *Involuntary Detention and Therapeutic Jurisprudence, International Perspectives on Civil Commitment* (Ashgate 2003).

<sup>58</sup> See, for example, BA Hudson, *Understanding Justice, An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory* (Oxford University Press 2003); R Bellamy (ed), *Beccaria, On Crimes and Punishments and Other Writings* (Cambridge University Press 1996).

<sup>59</sup> See, for example, HLA Hart, *Punishment and Responsibility* (Oxford University Press 2008). This includes also, debate on legal responsibility, intention, punishment, justice, negligence, mens rea, criminal responsibility, and even changing concepts of responsibility, *ibid*.

<sup>60</sup> See D Garland, *Punishment and Welfare, A History of Penal Strategies* (Gower 1985).

<sup>61</sup> See M Doherty, *Criminal Justice and Penology* (Old Bailey Press 2004) chs 3, 4 and 5.

- *Pre-Trial Publicity*: Many researchers and across different fields have researched pre-trial publicity issues. This is a constant concern for the legal system. Communications researchers for example research the effects of pre-trial publicity on the outcomes of cases. J Brusckhe and WE Logos, for example, research these issues in the context of its perceived growing importance since the *Simpson* (criminal) case<sup>62</sup>;
- *Discretion*: Discretion and public prosecutors is also a frequent area of study.<sup>63</sup> R Hood's study refers to the need for research, the approach and method adopted, strategy, sources of information, the sample and the data collection for the research<sup>64</sup>;
- *Death Penalty*: Capital punishment<sup>65</sup> is not a neat stand alone legal issue. Neither does it fit into just one neat legal subject category. The death penalty is constantly debated and controversially so. There is a reported decrease in support for the death penalty in the UK.<sup>66</sup> It is also compared and re-assessed comparatively.<sup>67</sup> It is accepted in some societies and not others.<sup>68</sup> Lawyers, courts and legal-policymakers may consider issues of crime and law, but also morality,<sup>69</sup> societal views of acceptability, religion,<sup>70</sup> ethics,<sup>71</sup> politics, etc;
- *Juvenile Justice*: Juvenile justice<sup>72</sup> is an important and sensitive area of legal cross-disciplinary research. It involves legal-psychology, family law, criminal law, juvenile law, sentencing law, policy and practice, health law and policy, criminology, evidence, etc;
- *Victimology*: Victims of crime<sup>73</sup> are increasingly being researched in terms of their needs in the criminal justice system. Their views, feelings and perspectives<sup>74</sup> are increasingly being researched and incorporated into law and legal-policy. Politicians are also keenly interested. Increasingly, the law is expanding to embrace research regarding the views and

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<sup>62</sup> J Brusckhe and WE Loges, 'The Effect of Pretrial Publicity on Trial Outcomes,' Applications for the Use of Human Subjects in Research < <http://commfaculty.fullerton.edu/jbruschke?PTP%20revision%20as%20of%205-22-98.htm> > accessed 23 August 2010. Also see J Brusckhe and WE Loges, 'Free Press vs Fair Trials: Examining Publicity's Role in Trial Outcomes' (22 December 2005) Hennepin Lawyer < <http://hennepin.timberlakepublishing.com/article.asp?article=981&paper=1&cat=147> > accessed 19 January 2014. They indicate at that time that there are at least 40 empirical studies in relation to the effects of pretrial publicity.

<sup>63</sup> J Fionda, *Public Prosecutors and Discretion, A Comparative Study* (Clarendon 1995).

<sup>64</sup> R Hood, above, see ch 2, Approach and Method.

<sup>65</sup> A Sarat, *Capital Punishment* (Ashgate 2005).

<sup>66</sup> C Davies, 'Support for Death Penalty Falls in UK, Survey Finds' *Guardian* (London, 14 August 2014).

<sup>67</sup> For instance R Hood and C Hoyle, *The Death Penalty, A Worldwide Perspective* (Oxford University Press 2008).

<sup>68</sup> As regards the US, see for example, HA Bedau, *Killing as Punishment, Reflections on the Death Penalty in America* (Northwestern University Press 2004); HA Bedau and PG Cassell (eds), *Debating the Death Penalty, Should America Have Capital Punishment? The Experts on Both Sides Make Their Case* (Oxford University Press 2004).

<sup>69</sup> See HA Bedau and PG Cassell, *ibid* ch 3.

<sup>70</sup> P Hodgkinson and WA Schabas (eds), *Capital Punishment, Strategies for Abolition* (Cambridge University Press 2004) ch 5.

<sup>71</sup> *ibid* ch 3.

<sup>72</sup> B Krisberg and JF Austin, *Reinventing Juvenile Justice* (Sage 1993).

<sup>73</sup> M Wright, *Justice for Victims and Offenders, A Restorative Response to Crime* (Waterside Press 1996).

<sup>74</sup> A Crawford and J Goodey, *Integrating a Victim Perspective Within Criminal Justice, International Debates* (Ashgate 2000).

opinions of victims. There is an enhanced policy and practice<sup>75</sup> of the law recognising victim rights. Again, there is no single neat legal pigeon hole;

- *Hate, Harassment, Stalking*: Victimology and victim concerns are possibly even further refined in the separate discrete areas of harassment, stalking and hate crimes. P Infield and G Platford, for example, refer to the legal-psychology of stalking when outlining the law of harassment and staking.<sup>76</sup> JB Jacobs and K Potter analyse hate crimes as criminal law and identity politics.<sup>77</sup> Emotions and feelings such as hate are receiving greater legal-empirical analysis<sup>78</sup>;
- *Violence*: Violent acts<sup>79</sup> have always been considered in terms of legal-policy and sanction, but are equally receiving more nuanced and considered analytical attention. Public order<sup>80</sup> is increasingly being analysed, and judges and prosecutors are increasingly assimilating understanding as well as evidence from IT and related technologies. Deviant acts deemed anti-social<sup>81</sup> are increasingly the subject of social-legal-political focus. There is not just one single entity or sector dealing with anti-social behaviour, such as local authorities, police, courts, social services, health service, etc.<sup>82</sup> New cross-disciplinary reactions such as ASBOS are evolving.<sup>83</sup> Public order in the context of free speech and legitimate non-violent protest<sup>84</sup> is not just a legal consideration. Lawyers and judges have also to be familiar with wider public policy and personal autonomy issues. On one hand politicians may be praising Twitter and social networking and the part it played in the Arab Spring, yet display consternation at disclosures through Wikileaks (and now Snowden). Modern internet technology dictates and recalibrates many traditional legal concepts. New reactions also include educational type remedies.<sup>85</sup> Public order issues now extend to national security considerations<sup>86</sup> and emergency powers.<sup>87</sup> Prisoner's legal rights are also a related area of research.<sup>88</sup> Again, it extends beyond any one legal pigeon hole;

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<sup>75</sup> M Hall, *Victims of Crime, Policy and Practice in Criminal Justice* (Willan Publishing 2009).

<sup>76</sup> P Infield and G Platford, *The Law of Harassment and Stalking* (Butterworths 2000) ch 1.

<sup>77</sup> JB Jacobs and K Potter, *Hate Crimes, Criminal Law & Identity Politics* (Oxford University Press 1998).

<sup>78</sup> See for instance, FM Lawrence, *Punishing Hate, Bias Crimes Under American Law* (Harvard University Press 1999).

<sup>79</sup> One text on the topic is B Mitchell, *The Law Relating to Violent Crime* (CLT 1997). This includes analysis of corporate liability at ch 17.

<sup>80</sup> R Card, *Public Order Law* (Jordan 2000).

<sup>81</sup> J Anderson, P Grotorex, D Falkowski, and B Tankel, *Anti-Social Behaviour Law* (Jordan 2011).

<sup>82</sup> *ibid* ch 2.

<sup>83</sup> *ibid* ch 6. Also M Sikand, *ASBOs, A Practitioner's Guide to Defending Anti-Social Behaviour Orders* (LAG 2006).

<sup>84</sup> See J Thornton, R Brander, R Thomas, D Rhodes, M Schwarz and E Rees, *The Law of Public Order and Protect* (Oxford University Press 2010).

<sup>85</sup> *ibid* see ch 15.

<sup>86</sup> M Supperstone, *Brownlie's Law of Public Order and National Security* (Butterworths 1981).

<sup>87</sup> *ibid* ch 10.

<sup>88</sup> L Lazarus, *Contrasting Prisoners' Rights, A Comparative Examination of Germany and England* (Oxford University Press 2004).

- *Evidence*: There are many legal texts in relation to the law of evidence.<sup>89</sup> However, evidence and evidential issues are no longer solely traditional legal issues. S Uglow refers to witness reliability issues.<sup>90</sup> Cross-disciplinary research casts light on these issues;
- *DNA Evidence*: A Choo refers to issues such as DNA evidence.<sup>91</sup> There is an increasing body of legal and cross-disciplinary literature dedicated to DNA law, evidence and technical issues. Examples include R Williams and P Johnson,<sup>92</sup> and L Heffernan<sup>93</sup> amongst others.<sup>94</sup> These issues and uses include biological evidence in science and criminal investigation; forensic legal DNA analysis; genetics, statistics and databases; litigation and DNA cases, and how to go about litigating such a case; DNA evidence at the trial; exonerating the innocently accused through the use of DNA.<sup>95</sup> Being such a cross-disciplinary legal concern, it interests and involves a number of types of legal scholar;
- *Witness Identification Evidence*: Legal-psychology and behavioural science is increasingly cross reliant.<sup>96</sup> The outstanding legal researcher in relation to weapon-focus, for example, is a Professor in law and in psychology.<sup>97</sup> M Hannibal and L Mountford<sup>98</sup> have a chapter dedicated to identification evidence as does J Healy.<sup>99</sup> R May and R Powles have two chapters on identification and corroboration.<sup>100</sup> Identification evidence chapters are an increasing feature in law books, such as for example A L-T Choo's evidence book.<sup>101</sup> D McGrath refers to the unreliability of evidence, including identification evidence.<sup>102</sup> The

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<sup>89</sup> C Fennell, *The Law of Evidence in Ireland* (Bloomsbury 2009); R Munday, *Evidence* (Oxford University Press 2007); C Tapper, *Cross and Tapper on Evidence* (Oxford University Press 2010); DH Kaye, DE Bernstein, JL Mnookin, *The New Wigmore: A Treatise on Evidence* (Aspen 2004).

<sup>90</sup> S Uglow, *Evidence, Text and Material* (Thomson Sweet and Maxwell 2006) 328.

<sup>91</sup> A Choo, *Evidence, Texts and Materials*, above 502, 506.

<sup>92</sup> R Williams and P Johnson, *Genetic Policing, The Use of DNA in Criminal Investigations* (Willan 2008).

<sup>93</sup> L Heffernan, *Scientific Evidence: Fingerprints and DNA* (FirstLaw 2006); CH Wecht and T Rago (eds), *Forensic Science and Law, Investigative Applications in Criminal, Civil, and Family Justice* (Taylor Francis 2006); VW Weedn, 'DNA Analysis' in CH Wecht and JT Rago (eds), above 419-430.

<sup>94</sup> See A Semikhodskii, *Dealing with DNA, A Legal Guide* (Routledge Cavendish 2007); C McCartney, *Forensic Identification and Criminal Justice, Forensic Science, Justice and Risk* (Willan 2006); J Schklar, 'DNA Evidence in the Courtroom: A Social-Psychological Perspective' in MH Freeman and Reece, *Science in Court* (Ashgate 1998) 109.

<sup>95</sup> L Kobilinsky, TF Liotti and J Oeser-Sweat, *DNA, Forensic and Legal Applications* (Wiley 2005).

<sup>96</sup> See CH Wecht and JT Rago (eds), 465 ff.

<sup>97</sup> Elizabeth Loftus.

<sup>98</sup> M Hannibal and L Mountford, *The Law of Criminal and Civil Evidence* (Longman 2002) ch 8, 142.

<sup>99</sup> J Healy, *Irish Laws of Evidence* (Thomson Round Hall 2004) ch 6, 169.

<sup>100</sup> R May and R Powles, *Criminal Evidence* (Thomson Sweet and Maxwell 2004) chs 14 and 15.

<sup>101</sup> A L-T Choo, *Evidence* (Oxford University Press 2009) ch 6, 152-168.

<sup>102</sup> D McGrath, *Evidence* (Thomson Round Hall 2005) ch 31, 112-119; ch 4, 123-212; identification evidence is at 185-207.

law increasingly considers concerns such as witnesses, confessions, testimony, identification issues and policies to improve testimony accuracy<sup>103</sup>;

- *Witness Corroboration*: Judicial warnings are given in relation to uncorroborated eyewitness identification.<sup>104</sup> Witness corroboration<sup>105</sup> and the legal and scientific basis behind the need for such warnings and corroborations are increasingly recognised. There is a growing cross-disciplinary body of legal research in relation to these issues. One of the judges responding to the judicial attitudinal research in Ireland also responded by listing relevant cross-disciplinary legal texts<sup>106</sup>;
- *Science, Law and Evidence*: Granhag et al refer to the detection of deception in forensic contexts.<sup>107</sup> Others refer to how science has come to prove what lawyers may have previously thought of as unprovable<sup>108</sup>;
- *Science*: ‘Law has always sought the assistance of scientists, though never more so than today.’<sup>109</sup> The earliest English authority commends the knowledge that experts can bring to legal consideration, ‘if matters arise in our law which concerns other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns, which is an

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<sup>103</sup> A L-T Choo, *Evidence* (Oxford University Press 2009) ch 13, 346. Also A Heaton-Armstrong, E Sheperd, G Gudjonsson and D Wolchover (eds), *Witness Testimony, Psychological, Investigative and Evidential Perspectives* (Oxford University Press 2006); EF Loftus, D Wolchover and D Page, ‘General Review of the Psychology of Witness Testimony’ in A Heaton-Armstrong, E Sheperd, G Gudjonsson and D Wolchover (eds), *Witness Testimony, Psychological, Investigative and Evidential Perspectives* (Oxford University Press 2006) 7; G Gudjonsson, ‘The Psychological Vulnerabilities of Witnesses and Risk of False Accusations and False Confessions’ in A Heaton-Armstrong, E Sheperd, G Gudjonsson and D Wolchover (eds), *Witness Testimony, Psychological, Investigative and Evidential Perspectives* (Oxford University Press 2006) 61; T Valentine, ‘Forensic Facial Identification’ in A Heaton-Armstrong, E Sheperd, G Gudjonsson, and D Wolchover (eds), *Witness Testimony, Psychological, Investigative and Evidential Perspectives* (Oxford University Press 2006) 281; D Wolchover and A Heaton-Armstrong, ‘Improving Visual Identification Procedures Under PACE Code D’ in A Heaton-Armstrong, E Sheperd, G Gudjonsson and D Wolchover (eds), *Witness Testimony, Psychological, Investigative and Evidential Perspectives* (Oxford University Press 2006) 309; S Kassin, ‘Judging Eyewitnesses, Confessions, Informants and Alibis: What is Wrong with Juries and Can They Do Better?’ in A Heaton-Armstrong, E Sheperd, G Gudjonsson and D Wolchover (eds), *Witness Testimony, Psychological, Investigative and Evidential Perspectives* (Oxford University Press 2006) 345.

<sup>104</sup> *Turnball* [1977] QB 224 C; I Dennis, *The Law of Evidence* (Sweet and Maxwell 2010) 672 para 15.53; R Cannon and N Neligan, *Evidence* (Roundhall Sweet and Maxwell 2002) 55; D McGrath, *Evidence* (Thomson Round Hall 2005) 201. In Ireland it is referred to as the Casey warning after *People (AG) v Casey* (No2) [1963] IR 33, see D McGrath, *ibid* 205, 202.

<sup>105</sup> C Fennell, *The Law of Evidence in Ireland* (Bloomsbury 2009) ch 6, 209; WA Thomas (ed), *Science and the Law: An Essential Alliance* (Westview 1983); P Murphy and R Glover, *Murphy on Evidence* (Oxford University Press 2009) ch 18, 639.

<sup>106</sup> See Appendices.

<sup>107</sup> P-A Granhag and LA Stromwall (eds), *The Detection of Deception in Forensic Contexts* (Cambridge University Press 2004).

<sup>108</sup> C Slobogi, *Proving the Unprovable, The Role of Law, Science and Speculation in Adjudicating Culpability and Dangerousness* (Oxford University Press 2007).

<sup>109</sup> M Freeman, ‘Law and Science: Science and Law’ in Freeman, above 1.

honourable and commendable thing in our law.’<sup>110</sup> Expert assistance goes back at least to Roman and Egyptian times in 3000BC.<sup>111</sup> Such ‘expert evidence can broadly be thought of as the promotion of accurate decision-making.’<sup>112</sup> Mathematics in the courtroom<sup>113</sup> is important for many reasons. Younger et al refer to mathematical and statistical issues in the law of evidence,<sup>114</sup> as do A Choo,<sup>115</sup> and Finkelstein and Levin.<sup>116</sup> Statistics is an increasing area of reliance and crossover between law and science.<sup>117</sup> Business law is also reliant upon business, accounting and mathematical input. Some of the biggest commercial and banking cases today involve a mix of law, legal-accounting forensics and legal-IT forensics<sup>118</sup>;

- *Law, Science and Forensics*: Forensic science is used in law and legal cases.<sup>119</sup> Various *Quinn* related cases in Ireland involve forensic and investigative techniques. Now law, science and forensics are almost inseparable, with an ever growing and complicated literature.<sup>120</sup> There is a specialised body of legal knowledge in relation to law, evidence, forensics and firearms.<sup>121</sup> One example is *Forensic Identification and Criminal Justice, Forensic Science, Justice and Risk*.<sup>122</sup> Other examples are *The Detection of Deception in Forensic Contexts*<sup>123</sup> and law, forensic medicine and tort negligence law<sup>124</sup>;
- *Law, Technology and Crime*: Internet crimes increasingly involve cross-disciplinary investigation, understanding and prosecution<sup>125</sup>;
- *Other Evidential Issues*: There are a variety of other evidential and cross-disciplinary issues. These include evidence and other issues in relation to appearances and testimony

<sup>110</sup> *Buckley v Rice Thomas* [1554] 1 Powd 118, 124 per Saunders J, as referred to in L Meintjes-Van der Walt, *Expert Evidence in the Criminal Process, A Comparative Perspective* (Rosenberg 2001) 1.

<sup>111</sup> L Meintjes-Van der Walt, *Expert Evidence in the Criminal Process, A Comparative Perspective* (Rosenberg 2001) 13.

<sup>112</sup> M Redmayne, *Expert Evidence and Criminal Justice* (Oxford University Press 2004) 5.

<sup>113</sup> P Murphy (ed), *Evidence, Proof and Facts, A Book of Sources* (Oxford University Press 2003) 458-474, 475-546.

<sup>114</sup> I Younger, M Goldsmith and DA Sonenshen, *Principles of Evidence* (Anderson 1997) 351.

<sup>115</sup> A Choo, *Evidence, Texts and Materials*, above 502, 506.

<sup>116</sup> MO Finkelstein and B Levin, *Statistics for Lawyers* (Springer-Verlag 1990).

<sup>117</sup> W Young and S Katkhuda, ‘Judicial Training’ in A Heaton-Armstrong, E Sheperd, G Gudjonsson and D Wolchover (eds), *Witness Testimony, Psychological, Investigative and Evidential Perspectives* (Oxford University Press 2006) 425.

<sup>118</sup> In relation to forensic accounting see, for example, H Silverstone and M Sheetz, *Forensic Accounting and Fraud Investigation for Non-Experts* (Wiley 2006).

<sup>119</sup> Redmayne, above, ch 2, ‘Constructing Cases with Science.’

<sup>120</sup> JT Rago, ‘Forensic Science and the Law-Revealing Truth and Freedom in a Single Light’ in CH Wecht and JT Rago, 35; CH Wecht and JT Rago (eds), *Forensic Science and Law, Investigative Applications in Criminal, Civil, and Family Justice* (Taylor Francis 2006); VS Browne-Barber and MK Krasil, ‘Forensic Science and the Family’ in CH Wecht and JT Rago, above 109.

<sup>121</sup> See CH Wecht and JT Rago (eds), *ibid* 333 ff.

<sup>122</sup> C McCartney, *Forensic Identification and Criminal Justice, Forensic Science, Justice and Risk* (Willan 2006).

<sup>123</sup> P-A Granhag and LA Stromwall (eds), *The Detection of Deception in Forensic Contexts* (Cambridge University Press 2004).

<sup>124</sup> SE Collins, ‘Forensic Medicine and Medical Negligence-Initial Case Investigation Applications,’ in CH Wecht and JT Rago (eds), above 239.

relay and video link.<sup>126</sup> Evidence in international litigation is increasingly an issue.<sup>127</sup> Science, law and environmental regulation<sup>128</sup> is a new and developing area. Science and construction law is also important.<sup>129</sup> Patents and biotechnology<sup>130</sup> are cross-disciplinary, and often require specialist knowledge in terms of practitioners, specialist judges and even calls for specialist juries. Judicial training<sup>131</sup> issues arise in a number of contexts from specialist legal and technical issues. A Stein explores the issue of evidence as an exercise in allocating risk in civil and criminal cases.<sup>132</sup> W Twining in *Rethinking Evidence* considers evidential issues and refers to evidence as a cross-disciplinary subject and as to an integrated science of evidence.<sup>133</sup> He also refers to cross-disciplinary warnings.<sup>134</sup> Also referred to are issues of identification and mis-identification in the legal process<sup>135</sup>;

- *Witness Issues:* Witness issues<sup>136</sup> are always of important legal interest but are ever increasing in the legal, legal-psychological and legal-empirical focus being directed to it. The legal appreciation of the eyewitness identification issues and their complexity could be hindered without legal-psychology. General and common knowledge alone are insufficient.<sup>137</sup> One example is the area of false confessions.<sup>138</sup> The factors that influence witnesses or indeed pre-trial publicity<sup>139</sup> issues are of cross-disciplinary concern. Evidence is also an issue to be considered in an international and cross-jurisdictional basis<sup>140</sup>;
- *Expert Admissibility:* The issue of the admissibility of expert evidence is sometimes on rare occasions contentious, particularly for new fields and new sciences.<sup>141</sup> Judicial knowledge

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<sup>125</sup> MR Blakeslee, *Internet Crimes, Torts and Scams* (Oxford University Press 2012).

<sup>126</sup> D McGrath, *Evidence* (Thomson Round Hall 2005) ch 31, 112.

<sup>127</sup> CF Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff 2005).

<sup>128</sup> P Park, 'Some Challenges for Science in the Environmental Regulation of Industry' in Freeman, above 191.

<sup>129</sup> F Paciaroni and KJ Stubblebine, 'Construction Law' in CH Wecht and JT Rago *ibid* 255.

<sup>130</sup> See M Llewelyn, 'The Application of Patent Law Principles to Scientific Developments: The Problem with Biotechnology' in M Freeman and H Reece, *Science in Court* (Ashgate 1998) 147.

<sup>131</sup> W Young and S Katkhuda, 'Judicial Training' in A Heaton-Armstrong, E Sheperd, G Gudjonsson and D Wolchover (eds), *Witness Testimony, Psychological, Investigative and Evidential Perspectives* (Oxford University Press 2006) 425.

<sup>132</sup> A Stein, *Foundations of Evidence Law* (Oxford University Press 2005) chs 6 and 7, 172.

<sup>133</sup> W Twining, *Rethinking Evidence* (Cambridge University Press 2006) ch 15, 436.

<sup>134</sup> *ibid* 261.

<sup>135</sup> *ibid* ch 5, 165.

<sup>136</sup> L Heffernan, R Tyan and E Imwinlefried, *Evidentiary Foundations* (Tottel 2008); E Borgida, and ST Fiske (eds), *Beyond Common Sense* (Blackwell 2008).

<sup>137</sup> GL Wells, 'Eyewitness Identification: Issues in Common Knowledge and Generalization' in E Borgida and ST Fiske (eds), *Beyond Common Sense* (Blackwell 2008) ch 8, 159.

<sup>138</sup> MA Berger, 'Research on Eyewitness Testimony and False Confessions' in E Borgida, and ST Fiske (eds), *Beyond Common Sense* (Blackwell 2008) ch 16, 315.

<sup>139</sup> MB Kovera and SM Greathouse, 'Pretrial Publicity: Effects, Remedies and Judicial Knowledge' in E Borgida and ST Fiske (eds), *Beyond Common Sense* (Blackwell 2008) ch 13, 261.

<sup>140</sup> S Mason (ed), *International Electronic Evidence* (British Institute of International and Comparative Law 2008).

<sup>141</sup> D Ormerod and A Roberts, 'The Admissibility of Expert Evidence' in A Heaton-Armstrong, E Sheperd, G Gudjonsson and D Wolchover (eds), *Witness Testimony, Psychological, Investigative and Evidential Perspectives* (Oxford University Press 2006) 401.



and training can also be a topic of consideration.<sup>142</sup> Commentators sometimes write about the need for having judicial training, whether generally or in relation to certain specific issues.<sup>143</sup> Expert evidence<sup>144</sup> and expert evidence admissibility<sup>145</sup> is always an organic matter, as knowledge, experience and the law continually change and grow.<sup>146</sup>

### **Advantages of Legal-Psychology**

Legal-psychology allows us to carry out research we may not be easily able to do in a real trial environment, or at least not at this stage. There has been a willingness to permit and engage in varied experiments and trials of TCB. Equally, there should also be a willingness to engage in the necessary and optimum normative research of distraction-effects issues. Carrying out legal-psychology research is also important because it allows us to ‘begin providing a sound factual base for decision-making concerning the ... effects of [TCB].’<sup>147</sup> Ultimately, the issue of whether TCB can deny the right to a fair trial ‘lies at the centre of the debate.’<sup>148</sup> However, the ‘problem lies in the discovery and objective measurement of this possible distortion, if it does exist.’<sup>149</sup> D Shores ‘reports on the findings of a study designed to quantify the effects of a [TCB] camera on the ability of the witness to present cogent testimony. By observing the witness testimony in a controlled, experimental environment and the analysis of the testimony for relative complexity, the study begins the process of quantifying the effects of a [TCB] camera on the witness’s ability verbally to express ideas.’<sup>150</sup>

Equally, eye-tracking seeks to provide objective measurement. It can provide more exacting and quantified data of TCB distraction-effects than any study previously. However, a body of such research is required not just a single study. The advantage of TCB eye-tracking is that it provides data as well as a recorded video of exactly where the participant subject was looking. This is available to other researchers, which is a

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<sup>142</sup> W Young and S Katkhuda, ‘Judicial Training’ in A Heaton-Armstrong, E Sheperd, G Gudjonsson and D Wolchover (eds), *Witness Testimony, Psychological, Investigative and Evidential Perspectives* (Oxford University Press 2006) 425.

<sup>143</sup> W Young and S Katkhuda, ‘Judicial Training’ in A Heaton-Armstrong, E Sheperd, G Gudjonsson and D Wolchover (eds), *Witness Testimony, Psychological, Investigative and Evidential Perspectives* (Oxford University Press 2006) 425.

<sup>144</sup> JD Heydon, *Cross on Evidence* (Australian edn, Butterworths 2004) 926 ff. Cannon, above 91 ff.

<sup>145</sup> CH Wecht and JT Rago (eds), above Part III, 285-298.

<sup>146</sup> The judicial assessment of expert evidence is not often discussed as these are frequently seen as judicial discretion related. See D Dwyer, *The Judicial Assessment of Expert Evidence* (Cambridge University Press 2008).

<sup>147</sup> D Shores, ‘The Effects of Courtroom Camera on Verbal Behavior: An Analysis of Simulated Trial Witness Testimony in Courtrooms Using Television Cameras’ (PhD thesis, University of Florida 1981) viii.

<sup>148</sup> D Shores, *ibid* 3.

<sup>149</sup> *ibid* 5.

frequent problem for researchers and legal-policymakers when looking at historical effects-research and commentary on TCB. D Shores states that by ‘conducting carefully-controlled experimental research, the media, jurists, and the general public can begin to perceive what effects cameras have on trial participants.’<sup>151</sup> The thesis broadly favours TCB eye-tracking for normative TCB legal-empirical effects-research given the many advantages.

Today, exacting detail and data gathering is possible in relation to TCB participant distraction-effects that were not possible previously. TCB eye-tracking is verifiable research and not mere speculation as might hitherto have been the case. The use of eye-tracking to address the issue of TCB distraction concerns identified by the US Supreme Court, and others, can address a real issue and real concern in the courtroom. This applies to courts permitting TCB as well as courts considering experimenting with TCB. The research and discussion to date has not properly dealt with the TCB concerns. Today we are better able to deal with a clear method to exactly, empirically and verifiably research the problem of what if any visible TCB distraction-effects occur with the TCB cameras and TCB camera operators. The limits of the research and indeed the limits of the research tools available previously has hindered the search for answers. The results of TCB eye-tracking studies can then directly influence our legal and legal-policy decisions in terms of rejecting TCB or adopting the potentially least disruptive or non-disruptive form of TCB. We can learn how better to design TCB so as to best alleviate the concerns raised by TCB distraction. We also know from some areas of legal-psychology research, namely, camera police confessions and camera-perspective-bias, that constructive alternatives have been suggested.<sup>152</sup> Also SR Pasternack’s research suggests that jurors may be adversely affected when they know that they may become known to the public via

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<sup>150</sup> ibid 5-6.

<sup>151</sup> ibid 39. There can also be some disadvantages. W Weite and SS Diamons cite using college students as mock jurors; inadequate trial simulation; lack of jury deliberations; inappropriate dependent variables; not enough corroborative field data; the explicit hypothetical nature of the role playing. W Weiten and SS Diamond, ‘A Critical Review of the Jury Simulation Paradigms: The Case of Defendant Characteristics’ [1979] 3 *Law and Human Behaviour* 629, referred to in A Bukoff, above 5. Sometimes also, individual studies have been criticised for methodological reasons. See A Bukoff, above, generally and references therein at 5-6. Some also criticise jury research studies. See SR Pasternack, ‘The Effects of Perceived Community Pressure on Simulated Juror Guilt Attributions: A Study’ (PhD thesis, University of Tennessee, Knoxville, December 1982) 34.

<sup>152</sup> It is better to have both the suspect being questioned as well as the police officer doing the questioning both equally in the camera frame of the video being recorded. Indeed, the day to day practice and policy of at least one police force has deliberately changed as a direct result. GD Lassiter and AA Irvine, ‘Videotaped Confessions: The Impact of Camera Point of View on Judgements of Coercion’ (1986) 16 *Journal of Applied Social Psychology* 286. The police practice in New Zealand has changed as a direct result of camera perspective bias research in legal-psychology.

TCB footage. He suggests that TCB policy should ensure provisions which prohibit the televising of the jury members.<sup>153</sup> The witness in the *Pistorius*<sup>154</sup> case can object to being filmed, but apparently not the victim's family in the body of the courtroom or members of the public.

### **Locus of TCB Research**

While there is a dilemma<sup>155</sup> in terms of field versus laboratory research, and in-court versus mock/laboratory effects-research, mock and laboratory research allows researchers to control or insulate the specific effect being researched. The potential for more accurate data and results are enhanced versus a less controlled real court trial. Some say that issues such as realism are diminished. This is correct to some extent. However, using a real court, and real courtroom participants, in a non-live mock trial setting can help to deal with this point. There are also other ways to enhance the importance of the test for the participant subjects.

D Shores refers to the variables being controlled in laboratory setting research.<sup>156</sup> For instance, if we record a mock courtroom scene, and use a subject category eg witnesses, jurors, and use eye-tracking investigation of the subjects watching the court film, we are controlling many variables by ensuring that they all watch and see the same court case. D Shores also states that by 'controlling a large number of variables, and by using an actual courtroom with realistic court personnel, this research improved the structural verisimilitude of' earlier research such as J Hoyt.<sup>157</sup>

TCB eye-tracking research also lends itself to real courts and mock courts (in non-live cases) and so is more realistic<sup>158</sup> than many previous research studies. It is, therefore, more realistic and arguably more valid in its conclusions and findings than certain previous research in pure laboratory settings. Indeed, that the research materials are court and trial related also overcomes some of the issues with certain previous studies which relied upon non-legal materials to test the subjects.<sup>159</sup>

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<sup>153</sup> SR Pasternack, 'The Effects of Perceived Community Pressure on Simulated Juror Guilt Attributions: A Study' (PhD thesis, University of Tennessee, Knoxville, December 1982) iv.

<sup>154</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>155</sup> See D Shores, above 42 ff.

<sup>156</sup> *ibid* 45.

<sup>157</sup> *ibid* 46.

<sup>158</sup> See *ibid* 94.

<sup>159</sup> Eg J Hoyt. See J Hoyt, 'Courtroom Coverage: The Effects of Being Televised' (1977) 21 *Journal of Broadcasting* 487.

## **Courtroom Participants**

One concern is that TCB may affect different participants in different ways. For example, the effects on professionally trained or routine court attendees such as lawyers, judges and professional witnesses, may be different from those participants such as parties, jurors or non-professional witnesses who do not attend court regularly. D Shores puts it as follows, namely, that TCB ‘may affect certain types of people negatively and not adversely affect others.’<sup>160</sup> No research appears to examine the graduated-effects but with different categorisation of the courtroom personnel. Regardless of category, everyone is an individual and therefore the effect on participant A could be individual and quite different from the effect of participant B. Individualisation of effects is also not really considered in the research regarding TCB. However, these issues can also be dealt with in TCB eye-tracking research whereby, regardless of the participant, the eye-trackers record exactly where each individual is looking, for how long, how frequently, etc. This applies across the participant category being investigated and between different categories. It can be more easily replicated and repeated than some other research and, therefore, the overall study population is increased. The study population also becomes more generalisable as numbers increase and also as the forensically relevant population eg jurors, are included in the study. As mentioned above, cross-jurisdictional research can also be undertaken, thus adding a valuable facet to the research thus far missing. SR Pasternack also acknowledges the need for legal cross-disciplinary research when he notes the ‘definite lack of data for the [US] states to consult in formulating policies, suggests a need for an ongoing program of research to assist these decision makers.’<sup>161</sup>

## **Conclusion**

S Prince, commenting in relation to witness effects, states that ‘[u]ntil a detailed experiment is conducted so that the effect upon witnesses can be tested the arguments are only based upon conjecture rather than substantive evidence.’<sup>162</sup> MM Feeley refers to the author’s research and notes that most of the TCB arguments are ‘self-serving assertions with next to no evidence to support them,’ and that the author ‘sets out a sensible approach to replace hot air with hard evidence.’<sup>163</sup> EP Robinson also states that the TCB eye-tracking and other suggestions made by the author ‘proposes an innovative

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<sup>160</sup> D Shores, above 97.

<sup>161</sup> SR Pasternack, above 3.

<sup>162</sup> S Prince, above 102.

<sup>163</sup> MM Feeley, Claire Sanders Clements Dean’s Professor Jurisprudence and Social Policy Program, Boalt Hall School of Law, University of California at Berkeley, referring to P Lambert, *Television Courtroom Broadcasting Effects: The Empirical Research and the Supreme Court Challenge* (University Press of America 2013). Professor Feeley has provided a review of the said publication.

methodology for studying these assumptions and issues that will add a new, interesting and useful perspective to the discussion and debate over the advisability and effects of the cameras in the courtroom.’<sup>164</sup> The TCB debate and TCB distraction-effects research should benefit from any suggestions for better and more contemporary normative effects-research. This includes TCB eye-tracking and legal cross-disciplinary research. As S Prince notes in relation to her research, ‘[i]t is a normative as well as a legal issue and more discussion of the issues within the legal community would perhaps lead to a change in the law.’<sup>165</sup> One could say that this may also apply to the current research issue, the TCB question and the TCB effects. The TCB concerns will only be answered once we develop sufficient streams of repeated normative legal-empirical research of TCB. Not only do the concerns of the US Supreme Court remain but new concerns and effect issues are arising, as recently evidenced in the *Pistorius*<sup>166</sup> case.

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<sup>164</sup> EP Robinson also refers to and reviewed the forthcoming book mentioned immediately above. He is Deputy Director, Donald W Reynolds National Center for Courts and Media, and Managing Editor of the Reynolds Courts and Media Law Journal. Professor D Bloy, co-author of *Hadwin and Bloy: Law and the Media*, also describes the book as ‘making a major contribution to the debate; being perhaps the only book on the market that provides a totally objective assessment of the evidence to date.’

<sup>165</sup> S Prince, above 129.

<sup>166</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.



## CHAPTER 11: LEGAL-PSYCHOLOGY

### Introduction

The context outlined above indicates that there are a number of problems and challenges with the TCB research to date. This presents difficulties for courts, lawyers and legal-policymakers in considering whether or not TCB should be permitted, and when it is, what effects issues arise and how these might be dealt with. Legal-psychology is not only relevant to but is important for these TCB research and effects considerations.<sup>1</sup> The interdisciplinary research which includes legal-psychology can help to identify solutions to address the US Supreme Court concerns. To date, these have been missed opportunities. The problems are referred to below as well as many of the areas of legal-psychology which can assist the TCB research effort, and thus ultimately those whom need to understand and deal with these issues most.

TCB general research often seeks to answer questions and issues by relying upon self-reports and opinions-reports. It also relies upon the expressed confidence-reports of (some of the) courtroom participants. The issues of opinion-reports, self-reports<sup>2</sup> and confidence-reports appear extensively in the existing legal-psychology literature. TCB research should consider this literature and research. Other areas of research recognise the limitations of self-reports and opinion-reports. TCB commentators fail to appreciate these limitations. Considered TCB effects-research can learn from legal-psychology and other research. TCB research can advance in normative terms to include solutions capable of overcoming the limitations of TCB opinion, self and confidence reports. Legal-psychology is important because it can assist this endeavor by illuminating avenues where TCB legal and legal-policy considerations can be better advanced. We should not continue to rely wholly upon popular, limited or flawed research and research methodologies, such as have often been used in the past, given the importance of the issue and legal rights at stake with TCB. Where research avenues are available to back up or contradict TCB popular arguments, and address the issues, concerns and legal-policy decisions, they should be pursued.

### Problems with TCB Research to Date

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<sup>1</sup> This not meant to be a summary or review of legal-psychology or legal-psychology literature, as such would be beyond the scope of this thesis. It does serve to highlight how parts of the literature and research in legal-psychology can be the basis for or compliment research to fill the gaps in TCB research.

<sup>2</sup> P Mason's research in Europe also involves self-report type research. P Mason, 'Court on Camera: Electronic Broadcast Coverage of the Legal Proceedings' < [www.usfca.edu/pj/camera-mason.htm](http://www.usfca.edu/pj/camera-mason.htm) > accessed 19 January 2014.

Some of the problems with TCB research to date include the following. The consequence is that there are difficulties for courts and others whom have to consider TCB issues, sometimes contentiously.

- *Problem with Little Out-of-Court Research:* One of the flaws to date is that predominantly all identified TCB research focuses on potential effects inside the courtroom (in-court). It ignores any substantial or sustained reference and consideration to audience effects and effects on persons outside of the courtroom (out-of-court).<sup>3</sup> This means we have only begun research into one half of the TCB spectrum.<sup>4</sup> Legal-psychology can help us to separate the different in-court and out-of-court issues;
- *Problem with In-Court Research:* In terms of the in-court research, this is limited. It focuses on some but not all of the courtroom participants. In addition, it relies on limited models of research.<sup>5</sup> There is no independent verification of the opinions given. The legal-psychology research is very relevant to in-court TCB issues in terms of offering opportunities for additional and validation research;
- *Problem of In-Court Self, Opinion and Confidence Reports:* Many studies into TCB are limited to self-report, opinion-report and confidence-report studies. People in actual cases (or in mock cases) are asked for their opinions on whether they feel that they have been affected by the TCB cameras filming in the courtroom. While gathering such opinions is in itself a worthwhile exercise, self-reports are not the most accurate indicator of an individual being affected by TCB cameras in the courtroom. Self-report studies should not be relied upon as the sole indication of the in-court effects of TCB. It may cost more to undertake wider ranging, more reliable and cross disciplinary legal research. However, this is an insufficient reason for limiting the scope of research into such an important legal, social and policy issue as TCB effects;
- LM Hulse and A Memon state that ‘any relations between identification accuracy, confidence, and event factors are complex.’<sup>6</sup> However, in the context of the TCB research it is generally assumed that the self-reports, opinion-reports and confidence-reports of courtroom participants are always correct. Yet the research effort to date fails to investigate

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<sup>3</sup> There was, however, one study found where viewer reaction to a particular case was gauged via a questionnaire in Arizona. One thousand questionnaires were used with a twenty five percent response rate. Ninety five percent watched the trial more than once and eighty four percent agreed with the guilty verdict. See (30 November 1987) *New Law Journal* 13 ff, as referred to in W Freedman, *Press and Media Access to the Criminal Courtroom* (Quorum 1988) 46.

<sup>4</sup> Media and communications studies can also be applied to TCB issues.

<sup>5</sup> Primarily, it uses questionnaires to ask (some of the) courtroom participants if they themselves have been affected. This amounts to self-reports of effects. Sometimes, but not always, researchers will ask a courtroom participant if they feel other courtroom participants have been affected (opinion-reports). Such reports and self-report studies are limited and ignore an abundance of other opportunities for additional supporting research.

<sup>6</sup> LM Hulse and A Memon, ‘Fatal Impact? The Effect of Emotional Arousal and Weapon-Focus on Police Officer’s Memories for a Simulated Crime’ (2006) 11 *Legal and Criminal Psychology* 313, 322.



corroboration of these reports. It is less than optimum for TCB legal and related research and discussion to accept such assumptions and problem opinion. The professionally trained police officers in the LM Hulse and A Mermon study, tended to downplay their emotional responses.<sup>7</sup> The study found that there were significant differences between the self-report arousal level and the actual recorded level of arousal.<sup>8</sup> The police officers recall may be susceptible to the same arousal biases as other people.<sup>9</sup> The influence of personal individual factors and their effects have been generally avoided in the TCB research. TCB eye-tracking offers an independent means of comparison and verification of TCB self-reports;

- According to legal-psychology research, juries are impressed by confident eyewitness identifications.<sup>10</sup> TCB research predominantly relies on confidence-reports. This occurs in the self-reports, opinion-reports and limited interviews of courtroom participants. These are useful but cannot be overly relied upon. Nor should they be solely relied upon. Legal-psychology research suggests that third parties largely accept eyewitness testimony based upon the confidence of the eyewitness and the degree of detail given in the eyewitness testimony.<sup>11</sup> Unfortunately, a person's individual confidence cannot be overly relied upon. This problem is highlighted in legal-psychology research. Unfortunately, this same caution is not demonstrated in TCB research. That a witness, or courtroom participant, indicates confidence that they were not affected, may not be conclusive. Legal-psychology research has found jurors equally willing to believe an incorrect witness as a correct witness.<sup>12</sup> We should not be non-questioning in our assessment of confidence in TCB self-report studies. This applies to opinion-reports and observer-report studies. Additional research and research tools can be applied to this important topic. It can act as a verification and an additional test of TCB participants' own reports;
- In the context of TCB, for somebody involved in a trial to admit that they were affected by TCB cameras could be tantamount to an admission that, but for the TCB cameras they may have acted differently or perhaps rendered a different decision. It may not be altogether surprising for them to express any affect upon themselves in the negative. Even if they were aware of TCB cameras during a case, any decision reached by a courtroom participant

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<sup>7</sup> ibid 323.

<sup>8</sup> ibid.

<sup>9</sup> ibid.

<sup>10</sup> See L Re, above 515.

<sup>11</sup> B Culter and S Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* (Cambridge University Press 1985) 195; C Hollin, *Psychology and Crime: An Introduction to Criminological Psychology* (Routledge 1989) 165. See also C TerBeek, 'A Call or Precedential Heads: Why the Supreme Court's Eyewitness Identification Jurisprudence is Anachronistic and Out-of-Step with the Empirical Evidence' (2007) 31 *Law & Psychology Review* 21, at 24 ff, and 40 ff.

<sup>12</sup> ibid 19, referring to G Wells et al in 1978, G Wells, 'Applied Eyewitness-testimony Research: System Variables and Estimator Variables' (1978) 12 *Journal of Personality and Social Psychology* 1546, also E Loftus, above 177. Interestingly, many of the questionnaire and self-report studies of TCB do not appear to code or rate courtroom participant confidence. Confidence is rated in legal-psychology research as one of the two least important factors in testing accuracy of eyewitness identifications, see B Cutler and S Penrod, above 112.

should be clearly reached without influence from the cameras present. One might also add that it should also be without the appearance of such influence. Yet, TCB research almost invariably ignores these issues and leaves research questions unaddressed and or replies accepted without question. Interestingly, a High Court judge referred to in-court distraction from media personnel typing.<sup>13</sup> The judge in the Steinberg case also indicates that he did change his actions as a result of the *TCB feedback loop effects*.<sup>14</sup> New Zealand research also offers various legal-policy effects issues to consider, as it ‘found that most judges were distracted by [TCB] cameras’<sup>15</sup>;

- *Problem with TCB Participants*: Many different reasons contribute to mistaken identification. One flaw with TCB research is that it frequently assumes that limited and basic courtroom participants questionnaires are not undermined by bias, drafting, self-reports, confidence, etc, issues. Frequently these issues are left unconsidered. We can start to address the research flaws in TCB. We should not continue to assume that courtroom participants and their replies, are better than eyewitnesses accounts, or better in all instances. TCB issues should at least be similarly tested and researched,<sup>16</sup> as is included in eyewitness identification;<sup>17</sup>
- *Problem with Identifying and Researching TCB Distraction Factors*: The TCB commentary and research does not properly identify and analyse the factors relevant to the TCB distraction-effect issues. Legal-psychology research identifies many of the factors which contribute to incorrect eyewitness identifications.<sup>18</sup> This research is already applicable to the many gaps in the TCB research. For example, we should consider how courtroom participants see TCB cameras in the courtroom. Researchers can consider how we identify them. Issues include, for example, what they see, and do not see, in the courtroom. We should consider whether the process of attendance, viewing, recall and identification have effects in the TCB courtroom setting;

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<sup>13</sup> Peart J, in *McKeogh v Doe and Others* IEHC (2012), unreported.

<sup>14</sup> PE Thaler, ‘The Impact of the Television Camera on Courtroom Participants: A Case Study of the Joel Steinberg Murder Trial’ (PhD thesis, New York University 1990).

<sup>15</sup> Department of Constitutional Affairs [UK], *Broadcasting Courts, Consultation Paper*, CP 28/04 (November 2004) 109, referring to UMR Insight Ltd, *Media Coverage of Court Proceedings: Summary Report* (February 1998) and *The Impact of Television, Radio and Still Photography on Coverage of Court Proceedings - Final Report, A Report Prepared for the Department of Courts by a research team from the Department of Human Management, Massey University* (April 1998). This is the New Zealand research. It appears opinion related.

<sup>16</sup> Similarly legal-psychology, media and communications can assist out-of-court effect issues eg research of effects while cross-tasking.

<sup>17</sup> In the context of TCB eye-tracking research, the issue of students can be dealt with by introducing more non-students and particularly those who fit the jury population profile. In addition, generalisability can be dealt with by using certain eye-tracking studies which can be applied to greater study populations than would have been feasible in some of the earlier TCB studies. In certain examples of eye-tracking TCB studies we should be able to incorporate cross jurisdiction research in relation to the same courtroom footage and scenes, and thereby achieve a level of generalisability and cross-comparative TCB research which has not been considered or attempted before. See D Shores above, 92.

<sup>18</sup> However, as previously pointed the courts have long held the view that eye witness identification must be considered very carefully.

- Many of the various factors identified as being applicable to eyewitness identification and eyewitness evidence may apply to research of the TCB issues. L Re for example,<sup>19</sup> identifies many acquisition stage factors, event stage factors, witness factors, recollection factors, post event information factors, displacement factors, context importance factors, etc. E Loftus and JM Doyle<sup>20</sup> also identify many factors. ‘In recent years psychologists have undertaken research which reveals that each of the [eyewitness identification] stages listed by Evatt and McTiernan JJ [in the Australian High Court] is subject to factors which may weaken the value of the final identification and lead to a wrongful conviction.’<sup>21</sup> The research processes through which legal-psychology investigates and identifies various factors is important to TCB, given that TCB has not always been so rigorous in its research. The same rigour as is evident in other areas of legal-empirical research can be applied to the TCB effects issues;
- Courtroom participants may be able to give their opinions and experience to a certain extent. However, they are arguably not qualified in all aspects and areas where a change may be effected and or visible. The TCB research and research tools need to be expanded. In addition, asking courtroom participant A about his or her opinion on whether courtroom participant B was affected or changed in some way (eg distraction) due to the TCB cameras, ignores the fact that courtroom participant A was actually busy doing something in court as their primary task. Therefore, their task was not to observe meticulously everything that courtroom participant B may, or may not, have been doing. Equally, this applies to observing what the TCB cameras, equipment and camera operator were doing. Such questions are also focused on main perceivable effects, and not more internal or non-observable effects. As previously pointed out, self-reports and opinion-reports are limited in that they may not on their own demonstrate in-court effects. In addition, they are not corroborated by any further or additional set of research techniques and studies. Again, we need to cast a wider net and involve more than one type of research technique to properly evaluate TCB effect issues;
- *Problem with TCB Safeguards:* In terms of TCB research, there are generally no comparable safeguards. The TCB research does not identify or research the problem of relying solely upon self-reports, opinion-reports and confidence-reports. It appears some researchers may not be even aware of these issues. There are generally no suggestions

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<sup>19</sup> ibid.

<sup>20</sup> EF Loftus and JM Doyle, *Eyewitness Testimony: Civil and Criminal* (Kluwer 1987) ch 2. Note also second edition/supplement published in 1994 by Lex Law Publishing.

<sup>21</sup> L Re, above 510, referring to Evatt and McTiernan, JJ, in *Craig v The King*, High Court, Australia. No citation given. *Craig v R* [1933] HCA 41; [1933] 49 *CRL* (1933)(49) (29 August, 1933); < www.austlii.edu.au > accessed 19 January 2014. Evatt and McTiernan, JJ, refer to the following stages, namely, ‘An honest witness who says “the prisoner is the man who drove the car” whilst appearing to affirm a simple clear and impressive proposition, is really asserting: (1) that he observed a driver; (2) that the observation became impressed upon his mind; (3) that he still retains the original impression; (4) that such impression has not been affected, altered or replaced ... and (5) that the resemblance between the original impression, and the prisoner is sufficient to base a judgement, not of resemblance, but of identify.’

made as to how to address the self-report, opinion-report and confidence-report issues. In addition, not all courts which permit TCB have legal-policy procedures and restrictions in place. Judges do not appear to be appraised on all of the effect-issues involved in TCB media, communication, production, editing, selection, etc, and generally have no direct input or control over what happens the footage once it is filmed and leaves the court.<sup>22</sup> This is generally only possible through considered legal-policy enumerated in advance by courts, and not individual judicial decisions. It is also potentially easier with planned iTCB. As indicated above, more normative research is needed into the TCB effect issues raised;

- *Problem with Safeguards and Contempt Rules:* Contempt of court rules are one mechanism used to protect and regulate proceedings in relation to TCB cameras. However, it can be suggested that relying on contempt of court rules alone, may not be a sufficient safeguard. (TCB eye-tracking offers avenues for considered legal-empirical verified safeguards). We should be cautious in considering that contempt rules cover every problem effect issue which may arise in-court and out-of-court in relation to TCB. Contempt rules were developed prior to the advent of TCB. We should not assume that contempt rules contemplate modern communications technologies such as TCB. The court in the *Pistorius*<sup>23</sup> case, which involves certain forms of TCB,<sup>24</sup> has had to admonish the public in court after at least one individual took a ‘selfie’ photograph of the defendant. While potential contempt issues arise, this indicates that TCB effect issues can change and that new issues can arise. While the popular discussion of in-court TCB effects has traditionally referred to some of the courtroom participants, such as judge, jury, witnesses, lawyers, there does not appear to be any detailed popular discussion nor legal-empirical research of the TCB public-in-court effects. This area is, however, no less worthy of research. The Law Commission of Australia is currently reviewing contempt issues in that jurisdiction<sup>25</sup>;
- Surprisingly, no detailed research has been carried out into in-court safeguards, or out-of-court safeguards, for TCB. While there are ‘use’ rule restrictions in relation to parliamentary broadcasting, including Ireland,<sup>26</sup> there is no considered research of use

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<sup>22</sup> iTCB may potentially change this however.

<sup>23</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>24</sup> For example, it involves a criminal case, it involves certain specific types of cameras, there are no large cameras, there are no in-court camera operators, the camera locations are fixed and the cameras and camera locations do not move about or change in the courtroom, what and whom can be filmed in court is limited and restricted, there appear to be clear and transparent advance notice and procedures advised to witnesses that they can object to being filmed and broadcast – which does not appear to be the case in some of the US examples, there are restrictions on close-up, zooming, etc. It may be that the miniature cameras cannot move and tilt from left to right, etc, albeit this aspect is not clear from the report so far.

<sup>25</sup> See ‘Call for feedback,’ Law Commission of Australia, available at <http://www.lawcom.govt.nz/project/review-contempt-court>, accessed 1 August 2014. Separately, the Law Commission also looked at the legal environment relating to the news media, particularly new and emerging forms of news media. See ‘Review of Regulatory Gaps and the New Media’ Law Commission of Australia, <http://www.lawcom.govt.nz/project/review-regulatory-gaps-and-new-media>, accessed 21 August 2014.

<sup>26</sup> See chapters below.

issues and use safeguards in relation to TCB. This should be pursued, and in a manner which allows comparisons. Considering the *Pistorius*<sup>27</sup> case for example, as well as the developing trend for more nuanced and layered rules and warnings to jurors in relation to social media usage, research and possibly similarly nuanced and layered rules may apply to the public attending TCB cases. If the example of the member of the public attending the *Pistorius*<sup>28</sup> case taking a 'selfie' tended to be repeated, there could be a rule requiring members of the public attending to leave their mobile telephone outside the court or turned off<sup>29</sup>;

- *Problem with Consent*: Some of those involved in TCB self-report studies were initially asked if they consent to the use of TCB. If they initially agreed and gave some tacit support to the presence of TCB cameras, it may be inconsistent for them later to say that they were adversely affected by the use of TCB cameras.<sup>30</sup> This issue has not been researched. It would appear to be relevant. Again, documenting the issues as well as legal-psychology research can assist in investigating this issue. Other courtroom participants may not have consented. Alternatively, they may have already become heavily involved in the TCB process. Given this acceptance, they could be less likely to disagree with TCB or identify any negative effects, if subsequently asked to do so. This issue has not been researched to date. Legal-psychology research can assist the consideration and investigation of this issue. The *Pistorius*<sup>31</sup> case offered an excellent opportunity for investigating certain witness related issues given that there was a transparent right to object to be filmed and broadcast. Research may examine effect issues between those who were broadcast and those who objected or elected not to be broadcast. TCB studies do not appear to ascertain views of those actual and potential courtroom participants who objected to TCB. This could be useful and would also assist in comparison. Legal-psychology (and eye-tracking) research can assist in designing such research;
- *Problem of Replication*: A further issue is that no repeated body of TCB research has sought to investigate effects and distraction-effects on courtroom participants, other than by opinion-reports and self-reports. This is, in terms of the normative research capabilities available today, a disappointment;

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<sup>27</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>28</sup> *ibid.*

<sup>29</sup> Indeed, interested parties could potentially consider this as a solution to the increasing issue of members of the public secretly recording segments or snippets of a court case and posting the footage online.

<sup>30</sup> Also when people are questioned or surveyed they arguably pay greater attention and may be less likely to be confused eg in trade mark litigation surveys for instance. This point is made in J Jacoby, 'Survey and Field Experimental Evidence' in S Kassin and L Wrightsman (eds), *The Psychology of Evidence and Trial Procedure* (Sage 1985) 194. Some commentators also make a similar point with regard to courtroom broadcasting. They feel courtroom participants will be more responsible when being filmed. Whether this is true or not, something which has not been shown either way, it remains a fact that only a very small percent of cases will be covered. This is so even with a whole channel devoted to courtroom broadcasting.

<sup>31</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

- Problem and Inconsistent View Effects*: An individual courtroom participant may feel that others may be affected by TCB cameras in the courtroom, but that they themselves are not so affected. Many of the opinion-report studies concentrate on asking whether individuals feel that they themselves or other participants were or were not affected. Legal-psychology research could be used to begin to assess how correct this is. People often reject information inconsistent with views they have of themselves.<sup>32</sup> If a courtroom participant feels everyone else is positive about TCB if and when asked, this potentially affects their own replies. Another issue is the extent to which we can, or should, rely on opinion-reports of effects on others as a sole validation for the testing of effects. It is feared that incorrect information is most likely to be accepted when it comes from a position of authority or so called impartiality.<sup>33</sup> Again, this raises issues in relation to the TCB research to date as well as popular discussions on TCB issues. Sometimes it could be biased or prejudicial against recording negative effects because of who asks the questions. In some instances the TCB research is conducted by the judge. If a judge appears to be in favour of TCB, or has permitted TCB, that could potentially restrict or influence those being questioned. Also, the popular literature does not make clear or record how and who ensures that witnesses are aware of a right of election not to be filmed and or broadcast and or broadcast only with blocking or pixilation masking. Similarly, in some US states a witness can be obliged to engage with TCB even if they object. However, if the judge asks them, but the witness is already aware that the judge is in favour of TCB, or facilitating TCB, potentially the witness reply may be partly biased. If TCB is described as having no adverse effects or as being educational or impartial, it may be more difficult for courtroom participants to disagree – even when they do feel affects<sup>34</sup> or fear affects. The legal-psychology research emphasises the point that TCB studies need to become more sophisticated and nuanced in focus. The *Pistorius*<sup>35</sup> case also demonstrates these concerns.

### **Illuminating TCB with Legal-Psychology Research and Models**

Legal-psychology assists us to better inform legal and legal-policy decision with new normative and accurate TCB effects-research. It might be considered unwise to continue to assume that courtroom participants, and their replies, are better than eyewitness accounts, or better in all instances. They should at least be similarly tested and

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<sup>32</sup> D McQuail and S Windahl, *Communications Models: For the Study of Mass Communication* (2nd edn, Longman 1993) 47. Generally also E Loftus, *Eyewitness Testimony* (Harvard University Press 1979, 1996); A Heaton-Armstrong, E Shepard, GH Gudjonsson and D Wolchover (eds), *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (OUP 2006).

<sup>33</sup> See EF Loftus and K Ketcham, above; W Twining, above. Also E Loftus, *Eyewitness Testimony* (Harvard University Press 1979, 1996).

<sup>34</sup> See GS Goodman and A Hahn, 'Evaluating Eyewitness Testimony' in I Weiner and A Hess, *Handbook of Forensic Psychology* (Wiley 1987) 258.

<sup>35</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

researched.<sup>36</sup> Some of the relevant, illustrative and illuminating legal-psychology research which may be of assistance for TCB research issues is set out below.

- *Research Models and Overcoming Self-Report, Etc, Limitations*: While self-report questionnaires are useful, it is possible with cameras, high speed cameras and eye-trackers to see where a person is actually looking, for how long, and how frequently. These can be cross referenced with the questionnaire answers. They can also be used in laboratory settings and in moot courtrooms. It is not always necessary get access to actual live courtrooms to undertake such research. The use of high speed cameras has application in relation to in-court effects. High speed cameras can also be used for certain out-of-court research studies of the audience;
- *Research and Self-Reports Issues and Models*: Studies can involve test participants in a mock trial jury, as part of research into various factors involving eyewitness identification and testimony issues.<sup>37</sup> These types of studies can be repeated both with more demanding effects-research and in a TCB context;
- *Eyewitness Identification Research Models*: One legal-empirical example is legal-psychology investigations into eyewitness identification issues. The models and tools of such research are relevant to TCB. For example, legal-psychologists research the factors involved in identification. On occasion they recommend improved procedures.<sup>38</sup> Many psychologists have testified in courts as to eyewitness identification factors.<sup>39</sup> Cases include *US v Amaral*<sup>40</sup> and *Estate v Galloway*.<sup>41</sup> OP Holtenson also refers to cases<sup>42</sup>;
- UK discussion and guidelines also emphasise legal and effect issues in relation to witnesses and identification. T Valentine et al<sup>43</sup> point out that in the UK, the Turnbull guidelines<sup>44</sup>

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<sup>36</sup> Similarly, media and communications can assist out-of-court effect issues eg research of effects while multi-tasking.

<sup>37</sup> See B Cutler and S Penrod, *Mistaken Identification: The Eyewitness, Psychology and the Law* (Cambridge University Press 1995) 9, 101-102.

<sup>38</sup> L Re refers to a case where the warning to jurors was not sufficient. See L Re, 'Eyewitness Identification: Why So Many Mistakes?' (1984) 58 Australian Law Journal 519. While many factors may be already within the knowledge of jurors and other courtroom participants, the extent to which case factors or all of these factors are known to the public, ie jurors, is less certain. Holtenson strongly argues that judicial warnings are insufficient. OP Holtenson, 'The Admission of Expert Evidence of Opinion as to the Potential Unreliability of Evidence of Visual Identification' (1988) 16 Melbourne University Law Review 521. Judges are not experts in the mental processes which occur during the identification process and are not in the best placed position to advise on identification evidence and Holtenson therefore advocates expert psychological testimony.

<sup>39</sup> See A Heaton-Armstrong, E Shepard, GH Gudjonsson and D Wolchover (eds), *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (OUP 2006).

<sup>40</sup> *US v Amaral* 488 F2d 1148 (1973).

<sup>41</sup> 275 NW 2d 736 (Iowa)(1979).

<sup>42</sup> OP Holtenson, 'The Admission of Expert Evidence of Opinion as to the Potential Unreliability of Evidence of Visual Identification' (1988) 16 Melbourne University Law Review 521, 542 ff. Note also A Roberts, 'Eyewitness Identification and Expert Insight: *R v Forbes*' (2010) 14 International Journal of Evidence & Proof 57.

<sup>43</sup> T Valentine, A Pickering and S Darling, 'Characteristics of Eyewitness Identification that Predict the Outcome of Real Lineups' (2003) 17 Applied Cognitive Psychology 969, 989.

enshrine ‘some’ of the factors needed to be considered in assessing eyewitness identifications, but that other factors need to be taken into account also. This includes warning juries in the event of disputed identifications and a lack of independent corroborating evidence. G Davies and L Griffiths<sup>45</sup> suggest that despite our history of knowing that mistaken identifications occur, procedural changes following the Devlin Report, and more recently CCTV and DNA evidence, mistakes still arise. They call into question the continued use of a single confident witness as being sufficient to convict an accused person.<sup>46</sup> We should consider that TCB distraction-effects self-report research also needs corroboration. Legal-empirical and other research suggests that normative research studies be repeated, replicated and verified. The TCB self-report, opinion-report and observer-report studies are not corroborated. In terms of TCB distraction-effects, eye-tracking now allows us to begin the corroboration and verification process thus far absent in the TCB legal and legal-policy discussion;

- E Loftus is a cross-disciplinary legal researcher, being a Law Professor and Psychology Professor. One of the most famous lawyers internationally is Barry Scheck. He is a law Professor at the Cardozo School of Law. He co-launched the Innocence Project. Indeed, the Innocence Project has also been extended to Ireland and the UK by legal and legal-empirical researchers.<sup>47</sup> This cross-disciplinary legal research project has successfully ensured that many innocent people whom were convicted and imprisoned were later freed.<sup>48</sup> He was also one of the lawyers in the *Simpson* (criminal) case. A recent eyewitness research study indicates that seventy five percent of people exonerated through the use of DNA evidence were originally convicted due largely to erroneous eyewitness identifications.<sup>49</sup> CJ TerBeek strongly recommends using legal-empirical research in relation to eyewitness identification issues.<sup>50</sup> He also notes that the courts use statistical evidence in many instances.<sup>51</sup> Research also suggests that not all courtroom participants are familiar with legal-psychology research findings. For example, research in Sweden involving police officers, prosecutors and judges found that a number of wrong

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<sup>44</sup> *R v Turnbull* [1976] 3 All ER 549. Note also A Roberts, ‘Eyewitness Identification and Expert Insight: *R v Forbes*’ (2010) 14 International Journal of Evidence & Proof 57.

<sup>45</sup> G Davies and L Griffiths, ‘Eyewitness Identification and the English High Courts: A Century of Trial and Error’ (2008) 15:3 Psychiatry, Psychology and Law 435.

<sup>46</sup> *ibid.*

<sup>47</sup> See < [www.innocenceproject.gcd.ie](http://www.innocenceproject.gcd.ie) >; and < [www.innocencenetwork.org.uk](http://www.innocencenetwork.org.uk) >.

<sup>48</sup> See < [www.innocenceproject.org](http://www.innocenceproject.org) >. Note also D Langwallner, ‘Miscarriages of Justice in Ireland: A Survey of the Jurisprudence with Suggestions for the Future’ (2011) 2 Irish Journal of Legal Studies 22.

<sup>49</sup> GL Wells and AL Bradfield, “‘Good, You Identified the Suspect’”: Feedback to Eyewitnesses Distorts their Reports of Witnessing Experience’ (1998) 83 Applied Psychology 360, at 360, as referred to in C TerBeek, ‘A Call or Precedential Heads: Why the Supreme Court’s Eyewitness Identification Jurisprudence is Anachronistic and Out-of-Step with the Empirical Evidence’ (2007) 31 Law & Psychology Review 21, 21-22.

<sup>50</sup> GL Wells and AL Bradfield, above 21-51.

<sup>51</sup> *ibid* 51, referring to the case of *Roper v Simmons*, but no citation given.



understandings existed.<sup>52</sup> It also found that there were some differences between the subject groups.<sup>53</sup> Where legal-psychology is relevant to TCB issues, it should be considered;

- Eye-tracking research can also be utilised. It is increasingly used for applications in many different fields. However, eye-tracking tools have been used in legal-psychology research too. It should now be applied to TCB in an independent and corroborative manner. Eyewitness research and eyewitness identification research tools in legal-psychology are potentially very useful for effects-research into TCB.<sup>54</sup> Courts and the public have long recognised that there can be flaws with identifications and eyewitness identification evidence. In court, certain eyewitness identification requires additional corroboration evidence. Sometimes judges also give a warning to the jury in relation to such evidence<sup>55</sup>;
- GL Wells et al state in their review of thirty-one legal-psychology studies, that ‘the eyewitness accuracy-confidence relationship is weak under good laboratory conditions and functionally useless in ... representative settings.’<sup>56</sup> Eyewitness recall (or, perhaps recall by a participant in a televised trial, or a television viewer of a televised trial) is not the most reliable indicator. Perhaps we should not continue to accept the popular suggestion that a participant saying confidently that they did not look at the TCB camera is sufficient verification on its own;
- Eyewitness evidence can be highly malleable and subject to influence by many factors.<sup>57</sup> Legal-psychology research examines the context of questions to witnesses, information given to witnesses, the replies and the effects of the context, questions and information. Generally, no similar examination occurs with TCB research. Indeed, the context of the research, and sometimes the questions themselves, are not recorded in TCB research. This makes it impossible for later researchers to examine these studies or to attempt to make

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<sup>52</sup> PA Granhad, LA Stromwall and M Hartwig, ‘Eyewitness Testimony: Tracing the Beliefs of Swedish Legal Professionals’ (2005) 23 Behavioral Sciences and the Law 709.

<sup>53</sup> *ibid.*

<sup>54</sup> See generally A Heaton-Armstrong, E Shepard, GH Gudjonsson and D Wolchover (eds), *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (OUP 2006).

<sup>55</sup> There are increasingly strong arguments in psychology to suggest that these may be insufficient. For example, not every judge or every juror is familiar with the research identifying the process through which witnesses make identification, recall what they witnessed, and the various factors which effect witness perception and recall. Note also C TerBeek, above 21-51. Many legal-psychologists who are familiar with such evidence and research have assisted the courts in outlining these issues both in person and academically. E Loftus is just one such example. See also OP Holtenson, ‘The Admission of Expert Evidence of Opinion as to the Potential Unreliability of Evidence of Visual Identification’ (1988) 16 Melbourne University Law Review 521.

<sup>56</sup> Referred to in C Hollin, *Psychology and Crime: An Introduction to Criminological Psychology* (Routledge 1989) 161. Also GL Wells *et al*, ‘Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification’ (1979) 64:4 Journal of Applied Psychology 440.

<sup>57</sup> *ibid.* See also D Martin and CN Macrae, ‘Processing Style and Person Recognition: Exploring the Face Inversion Effect’ (2010) 18:2 Visual Cognition 161, at 163. Post event factors are one category of influence, such as questions, briefings, personal anticipation, cross examination and feedback or alleged feedback, from other witnesses or participant, see B Cutler and S Penrod, above 195. Also BE Bell and EF Loftus, ‘Trivial

comparisons across studies. It is important to record the questions asked, the context, all of the results and to describe how the TCB research was carried out;

- *Identification Evidence/Warnings/Corroboration Models*: There have been many notorious examples of eyewitness unreliability.<sup>58</sup> Trained observers can give wrong identifications. Even ‘the most positive identification made by a confident witness may be wrong.’<sup>59</sup> Lord Justice Scarman in *R v Dunne*,<sup>60</sup> states that ‘there is no branch of human perception more fallible than identifying a person.’ L Heffernan also comments that ‘[e]yewitness testimony, however sincere and persuasive, is notoriously unreliable and the courts have long recognised that the frailties of human observation and memory may lead to mistaken identity and ultimately wrongful conviction.’<sup>61</sup> Courts, aware of the potential unreliability of visual identification evidence, frequently warn juries about such evidence and also advise juries of the importance of having supporting collaborative evidence. Justice Kingsmill Moore in *People (AG) v Casey (No 2)*, and other cases, refer to the need for cautions and warnings.<sup>62</sup> Georgia’s Supreme Court, for example, also warned judges about the unreliability of eyewitness identifications.<sup>63</sup> The courts afford certain safeguards and warnings against eyewitness identification, particularly when uncorroborated by additional evidence.<sup>64</sup> The warnings attempt to restrict instances of bias, mistake, etc. Legal appeals are also possible.<sup>65</sup> No such general warnings are given in relation to TCB and TCB

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Persuasion in the Courtroom: The Power of (a Few) Minor Details’ (1989) 56:5 Journal of Personality and Social Psychology 669.

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See example in L Re, above 509.

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L Re, *ibid* 510.

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*R v Dunne* (English Court of Appeal) 4 October 1976, (unreported), referred to in L Re, *ibid* 516. This may not be the leading case as there are indeed many cases which have had to touch on these issues. Note also *People (AG) v Casey (No 2)* [1963] IR 33.

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L Heffernan, *Evidence: Cases and Materials* (Thomson Round Hall 2005) 284, and also chs 4 and 7, *ibid*, regarding expert evidence. See generally ch 7 therein on visual identification evidence.

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*People (AG) v Casey (No 2)* *ibid* 284, case at [1963] IR 33. Kingsmill Moore J. See also related cases referred to therein. Other cases to consider include *DPP v Gilligan*, IESC, 23 November 2005; *DPP v Christo*, IECCA, 31 January 2005; *DPP v Fee*, IECCA, 13 July 2006; *DPP v O’Donovan*, IECCA, 10 December 2004.

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As referred to in C TerBeek, ‘A Call or Precedential Heads: Why the Supreme Court’s Eyewitness Identification Jurisprudence is Anachronistic and Out-of-Step with the Empirical Evidence’ (2007) 31 Law & Psychology Review 21, 47.

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See L Re, above 517. See generally *Cross and Tapper on Evidence* (11th edn, OUP, 2007), for example 578 *et seq*, and commentary in A Keane, *The Modern Law of Evidence* (7th edn OUP 2008) 549 ff.

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*People (AG) v Stafford* [1983] IR 165, is an example of where an appeal was successful on the basis that the trial judge misdirected the jury in his summation and warnings to the jury. Note also *R v Turnbull* [1976] 3 All ER 549. Cutler and Penrod note that jurors do not/cannot assess the detrimental impact that reading or seeing media reports may be having upon them, and thereby cannot guard against it. It has also been found, they note, that the judge’s warning to a jury does not do away with jury prejudice. ‘The only certain safeguard against the effects of pretrial publicity is to impanel a jury which has not been exposed to pre-trial publicity.’ BL Cutler and SD Penrod, above. Note also references to warnings, corroboration, etc, in Chapter 10. Also note references to Twining under the heading Witness in this Chapter, post. Twining also points out that warning the jury about the perils of convicting on identification evidence alone is not a sufficient safeguard. W Twining, *Rethinking Evidence, Exploratory Essays* (Blackwell 1990) 152-175.

research.<sup>66</sup> While there is no research on this point, the disparity between TCB rules (where they exist), appear to be greater than differences between approaches to court warning/safeguard regarding identifications. This arguably deserves further TCB research<sup>67</sup>;

- *Research on Effects Models*: E Loftus and K Ketcham<sup>68</sup> point out that that human memory is extremely fragile and malleable. It can be ‘supplemented, altered or even reconstructed by as simple an instrument as a strong verb, embedded unnoticed in a question.’<sup>69</sup> Individuals in studies have said that certain objects existed at a crime scene.<sup>70</sup> However, none of the objects in fact existed.<sup>71</sup> In one study one hundred and seventy five of those who received false information, identified a non-existent barn. In tests to examine later recall, eight hundred and five people gave incorrect information as the period was prolonged.<sup>72</sup> Other examples of false recall include the fact that an assailant had curly hair, when in actuality he had straight hair; that broken glass was present when there was none at the accident; and indicating incorrect colours of objects.<sup>73</sup> Courts and legal-policymakers might consider whether it is safe to continue to assume that self-reports, opinion-report and observer-reports are immune from such subtle changes and influences. Eye-tracking, in contrast to the traditional TCB research methods, is an accurate measure of some of these TCB effect issues, particularly TCB distraction issues;
- *Arousal Models*: Arousal research suggests that once aroused, a person’s focus narrows.<sup>74</sup> Therefore, potentially arousal, stress or excitement at TCB cameras could lead to more focus on the camera and less on the overall events. It does not appear that we have properly considered or investigated issues such as stress and arousal on the different categories of courtroom participants, and how the introduction of cameras and TCB may impact this. While investigating weapon-focus issues, LM Hulse and A Memon<sup>75</sup> found that even

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<sup>66</sup> A warning may be of little use if it is given after the information has been given to the subjects and is thus processed by the brain. However, warnings before the information is received seems to ensure that they read the information slower and increase their resistance to suggestion.

<sup>67</sup> This is currently beyond the scope of the present work.

<sup>68</sup> EF Loftus and K Ketcham, ‘The Malleability of Eyewitness Accounts’ in S Lloyd-Bostock and BR Clifford (eds), *Evaluating Eyewitness Testimony* (Wiley 1985) 159-170; W Twining, ‘Identification and Misidentification in Legal Processes: Redefining the Problem’ in S Lloyd-Bostock and BR Clifford (eds) *ibid* 255, and other sections therein. Also E Loftus, *Eyewitness Testimony* (Harvard University Press 1979, 1996). Also E Loftus, ‘A 30-year Investigation of the Malleability of Memory’ (2005) 12 *Learning and Memory* 361.

<sup>69</sup> *ibid*.

<sup>70</sup> *ibid*.

<sup>71</sup> *ibid*.

<sup>72</sup> *ibid*.

<sup>73</sup> See EF Loftus and K Ketcham, above; W Twining, above, in ‘Legal Processes: Redefining the Problem’ in S Lloyd-Bostock and BR Clifford *ibid* 255, and other sections therein. Also E Loftus, *Eyewitness Testimony* (Harvard University Press 1979, 1996).

<sup>74</sup> LM Hulse and A Memon, ‘Fatal Impact? The Effect of Emotional Arousal and Weapon-Focus on Police Officer’s Memories for a Simulated Crime’ (2006) 11 *Legal and Criminal Psychology* 313, 314.

<sup>75</sup> *ibid* 313-325. There are also other parallels with courtroom broadcasting and the instant study. Defendants in the courtroom broadcasting context have been seldom researched.

professionally trained police officer' recall performances, can be affected when they witness an arousing type event eg a shooting. It should not be assumed without research that TCB cameras in courts will not have some effect on professional police officer witnesses. TCB research should consider both professionals and non-professionals. There are many opportunities for more normative TCB effects-research and investigation of these issues. For example, one model would be to arousal levels, and indicate to participants that there was going to be a dry run before the TCB cameras came in. Tasks can be quantified. Other models could arrange an extended period whereby selected courtroom participants agree to be monitored for arousal levels. These could be a baseline measures. Then the same participants would be similarly measured during a pilot period where TCB cameras are introduced;

- *Weapon-Focus and Camera-Focus Models*: Legal-psychology research into the weapon-focus effect is relevant. Weapon-focus research shows that victims or witnesses of crimes involving a weapon are sometimes less able to identify the attacker because they were focusing on the weapon. The focus on the weapon 'impairs'<sup>76</sup> the ability to see and remember other information. Studies show that with a weapon-present, recall for identification of the face of the person holding the weapon is 'impaired.'<sup>77</sup> Correct identifications are reduced and incorrect identifications increase with a weapon-present<sup>78</sup>;

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Also, there is no apparent television courtroom broadcasting arousal research. Note comments *ibid* 313.

<sup>76</sup> See references and definition in KL Pickel, DB Narter, MM Jameson and TT Lenhardt, 'The Weapon-Focus Effect in Child Eyewitnesses' (2008) 14:1 *Psychology, Crime and Law* 61, 72. Also L Hope and D Wright, 'Beyond Unusual? Examining the Role of Attention in the Weapon-Focus Effect' (2007) 21 *Applied Cognitive Psychology* 951, 957-958.

<sup>77</sup> LM Hulse and A Memon, *above* 314. This is also discussed in the findings of their study, *ibid* 321.

<sup>78</sup> *ibid*. This has also been shown to be the case for adults and children, see, for example, GM Davies, S Smith and C Blincoe, 'A "Weapon-Focus" Effect in Children' (2008) 14:4 *Psychology, Crime and Law* 19. N Steblay provides a general review of the weapon-focus research, see N Steblay, 'A Meta-Analytic Review of Weapon-Focus Effect' (1992) 16 *Law and Human Behavior* 413. Note also E Loftus, G Loftus and J Messo, 'Some Facts About Weapon-Focus' (1987) 11 *Law and Human Behavior* 55; A Maass and G Kohnken, 'Eyewitness Identification: Simulating the Weapon-Effect' (1989) 13 *Law and Human Behavior* 379; RT McCraty, M Atkinson and J Sundram, *Impact of the HeartMath Self-Management Skills Program on Physiological and Psychological Stress in Police Officers* (Institute of HeartMath, HeartMath Research Centre Publications No 99-075 1999); KL Pickel 'Unusualness and Threat as Possible Causes of Weapon-Focus' (1998) 6 *Memory* 277; M Safer, S-A Christianson, M Autry and K Osterlund, 'Tunnel Memory for Traumatic Events' (1998) 12 *Applied Cognitive Psychology* 99; S Sporer, S Penrod, D Read and B Cutler, 'Choosing, Confidence and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies' (1995) 118 *Psychological Bulletin* 315; P Woolnough and M MacLoud, 'Watching the Birdie Watching You: Eyewitness Memory for Actions Using CCTV Recordings of Actual Crimes' (2001) 15 *Applied Cognitive Psychology* 395; J Yuille and J Cutshall, 'A Case Study of Eyewitness Memory of a Crime' (1986) 71 *Journal of Applied Psychology* 291; J Yuille, G Davies, F Gibling, D Marxsen and S Porter, 'Eyewitness Memory of Police Trainees for Realistic Role Plays' (1994) 79 *Journal of Applied Psychology* 931; KL Pickel, TA French and JM Betts, 'A Cross-Modal Weapon-Focus Effect: The Influence of a Weapon's Presence on Memory for Auditory Information' (2003) 11 *Memory* 277; KL Pickel, SJ Ross and RS Truelove, 'Do

- Opponents and proponents of TCB could use weapon-focus research methodologies to conduct research into whether courtroom participants may be distracted by, or may look at, TCB cameras. Similarly, effects could occur because of other TCB equipment and or TCB cameras operators (see examples below);
- It sometimes appears to be implicitly assumed that everyone in the courtroom will react the same. Research could also examine whether some courtroom participants may be more affected than others. For example, there can be different character types, professional, non-professional, expert, non-expert, police, etc;
- In one of the legal-psychology studies, E Loftus, G Loftus and J Messo<sup>79</sup> showed individuals a series of slides showing a crime being committed. The researchers then monitored subjects' eye movements with the use of a video camera. The study found that the subjects focused more often, and for longer periods of time, on the weapon as opposed to other objects that appeared in the scene. This does not mean that facial, clothing or other details are completely ignored, rather that the weapon is given a disproportionate amount of focus. The point is that because subjects pay less attention to the details of the criminal or other details in the scene, they may then be less likely to be correct in a subsequent identification. In another study, twenty six percent of individuals who saw a video where a weapon was present, gave a correct identification at a later test. Forty six percent of subjects who saw the weapon-hidden video gave correct decisions, which is significant.<sup>80</sup> For example, we can compare the participants with eye-tracking in relation to visual cones-of-vision. Eye-tracking can be used to carry out studies for effects of TCB. This raises important legal and legal-policy implications for TCB research;
- Some of the weapon-focus research also refers to arousal levels.<sup>81</sup> This highlights that potentially courtroom cameras, or TCB, may have different effects and or arousal levels on different courtroom participants. This needs to be considered. For example, potentially the defendant or the parties may be more prone to being effected than other courtroom participants. If so, this could potentially impact TCB legal rights arguments<sup>82</sup>;

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Weapons Automatically Capture Attention?' (2006) 20 Applied Cognitive Psychology 871; W Oue, Y Hakoda and N Onuma 'The Effects of Visual Features of a Weapon on Eyewitnesses' Cognitive Processing' (2006) 77:5 Japanese Journal of Psychology 443.

<sup>79</sup> E Loftus, G Loftus and J Messo, *ibid.* Referred to in B Cutler and S Penrod, *Mistaken Identification: The Eyewitness, Psychology and the Law* (Cambridge University Press 1995) 101-102. Generally see also RCL Lindsay, DF Ross, JD Read and MP Togliola (eds), *The Handbook of Eyewitness Psychology* (Erlbaum 2007).

<sup>80</sup> B Cutler and S Penrod *ibid* 102, referring to Brian L Cutler, Steven D Penrod and TK Martens, 'The Reliability of Eyewitness Identifications: The Role of System and Estimator Variables' (1987) 11 Law and Human Behavior 223.

<sup>81</sup> L Husle and A Memon, 'Fatal Impact? The Effects of Emotional Arousal and Weapon Presence on Police Officers' Memories for a Simulated Crime' (2006) 11 Legal and Criminal Psychology 313, 313.

<sup>82</sup> Arousal and weapon-focus may not be the only areas of legal-psychology of interest to TCB effects research. Husle and Memon note that '[p]erceptual and attentional narrowing during encoding is unlikely to be the only explanation for the effects of arousal and weapon-presence on memory.' More complex research issues arise for TCB than have been examined before. See *ibid* 314.

- KL Pickel et al found that control witness in their study reported fewer correct and more incorrect details when the subject carried a weapon versus a book.<sup>83</sup> They found some differences as between ‘educated’ witness subjects.<sup>84</sup> They also refer to discussions and research which looks at why someone focuses on the weapon eg that it is threatening.<sup>85</sup> So for example, different courtroom participants could be threatened or inhibited in different ways by cameras and TCB. Some may be threatened but not others. Consider that certain forms of TCB can occur even if one of the courtroom participants has objected. Consider further, that some courtroom participants may on occasion object not to the cameras, but to being shown in the footage. These are different effect issues. Potentially, there are different effects as between, a courtroom participant who knows that the TCB camera(s) cannot focus or point at them, as opposed to a courtroom participant whom is filmed but will have their face digitally blocked. Indeed, some of these issues are raised in the *Pistorius*<sup>86</sup> case.<sup>87</sup> This offers much for TCB research to consider. Potentially such effects may differ across TCB courtroom participant groups;
- L Hope and D Wright found that individual reaction times in dealing with a second task were impaired in the weapon-present group and unusual-object-present groups, as compared to the control group.<sup>88</sup> Research can examine whether TCB inhibits or extends reaction times, or even extends the length of TCB cases over non-TCB cases;
- Courtroom proceedings involves many complex visual and aural elements. Introducing TCB cameras and TCB brings more complexity. Courtroom participants have roles and tasks to undertake, both visually and aurally. KL Pickel et al<sup>89</sup> undertook research to see if a weapon’s presence impairs memory for auditory information, similar to the way it does for visual information. They found diminishing memory accuracy when the task has more

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<sup>83</sup> Kl Pickel, SJ Ross and RS Truelove, ‘Do Weapons Automatically Capture Attention’ (2006) 20 Applied Cognitive Psychology 871, 871.

<sup>84</sup> *ibid.*

<sup>85</sup> *ibid* 871.

<sup>86</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>87</sup> This out-of-site ‘safeguard’ may be different from an in-court ‘safeguard.’ One study also found that weapon-focus effect can occur even in states of low anxiety level. TH Kramer, R Buckhout and P Eugenio, ‘Weapons Focus, Arousal, and Eyewitness Memory, Attention Must be Paid’ (1990)14: 2 Law and Human Behaviour 167, as referred to in KL Pickel, SJ Ross and RS Truelove, ‘Do Weapons Automatically Capture Attention’ (2006) 20 Applied Cognitive Psychology 871, 872.

<sup>88</sup> L Hope and D Wright, ‘Beyond Unusual? Examining the Role of Attention in the Weapon Focus Effect’ (2007) 21 Applied Cognitive Psychology 951. Jo Saunders refers to the issues of introducing post event questioning (PEQ) and post event narratives (PENs) after the witnessed event and the influence these can have on recall and retrieval. This also ties in with TCB effects research which rely upon and do not properly record the manner of how views, opinions and self-reports of courtroom participants are obtained. Further examination and scrutiny is possible in relation to TCB regarding these issues. See J Saunders, ‘Memory Impairment in Weapon-Focus Effect’ (2009) 37:3 Memory and Cognition 326, 326, and references therein.

<sup>89</sup> KL Pickel, TA French and J Betts, ‘A Cross-modal Weapon-Focus Effect: The Influence of a Weapon’s Presence on Memory for Auditory Information’ (2003) 11:3 Memory 277.

demanding auditory content.<sup>90</sup> Weapon-focus raises many questions, but also opportunities, for TCB effects-research;

- There is various research and classification of the factors and stages influencing eyewitness memory.<sup>91</sup> No similar research exists in the study of TCB. It is also clear that the literature relating to TCB needs an altogether greater level of normative details and sophistication. The body of TCB legal-empirical research does not identify and verify factors or variables which would influence the different TCB participants in terms of their memory recall being affected by (a) TCB cameras being in the courtroom and/or (b) their being involved in media TCB. Weapon-focus raises many opportunities for TCB distraction-effects research;
- *TCB Research Models and Identifying Research Focus:* Research studies can be both laboratory based and more realistic field studies.<sup>92</sup> They can also be court based. Typical of such studies should be research examination of one isolated factor in TCB filming. As with all research, one needs to define and describe the effect or test being carried out. This is not always evident in TCB research. It is a significant flaw of TCB research studies that frequently no hypothesis is identified and tested. Arguably no effect of TCB is therefore shown. It is also important to have baseline research;
- *Eyewitness Research Models:* Modern high speed video and film techniques and other tools are currently being used in a variety of research forms. Legal-psychology uses videos and high speed cameras for research of, amongst other things, attention, weapon-focus and eyewitness focus issues. This is referred to below. These technologies and techniques are an obvious avenue of research into TCB. These tools can permit accurate research into where courtroom participants are actually looking and also for how long;
- *Identification and Recall Models:* EF Loftus<sup>93</sup> indicates that many studies have examined how malleable eyewitness memory can be, and also how, effected by post event factors or post event information. She indicates some of the procedures.<sup>94</sup> The participants of the study are shown an event. Half of the participants are then given new misleading information regarding the event. The other half of the participants do not receive any new information.<sup>95</sup> Both groups are then tested in relation to the original event they witnessed. Such models of research may introduce cameras to the event situations, and to test different TCB effects. In a TCB study we might consider whether TCB-absent and TCB-present courtroom participants may have identical recall of details;

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<sup>90</sup> *ibid.*

<sup>91</sup> See C Hollin, *Psychology and Crime* (Routledge 1989) 153. C Hollin also indicates, the 'study of eyewitness memory has therefore been concerned with the effects ... variables at the stage of acquisition, retention, and retrieval. This has generated a vast body of research.' *ibid* 154.

<sup>92</sup> See references in for example B Cutler and S Penrod, above 10.

<sup>93</sup> E Loftus, *Eyewitness Testimony* (Harvard University Press 1996) vii.

<sup>94</sup> *ibid.*

<sup>95</sup> *ibid.*

- *Filming TCB Footage Models*: A large variety of studies have researched and tested eyewitness identification issues.<sup>96</sup> Some of these could be followed in a TCB courtroom setting. As well as testing courtroom participants in relation to identification or recall of participants such as a police officer or other witness, research could also test their identification and recall of a camera operator. Similar research could test recall and identification of various pieces of evidence. Research could also examine the camera type and model. Someone saying that they were not affected, could be asked to identify pieces of evidence and the TCB camera. There may be implications if they can correctly identify the TCB camera, but not one or more pieces of important evidence. These could be adapted for TCB distraction and attention effects-research;
- *Normative Models Example*: LM Hulse and A Memon in their study, used a system of live action realtime events shown on screen, and required police officers to interact with and respond to the scenes.<sup>97</sup> They also tested anxiety and arousal levels before the studies as a baseline measure.<sup>98</sup> Then, during the studies they monitored participants with wireless heart monitors.<sup>99</sup> This raises important research possibilities for TCB. It is another measure of accurate research not yet present in TCB distraction-effects research. This example also indicates that at least for the subject research and repeat showings of recorded TCB footage, no live courtroom may be needed;
- *Distraction-Effect Models*: The various tools utilised in weapon-focus research can be used to actually see whether or not courtroom participants are distracted by or look at the TCB cameras. Some tools have a research subject look at a particular pre-recorded scene and examine eye movements to see which objects and part of the film the subject watches most. Therefore, it is possible to construct a similar study where subjects watch a particular court case with a camera present and to see if, how frequently, and for how long they focus on the courtroom camera. One of the results of some of the weapon-focus research is that subjects focus on the weapon for longer than other objects in a scene. This could include some of the courtroom participants. This is something we can test for. Other studies can have two subject groups, one with a TCB camera present and the other with none. The focus of such a study would be to examine the effects of TCB courtroom cameras, specifically on how courtroom cameras influence what information is taken in by a courtroom participant, and how their recall for pertinent details of a case are affected<sup>100</sup>;
- *Saliency Models*: In some legal-psychology studies regarding eyewitnesses, there is examination of saliency<sup>101</sup> or importance. Applying such studies to TCB, we can stage a

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<sup>96</sup> See A Heaton-Armstrong, E Shepard, GH Gudjonsson and D Wolchover (eds), *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (OUP 2006).

<sup>97</sup> LM Hulse and A Memon, above 316.

<sup>98</sup> *ibid* 317.

<sup>99</sup> *ibid*.

<sup>100</sup> It is also possible to have follow up studies at medium and long term intervals.

<sup>101</sup> See references in, for example, *ibid* 26. Note also references in M L-H Vo and W Schneider, 'A Glimpse is Not a Glimpse: Differential Processing of Flashed Scene Previews Leads to Differential Target Search Benefits' (2010) 18:2 *Visual Cognition* 171, 173.



trial, film a trial, etc, and list all of the items that each participant category would have seen. Then we may get them to list or rate these in order of importance. For example, the most important items could include a TCB camera. There may be legal and legal-policy issues to consider if, for example, less details or less important details were consistently recalled for the TCB scenarios than non-TCB scenarios;

- *Camera Models*: Further testing can be undertaken into TCB forms by varying the type, size, colour, movement, location, location-effects, noise, etc, of the TCB camera or cameras. Research regarding recall and identification of central versus peripheral courtroom scene details<sup>102</sup> would also be relevant here. Additional research should investigate the effects of TCB cameras appearing only for certain witness testimony. The TCB camera presence could enhance the importance and or credibility of that witness in the eyes of the jury. The perceived importance of the TCB case could increase. Despite the opportunity for effects-research, including baseline research, the *Pistorius*<sup>103</sup> case has ignored research opportunities. Research can focus on how long each courtroom participant may focus on the TCB camera, and compare this to their opinion as to whether they saw or looked at the TCB camera, and if they did, for how long. The research can also involve pictures and drawings,<sup>104</sup> some of which for example, may have a TCB camera present and a TCB camera absent. This would also be somewhat easier to arrange than live or pre-recorded filming of a mock courtroom scene. We can use eye-tracking to monitor the pictures of the courtroom scene, some of which have a visible TCB camera and some not. This has the advantage that there is a real courtroom, and that it is not required for as long as a full in-court eye-tracking study. The main research time is away from the court. However, the research is more authentic than many of the previous TCB studies. M Safer et al<sup>105</sup> found that when shown four pictures, taken from different standpoints in the same witnessed event scene, participants chose the close-up picture. There are various opportunities and models which can be built for TCB issues;<sup>106</sup>
- *Camera Position Models*: Ewing et al have found that gaze direction effects judgements of facial attractiveness.<sup>107</sup> Research is needed into the effects of different in-court TCB camera positions, heights, angles and directions, and how this affects the audience when

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<sup>102</sup> See *ibid* 63. See also B Cutler and S Penrod, above 183.

<sup>103</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>104</sup> See, for example, the many examples of drawings in E Loftus, *Eyewitness Testimony*, above.

<sup>105</sup> M Safer, S-A Christianson, M Autry and K Osterlund, 'Tunnel Memory for Traumatic Events' (1998) 12 *Applied Cognitive Psychology* 99, as referred to in LM Hulse, and A Memon, above 314.

<sup>106</sup> This emphasised critical details matching their memory if the event was emotionally arousing versus neutral, *ibid*.

<sup>107</sup> L Ewing, G Rhodes and E Pellicano, 'Have You Got the Look? Gaze Direction Affects Judgements of Facial Attractiveness' (2010) 18:3 *Visual Cognition* 321. See also D Martin and CN Macrae, 'Processing Style and Person Recognition: Exploring the Face Inversion Effect' (2010) 18:2 *Visual Cognition* 161.

they see the footage. D Martin and CN Macrae<sup>108</sup> also refer to how different processing strategies can be ‘primed,’ which also suggests that research is required of cameras and camera footage for TCB. They also refer to research demonstrating that specific processing orientations impacts performance for face recognition.<sup>109</sup> S Landstrom et al<sup>110</sup> found evidence in their study to show that different effects were obtained from using three differently located cameras to film the same interview. They found camera-perspective-bias. They also refer to concurring research.<sup>111</sup> They also state that ‘the camera should not be considered a passive bystander, objectively recording what is said and done. Instead, factors such as camera shot (ie the distance between the camera and the suspect; ... and the camera focus (eg if the camera is focused on the suspect alone or on both the suspect and the interrogator; ... can contribute to biased assessments.’<sup>112</sup> ‘Research has shown that ... particular camera focus can bias judgements on the suspect’s guilt, voluntariness, and credibility.’<sup>113</sup> Research and models can be developed for TCB effects issues. M Safer et al<sup>114</sup> found that when shown four pictures, taken from different standpoints in the same witnessed event scene, participants chose the close-up picture. This emphasised critical details matching their memory of the event was emotionally arousing versus neutral<sup>115</sup>;

- *Stress Models*: Stress is meant to have a large influence on witnesses.<sup>116</sup> However, TCB research has never looked at this issue. New TCB research should add stress as a factor to be researched and gauged. Again, there is legal-psychology research which can be helpful in designing such research.<sup>117</sup> One method is to use heart monitors in the TCB research. Police officers wore heart monitors in previous research.<sup>118</sup> There is no reason why some TCB distraction-effects research cannot also use this method, including baseline research before TCB is introduced;
- *Contextual Models*: Legal-psychology research has recognised the stages of recall and identification (namely, acquisition, retention and retrieval<sup>119</sup>). These might be co-related or followed (as appropriate) in TCB research. To date, there is no effort to examine how and when different courtroom participants can be effected. Nor does research examine or contextualise (when research is carried out) the time and context of the popularly argued

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<sup>108</sup> D Martin and CN Macrae, ‘Processing Style and Person Recognition: Exploring the Face Inversion Effect’ (2010) 18:2 Visual Cognition 161, 163.

<sup>109</sup> *ibid* 167.

<sup>110</sup> S Landstrom, E Hjelmsater and P Granhag, ‘The Camera Perspective Bias: A Case Study’ (2007) 4 Journal of Investigative Psychology and Offender Profiling 199.

<sup>111</sup> They give the example of G Lassiter, A Geers, P Munhall, I Handley and M Beers, ‘Videotaped Confessions: Is Guilt in the Eye of the Camera?’ in M Zanna (ed), *Advances, in Experimental Social Psychology, Vol 20* (Academic Press 2001) 189, referred to *ibid* 205.

<sup>112</sup> Landstrom et al, above 200.

<sup>113</sup> *ibid*.

<sup>114</sup> M Safer, S-A Christianson, M Autry and K Osterlund, above 314.

<sup>115</sup> *ibid*.

<sup>116</sup> See E Loftus, *Eyewitness Testimony*, above 33.

<sup>117</sup> They also report that participant viewers relied heavily on verbal cues, see *ibid* 199.

<sup>118</sup> See LM Hulse and A Memon, above.

<sup>119</sup> See, for example, *ibid* 50, 113, 114.

TCB effect. It is important to also refer to when questions are asked of courtroom participants. Legal-psychology research indicates that the longer the time between the event and the questions and recall, the more inaccurate and incomplete the witness will be.<sup>120</sup> This point is not always recognised in the research. Some TCB research has asked participants for their opinions a year after the TCB event being researched. This is less than optimum<sup>121</sup>;

- W Oue et al<sup>122</sup> found that the visual features of the weapon affected the witnesses' memory suggesting the shape of the weapon is a factor attracting witness attention. The types, models, size, locations, location-effects, etc, of TCB cameras need to be considered in TCB effects-research. Similarly, it is important to be careful that the questions or queries do not taint or influence the answer. Many TCB studies, however, are conducted by people who would not otherwise draft questionnaires or experiments and who may not be aware that their queries, although well intentioned, may potentially be influencing the reply. Timing of post event information can be very relevant in a number of studies.<sup>123</sup> So, for example, if a TCB camera is already present, or indeed permanently in the courtroom, this is potentially less relevant, obvious, effects, etc. It is potentially less disrupting than a TCB camera moving about in the courtroom. It is also potentially less disruptive than a TCB camera and TCB camera operator coming into the courtroom (a) after the case starts or (b) after many or all of the courtroom participants have come into and prepared themselves in the courtroom. Again, these issues are ripe for research and have legal-policy influence;
- *TCB Coding and Retrieval Models*: There are also interesting differences in the form of retrieval. For example, differences have been found between asking subjects what they saw, versus asking them to reply to a predetermined list of questions.<sup>124</sup> Also, who is asking the questions is not always neutral.<sup>125</sup> Consider a judge after a TCB trial asking jury members if they were affected by the TCB. Many potential bias issues arise.<sup>126</sup> Yet, this is what has occurred in some of the TCB research. G Wells and A Bradfield<sup>127</sup> amongst others, have been researching confirmations and feedback given to witness and found that it can influence the witness. M L-H Vo and WX Schneider also make the point that in

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<sup>120</sup> See ibid 53.

<sup>121</sup> See ibid 54, 94. Equally, post event information, discussions and questions can alter, change or influence a witness as much as a courtroom participant. These issues are beyond the current study. However, there are examples of important issues being examined elsewhere.

<sup>122</sup> W Oue, Y Hakoda and N Onuma, 'The Effects of Visual Features of a Weapon on Eyewitnesses' Cognitive Processing' (2006) 77:5 Japanese Journal of Psychology 443.

<sup>123</sup> See ibid 64.

<sup>124</sup> See ibid 90.

<sup>125</sup> See ibid 97.

<sup>126</sup> In one sense, the judge is not a neutral party. He may have considered an application to allow cameras and decided in favour – possibly in sight of the jury or they are aware of the decision. The judge may have made some positive comments by the judge. The jury before being asked are aware of the views of the judge in terms of reinforcing acceptance of the cameras and a view of no adverse effects.

looking at a given scene or carrying out a given task, we also rely on our existing knowledge and experience, which they refer to as ‘implicit knowledge.’<sup>128</sup> Again, this appears not to have been considered or researched in the TCB literature to date;

- *Recall Models*: Another avenue for examination is to carry out studies with cameras present in the courtroom and with cameras absent. Then each group would be tested for the recall accuracy for details in the courtroom scene. We can consider whether there is better and more detailed recall in the camera absent scenario. We should ask if the TCB camera presence affects subject recall of visual-central cone-of-vision details and visual-peripheral cone-of-vision details. Such research could be replicated in different CB forms;
- One method is to test jurors or mock jurors for their recall and retention. The jurors are shown a particular case or take part in a case. One group has TCB cameras present and the other does not. Thus, it is possible to compare results and see what the possible effects of the TCB cameras are. Research can be conducted in such a way that if the TCB camera-present group recalls less pertinent details of the case, that this effect can be isolated to the TCB cameras present. One of the advantages of conducting these types of studies is that it can be possible for the juries not to know what is actually being tested for, thus avoiding bias. This may be difficult to do in a real TCB setting with real courtroom participants. In terms of medium and long term retention it is also possible to conduct follow up studies on both sets of jurors;
- *Different Subject Models*: Other studies into TCB can also involve filmed TCB events which are then shown to subject participants in the study. Subjects are divided into two or more study groups. Then each group is tested and examined in relation to the particular matter or effects hypothesis being researched<sup>129</sup>;
- *Video Models*: Video technology can be used to carry out studies for effects of TCB broadcasting. The videotaping of courtroom scenes or interviews of subjects after seeing or recalling events can be used in research studies<sup>130</sup>;
- *Crime and Trial Research Models*: Another study method is to stage a mock crime, then conduct interviews of the subject witnesses, and later arrange a mock trial where the witnesses are cross examined. Various factors can be tested for<sup>131</sup>;
- *Image Blocking Models*: It is possible to study the effects of digital image blocking. We should ask whether witnesses (or indeed other courtroom participants) who have been able to have their image digitally blocked react any differently than those who know that their

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<sup>127</sup> G Wells and A Bradfield, “‘Good, You Identified the Suspect’”: Feedback to Eyewitnesses Distorts Their Reports of Witnessing Experience’ (1998) 83 *Applied Psychology* 360, 360, as referred to in C TerBeek, above 25-26.

<sup>128</sup> M L-H Vo and WX Schneider, ‘A Glimpse is not a Glimpse: Differential Processing of Flashed Scene Previews Lead to Differential Target Search Benefits’ (2010) 18:2 *Visual Cognition* 171, 172.

<sup>129</sup> See example reference to such experimentation in E Loftus, *Eyewitness Testimony*, above, 25.

<sup>130</sup> See references in *ibid* 183.

<sup>131</sup> See example referred to *ibid* 185.

image will be shown. There could be a difference between those whose image is automatically blocked by a pre-existing court broadcasting rule or those who are asked for their preference or have to apply to have their image blocked. Similar studies can be used to test effects of those who may have objected to the TCB but were overruled. The *Pistorious*<sup>132</sup> case is relevant in this context;

- *Accuracy Models*: Cameras can also be used, whether in a real TCB context or a mock trial situation, to test for accuracy of self-reports and third party reports of effects. A study could use (miniature) cameras to examine effects of TCB cameras on courtroom participants and compare these to self-reports *and* third party observed-reports;
- *Confidence Models*: It would be possible to introduce some confidence type tests to TCB research. For example, testing if courtroom participants felt they were affected by cameras; testing if others thoughts so; and testing the confidence of each. Additional objective criteria to these views can also be imposed eg recording the event. Also, carefully arranging the different elements of what will be seen, recording and tested it, can be an important control mechanism. Eye-tracking research can be beneficial to this, and adds an objective, verifiable and normative element. Further details on potential TCB eye-tracking models are set out below.

## **Conclusion**

We should not be uncritical in our assessment of confidence in self-report studies. Additional research and research tools need to be applied to this important topic in and of themselves, but also as a verification and additional test of opinion-reports and self-report studies. In context, we can see that there has not been the abundance of TCB effects-research that we might have expected. This is important of itself but also in terms of the lack of hard knowledge and research which is then available to judges, lawyers and legal-policymakers. Legal-psychology provides many relevant research opportunities. It helps to illuminate many of the specific and wider research avenues. As we see above, there continue to be difficulties with self-reports, opinion-reports and confidence-reports. However, sole reliance upon limited self-report, opinion-report and confidence-report studies does not answer any of the real and popular arguments in the TCB debate. The extensive literature of legal-psychology research shows that we should not rely on TCB self-reports, opinion studies and confidence-report alone. It also offers opportunities and solutions to deal with and overcome these research limitations. A more robust TCB research based examination following the opportunity of other areas of research, such as legal-psychology, begins to provide the real basis for decision making regarding TCB. Existing research and developments within the area of legal-psychology (etc) provides a wealth of material which should have a bearing on any serious effort to investigate TCB in

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<sup>132</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

a more effective, nuanced and normative manner. Just some of the potential normative examples include TCB eye tracking in relation to in-court distraction effects, out-of-court audience attention to TCB footage, and TCB education-effects research. This is important as it highlights the wider issues of the potential benefits or not of TCB to law and society and the potential negative distraction effects in-court. The latter in particular have been indicated in the jurisprudence<sup>133</sup> to be a particular matter of concern, and as yet there are no firm conclusions available to current courts whom may any day have to deal with a further TCB related case.

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<sup>133</sup> *Estes, Chandler and Hollingsworth*, see above.

## CHAPTER 12: EYE-TRACKING AND THE US SUPREME COURT CHALLENGE

### Introduction

The basis of the arguments in the TCB debate are largely unchanged since 1965.<sup>1</sup> While legal-empirical, legal-psychological, media and communications research have all advanced, little has changed in the TCB effects-research. Eye-tracking in particular provides definite avenues for examining some of the actual in-court and audience effects referred to by the US Supreme Court. Now, more than at any stage previously, we are in a position to begin research of actual TCB effects issues without having to rely solely on limited self-reports, opinion-reports and observer-reports. Let us consider some of these venues below. The US Supreme Court and researchers such as SL Alexander note the lack of legal-empirical research available to assist courts and legal-policymakers.<sup>2</sup> Eye-tracking can greatly assist in addressing the research challenge of the US Supreme Court. Indeed, it has been suggested that the US Supreme Court decisions only ‘speculates on effects.’<sup>3</sup> Eye-tracking offers real answers as opposed to hot air, popular comment, speculation and opinion. Courts and legal-policymakers are encouraged, therefore, to consider normative legal-empirical research opportunities such as eye-tracking. There has been legal-psychology eye-focus research on particular legal issues, primarily eyewitness identification issues, weapon-focus and camera-perspective-bias. However, the issue of TCB distraction-effects is largely ignored. We shall explore the opportunities available in terms of contemporary normative TCB distraction-effects research.

### Eye-Tracking and US Supreme Court Concerns

The distraction-effects concerns identified by the US Supreme Court include lawyers; juries (in-court); prospective juries (out-of-court); judges; defendants; parties; witnesses; court personnel; and courtroom participants effects generally. The *Pistorius*<sup>4</sup> case raises a new issue. The public actions in-court at a TCB trial appears not to have arisen for contemplation in the US Supreme Court cases. Neither are the television personnel in court and the press in court. The traditional press might also be affected, or distracted, by TCB. Each of these individual courtroom participants can be the subject of separate eye-tracking research to gauge if they are distracted, the frequency of distraction and also the level of distraction. This is important in order to inform and assist courts, lawyers, legal-

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<sup>1</sup> RER Stewart, ‘The Changing Relationship Between Camera and the Courts’ (MA thesis, Florida Atlantic University 1998) 9.

<sup>2</sup> *ibid.*

<sup>3</sup> SL Alexander, ‘“Mischievous Potentialities”: A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit, Florida, 1989’ (PhD thesis, University of Florida 1990) 39.

<sup>4</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

policymakers, and others when considering TCB issues, and in a manner better informed than the literature and limited research to date.

### **US Supreme Court Concerns**

The US Supreme Court identifies many effect concerns.<sup>5</sup> The distraction related concerns, and therefore the issues potentially most relevant to distraction-effects research, are also referred to by the US Supreme Court to include,

distraction; distortion; disruption; general distraction; participant distraction; duties; diverting the trial; impacting on all participants; prejudicial conditions not experienced by other defendants; acting differently; not giving full attention; noise of cameras; appearance of cameras; process of televising; probable hazards; effects on the normal detached atmosphere; distorting the trial process; detracting from the trial, justice and Constitutional functions; undermining or effecting the serenity, calm and decorum of the court; prejudice of actual and potential jurors; conscious or unconscious effects; awareness; focus; attention; emphasising that the case is special; extraneous influence; jury prejudice by media; witness effects; amending testimony; judge effects; undivided attention; diversion; psychological effects and reactions; psychology research; various effects; interruptions; concentration; defendant effects; prejudice; effects on courtroom participants; diverting the process; dividing participant efforts; undercutting integrity of trial process; dignity and calmness; unfairness; subtle effects; effect on timid or reluctant witness; unconscious effects; effect of television performance; prejudice; jury ability to judge fairly; limited and non scientific research; prejudice; something more than juror awareness; qualitative differences; altered testimony; integrity of trial process; cases with witnesses; adverse effects from presence of camera; trial management; integrity of trial; protective measures; actual prejudice; subtle prejudice; jury influence.

The US Supreme Court also refers to other wider research issues.<sup>6</sup>

### **Eye-Tracking and TCB**

Eye-tracking (the study of eye movement and gaze<sup>7</sup>) was not directly considered in the US Supreme Court decisions. Neither has it been considered, as far as the author can

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<sup>5</sup> These words are taken directly from the US Supreme Court in the three TCB cases ie direct quotes. These are set out in full in the Appendices.

<sup>6</sup> Such as: further studies; body of reliable factual data; experience effects research; impacting on all participants; giving the public the wrong impression about the trial process; singling out certain defendants; prejudicial conditions; changing behaviour; not giving full attention; techniques of public communication; future technology; process of televising; probable hazards; distorting the trial process; effects of commercials and intervals; detracting from the trial, justice and constitutional functions; increasing publicity; conditioning the public; prejudicing the public; prejudice of actual and potential jurors; inadmissible evidence leakage; editing; pre-trial publicity; awareness; focus; attention; extraneous influence; impact of being filmed and broadcast; undivided attention; politics and elected judges; diversion; psychological effects and reactions; psychology research; commercial objectives; effects on courtroom participants; effect of the audience; effects in re education; entertain; diverting the process; dividing participant efforts; television as accurate; educational; selected trials; courts layouts selected; close-ups; unfairness; subtle effects; effects of constitutional dimensions; prejudice; jury ability to judge fairly; limited and non scientific research; witness testimony chilling; unwillingness to testify; qualitative differences; trial management; integrity of trial; protective measures; actual prejudice; subtle prejudice; jury influence. See also list in Chapter 9.

<sup>7</sup> While eye-tracking technologies are relatively recent, the study of gaze has existed since the eighteenth century. See Overview, < [www.fixation2010.se/overview](http://www.fixation2010.se/overview) > accessed 30



find, in the general literature in relation to TCB. However, eye-tracking affords the opportunity for much improved normative TCB distraction-effects research. Eye-tracking technology is significantly advanced as a research method. It is now so sophisticated that it can greatly assist in conducting research of effects of TCB, and in such way as the US Supreme Court may not have even considered possible.

It is evident that the US Supreme Court was not aware of eye-trackers and did not refer to eye-tracking in the three cases so far. While W Petkanas suggests that recordings of TCB may be shown to audience subjects, and that they may then be interviewed afterwards eg in terms of what they found informative and interesting,<sup>8</sup> no reference is made to eye-tracking.<sup>9</sup> Eye-tracking research<sup>10</sup> has been used successfully in advertising, marketing, legal-psychology, eyewitness accuracy studies, internet usage research, health, safety, etc. The literature on eye-tracking is constantly growing.<sup>11</sup>

Particular comments in the US Supreme Court also suggests that eye-tracking may assist in ways that it may not have even considered possible. Eye-tracking can provide a level of legal-empirical accuracy that would not previously have been thought possible in relation to TCB effects.<sup>12</sup> Eye-tracking is important because it can assist in addressing the research of TCB distraction-effects concerns.

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April 2010. Visual attention has been studied for a considerable time. For a brief review and introduction to visual attention research, see A Duchowski, *Eye-tracking Methodology, Theory and Practice* (2nd edn, Springer, 2007) 3-13.

<sup>8</sup> W Petkanas, 'Cameras on Trial: An Assessment of the Educational Affects of News Cameras in Trial Courts' (PhD thesis, New York University 1990) 118.

<sup>9</sup> He further suggests that another study might have one group viewing film footage, while the other reads reports of the same case, *ibid.* Definitions and forms are also ignored by the literature and US Supreme Court cases.

<sup>10</sup> See *ibid* regarding eye-tracking techniques generally 52-86.

<sup>11</sup> J Nielsen and K Pernice, *Eyetracking Web Usability* (New Riders 2009); M Wedel and R Pieters, *Eye-Tracking for Visual Marketing* (now Publisher 2008), Foundations and Trends in Marketing, vol 4; JM Spector, *Handbook of Research on Educational Communications and Technology* (Lawrence Erlbaum Associates, Taylor and Francis 2008). See also JM Henderson (ed), *Real-world Scene Perception* (Psychology Press, Taylor and Francis, 2005); G Hatfield, *Perception and Cognition: Essays in the Philosophy of Psychology* (Clarendon Press 2009); C Bundesen and T Habekost, *Principles of Visual Attention: Linking Mind and Brain* (Oxford University Press 2008); P Shah and A Miyake, *The Cambridge Handbook of Visuospatial Thinking* (Cambridge University Press 2005). SF Davis, *Handbook of Research Methods in Experimental Psychology* (Blackwell 2003) 367, 378. JF Mackworth and NH Mackworth, 'Eye Fixations Recorded on Changing Visual Scenes by the Television Eye-Marker' (1958) 48 *Journal of the Optical Society of America* 439; B Shackel, 'Note on Mobile Eye Viewpoint Recording' (1960) 50 *Journal of the Optical Society of America* 763.

<sup>12</sup> Indeed, it has been suggested that the US Supreme Court previously only 'speculates on effects.' SL Alexander, "'Mischievous Potentialities': A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit, Florida, 1989" (PhD thesis, University of Florida 1990) 39. The US Supreme Court and researchers such as SL Alexander the lack of legal-empirical research, *ibid.*

## TCB Eye-Tracking In-Court

The US Supreme Court refers to issues and concerns regarding possible (adverse) effects such as distraction; participant distraction; duties; not giving full attention; noise of cameras; appearance of cameras; conscious or unconscious effects; awareness; focus; attention; undivided attention; diversion; dividing participant efforts; subtle effects; limited and non legal-empirical research; qualitative differences; altered testimony; and subtle prejudice. Some of the research gaps referred to in these cases,<sup>13</sup> and where eye-tracking may be applied to TCB could involve, the following,

- *Distraction*: Applying eye-tracking to the various courtroom participants scenarios eg jury, witness, judge, lawyers. In terms of considering distraction, eye-tracking would allow us to tell empirically if they look at the TCB camera. If so, the research would allow us to determine for how long and how frequently. This would be significant real data for courts and legal-policymakers to consider;
- *Not Giving Full Attention*: Eye-tracking research would allow us to test whether there are significant risks of taking away full and proper attention to the case at hand caused by TCB cameras;
- *Noise of TCB Cameras*: Potentially the noise of certain TCB cameras, or the size of certain TCB cameras may distract. Eye-tracking can begin to research these issues resulting in real data becoming available to courts and legal-policymakers;
- *Appearance of TCB Cameras*: In some instances TCB cameras are fixed and in-situ before the case commences, whereas in other instances TCB camera plus TCB camera operators can arrive in court after commencement and or move about in the courtroom. While enhanced risk of distraction may appear intuitive, TCB eye-tracking could begin to provide hard data for courts and legal-policymakers;
- *Conscious or Unconscious Effects*: Eye-tracking offers a normative and more verifiable means of researching TCB effect issues as compared with the limited studies of the past. It also allows us to examine whether courtroom participants may be (frequently) looking at the TCB camera unconsciously and without realising it. The TCB eye-tracking data can be compared to self-report data. Potentially, a body of TCB eye-tracking research data may call into question what many may think they know based on reliance upon the limited TCB research studies to date;
- *Focus/Attention/Undivided Attention/Diversion*: These are all issues capable of being researched with modern eye tracking technology, given that we can see exactly where and for how long courtroom participants have their eye focus;

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<sup>13</sup> *Estes, Chandler and Hollingsworth*, see above.

- *Dividing Participant Efforts:* The concern as to whether court participants may have reduced or divided attention in a TCB scenario as compared to a non-TCB scenario can be investigated, whereas this may have been difficult or impossible heretofore;
- *Subtle Effects/Subtle Prejudice:* The subtle issue of exactly where a person looks in courtroom scenarios is now no longer beyond the scope of legal and legal-policy knowledge and consideration;
- *Limited and Non Legal-Empirical Research:* TCB eye-tracking research as a valid form of normative legal-empirical research can move the discussion beyond intuition, speculation and hot air to real and informed legal case argument and legal-policy decision making;
- *Nuanced Case Issues:* With eye-tracking research, courts would be able to consider what the effects and implications for such things as legal cases, TCB access/objection cases and for courtroom TCB legal-policy, courtroom layouts, etc;
- *TCB Location:* TCB eye-tracking research may better inform consideration and decision making as regards what difference the location of the TCB camera may have on the different courtroom participants;
- *Comparisons:* It may definitively answer if there are different effects for TCB camera only, TCB camera versus TCB camera plus TCB camera operator. Eye-tracking allows us to explore these scenarios;
- *Different TCB Camera Effects:* Given the variety of potential TCB cameras, such research may provide valuable legal-empirical data on different effects for different types of TCB camera which may have valuable legal and legal-policy implications. The defendants in TCB cases are one of the least researched categories of participant. They should be researched so as not to be discriminated against, but perhaps more importantly because they are the party whom has potentially most at stake in the respective case they are involved in. It is also legitimate to undertake defendant eye-tracking distraction-effects research because, arguably, they cannot reasonably be expected to be looking out for adverse reactions and distraction-effects from other courtroom participants while their case is ongoing.

One case criticised particular evidence on the basis of lack of peer review, quantification and objective standards.<sup>14</sup> In terms of TCB eye-tracking this is research which can be peer reviewed and can be objectively verified as it is recorded and subject to quantitative statistical data analysis. TCB eye-tracking lends itself better to examining distraction-effects than self-reports, opinion-reports and observer-reports.

Additional issues for TCB eye-tracking research may also arise. The literature to date does not incorporate an analysis of the different tasks of the different courtroom participants into discussion or research of the different TCB effects issues being

examined. We should employ eye-tracking to examine distraction, attention, etc, of courtroom participants in the context of task analysis.<sup>15</sup> A ‘critical variable in information space is the task that the user is expected to carry out.’<sup>16</sup> TCB eye-tracking research may provide answers on how TCB cameras may affect different courtroom participants while undertaking their designated tasks. Almost invariably the literature and limited research ignores reference to and consideration of camera location and frame issues. We need to be able to describe and represent descriptively and diagrammatically the various camera issues.<sup>17</sup>

Distraction and distraction research needs to examine the camera location and location-effect issues. While eye-tracking can assist in this, we also need to start recording where the camera is located in the courtroom, so that different research studies can be compared.

It is also important in studies to know where the different courtroom participants are located and which direction they are facing, and how this compares with the TCB camera location. For example, we can consider whether the courtroom participants are facing straight on, left or right when they look at the TCB camera. Courts and legal-policymakers should be able to compare this across TCB research findings. ‘In the [*Estes*<sup>18</sup>] case construction of a television booth in the courtroom made it necessary to alter the physical layout of the courtroom and to move from their accustomed position to benches reserved for spectators.’<sup>19</sup> In most research, the location and height of the cameras is not considered or even documented, so we cannot look back to assess and compare different TCB cases or research studies on these points.

Different angles and frames can have different effects and meanings.<sup>20</sup> We need to begin examining the various issues in the TCB field. Different frames can have different costs

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<sup>14</sup> *Ramirez v State* 810 So 2d 836 [Florida 2001], referred to *ibid* 11-12.

<sup>15</sup> CD Wickens et al refer to task analysis issues and research, see CD Wickens, M Vincow and M Yeh, ‘Design Applications of Visual Spatial Thinking: The Importance of Frame of Reference’ in P Shah and A Miyake, *The Cambridge Handbook of Visuospatial Thinking*, (Cambridge: Cambridge University Press 2005) 383, 385 ff. See also P Shah, E Freedman and I Vekiri, ‘The Comprehension of Quantitative Information in Graphical Displays’ in P Shah and A Miyake, *The Cambridge Handbook of Visuospatial Thinking* (Cambridge University Press 2005) 426, 450 ff regarding task demands.

<sup>16</sup> CD Wickens, M Vincow and M Yeh, above at 415.

<sup>17</sup> See generally discussion of frame representation issues in *ibid*, 387 ff.

<sup>18</sup> *Estes v Texas* 381 US [1964] 532.

<sup>19</sup> *Estes v Texas* 381 US 532 [1965] 572 (Warren CJ).

<sup>20</sup> See CD Wickens, M Vincow and M Yeh, above 398 ff.

and benefits, advantages and disadvantages.<sup>21</sup> We need to begin examining and contrasting these TCB issues.

### **Eye-Tracking and Distraction**

One of the concerns with TCB is that the cameras in court ‘might be so completely and thoroughly disruptive and distracting as to make a fair trial impossible.’<sup>22</sup> Justice White states that,

‘the currently available [research] materials assessing the effect of cameras in the courtroom are too sparse and fragmentary ..., “we know too little of the actual impact ... to reach a conclusion ... evidence before us.” It may well be, however, that as further experience and informed judgment do become available, the use of cameras in the courtroom, as in this trial, will prove to pose such a serious hazard to a defendant’s rights that a violation of the Fourteenth Amendment will be found without a showing on the record of specific demonstrable prejudice to the defendant.’<sup>23</sup>

Until now, however, the US Supreme Court has not realised that research tools actually exist to examine these issues. Eye-tracking provides tangible methods for examining actual distraction of courtroom participants caused by TCB cameras in court.<sup>24</sup> We could apply eye-tracking to the various courtroom participants who are involved in televised cases. We can assess whether they look at the TCB camera and if so, for how long, with what effect. Eye-trackers allow us to begin this research. There may be different effects for TCB camera only versus TCB camera plus cameraman. Different effects may ensue from different types of camera. Again, eye-trackers allow us to begin the research.

Many issues of confidence and ratings come up in relation to TCB research. Many opportunities arise in terms of examining these issues with eye-tracking technology. For example, an eye-tracker and an observer could both look at a particular courtroom participant and examine how many times they focus their attention or look at the TCB camera in the courtroom. The observer could press a button to record each time they perceive the courtroom participant to look at the TCB camera. The observer in court can be tested against what is recorded by the eye-tracker. Thus far the use of observers in court to record the effects of TCB has not been independently assessed. The results

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<sup>21</sup> ibid 401.

<sup>22</sup> *Estes v Texas* 381 US 532 [1965] at 611-612 (Stewart J). Minority opinion.

<sup>23</sup> ibid 616 (White J). Minority opinion.

<sup>24</sup> This would be mock cases and not real cases, at least for current purposes.

could then be compared. The observers could also be tested for their confidence ratings regarding the data which they recorded regarding participant distraction.<sup>25</sup>

The various results would then be compared. The observers would also be tested for their confidence ratings.<sup>26</sup> This would assist in dealing with the problem of most TCB research, namely, that of relying solely upon self-report, opinion-reports and questionnaires.

There are various types of eye-trackers. One avenue for in-court research is to use eye-trackers which are incorporated into lightweight glasses.<sup>27</sup> With eye-tracking glasses<sup>28</sup> it is possible for one or all courtroom participants in a research study to be tested for distraction. This type of research allows itself to be adopted to different courtroom participants and also in realistic settings and in real (non-live) court settings.<sup>29</sup>

Other studies can use a variety of eye-trackers where subjects can view pictures or videos of court scenes on a PC, laptop or projection screen. In considering different TCB forms and in particular long extended footage versus short or snippet footage, we need to research what is viewed, for how long, eye-movement behaviour and visual processing speeds.<sup>30</sup>

Other studies can use a variety of eye-trackers where subjects can view pictures or videos of court scenes on a PC, laptop or projection screen. This particular method may allow

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<sup>25</sup> Note that the Short Report in California did attempt to have observers in court to ascertain if the courtroom participants were affected by the cameras. However, they did not have the benefit of eye-trackers, nor do they appear to have been tested for confidence. Indeed the test recording sheet does not appear to rate whether or how many times a particular courtroom participants is (a) distracted by and (b) focuses at the television camera. Schmidt used a press button system once the subject perceived a target effect. See HC Schmidt, above 30. Also note 38.

<sup>26</sup> Note that the Short Report in California did attempt to have observers in court to ascertain if the courtroom participants were affected by the cameras. However, they did not have the benefit of eye trackers, nor do they appear to have been tested for confidence. Indeed the test recording sheet does not appear to rate whether or how many times a particular courtroom participants is (a) distracted by and (b) focuses at the television camera. HC Schmidt used a press button system once the subject perceived a target effect. See HC Schmidt, above 30. Also note 38.

<sup>27</sup> See example reference to same at < [www.eyetracker.co.uk/](http://www.eyetracker.co.uk/) > accessed 19 January 2014.

<sup>28</sup> One example of glasses with eye trackers is the EyeLock training system. See < [www.setcan.com/eyelock.html](http://www.setcan.com/eyelock.html) > accessed 12 June 2010.

<sup>29</sup> There are also various types of head mounted eye-tracking tools. These can also be used for TCB effects studies. In terms of head mounted display applications see discussion in CD Wickens, M Vincow and M Yeh, above 406 ff.

<sup>30</sup> Note recent research by M L-H Vo and WX Schneider, 'A Glimpse is Not a Glimpse: Differential Processing of Flashed Scene Previews Lead to Differential Target Search Benefits' (2010) 18:2 Visual Cognition 171.

for examination of greater numbers of test subjects. In terms of TCB numerous research possibilities arise. Various types of research study can be conducted of eye-tracking monitoring of different camera and courtroom ‘photographic stimuli.’<sup>31</sup> One could have separate subject groups who also have to perform tasks and tap a spacebar. Reaction times and eye movement can be tracked and coded. The groups might in one scene have to tap the space bar as soon as the judge arrives into the courtroom. In one group, the scene may have a TCB camera and TCB camera operator moving; in another a TCB camera and TCB camera operator with no movement; another with camera only; and a final control group with no camera at all. In each group, the judge arrives in (after introducing the camera focus element). The research can then be compared. The reaction time may be slower for certain groups eg the moving TCB camera group. These answers can have policy, legal policy implications and better inform judicial consideration and decision making.

### **Witnesses**

Eye-tracking can now be used to research witness distraction-effects for TCB. Witnesses are one of the two categories of participant that most concern has related to. This should be one of the first areas to be addressed. The legal-psychology research for eye witnesses, weapon-focus and camera-perspective-bias can be of assistance to designing such TCB witness distraction studies.

We should also begin to research camera focus issues in terms of witness tests. Just as research has found that there are problems and biases created by police interviews which only record the suspect being interviewed (suspect-only), issues could arise with TCB also. When a TCB camera focuses on a witness being examined or cross-examined, a research consideration is whether this creates different effects than the TCB camera focusing on the questioner and the person being questioned. Legal-psychology studies and eye-tracking<sup>32</sup> can assist in starting this research.

Some TCB seeks to focus on the defendant for a reaction shot when a witness is being examined. The witness testimony if carried as audio, is played over a close-up of the defendant. This may raise various issues. There may be effects for example. It would appear that the research referred to above in relation to videotaped confessions and eye-tracking may assist in investigating these TCB issues.

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<sup>31</sup> To use the words of W Sato and S Yoshikawa, ‘Detection of Emotional Facial Expressions and Anti-Expressions’ (2010) 18:3 Visual Cognition 369.

<sup>32</sup> See HC Schmidt, above, generally, and 39, and also references therein.

The video confession research is also concerned that ‘as the salience of the suspect in the video is increased’ perceived voluntariness may also increase.<sup>33</sup> There is a potential for a TCB pressure or influence effect. Courts and legal-policymakers may consider whether this holds relevance for TCB camera zooming in the courtroom. Research of these issues could involve eye-tracking, confidence and test of various participant judgements, awards, verdicts, etc.<sup>34</sup>

## **Jury**

The TCB jury distraction issue is also possible to research via eye-tracking. Jurors play a critical role in the legal process. There is particular sensitivity given that they are ordinary members of the public and are not legal professionally trained. In terms of TCB eye-tracking a courtroom scenario may be filmed in TCB distraction-present and distraction-absent and then replayed to individual mock jurors wearing an eye-tracker, or to panels of mock juror members wearing eye-trackers. The former will take longer. The equipment cost in the later will be significantly more. These scenarios have the advantage that the courtroom enactment only has to be run once or twice. One needs to use the courtroom for a shorter period. A more involved alternative would have a live mock court enactment with a panel of jurors present in the mock courtroom, all wearing eye-trackers. To increase statistical significance the case scenario would have to be repeated for a number of different juror panels. This would be primarily aimed at a TCB camera distractor-present scenario. Separate re-enactments may be needed with new jury panels to cater for (a) TCB camera plus operator; and (b) TCB camera absent comparison.

## **Experts/Non-Experts**

There is no real research of differential or graduated-effects of TCB as between those professionally trained such as lawyers and judges versus the non-trained jury members. While certain witnesses may be trained in some capacity, not all witnesses are. Of those that are trained, only a portion of these come to court regularly. In effect, they specialise

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<sup>33</sup> See LJ Ware, above 18-19, and references therein.

<sup>34</sup> CC Williams also used eye-tracking in his research, finding that target memory influences by the number of target object presentations, not the number of searches for the target(s). CC Williams, ‘Not All Visual Memories Are Created Equal’ (2010) 18:2 Visual Cognition 201, 226. In one study, the results showed that the more times the target object was presented, then the better the visual memory, *ibid* 224. The ‘present study demonstrates that when looking for car keys multiple times, memory for car keys is impacted by how many times they are found. However, memories for other objects encountered in the search are tied to how much those objects are viewed.’ *ibid* 226. There are implications in terms of types of TCB attention, distraction and recall of factors, items, evidence, legal arguments etc, by the courtroom participants. Eye-tracking can assist in considered this possibility.



as court expert witnesses. In terms of airline design and safety issues, P Kasarskis et al<sup>35</sup> carry out research of differences between expert and novice subjects. They found many differences in the types of gaze and fixations of experts versus novices.<sup>36</sup> Y Itoh et al's researched pilots for different types of plane.<sup>37</sup> M Matessa and R Remington also undertook expert pilot and novice research in relation to space shuttle pilots and tasks.<sup>38</sup> RJ Brou et al also undertook research regarding expert and novice pilots in relation to instrument failure issues.<sup>39</sup> They found differences to increase significantly for the novice subjects.<sup>40</sup>

### **Study and Subjects**

Each study would need to incorporate a number of participant subjects for each of the respective participant categories. Initially, these would be in the context of a non-live courtroom case. The locus of the study could be in a laboratory setting, a setting with a similar layout to a courtroom, a real but non-live courtroom or in a mock courtroom. An increasing number of universities have purpose built realistic mock courtrooms. Distraction research does not necessarily require a live trial in a real courtroom.

The participant subjects could be lay, student or professional. There is nothing to stop real lawyers and real judges taking part in appropriate eye-tracking research in simulated or mock cases related to the testing of distraction-effects. Equally, real police officers or other regular or professional witness categories can be involved. In terms of juror participants, it may be possible to consider real jurors - but outside of the real case they are involved in. For example, a jury pool could be considered, with appropriate court consent of course. Alternatively, participants can be recruited who are proportionally and representatively the same as the persons who would normally fit within the criteria for a real jury pool. However, in some jurisdictions there may be restriction on jury deliberation research, such as under section 8 of the (England and Wales) Contempt of Court Act 1981. The Irish Law Reform Commission (provisionally) recommends that legislation be introduced to make it a criminal offence for a juror to disclose matters

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<sup>35</sup> P Kasarskis, J Stehwein, J Hickox, A Aretz and C Wickens, 'Comparison of Expert and Novice Scan Behaviors During VFR Flight' (11th International Symposium on Aviation Psychology, Columbus, Ohio, Ohio State University 2001).

<sup>36</sup> *ibid.*

<sup>37</sup> Y Itoh, Y Hayashi, I Tsukui and S Saito, 'The Ergonomic Evaluation of Eye Movement and Mental Workload in Aircraft Pilots' (1990) 33 *Ergonomics* 719.

<sup>38</sup> M Matessa and R Remington, 'Eye Movement in Human Performance Modelling of Space Shuttle Operations' (2005) Human Factors and Ergonomics Society Annual Meeting Proceedings, Human Performance Modelling 1114.

<sup>39</sup> RJ Brou, S Doane, DW Carruth and GL Bradshaw, 'Pilot Expertise and Instrument Failure: Detecting Failure is Only Half the Battle' (Human Factors and Ergonomics Society Annual Meeting Proceedings, Perception and Performance 2007) 1306.

discussed in the jury room or to make inquiries about matters arising in the course of a trial beyond the evidence that is presented.<sup>41</sup>

### **Eye-Tracking Out-of-Court**

While the thesis research is particularly focused on in-court TCB distraction issues, pursuing this line of research also potentially opens up much wider avenues of research of TCB issues, not just in-court participant distraction. Various studies can be undertaken with eye-trackers in relation to out-of-court effects. Just some of the potential studies can involve the following. The actual footage and segments broadcast potentially have effects. One aspect we need to begin research into the use and integration of different footage segments; presenter discussion, analysis, etc. Questions include whether there is continuity, discontinuity, visual momentum<sup>42</sup> and what effects occur for the viewer. We could ask ‘what do you ... see?’<sup>43</sup> in the context of the audience of TCB. Eye-trackers can help us to see what the audience focuses upon in a given picture or broadcast. An issue may be whether TCB is designed best to educate, or whether certain forms of TCB are best to educate. Some researchers<sup>44</sup> refer to preparation and deliberate design of multimedia presentations in order to enhance learning and education.

Courts and legal-policymakers should readily be aware of how and what the audience learns from TCB. In the first instance, we can now at least track what they are looking at and what they see, and for how long, in TCB broadcasts and pictures of TCB cameras in courts. Eye-tracking now permits this research.<sup>45</sup>

Consider the utility of news snippets of TCB. Courts and legal-policymakers might consider how they are to know that TCB is educational. Eye-tracking research can begin to assist us in addressing these questions. Consider, for example, the eye-tracking research undertaken by M L-H Vo and WX Schneider<sup>46</sup> into the information we obtain

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<sup>40</sup> *ibid.*

<sup>41</sup> Law Reform Commission, Consultation Paper on Jury Service, LRC CP 2010-61, paras 8.69 and 9.54. Generally note P Darbyshire, ‘What Can We Learn From Published Jury Research?: Findings For The Criminal Courts Review 2001’ (2003) 3:1 *Judicial Studies Institute Journal* 71.

<sup>42</sup> See CD Wickens, M Vincow and M Yeh, above 383, 402.

<sup>43</sup> See SMI article of this heading available at < [www.smi.com](http://www.smi.com) > accessed 19 January 2014.

<sup>44</sup> See EE Mayer, ‘Multimedia Learning: Guiding Visuospatial Thinking with Instructional Animation’ in P Shah and A Miyake, above 477, 479.

<sup>45</sup> Of course we also have other issues to consider in dealing with measuring audience education and information gain, such as understanding, coding, differences between pictures, videos, text and audio, different channels and different speeds. See general comments in EE Mayer, ‘Multimedia Learning: Guiding Visuospatial Thinking with Instructional Animation’ *ibid* 477, 479-481.

<sup>46</sup> M L-H Vo and WX Schneider, above, the EyeLink eye tracker described at 179.

from mere glimpses. They found ‘strong evidence for the influence of flashed scene previews on the guidance of eye movements which indicated that participants were able to generate, store, and make use of initial scene representation for subsequent target search ... the results ... add to the growing evidence that initially generated scene representations can be stored across saccades continuously exhibiting their influence on eye movement control.’<sup>47</sup> However, one group was found to process information faster than the other group.<sup>48</sup> There can be implications for TCB.

CC Williams also used eye-tracking in his research, finding that target memory was influenced by the number of target objects presentations, not the number of searches for the target(s).<sup>49</sup> In one study, the number results showed that the more times the target object was presented, then the better the visual memory.<sup>50</sup> He concludes that ‘the present study demonstrates that when looking for [an object] multiple times, memory for [the object] is impacted by how many times they are found. However, memories for other objects encountered in the search are tied to how much those objects are viewed.’<sup>51</sup> In R Graham et al’s study the participant subjects were asked to perform a task and then tap a spacebar on a computer.<sup>52</sup> This assisted in recording time spent reacting to the stimulus. Different subject groups can be compared.<sup>53</sup>

Newspaper reports consist of different layouts, articles, texts, headlines, photographs, captions, ‘tickers, drop quotes, fact boxes, maps, diagrams, tables, etc.’<sup>54</sup> Television programming contains some of these but in addition many additional elements. The

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<sup>47</sup> ibid 187.

<sup>48</sup> ibid 191. The information shown to the groups was different, see 192 ibid.

<sup>49</sup> CC Williams, ‘Not All Visual Memories Are Created Equal’ (2010) 18:2 Visual Cognition 201.

<sup>50</sup> ibid 224.

<sup>51</sup> ibid 226. Complex issues such as emotions and emotional content in the footage also need to be examined. R Graham et al found that during longer presentations ‘validity and emotion interacted such that cuing by emotional faces, fearful faces in particular, was enhanced relative to neutral faces. These results converge with a growing body of evidence that suggests that gaze and expression are initially processed independently and interact at later stages to direct attentional orienting.’ R Graham, CK Friesen, Fichtenholtz and LaBar, ‘Modulation of Reflexive Orienting to Gaze Direction by Facial Expressions’ (2010) 18:3 Visual Cognition 331.

<sup>52</sup> ibid 339.

<sup>53</sup> H Rutherford and J Raymond also refer to research which found that ‘presenting negative versus neutral targets in short alternating blocks and examining [inhibition of return (IOR)] on the first trial of each new block, we show that the emotional modulation of IOR stems from the affective context in place before visual orienting is initiated, not by perceptual processing of the targets after cue effect.’ H Rutherford and J Raymond, ‘Effects of Spatial Cues on Locating Emotional Targets’ (2010) 18:3 Visual Cognition 389.

<sup>54</sup> J Holsanova, N Holmberg and K Holmqvist, ‘Reading Information Graphics: The Role of Spatial Contiguity and Dual Attention Guidance’ (2008) 22 Applied Cognitive Psychology 1.

research might consider how the audience interacts with, uses, and (possibly) learns from TCB and different forms of such broadcasting. Different viewing, learning and cognitive processes can be involved. Significant research has yet to be undertaken in relation to audience effects issues in TCB. Eye-tracking tools can assist in examining some of these important issues. J Holsanova et al used eye-tracking to research the effects of reading information graphics in a newspaper study.<sup>55</sup> They found that different spatial layouts have a significant effect on readers' eye movement behaviour.<sup>56</sup> They indicate that the results are important in contributing to the study of 'attentional guidance in printed media.'<sup>57</sup> Research identifies different reading and scanning speeds with different tasks and purposes.<sup>58</sup> We need to start undertaking research into attention, education, information, etc, in relation to the TCB audience.

J Holsanova et al also refer to research regarding cognitive load<sup>59</sup> and the cognitive theory of multimedia learning.<sup>60</sup> In term of suggesting effects for TCB (eg education; educational benefits equally across all forms of TCB), we need to incorporate additional

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<sup>55</sup> ibid 1-12. The main measures of online reading compared were: reading order; reading time; and text-graphic integration. ibid 8.

<sup>56</sup> ibid 1, 10.

<sup>57</sup> ibid 1.

<sup>58</sup> See references in R Khosla, J Simola, J Salojarvi and I Kojo, 'Using Hidden Markov Model to Uncover Processing States from Eye Movements in Information Search Tasks' (2008) 9 Cognitive Systems Research 237-251, and 238. R Khosla et al researched different instructional tasks, namely, word search, question – answer task and finding subjectively most interesting answer, and tracking time for the various tasks. ibid 238. They also refer to different subject states, namely, scanning, reading and decision state. ibid 245-246, and 249. The decision-state suggested a more careful analysis, 'R Khosla et al, 'Reading Information Graphics: The Role of Spatial Contiguity and Dual Attention Guidance' (2008) 23 Applied Cognitive Psychology 1215.

<sup>59</sup> See, for example, P Chandler and J Sweller, 'Cognitive Load Theory and the Format of Instruction' (1991) 8 Cognition and Instruction 293, as referred to J Holsanova in ibid.

<sup>60</sup> J Holsanova, N Holmberg and K Holmqvist, 'Reading Information Graphics: The Role of Spatial Contiguity and Dual Attention Guidance' (2008) 22 Applied Cognitive Psychology 1, 2-3. See also the following as referred to ibid, namely, JM Henderson and F Ferreira, 'Scene Perception for Psycholinguists' in JM Henderson and F Ferreira (eds), *The Interface of Language, Vision and Action: Eye Movements and the Visual World* (Psychology Press 2004) 1; K Holmqvist, J Holsanova M Barthelson and D Lundqvist, 'Reading or Scanning? A Study of Newspaper and Net Paper Reading' in J Hyona, R Radach and H Duebel (eds), *The Mind's Eye: Cognitive and Applied Aspects of Eye Movement Research* (Elsevier Science 2003) 657; J Holsanova, H Rahm and K Holmqvist, 'Entry Points and Reading Paths on the Newspaper Spread: Comparing Semiotic Analysis with Eye-Tracking Measurements' (2005) 5 Visual Communication 65; H-J Jeung, P Chandler and J Sweller, 'The Role of Visual Indicators in Dual Sensory Mode Instruction' (1997) 17 Educational Psychology 329; RE Mayer, *Multimedia Learning* (Cambridge University Press 2001); RE Mayer, 'Principles for Managing Essential Processing in Multimedia Learning: Coherence, Signalling, Redundancy, Spatial Continuity and Temporal Contiguity Principles' in RE Mayer (ed), *Cambridge Handbook of Multimedia Learning* (Cambridge University Press 2005) 183; and K Scheiter, E Wiebe and J Holsanova, 'Theoretical and Instructional Aspects of Learning with Visualizations' in R Zheng (ed), *Cognitive Effects of Multimedia Learning* (IGI Global 2009).

factors such as competing programmes, forms, task, dual-tasks being undertaken, environment, etc. Arguably, research of TCB is more complex because it is multimedia and multimodal<sup>61</sup> based.<sup>62</sup> That, however, is no reason to avoid such research. In order to research such suggestions and also in terms of making such research more realistic, various methods of eye-tracking research can assist in undertaking such types of research. Eye-tracking can be used to carry out similar type research of TCB effects.

## Design

In terms of designing TCB, and TCB forms, we could consider, for example, how to get the best broadcast footage for education purposes and the optimum scenario for filming without adverse effects upon courtroom participants. Legal and legal-policy considerations which have not been considered before are how best to tailor initial design features<sup>63</sup> to try and accomplish these aims. Additional design features, both in terms of in-court and out-of-court effects, are TCB camera type, height and location. These design features have not been addressed in the general TCB literature nor in the limited effects literature. CD Wickens et al, for example, refer to and examine issues involved with framing issues with design applications and visual spacing<sup>64</sup> and refer to different effects.<sup>65</sup> We might adapt, for example, some of the frames referred to by CD Wickens et al,<sup>66</sup> to TCB research. CD Wickens et al<sup>67</sup> refer to various effect issues and concerns. They refer to high risk systems eg vehicle and medical where it is important to reduce errors.<sup>68</sup> Criminal legal cases are also highly important and important to reduce errors and error factors.<sup>69</sup>

## Eye-Tracking and Dual Tasking

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<sup>61</sup> See for example S Folker, L Sichelschmidt and H Ritter, 'Processing and Integrating Multimodal Material: The Influence of Color-Coding' in BG Bara and Bucciarelli (eds), *Proceedings of the 27th Annual Conference of the Cognitive Science Society* (Erlbaum) 690.

<sup>62</sup> Considerations such as distraction, priming, negative priming, attentional capture, attentional orientation, visual search, divided attention also arise. C Bundesen and T Habekost, *Principles of Visual Attention: Linking Mind and Brain* (Oxford University Press 2008) 16-102.

<sup>63</sup> Consider generally CD Wickens, M Vincow and M Yeh, above 383.

<sup>64</sup> *ibid* 384.

<sup>65</sup> *ibid* 418-419.

<sup>66</sup> *ibid* 383-425, at 384. These include courtroom frame, details of the parameters of the instant courtroom setting and environment; participant head frame, defined in terms of their orientation of head; trunk frame, if different from head (eg a juror may have to look left or right to see the witness stand, camera, etc); camera location frame; camera focus frame, orientation and direction of camera focus; camera control frame eg details of the camera operator; glasses<sup>66</sup> (eg EyeLock training system) can incorporate eye-trackers, so it is possible for one or all courtroom participants in a research study to wear eye-trackers.

<sup>67</sup> CD Wickens, M Vincow and M Yeh, above at 384-385.

<sup>68</sup> *ibid* 385.

Certain research considers eye-tracking and dual task activities.<sup>70</sup> CD Wickens et al<sup>71</sup> also research dual task issues in relation to airline pilots. Research also exists for what is described as capacity or the visual load facing participant subjects.<sup>72</sup> A ‘critical variable in information space is the task that the user is expected to carry out.’<sup>73</sup> The TCB literature to date does not incorporate an analysis of the different tasks of the different courtroom participants and effects issues being examined. Elsewhere, for example, A Bukoff refers to task analysis research of video tape operators.<sup>74</sup> We should also employ eye-tracking to examine TCB distraction, attention, etc, of courtroom participants in the context of task analysis.<sup>75</sup>

The issue of dual tasking and multi-tasking in TCB courtrooms has not been researched or addressed yet. There are potential effects on a courtroom participant of doing various tasks at once. These complex issues have yet to be considered in the CB context. While there is some eye-tracking research referring to this issue in other fields, this is complex issue which needs consideration in the TCB context.<sup>76</sup>

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<sup>69</sup> HC Schmidt, above 18.

<sup>70</sup> N Kathmann, A Hochrein and R Uwer, ‘Effects of Dual Task Demands on the Accuracy of Smooth Pursuit Eye Movements’ (1999) 36 *Psychophysiology* 158.

<sup>71</sup> CD Wickens, J Goh, WJ Horrey and DA Talleur, ‘Attentional Models of Crosstask Pilot Performance Using Advanced Display Technology’ (2003) 45 *Human Factors: The Journal of the Human Factors and Ergonomics Society* 360.

<sup>72</sup> For example, C-F Chi and F-T Lin, ‘A New Method for Describing Search Patterns and Quantifying Visual Load Using Eye Movement Data’ (1997) 19 *International Journal of Industrial Ergonomics* 249.

<sup>73</sup> CD Wickens, M Vincow and M Yeh, ‘Design Applications of Visual Spatial Thinking: The Importance of Frame of Reference’ in P Shah and A Miyake, above 415.

<sup>74</sup> A Bukoff, ‘The Effects of Video Camera Techniques on the Pre-Deliberation Judgements and Perceptions of Role-Playing Jurors’ (PhD thesis, Kent State University 1984) 9.

<sup>75</sup> Wickens et al refer to task analysis issues and research, see CD Wickens, M Vincow and M Yeh, ‘Design Applications of Visual Spatial Thinking: The Importance of Frame of Reference’ in P Shah and A Miyake, *The Cambridge Handbook of Visuospatial Thinking* (Cambridge University Press 2005) 383, 385 ff. See also P Shah, E Freedman and I Vekiri, ‘The Comprehension of Quantitative Information in Graphical Displays’ in P Shah and A Miyake, *The Cambridge Handbook of Visuospatial Thinking* (Cambridge University Press 2005) 426, 450 ff regarding task demands.

<sup>76</sup> The issue of carrying out dual tasks simultaneously also appears in eye-tracking research but as yet not TCB. See AT Duchowski, above 239. R Khosla, J Simola, J Salojarvi and I Kojo, ‘Using Hidden Markov Model to Uncover Processing States from Eye Movements in Information Search Tasks’ (2008) 9 *Cognitive Systems Research* 237, 249, and also JK O’Regan, ‘Eye Movements and Reading,’ in E Kowler (ed), *Eye Movements and Their Role in Visual and Cognitive Processes* (Elsevier 1990) 395; and JK O’Regan, ‘Optimal Viewing Position in Words and the Strategy-tactics Theory of Eye Movements in Reading’ in K Rayner (ed), *Eye Movements and Visual Cognition: Scene Perception and Reading* (Springer-Verlag 1992) 333–354, each as referred to *ibid*. Viewer strategies and tactics may also be involved. For example, in terms of reading and eye-tracking research, R Khosla et al (depending on whether the subjects perceive a forthcoming task as difficult or not), subjects adopt different strategies and which can influence their fixation times. See R Khosla, J Simola, J Salojarvi and I Kojo, ‘Using Hidden Markov Model to Uncover Processing States from Eye Movements in Information Search Tasks’ (2008) 9 *Cognitive*

Options for TCB effects research are many and varied. Some of the more interesting effect ‘stimuli’<sup>77</sup> obviously relate to distraction and attention involving TCB cameras. Obviously courtroom participants undertake many actions and tasks in the courtroom. Reactions and distractions can be investigated even in the multitasks situation. TCB reaction times and eye movement can be tracked and coded. A group with a TCB camera or a camera plus operator versus one without, may or may not have similar reaction times when undertaking dual tasks. Research can consider if they have the same recall of court and case details, action times, etc. Spacebars, device clicking, time measurement for tasks and eye-tracking are some of the potential measures. J Simola et al<sup>78</sup> state that,

‘[t]he finding that eye movement patterns differ when different processing demands are encountered can be used for developing an interactive information search application that learns and adapts to users’ goals and intentions. For example, by examining which parts of a search engine results are read in different states, such as *reading* or *decision* states, it is possible to infer about the intentions and interests of the user’ (original emphasis).

Our knowledge and legal-policy considerations should benefit from research of audience viewing of TCB. Take a gavel to gavel (G2G) criminal trial for example. The intention, tasks and load on the viewer may effect what they see, how their eyes fixate and for how long. This may change during different segments of the trial (eg opening, testimony, arguments and motions, closing), and or between different courtroom participants (eg judge, witness, expert witness). Eye-tracking can assist us in the task of beginning to unlock the answers to these legal and legal-policy queries.

### **Visual Cones-of-Vision**

In one study regarding driver distraction, subjects were found to look more centrally than peripherally.<sup>79</sup> In terms of TCB and visual cones-of-vision, we need to consider in greater detail the possibility that effects, or distraction-effects, could occur even when the TCB camera is not central in the visual cone-of-vision. It is also possible that when we come to reconsider the observer-report research studies previously undertaken, we may

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Systems Research 237, 249, and also JK O’Regan, ‘Eye Movements and Reading’ in E Kowler (ed), *Eye Movements and Their Role in Visual and Cognitive Processes* (Elsevier, 1990) 395-453; and JK O’Regan, ‘Optimal Viewing Position in Words and the Strategy-Tactics Theory of Eye Movements in Reading’ in K Rayner (ed), *Eye Movements and Visual Cognition: Scene Perception and Reading* (Springer-Verlag 1992) 333–354, each as referred to *ibid*.

<sup>77</sup> To use the words of W Sato and S Yoshikawa, ‘Detection of Emotional Facial Expressions and Anti-Expressions’ (2010) 18:3 *Visual Cognition* 369.

<sup>78</sup> R Khosla, J Simola, J Salojarvi and I Kojo, above 237, 249-250.

<sup>79</sup> JL Harbluk, YI Noy, PL Trbovich and M Eizenman, ‘An On-Road Assessment of Cognitive Distraction: Impacts on Driver’s Visual Behavior and Braking Performance’ (2007) 39 *Accident and Analysis Prevention* 372.

have to make assessments of whether these third party observers were less likely to be able to assess central visual cone-of-vision distraction-effects – and outer or peripheral visual cone-of-vision distraction-effects. It might be the case that distraction occurred in certain instances but the observers were not able to measure or recognise this because of their location, the participant location, the TCB camera location and the focus direction of the subject they were looking at. Consider that an observer may be sitting at the back of a courtroom. There may be a TCB camera in the front or top section of the courtroom ie in advance of the lawyers. A consideration may be whether the observer at the back of the courtroom realistically be expected to accurately record where the subject lawyer is looking and whether the lawyer is distracted, how frequently, and for how long. JL Harbluk et al<sup>80</sup> consider legal changes whereby new laws increasingly ban the use of handheld mobile telephones. However, they say that their eye-tracking research suggests that greater research is required in relation to whether hands-free mobile devices can still be significant distraction to drivers.<sup>81</sup> Just as the effects of hands-free devices needs to be considered from a safety and a legal perspective, what was and is considered to be a concern for TCB, namely distraction-effects, needs to be appropriately considered, researched and assessed in light of better and more normative means today. Regardless of whether we question the validity of the historical research or not, the availability of new normative research tools suggests that we should at least enhance our knowledge with better research. For example, research does not demonstrate that miniaturised TCB cameras - if used - will have no distraction-effects.<sup>82</sup> TCB can assist in beginning to research these effect concerns and considerations. Unfortunately, the legal-policy and discussion on these issues is not backed up by legal-empirical TCB studies.

### **Eye-Tracking and Location**

Almost invariably the TCB literature and limited research ignores reference to and consideration of camera location and frame issues. We need to be able to describe and represent descriptively and diagrammatically the various camera issues<sup>83</sup> at play in the study of TCB distraction. Location and frame data need to be gathered. Distraction and distraction research needs to examine the camera-location issues. While eye-tracking can assist in this, we also need to start recording where the TCB camera is located in the courtroom, so that different research studies can be compared.

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<sup>80</sup>     ibid.

<sup>81</sup>     ibid.

<sup>82</sup>     Or even psychological effects.

<sup>83</sup>     See generally discussion of frame representation issues in CD Wickens, M Vincow and M Yeh, above 387 ff.



It is important in studies to know where the different courtroom participants are located and which direction they are facing, and how this compares and interacts with the camera location. For example, the courtroom participants could be facing straight on, left or right when they look at the TCB camera. For legal-policy purposes, we need to be able to compare this across the research findings. In the *Estes*<sup>84</sup> case ‘construction of a television booth in the courtroom made it necessary to alter the physical layout of the courtroom and to move [participants] from their accustomed position.’<sup>85</sup> Research should consider what other changes and alterations occur, and what the impact may be. This might also relate to distraction and which may also raise particular considerations.

In most research, the location and height of the cameras is not considered or even documented, so we cannot look back to assess and compare different past cases or research studies on these points. S Landstrom et al<sup>86</sup> note that error and bias can arise from the distance between the camera and the suspect and the camera focus (on suspect only versus suspect plus interviewer). This is a further location-effects issue to consider. The visuospatial<sup>87</sup> layout and design of the courtroom is another study area. The visuospatial location and layout issues, design applications and ultimate attention, distraction and comprehension issues<sup>88</sup> need to be considered for TCB.

### **Eye-Tracking and Optimum Design**

Eye-tracking of TCB distraction-effects can also lead to insight in relation to normative TCB and normative TCB design. In terms of designing TCB, and TCB forms, we should consider how to get the best broadcast footage for education purposes and the optimum scenario for filming without adverse effects upon courtroom participants.<sup>89</sup> Considerations which have not been considered before are how best to tailor initial design features<sup>90</sup> to try and accomplish these aims. Additional design features, both in terms of in-court and out-of-court effects, are TCB camera type, height and location. These design

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<sup>84</sup> *Estes v Texas* 381 US [1964] 532.

<sup>85</sup> *Estes v Texas* 381 US 532 (1965) 572 (Warren CJ).

<sup>86</sup> S Landstrom, ER AF Hjelmsatar and PA Granhag, ‘The Camera Perspective Bias: A Case Study’ (2007) 4 *Journal of Investigative Psychology and Offender Profiling*, 199, 200.

<sup>87</sup> P Shah and A Miyake (eds), *The Cambridge Handbook of Visuospatial Thinking* (Cambridge University Press 2005).

<sup>88</sup> Note D Reisberg, and F Heuer, ‘Visuospatial Images’ at 35; CD Wickens, M Vincow and M Yeh, ‘Design Applications of Visual Spatial Thinking: The Importance of Frame of Reference’ at 383; and P Shah, EG Freedman and I Vekiri, ‘The Comprehension of Quantitative Information in Graphical Displays’ at 426; all in P Shah and A Miyake (eds), *The Cambridge Handbook of Visuospatial Thinking* (Cambridge University Press 2005).

<sup>89</sup> The thesis is not, as pointed out above, arguing for or against TCB.

<sup>90</sup> Consider generally CD Wickens, M Vincow and M Yeh, ‘Design Applications of Visual Spatial Thinking: The Importance of Frame of Reference’ in P Shah and A Miyake, above 383.

features have not been addressed in the general TCB literature nor in the limited TCB distraction-effects literature. CD Wickens et al, for example, refer to and examine issues involved with framing issues with design applications and visual spacing<sup>91</sup> and refer to different effects.<sup>92</sup> Possibly distraction and legal-psychological effects differ depending on the spatial layout<sup>93</sup> of the TCB courtroom.

### **Eye-Tracking and Confidence**

Many issues of confidence and ratings arise in relation to TCB research. Many opportunities arise in terms of examining these issues with eye-tracking technology. For example, an eye-tracker and an observer could both look at a particular courtroom participant and try to examine how many times they focus their attention or look at the TCB camera in the courtroom. The observer could press a button to record each time they perceive the courtroom participant to look at the camera. The results can be compared with the results from eye-tracking studies.

The observer could also be tested for their confidence ratings.<sup>94</sup> This would assist in dealing with the problem of most TCB research, namely, of relying solely upon self-report, opinion-reports and observer-reports. Eye-tracking now lets us verify whether the observer-report is correct, and how frequently. The eye-tracker records the participants *actual* gaze, direction and focus in real time. This allows us to match the data with the self-report, opinion-report and observer-report data. We can see exactly where the individual participant is looking, how frequently and for how long. This data can all be gathered with exact legal-empirical accuracy. The US Supreme Court was not aware of this. The research technology in relation to the distraction-effects of TCB has now moved on in a meaningful way. We can now shed new light on the research results of the prior research and research methods.

### **Anxiety and Emotion**

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<sup>91</sup> ibid 384.

<sup>92</sup> ibid 418-419.

<sup>93</sup> TA Brown and MP Munger, 'Representational Momentum, Spatial Layout, and Viewpoint Dependency' (2010) 18 *Visual Cognition* 780.

<sup>94</sup> Note that the Short report in California did attempt to have observers in court to ascertain if the courtroom participants were affected by the cameras. However, they did not have the benefit of eye-trackers, nor do they appear to have been tested for confidence. Indeed the test recording sheet does not appear to rate whether or how many times a particular courtroom participants is (a) distracted by and (b) focuses at the television camera. Schmidt used a press button system once the subject perceived a target effect. See HC Schmidt, above 30.

It has been suggested already that TCB research and TCB eye-tracking research can incorporate research of stress, emotions, etc. in terms of mock participants. This can involve amongst other things the use of portable heart monitors. Anxiety and related research is absent in the legal-psychology research of TCB. Similar issue can also have relevance outside of the court. Emotional related content in the TCB footage may influence the audience and as such might be an issue to consider researching.<sup>95</sup> Different TCB content and groups may be compared. H Rutherford and J Raymond<sup>96</sup> also refer to emotional research.<sup>97</sup> Various issues arise in terms of considering future TCB effects.

### **Cognitive Effects**

The thesis refers to issues of visual-distraction-effect in TCB, as opposed to cognitive TCB distraction.<sup>98</sup> While the latter is deserving of research, it is beyond the current research focus.<sup>99</sup>

### **Conclusion**

Researchers use eye-tracking and content analysis to examine education.<sup>100</sup> Using eye-tracking in addressing the many effects concerns posed by TCB and the US Supreme Court will assist our general understanding as well as the considerations and decisions of courts and legal-policymakers.

K-J Raiha, Professor of Computer Science states that we should ‘think of all of the other potential applications for this technology that we just haven’t thought about, or imagined yet.’<sup>101</sup> Eye-tracking in the context of examining certain effects of TCB is recommended by the author as one such application. To use the description of T Armstrong and B

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<sup>95</sup> ibid 339.

<sup>96</sup> H Rutherford and J Raymond ‘Effects of Spatial Cues on Locating Emotional Targets’ (2010) 18:3 Visual Cognition 389.

<sup>97</sup> They refer to such research ‘presenting negative versus neutral targets in short alternating blocks and examining [inhibition of return (IOR)] on the first trial of each new block, we show that the emotional modulation of IOR stems from the affective context in place before visual orienting is initiated, not by perceptual processing of the targets after cue effect.’ ibid 389.

<sup>98</sup> J Pohl, W Birk and L Westervall, ‘A Driver-Distracted-Based Lane-Keeping Assistance System’ (2007) 221 Journal of Systems and Control Engineering 541. This refers to distinctions of visual and cognitive distraction, 543.

<sup>99</sup> However, there are driver cognitive distraction studies. See, for example, J Harbluk and YI Moy, ‘The Impact of Cognitive Distraction on Driver Visual Behaviour and Vehicle Control’ [February 2002] Transport Canada.

<sup>100</sup> An example of one study using both eye-tracking and content analysis, see Barrios, VMG, et al, ‘AdELE: A Framework for Adaptive E-Learning Through Eye-tracking,’ < [www.iicm.tu-graz.ac.at/home/cguetl/publications/2004/Garcia%20et%20al.%202004%20-%20IKNOW.pdf](http://www.iicm.tu-graz.ac.at/home/cguetl/publications/2004/Garcia%20et%20al.%202004%20-%20IKNOW.pdf) > accessed 19 January 2014.

<sup>101</sup> At the Finnish University of Tampere and project coordinator of the Communication by Gaze Interaction (COGAIN) project. Referred to at ‘An Affordable Future for Eye-

Olatunji in a different eye-tracking context, it ‘provides a more direct and continual measure of limitations in more manual measurements.’<sup>102</sup> It also has potential to overcome the limitations of opinion-reports and self-reports. It can be used to test and validate opinion-reports and self-reports. ‘[E]ye movements are a direct indicator of overt attention’ and provides ‘a highly direct measure of visual attention, eye systems also allow continuous measurement of eye movements.’<sup>103</sup> We should be researching this in the context of TCB.

We should also not automatically accept popular arguments just because they appear to be logical or common sense. We should still seek to weigh them, analyse and research them. That commentators and proponents may feel that many of the in-court effects issues are moot because we now no longer have the very large and bulky TCB cameras, cables and equipment as were initially used in courts, does not mean we should stop research. In fact, the contrary should be the case, because the research tools available have now improved. We now have significantly advanced research tools with eye-trackers which the US Supreme Court never thought possible. We should avail of the opportunity presented.

HC Schmidt also states that the current research in legal-psychology into videotaped confessions is motivated by the US Supreme Courts treatment of confession evidence cases.<sup>104</sup> It is surprising that more research has not been undertaken into the effects of TCB, given that the US Supreme Court first called for legal-empirical research studies as far back as the *Estes*<sup>105</sup> case in 1965.

One of the advantages of eye-tracking is that it permits testing and direct observation of fixation, focus and attention.<sup>106</sup> Eye-tracking research also has the advantage that it tracks and documents *exactly* what people see – and what they ignore.<sup>107</sup> The time has come to address the research challenge set by the US Supreme Court and also to ensure that the research effort into the effects of TCB advances beyond the criticism that ‘[s]ocial scientists measure the intelligence of monkeys more effectively than courts have attempted to ascertain the effects of television in the courtroom.’<sup>108</sup> It is time to move

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Tracking in Sight’ at < [www.physorg.com/news63294534.html](http://www.physorg.com/news63294534.html) > accessed 19 January 2014.

<sup>102</sup> *ibid.*

<sup>103</sup> *ibid.*

<sup>104</sup> HC Schmidt, above 74.

<sup>105</sup> *Estes v Texas* 381 US 532 [1965] 532.

<sup>106</sup> See LJ Ware, above 11.

<sup>107</sup> See < [www.prsresearch.com/prs-tools/](http://www.prsresearch.com/prs-tools/) > accessed 19 January 2014, last accessed 12 June 2010.

<sup>108</sup> J Hirschhorn, ‘Cameras in the Courtroom? No’ (1980) 7:3 *Barrister* 7 and 9.

beyond limited self-reports and opinion-reports and embrace eye-tracking research. Eye-tracking can be particularly beneficial in addressing distraction-effect research. We should embrace the opportunity. This involves expanding upon the initial proof-of-concept demonstration work of the author (see below), and also the novel suggestions of the author introducing eye-tracking into the discussion of TCB effects-research and the US Supreme Court challenge.

This is important because the concerns of the US Supreme Court and others are real and the inherent questions remain to be answered. Indeed, the *Pistorius*<sup>109</sup> case exemplifies that new issues not considered previously in relation to TCB can also arise. The internet and iTCB also raises new legal-policy considerations. Normative legal-empirical research can assist in dealing with some of these TCB concerns and questions and which will be of benefit to courts, legal-policymakers and those interested in or affected by TCB.

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<sup>109</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.



## CHAPTER 13: EYE-TRACKING TECHNOLOGY, EXAMPLES AND ETHICS

### Introduction: The rationale for Eye-Tracking

‘Social scientists measure the intelligence of monkeys more effectively than courts have attempted to ascertain the effects of television in the courtroom.’<sup>1</sup> This and the US Supreme Court concerns are legitimately concerned that while there is a large popular TCB literature, it is mostly discursive, descriptive and promulgatory and all without being backed up by legal-empirical research. More ‘primary data’<sup>2</sup> and legal-empirical distraction-effects research is required. The overall body of knowledge of TCB and its effects could, and should, be better.<sup>3</sup>

For example, in terms of driver safety research, J Pohl et al state that in ‘order to detect visual distraction it is necessary to assess the driver’s visual focus and to categorize whether this visual focus contributes to proper assessment of the road scene or not.’<sup>4</sup> Yet, seldom does research record the scene, participant location, camera location, etc, in relation to TCB effects. Neither does the body of research seek to consider how the focus and assessment of the court scene will impact effects, and effects-research, in relation to TCB distraction.

Eye-tracking studies appear eminently suited to TCB distraction-effects research. Tobii glasses, for example, are described as ‘a revolutionary, accurate and efficient tool for capturing natural user behaviour in both qualitative and quantitative real world research.’<sup>5</sup> They also have other advantages, such as being ‘[d]iscreet, ultra lightweight design of the Glasses and the Recording Assistant make the system unobtrusive. There are no distracting cameras or mirrors and test subjects are free from carrying bulky and heavy recording equipment.’<sup>6</sup> Eye-tracking ‘accurately and objectively maps eye-tracking data

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<sup>1</sup> J Hirschhorn, ‘Cameras in the Courtroom? No’ (1980) 7:3 Barrister 7, 9.

<sup>2</sup> F Bannister and R Connolly, ‘Researching eGovernment: A Review of ECEG in its Tenth Year’ (10th European Conference on e-Government ECEG 2010 Limerick, Ireland 17-18 June 2010).

<sup>3</sup> One of the concerns of TCB both in its original infancy and still today, is that those in the courtroom will be distracted by the TCB cameras or the TCB cameras plus TCB operators in charge of the cameras. Seldom is this considered in actual research, and where it is, the research is mostly limited to self-reports, opinion-reports and sometimes observational-reports. These are not the optimum means of seeking to research such effects. The self-reports in particular are questionable as they ask the individual themselves if they were affected, which introduces elements of opinion, bias, influence, pre-disposition or favouritism. It is not the most accurate and independent validation of such effect issues.

<sup>4</sup> J Pohl, W Birk and L Westervall, ‘A Driver-Distraction-Based Lane-Keeping Assistance System’ (2007) 221 Journal of Systems and Control Engineering 541, 544.

<sup>5</sup> Tobii Glasses Eye-tracker, Tobii Glasses, Mobile Eye-tracker for Real World Research, Tobii. No date.

<sup>6</sup> *ibid.*

to real-world objects.<sup>7</sup> TCB distraction-effects in court are a real world concern, and a longstanding one. Tobii eye-tracking case studies include research involving cognitive psychology, developmental psychology, media and marketing, ophthalmology, etc.<sup>8</sup> In terms of media and marketing eye-tracking researches the impact and effect of advertisements.<sup>9</sup> One Tobii document states that, '[a]ttention and recollection are essential indicators of advertisement impact. In order to gain insight into the link between ad design, eye movement during ad perception and recollection of the brand name of advertised products'<sup>10</sup> can be tracked, recorded and verified. Similarly, case details and recall of case details, can be compared to the courtroom participant eye-tracking data.

### **Advantages of Eye-Tracking**

TCB eye-tracking may provide many advantages over the research to date. Eye-tracking 'provides a more direct and continuous measure of attention' than manual measurements.<sup>11</sup> It also overcomes the limitations of opinion-reports and self-reports, eg to validate opinion-reports and self-reports. '[E]ye systems ... allow continuous measurement of eye movements.'<sup>12</sup> Eye-tracking permits testing and direct observation of fixation, focus and attention of TCB cameras.<sup>13</sup> Eye-tracking research also has the advantage that it tracks and documents exactly what people see.<sup>14</sup> The recordings can be played back and repeated.

Eye-tracking also helps with other research issues. For example, T-R Valikoski<sup>15</sup> carries out research in relation to prosecutors in court. Eye-tracking provides a method to further research such issues with a direct and recorded accurate measurement of eye-movement and eye-focus of prosecutors. In each instance, it is more accurate than each of these individually. '[E]ye movements are a direct indicator of overt attention.'<sup>16</sup> They provide 'direct measure of visual attention'<sup>17</sup> and distraction. Furthermore, it can be used to test

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<sup>7</sup> *ibid.*

<sup>8</sup> Tobii case studies, < [www.tobii.com/scientific\\_research/case\\_studies](http://www.tobii.com/scientific_research/case_studies) > accessed 3 August 2012.

<sup>9</sup> Tobii, Marketing Research. No date.

<sup>10</sup> *ibid.*

<sup>11</sup> T Armstrong and BO Olatunji, 'What They See Is What You Get: Eye-Tracking of Attention in the Anxiety Disorders' American Psychological Society (March 2009) < [www.apa.org/science/about/psa/2009/03/science-briefs.aspx](http://www.apa.org/science/about/psa/2009/03/science-briefs.aspx) > accessed 19 January 2014.

<sup>12</sup> *ibid.*

<sup>13</sup> See LJ Ware, 'Monitoring Visual Attention in Videotaped Interrogations: An Investigation of the Camera Perspective Bias' (MSc thesis, Ohio University 2006) 11.

<sup>14</sup> See < [www.prsresearch.com/prs-tools/](http://www.prsresearch.com/prs-tools/) > accessed 19 January 2014, last accessed 12 June 2010.

<sup>15</sup> T-R Valikoski, *The Criminal Trial as a Speech Communication Situation* (University of Tampere, Finland 2004) 178.

<sup>16</sup> T Armstrong and BO Olatunji, above.

<sup>17</sup> *ibid.*



and assess the validity of each of these respective types of reports. It is a new independent measure of TCB distraction.

There are also other reasons to use eye-tracking. Eye-tracking studies produce a stream of accurate data, but also a video recording of the eye-tracking event being studied. In this case, the distraction-effect study will be recorded on video with the exact focus of the witness subject marked on screen with prominent '+' marker. The marker will move on the screen to show when the witness subject changes the focus of their visual direction. Therefore, the researcher, and other researchers, can look back and review exactly what was looked at by the witness suspect. This is not possible with self-reports, opinion-reports, nor observer-reports. It can also be used for other courtroom participants.

Eye-tracking offers 'crucial improvements over manual reaction time measures of attention.'<sup>18</sup> It also provides 'increased sensitivity to detect additional biases.'<sup>19</sup> It is more accurate than observer-reports. It also offers greater advantages over other alternative research measures, such as research subjects pushing a button each time that they perceive a research stimuli occurs.<sup>20</sup> T Armstrong and B Olatunji state that eye-tracking is 'more closely linked to attention than key press behaviour, which occurs downstream of intervening response selection.'<sup>21</sup> In the context of the limited TCB distraction-effects research actually undertaken, we can say that the self-report, opinion-report and even the observer-report studies, all of these are even further removed from the event stimulus - in this case the attentional or distraction-effects of the TCB camera and or TCB camera plus operator. Eye-tracking is simply more accurate.

Indeed, we should also not forget that some courts have permitted more than one TCB camera and more than one TCB camera operator. Instances also have occurred, and may still occur despite miniaturisation technology, where a TCB camera operator can enter and move about the courtroom with a shoulder mounted camera. Unfortunately, there is no research and statistics of TCB miniaturised fixed cameras and non-fixed and moving operator held cameras in the instances of TCB. TCB eye-tracking is better equipped to examine distraction-effects in the scene than are observers.

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<sup>18</sup> *ibid.*

<sup>19</sup> *ibid.*

<sup>20</sup> Even these research methods, however, do not appear to have been yet incorporated into TCB distraction-effects research.

<sup>21</sup> *ibid.*

Tobii also note that eye-tracking provides a direct measure of first hand information in, for example, driver drowsiness and distraction research.<sup>22</sup> Various research examines legal-safety related issues with eye-trackers.<sup>23</sup> Eye-tracking can furnish first hand hard data, where observer-reports are mere opinions and second hand in nature. Therefore, eye-tracking can bring many advantages to the TCB distraction-effects research. For example, it,

- can test to see if there are TCB distraction-effects;
- can test to see if the TCB distraction-effects are short-lived;
- can accurately and exactly see and mark where the TCB participants are actually looking, and for how long;
- can test across all TCB courtroom participants;
- can provide in addition to testing, a permanent record in the form of a video of exactly where the participant was looking and with a marker identifying the exact spot that is the current real visual time focus of the participant;
- can provide a record for the current researcher as well as for any future researchers whom wish to see the video;
- can provide a method for third party and future researchers to examine, repeat, verify and replicate the current research in future studies;
- can provide exact TCB data and measurements which are legal-empirical and verifiable, unlike self-reports, opinion-reports and observer-reports;
- can provide better effects-research data than self-reports, opinion-reports and observer-reports is possible; and
- the TCB eye-tracking data can help to assess and verify the self-reports, opinion-reports and observer-reports.

### **Eye-Tracking Disadvantages**

For the sake of completeness, eye-tracking also has certain disadvantages. Such studies can be complex to plan, undertake and to summarise. The complexity and cross-disciplinary nature of such studies can require collaboration and expertise across a number of research fields.<sup>24</sup> Some eye-trackers have to be calibrated to the particular individual participant subject's eye focus before the research study commences.

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<sup>22</sup> Tobii, 'Tobii Paves the Way for Use of Eye-Tracking in Driver Safety' < <http://www.tobii.com/en/eye-tracking-integration/global/news-and-events/press-release-normal/archive-2011/eye-tracking-in-driver-safety/> > accessed 7 July 2012, and also demonstration video at < <http://www.youtube.com/watch?v=gvN1eIQ8NLY&feature=youtu.be> > accessed 19 January 2014.

<sup>23</sup> For example, K Kircher, A Kircher and F Claezon, *Distraction and Drowsiness - A Field Study* (VTI 2009) < [www.vti.se/publications](http://www.vti.se/publications) > accessed 19 January 2014.

<sup>24</sup> *ibid.*

Calibration can be viewed as a disadvantage in itself. It also means that one could argue that the research participant is aware and in some way affected before the research begins. However, eye-tracking technology is developing and there are some eye-trackers which do not require to be calibrated.<sup>25</sup> Indeed, this makes sense when we consider the practicality of eye-tracking safety and mass market applications. Calibration would be less practical for the general public. Mobile telephones are now incorporating eye tracking which would be non-calibrated,<sup>26</sup> as are vehicles.

The eye-tracker is an item of equipment hardware. However, it also requires software to run and deal with the data results. The eye-tracking hardware and software can be expensive to purchase. This figure can be increased if one is researching different participants at the same time eg some jury contexts.

While it can be an advantage on one hand, there will be vast quantities of data to summarise. This is because data is coming from a realtime video feed of the participant wearing the eye-tracker. The courtroom proof-of-concept demonstration generated approximately twenty thousand still images from the eye-tracking video feed. The level of statistical work can be significant.<sup>27</sup> J Ross<sup>28</sup> also refers to the following limitations of eye-tracking, namely, that it,

- Does not track peripheral vision;
- Fixations do not represent attention or understanding;
- Visual fixations do not communicate meaning;
- Can be intrusive;
- Can be expensive;
- Eye-tracking can be difficult to learn.

Notwithstanding these, we can apply eye-tracking to the problems of TCB distraction-effects research. The US Supreme Court concerns still remain to be addressed.

## Eye-Tracking Research

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<sup>25</sup> E Bate, 'Behavioural Measurement: The State of the Art, Mobile Eye-Tracking Seminar' (Trinity College Dublin 27 June 2012). Also see < [www.smi.de](http://www.smi.de) >, < [www.tracksys.co.uk](http://www.tracksys.co.uk) > and < [www.eyetracking-glasses.com](http://www.eyetracking-glasses.com) > accessed 19 January 2014.

<sup>26</sup> For example, the Samsung Galaxy.

<sup>27</sup> However, there can be specialist software programs to assist with eye-tracking research and the data generated.

<sup>28</sup> J Ross, 'Eye-Tracking: Is It Worth It?' (UX Matters 19 October 2009) < <http://www.uxmatters.com/mt/archives/2009/10/eyetracking-is-it-worth-it.php> > accessed 19 January 2014.

The device used in an eye-tracking study is known as an eye-tracker. One of the initial stages in designing eye-tracking research is formulating a hypothesis to research.<sup>29</sup> So it is not possible to properly research effects, if one does not say what effect hypothesis one is attempting to test and research. This applies to legal-empirical research generally as it does to TCB research. Frequently, this basic step is absent in TCB research. The concern of the US Supreme Court and others suggests a number of different distraction theories to be investigated, including each of the respective courtroom participants. These could include,

- X courtroom participant will be distracted to look at the TCB camera;
- X courtroom participant will be distracted to look at the TCB camera operator more than the TCB camera alone;
- X courtroom participant will be distracted to look at the TCB camera more than Y courtroom participant;
- X courtroom participant will be distracted to look at the TCB camera more than X courtroom participant self-reports of how much they were distracted to look at the TCB camera;
- X courtroom participant will be distracted to look at the TCB camera more than Y courtroom participant opinion-reports of how much X courtroom participant was distracted to look at the TCB television camera;
- X courtroom participant will be distracted to look at the TCB camera more than observer-reports on how much X courtroom participant was distracted to look at the TCB camera.

Various more issues arise to be examined.<sup>30</sup> Some of the particularly more important ones are camera-location-effect issues and visual cones-of-vision effect issues.

### **Eye-Tracking Technology and Examples**

Some reference to the technical aspects of eye-tracking is useful. The purpose of eye-tracking research is to study the eye focus, position and movements of the participant subject. The main eye-tracking measures and metrics<sup>31</sup> include, fixation, length of

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<sup>29</sup> Overview < [www.fixation2010.se/overview](http://www.fixation2010.se/overview) >, above 157, accessed 19 January 2014. There are also different types of research design, see *ibid* 159 ff.

<sup>30</sup> See visual cones-of-vision below.

<sup>31</sup> RJK Jacob and KS Karn, 'Eye-Tracking in Human-Computer Interaction and Usability Research: Ready to Deliver the Promises' in J Hyona, R Radach and H Deubel (eds), *The Mind's Eye: Cognitive and Applied Aspects of Eye Movement Research* (Elsevier Science 2003) 573, referred to *ibid* 173. Such research relies on sophisticated software (see reference *ibid* 88-91. Detailed experience and expertise with software, computers, computer science and statistics can also be a prerequisite to undertaking such studies. Note also *ibid* 171), and hardware tools, as well as calibration of those tools (see comments in relation to calibration issues, *ibid* 87-99 and 301).

fixation, number of fixations, etc.<sup>32</sup> Another measure is task completion duration.<sup>33</sup> A Duchowski refers to various eye-tracking case studies<sup>34</sup> and applications.<sup>35</sup> At a headline level, the two headline application categories are, interactive (input) applications; and diagnostic applications.<sup>36</sup> Diagnostic eye-tracking can be used in the fields of psychology, marketing, advertising, human factors and ergonomics.<sup>37</sup> It is also used in law enforcement and policing security.<sup>38</sup> Examples of interactive applications<sup>39</sup> include using eye-tracking to input instructions to or interact with a (technology) device of some sort using eye focus.<sup>40</sup> For example, a person's gaze can be used to give instructions or input instructions. Quadriplegics, for example, can use their eyes to move a pointer or cursor.<sup>41</sup> A paralysed man was able to send his first tweet with the aid of eye-tracking.<sup>42</sup> Applications include the fields of human computer interaction, visual displays and computer graphics.<sup>43</sup> Home entertainment systems may soon be controlled by merely looking at them. Devices in vehicles might similarly be controlled.<sup>44</sup> There are many

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<sup>32</sup> *ibid.* The measures referred to are fixation; fixation (gaze) duration; fixation rate (overall); fixation duration mean (overall); number of fixations (overall); scan path (fixation sequence); area of interest (AOI); gaze percentage (proportion of time) per AOI; number of fixations per AOI; gaze duration mean per AOI.

<sup>33</sup> Also V Sundstedt, 'Eye-Tracking in User Studies' (SIGGRAPH 2009, New Orleans) < [www.siggraph.org/s2009/](http://www.siggraph.org/s2009/) > accessed 12 June 2010, and also < [www.scss.tcd.ie/Veronica.Sundstedt/](http://www.scss.tcd.ie/Veronica.Sundstedt/) > accessed 12 June 2010.

<sup>34</sup> See AT Duchowski, above 181 ff. See also C Morimoto and MRM Mimica, 'Eye Gaze Tracking Techniques for Interactive Applications' (2005) 98:1 *Computer Vision and Image Understanding* 4.

<sup>35</sup> AT Duchowski, *ibid* 203 ff.

<sup>36</sup> *ibid* 205. Also V Sundstedt, 'Eye-Tracking in User Studies' (SIGGRAPH 2009), above.

<sup>37</sup> *ibid* 205. Also M Bingemann, 'Eye-Tracking Device Watches You Watching Ads' (PC World Business 10 May 2007) < [www.pcwprld.idg.com.au/article/182716/eye-tracking\\_device\\_watches\\_watching\\_a...](http://www.pcwprld.idg.com.au/article/182716/eye-tracking_device_watches_watching_a...) > accessed 30 April 2010.

<sup>38</sup> See, for example, < [www.setcan.com/eyelock.html](http://www.setcan.com/eyelock.html) >, referring to the EyeLock training system which comprises a forward focus camera and two eye-trackers, all of which are encompassed in a pair of glasses that a combat or police trainee wears, accessed 3 August 2012.

<sup>39</sup> CH Morimoto and MRM Mimica, 'Eye Gaze Tracking Techniques for Interactive Applications' (2005) 98 *Computer Vision and Image Understanding*, 4.

<sup>40</sup> See AT Duchowski, above 205.

<sup>41</sup> AT Duchowski *ibid* 206. One enterprising father also wrote his own iPhone application, called the iComm, to allow his disabled daughter to point instructions of the iPhone screen using her eyes, *Metro* (Dublin, 11 May 2010) 8. Martin Tall also refers to eye-tracking and that sometimes eye movement can sometimes be the only means of communication for some disabled people, M Tall, 'ITU Gaze Tracker: Low-Cost Gaze Interaction: Ready to Deliver the Promises' (Martin Tall, On Gaze Interaction blog) < <http://gazeinteraction.blogspot.com> > accessed 19 January 2014. Also see 'An Affordable Future for Eye-tracking in Sight' (3 April 2006) < [www.phsyorg.com/news63294534.html](http://www.phsyorg.com/news63294534.html) > accessed 30 April 2010.

<sup>42</sup> C Doyle, 'Paralysed Man Tweets Using Eye Tracking Technology' *SiliconRepublic* (Dublin, 16 June 2012) < <http://www.siliconrepublic.com/innovation/item/27778-paralysed-man-tweets-using> > accessed 19 January 2014.

<sup>43</sup> AT Duchowski, above.

<sup>44</sup> 'Tiny cameras on the dashboard monitor the driver, allowing him to control, say, the radio volume,' R Melville, 'Techno Mission: Accomplished' *Sunday Times, InGear* (Dublin, 15 July 2012).

successful examples of eye-tracking. Perhaps the most important one for current purposes is in relation to legal-psychology (particularly eyewitness identification, weapon-focus and camera-perspective-bias). However, there are many other examples across disciplines. Some of the many examples include vehicle safety, airline safety, medical, security, market research, education and reading, mass market, advertising and games. There are a growing number of eye-tracking manufacturers, conferences and courses.<sup>45</sup>

### **Choices of Eye-Tracking**

There are various types of eye-trackers. One avenue for in-court research is to use eye-trackers which are incorporated into lightweight glasses.<sup>46</sup> This type of TCB distraction research allows itself to be adopted to different courtroom participants and also in realistic settings and in real non-live court settings. There are also various types of head mounted eye-tracking tools.<sup>47</sup> Other studies can use a variety of eye-trackers where subjects can view pictures or videos of court scenes. These can be shown on a PC, laptop or projection screen. The recorded eye-tracking videos better inform our research and knowledge of effects. In considering different TCB forms and in particular long extended footage versus short or snippet footage, we need to research what is viewed, for how long, eye movement behaviour and visual processing speeds.<sup>48</sup> Eye-tracking allows us to begin such research.

### **Ethics**

We do need the input of cross-disciplinary research knowledge on a range of day to day legal issues.<sup>49</sup> We might consider what the underlying ethical issues in relation to TCB distraction-effects research may be. Issues can arise in relation to completing TCB distraction-effects research. There are various rules and regulations which have sought to regulate and or ban the use of TCB.<sup>50</sup> Various TCB cases have also resulted in tighter

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<sup>45</sup> These are referred to in greater detail in the Appendices.

<sup>46</sup> See example reference to same at < [www.eyetracker.co.uk/](http://www.eyetracker.co.uk/) > accessed 19 January 2014.

<sup>47</sup> In terms of head mounted display applications see discussion in CD Wickens, M Vincow and M Yeh *ibid* 406 ff.

<sup>48</sup> Note recent research by ML-H Vo and WX Schneider, 'A Glimpse is Not a Glimpse: Differential Processing of Flashed Scene Previews Lead to Differential Target Search Benefits' [2010] 18:2 *Visual Cognition* 171.

<sup>49</sup> S Kassin refers to juries and asks if they can do better. He is referring in particular to jury assessments of eyewitnesses, confessions, alibis and informants. He infers that we can do better. S Kassin, 'Judging Eyewitnesses, Confessions, Informants and Alibis: What is Wrong with Juries and Can They Do Better?' in A Heaton-Armstrong, E Sheperd, G Gudjonsson and D Wolchover (eds), *Witness Testimony, Psychological, Investigative and Evidential Perspectives* (Oxford University Press 2006) 345.

<sup>50</sup> Including the ABA (American Bar Association) rules and its Canon 35 (as amended), J Hoyt 487.

media self regulation.<sup>51</sup> RE Reeves Stewart in referring to TCB, ethics and the Constitution, points out that professional standards and ethical rules are also applicable, such as regulating what lawyers can and cannot say about an instant case when (and if) speaking to the press outside of the courtroom.<sup>52</sup> She refers also to the case of *Gentile v State Bar of Nevada*.<sup>53</sup> More recently RC Lee queries the ethical implications of lawyers blogging about their pending - and current - cases in the hope to influence the outcome in some way.<sup>54</sup> Such communications could be prejudicial, non-permitted ex parte communication, biased pre-trial publicity as well being professionally unethical.<sup>55</sup>

In many other circumstances court and the judicial processes are concerned to eliminate or minimise prejudicial effects. Examples in relation to juries include, for example, judicial warnings, corroboration, security, sequestration, change of venue, delay, adjustment, etc.<sup>56</sup> These protections all exist because of concern that justice be done and that legal rights are respected. TCB has raised significant debate to say the least. If we are as concerned with maintaining and protecting the integrity of the judicial system during TCB, we should equally be concerned to ensure research, safety and protection, as appropriate, to the form of TCB being considered.

While the current proposal is to begin eye-tracking studies, whether in a research setting, mock courtrooms or in real (non-live) courtrooms, it is suggested that it may be possible to consider some eye-tracking testing in a real court case in future. This is an issue to be considered in future, as it is beyond the core focus of this thesis. However, it is noted that this may not apply to all court cases nor indeed to all courtroom participants. In England and Wales, for example, S Prince points out that the (England and Wales) Contempt of Court Act 1981 prohibits research of the jury.<sup>57</sup>

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<sup>51</sup> This refer to the Riordan guidelines governing press performance and ethics and guidelines, see SR Pasternack, at SR Pasternack, 'The Effects of Perceived Community Pressure on Simulated Juror Guilt Attributions: A Study' (PhD thesis, University of Tennessee, Knoxville December 1982) 8.

<sup>52</sup> This is where a lawyer was sought to be reprimanded for particular statements made about a pending case to the press. RER Stewart, 'The Changing Relationship Between Cameras and Courts' (MA thesis, Florida Atlantic University 1998) 26.

<sup>53</sup> *Gentile v State Bar of Nevada* [1991], referred to in RER Stewart, above at 26. Full citation not given.

<sup>54</sup> RC Lee, 'Ex Parte Blogging: The Legal Ethics of Supreme Court Advocacy in the Internet Era' (2009) 61 *Stanford Law Review* 1535.

<sup>55</sup> *ibid* 1535. See also, for example, RJ Peltz, 'Fifteen Minutes of Infamy: Privileged Reporting and the Problem of Perpetual Reputational Harm' [2008] 34 *Ohio Northern University Law Review* 717; N Fennessy, 'Bringing Bloggers into the Journalistic Privilege Fold' (2005-2006) 55 *Catholic University Law Review* 1059.

<sup>56</sup> See, for example, RER Stewart, 'The Changing Relationship Between Cameras and Courts' (MA thesis, Florida Atlantic University 1998) 28.

<sup>57</sup> S Prince, 'Is Court TV A Favourable Proposition: A Normative and Comparative Analysis of the Transmission of Courtroom Proceedings on Television?' (PhD thesis, University of

The section 8 prohibition relates to the jury ‘in the course of their deliberations.’ One view is that this may not prohibit research in-court prior to leaving for deliberations which are held in the jury room. Therefore, as regards this section, it may be that in-court TCB eye-tracking research involving the jury may not be prohibited.

The (England and Wales) Contempt of Court Act does not prohibit research as regards other courtroom participants. However, in England and Wales section 41 of the Criminal Justice Act 1925 still applies - with the exception of the new UK Supreme Court and more recently Court of Appeal developments.<sup>58</sup> Equally, it does not apply in Scotland. The section prohibits any person taking photographs, in that it states that no person shall,

‘take or attempt to take in any court any photograph ... of any person, being a judge ... or a juror or a witness in or any party to any proceedings before the court, whether civil or criminal.’

Section 41 does not apply to the courts in Scotland, nor to the new UK Supreme Court. While section 41 refers to a ‘photograph’ one would have to assume from an abundance of caution and respect to the court, that it could be interpreted as including photographs, and recorded multimedia moving photography such as video recording. This could encompass video recordings made via eye-tracking miniature cameras. Therefore, this could prohibit in-court TCB distraction-effects recording via eye-tracking cameras; and eye-tracking recording of the judge, jury and witnesses. Lord Justice Woolf CJ in the case of *R v Loveridge*, which dealt with section 41, said that the section should be interpreted as encompassing modern technological developments.<sup>59</sup>

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Exeter 2003) 7. Section 8 is headed ‘Confidentiality of Jury’s Deliberations’ and states as follows: ‘(1) Subject to subsection (2) below, it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings. (2) This section does not apply to any disclosure of any particulars - (a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict, or in connection with the delivery of that verdict, or (b) in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first mentioned proceedings, or to the publication of any particulars so disclosed. (3) Proceedings for a contempt of court under this section (other than Scottish proceedings) shall not be instituted except by or with the consent of the Attorney General or on the motion of a court having jurisdiction to deal with it.’ Section 10 is headed ‘Sources of Information’ and also states as follows ‘No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.’

<sup>58</sup> See Crime and Courts Act 2013 in relation to the Court of Appeal TCB provisions.

<sup>59</sup> *R v Loveridge* [2001] 2 Cr App R 29, and also commentary in S Prince, above 92.



One could argue that it does not prohibit eye-tracking recording of the court clerk or registrar, or the lawyers (whether solicitors or barristers). This, however, depends on an interpretation of the section which conjoins the first clause (no person shall take or attempt to take in any court any photograph ...) and the second clause (... of any person, being a judge ...). If these clauses stand to be interpreted separately, it could mean that the prohibition against photography stands alone in the first clause. If so, this could therefore also prohibit eye-tracking photography of persons in court other than the judge, jury, witnesses or parties. There is also an issue to be argued as to whether 'party' means the expressly named parties or any person whatsoever in court. However, regardless of the extent of the prohibition in England and Wales encompassed within section 41, it is clear that section 41 may not prohibit TCB eye-tracking research in the UK Supreme Court, as a result of the amendment of section 41 of the Criminal Justice Act 1925 made by section 47 of the Constitutional Reform Act 2005.<sup>60</sup> Equally, the restriction in the 1925 Act does not apply to Scotland. Therefore, this could permit TCB distraction-effects research in Scotland - subject to any separate rules which may be specific to Scotland.

Separately, in terms of TCB distraction-effects in research in courts in England and Wales, part of the section 41 restriction refers to 'proceedings before the court.' This could, therefore, mean that TCB distraction-effects research with eye-trackers is permitted in non-active proceedings. Mock trials and mock research with eye-tracking would appear to be permitted. A further possibility is to use some of the personnel from an actual case in a re-enacted or mock demonstration in the same courtroom outside of the active part of the proceedings.

Yet another possibility to consider is to have members of the public in court to use eye-trackers in a real case in court. The ordinary members of the public in-court may be distracted by the TCB cameras. This could be considered in the UK Supreme Court, in Scotland and in any other courts where TCB may be permitted in England and Wales. It could also be considered in cross-jurisdictional TCB distraction research in appropriate jurisdictions where TCB is also permitted.

Of course disruptive eye-tracking could still be subject to potential other problems under contempt rules. Many studies involve test participants in a mock trial jury, as part of

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<sup>60</sup> Constitutional Reform Act 2005 < [www.legislation.gov.uk](http://www.legislation.gov.uk) > accessed 19 January 2014.

research into various factors involving eyewitness identification and testimony issues.<sup>61</sup> TCB related research would not be unprecedented. The utility of engaging in discussion, research and studies of distraction-effects of TCB remains similar to comments by S Prince and other researchers, the matter of TCB ‘raises questions about the correct relationship between the media and the courts.’<sup>62</sup> While the present researcher focuses on a different question, the benefit of the research remains. The New Zealand Law Commission paper, *Contempt in Modern New Zealand*, also seeks to deal with modern media issues such as new media contempt, juror contempt, publication restrictions and takedown orders, and seeks a prudent approach of risk reduction.<sup>63</sup> TCB should also incorporate a risk reduction approach. Other legal areas such as data protection law similarly seek to reduce risk, by for example promoting a Privacy by Design (PbD) approach.<sup>64</sup>

### **Eye-Tracking, Distraction and Ethics**

As indicated above, the immediate research being proposed is in a non-live court setting. Therefore, it does not directly impact upon a real case nor the real participants nor the participant legal and justice issues at stage in a real case. In the context of judges, they could be potential participant subjects in research studies. Irish judges have participated in two separate baseline attitudinal surveys in relation to TCB.<sup>65</sup> There does not appear to be any rule preventing any particular judges from taking part in an eye-tracking study. However, it may be an issue that judges may feel the need to consult with superior judges or the office of the Chief Justice. Judges in other jurisdictions have been involved in research studies. In the UK, researchers wishing to conduct court or judicial related research need to first contact HM Courts & Tribunals Service Data Access Panel Secretariat<sup>66</sup> and or the Judicial Office.<sup>67</sup> There does not appear to be similar formalised

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<sup>61</sup> See B Cutler and S Penrod, *Mistaken Identification: The Eyewitness, Psychology and the Law* (Cambridge University Press 1995) 9, 101-102.

<sup>62</sup> S Prince, ‘Is Court TV A Favourable Proposition: A Normative and Comparative Analysis of the Transmission of Courtroom Proceedings on Television?’ (PhD thesis, University of Exeter 2003) 8.

<sup>63</sup> M Lark, ‘Codification of Contempt,’ ADLSI (8 August 2014) < <http://www.adls.org.nz/for-the-profession/news-and-opinion/2014/8/8/codification-of-contempt/> > accessed 22 August 2014.

<sup>64</sup> See, for example, PrivacybyDesign.ca, < <http://privacybydesign.ca/> >; P Lambert, *Data Protection Law in Ireland, Sources and Issues* (Clarus Press 2013); P Lambert, *Social Networking, Law, Rights and Policy* (Clarus Press 2014).

<sup>65</sup> Each conducted by the author, in 1996 and 2010 respectively. See Appendices.

<sup>66</sup> HM Courts & Tribunals Service Data Access Panel Secretariat < <http://www.justice.gov.uk/publications/research-and-analysis/courts/research-contact-points> > accessed 19 January 2014.

<sup>67</sup> See < <http://www.justice.gov.uk/publications/research-and-analysis/courts> > accessed 19 January 2014. The author was in extended contact with the Judicial Office in terms of seeking to extend the judicial research to England and Wales.

official rules in Ireland. In the case of regular or professional witnesses, these should be able to agree and consent themselves, particularly as there is no real case or case confidentiality arising. The police, however, may need internal approval.

As regards members of the public, whether to act as mock lay participants or mock professional participants, they would be able to consent themselves. In terms of members of the public acting as mock jurors, it would be recommended that the profile should be consistent with the normal profile of persons eligible for jury selection. As a real case is not being examined, they would be free to agree themselves to participate.

As regards students acting as mock courtroom participants, there are generally internal university rules and guidelines which set out procedures for undertaking certain types of research. It would, therefore, be a matter of complying with these. In all of these instances, the participants would need to be generally advised on the type of research and activity they are about to consent to. As with any such research, the exact specific issue being researched might not be disclosed as this may influence or bias the outcome. At the end of the study, the participants would be debriefed.

In terms of the wider considerations of TCB distraction research, it is worth making the following comments. While it is possible that TCB effects-research could one day be undertaken in a real case situation, that is not presently being proposed or considered. As such, the concerns of the eye-tracker changing or otherwise influencing a real case does not arise. A simulated court case, or segment of a court case, could be the scenario for undertaking the TCB distraction research. The script for the case could be fictional or could be taken from a real past case. It should not be a case that the participants would be familiar with.

There are various potential locations for the research to take place. However, the nearer to an actual (non-live) courtroom, the better and more realistic is the research study for the participant subjects. However, a mock courtroom would also be suitable. It is noted that not all of the legal-empirical research studies would have used a real courtroom or even a mock courtroom. The in-court demonstration has an advantage over such studies.

The next issue relates to which research participant category is being researched. If it is lawyers or judges, this could be mock lawyers or judges, or real ones. Real ones would make the research potentially more realistic. In the case of judges, it may be possible to consider recently retired judges if there was a particular official sensitivity.

Frequently, legal-psychology research involves university students acting as a courtroom participant, most frequently as witnesses or jurors. There is sometimes criticism that they are inexperienced as compared to members of the public who are older. However, researchers accept the validity and viability of using student subjects. Students also tend to have an advantage in being more available and more flexible time wise than certain other potential participants.

### **Ethics, Examples and Jury Research in Ireland**

While there does not appear to be significant legal-empirical jury research in Ireland there is a generally literature.<sup>68</sup> However, it is more important to note that there is not a statutory equivalent of the restriction on jury research as contained in section 8 of the (England and Wales) Contempt of Court Act 1981. Therefore, there would be no legal statutory restriction explicitly preventing eye-tracking research in Ireland as there may be in England and Wales. However, as pointed out by M Coen,<sup>69</sup> these issues still come to be considered under Irish Common Law. It has been suggested, however, that two cases appear to operate as a blanket ban on jury research in practice.<sup>70</sup>

### **Ethics and Researching Distraction**

One might ask whether it is legitimate to undertake research of the courts, court processes and in this instance, research of a particular effect issue relating to inside the courtroom. The answer is likely yes given that there are important issues and concerns both in relation to whether TCB should be permitted, and in relation to the effects of TCB on the participants when it is permitted. There are clearly important issues at stake, including legal rights, fairness, liberty, freedom, and in some jurisdictions life itself. The issue of TCB distraction-effects, and the consequences, are a proper issue of concern to be investigated. The three most important and authoritative cases in relation to TCB, namely *Estes*,<sup>71</sup> *Chandler*<sup>72</sup> and *Hollingsworth*,<sup>73</sup> each have referred to the need for more legal-empirical research of these issues.

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<sup>68</sup> See, for example, chapters in T O'Malley, *The Criminal Process* (Round Hall 2009); and M Coen and L Heffernan, 'Juror Comprehension of Expert Evidence, A Reform Agenda' (2010) *Criminal Law Review* 195.

<sup>69</sup> M Coen, 'Elephants in the Room: The Law Reform Commission Consultation Paper on Jury Service - Part 1' (2010) 20 *Irish Criminal Law Journal* 75. Referring to the Law Reform Commission consultation entitled *Jury Service* (LRC CP 61-2010).

<sup>70</sup> *ibid* 76, referring to *People (Longe) v AG* [1967] IR 369; and *O'Callaghan v AG* [1993] 2 IR 17.

<sup>71</sup> *Estes v Texas* 381 US [1964] 532.

<sup>72</sup> *Chandler v Florida* 449 US [1981] 560.

Legal-psychology researchers are frequently involved in researching the issues involved in cases and court processes. Many researchers examine eyewitness identification, weapon-focus<sup>74</sup> and more recently camera-perspective-bias.<sup>75</sup> Other researchers also examine various aspects of court related matters. S Prince<sup>76</sup> researches court mediation processes. T-R Valikoski<sup>77</sup> researches prosecution legal speech communications process in courts. C Coulter<sup>78</sup> carries out research in relation to the workings of the family law courts in Ireland. C O’Nolan carries out ‘courtroom based research’ in relation to Irish District Courts.<sup>79</sup> Both the Short<sup>80</sup> report and P Thaler<sup>81</sup> undertook case study analysis of real courtroom cases in relation to the TCB used. We should not underscore the importance of research and case studies.<sup>82</sup> There is also research in relation to communications and behaviours in court. The non-verbal communications of judges was researched in one study. A Burnett and DM Badzinski<sup>83</sup> research the reaction of mock jurors to the non-verbal communications of the judge. The author also researches judicial attitudes in Ireland to TCB.<sup>84</sup>

TCB distraction-effects research is necessary in order to advance our research and knowledge of these issues. It is particularly needed as the concerns are real concerns and

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<sup>73</sup> *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 19 January 2014.

<sup>74</sup> For example, E Loftus, *Eyewitness Testimony* (Harvard University Press 1996).

<sup>75</sup> For example, GD Lassiter and AA Irvine, ‘Videotaped Confessions: The Impact of Camera Point of View on Judgements of Coercion’ (1986) 16 *Journal of Applied Social Psychology* 268.

<sup>76</sup> SJ Prince, ‘Institutionalising Mediation? An Evaluation of the Exeter Court Small Claims Mediation Pilot’ (2007) 5 *Web Journal of Current Legal Issues* < <http://webjcli.ncl.ac.uk/2007/issue5/prince5.html> > accessed 14 July 2012.

<sup>77</sup> T-R Valikoski, *The Criminal Trial as a Speech Communication Situation* (thesis, University of Tampere, Finland 2004) 178.

<sup>78</sup> C Coulter, Dr, *Family Law Reporting Pilot Project, Report to the Board of the Courts Service* (Courts Service 2007). Note also The Child Care Law Reporting Project and The Child Care Law Reporting Project Website which was launched on 4 April 2013, launched by Justice Rosemary Horgan.

<sup>79</sup> To use the publishers description, see C O’Nolan, *The Irish District Courts, A Social Portrait* (Clarus 2013), publisher description at [www.claruspress.ie](http://www.claruspress.ie), accessed 21 August 2014. Generally note also M Kotsonouris, *‘Tis All Lies, Your Worship’: Tales from the District Court* (Liffey Press 2011).

<sup>80</sup> EH Short and Associates, *Evaluation of California’s Experiment with Extended Media Coverage of Courts, submitted to Administrative Office for the Courts; the Chief Justice’s Special Committee on the Courts and the Media, and the California Judicial Council*, (1981) [California].

<sup>81</sup> PE Thaler, ‘The Impact of the Television Camera on Courtroom Participants: A Case Study of the Joel Steinberg Murder Trial’ (PhD thesis, New York University 1990).

<sup>82</sup> D Greenwood and M Levin, *Introduction to Action Research, Social Research for Social Change* (Sage 2007).

<sup>83</sup> A Burnett and DM Badzinski, ‘Judge Nonverbal Communication on Trial: Do Mock Trial Jurors Notice?’ (2006) 55 *Journal of Communication* 209.

<sup>84</sup> See survey in Appendices.

there are problems with the TCB research, and the research methods, used previously. Already SA Kohm<sup>85</sup> has studied reality TCB in terms of entertainment, sentencing, law and ethics, whereby sentencing decisions are used to display court sentencing as morality entertainment. The *Irish Times*<sup>86</sup> case has been argued to open up interesting issues in the TCB legal rights debate. The Law Reform Commission recommended a TCB pilot project, albeit without referring to the different forms of TCB, how it might be regulated and what effect or other research may be required.<sup>87</sup> The US Supreme Court research concerns have yet to be judicially considered in Ireland.<sup>88</sup>

While certain issues have received increasing research attention, TCB and TCB baseline issues also require research - even in Ireland. The US Supreme Court concerns are relevant here as much as they are in the US. Some examples include criminal law and policy,<sup>89</sup> presumption of innocence,<sup>90</sup> courts,<sup>91</sup> criminal procedure,<sup>92</sup> sentencing,<sup>93</sup> victims and victimology,<sup>94</sup> justice and justice theory,<sup>95</sup> legal rights and due process,<sup>96</sup> family court

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<sup>85</sup> SA Kohm, 'I'm Not a Judge But I Play One On TV: American Reality Based Courtroom Television' (PhD thesis, Simon Fraser University 2004).

<sup>86</sup> See above.

<sup>87</sup> It failed to recognise that there is no substantiation of any of the various TCB arguments given that the research to date is problematic.

<sup>88</sup> If TCB was ever considered in Ireland it would require an impact assessment, regulatory impact assessment, proper consideration of empirical research issues and how to implement and record effects data before and during an initial experiment. The various baselines, options and form issues would need careful consideration.

<sup>89</sup> A sample of the literature includes, T O'Malley, above; I Bacik and M O'Connell, *Crime and Poverty in Ireland* (Round Hall Sweet and Maxwell 1998); P O'Mahony, *Criminal Chaos, Seven Crisis in Irish Criminal Justice* (Round Hall Sweet and Maxwell 1996); P O'Mahony, *The Irish War on Drugs, The Seductive Folly of Prohibition* (Manchester University Press 2008). Also P Charleton, PA McDermott and MA Bolger, *Criminal Law* (Butterworths 1999).

<sup>90</sup> C Hamilton, *The Presumption of Innocence in Irish Criminal Law, 'Whittling the Golden Thread'* (Irish Academic Press 2007).

<sup>91</sup> One example is FF Davis, *The History and Development of the Special Criminal Court 1922-2005* (Four Courts Press 2007); C Costello (ed), *The Four Courts: 200 Years, Essays to Commemorate the Bicentenary of the Four Courts* (Incorporated Council of Law Reporting for Ireland 1996); KPE Lasok, *The European Court of Justice, Practice and Procedure* (Butterworths 1994).

<sup>92</sup> For example, D Walsh, *Criminal Procedure* (Thomson Round Hall 2002).

<sup>93</sup> ISIS, Irish sentencing website < [www.irishsentencing.ie](http://www.irishsentencing.ie) >; A Von Hirshe and A Ashworth, *Proportionate Sentencing, Exploring the Principles* (OUP 2005); A Von Hirsch, A Ashworth and J Roberts, *Principled Sentencing, Readings on Theory and Policy* (OUP 2009); A Lovegrove, *The Framework of Judicial Sentencing, A Study in Legal Decision Making* (CUP 1997); J Fionda, *Public Prosecutors and Discretion, A Comparative Study* (Clarendon 1995).

<sup>94</sup> A Crawford and J Goodey, *Integrating a Victim Perspective Within Criminal Justice, International Debates* (Ashgate 2000). T O'Malley has also been interested in this specific topic.

<sup>95</sup> BA Hudson, *Understanding Justice, An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory* (OUP 2003).

<sup>96</sup> G Hogan and G Whyte, above; M Forde, above; DJ Galligan, *Due Process and Fair Procedures, A Study of Administrative Procedures* (Clarendon 1996); DG Morgan and G

issues such as family law agreements,<sup>97</sup> scientific evidence,<sup>98</sup> the process, procedure,<sup>99</sup> form<sup>100</sup> and substance of law, etc.

One of the US judges with experience of TCB, advocates that ‘a cautious approach is preferable’ when dealing with TCB issues.<sup>101</sup> It is consistent with this approach to engage with the optimum TCB distraction-effects research avenues available. As the thesis seeks to demonstrate, one of those avenues is TCB eye-tracking distraction-effects research.

### **Eye-Tracking and Legal-Psychology**

Eye-trackers are increasingly used in psychology and eyewitness identification research. S Josephson and ME Holmes used eye-trackers recently to examine whether eyewitness use scanpaths to recognise suspects in photograph lineups.<sup>102</sup> E Loftus in legal-empirical research of the weapon-focus effect,<sup>103</sup> used a corneal reflection device<sup>104</sup> to discover where and for how long individuals would focus their attention. A corneal reflection device is one of the types of eye-focus research that can be used.<sup>105</sup> However, while there has been legal-psychology and eye focus research on particular legal issues, primarily

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Hogan, *Administrative Law in Ireland* (Round Hall Sweet & Maxwell 1998); DG Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall Sweet & Maxwell 1997); RA Primus, *The American Language of Rights* (CUP 1999).

<sup>97</sup> E Mahon and E Moore, *Post Separation Parenting: A Study of Separation and Divorce Agreements Made in the Family Law Circuit Courts in Ireland and their Implications for Parent-Child Contract and Family Lives* (Office of the Minister for Children and Youth Affairs January 2011) < www.omc.gov.ie >. Also see C Coulter, above.

<sup>98</sup> L Heffernan, *Scientific Evidence: Fingerprints and DNA* (First Law 2006).

<sup>99</sup> For example, B O Floinn, *Practice and Procedure in the Superior Courts* (Tottel 2008); H Delaney and D McGrath, *Civil Procedure in the Superior Courts* (Thomson Round Hall 2005); K Dowling, *Civil Procedure in the Circuit Court* (Round Hall Thomson Reuters 2008); K Dowling, *Civil Procedure in the District Court* (Round Hall Thomson Reuters 2009); JV Woods, *District Court Practice and Procedure in Civil, Licensing and Family Law Proceedings* (Woods); JV Woods, *District Court Practice and Procedure in Criminal Proceedings* (Woods 2010); H Delaney, *The Courts Acts 1924-1997, Including the Courts Service Act 1998* (Round Hall 2000).

<sup>100</sup> RS Summers, *The Jurisprudence of Law's Form and Substance* (Ashgate 2000).

<sup>101</sup> DF O'Scannlain, 'Some Reflections on Cameras in the Appellate Courtroom' (2007) 9 *Journal of Appellate Practice and Process* 323, 323.

<sup>102</sup> An example is S Josephson and M Holmes, 'Have You Seen Any of These Men? Looking at Whether Eyewitnesses Use Scanpaths to Recognize Suspects in Photo Lineups' (ETRA, Proceedings of the 2010 Symposium on Eye-Tracking Research & Applications, Austin, Texas 22-24 March 2010).

<sup>103</sup> E Loftus, G Loftus and J Messo, 'Some Facts About "Weapon-Focus"' (1987) 11:1 *Law and Human Behaviour* 55, n 43 at 55. More recently, see for example, JY Kwak, 'Remembering Faces: Using Eye Movement Measures to Investigate Differences Between True and False Memory' (PhD, University of California 2009).

<sup>104</sup> As originally used by GR Loftus and NH Mackworth, 'Cognitive Determinants of Fixation Location During Picture Viewing' (1978) 4:4 *Journal of Experimental Psychology* 565.

<sup>105</sup> See description in LJ Ware, above 34-35.

eyewitness identification issues, the issue of TCB effects is largely, if not entirely, ignored.<sup>106</sup>

- *Eye-tracking and Police Interviews/Camera-Perspective-Bias*: More recently there is also increasing use of eye-tracking in relation to legal-psychology research into the effects of cameras and camera perspective in recorded police interviews and confessions.<sup>107</sup> This is partly driven by the knowledge that there can be false convictions, and erroneous and false confessions captured on video recordings of suspect interrogations. Different camera angles and focus orientations of the interview camera can alter significantly how viewers (eg judges, jurors, etc) of such film footage rate the genuineness and voluntariness of the recorded ‘confessions.’ The manner in which the evidence is filmed, ie the confession footage, can influence judgements of guilt.<sup>108</sup> Mock jurors have been found to be influenced by the camera angle from which the interrogation is filmed.<sup>109</sup> This is now known as *camera-perspective-bias*.<sup>110</sup> This is additionally significant since the Innocence Project which applies DNA technology and techniques to past cases. It found that a quarter of the DNA exoneration cases originally relied strongly on false confessions.<sup>111</sup> DNA and eye-tracking are helping to reduce this number - in different ways. The Irish branch of Innocence Project began in 2009.<sup>112</sup> Obviously, these projects are interdisciplinary in nature, relying on law and forensic techniques. Most criminal investigation interviews that are recorded, adopt a suspect-only focused angle. This is as opposed to focusing on the police officer or focusing on both of them at the same time.<sup>113</sup> GD Lassiter and AA Irvine<sup>114</sup> showed the same interview recorded on different cameras to show suspect only, police officer only, and both equally focused. The research study subjects then viewed one of the videos, depending on which group they were in. The subjects whom saw the suspect-

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<sup>106</sup> Legal-psychology have been accepted and permitted in various courts. However, there is a somewhat different approach as between the US and UK as to which legal-psychology expert evidence is permitted. In the US the traditional test was the Frye test. *Frye v US* 293 F 1013 [DC Circuit 1923]. However, this was replaced by the Federal Rules of Evidence, as held in a series of cases. These cases were *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 [1993]; *General Electric Co v Joiner* 522 US 136 [1997]; and *Kumho Tire Co v Carmichael* 526 US 137 [1999]. This has resulted in debate in relation to certain forms of expert evidence and accepted expertise. See discussion in PC Giannelli, ‘Forensic Symposium: The Use and Misuse of Scientific Evidence’ (2003) 28 *Oklahoma City University Law Review* 1, 10-11.

<sup>107</sup> This is also noted by LJ Ware, above 35.

<sup>108</sup> HC Schmidt, ‘Effects of Interrogator Tactics and Camera Perspective Bias on Evaluations of Confession Evidence’ (MSc thesis, Ohio University 2006) 3.

<sup>109</sup> GD Lassiter and AA Irvine, ‘Videotaped Confessions: The Impact of Camera Point of View on Judgements of Coercion’ (1986) 16 *Journal of Applied Social Psychology* 286. Referred to in HC Schmidt, above 9-10.

<sup>110</sup> The author refers to camera perspective bias issues in Ireland, see P Lambert, ‘Confessions and Camera Perspective Bias’ (December 2010) *Bar Review* 128.

<sup>111</sup> See < [www.innocenceproject.org](http://www.innocenceproject.org) > and as referred to in HC Schmidt, above 11.

<sup>112</sup> See < [www.InnocenceProject.ie](http://www.InnocenceProject.ie) >.

<sup>113</sup> This also enhances the salience of the suspect and also the perceived voluntariness of any confession. See HC Schmidt, above 25-26.

<sup>114</sup> GD Lassiter and AA Irvine, above, 286. Referred to in HC Schmidt, above 26.



only video, perceived less coercion.<sup>115</sup> Other research also confirmed that suspect-only focus videos yielded significantly higher ratings for perceived guilt and voluntariness.<sup>116</sup> As a result of the GD Lassiter and AA Irvine study, the police in New Zealand changed their practice to ensure that there was no suspect-only video recordings, and that suspect and questioner were always in frame.<sup>117</sup> Pressure is increasing to change policies elsewhere also. LJ Ware<sup>118</sup> also examined camera-perspective-bias and used eye-trackers to monitor visual attention. She also refers to studies and the literature which shows that suspect-only focus camera perspective, creates a bias for judgements of voluntariness and guilt.<sup>119</sup> Eye-trackers are increasingly used in legal-psychology, including eyewitness identification research, weapon-focus and camera-perspective-bias;

- *Eyewitness Identification:* Research also examines how witnesses come to recognise and identify suspects using eye-tracking.<sup>120</sup> Legal-psychology and a variety of research, sometimes including weapon-focus, indicate that memory is influenced by event factors and encoding which influence the later memory and recall. More recently eye-tracking research is also coming to investigate some of these. In one study C Williams uses eye-trackers on twenty four test subjects and found that not all memories are created equal<sup>121</sup>;
- Implications other than distraction also arise. Consider the statement in C Williams findings, that the ‘results provide support for the claim that target memory is dependent on the number of times the target is present rather than how many times it is searched for.’<sup>122</sup> There has been an assumption promulgated that TCB distraction and legal-psychological effects disappear with familiarity with the TCB cameras and the use of TCB. However, there would appear to be a need to examine this. We need to consider whether the presence of TCB cameras could lead to greater opportunity for distraction in-court and or adversely effected memory;

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<sup>115</sup> *ibid.*

<sup>116</sup> See for example GD Lassiter, PJ Munhall, RJ Ploutz-Snyder and DL Breitbecher, ‘Illusory Causation: Why It Occurs’ (2002) 13 *Psychological Science* 299, as referred to in HC Schmidt, above 28.

<sup>117</sup> See HD Schmidt, above 31.

<sup>118</sup> LJ Ware, above.

<sup>119</sup> WA Geller, *Police Videotaping of Suspect Interrogations and Confessions: A Preliminary Examination of Issues and Practices* (A Report to the National Institute of Justice, Washington, DC: US Department of Justice 1992); SM Kassin, ‘The Psychology of Confession Evidence’ (1997) 52 *American Psychologist* 221; and GD Lassiter, ‘Illusory Causation in the Courtroom’ (2002) 11 *Current Directions in Psychological Science* 204; each as referred to in LJ Ware, above 10.

<sup>120</sup> For example, S Josephson and ME Holmes, ‘Have You Seen Any of These Men? Looking at Whether Eyewitness Use Scanpaths to Recognize Suspects in Photo Lineups’ (Proceedings ETRA 2010 Proceedings of the 2010 Symposium on Eye-Tracking Research & Applications 2010) 44.

<sup>121</sup> CC Williams, ‘Not All Visual Memories Are Created Equal’ (2010) 18 *Visual Cognition* 201. There were 24 subjects in experiment 1 and 48 in experiment 2. More generally see, for example, M Mitchell, ‘Initial Report of the Eyewitness Identification Field Studies’ (2011) 95 *Judicature* 49.

<sup>122</sup> CC Williams, ‘Not All Visual Memories Are Created Equal’ (2010) 18 *Visual Cognition* 201, 223.

- S Josephson and ME Holmes, for example, used eye-trackers to examine whether eyewitness use scanpaths to recognise suspects in photograph line-ups.<sup>123</sup> There is also research suggesting that gaze direction of the subject being looked at can effect judgements of facial attractiveness.<sup>124</sup> Television research also suggests that the viewing angle<sup>125</sup> does matter and that this can have differing effects. Camera focal length can also impact upon impressions of speed.<sup>126</sup> Eye-tracking research can assist TCB distraction-effects research;
- Research of perception in real world settings is constantly increasing.<sup>127</sup> Perception and cognition issues are also investigated<sup>128</sup> as is the principles of visual attention.<sup>129</sup> Research of memory for events as seen and perceived are important.<sup>130</sup> Ninety percent of information reaching our brain is visual.<sup>131</sup> In terms of TCB, whether it be educational, distraction or other effects, the significant amount is visual in orientation. Research could be expending more attention to the research of the visual elements of TCB and TCB distraction-effects. We also need to consider research such as the first Federal pilot experiment and the New Zealand study;
- *Weapon-Focus*: E Loftus conducts legal-empirical research in relation to the weapon-focus effect<sup>132</sup> and to discover where and for how long individuals would focus their attention. Perhaps the seminal text in relation to weapon-focus is Loftus's book *Eyewitness Testimony*.<sup>133</sup> She is a Professor of Law.<sup>134</sup> Perhaps courtroom participants may respond

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<sup>123</sup> An example is J Josephson and M Holmes, 'Have You Seen Any of These Men? Looking at Whether Eyewitnesses Use Scanpaths to Recognize Suspects in Photo Lineups' (ETRA, Proceedings of the 2010 Symposium on Eye-Tracking Research & Applications, Austin, Texas 22-24 March 2010).

<sup>124</sup> See L Ewing, G Rhodes and E Pellicano, 'Have You Got The Look? Gaze Direction Affects Judgements of Facial Attractiveness' (2010) 18 *Visual Cognition* 321.

<sup>125</sup> S Bellman, A Schweda and D Varan, 'Viewing Angle Matters - Screen Type Does Not' (2009) 59 *Journal of Communication* 609.

<sup>126</sup> S Lines and J Searle, 'Factors Affecting the Impression of Vehicle Speed Gained from a Video Recording' (1995) 81 *Perceptual & Motor Skills* 472.

<sup>127</sup> JM Henderson, *Real World Scene Perception* (Psychology Press 2005).

<sup>128</sup> G Hartfield, *Perception and Cognition, Essays in the Philosophy of Psychology* (Oxford: Clarendon Press 2009).

<sup>129</sup> C Bundesen and T Habekost, *Principles of Visual Attention: Linking Mind and Brain* (Oxford University Press 2008).

<sup>130</sup> M McCotter, F Gosselin, P Sowden and P Schyns, 'The Use of Visual Information in Natural Scenes' at 938; A Hollingsworth, 'Memory for Object Position in Natural Scenes' at 1003; MS Castelhana and JM Henderson, 'Incidental Visual Memory for Objects in Scenes' at 1017; all in JM Henderson, *Real World Scene Perception* (Psychology Press 2005).

<sup>131</sup> (Fixation 2010, International Symposium on Fixational Eye Movements and Visual Stabilization) < [www.fixation2010.se/overview/](http://www.fixation2010.se/overview/) > accessed 19 January 2014.

<sup>132</sup> E Loftus, G Loftus and J Messo, 'Some Facts About "Weapon-Focus"' (1987) 11:1 *Law and Human Behaviour* 55, 55 n 43. More recently, see for example, JY Kwak, 'Remembering Faces: Using Eye Movement Measures to Investigate Differences Between True and False Memory' (PhD thesis, University of California 2009). GR Loftus and NH Mackworth, 'Cognitive Determinants of Fixation Location During Picture Viewing' (1978) 4:4 *Journal of Experimental Psychology* 565. LJ Ware, above 34-35.

<sup>133</sup> E Loftus, *Eyewitness Testimony* (Harvard University Press 1996).

<sup>134</sup> She is also a Professor of Psychology.

slower, faster or longer in TCB situations versus non-TCB situations.<sup>135</sup> Eye-tracking can be incorporated into such research. Other researchers such as LM Hulse and A Memon have studied emotional arousal and the presence of a weapon on police officer recall of a simulated crime.<sup>136</sup> This includes weapon-focus as well as gauges arousal levels. A heart rate monitor is used.<sup>137</sup> Other research also looks to incorporate anxiety levels.<sup>138</sup> It does not appear TCB effects-research yet incorporates heart monitors, anxiety levels, base levels, etc. Eye-tracking and heart monitoring can also be used simultaneously;

- *Camera-Perspective-Bias*: LJ Ware's study and the literature show that the suspect-only focus camera perspective, creates a bias in favour of judgements of voluntariness and guilt.<sup>139</sup> One of the seminal researchers in this area is GD Lassiter, whom in one of his research studies asks 'is guilt in the eye of the camera?'<sup>140</sup> S Landstrom et al,<sup>141</sup> amongst others, reaffirmed camera-perspective-bias in their research. The 'results confirmed the camera-perspective-bias, by showing that the observers in the "suspect-only" condition assessed the confession as significantly more reliable than did the observers in the "interviewer-only" condition.'<sup>142</sup> They further state that 'the camera should not be considered a passive bystander, objectively recording what is said and done.'<sup>143</sup> Camera-perspective-bias can influence perceptions of the suspect's guilt, confession voluntariness and general credibility.<sup>144</sup> This is a real world legal problem which legal-empirical research is seeking to address.

## Participant Numbers

One consideration in terms of developing TCB eye-tracking studies may involve consideration of how many research participants may be needed in each study. There is

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<sup>135</sup> On example of research referring to response times in other context is HJV Rutherford and JE Raymond, 'Effects of Spatial Cues on Locating Emotional Targets' (2010) 18 *Visual Cognition* 389. Fifty subjects, twenty two subjects, forty subjects and twenty eight subjects were used in respective experiments.

<sup>136</sup> LM Hulse and A Memon, 'Fatal Impact? The Effects of Emotional Arousal and Weapon Presence on Police Officers' Memories for a Simulated Crime' (2006) 11 *Legal and Criminological Psychology* 313.

<sup>137</sup> *ibid* 317.

<sup>138</sup> N McGlade and A Moran, 'Anxiety and Visual Search Strategy in Expert Female Gymnasts' First Irish Workshop on Eye-Tracking: Abstracts < <http://isg.cs.tcd.ie/iwet/Abstract6.htm> > accessed 25 May 2010.

<sup>139</sup> LJ Ware, above. WA Geller, *Police Videotaping of Suspect Interrogations and Confessions: A Preliminary Examination of Issues and Practices* (A Report to the National Institute of Justice, Washington, DC: US Department of Justice 1992); SM Kassin, 'The Psychology of Confession Evidence' (1997) 52 *American Psychologist* 221; and GD Lassiter, 'Illusory Causation in the Courtroom' (2002) 11 *Current Directions in Psychological Science* 204; each as referred to in LJ Ware, above 10.

<sup>140</sup> DG Lassiter, AL Geers, PJ Munhall, IM Handley and MJ Beers, 'Videotaped Confessions: Is Guilt in the Eye of the Camera?' in M Zanna (ed), *Advances in Experimental Social Psychology* (Academic Press, vol 33 YEAR) 189.

<sup>141</sup> S Landstrom, ER AF Hjelmsatar and PA Granhag, 'The Camera Perspective Bias: A Case Study' (2007) 4 *Journal of Investigative Psychology and Offender Profiling* 199.

<sup>142</sup> *ibid* 199.

<sup>143</sup> *ibid* 200.

no golden rule and numbers will vary depending on the exact research being undertaken, complexity and on the availability of subjects. Eye-tracking has advantages over self-reports, opinion-reports and observer-reports in that opinion (and speculation) is minimised as the TCB eye-tracking data is from direct visual evidence. It is first hand, not second or third hand, and it is recorded and verified. If real judges are the subjects, then one would expect that the available subject population would be on the smaller side. Some examples from the literature are also illustrative. J Pohl et al used fourteen test subjects.<sup>145</sup> JL Harbluk and YI Noy's eye-tracking research used twenty one subjects.<sup>146</sup> N Kathmann et al used twenty seven subjects.<sup>147</sup> RA Lavine et al<sup>148</sup> used twenty subjects. CD Wickens et al<sup>149</sup> undertook research with twelve pilots. In P Kasarskis et al,<sup>150</sup> seventeen subjects were used. CD Wickens et al used fourteen subjects.<sup>151</sup> K Colvin et al use twelve pilots participating.<sup>152</sup> Twenty one pilots were used in another study.<sup>153</sup> Another study had thirty two subjects participating.<sup>154</sup> D Shores in his TCB research used

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<sup>144</sup> ibid.

<sup>145</sup> J Pohl, W Birk and L Westervall, 'A Driver-Distracted-Based Lane-Keeping Assistance System' (2007) 221 *Journal of Systems and Control Engineering* 541. However, there are driver cognitive distraction studies. See, for example, J Harbluk and YI Moy, 'The Impact of Cognitive Distraction on Driver Visual Behaviour and Vehicle Control' *Transport Canada* (February 2002).

<sup>146</sup> JL Harbluk, YI Noy, PL Trbovich and M Eizenman, 'An On-Road Assessment of Cognitive Distraction: Impacts on Driver's Visual Behavior and Braking Performance' (2007) 39 *Accident and Analysis Prevention* 372.

<sup>147</sup> N Kathmann, A Hochrein and R Uwer, 'Effects of Dual Task Demands on the Accuracy of Smooth Pursuit Eye Movements' (1999) 36 *Psychophysiology* 158.

<sup>148</sup> RA Lavine, JL Sibert, M Gokturk and B Dickens, 'Eye-Tracking Measures and Human Performance in a Vigilance Task' (2002) 73 *Aviation, Space and Environmental Medicine* 367.

<sup>149</sup> CD Wickens, J Goh, WJ Horrey and DA Talleur, 'Attentional Models of Crosstask Pilot Performance Using Advanced Display Technology' (2003) 45 *Human Factors: The Journal of the Human Factors and Ergonomics Society* 360.

<sup>150</sup> P Kasarskis, J Stehwein, J Hickox, A Aretz and C Wickens, 'Comparison of Expert and Novice Scan Behaviors During VFR Flight' (11th International Symposium on Aviation Psychology, Columbus, Ohio, Ohio State University 2001).

<sup>151</sup> CD Wickens, AL Alexander, WJ Horrey, A Nunes and TJ Hardy, *Traffic and Flight Guidance Depiction on a Synthetic Vision System Display: The Effects of Clutter on Performance and Visual Attention Allocation* (Aviation Human Factors Division Institute of Aviation, University of Illinois Report 2004) < [www.incongentaconnect.com](http://www.incongentaconnect.com) > accessed 6 August 2010 and < <http://www.humanfactors.uiuc.edu/Reports&PapersPDFs/TechReport/04-10.pdf> > accessed 7 July 2012.

<sup>152</sup> K Colvin, R Dodhia and RK Dismukes, 'Is Pilots' Visual Scanning Adequate to Avoid Mid-Air Collisions?' (13th International Symposium on Aviation Psychology, Oklahoma, 2005) 104.

<sup>153</sup> MT Jodlowski, SM Doane and RJ Brou, 'Adaptive Expertise During Simulated Flight' (Human Factors and Ergonomics Society Annual Meeting Proceedings 2003) 2028.

<sup>154</sup> See L Ewing, G Rhodes and E Pellicano, 'Have You Got The Look? Gaze Direction Affects Judgements of Facial Attractiveness' (2010) 18 *Visual Cognition* 321.

fifty eight subjects.<sup>155</sup> In Y Itoh et al's research, five pilot subjects were used.<sup>156</sup> The research of camera-perspective-bias by S Landstrom et al involved thirty two subjects.<sup>157</sup> Further research by S Landstrom et al<sup>158</sup> used ninety six subjects. LM Hulse and A Memon researching weapon-focus and arousal used seventy police officers as test subjects.<sup>159</sup>

### **Eye-Tracking and Camera Frames**

C Wickens et al<sup>160</sup> refer to frame issues. Different angles and frames can have different effects and meanings.<sup>161</sup> We can begin examining the various issues in the TCB field. Different frames can have different costs and benefits, advantages and disadvantages.<sup>162</sup> We can examine and consider these for TCB. Adapting C Wickens et al's research to TCB, we might consider research involving the following frames in TCB research (including eye-tracking),

- Courtroom frame, details of the parameters of the instant courtroom setting and environment;
- Participant head frame, defined in terms of their orientation of head;
- Trunk frame, if different from head (eg a juror may have to look left or right to see the witness stand, camera, etc);
- Camera location frame;
- Camera focus frame, orientation and direction of camera focus;
- Camera control frame eg details of the camera operator;
- Glasses<sup>163</sup> can incorporate eye-trackers, so it is possible for one or all courtroom participants in a research study to wear eye-trackers.<sup>164</sup>

C Wickens et al<sup>165</sup> also suggest that the interaction of the different frames and the effort necessary to deal with same will vary in cognitive demand, time, workload, etc, between

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<sup>155</sup> D Shores 'The Effects of Courtroom Camera on Verbal Behavior: An Analysis of Simulated Trial Witness Testimony in Courtrooms Using Television Cameras' (PhD thesis, University of Florida 1981) viii.

<sup>156</sup> Y Itoh, Y Hayashi, I Tsukui and S Saito, 'The Ergonomic Evaluation of Eye Movement and Mental Workload in Aircraft Pilots' (1990) 33 *Ergonomics* 719.

<sup>157</sup> S Landstrom, ER AF Hjelmsatar and PA Granhag, 'The Camera Perspective Bias: A Case Study' (2007) 4 *Journal of Investigative Psychology and Offender Profiling* 199.  
<sup>158</sup> *ibid* 199, 202.

<sup>159</sup> LM Hulse and A Memon, 'Fatal Impact? The Effects of Emotional Arousal and Weapon Presence on Police Officers' Memories for a Simulated Crime' (2006) 11 *Legal and Criminological Psychology* 313.

<sup>160</sup> *ibid* 383, 384.

<sup>161</sup> See CD Wickens, M Vincow and M Yeh, *ibid* 398 ff.

<sup>162</sup> *ibid* 401.

<sup>163</sup> Just one example of glasses with eye-trackers is the EyeLock training system. See < [www.setcan.com/eyelock.html](http://www.setcan.com/eyelock.html) > accessed 3 August 2012.

<sup>164</sup> *ibid* 383, 384.

frames. They also note that in particular high risk systems, giving the examples of vehicle control and medical operations, the premium that is put on reducing errors.<sup>166</sup> HC Schmidt also refers to the high stakes of criminal cases and investigations.<sup>167</sup> Many would agree that court cases, and especially certain types of court cases, are equally important and high risk systems. Rights, liberty, justice and even life can be at stake.

### **Other Research Data**

Eye-tracking research can also include valuable data from other instruments. For, example a heart rate monitor can be introduced. Issues such as stress are generally not included in the TCB effects-research. Y Itoh et al<sup>168</sup> uses eye-trackers and heart rate monitoring. The research examined pilots looking at a particular type of instrument. Under a normal situation pilots of two different types of plane (B747 and B767) did not differ. However, when abnormal situations were introduced, different eye scanning patterns were found between the participant groups.<sup>169</sup> LM Hulse and A Memon study police officer actions,<sup>170</sup> and anxiety and arousal levels both before and during the studies<sup>171</sup> with wireless heart monitors.<sup>172</sup> This raises similar research possibilities for TCB eye-tracking. It is another measure of normative accurate research not yet discussed in TCB distraction-effects research.

### **First In-Court TCB Eye-Tracking Demonstration**

Some of the one off in-court television broadcasts in the UK took years of negotiation before approval and agreement was reached. As noted above, the US Supreme Court (and possibly courts elsewhere) are not aware of the existence of eye-trackers when discussing TCB issues, particularly effect issues. No commentator has discussed or identified the utility of eye-tracking of TCB effects-research. It is, therefore, useful to consider and recommend, as the thesis does, eye-tracking in order to address (parts of) the US Supreme Court research concerns.

While eye-tracking studies can be costly, complex and can produce very large volumes of data, it would be useful and would assist in scoping eye-tracking study of TCB in-court effects, to bring an eye-tracker into an actual courtroom and to examine how it will

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<sup>165</sup> CD Wickens, M Vincow and M Yeh, above 384-385.

<sup>166</sup> *ibid* 385.

<sup>167</sup> HC Schmidt, above 18.

<sup>168</sup> Y Itoh, Y Hayashi, I Tsukui and S Saito, 'The Ergonomic Evaluation of Eye Movement and Mental Workload in Aircraft Pilots' (1990) 33 *Ergonomics* 719.

<sup>169</sup> *ibid*.

<sup>170</sup> LM Hulse and A Memon, above 316.

<sup>171</sup> *ibid* 317.

<sup>172</sup> *ibid*.

operate. This assists in scoping actual eye-tracking experimentation, deciding upon which eye-trackers to use, developing hypothesis and models of examination for effects, etc. It also highlights some of the considerations which arise, such as visual cones-of-vision and location-effects. These have not been referred to the TCB literature.

With this in mind, the author entered into dialogue with the court authorities in Ireland to discuss the possibility of obtaining permission to undertake a recorded demonstration of eye-tracking technology in a real courtroom. After a period of discussion, the Courts Service in Ireland granted permission in principle to such a demonstration. Certain criteria were required to be formalised and documented.

The ultimate demonstration involved a head mounted eye-tracker. The subject sat in the respective positions of the main courtroom participants, namely, barrister, solicitor, witness, court clerk and judge. It was initially hoped to undertake the demonstration in two courts, one normal or commercial/civil court, and one with a jury box. In the later court, it was proposed that the subject wearing the head mounted eye-tracker also sit in the jury box. Ultimately this did not occur.

One of the advantages of an eye-tracker is that whatever the subject looks at, can be monitored, but also recorded. Therefore, the demonstration of where the participating subject is looking, and can look (their visual cone-of-vision), can be recorded in relation to their position in the courtroom.<sup>173</sup> Location-effect issues should be incorporated in future research. The policy and design implications also need to be considered. It was also proposed to introduce an actual tripod TCB camera into the courtroom. This would act as an example of TCB camera distraction. The proposal was to record the participant eye movements and focus on their visual cone-of-vision in their respective locus; and then secondly, introduce the tripod TCB camera to a fixed position within the visual cone-of-vision, to record and demonstrate how an eye-tracker can accurately monitor, track and record when a participant actually looks at the TCB camera. P Pohl et al in relation to their study suggest that further research now be carried out given that their

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<sup>173</sup> In addition, while not a full eye-tracking experiment given that, a different type of eye-tracker may be more appropriate; significantly more detail and planning would be required; as well as dealing with issues of official and university approvals. In addition, while not a full eye-tracking study (given that, a different type of eye-tracker would be more appropriate; significantly more detail and planning would be required; budget; as well as dealing with issues of official and university approvals), it was proposed to introduce an actual tripod TCB camera into the courtroom. This would act as an example of distraction focus.

case study shows that ‘the feasibility of the concept has already been show.’<sup>174</sup> The author would make a similar suggestion having carried out the TCB eye-tracking proof-of-concept demonstration.

## Conclusion

The research recommends a greater appreciation of the nuances of TCB distraction-effects research, and that greater granularity can assist in better understanding of the effects, legal-policy and legal issues concerned. Better research is needed in order that courts today will have a suitable body of effects-research available to them. Importantly, however, the thesis recognises that better more normative TCB effects-research is indeed possible. We can and should use eye-tracking in addressing the many effects concerns posed by TCB and the US Supreme Court. It is particularly well suited to TCB distraction-effects research. Courts and legal-policymakers would be better informed in their own considerations. These concerns and challenges remain real legal and legal-policy issues today as they have done previously. The important difference is that today’s normative research opportunities are potentially better suited to reaching more firm conclusions.

We can and should expand the use of eye-tracking especially where it can bring greater clarity and assurance to TCB concerns.<sup>175</sup> The thesis recommends TCB eye-tracking legal-empirical research. This is particularly apt to TCB distraction-effect issues. Eye-tracking provides advantages over past TCB research,<sup>176</sup> such as ‘direct’ measurements and ‘continual [recorded] ... measurements.’<sup>177</sup> Another advantage is its ability to act as a validation mechanism over certain past and current research studies. Eye-tracking tools permit TCB research incorporating direct testing and direct observation of participants.<sup>178</sup> It tracks, documents and *records exactly* where TCB participants actually look in the courtroom setting.<sup>179</sup> We should be ambitious in considering the normative research tools and research avenues today available to evaluate the TCB concerns which continue to exist. These have been most recently voiced in the UK by the Lord Chief Justice.<sup>180</sup>

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<sup>174</sup> P Pohl, W Birk and L Westervall, ‘A Driver-Distraction-Based Lane-Keeping Assistance System’ (2007) 221 *Journal of Systems and Control Engineering* 541, 551.

<sup>175</sup> See K-J Raiha in relation to a call to expand eye-tracking research generally, referred to at ‘An Affordable Future for Eye-Tracking in Sight’ < [www.physorg.com/news63294534.html](http://www.physorg.com/news63294534.html) > accessed 19 January 2014.

<sup>176</sup> Particularly opinion-reports and self-reports.

<sup>177</sup> ‘An Affordable Future for Eye-Tracking in Sight’ < [www.physorg.com/news63294534.html](http://www.physorg.com/news63294534.html) > accessed 19 January 2014.

<sup>178</sup> See LJ Ware, above 11.

<sup>179</sup> See < [www.prsresearch.com/prs-tools/](http://www.prsresearch.com/prs-tools/) > accessed 19 January 2014.

<sup>180</sup> See F Gibb, ‘Britain Rethinks Cameras in Court’ *Times* (London, 16 May 2014).



We should also advance our legal-empirical research avenues in order to deal with the popular arguments which still remain to be effectively backed-up by the research.



## CHAPTER 14: TCB EYE-TRACKING DEMONSTRATION

### Introduction

One of the TCB concerns is that the courtroom participants may be distracted by the TCB camera and or the TCB camera operator. This is the TCB distraction-effects question. The US Supreme Court has discussed some of the concerns which arise in relation to TCB on three occasions.<sup>1</sup> The US Supreme Court is aware that there are research gaps hindering it from giving assured answers on the distraction concerns. Various US Supreme Court comments consider that more legal-empirical research is necessary to fully consider the research concerns. Unfortunately, the research concerns have not yet been properly addressed.

One of the problems with the distraction question is that if there are effects, they can be hard to gauge (or hard to gauge exactly), with self-reports, opinion-reports and observer-reports. The distraction-effects may also be different for different courtroom participants and across participant categories. Research to date is undermined to the extent that much of it almost solely relies on self-reports from courtroom participants (as to whether they themselves were distracted or not). Reports of effects on others are also opinion based.<sup>2</sup> Eye-tracking is proposed as a means of assisting courts, researchers and legal-policymakers in arriving at more informed and assured decisions. A proof-of-concept demonstration of eye-tracking technology for TCB effects-research and in a real criminal courtroom, assists to advance this suggestion. Indeed, some of the other eye-tracking research also incorporates eye-tracking proof-of-concept type research. The author undertook what appears to be the first TCB related proof-of-concept research in a courtroom.<sup>3</sup>

### The US Supreme Court Concerns and Distraction

The thesis recommends the use of eye-tracking technology in addressing part of the US Supreme Court concerns including in particular distraction. As far as the author can

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<sup>1</sup> The cases were 1965, 1981 and 2010. See *Estes v Texas* 381 US [1964] 532; *Chandler v Florida* 449 US [1981] 560; and *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 19 January 2014. See 'US Judge Overturns Gay Marriage Ban' (Irish Times online, 5 August 2010) < [www.irishtimes.com](http://www.irishtimes.com) > accessed 3 August 2012, regarding ultimate trial decision.

<sup>2</sup> The general research to date is too heavily reliant upon self-reports and opinion-reports only. The legal-empirical research in relation to in-court TCB distraction-effects is still minimal.

<sup>3</sup> This may also be the first time that an eye-tracker has been used in a courtroom.

ascertain, eye-tracking has never been considered inside any courtroom on any issue.<sup>4</sup> It has not been addressed, nor considered, in any of the US Supreme Court TCB cases nor apparently the related TCB effects-research. The literature on TCB distraction has consequently not considered or referred to the advantages of TCB eye-tracking technology.

### **Proof-of-Concept Demonstration**

The TCB effects referred to by the US Supreme Court which appear most relevant for eye-tracking research are distraction-effects caused by the TCB cameras (and TCB camera operators) in the courtroom (ie in-court effects).<sup>5</sup> A number of scoping and preparation issues also need to be considered. The thesis is novel in linking TCB and eye-tracking, and in making the suggestion that eye-tracking can apply to TCB distraction-effects research. In terms of advancing, it is a useful, if not a necessary, first step to undertake a proof-of-concept demonstration of eye-tracking in-court (see below). A proof-of-concept demonstration can assist the development of the models needed for such normative legal-empirical research.

### **Eye-Tracking Already In Use**

By way of background and context, it is useful to refer to eye-tracking generally. Regardless of TCB research, eye-tracking is used widely across many fields. Some of the fields where eye-tracking is used include safety, medicine, psychology, advertising, marketing and design. There are even some legal security applications as well as various legal-psychology research into eyewitness identification, witness memory and camera-perspective-bias already using eye-tracking.<sup>6</sup>

Eye-trackers examine how eyewitnesses recognise suspects in photograph line-ups.<sup>7</sup> They are additionally used for examining the weapon-focus effect<sup>8</sup> to discover where and

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<sup>4</sup> The only other area appears eye-tracking for effectiveness of tobacco product warnings. While referred to in the context of a legal case, this would be out-of-court eye-tracking research.

<sup>5</sup> While there are numerous potential effects referred to by the US Supreme Court, and indeed commentators, which can be used as the primary research hypothesis for developing an eye-tracking effects study, in particular distraction, there are many issues which may be addressed beforehand.

<sup>6</sup> For one recent example, see JY Kwak, 'Remembering Faces: Using Eye Movement Measures to Investigate Differences Between True and False Memory' (PhD thesis, University of California 2009).

<sup>7</sup> An example is S Josephson and M Holmes, 'Have You Seen Any of These Men? Looking at Whether Eyewitnesses Use Scanpaths to Recognize Suspects in Photo Lineups' (ETRA, Proceedings of the 2010 Symposium on Eye-Tracking Research & Applications, Austin, Texas, 22-24 March 2010).

for how long individuals focus their attention.<sup>9</sup> Eye-tracking is also used to research effects of cameras and camera-perspective-bias in recorded police confessions.<sup>10</sup> The interview camera can alter significantly how viewers of such film footage rate the genuineness and voluntariness of the recorded interview ‘confessions.’ The manner in which the evidence is filmed, ie the confession footage, can influence judgements of guilt.<sup>11</sup> Mock jurors have been found to be influenced by the camera angle from which the confession interrogation is filmed,<sup>12</sup> known as camera-perspective-bias.<sup>13</sup> Camera-perspective-bias research uses eye-trackers to monitor visual attention. Eye-trackers have also been used in another novel legal context, but not yet in-court, namely, tobacco effects litigation in the US.<sup>14</sup> It has been suggested that court mandated health advertisements use eye-tracking research. This also uses baseline<sup>15</sup> research. TCB research generally ignores the gathering of important baseline data in effects-research prior to TCB occurring. This can underscore the utility of subsequent research findings.

## Scoping

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<sup>8</sup> E Loftus, G Loftus and J Messo, ‘Some Facts About ‘Weapon-Focus’’ (1987) 11:1 Law and Human Behaviour 55, 55 n 43. More recently, see for example, JY Kwak, ‘Remembering Faces: Using Eye Movement Measures to Investigate Differences Between True and False Memory’ (PhD thesis, University of California 2009).

<sup>9</sup> As originally used by GR Loftus and NH Mackworth, ‘Cognitive Determinants of Fixation Location During Picture Viewing’ (1978) 4:4 Journal of Experimental Psychology 565. See description in LJ Ware, ‘Monitoring Visual Attention in Videotaped Interrogations: An Investigation of the Camera Perspective Bias’ (MSc thesis, Ohio University 2006) 34-35.

<sup>10</sup> This is also noted by LJ Ware, *ibid* 35.

<sup>11</sup> HC Schmidt, ‘Effects of Interrogator Tactics and Camera Perspective Bias on Evaluations of Confession Evidence’ (MSc thesis, Ohio University 2006) 3.

<sup>12</sup> GD Lassiter and AA Irvine, ‘Videotaped Confessions: The Impact of Camera Point of View on Judgements of Coercion’ (1986) 16 Journal of Applied Social Psychology 286. Referred to in HC Schmidt, above 9-10.

<sup>13</sup> This is even more important with the arrival of the DNA Innocence Project. See < [www.innocenceproject.org](http://www.innocenceproject.org) > and as referred to in HC Schmidt, above 11. GD Lassiter and AA Irvine found that people who viewed recorded police confession interview, when the video only showed the suspect being questioned (suspect-only), perceived less coercion, GD Lassiter and AA Irvine, above 286-276. Referred to in HC Schmidt, above 26; *ibid*. Other research also confirmed that suspect-only focus videos, yielded significantly higher ratings for perceived guilt and voluntariness. See for example GD Lassiter, PJ Munhall, RJ Ploutz-Snyder and DL Breitbecher, ‘Illusory Causation: Why It Occurs’ (2002) 13 Psychological Science 299, as referred to in HC Schmidt, above 28. LJ Ware, above. WA Geller, *Police Videotaping of Suspect Interrogations and Confessions: A Preliminary Examination of Issues and Practices* (A Report to the National Institute of Justice, Washington, DC: US Department of Justice 1992); SM Kassin, ‘The Psychology of Confession Evidence’ (1997) 52 American Psychologist 221; and GD Lassiter, ‘Illusory Causation in the Courtroom’ (2002) 11 Current Directions in Psychological Science 204; each as referred to in LJ Ware, above 10.

<sup>14</sup> P Smith, ‘Evaluating the Corrective Statements Proposed in the Court Case *US Department of Justice vs Philip Morris USA Inc et al*’ (MS thesis, State University of New York at Buffalo, 2009). See 449 F Supp 2d 1 (DDC 2006).

<sup>15</sup> *ibid*.

There has never been a TCB distraction-effects eye-tracking study conducted. Many complex considerations and preparations arise. One has to choose the effect to research, choose the technology, design the method of study, consider participants in a study, consider the different locations in the TCB camera, the location of the participants and what they see and to do so with eye-tracking. In addition, cost factors arise. This is therefore a complex task.

### **Eye-Trackers**

Once one has chosen the particular potential effect to research, one may design the study and choose the particular eye-tracking device that is most appropriate to the study. Currently the author favours eye-tracking glasses<sup>16</sup> for in-court type TCB distraction-effects research. There are other examples of eye-trackers available also. The advantages of eye-tracking glasses are that they appear like normal glasses and are, therefore, less obtrusive than some other eye-trackers. Another advantage is that they are flexible and allow the (mock) courtroom participants using them to move about and operate much as they might ordinarily do in an authentic trial or court situation.<sup>17</sup>

### **Cost**

The cost of the hardware, software, audiovisual equipment and related material required for a full eye-tracking TCB distraction study will not be insignificant. In designing, conducting and interpreting the vast amounts of data which will be generated, various specialised skills will be necessary, and which will also be a significant cost. The participant subjects in a given eye-tracking study may also have to be paid. Third party researchers may also be required to be paid. Costs may also arise in the context of filming a re-enactment court case scene for later eye-tracking research. The eye-tracker could be on a subject in a mock court scenario or looking at the video footage of the recorded courtroom activity.

### **Proof-of-Concept Demonstration**

Many issues arise in relation to a TCB eye-tracking study, such as courtroom participant locations, camera locations, as well as how these may interact with the chosen effect to be researched. It can also be important in effects-research, to demonstrate the issues in a pilot study or demonstration.<sup>18</sup> It was, therefore, felt beneficial to undertake an initial

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<sup>16</sup> One example is Tobeei eye-tracking glasses.

<sup>17</sup> Subject of course, to which courtroom participant it is.

<sup>18</sup> See M Mitchell and J Jolley, *Research Design Explained* (Wadsworth, Thomson Learning 2001) C-13.

proof-of-concept demonstration.<sup>19</sup> This is additionally useful because of the novelty of this technology for TCB effects-research. The author, therefore, sought permission from the Courts Service in Ireland to undertake the recorded demonstration of eye-tracking technology inside a courtroom as a proof-of-concept for TCB distraction-effect research.

There was no guarantee that permission would be granted. Indeed, the author was very conscious of the fact that the makers of *The Trial* programme in the UK had to prepare and negotiate for many years with the relevant courts, judges and officials before obtaining permission to film their programme. It was also hoped to extend the judicial attitudinal research from Ireland to Northern Ireland, Scotland and England and Wales. Substantial discussions and correspondence were advanced with the various authorities in this regard, but were ultimately unsuccessful at this stage.

The author obtained permission ‘in principle’ from the Irish Courts Service (and hereby expresses his kind appreciation) for making a court available for the proof-of-concept research. However, there were a number of specific criteria to be met and satisfied, and some of which were a financial cost to the author, in particular insurance costs.<sup>20</sup> Even at this stage, there was still no guarantee that the eye-tracking demonstration would be finally permitted or fully feasible. One of the other issues which arose was in relation to documenting why it was beneficial and or necessary to conduct the TCB eye-tracking demonstration inside an actual courtroom. This had to be discussed with the Courts Service. The Court Service also required thesis Supervisor documentation.

### **Eye-Trackers**

By way of explanation, an eye-tracker is a device with a double miniature camera which is affixed to a person’s head. One camera focuses in the direction that the person is looking, and the other focused on the person’s eye. The forward looking camera will focus on what the subject is seeing and looking at, while the eye-focused camera will track the eye gaze, focus and direction. The forward camera will capture the video footage, which is recorded on computer. Overlaid onto the footage will be an ‘+’ marker created from the footage and data gathered from the eye-focused camera. By this method it is possible to track and record exactly where the subject is looking in the

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<sup>19</sup> See RA McQueen and C Knussen, *Introduction to Research Methods and Statistics in Psychology* (Pearson 2006) 134-135, and 347.

<sup>20</sup> Unfortunately, no funding is currently available to undertake the next stage, an actual in-court eye-tracking distraction experiment. While beyond the scope of this current work for a variety of reasons, this is one of the natural next stages of this research.

recorded scene footage. Researchers and others can play back the scene that the subject was seeing, but also see on screen exactly what the subject was looking at in the scene.

Eye-trackers allow us to track and record where an individual is actually looking and for how long. This is relevant to research of distraction-effects of courtroom participants caused by TCB cameras/TCB camera operators in mock and non-live court settings. There has been no TCB distraction-effects research as of yet which incorporates eye-tracking technology. Therefore, this is novel. If there are effects demonstrated by a body of eye-tracking research in (mock) courtroom settings, this raises concern for TCB and also for TCB design in relation to court cases. Furthermore, it potentially raised questions on our ability to be assured with much of the self-report, opinion-report and similar effects-research if eye-tracking research shows self-reports etc, to be wrong.

### **An Actual Courtroom**

At the time no moot courtroom was available in any of the Dublin Law Schools.<sup>21</sup> It was felt necessary to undertake the demonstration in an actual court environment as it can be difficult to replicate an actual courtroom layout without great expense. No environment sufficiently similar to a courtroom was actually available. The results of the demonstration are more useful to researchers and other interested parties for having been undertaken in a real courtroom. The demonstration should assist greater insights in relation to the actual detailed practicalities and methodologies required for undertaking a full legal-empirical eye-tracking study. The author also undertook certain research and review work at the (new) criminal court complex in Dublin, and which included examining some of the new layouts and technology incorporated into these courts.<sup>22</sup> Digital audio recording (DAR) has been rolled out in Irish courts.<sup>23</sup> It may offer research opportunities, both on its own and also in terms of potential baseline research in the event that TCB were ever to be considered in Ireland. As pointed out elsewhere by the author, baseline research should begin prior to the introduction of TCB. The author's judicial research and audience/public research in Ireland is of assistance in terms of certain baseline research.<sup>24</sup>

### **The Demonstration**

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<sup>21</sup> The Sutherland School of Law in University College Dublin has recently built a moot court in its new law school building.

<sup>22</sup> Undertaken on 20 December 2010.

<sup>23</sup> Referred to in C Coulter, 'Judiciary Signals Support for Setting Up Judicial Council' (Irish Times 10 May 2010) < [www.irishtimes.com](http://www.irishtimes.com) > accessed 3 August 2012.

<sup>24</sup> See below and Appendices.



A full eye-tracking study could be complex and costly. For the moment the thesis wishes to demonstrate the technology for legal-empirical research in an actual (non-live) court environment. It would hopefully demonstrate as a proof-of-concept that it can be used to address TCB in-court distraction-effects research issues as referred to in the US Supreme Court concerns. This can be a first step before carrying out a full eye-tracking study. It is the first such demonstration of eye-tracking in a courtroom environment for TCB distraction-effects research. The author requested access to an empty courtroom with an eye-tracker, laptops, audio visual equipment, still camera, related equipment and technical expert assistants. It was also suggested by the author that it would be useful to get access to more than one courtroom, as the layout of courtrooms can vary in Ireland. Indeed, this is an issue to consider in TCB design and consideration of minimum adverse effects. In the end, one courtroom was used. It was a criminal courtroom. It was also useful to take still photographs, which could be of assistance in designing an actual eye-tracking effects study, and also in choosing which particular distraction-effect issue to study, and how to do so. It also serves to record where the TCB cameras are located.<sup>25</sup>

### **Research Aim**

The research aim was to undertake and record the use of an eye-tracker in an actual non-live court environment and to demonstrate and record what a person might see from different courtroom participant positions in the court - both with and without the TCB camera present. Also, it was hoped to be able to consider further possible implications for the possibility of different forms of TCB, and different TCB camera locations.

### **Research Method**

The demonstration was conducted to undertake and record the use of an eye-tracker in an actual non-live court environment and including the use of a static non working TCB camera (ie off) as an example TCB camera distractor. One of the subjects had the eye-tracker placed upon them. The eye-tracker was then calibrated to the individual. This is an exercise necessary with many eye-trackers.<sup>26</sup> The subject then positioned themselves in a number of directed positions within the courtroom which would be used as the normal locus of different courtroom participants within a courtroom. The participant

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<sup>25</sup> The research, as well as requiring the author's legal knowledge and experience, also required directed technical assistance in operating the eye-tracker and compiling the data. The author gratefully acknowledges the kind assistance of A Ghosh and M Arnold, both researchers in Trinity College, Dublin. The author also acknowledges the kind permission of the Computer Science Department in Trinity College for the use of its eye-tracker, which also serves as an example that legal-empirical research is sometimes cross-disciplinary.

subject wearing the eye-tracker then looked about in various directions simulating what a person in that position might see eg witness looking at the judge; witness looking at the lawyer. The purpose was to demonstrate what is available in the immediate visual cone-of-vision for the participant to see, and what they can see looking left, looking right and looking central (ie straight on) to their visual cone-of-vision. The eye-tracker recorded what they could see and what they were looking at. This exercise was undertaken with and without the TCB audiovisual camera equipment present and visible. The eye-tracker and laptop equipment tracked and recorded what the participant saw and where they looked. It is also possible to record how long they would focus on each item they were looking at from examining the recorded video footage from the eye-tracker. For example, a study could record how many times a witness looks at the TCB camera, how many times they look at the lawyer, and many times they look at the judge.<sup>27</sup>

### **Proof-of-Concept Demonstration**

The author undertook the proof-of-concept demonstration of eye-tracking in-court for research of in-court distraction-effects caused by TCB cameras and TCB camera operators. This demonstration research exercise was carried out in a real court in Dublin, Ireland.<sup>28</sup> This is understood to be the first use and demonstration of eye-tracking technology for any purpose in a real courtroom. The courtroom used was a District Court used for criminal arraignment and criminal trials. The courtroom was empty of lawyers and the public.

### **Equipment**

An Ergoneer<sup>29</sup> Dikabilis Cable (wired) head mounted eye-tracker system was used for conducting the demonstration.<sup>30</sup> In addition, a Sony DVCAM Model DSR 1P TCB camera and Sachler tripod was used as a TCB camera distractor foil. It was not plugged in or operating. In some images the TCB camera operator was shown simulating using the camera. A number of still photographs were also taken on a Sony Cyber-shot 14.1

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<sup>26</sup> However, certain new generations of eye-trackers do not need to be calibrated and hence will alert or involve the subject less. This will assist even more representative and real eye-tracking research.

<sup>27</sup> This is not, for the avoidance of doubt, an actual eye-tracking effects study. It is a proof-of-concept demonstration of an eye-tracker in a non-live court environment, but a beneficial demonstration in terms of TCB legal-empirical eye-tracking research.

<sup>28</sup> On 29 October 2010. The author acknowledges the kind assistance and permission afforded by the Courts Service. In addition, extensive gratitude is expressed to A Ghosh and M Arnold, researchers at Trinity College, Dublin, each of whom provided invaluable technical expertise in relation to the use, operation and recording of proof-of-concept demonstration results with the eye-tracker.

<sup>29</sup> See < [www.ergoneers.com](http://www.ergoneers.com) > accessed 19 January 2014.

mega pixel camera. A laptop was also used to operate the eye-tracking software and also to record the TCB form the different courtroom participant positions in the courtroom.

### **Procedure**

One of the directed technical assistants wore the eye-tracker (the subject). The subject took up the following directed courtroom participant positions using the eye-tracker, namely,

- Judge (J);
- Court clerk (C);
- Witness (W);
- Sitting solicitor<sup>31</sup> (S);
- Standing solicitor (S)/barrister(B) [lawyer (L)].

The tripod mounted TCB camera was located in four different positions within the courtroom. It was intended to identify the different TCB camera distractor positions and participant positions on an accurate map of the courtroom. No adequate drawings were available from the Courts Service. The author therefore arranged drawings of the design and layout of the courtroom (see below). The proposed pre-determined research conditions were as follows,

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<sup>30</sup> The system comprises the ergonomic head unit with EyeCam, nasal fitting, elastic band and infrared diode for illumination of the eye. See *Dikabil Manual* Section 2.1 at 5.

<sup>31</sup> In certain courtrooms, including the instant courtroom, this position could have also been a senior prosecuting Garda (police officer).

### Pre-Determined Research Conditions

<b>Judge (J) Conditions</b> No Camera Camera Position 1 Camera Position 2 Camera Position 3
<b>Clerk (C) Conditions</b> No Camera Camera Position 1 Camera Position 2 Camera Position 3
<b>Witness (W) Conditions</b> No Camera Camera Position 1 Camera Position 2 Camera Position 3
<b>Sitting Solicitor (S) Conditions</b> No Camera Camera Position 1 Camera Position 2 <sup>32</sup>
<b>Standing Solicitor (S)/Barrister (B) Conditions</b> No Camera Camera Position 1 Camera Position 2 [Camera Position 3][if visible]

This included only three intended camera positions, but during the demonstration it was thought useful to add one further location. A Camera Position 4 was added on the day in order to further consider the witness (W) visual cone-of-vision and location issues. The different courtroom positions are identified in the topography courtroom diagrams below. It was hoped to also record the eye-tracker subject from a public seated position but this was not technically or logistically possible in this instance. However, it could be possible in future demonstrations and or studies. The public/audience in court has perhaps added significance given certain developments in the South Africa *Pistorius*<sup>33</sup> trial. Prior to the actual demonstration, the author met Court Service officials which assisted in preparation for the proof-of-concept.

## Results

The eye-tracker used was successful for the proof-of-concept demonstration in showing a an active eye-tracker in a courtroom on a subject in each of the main courtroom

<sup>32</sup> There was no Camera Position 3 in this instance, as the television camera was located close to the back of the courtroom. It was, therefore, not directly visible.

<sup>33</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

participant locations and further in demonstrating what the subject participant was able to see in their full view and visual cone-of-vision in the courtroom. However, the eye-tracker used, like many eye-trackers, is conspicuous and would be very obvious to the courtroom participants wearing it, as well as to other courtroom participants. This may, therefore, not be the best type of eye-tracker to use in each in-court distraction study. It was quite sufficient, however, for the demonstration. It would also be sufficient for eye-tracking research of participant subjects watching pre-recorded TCB scenes for distraction-effects research. In addition, these head mounted types of eye-trackers offer less flexibility to the wearer, again hindering the authenticity of an actual eye-tracking study for in-court TCB distraction-effects. Video eye-tracking files created and recorded from the eye-tracker. Approximately twenty thousand still images were also created. In addition, there were a number of still camera photographs taken. The latter were mainly to record some background and environment photographs of the subject courtroom. In addition, they also recorded the markers for the four different TCB camera positions in the courtroom. Samples of the eye-tracker still images are presented below, and are attached in the Appendices. The red/white cross marker (+) on the still images (and relevant video) marks where the subject courtroom participant is actually looking. This is how it is possible to identify if and when the participant is looking during the court case and then to see if they are distracted to look at the TCB camera and or TCB camera operator. It can now be linked to self-report research.

### **Judge (J): No Camera**

- Image: J0.1 shows no TCB camera present and the judge (J) looking at the witness box (W), marked with the eye-tracker cross marker (+);
- Image: J0.2 shows the solicitor (S) sitting and the barrister (B) sitting. There is no TCB camera distractor visible. The Image shows the eye-tracker cross marker (+) indicating that the judge (J) is looking at the seated solicitor (S)(on right hand side);
- Image: J0.3 shows the solicitor (S) sitting and the barrister (B) sitting. There is no TCB camera distractor visible. The Image shows the eye-tracker cross marker (+) indicating that the judge (J) is looking at the seated barrister (B)(on left hand side);
- Image: J0.4 shows the solicitor (S) sitting and the barrister (B)(on left hand side) standing. There is no TCB camera distractor visible. The Image shows the eye-tracker cross marker (+) indicating that the judge (J) is looking at the standing barrister (B)(on left hand side);
- Image: J0.5 also shows the solicitor (S) sitting and the barrister (B)(on left hand side) standing. There is no TCB camera distractor visible. The Image shows the eye-tracker cross marker (+) indicating that the judge (J) is looking at the standing barrister (B)(on left hand side) in a different position.

### **Judge: Camera Position 1**

- Image: J1.1 shows the TCB camera distractor and TCB camera operator positioned on the left hand side of the courtroom. The Image shows the eye-tracker cross marker (+) indicating that the judge (J) is looking at the TCB camera distractor;
- Image: J1.2 shows the TCB camera distractor without the TCB camera operator, again positioned on the left hand side of the courtroom. The Image shows the eye-tracker cross marker (+) indicating that the judge (J) is looking at the TCB camera distractor.

### **Judge: Camera Position 2**

- Images show the solicitor (S) sitting and barrister (B) standing (both lawyers). The eye-tracker cross marker (+) shows that the judge (J) is looking at the barrister. The TCB camera distractor is evident to the right, in Position 2;
- Images show the eye-tracker cross marker (+) indicating that the judge (J) is looking at the TCB camera distractor in Position 2. The Image also indicates the solicitor (S) sitting and barrister (B) standing;
- Images show the barrister (B) is facing towards the witness box (W). The eye-tracker cross marker (+) again indicates that the judge (J) is looking at the TCB camera distractor in Position 2. It is noted that the TCB camera distractor while appearing to be ‘unobtrusive’ at the side of the courtroom, is in the direct centre of the judge’s visual cone-of-vision as s/he looks between the barrister (B) and the witness (W). It is visibly obvious;
- Images show the judge looking at the TCB camera distractor in Position 2 - with the TCB camera operator present. The TCB camera distractor is pointing and focusing upon the barrister (B)(and or solicitor (S)) position(s);
- Images show the judge (J) looking at the TCB camera operator in Position 2 - with the TCB camera operator present. The TCB camera distractor is pointing and focusing upon the judge (J);
- Images show the judge looking at the TCB camera distractor in Position 2 - with the TCB camera distractor present. The TCB camera distractor is pointing and focusing upon the witness (W) position;
- Images show the judge (J) looking forward and focusing on the standing barrister (B). The TCB camera distractor is not visible.

### **Judge: Camera Position 3**

- Image: 3.1 show the TCB eye-tracker cross marker (+) showing that the judge (J) is looking at the TCB camera distractor in Position 3, at the back left of the courtroom. The TCB camera operator is also present;
- Image: 3.2 show the TCB eye-tracker cross marker (+) showing that the judge (J) is looking at the TCB camera distractor in Position 3, at the back left of the courtroom. There is no TCB camera operator present.

Image: J0.1



Image: J0.2





Image: J0.3



Image: J0.4



Image: J0.5



Image: J1.1





Image: J1.2



Image: J0.1



Image: J3.1



Image: J3.2





### **Witness: No Camera**

- Images indicate that the TCB eye-tracker cross marker (+) shows that the witness (W) is looking at the seated solicitor (S). No TCB camera distractor is visible;
- Images indicate the eye-tracker cross marker (+) indicating that the witness (W) is looking at the judge's position (J).

### **Witness: Camera Position 1**

- Images indicate the solicitor (S) sitting and barrister (B) standing. The eye-tracker cross marker (+) shows that the witness (W) is looking at the barrister. The TCB camera distractor is in Position 1;
- Images indicate the solicitor (S) sitting and barrister standing. The eye-tracker cross marker (+) shows that the witness (W) is looking at the TCB camera distractor. The TCB camera distractor is focused on the witness (W). The TCB camera distractor is in Position 1;
- Images show the solicitor (S) sitting. The TCB eye-tracker cross marker (+) shows that the witness (W) is looking at the solicitor. The TCB camera distractor is focused on the witness (W). The TCB camera distractor is in Position 1. The TCB camera operator is also present;
- Images show the solicitor (S) sitting. The TCB eye-tracker cross marker (+) shows that the witness (W) is looking at the solicitor (S). The TCB camera distractor is focused on the witness (W). The TCB camera distractor is in Position 1. No TCB camera operator is present;
- Images show the solicitor (S) sitting. The TCB eye-tracker cross marker (+) shows that the witness (W) is looking at the TCB camera distractor. The TCB camera distractor is focused on the witness (W). The TCB camera distractor is in Position 1;
- Images show the solicitor (S) sitting. The eye-tracker cross marker (+) shows that the witness (W) is looking at the TCB camera distractor. The TCB camera distractor is focused on the witness (W). The TCB camera distractor is in Position 1. The TCB camera operator is also present. It is noted that the TCB camera distractor position is directly in the witness visual cone-of-vision, and also directly behind the solicitor (S) position. It is highly visible even when the witness (W) is looking at the solicitor (S).

### **Witness: Camera Position 2**

- Images show the solicitor (S) sitting and barrister (B) standing. The TCB eye-tracker cross marker (+) shows that the witness (W) is looking at the TCB camera distractor located to the right. The TCB camera distractor is in Position 2;
- Images show the solicitor (S) sitting and barrister standing. The TCB eye-tracker cross marker (+) shows that the witness (W) is looking at the TCB camera distractor located to the right. The TCB camera distractor is in Position 2;

- Images show the solicitor (S) sitting. The TCB eye-tracker cross marker (+) shows that the witness (W) is looking at the TCB camera distractor located to the right. The TCB camera distractor is in Position 2. The TCB camera operator is also present. It is noted that even when looking at the solicitor (S) position and the barrister (B) position, the distractor TCB camera is still within the witness (W) visual cone-of-vision.

### **Witness: Camera Position 3**

- Images show the TCB eye-tracker cross marker (+) indicating that the witness (W) is looking at the judge's position (J);
- Images show the TCB eye-tracker cross marker (+) indicating that the witness (W) is looking at the court clerk's position (C);
- Images show the solicitor (S) sitting. The TCB eye-tracker cross marker (+) shows that the witness (W) is looking at the solicitor (S);
- Images show the solicitor (S) sitting and barrister (B) standing. The TCB eye-tracker cross marker (+) shows that the witness (W) is looking at the barrister (B);
- Images show the solicitor (S) sitting. The TCB eye-tracker cross marker (+) shows that the witness (W) is looking at the TCB camera distractor located to the right. The TCB camera distractor is in Position 2;
- Images show the solicitor (S) sitting. The TCB eye-tracker cross marker (+) shows that the witness (W) is looking at the TCB camera operator located to the right. The TCB camera distractor is in Position 2;
- Images show the solicitor (S) sitting. The TCB eye-tracker cross marker (+) shows that the witness (W) is looking at the TCB camera distractor located to the right. The TCB camera distractor is in Position 2. There is no TCB camera operator present.

### **Standing Solicitor/Barrister: No Camera**

- Images show that the TCB eye-tracker cross marker (+) indicating that the lawyer (L) is looking at the judge's position (J);
- Images show that the TCB eye-tracker cross marker (+) indicating that the lawyer (L) is looking at the clerk's position (C);
- Images show the TCB eye-tracker cross marker (+) indicating that the lawyer (L) is looking at the witness (W) position.

### **Standing Solicitor/Barrister: Camera Position 2**

- Images show the TCB eye-tracker cross marker (+) indicating that the lawyer (L) is looking at the TCB camera distractor located behind to the left. The TCB camera distractor is in Position 2. There is a TCB camera operator present.

### **Standing Solicitor/Barrister: Camera Position 4**

- Images show the TCB eye-tracker cross marker (+) indicating that the lawyer (L) is looking at the distractor TCB camera located behind and also to the left of the witness box (W). The TCB camera distractor is in Position 4. There is no TCB camera operator present;
- Images show the TCB eye-tracker cross marker (+) indicating that the lawyer (L) is looking at the distractor TCB camera located behind and to the left of the witness (W) box. The TCB camera distractor is in Position 4. There is a TCB camera operator present;
- Images show the TCB eye-tracker cross marker (+) indicating that the lawyer (L) is looking directly at the witness (W) box. However, the distractor TCB camera located behind and to the left of the witness (W) box is still visible at the periphery of the visual cone-of-vision. The visual cone-of-vision includes the witness (W) position, the clerk position and the judge position. The TCB camera distractor is in Position 4. There is no TCB camera operator present;
- Images show the TCB eye-tracker cross marker (+) indicating that the lawyer (L) is looking at the witness (W) box. The TCB camera distractor is in Position 4. It is focused on the judge's position (J). There is no TCB camera operator present. In further Images which are similar, the visual cone-of-vision is altered to have the witness more centred. Within the visual cone-of-vision is the TCB camera distractor, witness box (W), judge's position (J) and clerk's position (C);
- Images show the TCB eye-tracker cross marker (+) indicating that the lawyer (L) is looking at the witness position (W). The TCB camera distractor located behind to the left of the witness box (W) plus TCB camera operator are visible. The TCB camera distractor is in Position 4. It is focused on the judge (J);
- Images show the TCB eye-tracker cross marker (+) indicating that the lawyer (L) is looking at the TCB camera distractor located behind to the left of the witness box (W). The TCB camera distractor is in Position 4. There is a TCB camera operator present.

### **Witness: No Camera**

- Image W1.1 indicates the TCB eye-tracker cross marker (+) showing that the witness (W) is looking at the judge's position (J). No TCB camera distractor is visible/present.

Image: W1.1

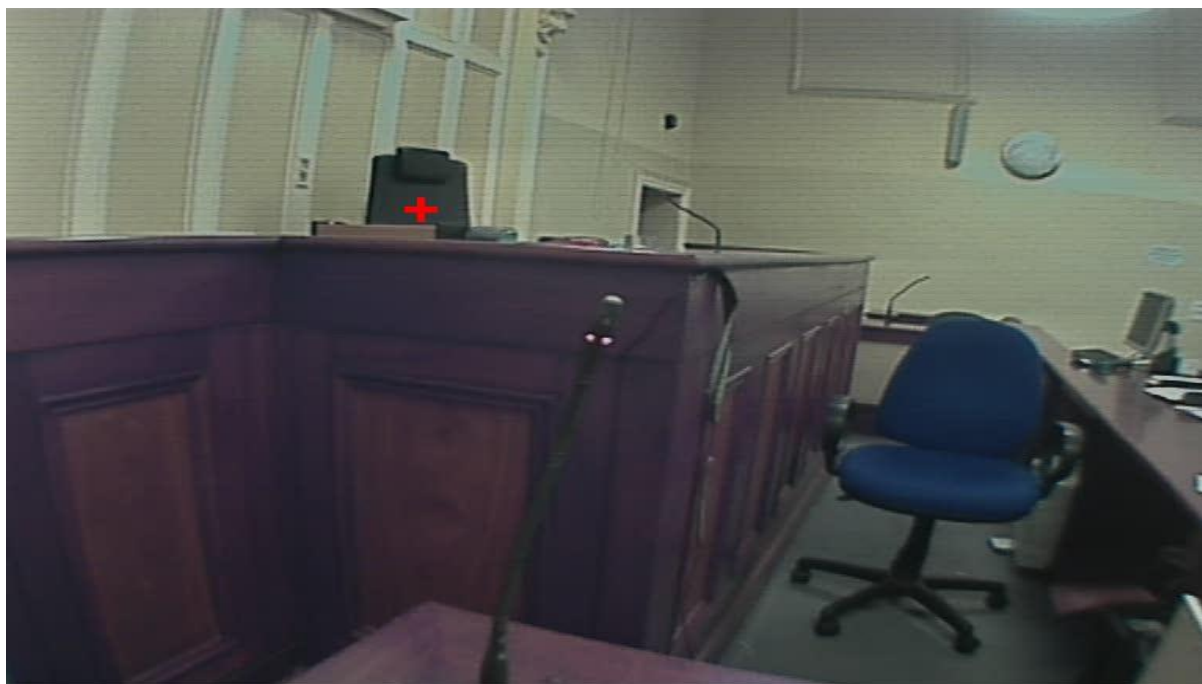
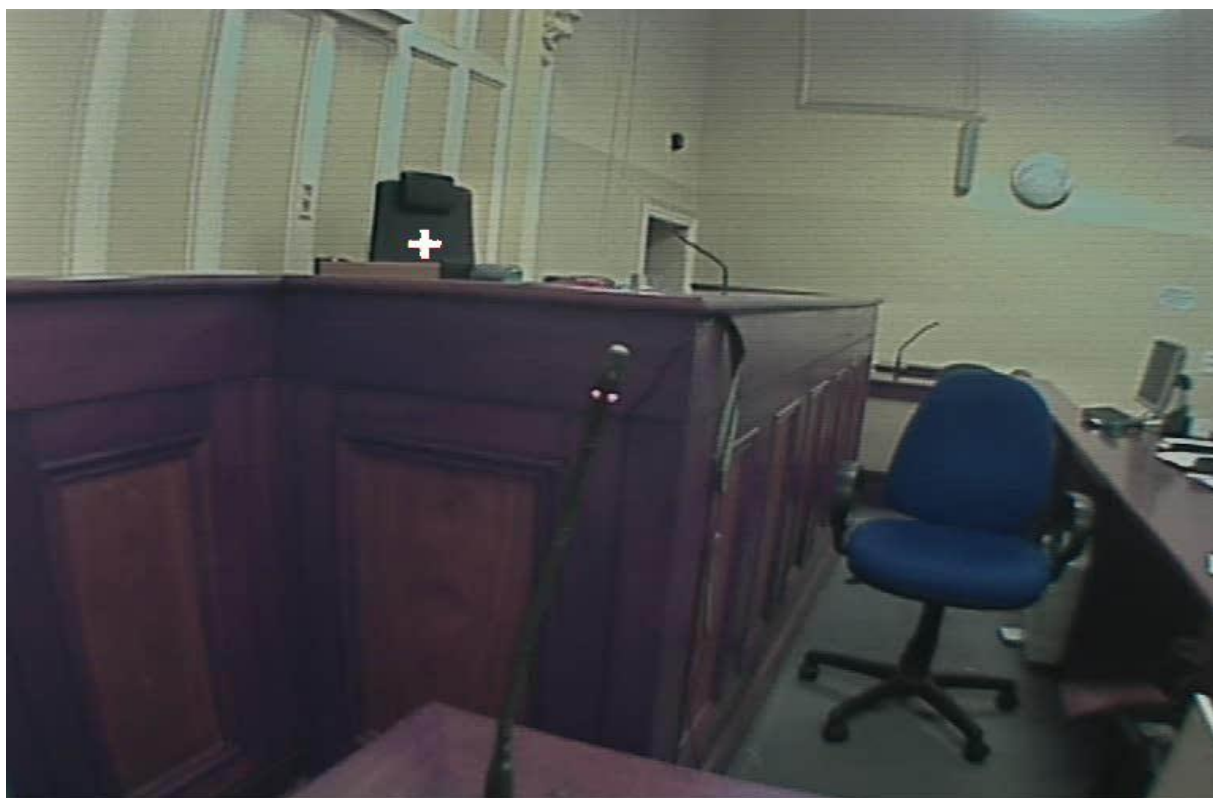


Image: W1.1 (White +)



- Image W1.2 shows a seated lawyer (L) and a standing lawyer (L). The standing lawyer appears to be examining/cross examining the subject witness (W). No TCB camera

distractor is visible/present. The TCB eye-tracker cross marker (+) shows that the subject witness (W) is looking at the standing lawyer (L).

Image: W1.2



### **Witness: Camera Position 1**

Image W2.1 shows a lawyer (L) sitting. The TCB camera distractor is in Position 1. No TCB camera operator is present. The TCB camera is focused on the witness (W). The TCB eye-tracker cross marker (+) shows that the witness (W) is looking at the lawyer (L). It is noted that in Camera Position 1, the TCB camera distractor and the seated lawyer (L) are very close. They are each central in the subject witness (W) visual cone-of-vision. It is not possible to say that the subject witness (W) does not/cannot see the TCB camera distractor when they are focused on the seated lawyer (L). The implication that this may have in relation to distraction-effects may be considered. Implications of TCB camera distractor on effects on different courtroom participants, and in this instance the witness (W), can also be considered further. Consider that some self-reports and proponents may suggest that soon after the case begins that participants will forget about the TCB cameras

in the courtroom.<sup>34</sup> The query arises as to whether TCB eye-tracking legal-empirical research will confirm or contradict such opinions. A related issue is whether a body of research will indicate different effects between TCB cameras as peripheral or central in the visual cone-of-vision of different courtroom participants, and what the implications may be from a legal and legal-policy perspective. This suggests a need for further research.

Image: W2.1



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<sup>34</sup> For example, R Goldfarb, in *Statement of Ronald Goldfarb, Allowing Cameras and Electronic Media in the Courtroom, US Senate Subcommittee on Administrative Oversight and the Courts, Committee on the Judiciary* (Washington DC Wednesday 6 September 2000) 56.



Image W2.2 shows the lawyer (L) sitting. The TCB eye-tracker cross marker (+) indicates that the witness (W) is looking at the TCB camera distractor. The TCB camera distractor is focused on the subject witness (W). The TCB camera distractor is in Position 1.

Image: W2.2



Image W3.1 shows a seated lawyer (L) and a standing lawyer (L). The TCB camera distractor is present in Position 1. The TCB eye-tracker cross marker (+) shows that the witness (W) is looking at the seated lawyer (L). We see that the TCB camera distractor, seated lawyer (L) and standing lawyer (L) are all in close proximity in the central field of the visual cone-of-vision of the subject witness (W). We can see that even when focused on the seated lawyer (L), and arguably also the standing lawyer (L), the subject witness (W) is still able to see the TCB camera distractor.

Image: W3.1



Image W3.2 is similar to Image W3.1 above, with the seated and standing lawyer (L) and TCB camera distractor in position 1. In this Image the eye-tracker cross marker (+) shows that the subject witness (W) is looking at the standing witness (W). If the subject witness (W) does not have to move their head when looking variously at the lawyers (L) and the distractor TCB camera, one might query how opinion-reports or observers in



court are able to discern and opine on whether the subject witness (W) was distracted.<sup>35</sup> While the TCB research to date has not investigated this point, we can say that the present proof-of-concept demonstration shows that eye-tracking technology allows us to begin to formulate this research. These issues have been debated since at least 1965 and even today there is no body of assured and verified research in relation to TCB distraction-effects.<sup>36</sup> The future of TCB in-court distraction-effects research can be assisted by eye-tracking. This is important to assist courts, legal-policymakers and other interested parties when they come to consider effects, rights, legal and legal-policy issues.

Image: W3.2



Image W3.3 is also similar to Image W3.1 above. In this Image the eye-tracker cross marker (+) shows that the witness (W) is looking at the TCB camera distractor. As pointed out above, the subject witness (W) would probably not have to twist their head to vary the focus of their visual attention as between the two lawyers (L) and the TCB

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<sup>35</sup> This occurred in the Short report.

<sup>36</sup> Eye-tracking permits us to now advance TCB distraction-research in a manner which is recorded, verified and legal-empirical and in a manner significantly more assured than any of the comparable research directed to this issue previously.

camera distractor. If one is an observer close to the subject witness (W), the question arises as to whether one would be able to discern exactly where the witness (W) is looking. Most of the research into TCB in-court effects does not use independent third party observers (observer-reports). In the few studies that have used observers and observer-reports, it is not always clear where the observers were located and sitting in the courtroom.<sup>37</sup> There are issues in relation to the utility of the observer-report studies to date per se. Also, issues arise in relation to the location of the camera, the location of the courtroom participants and the location of the TCB observer in the observer-reports. We may potentially need to re-assess the observer-reports to date. In addition, we should also rely upon a new body of normative legal-empirical eye-tracking research to move beyond or indeed overcome the limits of observer-reports. This will assist courts and legal-policymakers in their legal and legal-policy considerations.

Image: W3.3



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<sup>37</sup> See Short report.

Image W4.1 shows a seated lawyer (L) and TCB camera distractor in Position 1. In addition, there is a TCB camera operator present. In this Image the TCB eye-tracker cross marker (+) shows that the subject witness (W) is looking at the seated lawyer (L). We again note that the TCB camera distractor, TCB camera operator and seated lawyer are all central in the visual cone-of-vision of the subject witness (W). One can also speculate on the implication of whether the combination of the TCB camera distractor and TCB camera operator are more visually attention grabbing than a single seated lawyer (L). This discussion would also cross over with future research in relation to the implications of the location of the TCB camera distractor and the location of an instant courtroom participant (location-effects).

Image: W4.1



Image: W4.2 is similar to Image W4.1. There is a seated lawyer (L), TCB camera distractor and TCB camera operator. In this Image the TCB eye-tracker cross marker (+) shows that the subject witness (W) is looking at the TCB camera distractor. One of the implications is that both TCB camera distractor and TCB camera operator are in central focus. A further implication is that it may not be possible without TCB eye-tracking technology to discern that the subject witness (W) is looking at the TCB camera distractor - at least in part because of the location of the TCB camera distractor.

Image: W4.2





### **Witness: Camera Position 2**

Image W2.1 shows the lawyer sitting. The TCB camera distractor is located to the right of the witness (W) subject and close to the side of the courtroom. The TCB camera distractor is in Position 2. The TCB eye-tracker cross marker (+) shows that the subject witness (W) is looking at the TCB camera distractor located to the right. On this still Image it is clear that the subject witness (W) can easily pan from the seated lawyer (L) to the TCB camera and vice versa. It is also clear that even where the witness subject (W) is looking at the seated lawyer (L), the distractor television is within the witness' visual cone-of-vision (W). Distraction is still possible. This possibility may increase if the TCB camera moves. These are all avenues for further TCB legal-empirical research. The US Supreme Court and other courts are still in need of more assured effects data.

Image: W2.1



Image: W2.2 shows the lawyer sitting (L) as well as a lawyer standing (L). Again, the TCB camera distractor is located to the right of the witness subject (W) and close to the side of the courtroom. The TCB camera distractor is still in Position 2. The TCB eye-tracker cross marker (+) shows that the subject witness (W) is looking at the TCB camera distractor located to the right. It is evident that both lawyers (L) and the TCB camera distractor are all within the visual cone-of-vision of the subject witness (W). Indeed, the standing lawyer (S)(L) and the TCB camera distractor are within closer proximity than the seated lawyer (S)(L) in Image W5.1. The TCB eye-tracker cross marker (+) shows that the subject witness (W) is looking at the TCB camera operator located behind the TCB camera distractor. It is evident that both lawyer (L), the TCB camera distractor and the TCB camera operator are all within the visual cone-of-vision of the subject witness (W).

Image: W5.2



Image W5.3 shows the lawyer sitting (S)(L). The TCB camera distractor is located to the right of the witness subject (W) and close to the side of the courtroom. The TCB camera distractor is still in Position 2. In addition to the TCB camera distractor, there is also a TCB camera operator. There does not appear to have been any previous research directed to researching the effect, or additional effect, of TCB camera operators. While it may appear somewhat intuitive, this is still a surprising research gap given the general US Supreme Court concerns, and given that there are instances where TCB camera operators are permitted in some instances into courtrooms. The extent of this is unclear as it is not recorded specifically in the literature, laws or otherwise generally available.

Image: W5.3



It would also seem to be the case that in this proof-of-concept demonstration, the subject witness (W) can look at the various courtroom lawyers (L) and the TCB camera distractor in Position 2, without having to tilt their head left or right. The normative implication of this should be examined. If the limited self-reports, opinion-reports and in some instances observer-reports in previous TCB research, rely upon an expressive visual cue such as courtroom participant head tilting or turning, such normative research is of legal

and legal-policy relevance. This may be enhanced if the results indicate that different effects arise. The current demonstration would appear to indicate that the subject witness (W) can look at or be distracted by the TCB camera distractor without turning, or visibly turning, their head. If an observer was present and seeking to research TCB camera distractor issues they may therefore potentially miss some instances of distraction because they do not or cannot see it. This also has implications for our contemporary assessment of any previous observer-report studies. There is, therefore, a real possibility that there may be effects which no previous TCB research has measured. Indeed, it can also be said that no previous TCB research has sought to research for such subtle or non-head tilt effects. This appears to be a significant TCB research gap.

### **Lawyers**

The still images below are taken from the eye-tracker video recordings from the gaze direction and visual cone-of-vision in relation to the standing solicitors (S)/barrister (B)/lawyer (L) wearing the eye-tracker. Again the gaze direction is indicated with the TCB eye-tracker cross marker (+).

### **Standing Solicitor/Barrister: No Camera**

- In Image: L0.1 the TCB eye-tracker cross marker (+) shows that the standing lawyer (L) is looking at the judge position (J). No TCB camera distractor is visible;
- In Image: L0.2 the TCB eye-tracker cross marker (+) shows that the standing lawyer (L) is looking at the witness position (W). No TCB camera distractor is visible.

### **Camera Position 1**

- In the Appendix Images the TCB camera distractor is in Camera Position 1 (C1). The standing lawyer (L3) is looking at the TCB camera distractor, as indicated by the TCB eye-tracker cross marker (+). No TCB camera operator is present. Also in the Appendix Images the standing lawyer is looking at the witness position (W) as indicated by the TCB eye-tracker cross marker (+). The Appendix Images again shows the camera in Camera Position 1 (C1). This time the TCB camera distractor is present. The standing lawyer (L3) is looking at the TCB camera operator, as indicated by the TCB eye-tracker cross marker (+). The Appendix Images also show the standing lawyer (L) looking at solicitor bench.

### **Camera Position 2**

- Image: L2.1 shows the camera in Camera Position 2 (C2). The TCB eye-tracker cross marker (+) shows that the standing lawyer (L) is looking at the TCB camera distractor located to the left. There is a TCB camera operator present;



- Image: L2.2 shows the TCB camera distractor and TCB camera operator present in Camera Position 2 (C2). The standing lawyer (L) is looking in the direction of the TCB camera distractor. Both are present and visible in the lawyer visual cone-of-vision;
- Image: L2.3 shows the TCB camera distractor and TCB camera operator present in Camera Position 2 (C2). The standing lawyer (L) is looking in the direction of the TCB camera distractor. Both are present and visible in the witness visual cone-of-vision. In this instance the TCB camera distractor is directed and focused at the standing lawyer (L);
- Image: L2.4 shows the distractor TCB camera distractor present in Camera Position 2 (C2). The standing lawyer (L) is looking in the direction of the witness (W). Both the TCB camera distractor and the witness (W) are present and visible in the lawyer (L) visual cone-of-vision.

Further Appendices images show the standing lawyer (L) looking at the witness box (W), as indicated by the TCB eye-tracker cross marker (+). The Appendices images again shows the standing lawyer (L) looking at the witness area (W) but able to see the TCB camera distractor, still located in TCB camera distractor position 2 (C2). Further Appendices images show the TCB camera distractor in TCB camera distractor position 2 (C2) with the TCB camera operator. In this example, however, the TCB camera distractor is focused not on the witness (W) or judge (J), but rather on the standing lawyer (L). It is worth noting that there is not great distinction in the research to date between distraction-effects where one can see cameras in the participant visual cone-of-vision but not focusing upon one, and where the camera is directly focusing upon the participant themselves. Further Appendices images are similar but this time focusing on the judge (J).

#### **Camera Position 4**

- Image: L4.1 shows the TCB camera distractor present in Camera Position 4 (C4). The standing lawyer (L) is looking in the direction of the witness (W). Both the TCB camera distractor and the witness (W) are present and visible in the lawyer (L) visual cone-of-vision;
- Image: L4.2 shows the TCB camera distractor present in TCB camera distractor position 4 (C4). The standing lawyer (L) is starting to look in the direction of the TCB camera distractor. Both the TCB camera distractor and the witness (W) are closely present and visible in the lawyer (L) visual cone-of-vision;
- Further Appendices images show the distractor TCB camera distractor present in TCB camera distractor position 4 (C4). The standing lawyer (L) is looking in the direction of the witness (W). Both the TCB camera distractor and the witness (W) are present and visible in the lawyer (L) visual cone-of-vision. The Appendices images show the TCB camera distractor present in TCB camera distractor position 4 (C4). The standing lawyer (L) is

looking in the direction of the witness (W). Both the TCB camera distractor and the witness (W) are present and visible in the lawyer (L) visual cone-of-vision. Further Appendices images show the TCB camera distractor present in Camera Position 4 (C4). The standing lawyer (L) is starting to look in the direction of the TCB camera distractor. Both the TCB camera distractor and the witness (W) are closely present and visible in the lawyer (L) visual cone-of-vision. Appendices images also show the TCB camera distractor present in TCB camera distractor position 4 (C4). The standing lawyer (L) is starting to look in the direction of the TCB camera distractor. Both the TCB camera distractor and the witness (W) are closely present and visible in the lawyer (L) visual cone-of-vision. Further Appendices images show the standing lawyer (L) focusing on the witness (W). This time the TCB camera distractor is in TCB camera distractor position 4 (C4), as indicated with the eye-tracker cross marker (+);

- It is noted that it is difficult for the standing lawyer (L) not to see the TCB camera given its proximity to the witness (W) in the visual cone-of-vision. Further Appendices images also shows the TCB camera distractor in TCB camera distractor position 4. The standing lawyer (L) is starting to look at the TCB camera. There is no TCB camera operator present. Further images show the TCB eye-tracker cross marker (+) indicates that the lawyer (L) is looking at the TCB camera distractor located to the left of the witness box. The TCB camera distractor is in Camera Position 4 (C4). There is no TCB camera operator present;
- In addition, in further images the TCB eye-tracker cross marker (+) shows that the lawyer (L) is looking directly at the witness box (W). However, the TCB camera distractor located behind and to the left of the witness box (W) is still visible at the periphery of the visual cone-of-vision. The visual cone-of-vision includes the witness position, the clerk position and the judge position. The TCB camera distractor is in Camera Position 4 (C4). There is no TCB camera operator present;
- Other images show the TCB eye-tracker cross marker (+) indicating that the lawyer (L) is looking at the witness box (W). The TCB camera distractor is in Camera Position 4 (C4). It is focused on the judge's position (J). There is no TCB camera operator present. In further images, which are similar, the visual cone-of-vision is altered to have the witness (W) more centred. Within the visual cone-of-vision is the TCB camera distractor, witness box, judge's position and clerk's position;
- Images show the TCB eye-tracker cross marker (+) indicating that the lawyer (L) is looking at the witness position (W). The TCB camera distractor located behind and to the left of the witness box (W), plus TCB camera operator, is visible. The TCB camera distractor is in Camera Position 4 (C4). It is focused on the judge (J);
- Images show the TCB eye-tracker cross marker (+) indicating that the lawyer (L) is looking at the distractor TCB camera located behind and to the left of the witness box (W). The TCB camera distractor is in Camera Position 4 (C4). There is a TCB camera operator present.

Image: L0.1



Image: L0.2



Image: L2.1



Image: L2.2



Image: L2.3



Image: L2.4





Image: L4.1



Image: L4.2



## **Future Research**

The author recommends that research be undertaken culminating in a body of legal-empirical eye-tracking TCB distraction-effects research. Eye-tracking has been demonstrated to be relevant and possible for in-court type research, and in particular in-court TCB distraction-effects. It is recommended that an actual eye-tracking effects study, and further a body of such research studies, be undertaken. The present demonstration (and the US Supreme Court concerns) can form the basis for planning and designing such a study. Such a study could involve any one of the courtroom participants referred to above in a single TCB eye-tracking distraction study. Ultimately, all TCB courtroom participants should be the focus of similar research. A mock trial could be constructed, or the relevant portion of the trial, relevant to the particular courtroom participant being tested.

We could take the case of a witness and the TCB distraction research hypotheses. Other participant subjects would act as participant facilitators for the study, acting as normal. Therefore, a realistic courtroom scene is created for the witness distraction research study. The same case would be re-run for new witness test subjects who would attend and act as the witness in the case which would be re-run for each test subject. Therefore, by repeating the study, we build up a statistically relevant body of test subjects in the study. Obviously, as pointed out above, research of this type then needs to be replicated in further studies, and in particular third party research studies. The group of test witness subjects could, for example, be split into one group with no TCB camera distractor present, and a second group with a TCB camera distractor is present.<sup>38</sup> Each group of test subject would wear an eye-tracker. Thus, in this briefly described study, we are able to test via eye-tracking whether (subject) witnesses are distracted or change their visual cone-of-vision or what they look at and or for how long when a TCB camera distractor is present.

Variations of this type of study could include, for example, varying the TCB camera distractor location, varying the type and size and camera, varying between TCB camera distractor only and TCB camera distractor plus TCB camera operator. Further variation and study can be designed for all of the courtroom participants.

A further layer of legal-empirical research involves carrying out self-reports, opinion-reports, observer-reports and eye-tracking, and comparing the results. Courts and legal-

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<sup>38</sup> There can be different TCB camera types; different locations; etc.

policymakers may consider whether the self-reports are verified by TCB eye-tracking research, or whether there are discrepancies between them. If there are differences, and significant differences, there may be implications for the general research previously conducted eg in terms of reliability and acceptance. The pertinent query arising is whether today's courts and legal-policymakers can rely upon previous research.<sup>39</sup>

Eye-tracking studies such as those above could be used to test for distraction-effects of TCB cameras. They can also be used to research legal-policy in relation to location-effect issues and camera size/type issues. These are important issues and issues which have apparently not been researched to date. Courts and legal-policymakers would benefit from having research available to them.

### **Conclusion**

The US Supreme Court on three occasions refers to TCB effect issues. Concerns still remain today which do not yet have assured answers. Given the issues at stake in court cases, these TCB concerns remain important issues to address. The research demonstrates how eye-trackers may be used for TCB distraction-effects research. Further work should be done to design and undertake a full eye-tracking TCB distraction-effects study. In time a body of TCB eye-tracking research should be built up to pursue US Supreme Court concerns.<sup>40</sup> HC Schmidt states that the current research in legal-psychology into videotaped confessions is motivated by the US Supreme Court confession evidence cases.<sup>41</sup> One could expect that more research into the effects of TCB, given that the US Supreme Court first raised legal-empirical research studies as far back as the *Estes*<sup>42</sup> case. One commentator has stated that, '[i]f we don't like the way courtrooms look on camera, the solution is to change the courtrooms, not toss out the cameras.'<sup>43</sup> However, with respect, should it not be that if we decide to have TCB, and

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<sup>39</sup> There is also a further issue to be considered. Obviously, the individual participant wearing the eye-tracker is aware that they are wearing it, and some eye-trackers may have to be individually calibrated to the participants' eyes. However, there are different types of eye-trackers which may not have to be so calibrated and or which do not have to be 'worn' by the subject courtroom participant. It may be possible to design a study where a non-calibrated, non-conspicuous, non-wearable eye-tracker is used. If such a study is possible, this would go some way to measuring eye-tracker effects separate from the TCB camera distraction-effect. It could be even more real and authentic. A further direction of research is ethical considerations.

<sup>40</sup> Of course, eye-tracking is only one of many methods for researching TCB effects. Many methods need to be used in conjunction in order to build up the body of research knowledge required.

<sup>41</sup> HC Schmidt, above 74.

<sup>42</sup> *Estes v Texas* above 532.

<sup>43</sup> A Kozinski and R Johnson, above 1119.



we do not like some aspect/form of it, we can change the form as necessary.<sup>44</sup> Judge Kozinski suggests that ‘[w]e must consider the issue [of TCB] again, in light of the world today.’<sup>45</sup> The thesis suggests that we should also do so in light of our recognition of current normative research and current research methods for legal and legal-policy issues. Indeed, we should not be blinkered in our approach. If other cross-disciplinary research is relevant, we may prudently embrace it. This includes technologies such as eye-tracking and fields such as legal-psychology.<sup>46</sup>

Researchers use eye-tracking for research across a wide variety of fields and applications. Given the TCB concerns, there is no substantial reason why we should not use eye-tracking in addressing the many TCB effects gaps and the US Supreme Court concerns. The author recommends eye-tracking to examine some of the effects of TCB. Eye-tracking provides a direct measure of eye focus.<sup>47</sup> It permits testing and direct observation of courtroom participants eye fixation, focus and attention.<sup>48</sup> Eye-tracking research also has the advantage that it tracks and records exactly what people see in courtroom settings.<sup>49</sup> It can also help to test and validate self, opinion and observer reports.<sup>50</sup> Eye-tracking can improve TCB distraction-effects research to assist courts and legal-policymakers.

The time has come to address the research concerns of the US Supreme Court and also to ensure that the normative TCB research effort into the distraction-effects of TCB advances beyond the criticism that ‘[s]ocial scientists measure the intelligence of monkeys more effectively than ... attempt[s] to ascertain the effects of television in the courtroom.’<sup>51</sup> It is time to move beyond limited self-reports and opinion-reports and embrace modern normative legal-empirical research, in particular eye-tracking technology. The thesis recommends that research be undertaken culminating in a body of eye-tracking TCB distraction-effects research. Eye-tracking has been demonstrated to be possible for in-court research, and in particular in-court TCB distraction-effects. It is recommended that the next stage, an actual eye-tracking effects study, be undertaken.

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<sup>44</sup> This is not to suggest that we experiment willy nilly, or that we make and remake rules on the hoof. Separately, the wide disparity between the length and consent of the rules that do exist is also illuminating on the disparity of forms of TCB.

<sup>45</sup> A Kozinski and R Johnson, above 112.

<sup>46</sup> Media and communications research can also be beneficial to incorporate into TCB issues.

<sup>47</sup> T Armstrong and BO Olatunji, above.

<sup>48</sup> See LJ Ware, above 11.

<sup>49</sup> See < [www.prsresearch.com/prs-tools/](http://www.prsresearch.com/prs-tools/) > accessed 19 January 2014.

<sup>50</sup> ‘[E]ye movements are a direct indicator of overt attention’ and provide ‘a highly direct measure of visual attention, eye systems also allow continuous measurement of eye movements.’ *ibid.*

<sup>51</sup> J Hirschhorn, ‘*Cameras in the Courtroom? No*’ (1980) 7:3 *Barrister* 7 and 9.

The present proof-of-concept demonstration (and the US Supreme Court concerns) can form the basis for planning and designing such a study. Such a study could involve any one of the courtroom participants referred to above in a single TCB eye-tracking study. We are able to test via eye-tracking whether (subject) participants are distracted or change their visual cone-of-vision or what they look at and or for how long when a TCB camera is present. Variations of this type of study could include, for example, varying the TCB camera location-effects, type and size of TCB camera, varying between TCB camera-only and TCB camera plus TCB camera operator. Further models are also suggested below. Further research may compare results to see if the self-reports are verified by eye-tracking research. If there are differences, the legal and legal-policy implications may need to be considered recommendations.<sup>52</sup>

TCB distraction concerns are important issues and issues which have never been exactly gauged to date. This demonstration of eye-tracking helpfully shows the potential importance of eye-tracking for TCB distraction-effects research. It is important to note, however, that as with previous research problems, one study on its own is not sufficient to prove or decide any individual effect. This is only the first step. The next stage is to design and then undertake actual eye-tracking TCB distraction-effects studies. A body of research studies needs to be repeated, verified and built up. Only at that stage are we beginning to seriously address the US Supreme Court concerns.<sup>53</sup> Verifiable normative legal-empirical TCB distraction-effects research is now possible to finally assist the US Supreme Court, courts and legal-policymakers. The next time TCB issues come to be considered or litigated, there should be TCB eye-tracking distraction-effects research available to assist courts and legal-policymakers.

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<sup>52</sup> A further issue is that the individual participant wearing the eye-tracker is aware that they are wearing it, and individual calibration may occur. Some eye-trackers may not have to be so calibrated or may not have to be 'worn' by the subject courtroom participant. Experimental design may allow a non-conspicuous eye-tracker to be used.

<sup>53</sup> As indicated above, many methods need to be used to build up our body of research knowledge. Eye-tracking is only one such method.

## CHAPTER 15: TOPOGRAPHY, VISUAL CONE-OF-VISION, LOCATION & DESIGN

### Introduction

Location and location-effects are important issues for TCB distraction-effects research and courts and legal-policymakers to consider. This relates to the location of the courtroom participants; the location of the in-court TCB camera; and the location of the TCB camera operator. Location-effect issues have never been properly addressed in the body of general and legal-empirical TCB research to date. One consequence is that the research to date is less than optimum, and perhaps even unreliable, to the extent that location-effect issues and location-effect data are ignored. This is important because the location of the TCB camera and the TCB camera operator, respective to the location of the courtroom participants, could influence the courtroom participants in the courtroom.<sup>1</sup> The locus of the TCB camera, and TCB camera operator, can influence the courtroom participants and what goes on in the courtroom.<sup>2</sup> In making assessments about the effects of TCB we need to be aware of where the TCB camera is located. Therefore, research studies need to record this data. By way of background and context, we will now look at how the literature occasionally and implicitly refers to location-effects. However, the body of the TCB general and legal-empirical research both avoid the location issue. It is not sufficiently addressed to date to ensure the best information is available to courts and legal-policymakers.

Issues of TCB distraction-effects, design, location and legal and legal-policy decisions are all linked. Location is an important issue for TCB with implications for courts, legal-policymakers and courtroom participants. In particular, the location of the courtroom participants and the location of the in-court TCB cameras are important. Equally, the location of the in-court TCB camera operator - when present - is important. These data points should be gauged. Location issues have never been properly addressed in the body of general and legal-empirical TCB research to date. Research to date could be criticised as less than optimum and unreliable to the extent that location issues, data and factors are ignored. This is important because the location of the TCB camera and the TCB camera operator, respective to the location of the courtroom participants, could influence the courtroom participants in the courtroom. These issues also potentially influence the

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<sup>1</sup> Camera-perspective-bias is just one area of the legal-empirical research which tends to support the concern that location research be carried out.

<sup>2</sup> In-court effects. Indeed, we need to assess courts and trial procedures in this research also, see generally, CE Smith, *Courts and Trials: A Reference Handbook* (ABC-CLIO 2003). In addition, there can be effects outside of the courtroom. These issues also potentially influence the viewing audience outside of the courtroom. However, this is broadly beyond the current thesis focus.

viewing audience outside of the courtroom. Legal-empirical research regarding camera-perspective-bias might also assist these considerations.<sup>3</sup> Indeed, we need to assess courts and trial procedures<sup>4</sup> in this research also. Court and legal-policymaking regarding assessments about the effects of TCB should ideally be aware of where the TCB camera is located in previous research studies they may be considering. Therefore, research studies need to record and indicate where the camera is located.

Courtrooms can vary in design, size, orientation, etc, both within jurisdictions and across jurisdictions. The reasons can be socially and historically bounded. Courtroom design and layout is a relevant consideration in relation to TCB generally, TCB effects-research and TCB distraction-effects research.<sup>5</sup> It can be relevant in terms of considering whether or not to permit TCB. It may be relevant in terms of whether TCB is physically possible. Particular TCB cameras and or TCB camera operators may be considered to large in particular courtroom settings. Both the courtroom layout as well as TCB hardware equipment may militate against TCB on feasibility grounds. It might sometimes be felt that the smaller the courtroom, the more enhanced may be the potential disruption effects of (particular) TCB. While there is a large element of under-researching of TCB distraction-effects, it is also noted that there is a particular ‘absence of research’<sup>6</sup> of the many courtroom design issues. It ‘is difficult to find a ... discussion of the geography of “everyday” courts.’<sup>7</sup> The thesis suggests that there is even less literature and effects-research in relation to TCB distraction-effects. Such research should be beneficial to courts and legal-policymakers, not least the US Supreme Court.

### **Location-Effects Data**

The general legal-empirical studies refer very little to the location-effect issue. They do not record the actual location of TCB cameras in particular studies. This is unfortunate, as it means we cannot properly consider and evaluate the efficacy of those studies as influenced by potential location-effect factors.

### **Distraction**

The distraction concerns need to properly address eye-tracking in legal-empirical distraction-effects research. Distraction has long been voiced as one of the reasons

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<sup>3</sup> See, for example, G Lassiter, A Geers, P Munhall, I Handley and M Beers, ‘Videotaped Confessions: Is Guilt in the Eye of the Camera?’ in M Zanna (ed), *Advances, in Experimental Social Psychology*, Vol 20 (Academic Press 2001) 189.

<sup>4</sup> See generally, CE Smith, *Courts and Trials: A Reference Handbook* (ABC-CLIO 2003).

<sup>5</sup> It is also relevant in considering and generalising across TCB research.

<sup>6</sup> L Mulcahy, ‘Architects of Justice: the Politics of Courtroom Design’ (2007) 16 *Social & Legal Studies* 383, 384 and 388.

militating against TCB access. The same concerns exist today as they did in 1965. TCB camera-location and participant-location have never been properly addressed. Sometimes TCB cameras are placed in front of where participants are seated or standing. Therefore, the camera is within their visual cone-of-vision. It is logical, therefore, that the TCB camera may be a visual distraction. If there is a TCB camera operator present, this possibility of distraction may be increased. If the TCB camera is located behind the participant, then the possibility of visual distraction in the visual cone-of-vision is minimal. The US Supreme Court in a case today, would have difficulty finding any research on this point sufficient to assisting it in arriving at considered answers.

A TCB camera in front of the lawyer would seem to enhance the possibility of visual distraction-effects.<sup>8</sup> There have already been instances where TCB cameras and TCB camera operators have recorded (and attempted to record) discussions between the lawyer and client, and also recorded documents and notes on the lawyers table. It appears that this may perhaps be a reason why these concerns are explicitly addressed and prohibited in some of the US state laws regulating TCB.<sup>9</sup> When a lawyer is in discussion with his or her client, or witness, or other fellow lawyers or assistants, he or she is frequently altering their visual cone-of-vision sideways or backwards. The TCB camera is, therefore, potentially within focus, even if behind them.

The cases and the literature recognise that lawyers may not be the only persons in court who might be distracted. Consider the jury for example. Depending on the layout of a courtroom, they may be seated along one side of the courtroom. Let us assume the jury box is on the right-hand side of the courtroom. They might then have to turn to their right to see the lawyers, the judge and the witness box. If the TCB camera is located in the upper end of the courtroom, then the TCB camera will be in the right-facing visual cone-of-vision of the jury. It is a potential distraction. If the TCB camera moves, tilts, pans, zooms, etc, then the possibility of jury distraction may be higher. If there are lights on the TCB camera, or there is a TCB camera operator, then potential TCB distraction-effects may be heightened.

Yet, the location-effect issue and the recording and linking of the actual location of the camera and the location of the courtroom participants are not addressed in the TCB research literature. Therefore, because of this gap, there is going to be a limit to our

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<sup>7</sup> *ibid.*

<sup>8</sup> However, one should also not assume that a TCB camera located behind the lawyer, precludes visual distraction-effects. Cognitive psychological concerns can still arise.

<sup>9</sup> See survey and summary of state laws at < [www.rtdna.org](http://www.rtdna.org) >.

proper appraisal and consideration of much of the effects-research to date. The thesis recommends that future research address these issues.

Consider other courtroom participants. If we take the judge and the official court personnel, they are always seated at the top of the courtroom and facing everyone else. Consider further that some of the popular commentary has suggested that there may be effects of TCB cameras in the courtroom, but the judges will not be affected or will be the least affected. The basis of this suggestion is that the judges are professionally trained (and one might add experienced). However, if we now interpose the camera location-effect issue, we note that regardless of where the TCB camera is located, the judge will frequently be facing the TCB camera (and the TCB camera operator, if present). They are the courtroom participants whose visual cone-of-vision is most frequently going to contain the TCB camera and who have the opportunity to be distracted by the TCB camera (and TCB camera operator).<sup>10</sup> The issue arises as to whether we can still say that judges are the least likely courtroom participants to be distracted by in-court TCB.<sup>11</sup> The judicial distraction issue may need more in-depth consideration than any of the TCB literature and research has to date afforded.

The official courtroom personnel have been mentioned only briefly in the TCB literature. However, the same concerns as above arise. Indeed, one might argue that the concerns are somewhat escalated given that they may have less professional training than a judge. From a location perspective, their visual cone-of-vision is more likely directed towards the TCB camera than other courtroom participants – with the possible exception of judges.

The location-effect issue and coding of the TCB camera location data is relevant to any normative legal and legal-policy review of distraction issues and effects.

### **Visual Cone-of-Vision**

The concept of a visual cone-of-vision of courtroom participants needs to be researched. It is important, the thesis argues, for the research of TCB and TCB effects to accurately record where each individual courtroom participant is located, and to indicate and record where the TCB camera is located. When these two specifics are recorded, we can then

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<sup>10</sup> Let us leave the issue of professional training aside for the moment. An issue that has not in any event been legally-empirically researched in the TCB context.

<sup>11</sup> Admittedly, many other issues arise, such as training, professional experience, media experience, psychology, etc. A judge will have his or her professional training, depending on the jurisdiction, though they may or may not have additional specific judicial training. Even where such additional and express judicial training exists, the literature and research do not address how many judges are trained in TCB issues, where TCB is permitted.

consider the direction and visual cone-of-vision of the individual courtroom participant in question.<sup>12</sup>

Recording this data enables us to research and examine whether the TCB camera distraction is feasibly within the participant visual cone-of-vision, and specifically whether it is proximate-central or proximate-peripheral. That is, noting where the TCB camera is, allows us to gather data on how this interacts with the respective TCB participant visual cones-of-vision. When such information is recordable, it allows us to then consider research and distraction-effect issues more methodically. We are also better able to begin designing particular studies with eye-trackers. There is less point, for example, introducing an eye-tracker to a mock barrister subject (real or otherwise) standing at the front of the courtroom if the fixed tripod TCB camera is located at the back of the courtroom or on a balcony at the back of the courtroom. It is not within their direct visual cone-of-vision.<sup>13</sup>

In designing research for visual distraction and eye-tracking in actual court settings, we need to respect the actual use of a normal courtroom. We need to be cognizant of visual cones-of-vision and location-effect issues. We should record these and incorporate this knowledge into our TCB eye-tracking distraction-effect studies in future.<sup>14</sup> Generally the participant and observer locations are not recorded in previous research. This creates difficulties for normative assessment of the prior research regarding distraction. The Short research is further undermined as it does not record all cases researched. It is also typical of the general research in not appreciating the importance of recording details of the TCB courtroom and TCB cameras for comparative purposes. One of the remits of the Short report was in relation to effects-research.<sup>15</sup> In terms of communications in the courtroom, T-R Valikoski notes that the communicative situation is formed by the purpose of the activity and the environment.<sup>16</sup> TCB distraction-effects research should acknowledge environment and location-effect issues.

### **Distraction-Effects**

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<sup>12</sup> Even if the TCB camera moves and is in more than one location, the exercise of recording location is obviously more difficult, but nonetheless necessary.

<sup>13</sup> That is not to say that there can be no other effects other than visual distraction.

<sup>14</sup> One exception is the Short report. It does record the layout of some, but not all, of the courtrooms where research was undertaken. It included diagrams of seven courtrooms and the camera locations. Short, above 57–63. See Appendices.

<sup>15</sup> The Short report fails to appreciate that one cannot research and assess effects in court without factoring in the location of the courtroom personnel and the location of the TCB camera. This is the first research to identify this point.

<sup>16</sup> T-R Valikoski, 'The Criminal Trial as a Speech Communication Situation' (thesis, University of Tampere, Finland 2004) 116.

If we wish to research distraction-effects we need to incorporate the courtroom participant location and camera location. Let us consider an example of this point. The Short report refers to location issues in seven cases, namely, *Burnett v National Enquirer*; *People v Bittaker* (sentencing); *People v Parnell*; *People v Robbins* (opening and closing arguments only); *People v McDermand*; *People v Snyder*; and *Michel v Dillard*.<sup>17</sup>

Let us assume that we wish to research for TCB distraction-effects on the lawyers in the respective cases. If we look at the diagram for the case of *Burnett v National Enquirer*, we note that the single TCB camera is located behind the rail, which itself is located behind the lawyer table. The lawyers will be (generally) looking forward. Their visual cone-of-vision is forward. Therefore, the lawyers do not have the TCB camera within their visual cone-of-vision. They cannot be distracted visually by the TCB camera.<sup>18</sup> While there can be other effects, there is no visual distraction-effects. The situation is similar in *People v Parnell* and *People v Snyder*.<sup>19</sup>

The situation is different in the case of *People v Bittaker*,<sup>20</sup> where we note that the TCB camera is located before the lawyers, to the left. While it is not in the core of the visual cone-of-vision, it is still visible in the peripheral visual cone-of-vision.

In *People v Robbins* the courtroom layout means that the TCB camera is central in the direct visual cone-of-vision of the lawyers.<sup>21</sup> The TCB courtroom layout and TCB camera location in *Michel v Dillard* also means that (one of) the TCB camera(s) is directly in the lawyers' visual cone-of-vision.<sup>22</sup>

Therefore, only in three of the Short cases can we say that there can be potential visual distraction-effects on the lawyers caused by the TCB camera (and or camera plus TCB camera operator) in the courtroom. Without the courtroom layout and the location of the TCB cameras and courtroom personnel being recorded, we would not know this. We would not know that we should be focusing on these three Short cases for TCB distraction-effects on lawyers, and seeking to compare these cases with the distraction research in other studies. Unfortunately, the research is currently not sufficient to allow us to do this. If we are considering eye-tracking for normative legal-empirical research of TCB distraction-effects on lawyers, our research of the courtroom layout, courtroom

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<sup>17</sup> Short report 1981: 57-63; see Appendices.

<sup>18</sup> They can look behind and sideways, which would be potentially non-direct visual cone-of-vision distraction.

<sup>19</sup> See Appendices.

<sup>20</sup> See Appendices.

<sup>21</sup> See Appendices.

<sup>22</sup> See Appendices.



participant location, and the location of the TCB cameras could lead us to focus on these three cases and or courtrooms in the Short research. A further point is that eye-tracking research of in-court TCB distraction-effects on lawyers may be less applicable to courts with the layout in the other cases referred to above.

However, we may wish to research other TCB in-court distraction-effects. Consider witnesses for example. If we examine the courtroom layouts and locations, we may see that there is a TCB camera in the visual cone-of-vision of the witness in all seven cases referred to above.<sup>23</sup> Therefore, TCB distraction-effects and effects-research are live issues in each of these cases. Eye-tracking technology as a legal-empirical research tool is applicable in all of the cases to examine participant distraction-effects.<sup>24</sup>

### **The Eye-Tracking Demonstration and Location**

It is important to realise that courtroom personnel can potentially be distracted by TCB cameras. The issue is to research this and also to see the extent of this. This may then have implications for the legal, popular and legal-policy arguments in relation to TCB.<sup>25</sup> In terms of distraction-effects, a given courtroom participant may be looking at the TCB camera and or TCB camera operator directly. This is direct visual line-of-sight distraction (direct visual cone-of-vision). However, there is also another important potential form of distraction. All individuals have a wide visual cone-of-vision. They can see things directly *and* peripherally. Many items can be seen within the visual field of vision (visual cone-of-vision) of an individual participant. The implication for TCB distraction-effects research is that we should consider not just whether a courtroom participant is looking directly at the TCB camera in the courtroom, but also whether they see and are distracted by a TCB camera or TCB camera operator in their peripheral visual cone-of-vision. A final category may consider when courtroom participants may look sideways or behind themselves – when the TCB camera is located behind them – and which may be considered indirect distraction. So we have potentially three scenarios, namely, direct central visual cone-of-vision distraction; peripheral visual cone-of-vision distraction; and indirect visual cone-of-vision distraction of courtroom participants to consider.

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<sup>23</sup> Albeit in *People v Bittaker*, *People v Robbins* and *Michel v Dillard* the camera is in the peripheral visual cone-of-vision.

<sup>24</sup> Though the thesis only refers to lawyers and witnesses above, the layout and location issues are important in relation to all courtroom participants.

<sup>25</sup> There may be potential implications for other forms of courtroom broadcasting, for example, radio. Some US courts have decided to post some of their courtroom audio recordings online. See EP Robinson, 'Hear Ye, Hear Ye!: Some Federal Courts Post Audio Recordings Online' Blog Law Online, 17 April 2014 <<http://bloglawonline.blogspot.ie/2014/04/hear-ye-hear-ye-some-federal-courts.html>> accessed 27 April 2014.

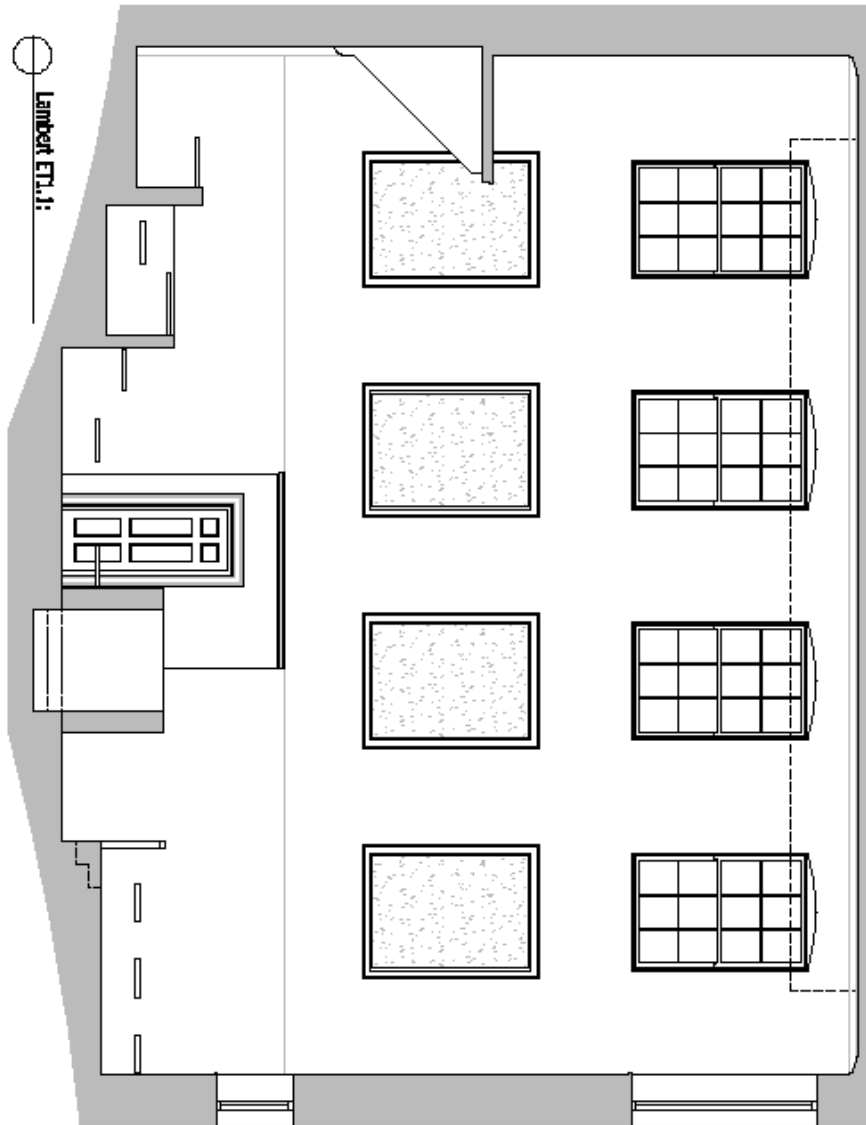
### **Proof-of-Concept Demonstration**

The visual cone-of-vision of the courtroom personnel in the figures below in the proof-of-concept demonstration are represented in an angle field of vision of 120 degrees. It is understood that normally people with good eye sight would have 20-20 vision, meaning a field of 140 degrees. It was chosen to show 120 degrees to allow for impairment, etc, and to remain conservative.

### **Location 1: ET1.1**

This Image is an exterior location drawing of the proof-of-concept demonstration courtroom, included a whole longitudinal exterior section, of the court building in question. The courtroom was located on the ground floor. There were two public entrances and two for the judge (see below).

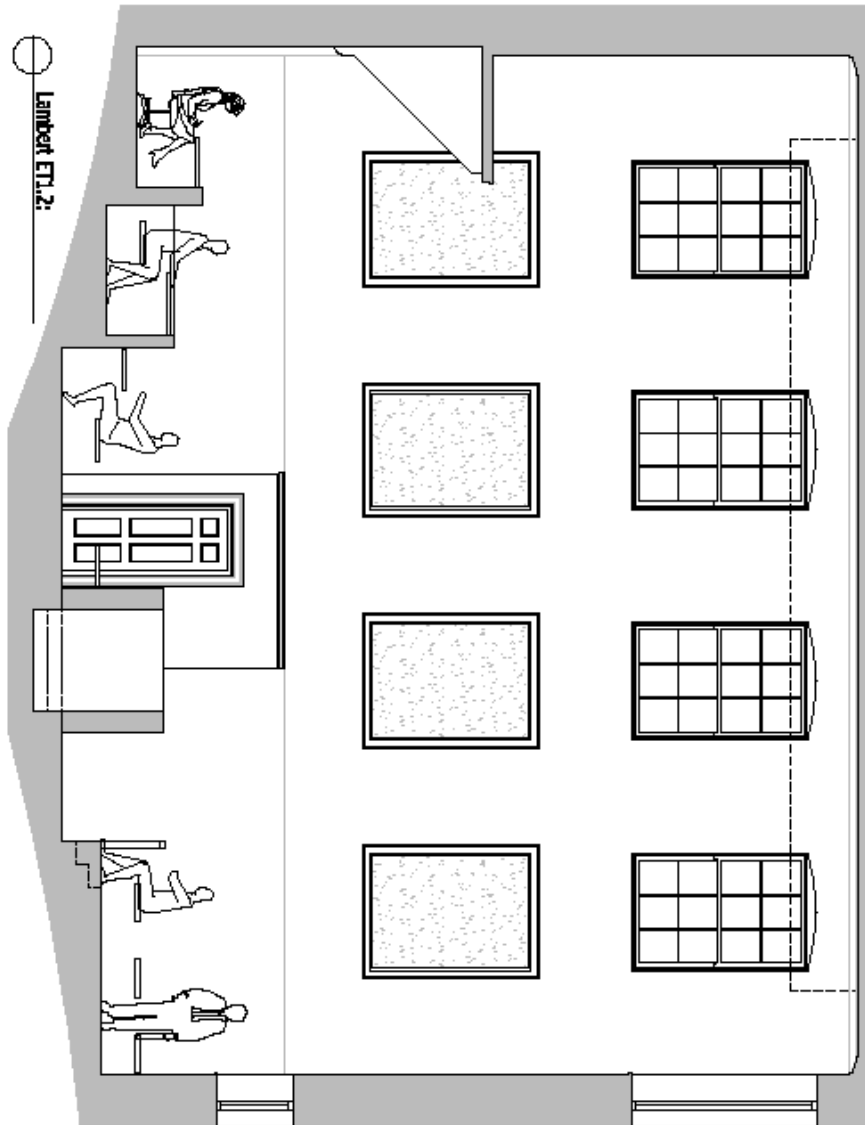
Image ET1.1



**Location 2: ET1.2**

This Image drawing is similar to the Image ET1.1, with various representative courtroom participants imposed. They are located in their normal or usual locations. Seated at the left-hand side (top of the courtroom) is the judge (J). Sitting below the judge is the court clerk (C). Below the clerk, one sees a solicitor or lawyer seated (S)(L). (In this longitudinal drawing we do not see the witness box, or the seated witness (W). To the rear of the court, on the right-hand side of the longitudinal drawings, we see two members of the public, one seated and one standing. In the proof-of-concept demonstration study there were no members of the public present. They are included for illustration purposes.

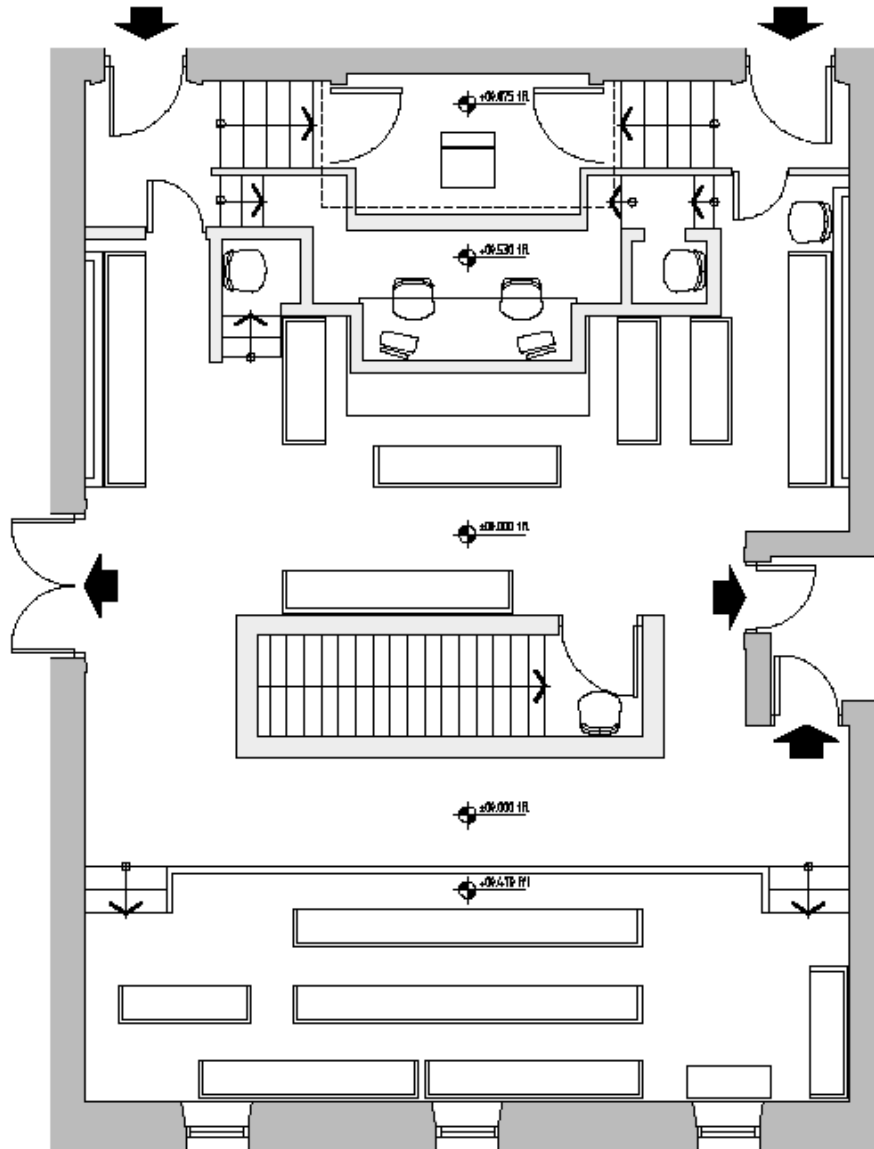
Image ET1.2



**Location 3: ET1.3**

Image ET1.3 is a topographical drawing of the courtroom. We see the two public entrances on the left hand side and right hand side. At the top of the courtroom we see two entrances on either side of the judge's bench (J). The square seat on the raised area at the top of the drawing is the judge's seat on the judge's raised bench (J). Directly below the judge's seating area (J), there are two seats for the court clerk (C) and assistant or alternatively a court transcriber. To the immediate left and right of the court clerk's seating area, there are two separate witness boxes containing seats (W). Directly below the judge's and court clerk's seats, there is a solicitors' or lawyers' bench (S)(L) for sitting. On the left and right, there are two further benches for lawyers and/or police prosecutors to sit. There is a stairwell area in the centre of the courtroom, which leads down to prisoner holding areas.

Image ET1.3



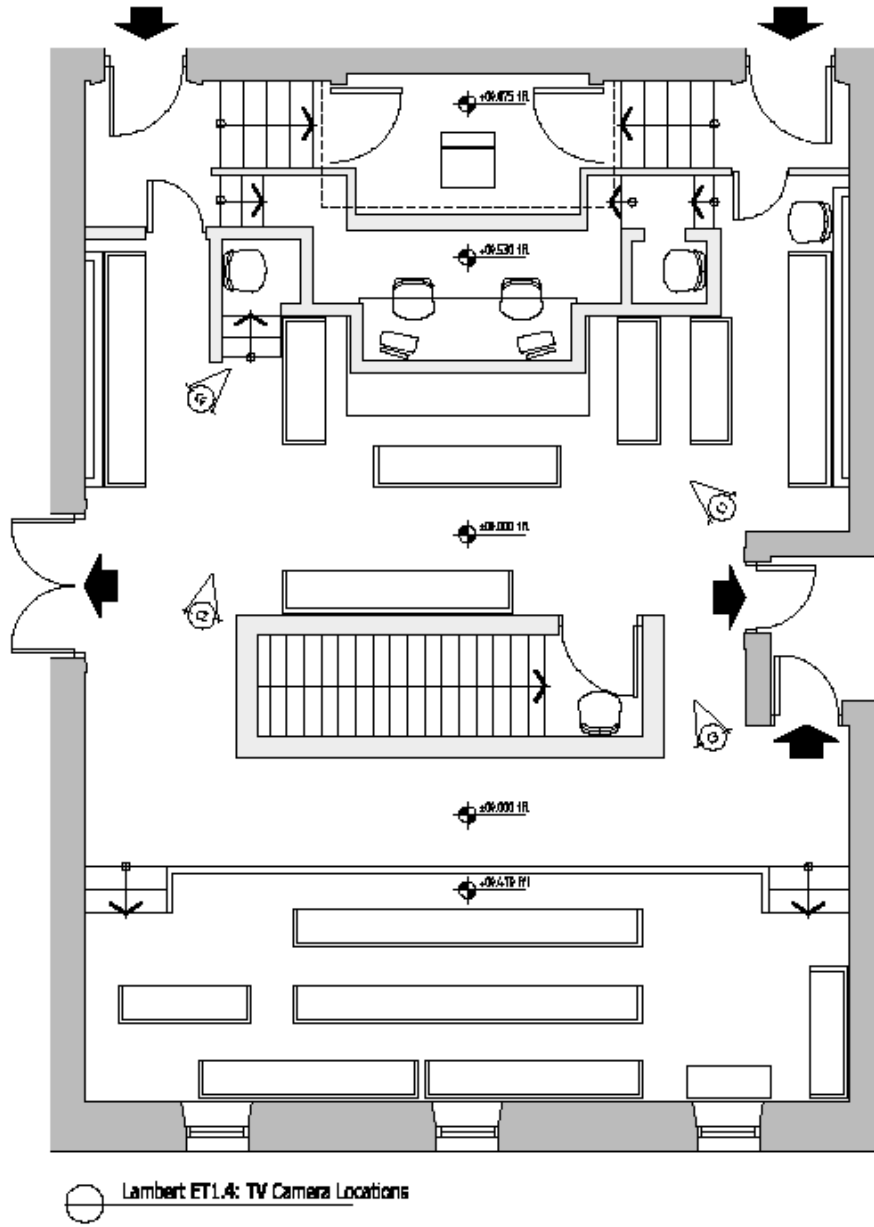
○ Lambert ET1.3: \_\_\_\_\_

**Location 4: ET1.4 TV Camera Locations**

Image ET1.4 shows the courtroom topography with the different tripod TCB camera distractor locations marked. These are locations C1, C2, C3 and C4 (TCB Camera Positions 1–4). They are represented in a circle, with an arrow pointing in the direction that the TCB camera distractor is pointing and focusing. Bear in mind, however, that the camera can tilt left and right and up and down, so the direction in which the camera is facing can change greatly. The directions marked are for the illustrative direction representation. However, they represent some of the most common directions.



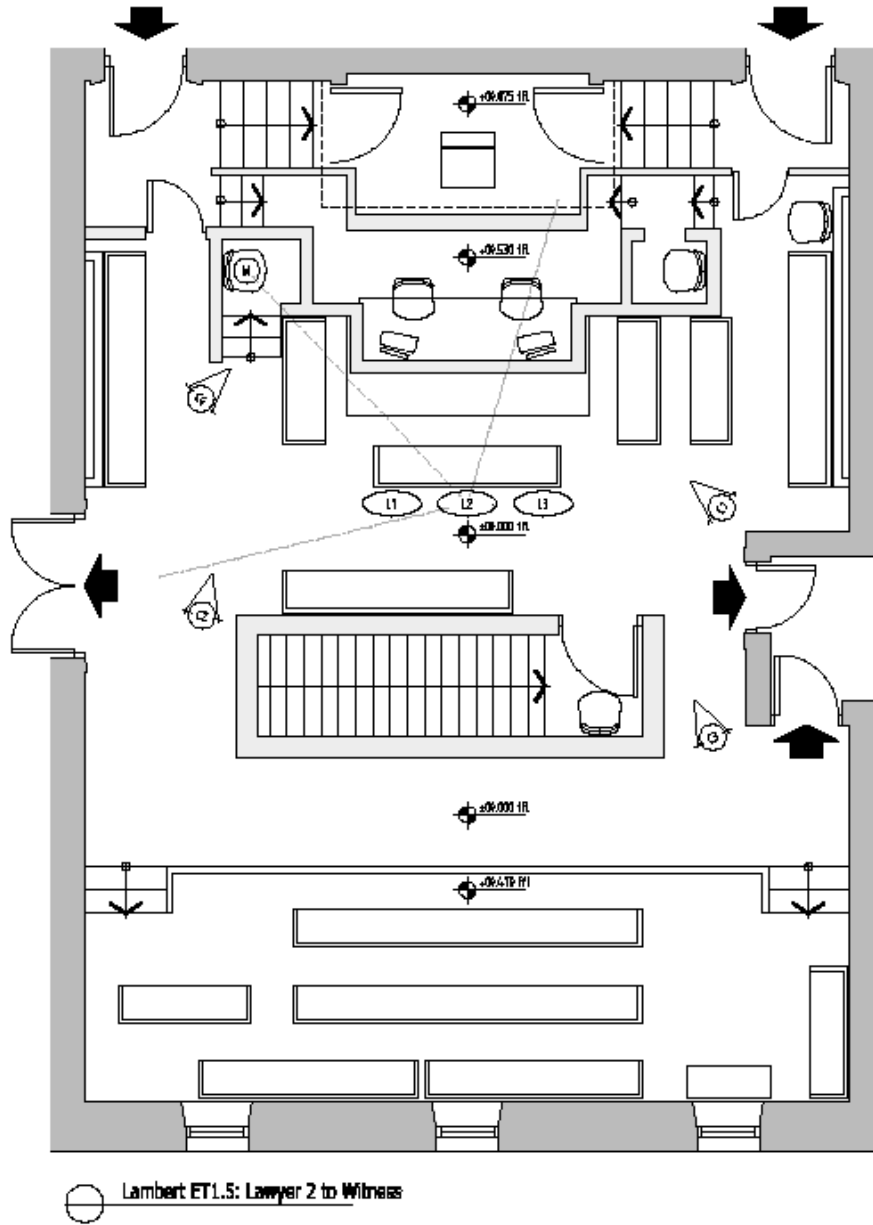
Image ET1.4



### **Location 5: ET1.5 Lawyer 2 to Witness**

This drawing shows the courtroom topography, the seats of the judge (J), court clerk (C), witness (W) and lawyers (S)(L). It also shows the four TCB camera distractor location positions C1–C4. In terms of the lawyer standing position (L), there are three lawyer standing positions represented, namely L1, L2 and L3. The reason is that standing lawyers can be located at any of these three potential standing locations. In Image ET1.5 we also see a representation of Lawyer 2 (L2) looking at the witness (W). A cross-examination or examination could be in process. The broken centre line indicates the lawyer's direct visual line-of-sight (L2 to W). The non-broken lines left and right of the direct central line-of-sight represent the complete visual cone-of-vision of the lawyer. It is evident that the visual cone-of-vision, looking directly at the witness, indicates that lawyer 2 (L2) can easily see TCB Camera Position 4 (C4). Without a significant movement forward towards TCB Camera Position 2 (C2), it would also come into the visual cone-of-vision of lawyer 2 (L2).

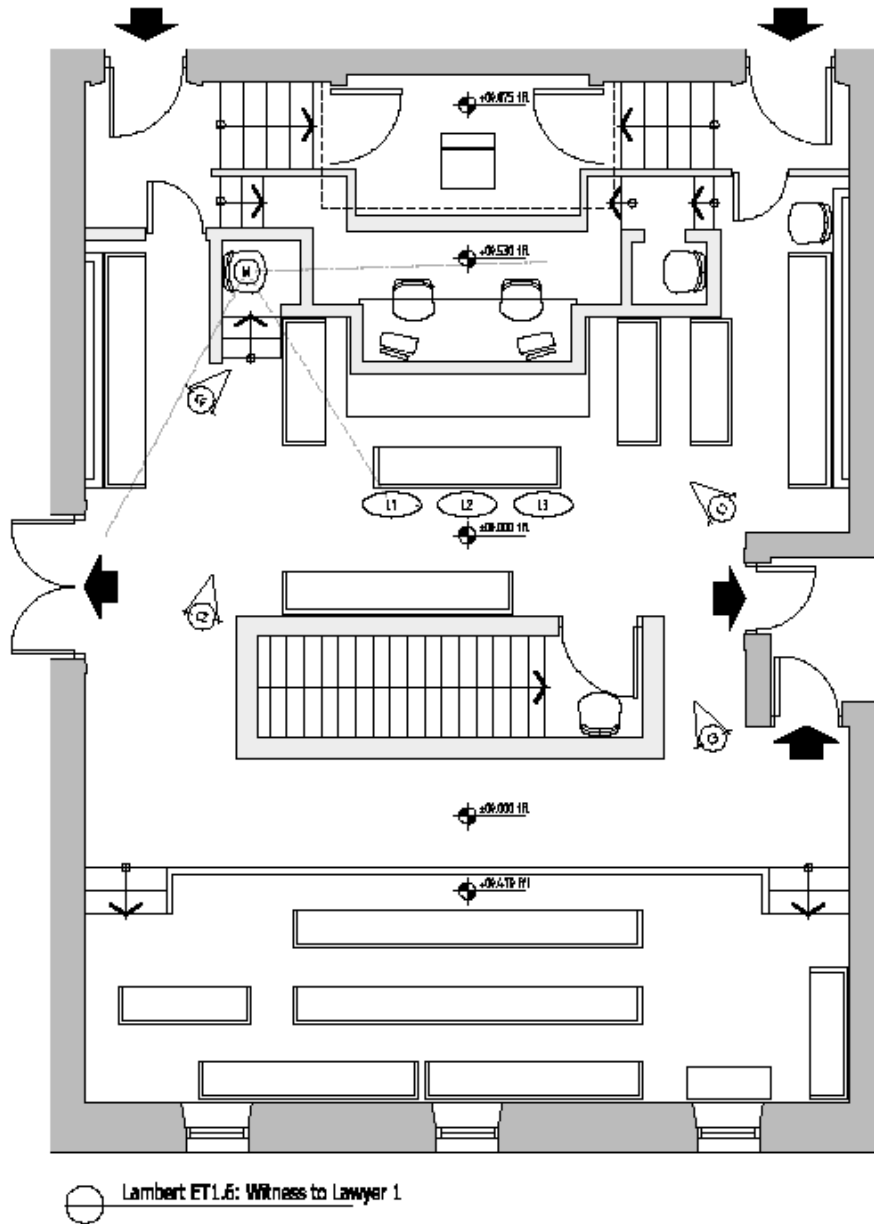
Image ET1.5



**Location 6: ET1.6 Witness to Lawyer 1**

In this courtroom topography image the witness (W) is looking at lawyer 1 (L1). It is clear from the witness' visual cone-of-vision that TCB camera distractor positions 1, 2, 3 and 4 (C1-C4) are all within the witness' visual cone-of-vision view.

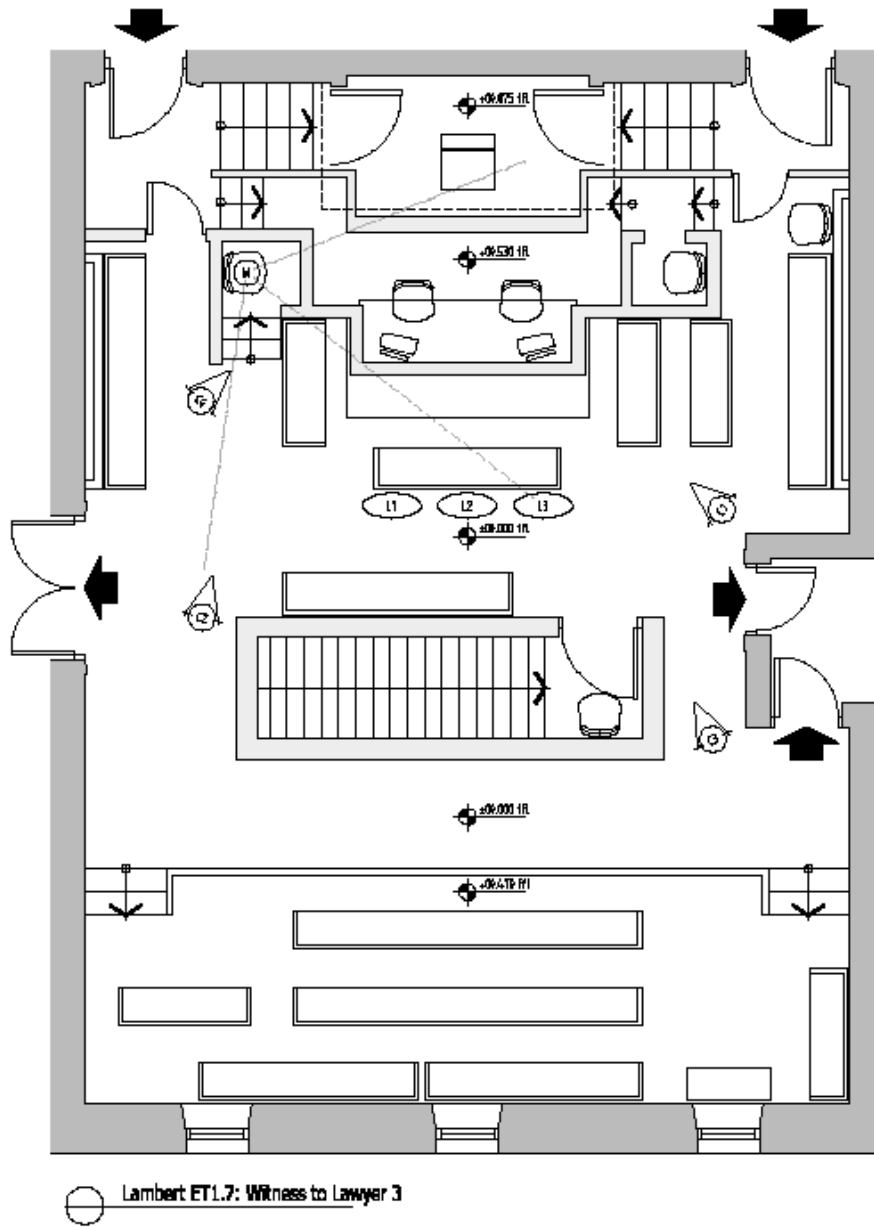
Image ET1.6



**Location 7: ET1.7 Witness to Lawyer 3**

This courtroom topography also shows the witness (W), but this time looking at lawyer 3 (L3). In this visual cone-of-vision TCB Camera Position 4 (C4) is (just) excluded. However, the witness can see in their visual cone-of-vision TCB camera distractor positions 1, 2 and 3 (C1, C2 and C3).

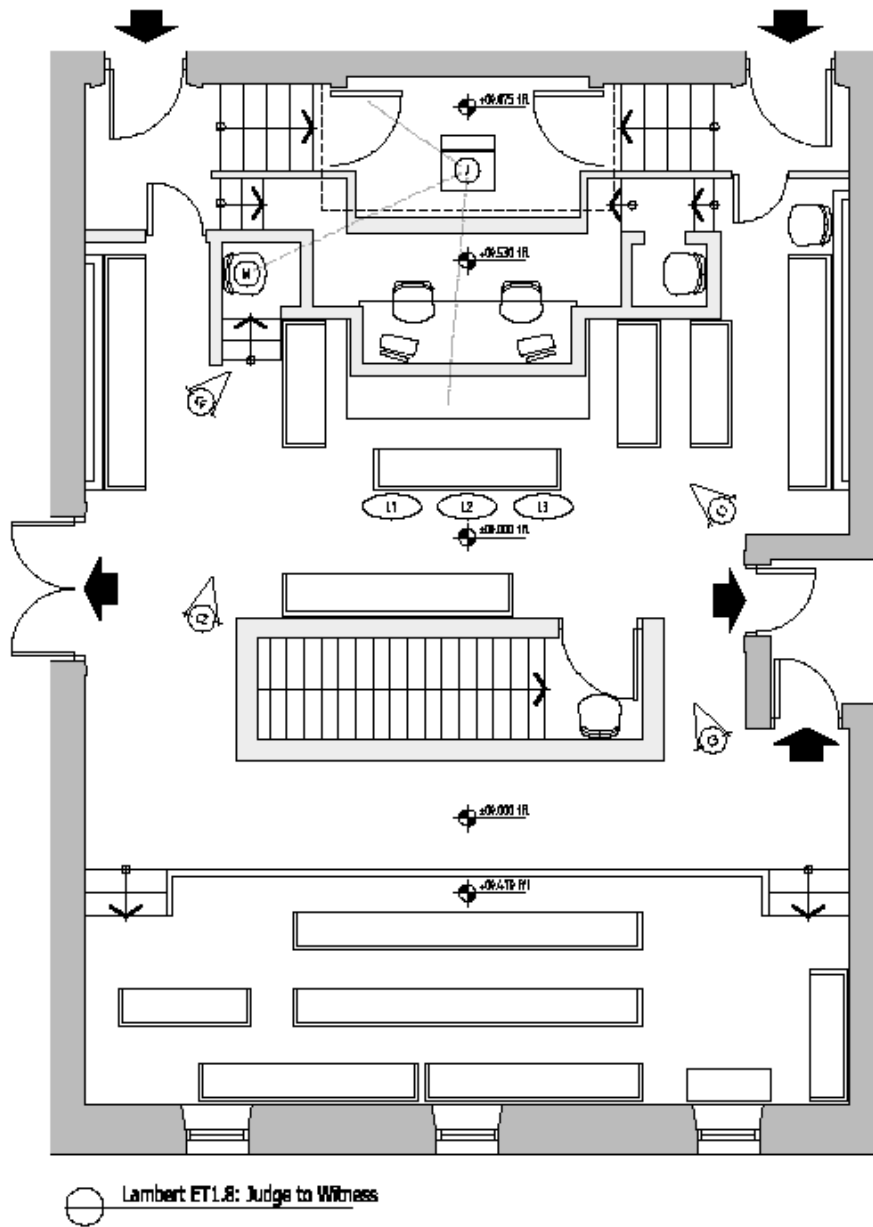
Image ET1.7



**Location 8: ET1.8 Judge to Witness**

The courtroom topography here indicates that the judge (J) is looking at the witness (W). The visual cone-of-vision indicates that the judge (J) can see TCB Camera Position 4 (C4) and TCB Camera Position 2 (C2).

Image ET1.8





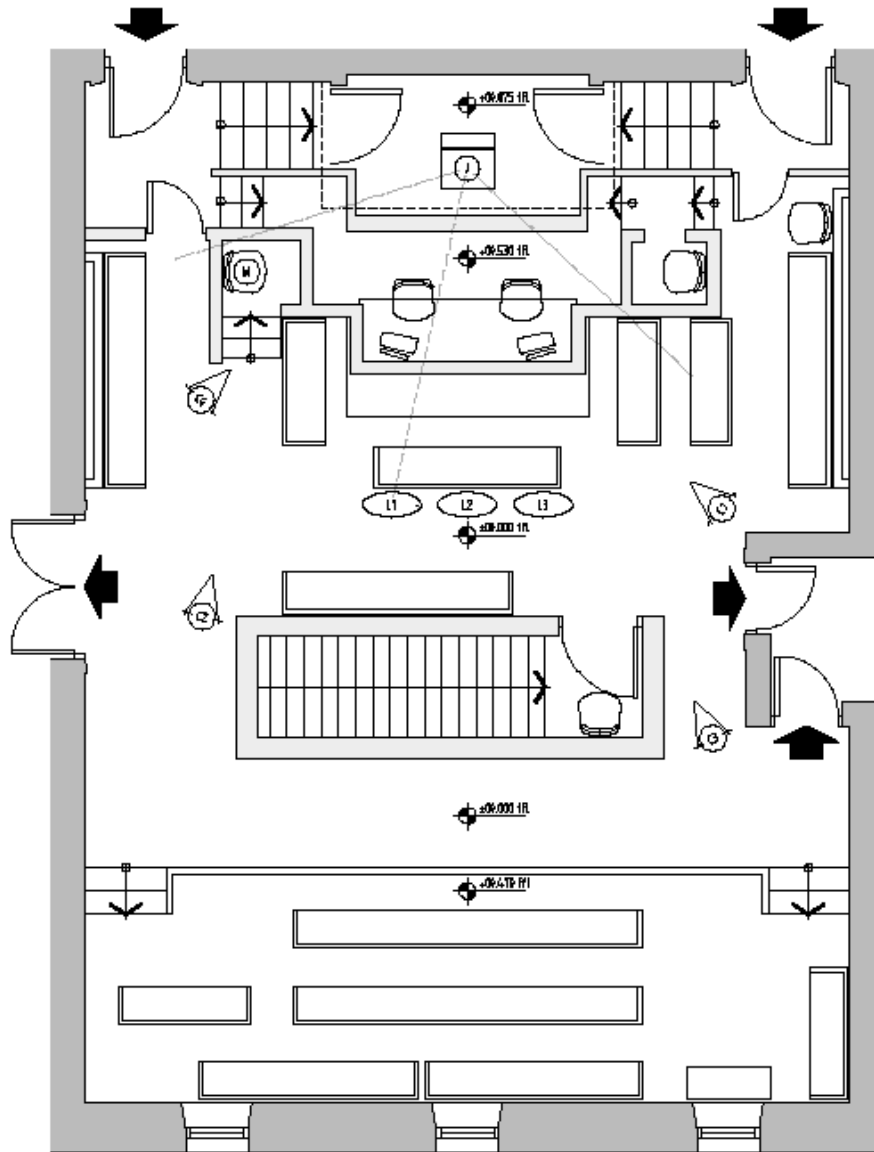
### **Location 9: ET1.9 Judge to Lawyer 1**

The courtroom topography shows that the judge (J) is looking at lawyer 1 (L1). The visual cone-of-vision shows that all four TCB camera positions are evident to the judge (C1, C2, C3 and C4). It is noted, therefore, that contrary to what might otherwise have been assumed, the judge is visually the person potentially most likely to be affected by distraction-effects of TCB camera distractor in the courtroom. Of course, judges are experienced, professionally trained and often judicially trained.<sup>26</sup> Traditionally, these points are similar to the points raised in cases and policy discussion in terms of judges being not affected – or less affected - by media pre-trial publicity. However, in light of the above proof-of-concept demonstration, it is suggested that this is an issue deserving of more research and deeper consideration. This applies in terms of TCB per se, and also in terms of particular forms of TCB where permitted.

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<sup>26</sup> Albeit not always media trained.

Image ET1.9



○ Lambert ET1.9: Judge to Lawyer 1

**Location 10: ET1.10 Judge to Lawyer 3**

In this instance the courtroom topography indicates that the judge (J) is looking at lawyer 3 (L3). The visual cone-of-vision for the judge (J) in this instance reveals that the judge (J) can easily see TCB Camera Positions 1, 2 and 3 (C1, C2 and C3). Possibly TCB Camera Position 4 (C4) in whole or in part is also visible. However, if it is not, even a small adjustment of the TCB camera would bring it into focus in the judge's visual cone-of-vision. We also see that the judge is looking directly at lawyer 3 (L3). TCB Camera Position 3 (C3) is almost directly behind the lawyer. The TCB camera distractor 1 (C1) is only slightly to the judge's left as s/he looks directly at lawyer position 3 (L3).



## Location and the Research Literature

The studies refer very little to the location issue. Studies do not record the actual location of TCB cameras in particular pilots. This is unfortunate, as it means we cannot properly consider and evaluate the efficacy of those studies as influenced by location factors. It may be disappointing how seldom the TCB camera location is recorded even in the legal-empirical studies. The instances where there is some recordal of location available in the literature are referred to below.

It may be pointed out, also, that it does not appear that any of the non-empirical or the legal-empirical research studies refer to the TCB camera operator issue. This is despite the apparent intuitive nature of the issue. While it can be said that, for example, the TCB camera operator will always be beside the TCB camera, this is perhaps an oversimplistic appraisal. If we are properly researching for in-court distraction-effects, we need to record if there is a TCB camera operator present, how many, where, whether they are moving, record exactly what they are doing, whether there are assistants, etc.

In terms of the legal-empirical research the following references to location and or TCB camera operators have been identified by the author. This is instructive as it demonstrates how little location research data would be available to the US Supreme Court if it had another TCB case tomorrow. Despite the concerns voiced in 1965, there is still no body of dedicated TCB location-effects research to support the arguments on either side of the TCB question and to inform TCB legal and legal-policymaking. Nevada is referred to as requiring TCB camera operators to dress appropriately for court.<sup>1</sup> The camera locations are not recorded. In JL Hoyt's study it was indicated that in the camera obtrusively-present control condition, the camera was 'in front' of and pointing 'directly at' the subjects.<sup>2</sup> No recorded diagram or photograph is produced.

The Short report does not address the camera location-effect issue, but does attach diagrams of some of the courts which mark the location of the TCB camera.<sup>3</sup> D Shores refers to one of his control groups where the TCB camera operator noticeably adjusts the

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<sup>1</sup> As referred to in KL Netteburg, 'Cameras in the Courtroom: Is a Picture Worth a Thousand Words?' (PhD thesis, University of Minnesota 1980) 43.

<sup>2</sup> JL Hoyt, 'Courtroom Coverage: The Effects of Being Televised' (1977) *Journal of Broadcasting* 487, 491.

<sup>3</sup> EH Short and Associates, *Evaluation of California's Experiment with Extended Media Coverage of Courts, Submitted to The Administrative Office for the Courts, The Chief Justice's Special Committee on the Courts and the Media and The California Judicial Council* (September 1981) see 57-63. (Short report).

camera and also turn it on an off.<sup>4</sup> The location issue is not mentioned. SM Kassin indicates that in his study the camera was ‘directed at the jury box from the witness stand.’<sup>5</sup> No diagram was attached. The location issue is not mentioned. E Borgida, KG DeBono and LA Buckman used a camera behind a one way mirror, approximately seventeen feet from the witnesses.<sup>6</sup> They do not refer to the location issue. AD Panches does record and include a diagram of where the two cameras were, both facing the subject head on from left and right.<sup>7</sup> He does not, however, refer to the location issue. A Bukoff in his research on video recording refers as follows, television ‘[c]amera *position* and angle, closeness of focus, lighting, and other video production techniques may be able to influence a juror’s perception of the physical attractiveness of the witness and attorneys by recording them in a more or less visually appealing view.’<sup>8</sup> In his study, he indicates that the cameras and equipment were set up ‘approximately ten feet from the witness.’<sup>9</sup> No diagrams, layouts or photographs of the study environment marking the cameras are included.

P Goldman and R Larson produce a diagram of TCB camera location in one case study.<sup>10</sup> One case is referred to where the pooled camera was located at the rear of the courtroom.<sup>11</sup> The details are not referred to or documented. P Thaler in his case study of the *Steinberg* case, indicates that in the pre-trial stages, cameras were permitted in the ‘well’ of the courtroom, but during the trial they were located at the end of the jury box behind the lawyers, thus shooting over the lawyers’ shoulders.<sup>12</sup> In fact the lawyers were asked to move on a number of occasions to permit TCB camera line of sight access to

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<sup>4</sup> D Shores, ‘The Effects of Courtroom Camera on Verbal Behavior: An Analysis of Simulated Trial Witness Testimony in Courtrooms Using Television Cameras’ (PhD thesis, University of Florida 1981) 59.

<sup>5</sup> S Kassin, ‘TV Cameras, Public Self-Consciousness, and Mock Juror Performance’ (1984) 20 *Journal of Experimental Social Psychology* 336, 339-340.

<sup>6</sup> E Borgida, K DeBona and LA Buckman, ‘Cameras in the Courtroom, The Effects of Media Coverage on Witness Testimony and Juror Perceptions’ (1990) 14:5 *Law and Human Behaviour* 489, 495-496.

<sup>7</sup> AD Panches, ‘The Cognitive Effects of Camera Presence on the Recall of Testimony in a Simulated Courtroom Setting’ (PhD thesis, Colorado State University, Fort Collins 1991) 33-34, 40-41.

<sup>8</sup> A Bukoff, ‘The Effects of Video Camera Techniques on the Pre-Deliberation Judgements and Perceptions of Role-Playing Jurors’ (PhD thesis, Kent State University 1984) 22. Emphasis added.

<sup>9</sup> *ibid* 58. Emphasis added.

<sup>10</sup> SL Alexander, “‘Mischievous Potentialities’”: A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit, Florida, 1989’ (PhD thesis, University of Florida 1990) 65, referring to P Goldman and R Larson, ‘News Cameras in the Courtroom During *State v Solorzano*: End to the Estes Mandate?’ (1978) 10 *Southwestern-Nevada Law Review* 2001. One media representative feels that the judge(s) have too much discretion in relation to where equipment (and presumably cameras too) would be located, *ibid* 129.

<sup>11</sup> *ibid* 138.

<sup>12</sup> P Thaler, ‘The Impact of the Television Camera on Courtroom Participants: A Case Study of the Joel Steinberg Murder Trial’ (PhD thesis, New York University 1990) 62.

witnesses.<sup>13</sup> The location-effect issue is not referred to. The first Federal pilot study refers to media representatives, who indicate that single TCB camera footage of a case can cause a problem for gavel to gavel (G2G) recording, as occasionally courtroom participants move and or block the camera line of sight.<sup>14</sup> No camera locations are recorded in the study.<sup>15</sup> The following do not explicitly refer to nor record TCB camera location, nor refer to the separate location issue itself, namely, the first Federal pilot study<sup>16</sup>; K Netteburg,<sup>17</sup> D Shores,<sup>18</sup> S Pasternack,<sup>19</sup> AR Paddon,<sup>20</sup> S Esposito,<sup>21</sup> W Petkanas,<sup>22</sup> S Kohm,<sup>23</sup> RE Reeves Stewart,<sup>24</sup> J Ossinger,<sup>25</sup> the New York study,<sup>26</sup> T Keller<sup>27</sup> and R Entner.<sup>28</sup> Neither does S Barber,<sup>29</sup> W Freedman,<sup>30</sup> R Goldfarb,<sup>31</sup> or M Cohn and D Dow.<sup>32</sup> Even D Stepniak in one of the more recent texts does not address this issue.<sup>33</sup> It appears that the author is again the first to explicitly raise location-effects

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<sup>13</sup> *ibid.*

<sup>14</sup> MT Johnson and C Krafka, *Pilot Program Involving Electronic Coverage in Six US District Courts and Two Appeal Courts* (Federal Judicial Centre 1994) 37.

<sup>15</sup> It is unclear if the second Federal study, regarding Federal TCB, will improve upon location-effects research.

<sup>16</sup> MT Johnson and C Krafka, *above*.

<sup>17</sup> KL Netteburg, 'Cameras in the Courtroom: Is a Picture Worth a Thousand Words?' (PhD, University of Minnesota 1980).

<sup>18</sup> DL Shores, Jr, *above*.

<sup>19</sup> SR Pasternack, 'The Effects of Perceived Community Pressure on Simulated Juror Guilt Attributions: An Experimental Study' (PhD thesis, University of Tennessee, Knoxville 1982).

<sup>20</sup> AR Paddon, 'Television Coverage of Criminal Trials with Cameras and Microphones: A Controlled Experiment of Audience Effects' (PhD thesis, University of Tennessee 1985).

<sup>21</sup> SA Esposito, 'OJ TV: A Narrative Analysis of Television's Pretrial Coverage of the OJ Simpson Case' (PhD thesis, Graduate School of Wayne State University, Detroit, Michigan 1996).

<sup>22</sup> W Petkanas, 'Cameras on Trial: An Assessment of the Educational Affects of News Cameras in Trial Courts' (PhD thesis, New York University, 1990).

<sup>23</sup> SA Kohm, 'I'm Not a Judge But I Play One On TV: American Reality Based Courtroom Television' (PhD thesis, Simon Fraser University 2004).

<sup>24</sup> RER Stewart, 'The Changing Relationship Between Cameras and the Courts' (MA thesis, Florida Atlantic University 1998) 1-2, and 32.

<sup>25</sup> J Ossinger, 'Electronic Access to Courtrooms: Television as an Educational Socializing Agent on the Judiciary' (MA thesis, University of Maine 2006).

<sup>26</sup> *New York State Committee to Review Audio-Visual Coverage of Court Proceedings, An Open Courtroom: Cameras in New York Courts* (Fordham University Press 1997).

<sup>27</sup> TD Keller, 'Cameras in Courtrooms: An Analysis of Television Court Coverage in Virginia' (PhD thesis, University of Tennessee, 1992) 125.

<sup>28</sup> R Entner, 'The Image of the Judiciary: A Semiotic Analysis of Broadcast Trials to Ascertain its Definition of the Court System' (PhD thesis, New York University 1993).

<sup>29</sup> S Barber, *News Cameras in the Courtroom: A Free Press – Fair Trial Debate* (Ablex 1987).

<sup>30</sup> W Freedman, *Press and Media Access to a Criminal Courtroom* (Quorum Books 1988).

<sup>31</sup> GL Goldfarb, *TV or Not TV: Television, Justice, and the Courts* (New York University Press 1998) in particular 116 ff.

<sup>32</sup> Referring to M Cohn and D Dow, *Cameras in the Courtroom: Television and the Pursuit of Justice* (Rowman & Little 2002).

<sup>33</sup> D Stepniak, *Audio-Visual Coverage of Courts* (Cambridge University Press 2008).

issues as a potentially significant consideration to be addressed in normative TCB effects-research in future.

The US Supreme Court in the three camera cases, *Estes*,<sup>34</sup> *Chandler*<sup>35</sup> and *Hollingsworth*,<sup>36</sup> does not refer at all to the camera and location issues. Neither does the US Supreme Court research challenge refer to the location problem, nor recommend this as a legal-empirical research issue. The author has previously made the point that while the US Supreme Court challenge refers to many issues to be legally-empirically researched eg distraction, we should not assume that the US Supreme Court has definitively referred to all such potential issues and effects. Indeed, while it has voiced the concern with TCB and highlights the problem of a lack of legal-empirical research to assist courts, the detail and parameters of conducting specific research is left to others to advance.<sup>37</sup>

The *Cameras in the Court: A State-By-State Guide*,<sup>38</sup> produced by Radio Television Digital News Association in the US, refers to local state laws in the US relating to TCB. The issue of location and effects is not referred to at all. However, in many instances, particularly the Tier 1 category identified therein, judges are given wide discretion<sup>39</sup> and, therefore, at least in these instances appear able to specify where the TCB camera(s) should be placed in the courtroom. Most states also provide a limit on the number of TCB cameras and or TCB camera operators.<sup>40</sup> In one instance (North Carolina) the camera and camera participants may be behind a partition or booth, albeit this may be waived.<sup>41</sup> However, it may not be sufficient to simply conclude there can be no effects of the TCB camera because of its location in the courtroom is within the visual cone-of-vision of given courtroom participants. The impact of the location issue is not addressed in the law reviewed. Considered research could advance the level of TCB legal and legal-policy information available for contemporary decision making. The Guidelines for Media Access to Judicial Proceedings in the Rhode Island study specified that the

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<sup>34</sup> *Estes v Texas* 381 US [1964] 532.

<sup>35</sup> *Chandler v Florida* 449 US [1981] 560.

<sup>36</sup> *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 19 January 2014.

<sup>37</sup> This is arguably as it should be, given that to properly design and undertake the best legal-empirical research, cross-disciplinary expertise is often required.

<sup>38</sup> Available at < [www.rtdna.org](http://www.rtdna.org) > accessed 29 August 2010.

<sup>39</sup> *ibid.*

<sup>40</sup> *ibid.*

<sup>41</sup> *ibid.*



location of the TCB camera would be as directed by the judge.<sup>42</sup> The potential importance of the location issues is not identified however.

### **Tru TV (Formerly Court TV)**

Tru TV generally uses a single TCB camera, without a TCB camera operator in court.<sup>43</sup> It is unclear if TCB camera location, TCB camera operator location, etc, are ever recorded and documented. Given that Tru TV undertake so much of the TCB that occurs, it would be useful for courts, legal-policymakers, participants and researchers, both now and in the future, to have these details documented and made available. A further issue is that future pilot periods,<sup>44</sup> there should ideally be a requirement to properly record location issue data.

### **Distraction**

Distraction-effects are often canvassed as one of the reasons against permitting TCB. Unfortunately camera location and participant location, and their interplay appear not to have been addressed in a manner sufficient to assure the US Supreme Court. Consider lawyers for example. Sometimes TCB cameras are placed somewhere in front of where they are seated or standing. Therefore, the TCB camera is within their direct visual cone-of-vision. It is logical, therefore, that the camera may be a potential distraction. If there is a TCB camera operator present, this possibility of distraction may potentially be enhanced. However, if the TCB camera is located somewhere in the courtroom that is behind the lawyers, then the possibility of distraction in the lawyers' visual cone-of-vision is less. It is important therefore, that in considering effect and research of effects, that we know which participant we are considering, what effect, what cause, and where the cause (camera) in this instance, is located.

While a camera in front of the lawyers would seem to enhance the possibility of distraction possibilities, one should not assume that a camera located behind the lawyers precluded distraction-effects.<sup>45</sup> There have already been recorded instances where TCB cameras and TCB camera operator have recorded (and attempted to record) discussions between lawyer and client, and also record documents and notes on the lawyers table.

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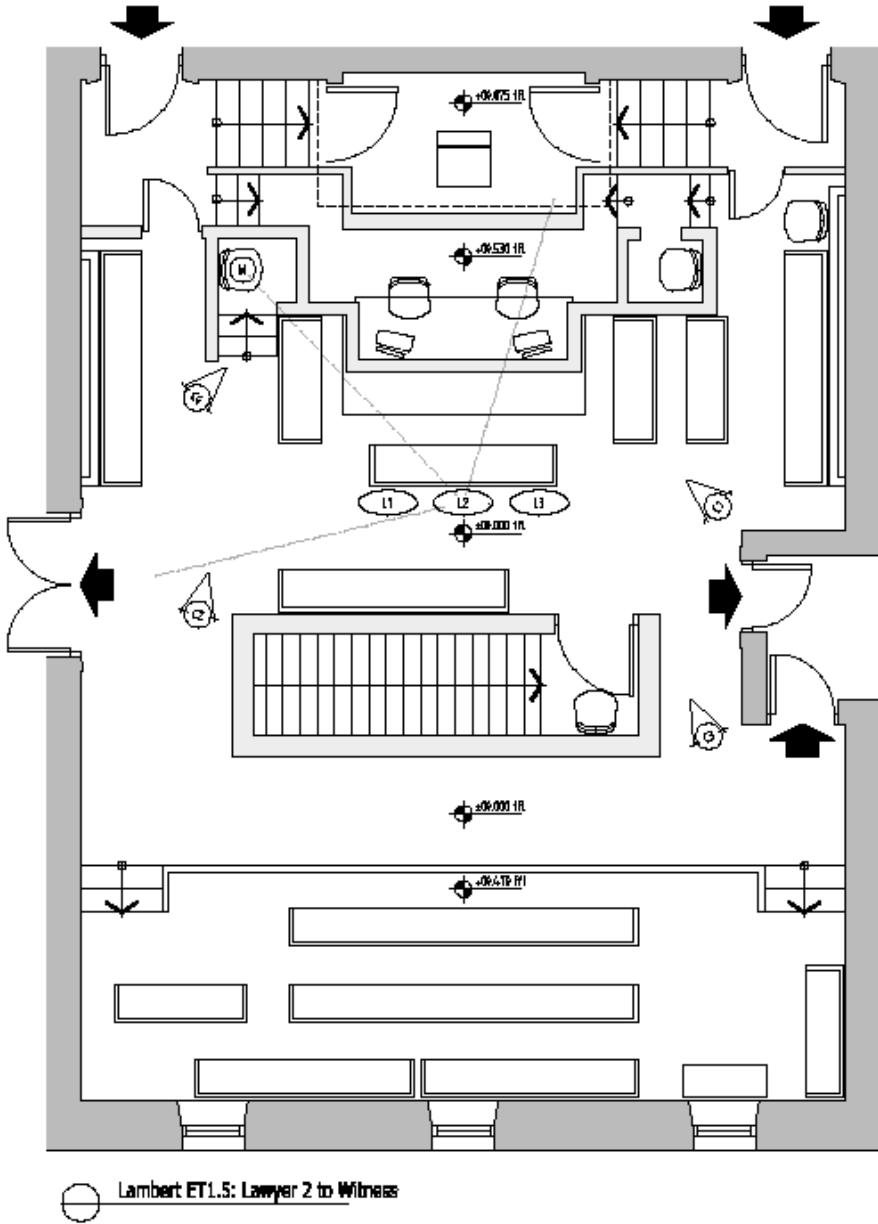
<sup>42</sup> In 1981–1982. Referred to and appended in JR Weisenberger, 'Cameras in the Courtroom: The Rhode Island Experience' (1983) *Suffolk University Law Review* 299, at 300 and 308.

<sup>43</sup> DA Harris, 'The Appearance of Justice: Court TV, Conventional Television, and the Public Understanding of the Criminal Justice System' (1993) 35 *Arizona Law Review* 785, 804.

<sup>44</sup> Including the second Federal pilot period.

<sup>45</sup> Psychological concerns can also arise.

In the image below we see that TCB cameras 2 and 3 (C2, C3) are located behind the Lawyer (L) position, and therefore outside of the direct visual cone-of-vision of the lawyer. There is likely no direct visual distraction in this instance.<sup>46</sup>



<sup>46</sup> There can of course be effects in terms of when the Lawyer looks back; sees the cameras entering and or setting up; and cognitive psychological effects.

### **Audience Effects/Camera-Perspective-Bias**

There can be effects outside of the courtroom too. The research in relation to camera-perspective-bias and confessions highlights how important it is to record camera and media issues which particularly impact upon the legal process, and which may have effects. By recording and examining the data, and carrying out research in relation to such data we can assess effects in a more considered and informed manner. Where adverse effects are identified, we can then factor this into legal and legal-policy decisions to ameliorate such adverse effects. In terms of the camera-perspective-bias effect, GD Lassiter and AA Irvine<sup>47</sup> showed that the same interview recorded on different camera locations showing (1) suspect only, (2) police officer only, and (3) both equally focused. Research subjects then viewed one of the videos. Subjects who saw the suspect-only video, felt that there was less coercion.<sup>48</sup> Other research confirmed that suspect-focus only videos, yielded significantly higher ratings for perceived guilt and voluntariness.<sup>49</sup> This has already led to policy changes.<sup>50</sup> In any considered assessment of audience effects, and more importantly in comparing effects as between different forms of TCB, we need to be aware of the layout of the courtroom, the location of the courtroom participants and the location of the TCB camera(s). Potentially different locations can mean different audience effects, as different locations and frames can have different biases and effects in the context of video confessions. We should expand our TCB research knowledge to include relevant TCB location-effect research avenues.

### **Observer Locations**

Few studies, whether general or legal-empirical have sought to use trained independent observers in court to watch for actual in-court camera effects, and to seek to gauge and measure these effects. The Short report<sup>51</sup> is one of the few studies which used observers for part of its research. However, no research, including the Short report records where the observers were located in each of the courtrooms being examined. While Short does provide some diagrams of courts and where the TCB cameras were located, it is important also that any parties looking at the Short report subsequently, should also be able to consider and assess where the observers were viz a viz the TCB cameras and the

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<sup>47</sup> GD Lassiter and AA Irvine (1986), above 286. Referred to in HC Schmidt, above 26.

<sup>48</sup> *ibid.*

<sup>49</sup> See for example DG Lassiter, PJ Munhall, RJ Ploutz-Snyder and DL Breitbecher, 'Illusory Causation: Why It Occurs' (2002) 13 *Psychological Science* 299, as referred to in HC Schmidt, above 28.

<sup>50</sup> See HD Schmidt, above 31.

<sup>51</sup> EH Short and Associates, *Evaluation of California's Experiment with Extended Media Coverage of Courts*, submitted to Administrative Office for the Courts; the Chief Justice's Special Committee on the Courts and the Media, and the California Judicial Council (1981).

respective courtroom participants. The Short report and most studies also do not begin the data collection process prior to the TCB cameras entering the court. The baseline for recording TCB distraction-effects against is absent.

It is noted elsewhere that there is increasing research in relation to camera-perspective-bias.<sup>52</sup> In terms of TCB effects, we can consider camera focus and camera location. There is further research separate from the camera-perspective-bias research<sup>53</sup> which may be relevant to TCB. There is also research which suggests that fixed versus moving cameras can have different effects on perception.<sup>54</sup> This is something which is not considered in terms of eg the wide disparity of camera footage shown in TCB.

These issues are also extremely relevant to the author's suggestion that eye-trackers should be used for TCB effects-research, in particular distraction-effects. There is also related research other than eye-tracking research.<sup>55</sup> Certain research also used TCB cameras to measure movements.<sup>56</sup> HL Westcott found that variations in production factors and type/length of camera shot leads to different results and effects.<sup>57</sup>

One early non-TCB study used the terms 'field of view,' and incidentally found effects and decision errors relating to the camera field of view and the size of the research targets in the view.<sup>58</sup> The 'design consideration'<sup>59</sup> and its relationship with in-court and out-of-court effects and potential effects is lacking in the studies and examples of TCB to date. The author recommends that this as a normative area for future TCB research. In

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<sup>52</sup> This field of research has found that the camera focus, and who is in the focus of the camera, can influence viewers perceptions of recorded confession interviews.

<sup>53</sup> For instance, SA Koyama, *Effects of Television Camera Angle, Locus of Control, and Two-sided/One-sided Persuasive Messages Upon Attitudes Toward Disabled People* (University of Washington 1982).

<sup>54</sup> For example, see, P Kipper and C Mills, 'Television Camera Movement as a Source of Perceptual Information' (1986) 30 *Journal of Broadcasting and Electronic Media* 295.

<sup>55</sup> See for example, RR Mourant and RJ Donaghue, 'Acquisition of Indirect Vision Information by Novice, Experienced, and Mature Drivers' (1977) 9 *Journal of Safety Research* 39.

<sup>56</sup> AP Rudell, 'The Television Camera Used to Measure Movement' (1979) 11 *Behavior Research Methods and Instrumentation* 339. While not directly considered presently, even this research should be investigated further to see if it could be applicable to TCB research.

<sup>57</sup> HL Westcott, 'Children's Credibility on Camera: The Influence of Age and Production Factors' (1991) 5 *Children and Society* 254.

<sup>58</sup> G Ruis and HL Snyder, 'The Effects of TV Camera Field of View and Size of Targets Upon Air-to-Ground Target Recognition' (1965) 7 *Human Factors* 493.

<sup>59</sup> To use the words of P Baker et al in another context. P Baker, A Fairchild, J Pater and A Seavey, 'Community, Participation and Virtual Spaces: Design Considerations for Inclusivity' (10th European Conference on eGovernment, University of Limerick 17-18 June 2010). Note also The Courtroom Design and Research Centre < <http://coweb.cc.gatech.edu/courtnext/3> > and related pages, accessed 19 January 2014. This project does not appear to consider design, location and layout issues in terms of the influence and effects of TCB.

addition, it is suggested that a framework of design considerations should be developed for future TCB studies, pilots and rollouts.<sup>60</sup>

### **Eye-Tracking and Location**

The general and legal-empirical research of TCB effects generally do not refer to the importance of the layout of the courtroom nor the recording of where the TCB camera is located in the courtroom. These are critical flaws in the TCB research to date. These flaws need to be addressed. Just one of the implications of this gap is that it is not possible to compare the results of one study with another. It is also not possible to assess the effects of the TCB camera on any of the courtroom participants. The research does not refer to or record the layout of the courtroom and the location of the TCB cameras. None of the legal-empirical and general research reviewed includes a diagram addressing the layout and location issues. The relevant research such that it is, and the implications for future research referred to below. One exception is the Short report. It does record the layout of some, but not all, of the courtrooms where research was undertaken. It included diagrams of seven courtroom and the camera locations.<sup>61</sup> However, even this legal-empirical research is flawed as it does not do so for all cases researched. It is also typical of the general and legal-empirical research by not appreciating the importance of recording details of the courtroom and cameras for comparative purposes. One of the remits of the report was also in relation to effects-research. The observer location data is not recorded by Short. The Short report fails to appreciate that one cannot research and assess effects in-court without factoring in the location of the courtroom participants and the location of the TCB camera. This is the first research to identify this important point. In terms of communications in the courtroom, T-R Valikoski notes that the communicative situation is formed by the purpose of the activity and the environment.<sup>62</sup>

### **Courtroom Design and Location**

We may need to consider courtroom design issues. Clearly courtrooms vary in design, size, orientation, etc, both within jurisdictions and across jurisdictions. This is a relevant consideration in TCB distraction-effects research, and in generalising such research. In addition, there is a suggestion that American courtrooms are seeking to redesign their

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<sup>60</sup> If and where TCB is permitted of course. The author makes no recommendation whether for or against TCB per se.

<sup>61</sup> EH Short and Associates, *Evaluation of California's Experiment with Extended Media Coverage of Courts, Submitted to The Administrative Office for the Courts, The Chief Justice's Special Committee on the Courts and the Media and The California Judicial Council* (September 1981) see 57-63.

<sup>62</sup> T-R Valikoski, *The Criminal Trial as a Speech Communication Situation* (University of Tampere, Finland 2004) 116.

layout so as to place the jury in a more strategic location in the courtroom.<sup>63</sup> This would appear relevant to research on courtroom design, courtroom processes as well as TCB effects issues. Of course, not all existing courts are being modernised or being modernised in the exact same way. Indeed, modernisation in and of itself cannot alter uniformly the existing design and layout of courts and court buildings. This makes it even more important that TCB distraction-effects research should record the courtroom design and layout. The same should apply to research studies conducted in locations other than actual courtrooms. This will all assist more normative and optimum TCB distraction-effects research. Otherwise, the research remains less than optimum. It would, for example, make comparison and generalisation more difficult, and would also hinder the buildup of replicated TCB distraction-effects research.<sup>64</sup>

### **TCB Courtroom Design and Modernisation**

However, there are instances where courtrooms may be redesigned somewhat in terms of modern architectural and other parameters. Courtrooms can be redesigned and modernised from time to time. However, even where official ‘design templates’<sup>65</sup> have emerged, as indeed they have in certain instances, these apply only going forward as and when budgets, building and or renovation projects permit. Such project can also be more difficult in older historical court buildings than new modern buildings. In addition, the standard design templates and the central control for court design of England and Wales only began to emerge from the 1970’s onwards.<sup>66</sup> L Mulcahy in reviewing the England and Wales *Court Standards and Design Guide*, is stuck by how detailed and particular it is.<sup>67</sup> There appears no reference to TCB issues.<sup>68</sup> However, it is noteworthy that while Mulcahy focuses in particular on courtroom design effects on the public in court, she notes how changing courtroom design has reflected the changing role of both the lawyers

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<sup>63</sup> As referred to in KL Netteburg, *Cameras in the Courtroom: Is a Picture Worth a Thousand Words?* (PhD thesis, University of Minnesota 1980) 167. Also SR Hall and BD Sales, *Courtroom Modifications for Child Witnesses: Law and Science in Forensic Evaluations* (American Psychological Association 2008).

<sup>64</sup> Note the Short court diagrams in the Appendices.

<sup>65</sup> L Mulcahy, above 387-390. She refers in particular to England and Wales, and also the emergence of the official *Court Standards and Design Guide*, Department of Constitutional Affairs (2004). The author is unaware of any similar publically available official design documents in Ireland. While undertaking the TCB eye-tracking proof-of-concept demonstration in Ireland, the author requested to see if there were official drawings for the courtroom in question. Unfortunately, none were available and the author arranged for his own. These are included as the topographical drawing herein. In relation to the new Criminal Court complex in Dublin, note generally, K O’Brien, ‘Courting Perfection’ (2010) 64 *Engineers Journal* 112. Also in relation to the UK Supreme Court generally, note C Miele, *The Supreme Court of the UK* (Merrell 2012).

<sup>66</sup> *ibid* 389.

<sup>67</sup> *ibid* 390. This included location, IT, etc.

<sup>68</sup> Which is to be extended beyond the restriction of the 1925 Act.

and also of the press.<sup>69</sup> Unfortunately, the issues of TCB in the courtroom, TCB courtroom design, nor related changes since *Estes*<sup>70</sup> in 1965, have been addressed in the research studies or the research literature in order to assist courts and legal-policymakers. This would all appear relevant to research on courtroom design, courtroom processes as well as TCB effect issues. While many courts in Ireland have been renovated in various parts of the country over the last couple of decades, not all courts have been, and not all changes appear to be of a uniform design. There does not appear to be an obvious research literature on the effect, research and design issues relating to Irish courtrooms.

### **TCB Courtroom Design Effects**

Researchers such as L Mulcahy query why we should accept, or assume, that courtroom design is 'neutral' and has no effect.<sup>71</sup> The courtroom shape, configuration of walls, configuration of barriers, the height of the partitions, the position and location of tables, etc, are suggested by L Mulcahy as 'crucial to ... understanding'<sup>72</sup> the courtroom, courtroom activities and effects. We ideally should have a similar research curiosity in relation to TCB effect issues notwithstanding the important issues at stake in courtrooms. Design and layout research can assist a better understanding of the process and effect issues in courtrooms.<sup>73</sup> We would also be in a better position to assess and understand TCB and TCB effect issues if there was a body of research incorporating analysis of the TCB courtroom process and related design issues. While various issues are highlighted comparatively by L Mulcahy which are of potential relevance in relation to TCB distraction-effects, it is noted in particular how emphasis is made in relation to design and 'sightlines within the court.'<sup>74</sup> She also notes in her research that these sightlines and sightline-issues have changed over time with changing courtroom design.<sup>75</sup> One can see certain similarity with the obvious references to TCB visual cones-of-vision and TCB location-effects referred to in the thesis. Interestingly also, some of the TCB research has found that on occasion the lawyers in an instant case have been asked to move as they were interfering with the line-of-sight of the TCB camera.<sup>76</sup> There might also be a possible research and legal-policy consideration as to whether such requests might restrict

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<sup>69</sup> *ibid* 393-395.

<sup>70</sup> *Estes v Texas* 381 US [1964] 532.

<sup>71</sup> L Mulcahy, above 382.

<sup>72</sup> *ibid*.

<sup>73</sup> For an example of courtroom process related research see, T-R Valikoski, 'The Criminal Trial as a Speech Communication Situation' (thesis, University of Tampere, Finland 2004) 178.

<sup>74</sup> *ibid* 396.

<sup>75</sup> *ibid*.

<sup>76</sup> P Thaler, 'The Impact of the Television Camera on Courtroom Participants: A Case Study of the Joel Steinberg Murder Trial' (PhD thesis, New York University 1990) 62.

the general movement and activities of such lawyers. It is also unclear from the research literature how frequent this issue may occur.

### **Eye-Tracking and Optimum TCB Courtroom Design**

Legal-empirical TCB distraction-effects research and eye-tracking research can potentially bring greater insights in relation to TCB effects and the US Supreme Court and legal and legal-policy concerns. In addition, it could also assist consideration of normative TCB and normative TCB design. For example, courts might wish to consider how to ensure the best TCB broadcast footage is captured for education purposes. It could also assist consideration of the optimum scenario for TCB filming without adverse effects upon courtroom participants.<sup>77</sup> It has not been considered before how best to tailor TCB and TCB courtroom design<sup>78</sup> to try and accomplish the least disruption and distraction in courtrooms. Additional design features to consider, both in terms of in-court and out-of-court effects, are the TCB camera type, TCB camera height and TCB camera location. It seems intuitive to suggest also that TCB camera versus TCB camera plus TCB camera operator may have effects. Surprisingly perhaps, there does not appear to be a research literature assessing this point.<sup>79</sup> The relationship between the TCB camera location and the participant location is also a relevant consideration. These design features have not been addressed in the TCB literature nor specifically in the limited TCB distraction-effects literature. Legal-empirical and other comparative research can be advantageous. CD Wickens et al, for example, refer to and examine relevant comparative research of framing issues with design applications and visual spacing.<sup>80</sup> They refer to how these issues can assist in creating different effects.<sup>81</sup> Potentially distraction and legal-psychological effects differ depending on the spatial layout<sup>82</sup> of the TCB courtroom. This might also differ as between potentially different types of TCB forms, TCB camera and TCB camera location.

### **Recording the TCB Location and Design Data**

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<sup>77</sup> The thesis is not, as pointed out above, arguing for or against TCB.

<sup>78</sup> Consider generally CD Wickens, M Vincow and M Yeh, 'Design Applications of Visual Spatial Thinking: The Importance of Frame of Reference' in P Shah and A Miyake, above 383.

<sup>79</sup> It could be suggested that modern miniature cameras overcome this concern. However, there is no research or literature as yet exploring and quantifying how frequently miniature cameras are used for TCB, and possibly more importantly the proportion of miniature versus non-miniature cameras used in TCB footage capture.

<sup>80</sup> *ibid* 384.

<sup>81</sup> *ibid* 418-419.

<sup>82</sup> TA Brown and MP Munger, 'Representational Momentum, Spatial Layout, and Viewpoint Dependency' (2010) 18 *Visual Cognition* 780.



L Mulcahy also refers to the ‘space-place dynamic’ in the courtroom.<sup>83</sup> This concept is also apt to consider in relation to TCB effect research, and in particular the issues highlighted in the current thesis. This emphasises the importance that TCB distraction-effects research should record the courtroom design and layout. Location recordal is also important. The same should apply to TCB research studies conducted in locations other than actual courtrooms. This will assist more normative and optimum TCB distraction-effects research. Otherwise, the research may remain less than optimum benefit to researchers, courts and legal-policymakers. Such research could, for example, make comparison and generalisation more difficult, and would also hinder the buildup of replicated TCB distraction-effects research.<sup>84</sup>

### **TCB Courtroom Research Designs and Models**

Too many of the studies to date are undermined by their methodology, scant data, self-reports, opinion-reports, etc.<sup>85</sup> Greater rigour and planning<sup>86</sup> ideally needs to be adhered to in future. Studies need to document and record their methods. They need to be legal-empirical,<sup>87</sup> otherwise it is difficult if not impossible to say that suggested results are anything other than supposition and opinion. It is also difficult if not impossible to justify or disprove a particular cause and effect if the effect is not disentangled and isolated from other possible effects or variables.<sup>88</sup> TCB court cases are complex events and processes, and therefore, require great particularity in terms of normative researching of such effects.<sup>89</sup> We need proper data on effects, and not mere opinions and interpretations of effects than has occurred.<sup>90</sup> Acknowledging that carefully thought out rules may be applied to try and reduce the potential for disadvantageous effects with iTCB, an editorial in *Judicature* states that by ‘making proceedings available for gavel-to-gavel broadcast on television or over the internet, we can educate the public about what actually goes on in our courts .... procedural rules can be developed to test whether the concerns can be adequately addressed.’<sup>91</sup>

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<sup>83</sup> L Mulcahy, above 385.

<sup>84</sup> Note the Short court diagrams in Appendices.

<sup>85</sup> In relation to research methods, see RA McQueen and C Knussen, *Introduction to Research Methods and Statistics in Psychology* (Pearson 2006); GM Breakwell, S Hammond, C Fife-Schaw and JA Smith, *Research Methods in Psychology* (Sage 2006); FJ Gravetter and L-AB Forzana, *Research Methods for the Behavioral Sciences* (Wadsworth, Thomson Learning 2003).

<sup>86</sup> M Mitchell and J Jolley, *Research Design Explained* (Wadsworth, Thomson Learning 2001) 469. Also RA McQueen and C Knussen, above, Part 3.

<sup>87</sup> See comments on scientific method in RA McQueen and C Knussen, above 5.

<sup>88</sup> See *ibid* 56 regarding variables.

<sup>89</sup> See comments *ibid* 7.

<sup>90</sup> Note comments in *ibid* 12 ff.

<sup>91</sup> ‘Cameras In Our Federal Courts - The Time Has Come’ Editorial (2009-2010) 93 *Judicature* 136.

Unfortunately, there is too little effort to research and examine TCB effect concerns in a legal-empirical manner satisfactory to assist the next US Supreme Court case in an assured manner. Again, TCB broadcast can be the whole of a case or alternatively just short snippets. As the New Zealand research and the first Federal study found out, that something is filmed in the courtroom does not mean that the footage will not be voiced over, or edited, with none of the in-court audio and in-court footage of the lawyer and judge speaking being broadcast.

### **Design and Forms**

TCB can take many forms. So too can iTCB. There can be different cameras, some more and less obstructive. There can be moving equipment in the courtroom. There may or may not be zooming in and out and close-ups. There may be a requirement for facial blocking. The footage can be captured by broadcasters or the court service. It can be live or non-live. It can involve all cases or only certain cases. It can be cases in one court or from a number of courts, and across court levels.

### **Conclusion and Future Considerations**

The location-effect issue is important. Recording the TCB camera distractor and courtroom participant location is important in undertaking optimum research. We need to address this in order to be satisfied we are undertaking proper research. It is also critical as it is one of the data points that allows us to compare distraction-effects research results. Future research should cross-reference location-effect issues and eye-tracking research. A complicating issue for research is the suggestion that US courtrooms are increasingly changing their layout to place the jury in more strategic locations.<sup>92</sup> This would appear relevant to research on courtroom design, courtroom processes as well as TCB distraction-effect issues. Not all courtrooms are the same. UK courts appear to have a centralised design system for new and updated courts. The US is not quite as centralised, but there is somewhat of a re-focus on the role and position of juries in terms of their location in court. In Ireland there is no centralised design document, or at least not one publically available. It is recommended that TCB effects-research in future record and document the courtroom layout, and in the case of research studies conducted in locations other than actual courtrooms, the layout of the research environment. Taking cognisance of the layout and location-effect issues should be a prerequisite in planning TCB effects-research. Without taking these issues into account, the research remains potentially

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<sup>92</sup> As referred to in Netteburg above, at 167. Also Hall and Sales 2008, above.

limited. It is also potentially flawed in that it precludes comparison and the build-up of a useful body of TCB distraction-effects research in respect of each of the effects issues being examined in similar studies. The TCB camera distractor location and the visual cone-of-vision research has implications for the location of TCB cameras in studies, pilots and in real courtrooms, which judges, legal-policymakers, lawyers and others may consider. These issues have dimensions that are legal, Constitutional, policy, ethical and research related. The thesis emphasises the importance of further research and how important it is that the US Supreme Court research concerns are properly addressed. We still need to continue the research because if the US Supreme Court had to deal with these issues anew tomorrow, there is still not enough answers to assist it to make confident and assured decisions.

L Mulcahy argues that ‘understanding the factors which determine the internal design of the courtroom is crucial to a broader and more nuanced understanding of judgecraft.’<sup>93</sup> The thesis suggests that greater understanding of courtroom design, TCB eye-tracking distraction research, visual cones-of-vision, location-effect issues,<sup>94</sup> and the particular nuances which have been overlooked to date, will assist a greater understanding of the TCB distraction concerns. This is important in that there needs to be more detailed and nuanced TCB effects-research to be available the next time the US Supreme Court or other courts come to pronounce on these important issues.

We have too little research as it currently stands. Just as there are stand alone references to adverse effects of TCB, such as the *Steinberg* trial casestudy, the New York public research and the New Zealand research on judicial effects, L Mulcahy is also able to point to examples of adverse trial effects of ‘internal courtroom design.’<sup>95</sup> Bad TCB design can have potentially bad effects and consequences, and or result in the mooted positive advantageous effects hoped for (eg education) not be achieved. Courts and legal-policymakers in all countries which come to consider TCB issues would ideally wish to be informed by adequate levels of legal-empirical effects-research to assist them in considering TCB in the first instance, and possibly also in ensuring that legal decision making and legal-policy avoid bad TCB decisions and design endeavors.

P Carlen describes research in relation to Magistrates courts in England and Wales, which suggest different effects on different courtroom participants, in some cases a ‘paralyzing

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<sup>93</sup> L Mulcahy, above 383.

<sup>94</sup> As regards the TCB camera location and the participant locations in the courtroom.

<sup>95</sup> L Mulcahy, above 386. She refers, for example, to the Jamie Bulger trial, and *V v United Kingdom* [1999] ECHR 171 *ibid*.

effect on those who are not regular users of the court system.’<sup>96</sup> These issues are too important, it is suggested, to continue to be ignored in relation to TCB and TCB distraction-effects. They are also important to the US Supreme Court which has referred to concerns and lack of research on three occasions.

The design and location issue is clearly important. Recording the TCB camera and courtroom participant location is important. We should address this in order to be satisfied we are undertaking proper optimum research. It is also critical as it is one of the data points which allows us to compare research results. Future research which cross references location issues and eye-tracking research could be a beneficial resource to assist courts.

US courtrooms are increasingly altering their layout for legal-policy reasons, namely to assist the jury.<sup>97</sup> It may advance the literature if research also sought to address the TCB courtroom design, layout and locations issues. The US jury-location-change literature and research, and the location, design and visual cone-of-vision points herein, may be of some assistance in this regard. It is recommended that TCB effects-research record and document the courtroom layout, and in the case of research studies conducted in locations other than actual courtrooms, the layout of the research environment. Taking cognisance of the layout and location issues might be considered a baseline prerequisite in planning for TCB and associated TCB effects-research. Without taking these issues into account, the research is potentially open to criticism. It may also preclude comparison and the buildup of a useful body of effects-research in respect of each of the effects issues being examined in similar studies. The US Supreme Court could still be left with adequate legal-empirical TCB research in its next case.

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<sup>96</sup> ibid 386, referring to P Carlen, *Magistrates' Justice* (Martin Robertson 1976).

<sup>97</sup> As referred to in KL Netteburg, ‘Cameras in the Courtroom: Is a Picture Worth a Thousand Words?’ (PhD thesis, University of Minnesota, 1980) 167. Also SR Hall and BD Sales, *Courtroom Modifications for Child Witnesses: Law and Science in Forensic Evaluations* (American Psychological Association 2008).

## CHAPTER 16: TCB EYE-TRACKING RESEARCH AND MODELS

### Introduction

The forgoing chapters highlights that there are a number of problems for courts and legal-policymakers when it comes to finding, assessing and relying upon research studies regarding TCB effects. By considering the wider normative TCB legal-empirical research opportunities, and which the thesis suggests encompasses normative eye-tracking research for legal-empirical research, we can begin to overcome past problems and assist courts and legal-policymakers in a tangible and meaningful manner. We consider below some of the past problem issues such as self-reports, and assess normative eye-tracking research which may closely assist in developing relevant TCB eye-tracking models to advance, in particular, normative TCB distraction-effects research.

### Self-Reporting Problem

Too much of the albeit small TCB effects-research has relied on self-report and opinion based studies. In other research A Katharina Huemer and M Vollrath<sup>1</sup> refer to the problem of whether ‘subjects [can] assess their performance.’ C Galera and E Lagarde<sup>2</sup> refer to limitations such as retrospective self reports; incomplete recall; desirability bias; etc. TCB self-reports are open to bias and opinion issues.

### Rationale (and Advantages) of Eye Tracking/Models and Measures

There are advantages for proposing the TCB eye-tracking route in addition to overcoming past problems such as self-reports and opinions. Normative TCB eye-tracking research is legal-empirical. It can be recorded. It can be reviewed as many times as required. It is possible to repeat and replicate the study/studies. AJ Filtness et al<sup>3</sup> also refer to some of the specific eye-tracking measures. These indicate some of the details which could be available to TCB researchers, courts and legal-policymakers in future. The measurables AJ Filtness refers to are the following, percentage of total gaze time (on the road); percentage of total gaze time on the display screen; number of glances towards the

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<sup>1</sup> A Katharina Huemer and M Vollrath, ‘Performance Assessment Under Visual, Cognitive and Haptic (Manual) Secondary Task Load – How to Interpret Lane Change Task (LCT) Results’ (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>2</sup> C Galera and E Lagarde, ‘Mind Wandering and Driving’ (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>3</sup> Dr AJ Filtness, Dr E Mitsopoulos-Rubens and Dr MG Lenne, ‘The Impact of Interface Modality on Police Officers’ Visual Behaviour When Using an In-Vehicle System’ (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

display screen; mean number of glances per completed task; mean glance duration per completed task; and glance duration distribution.

We can see the potential when courts and distraction become the focus of research, and not just roads, driving and distraction. These are advances which have not occurred with TCB research previously.

### **Normative Distraction Eye-Tracking Models**

The normative driver distraction and road safety research, as well as the normative airline research each of which use eye-tracking, can be instructive in relation to developing normative studies to examine TCB effects and particularly TCB distraction-effects concerns. C Monk<sup>4</sup> refers to separate phase issues. One of the research goals he refers to IS the development of guidelines ‘to ensure interfaces are effective without increasing distraction or creating high workload.’<sup>5</sup> Similarly, progressing normative TCB distraction-effects research utilising eye-tracking can assist courts and legal-policymakers in developing more informed guidelines for TCB.<sup>6</sup> Equally, such research may assist or better inform proponents or opponents of TCB more generally. It may also conceivably be used to favour some forms of TCB over other forms. Referring to particular principles, Monks refers to ‘[e]ffective warnings, distraction mitigation, driver-vehicle interface (DVI) integration, DVI design guidance, evaluation and measurement, safety pilot DVI criteria, and stakeholder input.’<sup>7</sup>

C Monks refers to distraction mitigation best practices as follows, test procedures to assess distraction potential; and research outcomes and NHTSA Distraction Guidelines.<sup>8</sup> This demonstrates how research can feed into, or trigger, specific legal guidelines, safeguards, policies or statute rules. One recent example is how research has fed into the new legal regulations restricting mobile and texting usage while driving in Ireland.<sup>9</sup> M

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<sup>4</sup> C Monk, ‘NHTSA’s Driver Distraction Research and Human Factors for Connected Vehicles’ (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>5</sup> *ibid.*

<sup>6</sup> If and when it may be permitted.

<sup>7</sup> C Monk, above.

<sup>8</sup> *ibid.*

<sup>9</sup> The Road Traffic Bill was approved by Cabinet on 11 December 2013. The RSA refers to research suggesting that mobile usage is responsible for 20-30% of collision on the road. See ‘Mobile Phones and Driving, RSA.ie < <http://rsa.ie/RSA/Road-Safety/Campaigns/Current-road-safety-campaigns/Mobile-Phone/> > accessed 13 April 2014. Also ‘Higher Penalty Points for Mobile Phone Use as Oireachtas Enacts New Road Traffic Laws – Varadkar,’ Department of Transport, Tourism and Sport, 18 February 2014 < <http://www.dttas.ie/press-releases/2014/higher-penalty-points-mobile-phone-use-oireachtas-enacts-new-road-traffic-laws> > accessed 13 April 2014, referring to the new Road Traffic Act (No 2) 2013.

Dozza et al also look at driver distraction caused by mobile telephone use.<sup>10</sup> TCB law and policy is no exception. There has also been normative driver research in relation to developing simulator tools for railway research.<sup>11</sup> It is understood that eye-tracking is also used in conjunction with pilot simulators. Indeed, this is another example of how a real live courtroom or live flight is not always necessary for undertaking research. In relation to driver related background issues, R Brostrom et al<sup>12</sup> refer to knowledge about visual distraction is important when designing in-vehicle tasks; glance requirements and testing procedures; NHTSA released visual-manual driver distraction guidelines.<sup>13</sup>

A Degani of General Motors R&D<sup>14</sup> refers to the '[n]eed for correct understanding.' He refers to examples where aeroplanes have, for example, followed wrong routes, overflying or landed at wrong airports, pilot deviation from policies, 'distraction from their Monitoring tasks' and the need to understand why. This includes examining the instrument panels – which eye tracking is very good at.<sup>15</sup> Courts and legal-policymakers need more information and data regarding TCB effects.

T Kujala<sup>16</sup> refers to official studies indicating that sixty five percent of seven hundred and sixty one near-crash situations were due to driver inattention. Also, seventy eight percent of eighty two crashes were due to driver inattention. T Kujala suggests that in some driving situations, a one second glance off road is too much. Also T Kujala asks if the visual demands on drivers in certain situations are the same for all drivers. TCB effects potentially may also differ as between different TCB forms, participants and participant categories.

C Monk<sup>17</sup> refers to the NHTSA's distraction and distraction research plan, in particular to eliminate crashes due to distraction.<sup>18</sup> It has issued Visual-Manual NHTSA Driver

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<sup>10</sup> M Dozza, J Sayer and C Flanagan, 'Understanding Driver Self-Regulating Behaviour: How Does Phone Use Influence Vehicle Control in Real World?' (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>11</sup> A Naweed, GRJ Hockey and SD Clarke, 'Designing Simulator Tools for Rail Research: The Study of a Train Driving Microworld' (2013) 44(3) Applied Ergonomics 445.

<sup>12</sup> R Brostrom, M Ljung Aust, L Wahlberg, L Kallgren, 'What Drives Off-Road Glance Durations During Multitasking' (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>13</sup> In 2012, *ibid*.

<sup>14</sup> A Degani, 'Distraction Inattention and Monitoring, Some Observations from Aviation' (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>15</sup> He refers in particular to the 'Monitoring Problem.' He also refers to training on how to monitor and redesigning flying tasks, defining times of high vigilance and low, and designing procedures. He also refers to difficulty in monitoring. There is a need for '[i]nformation organisation and integration.'

<sup>16</sup> T Kujala, 'Visgaurd – Distraction Prevention System' (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>17</sup> C Monk, above.

Distraction Guidelines for In-Vehicle Electronic Devices, published in April 2013.<sup>19</sup> It states that '[t]asks/devices not suitable for performance while driving should be locked out.'<sup>20</sup> C Monk refers to additional activities to include developing a software tool for designers in order to be able to estimate distraction potential or workload issues for their DVI and system configurations.<sup>21</sup> Asleigh J Filtness et al<sup>22</sup> refer to of road glances.<sup>23</sup> Referring to distraction, A Naweed and S Rainbird indicate that distraction arose from a new and competing activity that disrupted the driving task.<sup>24</sup>

Volvo has developed a Do-It-Best Feedback Model. This is in relation to driver distraction behaviour management and prevention.<sup>25</sup> This includes the following,

- D: Define behaviour
- O: Observe behaviour
- I: Intervene to influence
- T: Test the effectiveness of the intervention;
- B: Behavioural check-ups;
- E: Education;
- S: Safety benefit analysis;
- T: Training.<sup>26</sup>

C Galera and E Lagarde<sup>27</sup> and N Merat research driver distraction issues.<sup>28</sup> In terms of motivation and rationale for research, P Ebrahim et al indicate that drowsiness detection research is needed because in Germany every fourth car crash occurs due to driver

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<sup>18</sup> This comprises of the following Initiative 1: Improve understanding of the problem; Initiative 2: Reduce workload from interfaces; Initiative 3: Keep drivers safe; Initiative 4: Recognise risks and consequences, *ibid*.

<sup>19</sup> *ibid*.

<sup>20</sup> It indicates two methods for determining if a task or device should be locked out, namely, per se for certain devices or tasks – based on law or policy; acceptance test to determine if tasks can be safely performed while driving, *ibid*.

<sup>21</sup> *ibid*.

<sup>22</sup> Dr AJ Filtness, Dr E Mitsopoulos-Rubens and Dr MG Lenne, above.

<sup>23</sup> These can be caused by vehicle information systems (IVIS) causing potential division of attention; unexpected events; glance behaviour included in guidelines for good IVIS design eg AAM, 2002; ISO, 2006; SAE, 2000.

<sup>24</sup> A Naweed and S Rainbird, 'Risk Factors Moderating Driver-Related Distraction & Inattention in the Natural Rail Environment' (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>25</sup> C Wege, 'Volvo, The Do It Best Feedback Model – Distracted Driver Behaviour Management and Prevention Before, While and After Driving – A Model on Behavioural Change' (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>26</sup> *ibid*.

<sup>27</sup> In particular research of mind wandering and driving, *ibid*.

<sup>28</sup> Specifically the issue of enhancing lane keeping during driver distraction and the effect of lead car presence, N Merat, 'Enhancing Lane Keeping During Driver Distraction: The Effect of Lead Car Presence' (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).



drowsiness and according to the NHTSA thirty percent of car crashes are due to drowsiness of drivers.<sup>29</sup> Reliable assistant systems are needed to warn drowsy and inattentive drivers.<sup>30</sup> P Ebrahim et al indicate that eye blinks are drowsiness indicators eg blink frequency.<sup>31</sup> J Wekneke and M Dozza are concerned with cycling safety and eye tracking research.<sup>32</sup> G Yannis et al refer to mobile telephone and music distraction.<sup>33</sup>

### **Models and Methodologies for Driver Distraction-Effects Research**

Recent research in relation to driver distraction utilises the following models. There is both increasing use and increasing applications of eye tracking technology.<sup>34</sup> An examination of the research presented at the International Conference on Driver Distraction and Inattention illustrate some commonality and normative standards. Some of the pertinent individual models of research are set out as follows,

- A proof-of-concept, pilot studies, driver simulator study and analysis<sup>35</sup>;
- Rail collision avoidance, risk mitigation, data collection framework, (data) analysis, findings, SPAD risk model, implications and future research<sup>36</sup>;
- Off road glances while driving; work in police vehicles; driving simulator and study design (method, simulator, design, eye tracking measures); results; discussion; considerations for future research; and implications<sup>37</sup>;
- Using cellphones while driving; research questions; integrated vehicle-based safety system; dataset; results; self-regulation; conclusions<sup>38</sup>;
- Mind wandering; objective; methods: design and setting; methods: participants; outcome: responsibility for the crash; main exposure: mind wandering; other exposures; methods:

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<sup>29</sup> P Ebrahim, Dr W Stolzmann, Prof Dr IB Yang, ‘Spontaneous v Gaze Shift-Induced Blinks for Assessing Driver Drowsiness/Inattention by Electrooculography’ (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>30</sup> *ibid.*

<sup>31</sup> *ibid.*

<sup>32</sup> J Wekneke and M Dozza, ‘BikeSAFE – Analysis of Safety-Critical Events from Naturalistic Cycling Data,’ (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>33</sup> G Yannis, E Papathanasiou, E Postantzi, E Papadimitriou, ‘Impact of Mobile Phone Use and Music on Driver Behaviour and Safety by the Use of a Driving Simulator’ (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>34</sup> When the thesis commenced there was little distraction research. Now, there is even an annual conference devoted to eye tracking and driver distraction and inattention, namely, the International Conference on Driver Distraction and Inattention. Yet there are apparently no single standardised research model for TCB distraction.

<sup>35</sup> T Kujala, above.

<sup>36</sup> A Naweed and S Rainbird, above.

<sup>37</sup> Dr AJ Filtness, Dr E Mitsopoulos-Rubens and Dr MG Lenne, above.

<sup>38</sup> M Dozza, J Sayer and C Flanagan, above.

- analyses; discussion: main result; discussion: interpretation; discussion: limitations; discussion: interpretation perspectives<sup>39</sup>;
- Background; purpose; method/analysis; results and discussion; conclusions; future research<sup>40</sup>;
  - Driver distraction research; non-visual tasks and driving, performance/driving behaviour; gaze concentration; other relevant findings; current study; results; conclusions<sup>41</sup>;
  - Driver distraction research with simulators; how to measure the validity of a simulator for research; aims of research; choice of behavioural indicators for driver distraction research; study method; driving scenarios; method – measures; results (glance duration, visual attention allocation); results (success rate on secondary task); results (primary task performance); discussion; conclusions<sup>42</sup>;
  - Motivation; literature review; examples of eye movements; experimental description (real road driver; driver simulator); results; conclusions and future work<sup>43</sup>;
  - Cycling is (getting) popular and it is also a risky activity; how to increase bicycle safety; BikeSAFE; method; instrumented bicycle; design; data collection; distraction; conclusion and discussion, and future research steps;<sup>44</sup>
  - Background; data analysis (frequency of distracted driver is assessed with two approaches, CAN-data and video); CAN-data coding of distraction; video coding of distraction; secondary tasks; time spent on different secondary tasks; duration of secondary tasks; distraction in different manoeuvres; distinguished manoeuvre types; summary<sup>45</sup>;
  - Background; aim of research; method; validity of study details; devices; results; discussion; use of task; conclusion<sup>46</sup>;
  - Introduction; what is Smart driving; Foot-LITE Smart driving aid; driving scenario; participants; data collection; experimental conditions; dependent variables; results; number of glances; glance duration; percentage of glance duration; maximum glance duration;

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<sup>39</sup> C Galera and E Lagarde, above.

<sup>40</sup> R Brostrom, Mikael Ljung Aust, L Wahlberg, L Kallgren, ‘What Drives Off-Road Glance Durations During Multitasking’ (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>41</sup> N Merat, above.

<sup>42</sup> R Donker, G Burnett and S Sharples, ‘Do Drivers Prioritise Primary Driving Tasks Over Secondary Tasks Within Driving Simulators?’ (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>43</sup> P Ebrahim, Dr W Stolzmann, Prof Dr Ing B Yang, above.

<sup>44</sup> J Wekneke and M Dozza, above.

<sup>45</sup> Dr B Metz, A Landau, Dr V Hargutt and A Neukum, ‘Exposure to Secondary Tasks in Germany: Results from Naturalistic Driving Data’ (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>46</sup> G Burnett, E Crundall, D Large, G Lawson, N Neila, L Skrypchuk and S Thompson, ‘How Do You Assess the Distraction of In-Vehicle Information Systems? A Comparison of Occlusion, Lane Change Task and Medium-Fidelity Driving Simulator Methods’ (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

- glances of less than two seconds; glance analysis; summary of glance behaviour; conclusions of glance behaviour; video methodology, analysis<sup>47</sup>;
- Background; where to start from; driving parameters; research questions; methods; secondary tasks; gaze behaviour; demand, subjects and procedures; results; can subjects assess their performance?; subjects' effects: are there individual strategies?; summary and conclusions; performance changes<sup>48</sup>;
  - Introduction; research questions; method; results – visual sampling efficiency; results – visual demand; results – fixation; results – driving performance; results – search task performance; results – interviews; discussion; conclusions<sup>49</sup>;
  - Study objectives; method; example video; data analysis; results; conclusions<sup>50</sup>;
  - Research objectives; study hypotheses; driving simulator experiment; model development; mean speed; mean distance; reaction time; accident probability; conclusions; distracted driving; further research<sup>51</sup>;
  - Outline; database, use of hands-free telephone; impact of telephoning; conclusions<sup>52</sup>;
  - Driving is not just driving; a global view on driving performance; driver factor; classification of driver capability; driver profiles; driving task; the driver task as a factor for driving performance; distraction; the driver-driving task-distraction interrelation; risk level of driver-driving task-distraction interrelation; simulator study; experimental design; summary of results; conclusion<sup>53</sup>;
  - Introduction: objective, requirements; foundation for protocol, EMFACS; intensity; identify emotion; identify emotion intensity; passenger vehicle results; commercial vehicle results; exposure results; reliability; conclusion<sup>54</sup>;
  - Context; previous results; flow definition; purpose and hypotheses; material and method; first results; discussion; conclusion and perspectives<sup>55</sup>;

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<sup>47</sup> S Birrell, M Fowkes and P Jennings, 'A Smart Driving Smartphone Application: Real-World Effects on Driving Performance and Glance Behaviours' (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>48</sup> A Katharina Huemer and M Vollrath, above.

<sup>49</sup> A Lasch and T Kujala, 'Can You Ignore It? – Effects of Album Artwork on Driver Distraction' (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>50</sup> J Sayer, S Bao and D Funkhouser, 'Effects of Cell Phone Conversations and Device Manipulation on Objective Measures of Driving Performance' (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>51</sup> G Yannis, E Papathanasiou, E Postantzi, E Papadimitriou, above.

<sup>52</sup> A Landeau, B Metz, V Hargutt and A Neukum, 'Different Ways to Compensate Distraction While Using a Hands-Free Telephone in a Vehicle' (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>53</sup> M Ganzhorn, 'A Holistic Approach to Define the Risk of Driver Distraction and Inattention' (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>54</sup> GM Fitch, R Hanowski, G Burnett and D Crundall, 'Development of a Protocol to Classify Drivers' Emotional Conversation' (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>55</sup> C Gabaude, V Rolland, A Carrotte, C Jallais, A Fort, B Baracat and GA Michael, 'Influence of Psychological Flow on the Management of Cognitive Secondary Tasks While

- Objective, occlusion method; history; experimental flow; quantification; simulator; driving conditions; results and findings; discussion; conclusions.<sup>56</sup>

### **A Proposed Model and Methodology for TCB Research Eye-Tracking Research**

Considering the above research models, one can suggest the following in relation to TCB effects-research, in particular distraction research issues with various courtroom participants, namely, introduction; background; purpose/objective; proof-of-concept, pilot studies, repeat studies; requirements; study method/experimental design, analysis; results and findings; discussion; conclusions; future research. As indicated above, proof-of-concept research is desirable if not a requisite. The proof-of-concept undertaken for the thesis fits into this landscape.

### **Detailed Model Methodology For TCB**

A detailed model and proposal for an instant TCB eye-tracking study may adopt the above suggestions from the normative driving distraction research. A TCB model might, therefore, look like the following suggested template model,

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Driving' (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>56</sup> T Sato, M Akamatsu, A Tanaka, J Hatada, Y Denda and T Ishii, 'Estimating Visual Demands in Road Traffic Environments' (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

**TCB [Describe] Eye-Tracking Distraction-Effects Study**

1	<b>Introduction:</b>		
2	<b>Background:</b>		
3	<b>Purpose/ objective:</b>		
4	<b>Proof-of-Concept, Pilot Studies, Repeat Studies:</b>		
5	<b>Requirements:</b>		
6	<b>Study method/ Experimental Design, Analysis:</b>		
7	<b>Results and Findings:</b>		
8	<b>Discussion:</b>		
9	<b>Conclusions:</b>		

The specific details might include some or all of the following, depending on the specific distraction-effect issue being considered,

<p><b><u>TCB [DESCRIBE eg witness, juror] EYE-TRACKING DISTRACTION-EFFECTS STUDY</u></b></p> <p><b><i>Introduction:</i></b> [This section may refer to the history of the TCB in-court distraction concern, the limited research of that issue to date, the problems with the research to date, and how particular distraction issues are proposed to be research by way of eye-tracking to advance the research and knowledge of courts, legal-policymakers and others.]</p> <p><b><i>Background:</i></b> [This section might expand on the above issues, and highlight the previous problems, the ongoing concerns and how the US Supreme Court has been concerned with distraction-effects but also the lack of legal-empirical research available to courts and legal-policymakers. Background, context, previous research, concern, risk, description of concern and activity regarding, for example a specific courtroom participant eg witness, juror, etc.]</p> <p><b><i>Purpose/Objective:</i></b></p>
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[The specific research question regarding a specific courtroom participant. For example, this would include purpose, objective, hypotheses; parameters; research questions; risk avoidance, risk mitigation, etc.]

***Proof-of-Concept, Pilot Studies, Repeat Studies:***

[It may be useful to carry out proof-of-concept research per se, and or as part of developing and undertaking TCB eye-tracking research in a given research proposal.][The author undertook proof-of-concept research for the thesis. T Kujala<sup>57</sup> also refers to proof-of-concept and pilot studies in his eye tracking research undertaken in 2013.]

***Requirements:***

[Personnel, devices, location; method; instrumented bicycle; design; data collection; distraction; real; simulator; design and setting; data collection framework.]

***Study Method/Experimental Design, Analysis:***

[For example: Study, quantification, conditions, material, equipment, method, requirements, task, intensity; identify emotion; identify emotion intensity; primary tasks, secondary tasks; scenario; participants; choice of behavioural indicators for courtroom actor distraction research; study method; courtroom participant activity scenarios; method – measures; court scenario; participants; data collection; experimental conditions; dependent variables; results; number of glances; glance duration; percentage of glance duration; maximum glance duration; glances of less than two seconds; glance analysis; summary of glance behaviour; data collection; experimental conditions; variables, performance, methodology, analysis; data analysis (frequency of distracted driver is assessed with two approaches, data and video); data coding of distraction; video coding of distraction; secondary tasks; time spent on different secondary tasks; duration of secondary tasks; distraction in different manoeuvres; distinguished manoeuvre types; results (glance duration, visual attention allocation); results (success rate on secondary task); results (primary task performance); results - visual demand; results – fixation; results – courtroom performance; results – search task performance; results – interviews; study design (method, simulator, design, eye tracking measures); conclusions of glance behaviour; video methodology, analysis.]

***Results and Findings:***

[Results, findings, means, reaction times, performance, data analysis.]

***Discussion:***

[Discuss finding and results. Make suggestions for further research, legal and policy issues and implications.]

***Conclusions:***

[Conclusion including legal and policy implications.]

A sample for a witness for example may begin from the suggested model below,

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<sup>57</sup> T Kujala, above.

**Sample TCB WITNESS EYE-TRACKING**  
**DISTRACTION-EFFECTS STUDY**

***Introduction:***

This section refers to the history of the TCB in-court witness distraction concern.

The following are examples of the US Supreme Court referring to witness distraction-effects: [insert].

Some examples of the TCB literature referring to witness distraction-effects include: [insert].

The main problem is that there is only limited research of the TCB witness issue to date. There are also problems with the limited research to date. Some examples include [insert].

[Give details of how particular witness distraction-effect issues are proposed to be research by way of eye-tracking. Give details of the advantages of this normative approach. Explain how such an approach can advance the research and knowledge of witness TCB distraction-effects for the benefit of courts, legal-policymakers and others.]

***Background:***

This section expands on the above issues, and highlight the previous problems with the witness related effects-research, the ongoing concerns regarding witnessed and how the US Supreme Court has been concerned with witness distraction-effects.

There is a lack of legal-empirical research available to courts and legal-policymakers.

[Give details of background, context, previous research, concern, risk, description of concern and activity regarding witness courtroom participant.]

***Purpose/Objective:***

The specific research question regarding witness courtroom participants are referred to below.

Purpose: To examine witness distraction-effect issues in relation to TCB and to contribute to the build up a reliable body of TCB legal-empirical research for courts and legal-policymakers.

Objective: To test for specific witness distraction-effects.

Hypotheses: [eg]

Hypotheses One: That witnesses are distracted by TCB cameras.

Hypotheses Two: That witnesses are distracted by TCB camera operators.

Hypotheses Three: That witnesses are distracted more by TCB camera operators than TCB cameras.

Hypotheses Four: That witnesses are distracted more by TCB cameras plus TCB camera operators than by TCB cameras alone.

Hypotheses Five: That witnesses are distracted more by moving, non-fixed TCB cameras plus camera operators than (a) fixed TCB cameras (b) fixed TCB cameras plus camera operators.

Hypotheses Six: That witnesses are distracted more by TCB cameras in TCB form A than TCB form B and TCB form C.

Hypotheses Seven: That witnesses are distracted more during certain TCB forms compared to other TCB forms.

Hypotheses Eight: That witnesses do not accurately report being distracted by TCB cameras in self-reports when measured by TCB eye-tracking.

Hypotheses Nine: That witnesses under-report being distracted by TCB cameras in self-reports when measured by TCB eye-tracking.

[Other hypotheses can consider zooming, blocking, live, recorded, etc. issues].

Parameters: [insert][includes recording locus of witness, location of courtroom participants, location of TCB camera and TCB camera operator, type of camera, etc].

Specific research questions: The specific research questions are [insert].

Risk avoidance: [insert].

Risk mitigation: [insert].

[Etc: [insert].]

***Proof-of-Concept, Pilot Studies, Repeat Studies:***

[It may be useful to carry out proof-of-concept research per se, and or as part of developing and undertaking TCB eye-tracking research in a given research proposal.][The author undertook proof-of-concept research for the thesis. T Kujala<sup>58</sup> also refers to proof-of-concept and pilot studies in his eye tracking research undertaken in 2013.]

***Requirements:***

[Personnel, devices, location; method; instrumented bicycle; design; data collection; distraction; real; simulator; design and setting; data collection framework.]

***Study Method/Experimental Design, Analysis:***

[For example: Study, quantification, conditions, material, equipment, method, requirements, task, intensity; identify emotion; identify emotion intensity; primary tasks, secondary tasks; scenario; participants; choice of behavioural indicators for courtroom actor distraction research; study method; courtroom participant activity scenarios; method – measures; court scenario; participants; data collection; experimental conditions; dependent variables; results; number of glances; glance duration; percentage of glance duration; maximum glance duration; glances of less than two seconds; glance analysis; summary of glance behaviour; data collection; experimental conditions; variables, performance, methodology, analysis; data analysis (frequency of distracted driver is assessed with two approaches, data and video); data coding of distraction; video coding of distraction; secondary tasks; time spent on different secondary tasks; duration of secondary tasks; distraction in different manoeuvres; distinguished manoeuvre types; results (glance duration, visual attention allocation); results (success rate on secondary task); results (primary task performance); results - visual demand; results – fixation; results – courtroom performance; results – search task performance; results – interviews; study design (method, simulator, design, eye tracking measures); conclusions of glance behaviour; video methodology, analysis.]

***Results and Findings:***

[Results, findings, means, reaction times, performance, data analysis.]

***Discussion:***

[Discuss finding and results. Make suggestions for further research, legal and policy issues and implications.]



**Conclusions:**

[Conclusion including legal and policy implications for courts and legal-policymakers to consider, as well as wider relevance for parties, lawyers and researchers.]

## Conclusion

Courts and legal-policymakers can benefit from the development and undertaking of a new level of normative TCB effects related research. Eye-tracking offers many advantages in moving beyond limited and sometimes questionable TCB research from the past. TCB eye-tracking models can better inform TCB law and legal-policy. With a proper and verified body of TCB distraction-effects research data, courts and research would be eminently better placed to make informed and principled decisions in relation to some of the important TCB issues. While some specific models have been advanced above (and below), these will obviously vary across different experimental conditions, just as they vary for different experimental conditions in driver distraction research.<sup>59</sup> The TCB distraction concerns to be researched, and the ultimate legal and legal-policy decisions, also involve varying scenarios and nuances. Driver distraction research also refers to and includes baseline measures and baselines for appropriate visual glancing behaviours and distraction research. T Kujala,<sup>60</sup> GM Fitch et al<sup>61</sup> and AJ Filtness et al<sup>62</sup> all refer to baselines. TCB eye-tracking research can also assist in consideration and sometimes establishment of baselines in relation to some of the possible TCB effects.

Just as driver distraction research is concerned with investigated safety critical event risks and performance across different event scenarios,<sup>63</sup> TCB research may be concerned to scrutinise different models, conditions and forms of TCB and TCB cameras. Each may encompass different levels of risk, danger and concern. Principled decision making by courts and other in relation to TCB should involve graduated assessment and decisions regarding each specific TCB concern. Just as we have what is referred to as graduated responses to online infringement in the field of copyright law, it may be that we need

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<sup>59</sup> Dr AJ Filtness, Dr E Mitsopoulos-Rubens and Dr MG Lenne, above.

<sup>60</sup> T Kujala, above.

<sup>61</sup> GM Fitch, F Guo, Y Yang, S Soccolich, M Perez, R Hanowski, J Hankey and T Dingus, 'The Impact of Hand-Held and Hands-Free Cell Phone Use on Driving Performance and Safety-Critical Event Risk' (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>62</sup> Dr J Filtness, Dr E Mitsopoulos-Rubens and Dr MG Lenne, above.

<sup>63</sup> GM Fitch, F Guo, Y Yang, S Soccolich, M Perez, R Hanowski, J Hankey and T Dingus, above. They investigated safety critical event risks and performance across different types of telephone.

graduated responses to TCB, to TCB forms and the specific granular risks and concerns. It would seem eminently sensible to advocate properly researched and informed principled decision making by courts and legal-policymakers with regard to TCB.

## CHAPTER 17: WIDER TCB EYE-TRACKING MODELS

### **Introduction**

The eye-tracking research above indicates that there is an improved solution available to dealing with the problems with the TCB distraction-effects research to date. In fact following the line of TCB distraction related eye-tracking research should also lead to wider TCB research opportunities in addition to distraction. Following on from the above research we can also develop models to examine certain effects of TCB cameras on mock jurors and audience members. These mock jurors and audience models suggest research which overcomes some of the other significant problems with the current TCB effects-research. There is no cross jurisdictional TCB effects-research and no repeated effects-research studies even within jurisdictions. Current research remains stand alone, non-verified and non-repeated. These problems can be addressed in eye-tracking. Some of the models which can help to do so are explored below.

### **Addressing the Replication Problem**

One of the problems outlined earlier is that the small number of studies to date are generally stand alone. They do not seek to follow and replicate each other. We have not to date really sought to build up a proper, legal-empirical research body of knowledge in relation to the effects of TCB, and including TCB distraction-effects issues. TCB eye-tracking identical footage allows us to do that for the first time. The same footage can be used for different groups.

### **Addressing the Jurisdiction Research Problem**

A further problem, and one not identified previously, is that while forms of TCB are occurring in different countries, we have not sought to research the effects of TCB in and across different jurisdictions. Recorded identical TCB research footage will now allow us to repeat the same research study in different jurisdictions. This can be done many times over. It should also be done in order that we address the lack of replicated effects-research in a sustained manner.

### **Additional Effects-research**

We can also examine additional effects issues with identical TCB footage in addition to actual direct eye gaze on the TCB camera in the courtroom. The script for a subject TCB research case (or portion of case) can incorporate a number of key elements. For example there can be a key statement, outburst, objection, witnessed event, item of evidence, etc. In addition to gauging exactly where each individual is gazing, we can ask them all identical questions on this key issue, issues, etc. We can examine whether the TCB

camera-in-view subjects can recall and identify the key issue, or as many key issues as the no TCB camera in view group. If there is a difference, we can examine how statistically significant this difference is. We can also consider the implications for TCB.<sup>1</sup>

### **TCB Camera Operators**

One might think that in the instances where TCB is permitted, that TCB camera operators are no longer permitted. However, this is not the case. Some sample images are reproduced below where TCB camera operators are evident in TCB courtrooms. Also, it is difficult to compare which jurisdictions in the US do and do not allow TCB camera operators, as the rules that sometimes exist do not generally go into that level of detail. However, the fact that there are TCB camera operators sometimes permitted raises a valid legal research and legal-policy issue as to whether TCB camera operators may cause more distraction issues and other effects for participants (such as witness, jurors, etc) and audience members.

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<sup>1</sup> One potential model of research can involve a mock trial which is re-enacted numbers of times for additional subject witnesses or subject jurors with in-court eye tracking. Eventhough the case script may be the same, there can be slight changes made by the courtroom participants. That is not to say we should not undertake such research, but there is a qualification. Jury members 13-24 will be seeing a somewhat different courtroom enactment than jurors 1-12, eventhough courtroom, equipment, courtroom participant, positions, case script and what is said are all the same.



<http://news.yahoo.com/photos/sean-maroney-wgn-tv-operates-pool-television-camera-photo-174846100.html>



[http://www.imediamonkey.com/2013/04/26/ministry-of-justice-approves-cameras-in-court/courtroom\\_camera/](http://www.imediamonkey.com/2013/04/26/ministry-of-justice-approves-cameras-in-court/courtroom_camera/)

## **The Models and Research Content**

The mock jurors and audience models below are undertaken with eye-tracking.<sup>2</sup> In the models below we need some source content from a (mock or real) courtroom scene to show to and then examine mock jurors and audience members for its effects. A particular type of case will be selected or a realistic script for a mock case will be drafted. The case will proceed or courtroom participants will be arranged to enact the scripted case and the case will be filmed. In order to capture the footage content to later examine mock jurors and audience members, the case needs to be recorded. This can involve different methods. The relevant content material can be filmed with a multimedia TV camera or still images can be taken on a photographic camera. One option could involve taking still images from high quality TV footage.

The selected footage content and or still images are then shown to the test subjects, namely the mock jurors and or audience members. The test subjects will be divided into separate test groups. For example, there may be a control group which is shown the content without any TCB camera present (ie camera direct)(Group A: No TCB Camera); a second group which is shown the content with a TCB camera present and visible (Group B: TCB Camera); and a third group which is shown the content with a TCB camera plus a TCB camera operator (Group C: TCB Camera + Operator). In these models, the content shown in Groups A, B and C is identical in that it is taken from a single shoot and the same camera.

The content footage is edited to de-select the TCB camera operator and then the TCB camera in order to create the three test version. The core content is identical however across the three groups as indicated above. In order to capture the original footage, there will be the test TCB camera (the prop camera) and TCB camera operator present in the courtroom. A further camera (the main camera) is located further back in a different position in the courtroom which captures the core TCB footage content to be used in the test models. Some of the main points of filming in the courtroom in order to capture the required TCB content footage are discussed below.<sup>3</sup>

## **Picture Resolution is Important**

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<sup>2</sup> However, there may also be variations where eye-trackers are not used.

<sup>3</sup> Obviously in any given TCB study model, various details will need to be carefully planned and executed. These may include, for example, the position of the prop camera, how far into the frame of the main camera it needs to be, whether it is in corner or more prominent in the courtroom; whether it is wall mounted or whether is it very obvious - such as on a tripod, the size and shape of the selected courtroom, the layout of the courtroom, the

The picture resolution of the filming camera (the main camera) in these models is very important. This is particularly important if one is going to zoom-in and de-select the TCB courtroom camera/courtroom camera plus TCB camera operator in the second and third versions for Groups B and C.

### **Camera Equipment**

A Red/or Alexa camera is recommended in these models. This will shoot at a resolution of 4K. 4K is a very high resolution and will allow one to zoom in quite a lot without any deterioration of the image quality.<sup>4</sup> This is important as the models proposed will utilise the same original footage in three versions for Groups A, B and C. This may not be possible or may be sub-optimum if a lesser resolution camera is chosen.<sup>5</sup>

### **Footage and Editing**

When the TCB courtroom footage material is shot one will now have to edit from the first original version (TCB camera + TCB camera operator in view) to create the second and third versions (TCB camera in view; no TCB camera in view). The footage from the camera memory cards will be put it into a film editing system.<sup>6</sup> The zoom-in on the footage to cut out the visible TCB camera plus TCB camera operator and subsequently cut out the TCB camera would be done on the editing system. Thus, the three otherwise identical versions of the TCB courtroom footage sequence will be produced.<sup>7</sup> These three versions for Groups A, B and C are now the raw material footage for subsequent eye tracking research. Unlimited groups of individual mock jury and audience subjects can be examined for the effect of the TCB camera and TCB camera plus TCB camera operator in

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electrical layout, the lighting atmosphere and lights in the courtroom, the layout and elevations in the courtroom, etc.

<sup>4</sup> There are other alternative cheaper cameras, such as the Canon C300/C500, which can shoot images in resolution of 2K and 4K. For research purposes, the image may not need to be of transmission or projection quality. However, if this work is to be used for creating different versions, for replication, and for testing and utilisation by other researchers in other jurisdictions, the better resolution cameras such as the Red/Alexa are recommended.

<sup>5</sup> Personal interview with a producer/director and relates research. Also see < <http://cinemaeos.usa.canon.com/products.php?type=Camera-c500> > accessed 9 March 2014; < [www.arri.com/camera/digital\\_cameras/cameras/camera\\_details.html?product=251&cHash=4d3858908f0a8971c86318d603d7a5dd](http://www.arri.com/camera/digital_cameras/cameras/camera_details.html?product=251&cHash=4d3858908f0a8971c86318d603d7a5dd) > accessed 9 March 2014; < [www.red.com](http://www.red.com) > accessed 9 March 2014; < [en.wikipedia.org/wiki/4K\\_resolution](http://en.wikipedia.org/wiki/4K_resolution) > accessed 9 March 2014; < <http://www.apple.com/ie/finalcutpro/> > accessed 9 March 2014; < <http://www.avid.com/US/categories/Professional-Video-Editing-Finishing> > accessed 9 March 2014. Also see B Mamer, *Film Production Technique: Creating the Accomplished Image* (Wadsworth/Thomson Learning 2003); Michael O'Donoghue, *Producing Video For Teaching and Learning, Planning and Collaboration* (Routledge 2014).

<sup>6</sup> For example, Final Cut Pro or Avid. There are other editing systems also.

<sup>7</sup> One may want some simple titles at the beginning of the footage scenes and they would be placed on in the edit suit. This frequently happens in filming films, adverts, etc.

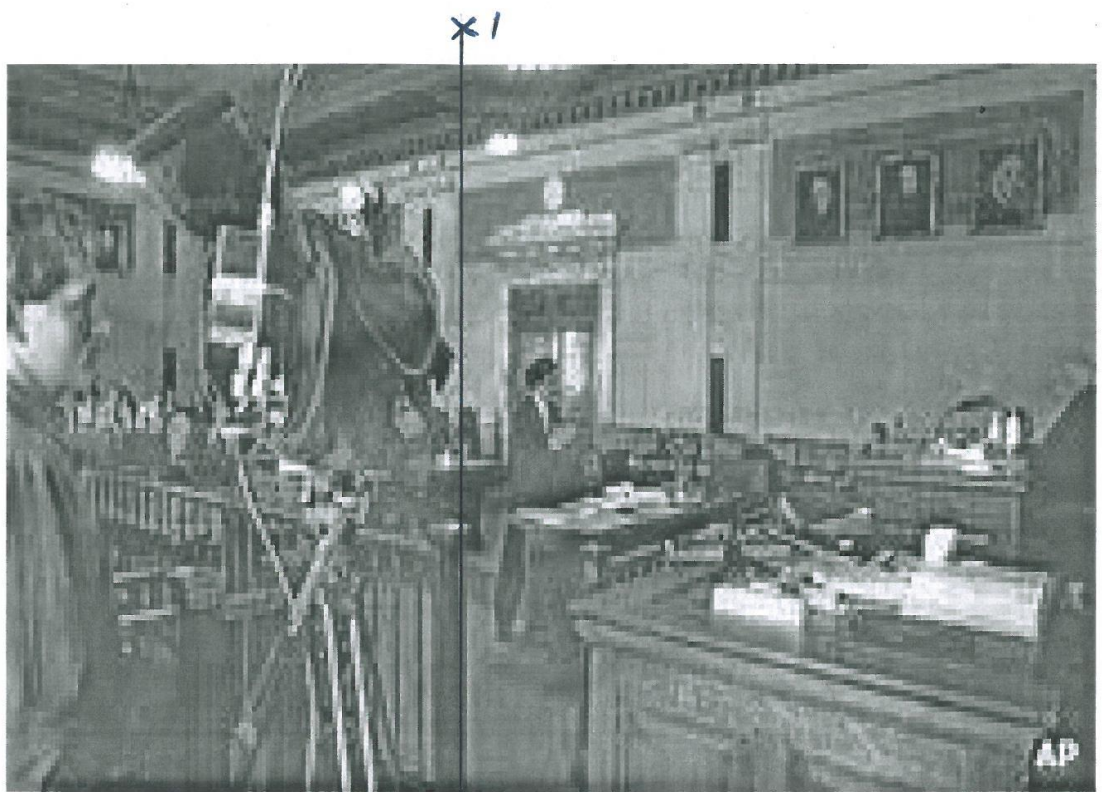
the courtroom. The TCB footage can also be considered cross-jurisdictionally. This offers research opportunities never previously explored.



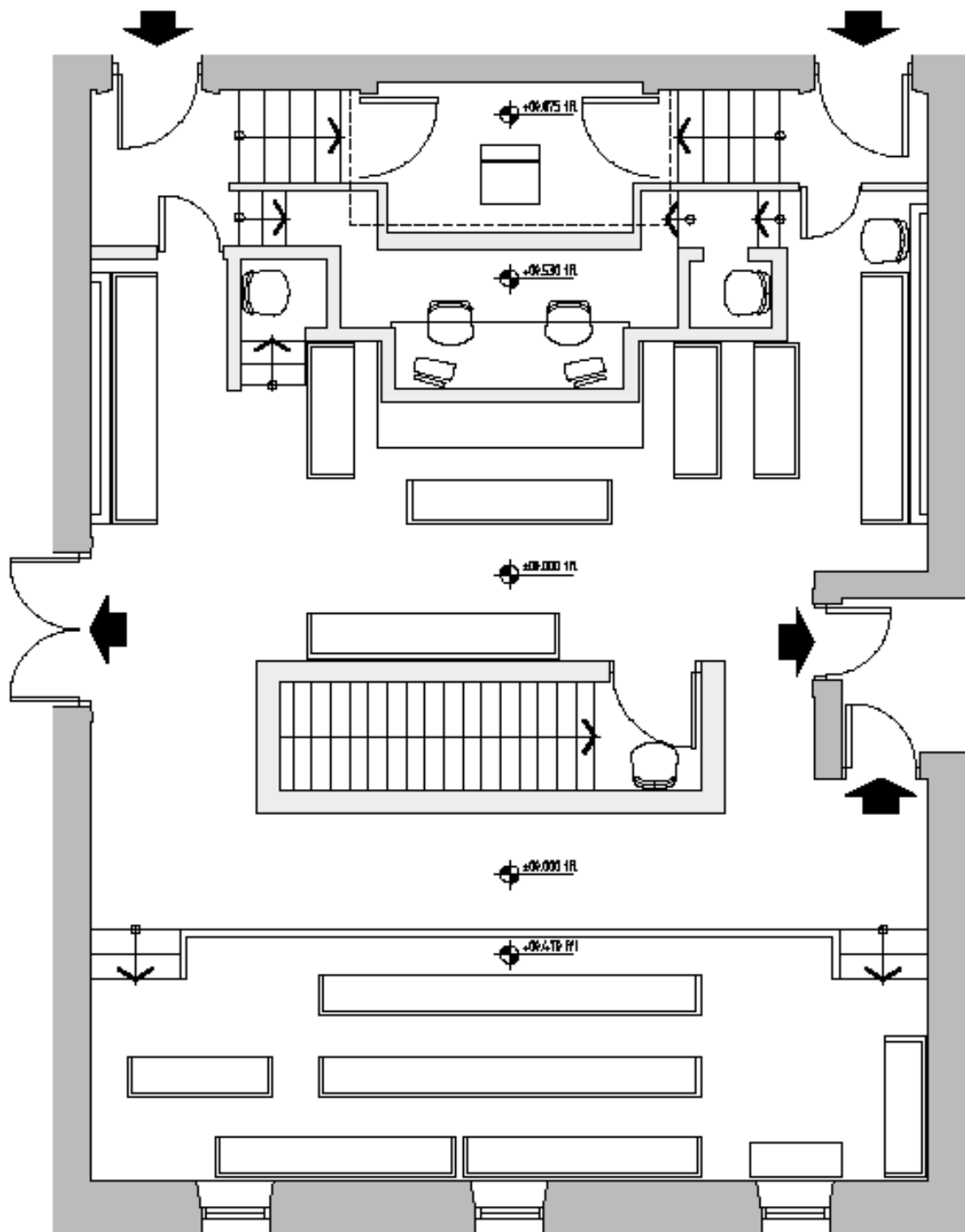
<http://www.bbc.co.uk/news/entertainment-arts-16908178>

We can also see how the angles and editing can work in relation to the immediately preceding courtroom image/footage. This is indicated in the image below. The original version (Group C) would be the TCB camera and TCB camera operator version. Line or edit X2 would represent the TCB camera only scenario (Group B). Line or edit X1 would represent the camera absent scenario (Group A).

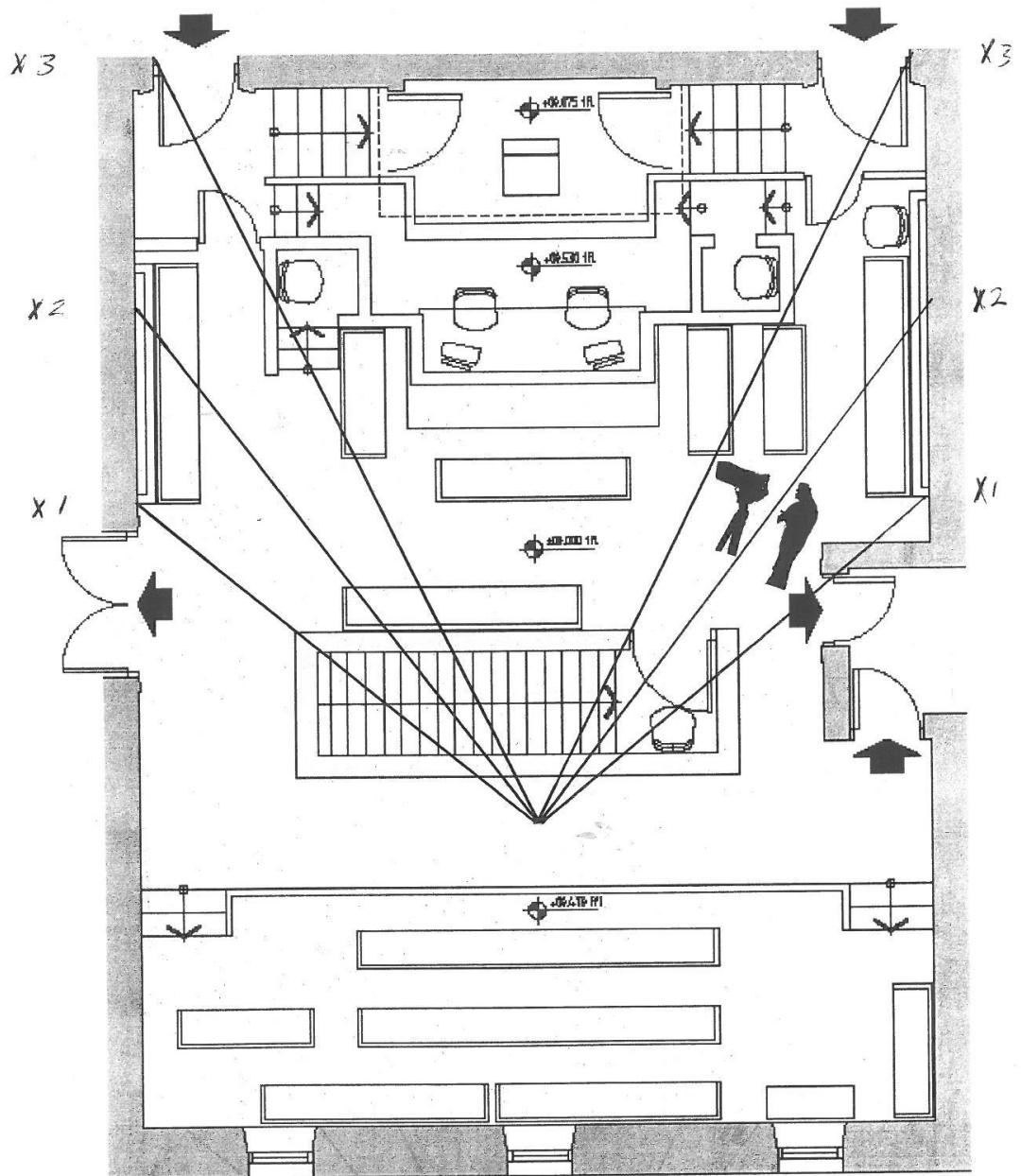




Applying the above model with 4K camera equipment to the eye-tracking proof-of-concept work above, we can examine and suggest the possible location for the TCB prop camera, the location of the real camera, and the angles and editing whereby the whole courtroom scene is included, which includes the TCB camera and TCB camera operator; the edited courtroom scene with only the TCB camera; and finally the control version with no TCB camera or TCB camera operator. In all versions, the entire of the core issues in the courtroom scene remain the same, such as judge, witness seats, clerk seating, etc. We can also advance to wider research opportunities, including out-of-court related research with eye-tracking, such as education related popular arguments and audience related effect issues.



○ Lambert ET1.3: \_\_\_\_\_



○ Lambert ET L3: \_\_\_\_\_

Some other considerations are prop camera and background;<sup>8</sup> choice of lens<sup>9</sup>; and colour temperature of courtroom and participants.<sup>10</sup>

## **Sound**

Obviously in order to capture what is occurring in the courtroom, depending on the particular study subject and courtroom participant(s) involved, it may require that sound (in particular voice) is captured in addition to the photographic film/footage image. Therefore, one may need to plug-in to the microphones of the court system. One should make sure it is a direct feed from the court system for the best quality audio. Alternatively, if this is not feasible, one may have to put radio microphones on the participants and have a sound recordist monitor the sound in or close to the courtroom. Installation work may be required by the sound recordist in the courtroom and related work with the courtroom participants. Depending on the particular requirements of the research study, it may be possible to utilise additional microphones placed in close proximity to the particular courtroom participants the subject of the given study filming.<sup>11</sup>

## **The Jury Model**

One can have a study group of, for example, sixty individuals. This is large enough to be a meaningful test and across each of the three groupings. Each individual in each group is given the exact same instruction and tested for the exact same criteria. The jury group is split into three groups with twenty each watching the first version (no camera in view)(Group A); twenty watching the second version (TCB camera in view)(Group B); and the final twenty individuals watching the third version (TCB camera plus TCB camera operator in view)(Group C). The exact same footage is used as it is a single

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<sup>8</sup> For the content footage version for Groups B (TCB camera in view) and C (TCB camera and TCB camera operator in view), one needs to make sure that the background does not camouflage the prop camera. A plain un-patterned part of the courtroom can make it more visible in the footage to be captured with the main camera. See *ibid*.

<sup>9</sup> The choice of lens for the filming camera (the main camera) is important as this gives one the angle of view. A 50mm lens will give a coverage approximately the same as the human eye. A lens that is wider will give more coverage but will push objects back so people or objects will look smaller. The lens should be chosen to suit the particular courtroom to be used for filming. A longer lens (above 50mm) can start to behave like a telescope and while objects will appear closer, the angle of view will become narrower. See *ibid*.

<sup>10</sup> The colour temperature of the courtroom is also relevant and the recorded image should look as real as possible. If there are no windows then the ambient artificial light may be around the same colour temperature. This would be approximately 3,200 Kelvin. See *ibid*. If the courtroom is lit with fluorescent light it will be generally be around 5,000 Kelvin. So when the image is 'white balanced' (ie technically altering the image colour contingent to the light in the courtroom) the courtroom participants' skin tones look natural. If the colour temperature is wrong, the participants in the footage can look different or even unnatural. The footage may need to be corrected or balanced to cater for the artificial-ness of the light skin colour by way of correction and balancing. See *ibid*.

<sup>11</sup> See *ibid*.

shoot. The exact same courtroom participants appear and are doing the exact same things. The only difference is that camera technology allows us to show a TCB camera and operator in view, TCB camera only and TCB camera absent condition (no TCB camera in view).

The whole mock jury group will individually watch their assigned footage. This can be on a laptop, computer, projection or other screen. However, it should be consistent for all mock jury subjects. The mock jury subjects will be wearing eye-trackers as they watch the TCB content footage. (Alternatively, if still images are used as the content, the jury subjects will be watching the sequence of still images of the courtroom). Therefore, we can track and record what each individual is looking at, for how long, including whether the TCB courtroom camera becomes an area of focus for the individuals, for how long, how frequently, the average or mean across the subject population, the length of camera gaze compared to other objects and persons in the courtroom, and the percentage of TCB camera gaze as compared to the total length of gaze in the entire courtroom footage scene.

Over time this can be played to other additional subject groups in addition to the first sixty. This is a significant improvement over, for example, the limitation of self-reports. In this model we are able to use self-report type tests and then compare these results with the accurate results of the eye-tracking research data for the same event. We can also undertake other tests. If the case scenario involves case evidence culminating in a sentence decision or a damages award decision, and these details are not revealed on the footage itself, the three subject Groups A, B and C can be asked to indicate what length of sentence or size of damages award they would individually make. We can test if the presence of the TCB camera or TCB camera plus TCB camera operator influences the mock jury decisions.

### **The Audience Model**

While the prior research focuses primarily on in-court participant type issues (with self reports, etc), these popular arguments and effect considerations expand to the out-of-court arena. The audience model employs the same methodology as the above. Different tests and test questions will be needed for the audience members as they will be not carrying out the same task or function as jurors or mock jurors. So the research project will need a different set of instructions to the audience test subjects, different hypotheses and a different set of issues being examined and tested for. However, the model is broadly the same as above with three test groups, courtroom footage and screenings and eye-tracking.

### **Issues to be Considered in Future**

The best TCB effects-research will bridge several empirical domains such as law, legal-psychology, media, communications and cognitive sciences. This is not an easy task, perhaps evidenced by the complexity of the thesis.<sup>12</sup> The thesis seeks to elucidate that a consideration of the effects issues from a legal and legal-policy perspective alone, without reference to effects-research beyond the hot air of mere popular arguments and opinions will leave interested parties bereft of getting any closer to considered answers to the many questions which the TCB issue raises. TCB effects-research should consider different angles and avenues for research which can bring us closer to better normative research conclusions.

The proof-of-concept research suggests a coherent argument for why such research is needed, as well as an indication that eye-tracking technology could be suitable. It also has many advantages and provides solutions over some of the problems facing the TCB effects-research previously, in particular opinion only studies such as self-reports. To those with a legal-psychology or legal-empirical background, the proof-of-concept demonstration and eye tracking research and suggestions for further relevant research, may not be an extraordinary suggestion. However, to those less familiar (and which audience may include judges, lawyers and legal-policymakers), this research may be altogether more novel. For those in the legal profession who are likely unaware of eye-tracking technology this should provide a persuasive case for the inclusion of eye-tracking and other models of research in considered TCB effects-research in future.

### **Identifying an Effect Hypotheses**

As indicated above, much of the (little) TCB research and popular discussion is headline only and does not identify specific hypotheses to be examined. Research should link effect hypotheses to the presence of TCB cameras to predicted positive or negative consequences. Some of these suggested effect points are referred to by the author<sup>13</sup> but more specific effect research hypotheses are below. For instance, for the *witness* we may predict the hypotheses that,

- the witness will look at the TCB cameras more often than chance would predict;
  - research can manipulate camera location, camera awareness;
  - research can control for individual differences in image management.

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<sup>12</sup> This thesis is from the point of view of a lawyer with a legal interest in the potential positive and detrimental effects of TCB. This is perhaps the most valid viewpoint that this thesis could have. However, it is not the only viewpoint. Those interested in media, technology, communications and psychology, for example, also have valid perspectives.

<sup>13</sup> P Lambert, *Television Courtroom Broadcasting, Distraction-Effects and Eye-Tracking* (Intellect 2012) 33-35.

- the presence of TCB cameras leads to changes in specific variables related to witness performance;
  - Do they have to look at them to be affected? Or is mere knowledge that the case is televised enough?;
  - What dependent variables can be used to reflect the performance of the witness? For laboratory studies one could use a memory task (eg recalling a 'witness statement,' with the number of factual errors. Or the number of pauses in the witness's statement. Or any measure that has previously been linked to indecision or even deceit (eg face touching, looking down, etc);
  - Is the witness trying to deceive? Deceivers might be differentially affected by the 'observer effect';
  - What is the differential impact of a virtual (TCB) audience versus a real audience (or possibly the jury). It is likely that the real audience will have a greater effect on people whose performance will have a direct impact upon themselves (eg the accused, or a lying witness). However, people who have less reason to be concerned about the outcome of the trial (eyewitness, expert witness), may be more impacted by the virtual audience, especially where image management is important to them);
  - What effects does audience size have on witness performance? (TCB would have a larger audience). Do witnesses correctly predict the size of audience for TCB?
  
- that these changes in witness performance are significant enough to influence decision making by the jury or judge:
  - Which situation most impacts on the jury's belief of that witness?;
  - How does observation affect the jury's judgement of the witness;
  - Can the jury be inoculated against observer effects by the judge?

Many of these studies could be undertaken in a laboratory setting, and or a moot court setting. The combined results can be scaled up to a more naturalistic and generalised context. There could be scope for a wide range of TCB eye-tracking studies.<sup>14</sup> Other eye-tracking issues would also need to be considered as the TCB research advances.<sup>15</sup>

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<sup>14</sup> Of course, TCB eye-tracking is only one tool for uncovering the true impact of TCB effect.

<sup>15</sup> Future TCB eye-tracking research might examine and explain better the relationship between ocular movements and different types of attention/distraction, namely to differentiate between exogenous vs endogenous, how top-down and bottom-up mechanism affects attention, covert vs overt, orientation vs allocation, etc. (See MF Land, 'Eye movements and the control of actions in everyday life' *Progress in Retinal and Eye Research* (2006) 296; MI Posner, 'Orienting of Attention' (1980) 32 *Quarterly Journal of Experimental Psychology* 3; K Rayner and MS Castelhana, 'Eye Movements During Reading, Scene Perception, Visual Search, and While Looking at Print Advertisements' in K Rayner and MS Castelhana, *Visual Advertising* (Erlbaum 2007)). Eye movements encompass not only extraocular movements, such as fixations and saccades, but intraocular movements as well. Pupil response intraocular movement is an important index of cognitive load and emotional state. (For a review see, for example, K



## Conclusion

TCB is a controversial topic and judicial as well as other concerns remain. The suggestions and models above may help in expanding the legal-empirical research to include the level of nuanced data collections and data recording which normative TCB effects-research requires to deal with the issues, concerns and challenges.<sup>16</sup> Courts and legal-policymakers are concerned to have more information, research and considered research results available to them when dealing with these important legal and legal-policy issues. It is recommended that those whom have to consider TCB issues should have information resources available which map out the key visual gaze locations and visual scan paths of the respective TCB courtroom participants being investigated. If TCB is being considered, it makes sense to map out these ‘hot’ regions of the courtroom location scene. This is research which will hopefully assist courts and legal-policymakers. Without enhancing our research data collection and recordal and in the context of moving to normative TCB research models and tools, the judicial and other concerns will continue to exist without being any closer to having appropriate answers. In researching particular courtrooms, and in conducting research in mock-courtroom, the layout of the courtroom is as equally important to what a broadcaster would wish to do in the courtroom as it is to legal-empirical researcher in designing appropriate distraction-effects research.

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Holmqvist, M Nyström, R Andersson, R Dewhurst, H Jarodzka and J van de Weijer, *Eye Tracking: A Comprehensive Guide to Methods and Measures* (OUP 2011). Since a trial in court is always an emotional situation, it could be important to bridge emotion and visual attention. (See for example MG Calvo, L Nummenmaa, & J Hyönä, ‘Emotional Scenes in Peripheral Vision: Selective Orienting and Gist Processing, But Not Content Identification’ (2008) 8 *Emotion* 68–80; L Nummenmaa, J Hyönä, & MG Calvo, ‘Eye Movement Assessment of Selective Attentional Capture by Emotional Pictures’ (2006) 6 *Emotion* 257-268). A multi-modal sensorial pattern of stimulation (eg visual, auditory, etc) can be present in courtrooms, and it would be important to try to disentangle their effect on visual attention in TCB research. Some examples of how the combination ET with other measures could produce valuable reliable data in future. Cognitive load and other required tasks are also issues for research consideration in relation to TCB. (See JM Cooper, N Medeiros-Ward and DL Strayer, ‘The Impact of Eye Movements and Cognitive Workload on Lateral Position Variability in Driving’ (International Conference on Driver Distraction and Inattention, Gothenburg, Sweden, 4-6 September 2013).

<sup>16</sup> If we decide that the TCB camera should be in different positions, to cover different angles there would be more work in the edit suit but even still it is a feasible research process.



## CHAPTER 18: OUT-OF-COURT EDUCATION-EFFECTS

### Introduction

While the argument that TCB will educate the public is one of the prototypical arguments, examination of the actual literature indicates that this does not appear to be actually established. Interested parties, including courts and legal-policymakers might be better informed if a full research literature was available. The legal and legal-policy question of whether TCB really educates remains an issue. We should therefore consider whether TCB generally, or particular forms of TCB, may educate. Courts, legal-policymakers and others in considering the educational-effects question may be assisted by greater and more nuanced consideration of the particular issues inherent in the educational TCB question and how we might advance normative research, particularly research of TCB education-effect issues which may not have been examined heretofore.

### Background

A particular consideration is whether the research is yet comprehensive and sufficient enough to answer the educational TCB question. As with distraction-effects, the concept of educational-effects can be considered to comprise many individual nuances. The general or popular argument that TCB is/will be educational may be somewhat one dimensional. The literature discussing the TCB educational question does not compare and distinguish potential educational TCB from other educational broadcasting. Nor does it seek to distinguish between different types of educational TCB. Potentially some TCB forms may better educate than others, which is an issue not yet addressed in the educational TCB question. The US Supreme Court has not yet addressed these nuances.

Examination of the existing TCB education research literature is relevant as a consideration of how much or how little relevant material is available to courts (including the US Supreme Court) if TCB has to be considered again tomorrow. Such a review may assist in the consideration of how to advance educational TCB research and research models. Courts, legal-policymakers, legal-empirical researchers and those engaged in popular discussion might enhance the level of discussion, research and normative knowledge in relation to TCB effects by engaging analysis of how we may measure, quantify and gather data in relation to TCB educational-effects. These issues are examined below and in the subsequent chapter.

The issue of how we should research for TCB educational-effects issues is a relevant research consideration, given the import of court cases, legal and rights issues and the potential positive and negative effects of TCB. An equally valid research consideration is

the extent to which the various popular arguments, in this case educational TCB, might be examined and assessed. This raises issues of legal-empirical criteria, optimum versus minimal research models, gaps in current research, areas yet unaddressed, recording, replication and validation of research, research baselines, models and parameters for legal-empirical TCB educational-effect research and levels of TCB educational-effect.

Below we refer to the available legal-empirical research, some of the issues raised, and proceed to highlight some of the wider educational TCB legal-empirical research opportunities. This could potentially include further eye-tracking research. The research and the literature seldom refer to the out-of-court issues. The seminal work by S Barber<sup>1</sup> is really the first call for out-of-court effects-research. She writes that TCB,

‘would give the television industry an awesome power to condition the public mind either for or against the accused. By showing only those parts of its films or tapes which depict the defendant or his witnesses in an awkward or unattractive position, television directors could give the community, state or country a false and unfavourable impression of the man on trial. Moreover, if the case should end in a mistrial, the showing of selected portions of the trial, or even of the whole trial, would make it almost impossible to select an impartial jury for a second trial ... To permit this powerful medium to use the trial process itself to influence the opinions of vast numbers of people, before a verdict of guilt or innocence has been rendered, would be entirely foreign to our system of justice.’<sup>2</sup>

We have no understanding of why the audience watch a TCB case. We do not know what the audience actually learns in relation to the instant case. The query arises as to what they may learn in relation to court issues and procedures in specific TCB cases and from TCB more generally. We may consider what factors and what types of TCB cases broadcasters would be interested in. Equally scheduling issues, programming policies<sup>3</sup> and types of programmes would to be used for TCB are all issues of potential influence. We might analyse the criteria of selection that will be used for TCB. Effects studies might also include longer term and wider audience effects.<sup>4</sup>

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<sup>1</sup> S Barber, *News Cameras in the Courtroom: A Free Press – Fair Trial Debate* (Ablex 1987).

<sup>2</sup> *Estes v Texas* above 547 (Warren CJ).

<sup>3</sup> To use the words of S Moores, *Interpreting Audiences: The Ethnography of Media Consumption* (Sage 1993) 106.

<sup>4</sup> Individual audience experience and presuppositions can also be relevant. See B Chang, *Deconstructing Communications* (Minnesota University Press 1996) 56. He also states that ‘reading is never innocent.’ *ibid.*

There may not be just one unique audience.<sup>5</sup> It may be oversimplistic to assert that TCB will educate (if permitted), or that all TCB will have the same effect. Equally, it may be oversimplistic to suggest that all audiences will be equally receptive in their viewing and understanding of TCB (or indeed TCB forms). The popular assertions should be investigated and verified. Given different media audiences,<sup>6</sup> it may be over simplistic to suggest that TCB will educate *the* audience eg would attention vary between educational TCB and entertainment TCB. The mediums of communication can demand different levels of audience attention.<sup>7</sup> Audience attention levels required for different TCB forms may vary. We might consider what levels of attention may be required for a meaningful or acceptable level of TCB education-effects on the audience(s). Differing media characteristics include the type of perception demanded from the audience; the social contexts in which the audience receive the TCB content; etc.<sup>8</sup>

### **US Supreme Court and TCB Education**

The focus and attention has been on in-court TCB effects, namely, in-court distraction. However, eye-tracking may be applied to some of the out-of-court considerations. Relying on Constitutional interpretation of these issues alone may not achieve assured answers and legal-policy. We can be more open in our approach to understanding the arguments and effects of TCB. In doing so we can connect with the wider cross-disciplinary research possibilities.<sup>9</sup> The US Supreme Court refers specifically to out-of-court concerns. Chief Justice Warren in *Estes*<sup>10</sup> cautions that,

‘[TCB] would cause the public to equate the trial process with the forms of entertainment regularly seen on television and with ... commercial objectives ... broadcasters [would] develop the personalities of the trial participants ... to give ... an element of drama. This

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<sup>5</sup> See comments of S Moores *ibid* 1-3. The comment above of course has to be qualified in terms of a once off programme of courtroom broadcasting. In such an instance the audience can indeed be partly) defined in terms of that once off broadcast. Separately we can also look at the location and context of reception by the audience, as well as the temporal location of broadcast viewing by the audience. See S Moores *ibid* 19 ff, 27-31, 34.

<sup>6</sup> See R Dimbelby and G Burton, *More Than Words, An Introduction to Communication* (3rd edn, Routledge 1998) 176.

<sup>7</sup> See D McQuail and S Windahl, *Communication Models for the Study of Mass Communication* (2nd edn, Longman 1993) 46.

<sup>8</sup> See G Maletzke, *Psychologie der Massenkommunikation* (Verlag Hans Bredow-Institut), as referred to in D McQuail and S Windahl, above 46-47.

<sup>9</sup> See for example H Mowlana, *Global Information and World Communication* (2nd edn, Sage 1997) 11. See this work also in relation the political use of information and also how information and communications are now international in nature. Advertising has also become much more international, *ibid* 97.

<sup>10</sup> *Estes v Texas* 381 US [1964] 532.

tendency was noticeable in the present case ... obviously to add any extra element of viewer appeal to.’<sup>11</sup>

He further refers to the effects of commercialisation on the audience.<sup>12</sup> Also, Chief Justice Warren states that,

‘[TCB] trials would be selected for television coverage for reasons having nothing to do with the purpose of trial. A trial might be televised because a particular judge has gained the fancy of the public by his unorthodox approach; or because the district attorney has decided to run for another office, and it is believed his appearance would attract a large audience; or simply because a particular courtroom has a layout that best accommodates [TCB] coverage. For the most part, however, the most important factor that would draw [TCB] would be the nature of the case. The alleged perpetrator of the sensational murder, the fallen idol, or some other person who, like petitioner, has attracted the public interest would find his trial turned into a vehicle for television. Yet these are the very persons who encounter the greatest difficulty in securing an impartial trial, even without the presence of television. This Court would no longer be able to point to the dignity and calmness of the courtroom as a protection from outside influences. For the [TCB] penetrates this protection, and brings into the courtroom tangible evidence of the widespread interest in a case - an interest which has often been fanned by exhaustive reports in the newspapers, television and radio for weeks before trial. The present case presents a clear example of this danger.’<sup>13</sup>

Chief Justice Warren queries,

‘how is petitioner to show that [TCB] diverted the trial sufficiently from its purpose to deprive him of a fair trial? It is no answer to say that an appellate court can review for itself tapes or films of the proceedings. In the first place, it is not clear that the court would be able to obtain unedited tapes or films to review. Even with the cooperation of counsel on both sides, this Court was unable to obtain films of this trial ... complete ... only of those portions of the trial that are most newsworthy and most likely to attract the attention of the viewing audience ... [TCB] even if unedited, could give a wrong impression of the proceedings ... While the camera is focused on the judge who is apparently acting properly, a juror may be glancing up to see where the camera is pointing, and counsel may be looking around to see whether he can confer with his client without the close-up lens of the camera focusing on them ... The most the camera can show is that a formally correct trial took place, but our Constitution requires more than form.’<sup>14</sup>

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<sup>11</sup> *Estes* 57 (Warren CJ).

<sup>12</sup> *ibid* 574 (Warren CJ).

<sup>13</sup> *ibid* 576-577. Footnote omitted. (Warren CJ).

<sup>14</sup> *ibid* 579-580 (Warren CJ).

This places focus on the development of TCB effects coding for legal-empirical research. Chief Justice Warren cautions that ‘[w]e must take notice of the inherent unfairness of [TCB], and rule that its presence is inconsistent with the “fundamental conception” of what a trial should be.’<sup>15</sup> The effect on the process of the trial has not been systematically researched to date. The influence of the medium is relevant to TCB studies. Eye-tracking studies can be devised which would assist in research of these issues to benefit legal and legal-policy contemplation of TCB issues.

The US Supreme Court also referred to out-of-court educational issues, but these comments and the popular discussion are seldom researched. The court and popular arguments do not focus on the importance of verification and research. Chief Justice Warren states in *Estes*<sup>16</sup> that,

‘It is argued that [TCB] not only entertains, but also educates the public. But the function of a trial is not to provide an educational experience; and there is a serious danger that any attempt to use a trial as an educational tool will both divert it from its proper purpose and lead to suspicions concerning the integrity of the trial process ... This divided effort undercuts confidence in the guilt-determining aspect of the procedure, and, by so doing, rendered the educational aspect self-defeating.’<sup>17</sup>

Justice Harlan states that,

‘Many trials are newsworthy, and televising them might well provide the most accurate and comprehensive means of conveying their content to the public. Furthermore, television is capable of performing an educational function by acquainting the public with the judicial process in action. Albeit, these are credible policy arguments in favour of television, they are not arguments of Constitutional proportions.’<sup>18</sup>

It appears to be suggested that the popular TCB educational argument is an extra-constitutional and extra-legal point. Effectively, it is saying that education and the education question (and presumably entertainment TCB) are not issues for Constitutional and legal TCB considerations. Justice Harlan refers to whether TCB will,

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<sup>15</sup> *ibid* 580 (Warren CJ).

<sup>16</sup> *Estes v Texas* 381 US [1964] 532.

<sup>17</sup> *ibid* 575 (Warren CJ).

<sup>18</sup> *ibid* 589 (Harlan J).

‘educate the public ... Whatever force such arguments might have in run-of-the-mill cases, they carry little weight in cases of the sort before us, where the public’s interest in viewing the trial is likely to be engendered more by curiosity about the personality of the well-known figure who is the defendant (as here), or about famous witnesses or lawyers ... or about the details of the particular crime involved, than by innate curiosity to learn about the workings of the judicial process itself. Indeed it would be naive not to suppose that it would be largely such participants that would qualify a trial for commercial [TCB] “billing,” and it is precisely that kind of case where the risks of permitting [TCB] are at their greatest.’<sup>19</sup>

It is unclear if there is a difference between educational TCB effects and informative TCB effect. This may be an area of focus for further research. Interestingly, the US Supreme Court states that the ‘propriety of closed circuit television for the purpose of making a court recording or for limited use in educational institutions obviously presents markedly different considerations.’<sup>20</sup>

### **Preferential TCB for Educational-Effects**

Those whom have to consider TCB access may also have to consider whether TCB is best designed educate the public. Nuanced consideration may advance to differentiate whether certain forms of TCB are better designed to educate. Some researchers<sup>21</sup> refer to preparation and deliberate design of media in order to enhance educational learning. If we are considering education, we might consider what the audience actually learns from TCB. We can now track what the courtroom audience are looking at and what they see, and for how long, in the TCB context with eye-tracking.<sup>22</sup>

### **Limited TCB Education-Effect Research Available to Courts**

Even today courts are faced with a limited TCB research literature on the TCB educational question. S Barber in 1987, in the first book dedicated to TCB,<sup>23</sup> was not able to identify any legal-empirical research on TCB education-effects. R Entner states that up

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<sup>19</sup> ibid 594-595 (Harlan J).

<sup>20</sup> ibid 590 (Harlan J). This implicitly acknowledges that there are different forms (see below also) of TCB. The forms issue is not defined or addressed in the literature or the research to date.

<sup>21</sup> See EE Mayer, ‘Crossmedia Learning: Guiding Visuospatial Thinking with Instructional Animation’ in P Shah and A Miyake, above 477, 479.

<sup>22</sup> Of course we also have other issues to consider in dealing with measuring audience education and information gain, such as understanding, coding, differences between pictures, videos, text and audio, different channels and different speeds. See general comments in EE Mayer, ‘Crossmedia Learning: Guiding Visuospatial Thinking with Instructional Animation’ ibid 477, 479-481.

<sup>23</sup> S Barber, *News Cameras in the Courtroom: A Free Press – Fair Trial Debate* (Ablex 1987).



until 1992, there was no research of how television uses TCB footage.<sup>24</sup> RL Goldfarb in 1998 does not find any TCB educational research.<sup>25</sup> M Cohen and D Dow<sup>26</sup> (referred to in *Hollingsworth*<sup>27</sup>) are unable to refer to any TCB educational legal-empirical research.<sup>28</sup> A Hiber in 2008 is also unable to refer to legal-empirical educational TCB research.<sup>29</sup> The California Short report while referring to TCB being permitted for a university related educational purpose,<sup>30</sup> the report study itself does not appear to have investigated for TCB education-effects. There is also a report of the *Pistorius*<sup>31</sup> case being used in schools in South Africa.<sup>32</sup> This lack of research, and hence lack of TCB education-effect research conclusions, is reflective of the literature generally.

### Education, Telescoping and Gatekeeping of TCB Cases

The California Short report notes that the media showed little interest in appellate court footage.<sup>33</sup> Only two appeals were broadcast.<sup>34</sup> The predominant media interest was in criminal trials<sup>35</sup> and predominantly ‘for daily news.’<sup>36</sup> Daily television news stories if further analysed could signify relatively short news snippets only, as compared with longer courtroom footage. The report states that ‘few ... [potentially] educational

<sup>24</sup> R Entner, ‘The Image of the Judiciary: A Semiotic Analysis of Broadcast Trials to Ascertain its Definition of the Court System’ (PhD thesis, New York University 1993) see abstract.

<sup>25</sup> RL Goldfarb, *TV or Not TV: Television, Justice, and the Courts* (New York University Press 1998), in particular 116 ff.

<sup>26</sup> M Cohn and D Dow, *Cameras in the Courtroom: Television and the Pursuit of Justice* (Rowman & Little 2002).

<sup>27</sup> *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 19 January 2014.

<sup>28</sup> M Cohn and D Dow, above.

<sup>29</sup> A Hiber (ed), *Should Cameras be Allowed in Courtrooms?* (Gale 2008). While no research and no empirical research is referred to, there is an article reproduced which argues that there are/will be education-effects. See S Gale, ‘Cameras in Courtrooms Would Lead to a More Educated Public’ in A Hiber, above 61-65. No studies or research is referred to.

<sup>30</sup> EH Short and Associates, *Evaluation of California’s Experiment with Extended Media Coverage of Courts, Submitted to The Administrative Office for the Courts, The Chief Justice’s Special Committee on the Courts and the Media and The California Judicial Council* (September 1981) see 1, 6, 9 and 55. However, it does refer to ‘one ... educational [study]. In Yolo County, a wrongful death civil suit was videotaped in its entirety for the University of California at Davis Law School.’ See P Thaler, above 54 and 71. In terms of the popular educational TCB arguments, this generally refers to the public or public audience being positively educated from the TCB footage.

<sup>31</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>32</sup> ‘South African Schools Use Pistorius Trial to Teach Legal Principles,’ Standard Media, 12 August 2014, available at < <http://www.standardmedia.co.ke/article/2000131266/south-african-schools-use-pistorius-trial-to-teach-legal-principles> > accessed 21 August 2014.

<sup>33</sup> P Thaler, above 44.

<sup>34</sup> *ibid* 71.

<sup>35</sup> *ibid* 220.

<sup>36</sup> *ibid*.

applications ... occurred.’<sup>37</sup> Recorded media TCB applications may have implications in relation to what types of TCB cases may ultimately be broadcast to the public eg criminal only, civil only, mix of criminal and civil, hearing, appeal, etc. In addition, the TCB footage actually broadcast can be very short eg short news snippet. This may be a very short, specific or telescoped aspect of the case reflective on one issue and perhaps not the case overall. Thus, what types and lengths of TCB case, and what aspect may be selected, may potentially influence the TCB educational potential.

The popular discussion and research ignore a number of potentially important issues. From a legal-policy perspective, it may be important to consider what cases are chosen to educate and which cases are left out and not chosen, and whether issues arise from this. The public reaction to TCB is not gauged. The potential public effects are not gauged. We do not appear to have examined whether the public may be better informed with TCB as compared with conventional coverage. Legal-empirical research does not examine whether, for example, the public may be educated on the judicial process. In many respects, these issues are linked to how the media present the TCB footage.<sup>38</sup>

It is possible that there may be more potential for TCB educational-effect from seeing longer excerpts of TCB footage than shorter excerpts. An example of longer TCB broadcast is where there is a court requirement that the broadcaster films and broadcasts from the entire case from start to end, known as ‘gavel to gavel’ TCB (G2G). Generally, very few ‘gavel to gavel’ TCB broadcasts appear to occur.<sup>39</sup>

Apart from gavel to gavel requirements, broadcasters can be selective in what they choose to broadcast of the courtroom visual footage and audio footage. The California Short report notes that critics argue that ‘[p]ublic education in light of ... highly selective editing cannot possibly take place.’<sup>40</sup> It adds that it ‘was not required to offer an opinion on the quality of [TCB] [but] highly selective editing ... is ... controversial ... Little [legal-empirical] inquiry has been done to contribute knowledge to the debate.’<sup>41</sup> E Margolin even criticises the report as it ‘fails to evaluate or even consider the use made by the media of the coverage obtained.’<sup>42</sup> Unfortunately, the US Supreme Court nor courts elsewhere would be little better informed today than at the time of the Short report in

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<sup>37</sup>     ibid.  
<sup>38</sup>     ibid 240.  
<sup>39</sup>     ibid 241, n 37.  
<sup>40</sup>     ibid 242.  
<sup>41</sup>     ibid 242.  
<sup>42</sup>     E Margolin, above.

1981. Considering the limited to legal-empirical research that may be ruminated upon by courts and legal-policymakers, the thesis may stimulate further research.

### **The Meaning of ‘TCB Education-Effect’**

TCB proponents frequently argue that TCB will be educational and should therefore be permitted. However, upon considering the available literature, these arguments are not really backed up. There is less than considered discussion of strategies to ensure and to track educational TCB, and over different forms of TCB. W Petkanas considers educational TCB effects.<sup>43</sup> He contextualises his research by referring to the New York State legislature’s decision to permit experimentation with certain TCB.<sup>44</sup> The legislature’s decision was based on the view that TCB could prove to be educational.<sup>45</sup> Education is referred to as meaning that ‘public knowledge of the judicial system would rise and public confidence in the courts would be enhanced.’<sup>46</sup> The Preamble to the New York law confirms that the purpose of the TCB broadcasting was to educate and inform.<sup>47</sup> Unfortunately, the New York legislature failed to envisage baseline research. However, future TCB experiments may be mindful to this aspect of TCB education-effects research. Interestingly, the New York legislature further expanded upon what it understood by ‘being educational.’ It gave four markers of educational TCB. Educational TCB may: increase public knowledge of the judicial system; increase public confidence; educate; and inform.<sup>48</sup> W Petkanas refers to concepts of ‘confidence in the judicial system,’ ‘information sources,’ ‘enhancement,’ etc.<sup>49</sup> He also codes the TCB footage as close-up (CU), mid-shot (MS), long-short (LS), jump-cut (JS), and title.<sup>50</sup> These are all issues of potential effect and effect upon whether TCB is educational. Already, we know that camera-perspective-bias can have sometimes have adverse effects.<sup>51</sup> W Petkanas asks if the public’s understanding of the judicial system and confidence, are enhanced, when measured objectively.<sup>52</sup> One could also ask whether media coverage of cases increases in order to educate. T Keller in one study found increasing TCB access does not increase the

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<sup>43</sup> W Petkanas, ‘Cameras on Trial: An Assessment of the Educational Affects of News Cameras in Trial Courts’ (PhD thesis, New York University 1990).

<sup>44</sup> *ibid* 2.

<sup>45</sup> *ibid*.

<sup>46</sup> *ibid*.

<sup>47</sup> Referred to W Petkanas, *ibid* 3.

<sup>48</sup> However, by referring to education, the definition becomes circular. It is also not clear if referring to ‘inform’ means increasing awareness or, for example, increasing the mere ‘push’ content available.

<sup>49</sup> *ibid* 21.

<sup>50</sup> *ibid* 68-69.

<sup>51</sup> See, for example, G Lassiter, A Geers, P Munhall, I Handley and M Beers, ‘Videotaped Confessions: Is Guilt in the Eye of the Camera?’ in M Zanna (ed), *Advances, in Experimental Social Psychology, Vol 20* (Academic Press 2001) 189.

<sup>52</sup> W Petkanas, above 20.

number of legal news stories.<sup>53</sup> In terms of what it may mean to be educational, W Stone and SG Edlin<sup>54</sup> refer to the hope that TCB will improve public understanding of the judicial system, increase awareness of legal rights and responsibilities, increase judicial scrutiny and enhance competence of lawyers and judges.<sup>55</sup> One of the issues is how to measure these effects. This could suggest taking baselines and measuring public understanding before and after TCB, measuring public awareness before and after TCB, etc. Neither W Stone and SG Edlin nor AR Paddon deal with how to measure these effects nor the issue of defining what ‘information’ and ‘education’ are.

### **No Education-Effects Shown**

W Petkanas finds that the educational TCB effects have not been proven.<sup>56</sup> His study (atypically) incorporates research before and after the TCB study. Most other research tends to be during or after the TCB study, without gathering any baseline data before TCB is introduced. It is sometimes said that as courtroom participants become more familiar with TCB cameras, distraction-effects will diminish.<sup>57</sup> (Implicitly, therefore, it is accepted that there are or can be distraction-effects). Another frequent suggestion is that as the public see more TCB, they will become more confident in the legal process. However, W Petkanas did not find any correlation between reported familiarity with cases/judicial process and the confidence ratings of respondents.<sup>58</sup> There was no increased confidence. W Petkanas found no statistically different answers at the end than at the beginning.<sup>59</sup> ‘Therefore, ... public knowledge and confidence in the courts did not increase or decrease after [TCB] access was permitted in New York courts.’<sup>60</sup> If ‘education’ means mere ‘information,’ there was no increased TCB education-effects demonstrated. ‘Public understanding of the judicial system and public confidence in the system were not enhanced as a result of allowing [TCB] access to courtrooms.’<sup>61</sup> K Netteburg<sup>62</sup> examines whether TCB educates the public. The proposition the TCB is educational was not supported by the results. He found that the TCB ‘low-coverage community [in the study] has significantly more knowledge about court procedures than

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<sup>53</sup> T Keller, ‘Cameras in Courtrooms: An Analysis of Television Court Coverage in Virginia’ (PhD thesis, University of Tennessee 1992) 125.

<sup>54</sup> W Stone and SG Edlin, ‘TV or Not TV: Televised and Photographic Coverage of Trials’ (1978) 29 *Mercer Law Review* 1119.

<sup>55</sup> AR Paddon, above 5.

<sup>56</sup> W Petkanas, above.

<sup>57</sup> Implicitly, therefore, this accepts that there are or can be distraction-effects.

<sup>58</sup> W Petkanas, above 91.

<sup>59</sup> *ibid* 110.

<sup>60</sup> *ibid*.

<sup>61</sup> *ibid* 112.

<sup>62</sup> KL Netteburg, ‘Cameras in the Courtroom: Is a Picture Worth a Thousand Words?’ (PhD thesis, University of Minnesota 1980).

[the TCB] high-coverage community.’<sup>63</sup> J Ossinger<sup>64</sup> reviewed TCB in terms of whether it is educational about the judiciary. She undertook an attitude and perception survey. The results were that Maine residents do not watch a lot of TCB. The public rather base their ‘opinions and confidence levels in the judicial system on other [media].’<sup>65</sup>

### **TCB Impact on Other Media**

It may be interesting to research whether other sources of court news and information are reduced or supplanted once TCB is introduced. Educational evaluations of TCB may be informed by comparing TCB and non-TCB reportage, whether TCB affects the non-TCB court reports and whether the public may use both sources or migrate over to TCB. The J Ossinger study suggests that people do not move over.<sup>66</sup> Further research is required however. How different media forms interact with each other requires research. We also need greater granularity in terms of considering the normative TCB educational issues.

### **TCB Not Increasing the Number of TV Law/Court Stories**

T Keller found that the number of courts open to TCB did not increase the number of legal or court stories in the television media.<sup>67</sup> News editors in Virginia felt the public were more confused than educated by TCB, due to disparities between different US state TCB programming.<sup>68</sup>

### **Content Analysis of TCB**

SA Kohm<sup>69</sup> carried out an extensive content analysis of the reality entertainment TCB programmes *Judge Judy* and *People’s Court*. He finds an increasing tendency to use court judgements as a form of entertainment and spectacle. His research leaves questions in terms of what form or forms of ‘telemediated courtroom’<sup>70</sup> programming we want, and for what particular purpose. If we seek to have educational TCB, one of the issues that may be considered by courts and legal-policymakers is whether we have choices and decisions to make in terms of the content, style and form of such TCB broadcasting. We might consider how tenable it is to suggest that all forms of TCB will educate equally. We might also consider if, and the extent to which, court judgements may be increasingly

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<sup>63</sup> ibid 170.

<sup>64</sup> J Ossinger, ‘Electronic Access to Courtrooms: Television as an Educational Socializing Agent on the Judiciary’ (MA thesis, University of Maine 2006).

<sup>65</sup> ibid, see abstract.

<sup>66</sup> ibid.

<sup>67</sup> T Keller, ‘Cameras in Courtrooms: An Analysis of Television Court Coverage in Virginia’ (PhD thesis, University of Tennessee 1992) 125.

<sup>68</sup> ibid 146.

<sup>69</sup> SA Kohm, ‘I’m Not a Judge But I Play One On TV: American Reality Based Courtroom Television’ (PhD thesis, Simon Fraser University 2004).

used for entertainment – not education. The judge in the *Pistorius*<sup>71</sup> case in South Africa felt the need to say that the case was not about entertainment.<sup>72</sup> Some of the *Estes*<sup>73</sup> comments also discounted education as a legitimising ground for TCB. Chief Justice Warren states in relation to the popular education argument that ‘the function of a trial is not to provide an educational experience.’<sup>74</sup> He adds that ‘there is a serious danger that ... use [of] a trial as an educational tool will ... divert ... from [the] proper purpose and [undermine] ... the integrity of the trial process.’<sup>75</sup> ‘This divided effort undercut[s] confidence.’<sup>76</sup>

R Entner finds no research of how television uses TCB footage until 1992.<sup>77</sup> She undertook a semiotic analysis of visual parts of a sample of TCB broadcasts. Amongst other things, she finds that ‘the camera is not a neutral transmitter of information.’<sup>78</sup> She states that TCB research may not only examine the event being filmed, but also how it is filmed.<sup>79</sup> Recording locations of courtroom participants and TCB camera is just one part of this. She finds that generally defendants are not shown in a neutral aspect but rather in ‘unsympathetic shots.’<sup>80</sup> A ‘suggestion of guilt was implied.’<sup>81</sup> Close-ups of the weapon and the defendant often occur.<sup>82</sup> In another case the victim’s weeping mother was juxtaposed with the defendant.<sup>83</sup> Some cases emphasised visuals which encouraged excitement.<sup>84</sup> This type of semiotic analysis might be able to be considered specifically in relation to examination of TCB education-effects. The *Pistorius*<sup>85</sup> case in South Africa also features close-up shots of the victim’s mother and family. The *Simpson* (criminal) case is often seen as having the effect set the cause and popularity of TCB back

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<sup>70</sup> *ibid* 291.

<sup>71</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>72</sup> S O’Carroll, ‘Oscar Pistorius Judge: This Trial is Not Public Entertainment’ *Journal.ie* (Dublin, 10 April 2014) accessed 12 April 2014. Also ‘Laughter at Pistorius Trial Angers Judge,’ *EyeWitnessNews* (12 April 2014) < <http://ewn.co.za/2014/04/11/Oscar-Pistorius-trial-Judge-Thokozile-Masipa-reprimands-both-legal-sides> > accessed 14 April 2014.

<sup>73</sup> *Estes v Texas* 381 US [1964] 532.

<sup>74</sup> *ibid* 575 (Warren CJ).

<sup>75</sup> *ibid*.

<sup>76</sup> *ibid*.

<sup>77</sup> R Entner, ‘The Image of the Judiciary: A Semiotic Analysis of Broadcast Trials to Ascertain its Definition of the Court System’ (PhD thesis, New York University 1993) see abstract.

<sup>78</sup> *ibid* 25.

<sup>79</sup> *ibid* 26.

<sup>80</sup> *ibid* 157.

<sup>81</sup> *ibid*.

<sup>82</sup> *ibid*.

<sup>83</sup> *ibid* 160.

<sup>84</sup> *ibid* 161.

<sup>85</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

somewhat. It will be interesting to see if the *Pistorius*<sup>86</sup> case has a similar effect in South Africa and further afield.

Television may also be very different from traditionally understood education.<sup>87</sup> Educational TCB may also have differences from traditional education and how to educate. The audience does not progress from the start to finish of a course, nor always view completely in exact sequence.<sup>88</sup> ‘A ... danger of televised trials, is the audience’s acceptance of the visual’ as fact or as a substitute for independent considerations and decisions.<sup>89</sup>

R Entner states that ‘[c]onsidering that the New York State Legislature’s reason to permit [TCB] was to enhance public knowledge and confidence in the judicial system, it is unsettling to realize that several production requirements may not help achieve this aim ... Trials are reduced to seconds of visuals ... complex ideas must be either ignored or treated simplistically.’<sup>90</sup>

In addition, we can also consider if there may be other unintended TCB effects. One view is that television is not ‘neutral.’<sup>91</sup> There can also be different kinds and levels of education, with the one intended not being the one achieved.<sup>92</sup> Also, it is possible that television ‘may offer little control over educational messages.’<sup>93</sup> While TCB studies might aspire to have TCB education-effects, the rules, parameters, processes and form permitted may individually or collectively diminish the potential for education-effects.

The first Federal pilot was part legal-empirical, in that it carried out a public opinion survey and content analysis of TCB reports.<sup>94</sup> However, it was not explicitly researching education-effects. It found that the TCB footage was not used directly, but rather with a reporter voiceover, which provided only ‘basic’ information on the facts of the cases, and provided little information in terms of the legal process generally.<sup>95</sup> There was an

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<sup>86</sup> *ibid.*

<sup>87</sup> W Petkanas, above 8.

<sup>88</sup> *ibid.*

<sup>89</sup> R Entner, above 167.

<sup>90</sup> *ibid.* 159. Note also the first Federal pilot study content analysis, MT Johnson and C Krafka, *Electronic Media Coverage of Federal Civil Proceedings, An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeal* (Federal Judicial Centre 1994).

<sup>91</sup> W Petkanas, above 4.

<sup>92</sup> *ibid.* 7.

<sup>93</sup> *ibid.*, referring to J Fiske and J Hartley, *Reading Television* (Methuen 1978) 81-82.

<sup>94</sup> MT Johnson and C Krafka, *Electronic Media Coverage of Federal Civil Proceedings, An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeal* (Federal Judicial Centre 1994).

<sup>95</sup> *ibid.* 7. Content analysis was defined as ‘the objective and systematic description of communicative material.’ See *ibid.* 32, n 27.

average of fifty six seconds of courtroom footage per story.<sup>96</sup> Sixty three percent of footage was narrated over by the broadcasters.<sup>97</sup> Most stations also used a mixture of footage from inside and outside the courtroom.<sup>98</sup> This latter point is not yet addressed in the TCB legal-empirical education-effects research.

However, while TCB education-effects research was not expressed as an aim of the US Federal study research, the content analysis study does examine whether ‘basic educational information’ was provided using information scales or codes.<sup>99</sup> The codes are (1) identification as a civil matter (ninety five percent of non first day stories did not); (2) identification of stage of proceeding covered (seventy seven percent did not); (3) identification of whether jury present or not (seventy four percent did not); (4) description of day’s proceedings; and (5) discussion of the next step in the proceedings.

Interestingly the first US Federal study research distinguishes single-day and multi-day proceedings,<sup>100</sup> the effect of which might be examined in further research. Overall, the first US Federal study finds that TCB does not provide a ‘high level’ of legal process details, and furthermore, even when the proportion of courtroom footage used is increased, the legal process information does not actually increase.<sup>101</sup> This may underscore the potential for TCB education-effects.

The US Federal study finds ‘considerable variation – across both stations and cases – of the following: amount of courtroom footage used and its integration with other elements of the story; the information conveyed about the facts of the case and the legal processes involved; and the degree to which both sides of the case were presented.’<sup>102</sup> Most footage was dubbed over with narration, ‘thus, the visual information was typically used to reinforce a verbal presentation, rather than add new and different material to the report.’<sup>103</sup> There appeared to be good information on the instant case but ‘poor’ information on the legal process.<sup>104</sup> This begs the questions of what we are seeking to ‘educate’ about; the case, the process or both, what the purpose is; whether the purpose is achieved successfully and how we may go about measuring it.

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<sup>96</sup> *ibid* 34.

<sup>97</sup> *ibid*.

<sup>98</sup> *ibid* 34.

<sup>99</sup> *ibid* 35.

<sup>100</sup> See MT Johnson and C Krafka, *ibid* 36.

<sup>101</sup> *ibid*.

<sup>102</sup> *ibid*.

<sup>103</sup> *ibid*.



Most of the US Federal study research above related to news reports. The researchers also sought to do some research in relation to extended coverage on Court TV (now Tru TV) and C-SPAN. However, it appears no content analysis of this footage was undertaken, instead relying on information furnished by the networks.<sup>105</sup> One of the networks said that working with just a single TCB camera makes gavel to gavel (G2G) coverage more difficult.<sup>106</sup> Both networks are said to have made the point that they provide ‘educational information.’<sup>107</sup> This is not researched, defined or validated. One issue is whether they mean that they ‘push’ educational information. If so, it may be queried why proponents or researchers do not research and demonstrate the education-effects achieved.

CD Vinson and JS Ertter<sup>108</sup> find the TCB ‘emphasis is on the most accessible facets of the judicial process ... driven by audience and market considerations ... cameras contribute to the dramatization of court reporting.’<sup>109</sup> The literature on how the media cover the courts is ‘limited.’<sup>110</sup> The existing literature and research does not ‘address whether court coverage is more explanation or entertainment.’<sup>111</sup>

The CD Vinson and JS Ertter research finds the emphasis is on entertainment, a predominant focus on the defendant and the media interest strongest at the beginning and the end of the case.<sup>112</sup> This all emphasises news media considerations rather than ‘educational concerns.’<sup>113</sup> Seventy five percent of television news stories were less than one minute, as opposed to the equivalent of only one third for newspapers.<sup>114</sup> CD Vinson and JS Ertter found that TCB did not influence the ‘amount’ of coverage, but that the substance, sources and how graphic the stories were did vary depending on whether cameras were in court or not.<sup>115</sup> Also, ‘there is unmistakable ... evidence that news organizations do prefer to report on what will interest us, regardless of its importance or

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<sup>104</sup> *ibid.*  
<sup>105</sup> *ibid* 37.  
<sup>106</sup> *ibid.*  
<sup>107</sup> *ibid.*  
<sup>108</sup> CD Vinson and JS Ertter, ‘Entertainment or Education, How Do Media Cover the Courts?’ (2002) 7:4 *Press/Politics* 80.  
<sup>109</sup> *ibid* 80, 84.  
<sup>110</sup> *ibid* 81.  
<sup>111</sup> *ibid* 82.  
<sup>112</sup> *ibid* 86-87.  
<sup>113</sup> *ibid* 87.  
<sup>114</sup> *ibid* 88.  
<sup>115</sup> *ibid* 90.

implications for us, and they are partial to stories and sources that are most accessible and therefore easiest to cover.<sup>116</sup> They also,

‘see evidence in the Bobbit trials [one broadcast, one not] that [TCB] shape[s] coverage and encourage[s] the broadcast media to highlight the more dramatic aspects of a case at the expense of discussing the wider significance of a judicial proceeding ... more avenues for dramatic reporting than print media ... Further, because of the limited news space in television, newspaper reporters may be better able than their television counterparts to incorporate more detailed information and point out the broader importance of seemingly isolated local cases even in the most dramatic reports.’<sup>117</sup>

The New Zealand content analysis of TCB programming, found that it ‘provided more information about court proceedings and the legal process than conventional coverage, which provided more information about the case.’<sup>118</sup> The degree of [deemed] educative value was indexed to the commitment of television to the story.<sup>119</sup> This related to two cases in particular.<sup>120</sup> However, it is noted that when ‘the cameras were present throughout the trial providing regular coverage through to sentencing then a [deemed] higher educative value was recorded than when only a few days of a trial were covered.’<sup>121</sup> Gavel to gavel (G2G) coverage appears to be better. In addition, however, the cases ‘that were covered conventionally were judged to be more educative about the case in general.’<sup>122</sup> Overall, plaintiffs received more airtime.<sup>123</sup> Therefore, we again need to consider the issue of what we mean by ‘educate.’ In considering the nuances of the TCB educational question, the query arises as to whether the purpose is to educate generally on the legal process or on the specific case in question. A further consideration is whether research validates that the educational purpose is achieved, and if not, how we might go about undertaking such research.

As regards the New Zealand TCB content and content use, the study found that ‘[n]one of the 149 stories evaluated contained film continuously shot in the court. Instead stories were generally a mixture of visual film gathered inside the court, outside the court and re-

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<sup>116</sup> *ibid* 94.

<sup>117</sup> *ibid* 95.

<sup>118</sup> Media Coverage of Court Proceedings Pilot Evaluation Committee, *Media Coverage of Court Proceedings, Introduction and Research Findings* (August 1998) 8. Author insertion.

<sup>119</sup> *ibid*.

<sup>120</sup> *ibid*.

<sup>121</sup> *ibid*. Author insertion.

<sup>122</sup> *ibid*.

<sup>123</sup> *ibid*.

cut with file footage.’<sup>124</sup> The authors of the related New Zealand Final Report<sup>125</sup> note that content analysis is ‘one of the most frequently used research methodologies in communications research’ and furthermore that it is ‘reliable.’<sup>126</sup> TCB content analysis seldom arises. In the instant research, there were six full cases and four sentencing hearings.<sup>127</sup> Unfortunately, there is little content TCB analysis overall and no TCB educational validation research outside of court with the TCB public audience.<sup>128</sup> The New Zealand Final Report notes that radio and print are ‘less competitive in nature than television’ and are not ‘head to head.’<sup>129</sup> This may have legal and legal-policy implications to be considered, for example, in relation to possible stronger arguments for RCB versus TCB, and possibly for different forms of TCB over other TCB forms.

### **Baselines and Comparisons**

One of the issues explored in the thesis is that legal-empirical effects-research, and the conclusions which court and legal-policymakers might draw from such research, is better informed once baseline research is carried out before TCB is introduced. This is generally absent from most of the research and discussion to date. The New Zealand Final Report does not address the baseline issue. However, it does suggest comparison between what happens in court and what is ultimately broadcast. This is frequently absent from TCB research. The Final Report states that ‘[a]ccuracy cannot be fully determined by content analysis as there needs to be some level of comparison between what occurred in court during the day and what was eventually broadcast on [TCB]. Only someone who has sat in court ... is qualified to make this judgement.’<sup>130</sup> Greater consideration of how to examine whether TCB content is educational and accurately reflective of the particular case being broadcast would appear to require more nuanced research. Interestingly, research may inform the length of digital audio recording (DAR)

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<sup>124</sup> *ibid* 12.

<sup>125</sup> K Allan, J McGregor and S Fontaine, *The Impact of Television, Radio and Still Photography Coverage of Court Proceedings, Final Report, A Report Prepared for the Department For Courts* (Department of Human Resource Management, Faculty of Business Studies, Massey University April 1998) 2. (New Zealand).

<sup>126</sup> *ibid*.

<sup>127</sup> *ibid* 4.

<sup>128</sup> For example, V Stodden, ‘Enabling Reproducible Research: Licensing for Scientific Innovation’ [2009] 13 *International Journal of Communications Law and Policy* 1, at 2. While a professional market research firm was engaged in New Zealand to undertake a study of public views to TCB, there does not appear to have been any research of education audience effects or public opinion, see reference K Allan, J McGregor and S Fontaine, *ibid* 67. There were some opinion queries on the potential to educate asked of judges, counsel and court staff, see *ibid* 98 ff.

<sup>129</sup> K Allan, J McGregor and S Fontaine, above 13.

<sup>130</sup> *ibid* 26. In the original the word ‘inaccuracies’ is emphasised in bold. This might well be an issue for future research and may involve an expert observer and other research in-court to compare and examine the TCB broadcast version.

recording for a court case and compare with the length of TCB footage broadcast. We might also consider baseline research of the average length of criminal and civil cases before TCB is introduced.

### **TCB Processes and Content**

There may be value in research and documentation of the process of how TCB cases occur from selection, planning to final broadcast. Such research could input to educational TCB research and considerations. It could also be of assistance to compare print, radio and TCB court reports. Such research could also assist in our understanding of the nuances of different TCB forms and the potential benefit of some over others.

Process and comparison research might also involve consideration of the potentially difficult issue of how to measure balance in TCB broadcasts. The New Zealand Final Report notes the complicating issue of balance and measuring balance. For example, the prosecutor may be the only side to speak on a particular day. If this is the only day covered by the media, then the TCB may not be ‘balanced overall.’<sup>131</sup>

One of the New Zealand rules states, in part, that the TCB may be ‘without editorial comment.’<sup>132</sup> The TCB content analysis examines whether any TCB narrative includes subjective opinion. The research concludes there was in one case and ‘possibly’ in three cases.<sup>133</sup> These types of issues potentially effect what the audience may take from a particular TCB broadcast, but may also have wider implications as regards potential education-effects. While more research is needed, depending on the results of such research, it may be that courts and legal-policymakers would wish to refuse some or all TCB and or tailor access permissions or rules in order to mitigate the possibility of educational purpose TCB being potentially undermined or diminished. For example, such research could influence legal or policy decisions as regards favouring gavel-to-gavel TCB (G2G), TCB footage use requirements/restrictions and or court/court service controlled iTCB streaming.

In one set of New Zealand interviews, fifteen of seventeen non-media participants felt that the television reports were selective and sensational.<sup>134</sup> In interviews the main reasons of those opposed to the study ‘were the selective nature of the news reports and perceived negative effects of cameras in court on those involved in the proceedings,

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<sup>131</sup> *ibid.*

<sup>132</sup> *ibid* 88, referring to Rule A1: Without editorial comment.

<sup>133</sup> *ibid* 88.

which was thought to detract from the judicial process.’<sup>135</sup> So even in some of the more recent official TCB research, the in-court TCB distraction-effects question continues to be raised. The eye-tracking research proposed by the author has the potential to produce stronger and more accurate answers than any of the TCB distraction related popular discussion and research thus far conducted. This could be of great assistance to those legal and legal-policymakers whom have to face the difficult and complex legal issues when TCB access and issues come to be considered.

New Zealand content analysis also examines effect issues.<sup>136</sup> Four of seven case reports were found to be sensational.<sup>137</sup> In relation to the degree to which TCB provides information about the case on TV1, thirty five percent provided only ‘basic’ information, with forty percent providing ‘relatively informative’ information.<sup>138</sup> The figures were thirty five percent and twenty seven percent for TV3.<sup>139</sup> On the issue of the degree to which TCB provides information about court proceedings, TV1 was thirty seven percent basic and twenty five percent relatively informative, and TV3 was thirty seven percent and seven percent respectively.<sup>140</sup>

In New Zealand on the question of the degree to which the story provided information about the legal process, the figures for TV1 were thirty seven percent basic and ninety percent relatively informative.<sup>141</sup> The TV3 figures were twenty one percent and seven percent.<sup>142</sup> In terms of considering potential TCB education-effects regarding the legal process, the higher standard of ‘relatively informative’ was only nine percent and seven percent across two separate television stations, which may appear to be low. The further consideration arising in relation to educational purpose TCB, is what threshold may need to be attained for courts and legal-policymakers to deem a given TCB pilot to be an educational success. While the thesis cannot provide these answers it is beneficial to the wider discussion to highlight that the educational TCB argument and the legal and legal-

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<sup>134</sup> *ibid* 32.

<sup>135</sup> *ibid* 63.

<sup>136</sup> *ibid* 89. Both sensationalism and misrepresentation were defined. Sensationalism was defined as ‘[c]oncentration on the unusual, shocking, bizarre or melodramatic aspects of, or associated with, a trial which are more than just dramatic real footage.’ Misrepresentation is defined as ‘[c]oncentration on aspects of the trial that distort the judicial system or are insignificant in terms of the trial in general.’

<sup>137</sup> K Allan, J McGregor and S Fontaine, *ibid* 89-90. No misrepresentation was found.

<sup>138</sup> *ibid* 99. Author’s calculations from data in report.

<sup>139</sup> *ibid*. Author’s calculations from data in report.

<sup>140</sup> *ibid* 99-100. Author’s calculations from data in report.

<sup>141</sup> *ibid* 100. Author’s calculations from data in report.

<sup>142</sup> *ibid*.

policy assessment of the educational question requires more considered and nuanced research than mere hot air supposition and opinion.

There was a two minute TCB minimum footage requirement in New Zealand. However, despite this legal and legal-policy requirement, which appears aimed at ensuring longer and hopefully more lengthy TCB footage, none of the one hundred and forty nine stories evaluated were—continuous (or extended) TCB footage.<sup>143</sup> Instead what was broadcast was a mix of courtroom footage, out of court footage and re-cut file footage.<sup>144</sup> There was also editing, splicing, re-ordering and a ‘mixture of visual elements.’<sup>145</sup> Several counsel expressed concern at how the TCB footage was used, for example, slowing down footage of the defendant, relying on the defendant and counsel for reaction shots, the repetition of dramatic footage and cutting audio or footage and using it with other audio or footage, some from out of court.<sup>146</sup> This is referred to as ‘mixed footage’ and ‘mixed mode of visual elements.’<sup>147</sup> (It appears this may have occurred in South Africa with the *Pistorius*<sup>148</sup> case). The New Zealand research also found ‘a difference in the framing of the news ... visual elements available. When the story is dominated by courtroom film an emphasis is the actual trial process ... courtroom routines and judicial processes. When there is an emphasis on file footage or outside court film the framing of the story is more likely to match other crime stories with in-court film acting as one visual ingredient.’<sup>149</sup> The Final report adds that this ‘has implications if a purpose of the [TCB] pilot was to promote public understanding of the court procedure and the justice system.’<sup>150</sup> Again, the issue arises as to legal and legal-policy decision requiring considered examination of all of the nuanced TCB educational issues, from aim to evaluation, to success or failure to achieve the aim. One of the intended purposes in New Zealand was for ‘some kind of “trade-off” [with] less intrusive media behaviour outside the courts in return for access.’<sup>151</sup> The report concludes that this has not occurred.<sup>152</sup>

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<sup>143</sup> *ibid* 203.

<sup>144</sup> *ibid*.

<sup>145</sup> *ibid*.

<sup>146</sup> *ibid* 203-204.

<sup>147</sup> *ibid* 204.

<sup>148</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>149</sup> *ibid*.

<sup>150</sup> *ibid*.

<sup>151</sup> *ibid* 205.

<sup>152</sup> See *ibid*.

W Pogorzelski and TW Brewer<sup>153</sup> undertook TCB content analysis of a New York case. They note testimony at the US Sunshine in the Courtroom proceedings on behalf of Radio-Television News Directors Association suggesting that TCB would allow ‘complete and direct observation of the demeanour, tone, credibility, contentiousness, and perhaps even the competency and veracity of the participants, [it] is the best means through which to advance the public’s right to know.’<sup>154</sup> Some contemporaneous media proponents appear to be moving from the educational argument to other (arguably more fluid) access arguments, such as this one. However, these claims need closer examination and research. Considering even the camera-perspective-bias effect in police interrogation videos, it is far from clear if any considered answers can yet be made in relation to TCB content and effect issues.

### **TCB Station Comparisons**

W Pogorzelski and TW Brewer note a TCB pooling arrangement in place between the television stations.<sup>155</sup> It does not appear that this study, nor other studies thus far, have sought to compare the TCB broadcast footage of different television stations from the same pooling feed, and the consequent potential educative effects as between the television stations/television programmes. It is submitted that this may be of interest to courts, legal-policymakers and others. They coded three items in each TCB newscast, namely, total time spent on the story; total in-court video footage; and total in-court audio used.<sup>156</sup> There were two hundred and one stories the majority of which consisted of reporter or anchorperson voiceovers using out-of court-footage.<sup>157</sup> The in-court footage was only used ‘in the form of soundbites.’<sup>158</sup> ‘The mean length of each newscast was 3.35 (two hundred and fifteen seconds). On average, each story contained forty seven seconds (twenty two percent of the total story) of audio coverage from inside the courtroom. For every ten minutes of news coverage, the public heard two minutes of actual court proceedings. Broadcasting audio from inside the courtroom is the purest form of communicating court proceedings to the public but was the least used. Producers tend to rely on the video feed from inside the courtroom rather than the audio footage.

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<sup>153</sup> W Pogorzelski and TW Brewer, ‘Cameras in Court, How Television News Media Use Courtroom Footage’ [November-December 2007] 91 *Judicature* 125. The case was particularly controversial, namely, Amadou Diallo.

<sup>154</sup> Quoted W Pogorzelski and TW Brewer, *ibid* 126. Some contemporaneous media proponents appear to be moving from the educational argument to other access arguments, such as this one. However, these claims need closer examination and research.

<sup>155</sup> *ibid* 128.

<sup>156</sup> *ibid* 128-129.

<sup>157</sup> *ibid* 129.

<sup>158</sup> *ibid*.

The mean length of video usage of a broadcast was 1:18 (seventy eighth seconds, thirty six percent of the total time).<sup>159</sup>

Over the course of the twelve day trial researched by W Pogorzelski and TW Brewer, almost two thirds of the stories focused on non in-court footage eg commentary, narration.<sup>160</sup> On average, seventy five percent of the time was devoted to non in-court audio, so the audience did not hear the judge, lawyers, witnesses or defendants for seventy five percent of the time.<sup>161</sup> In terms of policy, the research states that the ‘disparity between total story coverage and broadcasting what was being said in the courtroom speaks to the mismatch between how courts and legal-policymakers would like news stations to cover judicial proceedings and how the media actually covers them. These findings are from one case study and this limits its generalizability.’<sup>162</sup> Again, more legal-empirical research is needed. They raise a query as to whether TCB are effective at increasing ‘perception.’<sup>163</sup> Almost two thirds of the footage was not in-court footage, and that the in-court footage was generally used to supplement regular traditional broadcasting.<sup>164</sup> As the author points out, we need to define what we mean by ‘education.’ They also point out that there is no apparent increase in public opinion of courts.<sup>165</sup> The audience does not get to see the courts ‘at work.’<sup>166</sup> They further point out that the content analysis shows that this is as a result of media choices and not the courts or the applicable rules.<sup>167</sup> Media decisions and media forms need to be considered and analysed.

The Rhode Island study is referred to by W Pogorzelski and TW Brewer. After the first period, the courts said that the media ‘had an obligation to further the goal of public education as a justification for the’ additional court management burdens.<sup>168</sup> After reviewing the second experimental period, it was said that forty five seconds of courtroom footage ‘scarcely contributes to such public understanding.’<sup>169</sup>

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<sup>159</sup> *ibid.*

<sup>160</sup> *ibid.*

<sup>161</sup> *ibid* 131.

<sup>162</sup> *ibid.*

<sup>163</sup> *ibid* 132.

<sup>164</sup> *ibid.*

<sup>165</sup> *ibid.*

<sup>166</sup> *ibid.*

<sup>167</sup> *ibid.*

<sup>168</sup> At W Pogorzelski and TW Brewer, *ibid*, referring to *In re Extension of Media Coverage for a Further Experimental Period*, 473 RI A2d 1232 (1984).

<sup>169</sup> *ibid.*



W Pogorzelski and TW Brewer also refer to SL Alexander's research which also found that media footage was generally using the in-court footage to enhance traditional reporting only, and that this may not be what was intended by the courts or legislature.<sup>170</sup> Referring to 'news formats' W Pogorzelski and TW Brewer note research and content analysis which shows that selection and ordering of footage can 'significantly alter [the] meaning.'<sup>171</sup> They refer to R Entner's research which found that the frame by frame analysis shows that new television 'production bias' does not give adequate explanation of the courts nor does it enhance the image of the judiciary.<sup>172</sup>

W Pogorzelski and TW Brewer feel that the 'assumption that courts are an exception to this pattern [of information/entertainment blurring] needs to be questioned and re-examined' particularly on the TCB debate.<sup>173</sup> The present research parallels previous research regarding 'how established news formats and editing decisions shape broadcast content.'<sup>174</sup> Sustained research of other courts forms need to be undertaken. W Pogorzelski and TW Brewer recommend wider research, including for example tracking how much judicial and court time is spent in relation to assisting and monitoring TCB; monitoring media compliance with the rule; monitoring the party opponents time dealing with camera issues; and media effects.<sup>175</sup> Wider research is needed into how the judicial process is effected and 'at what cost' in order to fully understand the various impacts.<sup>176</sup> They comment that the research has not altered much since the judicial concerns voices in *Estes*.<sup>177</sup> More research, research funding and observational research is required.<sup>178</sup> Without increasing of research methodology and coding our TCB knowledge continues to be shaped by opinions and 'good intentions, rather than systematic evidence.'<sup>179</sup> 'Nor is it evident that broadcasting brief, heavily edited clips of trial footage is an effective

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<sup>170</sup> W Pogorzelski and TW Brewer, *ibid* 132, referring to SL Alexander, 'Cameras in the Courtroom: A Case Study' (1991) 74 *Judicature* 307.

<sup>171</sup> W Pogorzelski and TW Brewer, *ibid* 132, referring to R Entner, *The Image of the Judiciary: A Semiotic Analysis of Broadcast Trials to Ascertain Its Definition of the Court System* (New York University Press 1993) 197. They also refer to P Thaler, above, SJ Drucker, 'The Television Mediated Trial: Formal and Substantive Characteristics' (1989) 37 *Communications Quarterly* 305; VP Hans and JL Dee, 'Media Coverage and the Law: It's Impact on Juries and the Public' (1991) 35 *American Behaviour Scientist* 136; EJ Epstein, *News from Nowhere: The Selection of Reality in Television News Programs* (Vantage 1973); SA Esposito, 'Source Utilization in Legal Journalism: Network TV News Coverage of the Timothy McVeigh Oklahoma City Bombing Trial' (1998) 20 *Communications and Law* 15.

<sup>172</sup> W Pogorzelski and TW Brewer, *ibid* 132, referring to R Entner, above.

<sup>173</sup> *ibid* 133.

<sup>174</sup> *ibid*.

<sup>175</sup> *ibid*.

<sup>176</sup> *ibid*.

<sup>177</sup> *ibid*.

<sup>178</sup> *ibid* 134.

<sup>179</sup> *ibid*.

means of increasing the visibility of, or improving the perception of, the judiciary.’<sup>180</sup>  
‘The public has identified its concerns: unfair and unequal treatment in the justice system. The challenges faced by the judicial system are more complex than a lack of public awareness and a continued focus on [TCB] as a tool to improve public trust and confidence seems misdirected.’<sup>181</sup>

If TCB is educational and/or informative, and if one seriously wants to establish (or research) the points, one obvious place to examine is existing TCB output. We may examine the current TCB programmes and content. There is not enough content analysis and alternative research. In initial interviews with non-media subjects, fourteen of seventeen people thought that there was no ‘actual’ educational benefits.<sup>182</sup> The final interview sets reveal that thirteen of twenty eight interviewees indicating that there was no actual education.<sup>183</sup> The market research study did relate to some of the educational issues. It assessed whether the public were aware of the ongoing experiment at all, and gauged responses at three different stages. The results were sixty nine percent, fifty seven percent and sixty five percent.<sup>184</sup> It sought to assess whether public awareness of how the court system operates actually improved. Twenty three percent thought that their awareness had improved while sixty seven percent felt it had not improved.<sup>185</sup> The literature generally, when referring to the education arguments, does not separate non-media and media responses on the educational debate. This is an area which should be addressed, particularly as it is felt that differences may exist. It is also suggested that we should examine media education arguments in favour of courtroom access with how they see their actual roles. While positive education-effects is an argument advanced, issues of whether the media see one of their primary news and process functions as being education also arise. The New Zealand Final Report comments that ‘journalists themselves do not necessarily see their fourth estate role in terms of an educative value.’<sup>186</sup> The study appears to have only examined educative content analysis in two cases.<sup>187</sup> In terms of the research, it appear to show that educative potential effects are optimum the longer the

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<sup>180</sup> W Pogorzelski and TW Brewer, *ibid* 134.

<sup>181</sup> *ibid*.

<sup>182</sup> Short Report, above, *ibid* 102.

<sup>183</sup> K Allan, J McGregor and S Fontaine, *The Impact of Television, Radio and Still Photography Coverage of Court Proceedings, Final Report, A Report Prepared for the Department For Courts* (Department of Human Resource Management, Faculty of Business Studies, Massey University April 1998) 134.

<sup>184</sup> *ibid* 105.

<sup>185</sup> *ibid* 105.

<sup>186</sup> *ibid* 194.

<sup>187</sup> See *ibid* 195.

footage and more if a case is shown in entirety.<sup>188</sup> This suggests in the (optimum) educational TCB may be longer or gavel to gavel (G2G), not short news snippets.

### **TCB Audience Recall**

One result of the W Petkanas research is that '[m]ost of the public either cannot remember when news reports include pictures from the courtroom, or cannot distinguish news reports made with cameras inside courtrooms from news reports made without camera coverage. The latter group increased over the period of this study.'<sup>189</sup> This has a number of implications, not least in relation to how the media use TCB footage and the forms of TCB which predominates. Courts and legal-policymakers might consider whether educational TCB needs to be presented and differentiated from conventional television programming to be successful. Real issues arise as to which forms of TCB are (potentially) most efficient at achieving education-effects. Clearly significantly more research is needed into these important issues.

### **Case Content Analysis Needed**

W Petkanas notes that initial examination of case transcripts suggests that there are differences between reports with and without cameras present.<sup>190</sup> This requires further research, he suggests.<sup>191</sup> Another suggestion for research from the author, might be an assessment of effects on sentences before and after introducing TCB. A further suggestion would be to research the length of cases with and without TCB cameras. It should, however, be conducted after an extended baseline research period, and across a full range of cases.

### **Baseline Research**

Importantly, W Petkanas undertook a study at the beginning and the end of the New York study. It, therefore, has an advantage over other studies. Researching and recording a baseline are the very beginning is important, but unfortunately generally the TCB research does not do this. It is important to appreciate also, that the opportunity to do this is limited temporally in each courtroom.

### **Positive Effects**

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<sup>188</sup>    ibid.  
<sup>189</sup>    W Petkanas, above.  
<sup>190</sup>    ibid 117.  
<sup>191</sup>    ibid.

AR Paddon<sup>192</sup> investigated certain audience effects by comparing a videotaped criminal trial and the same trial with a sketch artist. She tested recall of information, presentation appeal and willingness to be a juror.<sup>193</sup> Based on the results of this study, she states that ‘cameras enhance information gain but cause no attitude change that would imperil justice.’<sup>194</sup>

In terms of the TCB legal-empirical audience effects-research generally, she notes that such research ‘could give [legal-]empirical support for the hopes or warn of the pitfalls expected from news cameras and microphones in the courtrooms, but unfortunately few of these have been done.’<sup>195</sup> Legal-empirical research is particularly important. Unfortunately, we need significantly more legal-empirical research.

She refers to the various sides in the educational debate, one arguing that access will lead to an ‘increase in news about judicial matters and hence increased public understanding of the courts,’ while others argue that the judicial process is not designed or intended to educate.<sup>196</sup> However, Paddon does not examine whether media court reports increase as a result of access, nor whether there are any actual audience or public education-effects.

In terms of the legal-empirical effects-research to date AR Paddon refers to J Hoyt (1977) and K Netteburg (1980).<sup>197</sup> She notes Hoyt’s study as finding that reliability of testimony improved when witnesses were aware they were being televised, and that in Netteburg’s study over fifty percent incorrectly remembering the whole outcome of a highly publicised case, while thirty six percent were not aware of the trial.<sup>198</sup> Hoyt’s research, however, deals with in-court-effects, not out-of-court education-effects.

AR Paddon researches five hypotheses<sup>199</sup> several of which were not found/supported by her research findings.<sup>200</sup> The separate condition variables used are: courtroom with video camera; sketches and voice over; and talking head presenter.<sup>201</sup> However, while she

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<sup>192</sup> AR Paddon, ‘Television Coverage of Criminal Trials with Cameras and Microphones: A Controlled Experiment of Audience Effects’ (PhD thesis, University of Tennessee 1985).

<sup>193</sup> *ibid.*

<sup>194</sup> *ibid.*, see Abstract.

<sup>195</sup> *ibid.* 3.

<sup>196</sup> *ibid.* 4.

<sup>197</sup> *ibid.* 5. Referring to JL Hoyt, ‘Courtroom Coverage: The Effects of Being Televised’ (1977) 21 *Journal of Broadcasting* 487; K Netteburg, ‘Does Research Support the *Estes* Ban on Cameras in the Courtroom?’ (1980) 63 *Judicature* 467.

<sup>198</sup> *ibid.* 5-6.

<sup>199</sup> *ibid.* 6-7.

<sup>200</sup> *ibid.* 9 ff.

<sup>201</sup> *ibid.* 7.

concludes that there was better aided recall of factual information in the videotape group than the sketch or talking head groups,<sup>202</sup> this requires further research. Her other effects hypothesis were not found to be supported.<sup>203</sup> She notes the study comprised of one viewing only; the content was only of part of the case; and that '[e]ven though television viewers see only part of the courtroom testimony in the abbreviated coverage given by newscasts, their perceptions of a defendant's guilt or innocence is unlikely to be affected by what is seen on television.' The latter statement in particular is open to question. There is a significant issue in terms of how different forms and frames can influence viewers perceptions and opinion. It is highlighted above how research in relation to how the manner of videotaping of false confession interviews can influence perceptions of guilt and voluntariness of confessions.<sup>204</sup>

AR Paddon comments on the data that persons were more willing to serve as jurors if assured they would not be recognised from photographs.<sup>205</sup> AR Paddon's comments that this supports the rationale for having guidelines and rules restricting the filming of jurors in court, and which she states most US states have in place.<sup>206</sup> She feels that the media is happy to accommodate these rules and furthermore that it is possible to cover a trial 'without exposing jurors to the community pressure that could result if they become instantly recognizable.'<sup>207</sup> But for regulations and restrictions, she accepts that there could be adverse effects on juries. AR Paddon appropriately cautions against generalising this study, but agrees that 'experiments are the best evidence for causal direction.'<sup>208</sup> We need more legal-empirical research. AR Paddon's research, and the legal-empirical research needs to be copied, replicated and validated. Only that way do we attain an acceptable body of research in relation to TCB effects. She concludes that more research is needed, particularly of the effect on trial fairness and the effects on public knowledge and attitudes.<sup>209</sup> It does not appear that she is distinguishing the viewing audience from the wider public, which also requires to be researched. There does not appear to be even an initial study on this issue yet.

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<sup>202</sup> See *ibid* 1 and 13.

<sup>203</sup> See *ibid* 1 and 13.

<sup>204</sup> See above, and for example, DG Lassiter, AL Geers, IM Handley, PE Weiland and PJ Mulhall, 'Videotaped Interrogations and Confessions: A Simple Change in Camera Perspective Alters Verdicts in Simulated Trials' (2002) 87 *Journal of Applied Psychology* 867.

<sup>205</sup> A Paddon, above 11.

<sup>206</sup> *ibid* 13.

<sup>207</sup> *ibid*.

<sup>208</sup> *ibid* 13.

<sup>209</sup> *ibid* 14.

## **Longitudinal Research**

In addition to more TCB research, we might also look at ongoing longitudinal research.<sup>210</sup> There are ongoing issues and changes in the courts and in the media presentation of courts that may be examined. AR Paddon notes a need for continual and ongoing research of changes.<sup>211</sup> TCB and the related issues will not remain fixed and constant, and hence there is a need for ongoing research and policy changes on foot of such research and as issues arise.

## **Different Types of Education**

In an interesting finding regarding TV1 footage, the W Pogorzelski and TW Brewer study finds that there is more educative content regarding court proceedings and the legal process in TCB cases than in conventional television reporting.<sup>212</sup> However, the conventional reporting is more educational in relation to the specific case.<sup>213</sup> It is speculated that this may be because ‘with no cameras in court footage, there is less visuals to drive the coverage of what actually went on in court (apart from textual graphics) and more visuals (such as file footage) to prompt further contextual coverage of the crime/case itself.’<sup>214</sup> The question arises as to what we want to educate about.

## **Length of TCB Story**

A factor relevant to TCB education-effect may be the length of the story. In New Zealand there was a minimum requirement of two minutes duration for TCB. These stories therefore tend to have more information and hence may potentially be more educative than the shorter conventional stories (which averaged ninety five seconds in length).<sup>215</sup> This is from a push or content perspective, not actual testing of education-effects. There are many effects-research opportunities in relation to minimum broadcast requirements. The New Zealand Final Report refers to another issue which does not appear to have been canvassed in the general literature on TCB. It notes that often the broadcast footage contains repeat materials and therefore ‘may not be truly educational after a series of repetitions.’<sup>216</sup> This appears to be the first reference to this issue. Further research is required.

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<sup>210</sup> Also, if TCB is permitting in a given jurisdiction, or that an TCB experimental period ends, should not mean that the research effort should immediately stop. Baselines, comparisons and other research are all important.

<sup>211</sup> A Paddon, above 14.

<sup>212</sup> K Allan, J McGregor and S Fontaine, above.

<sup>213</sup> *ibid* 195-196.

<sup>214</sup> *ibid* 196.

<sup>215</sup> *ibid*.

## Education and Form of TCB

The legal information people tend to get from television is generally crime focused and comes in the ‘form of’ news, entertainment and infotainment programming.<sup>217</sup> However, such information is frequently ‘misleading’ and ‘wrong.’<sup>218</sup> DA Harris<sup>219</sup> compares the portrayal of criminal courts on Tru TV (previously Court TV) versus ‘conventional’ television media.<sup>220</sup> He compliments Tru TV as presenting more of the courtroom than news or entertainment programming, but notes that there are flaws nonetheless.<sup>221</sup> These are that it exclusively focuses on trials, predominantly on criminal cases, and ignores the other parts and processes of the individual case in question, as well as being selective in the trials it chooses.<sup>222</sup>

Regardless of educational TCB, the public gets and will continue to get the existing court portrayals in news, entertainment and infotainment. The ‘entertainment offerings’<sup>223</sup> may surpass any amount of educational programming. The question, therefore, arises as to whether (educational) television broadcasting can increase public confidence in the justice system or allay misunderstandings. Courts and legal-policymakers should be able to be assured in considering how we might know whether TCB makes a difference.

DA Harris refers to literature commenting on ‘heavy viewers’<sup>224</sup> which raises the interesting issue for research as to what the effect of TCB forms are on, for example, habitual TCB viewers. He also notes that,

‘Since news programming would seem to aim at informing rather than providing dramatics, one would expect a more accurate portrayal of the criminal justice system than in entertainment programming. This is not always true. News coverage of crime and criminal justice can and often does suffer from incompleteness. Given the demands of the typical half-hour newscast, even top news stories on television seldom get more than “tiny bites” of airtime. This almost guarantees oversimplification. Thus the public seldom sees more than a fraction of actual trial proceedings, if any. In these constraints, with perhaps ten or fifteen

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<sup>216</sup> *ibid.*

<sup>217</sup> DA Harris, ‘The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System’ (1993) 35 *Arizona Law Review* 785, 786.

<sup>218</sup> *ibid* 786, 812 ff.

<sup>219</sup> *ibid* 785–837.

<sup>220</sup> Conventional television is defined as ‘the combination of entertainment and informational programming offered by television since its beginnings, whether in cable or broadcast format.’ *ibid* 787, n 24.

<sup>221</sup> *ibid* 788.

<sup>222</sup> *ibid* 788, 824.

<sup>223</sup> *ibid* 797.

<sup>224</sup> DA Harris, *ibid* 809, n 191, referring to G Gerbner and L Gross, ‘The Scary World of TV’s Heavy Viewer’ (April 1976) *Psychology Today* 44.

seconds to devote to film of the event itself, those producing television news programs naturally pick the most dramatic slice of the day's events that they can.'<sup>225</sup>

Research is referred to where a trial video was shown to research subjects and their attitudes and knowledge tested before and after viewing the case.<sup>226</sup> DA Harris notes that studies showed that confidence did not 'decrease.'<sup>227</sup> It appears that there is no enhanced or increased confidence. The viewing of the footage did not increase the confidence levels. If confidence is a measure of education, then there was no increase.

In many respects, Tru TV 'offers a view of the criminal justice system that contrasts markedly with the less than accurate picture presented by conventional television. As such, it represents a chance for a better understanding of how the criminal justice process works.'<sup>228</sup> '[Tru TV] does not necessarily do a better job than conventional television [in the areas studied] ... indeed, [Tru TV] does not address some of them in any way whatsoever, and may even help perpetuate some incorrect ideas.'<sup>229</sup> In considering the educational issue and the potential of each form of TCB to educate, we should also bear in mind the comment of Harris, namely, that we may also consider the difficulties of the form as well.<sup>230</sup> He additionally notes that both conventional and Tru TV programming 'transmit representation of the system. Neither conventional television nor [Tru TV] is the criminal justice system.'<sup>231</sup> 'The fact remains, however, that [Tru TV] must select and weave together its own story of the criminal justice system, its own narrative of what the system does, how it functions and why. This is where the potential to mislead arises.'<sup>232</sup>

Even with Tru TV 'editing is necessary to make programming fit television's format and advertising requirements ... [Tru TV] leans more heavily on edited programming.'<sup>233</sup> In terms of the best way of educating and the best forms of educational TCB, A Dershowitz criticises Tru TV and advocates public cable courtroom television broadcasting.<sup>234</sup> He favours a form of TCB, not TCB generally per se.

### **Confidence in the Judiciary and Legal System**

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<sup>225</sup> *ibid* 811, footnote omitted.

<sup>226</sup> *ibid* 817, referring to P Raymond, 'The Impact of a Televised Trial on Individual's Information and Attitudes' (1992) 75 *Judicature* 204.

<sup>227</sup> *ibid*, referring to 208 in P Raymond, above.

<sup>228</sup> *ibid* 818.

<sup>229</sup> *ibid*.

<sup>230</sup> *ibid*, see 820-821.

<sup>231</sup> *ibid* 821.

<sup>232</sup> *ibid* 821.

<sup>233</sup> *ibid* 825.



RE Roberts<sup>235</sup> also carries out research, in particular a review of the polling and public opinion surveys regarding confidence in the judicial process and public opinion regarding TCB.<sup>236</sup> He notes initially that there is ‘little research’ examining TCB ‘impact’ and effects on the public.<sup>237</sup> He also states that there is little research on ‘whether the public’s perception of the efficacy of the judicial system should factor into the debate about cameras in the courtroom.’<sup>238</sup> RE Roberts also provides a definition. He defines ‘televised proceedings’ as ‘any form of electronic media coverage, including television or radio broadcasts.’<sup>239</sup> He states that the television audience is ‘in the comfort of ... home’ and are also denied ‘the sensory impressions associated with the dignity and solemnity of the courtroom.’<sup>240</sup> He cites the first Federal pilot study which found that two third of news footage was narrated while only one third used the actual in court audio footage.<sup>241</sup> The first Federal pilot study is also referred to as finding that increasing the amount of courtroom footage did not significantly increase the information given about the legal process generally.<sup>242</sup>

Overall, there is a ‘paucity’ of TCB effects-research and effects evidence.<sup>243</sup> The data is referred to as being ‘by no means complete or sophisticated, it is a first step in analyzing the impact of televised court proceedings on public opinion.’<sup>244</sup> While there is some research ‘attempting’ to research in-court effects, there is ‘little’ audience effects-research.<sup>245</sup> In particular there is little education-effects research – which might partly be explained by the *Estes* case which concentrated on in-court effects issues.<sup>246</sup>

Unfortunately, while there were a lot of polls carried out during and immediately after the *Simpson* (criminal) case, ‘few questions ... were asked by the same polling organization to the same group of respondents over time. Had this quality of information been available, it would have provided a valuable insight into the changes over time in the public’s perception of *Simpson*’s trial and the participants in the trial.’<sup>247</sup> RE Roberts asks if ‘the

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<sup>234</sup> *ibid* 825-826.

<sup>235</sup> RE Roberts, ‘An Empirical and Normative Analysis of the Impact of Televised Courtroom Proceedings’ (1998) 51 SMU Law Review 621.

<sup>236</sup> *ibid* 622.

<sup>237</sup> *ibid* 622.

<sup>238</sup> *ibid*.

<sup>239</sup> *ibid* 621, n 1.

<sup>240</sup> *ibid* 627.

<sup>241</sup> *ibid* 631.

<sup>242</sup> *ibid* 631-632.

<sup>243</sup> *ibid* 632.

<sup>244</sup> *ibid*.

<sup>245</sup> *ibid* 634.

<sup>246</sup> *ibid*, and n 105 at 634.

<sup>247</sup> *ibid* 635.

risk of damaging the legitimacy of the courts worth the marginal benefits of televising the proceedings? The available evidence suggests that there is not a significant educational value to TCB trials.<sup>248</sup> The polling data in the *Simpson* criminal case “seems to indicate the presence of some degree of risk that there is a correlation between televising trials and the loss of confidence in the judicial system. The *Simson* data superficially indicate that significant numbers of the public lost confidence in defence attorneys, police, and jurors.”<sup>249</sup> The ‘public believes that cameras in the courtroom do have some type of influence on the proceedings; however, the direction of the effect is not clear.’<sup>250</sup> RE Roberts concludes that ‘[i]n the three decades since *Estes*, there has not been any systematic study that provides the courts or the legislatures with sufficient evidence to make an informed decision on the impact of televised legal proceedings on the public.’<sup>251</sup> He continues that ‘[t]he evidence that has been presented is either anecdotal, or is so limited that it cannot be generalized. Before going any further with a procedure that may imperceptibly affect a trial or lessen the public’s confidence in the courts, rigorous [legal-]empirical analysis should be performed.’<sup>252</sup> He concludes that ‘[u]ntil the effects, if any, of televised proceedings are known with any degree of certainty, the [TCB] camera should be turned off to protect the defendant and the courts.’<sup>253</sup>

### **Enhancing Public Confidence**

RE Reeves Stewart carries out research of what effect trials on television have on confidence in the justice system.<sup>254</sup> The research question addressed is whether broadcast coverage of courts has an impact on the public’s perception of the justice system.<sup>255</sup> While not researching educational issues per se, RE Stewart states that the cameras are a ‘poor teacher’ and that high profile and lurid cases are chosen without regard to educational value.<sup>256</sup> She is speaking in relation to Tru TV (previously Court TV). ‘The education of the masses on the court system is perhaps the most valid and noteworthy goal of [Tru TV].’<sup>257</sup> She refers to studies asking if the public watch TCB, where the

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<sup>248</sup> *ibid* 644.

<sup>249</sup> *ibid* 645.

<sup>250</sup> *ibid*.

<sup>251</sup> *ibid*.

<sup>252</sup> *ibid*.

<sup>253</sup> *ibid*.

<sup>254</sup> RER Stewart, ‘The Changing Relationship Between Camera and the Courts’ (MA thesis, Florida Atlantic University 1998) 1-2, and 32.

<sup>255</sup> *ibid* 21.

<sup>256</sup> *ibid* 61-64.

<sup>257</sup> *ibid* 65. She concludes that there ‘are many extensive and valid reasons to ban cameras from courtrooms. Their merits must be weighed against their negative factors in order to make a decision when determining if televising a trial is worthwhile. Each case needs to be decided on an individual basis because its framework and issues at hand are unique.’ *ibid*.

answer is a ‘resounding yes.’<sup>258</sup> However, there is scant research of watching TCB on the public opinion of the effectiveness of the justice system,<sup>259</sup> or confidence in the justice system. As we see from W Petkanas above, there was no increase in confidence found in the New York study. AR Paddon, however, finds some ‘information gain.’<sup>260</sup>

### Feedback Loop

C Lassiter argues from his analysis and review that while there are prejudicial potentials of TCB, these outweigh the advantages of increased public awareness.<sup>261</sup> The research is important as it is one of the few references which identify the TCB feedback loop. He points out that TCB ‘created a feedback loop between the principal actors in a [TCB] event and its audience, which potentially includes new witnesses and evidence, discovered through investigative journalism, and the significance of which is initially filtered through the television lens for entertainment appeal.’<sup>262</sup> He adds that ‘[b]y virtue of this instantaneous and comprehensive information exchange, the electronic media has the potential to alter the very event televised in ways much beyond that of a much slower and much less comprehensive and therefore much less commercially resourceful print media.’<sup>263</sup> TCB ‘creat[es] a ... feedback loop ... the reactions of [the] public ... become known to the trial [participants]. When the trial [participants] respond to the public reaction, the trial loses its judicial character.’<sup>264</sup> ‘The feedback loop empowers the remote public to prejudice the trial process’<sup>265</sup> C Lassiter states that the *Simpson* (criminal) case was an example of the feedback loop whereby there was an ‘interplay between cameras in an out of court altering the trial process from the perspective of the jurors.’<sup>266</sup> TCB ‘makes the public’s reaction accessible to those inside the courtroom.’<sup>267</sup> P Thaler also makes a similar feedback loop point in relation to the *Steinberg* case study he undertook.<sup>268</sup> C Lassiter feels that the *Simpson* (criminal) case was not a bad example of

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<sup>258</sup> ibid 1. However, the studies referred to are not cited at the reference made. She also states ‘The drawback on making such a claim is that empirical support for this statement is tough to produce. ... [others] point to other ways to achieve the same goal without tampering with justice.’ ibid.

<sup>259</sup> ibid 1-2, and 32.

<sup>260</sup> See also William Petkanas and Anna R Paddon, above.

<sup>261</sup> C Lassiter, ‘Cameras and the Infusion of Political Bias into the Courtroom’ (1997) 5:1 International Journal of Law and Information Technology 28.

<sup>262</sup> ibid 29.

<sup>263</sup> ibid.

<sup>264</sup> ibid 31.

<sup>265</sup> ibid 55.

<sup>266</sup> ibid 75.

<sup>267</sup> ibid 81.

<sup>268</sup> P Thaler, ‘The Impact of the Television Camera on Courtroom Participants: A Case Study of the Joel Steinberg Murder Trial’ (PhD thesis, New York University 1990).

TCB, but rather it provided the ‘blue print for [Tru TV’s] commercialized success.’<sup>269</sup> He adds that ‘[w]hile proponents of [TCB] have artificial and limited surveys to support their position that cameras do not prejudice the proceedings, the OJ Simpson criminal trial provides the most compelling [legal-]empirical evidence of what the future of cameras in the courtroom holds.’<sup>270</sup>

### Education Research

W Petkanas<sup>271</sup> found that ‘confidence’ did not increase as a result of TCB. While AR Paddon<sup>272</sup> found that there was some ‘information gain,’ there does not appear to have been any change in ‘attitude.’ K Netteburg<sup>273</sup> did not find any education-effect, nor any enhanced knowledge about the court procedures. J Ossinger did not find any enhanced usage of TCB. S Kohm<sup>274</sup> found evidence of TCB being used or made for entertainment

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<sup>269</sup> ibid 57.

<sup>270</sup> ibid 57-58. Footnote omitted. He highlights in his footnote reference the flawed and limited studies and surveys he refers to. These are: ‘Arizona – (untitled (“the Arizona Study”), which is at handwritten page 39 of the Information Service Memorandum IS 88.002, TV Cameras In the Courts, Evaluation of Experiments) (with Attachments)(“Sample Survey”); California – Evaluation of California’s Experiment With Extended Media Coverage of Courts, Submitted by EH Short and Associates, Inc (Sept 1981 (“the California Study”)); see also Cameras In Court, 1983 report to the Governor And Legislature: Florida – (untitled)(“the Florida Study”); Louisiana – Report On Pilot Project On The Presence of Cameras And Electronic Equipment In The Courtroom (undated)(“the Louisiana Study”); Minnesota – Report Of The Minnesota Advisory Commission On Cameras In The Courtroom To The Supreme Court (Jan 1982)(“the Minnesota Study”); Nevada – Final Statistical Report Cameras In The Courtroom In Nevada (1980)(“the Nevada Study”); New York – Report Of The Chief Administrator To The New York State Legislature The Governor And Chief Judge On The Effect Of Audio-Visual Coverage On The Conduct Of Judicial Proceedings, Matthew T Crossan (March 1991)(“the 1991 New York Study”); Report Of The Committee On Audio-Visual Coverage of Court Proceedings, Hon Burton B. Roberts, Chair (May 1994)(“the 1994 New York Study”); Washington, Cameras In The Courtroom – A Two-Year Review In The State of Washington, A Project Of The Washington State Superior Court Judges’ Association Committee On Courts and Community (Sept 1978)(“the Washington Study”). Most of these state studies, and studies from Hawaii, Kansas, Maine, Massachusetts, New Jersey, Ohio and Virginia, are described in Electronic Media Coverage of Courtroom Proceedings: Effects On Witnesses And Jurors, Supplemental Report of Federal Judicial Centre To The Conference Committee On Court Administration And Case Management (1994).’ Referred to ibid 57, n 107.

<sup>271</sup> W Petkanas, ‘Cameras on Trial: An Assessment of the Educational Affects of News Cameras in Trial Courts’ (PhD thesis, New York University 1990) 3.

<sup>272</sup> AR Paddon, ‘Television Coverage of Criminal Trials with Cameras and Microphones: A Controlled Experiment of Audience Effects’ (Radio-television Journalism Division, AEJMC Montreal, Que, Canada August 7 1992) 1. Also AR Paddon, ‘Television Coverage of Criminal Trials with Cameras and Microphones: A Controlled Experiment of Audience Effects’ (PhD thesis, University of Tennessee 1985).

<sup>273</sup> K Netteburg, ‘Does Research Support the Estes Ban on Cameras in the Courtroom’ (1980) 63 *Judicature* 467.

<sup>274</sup> SA Kohm, ‘I’m Not a Judge But I Play One On TV: American Reality Based Courtroom Television’ (PhD thesis, Simon Fraser University 2004).

programming. Similarly so with C Danielle Vinson and JS Ertter.<sup>275</sup> T Keller<sup>276</sup> found that TCB did not increase the number of legal and court stories. R Enter<sup>277</sup> in a detailed study found that the type and style of CB examined was biased and presented the defendant unfairly. Entertainment and excitement were emphasised. The first Federal pilot study found that most TCB courtroom footage was dubbed over and the audio from inside the court was not used. It also found that the footage was mostly used as short snippets. The first Federal study and the New Zealand study both found TCB used in-court and out-of court footage in the same broadcasts. New Zealand study found conventionally reported cases more educational. W Pogorzelski and TW Brewer found the average length of stories to be two hundred and fifteen seconds, of which seventy eight seconds (thirty six percent) was in-court footage, and forty seven seconds (twenty two percent) was in-court audio. The first Federal Study found the average courtroom footage per story to be fifty six seconds.<sup>278</sup> Ninety five percent of non first day stories did not identify cases as civil laws cases; seven hundred and forty five did not identify if a jury was present; seventy four percent did not explain what transpired in the day's proceedings.<sup>279</sup> The 'stories did not provide a high level of detail about the legal process ... [and] increasing the proportion of courtroom footage used in a story did not significantly increase the information given about the legal process .... the coverage did a poor job of providing information to viewers about the legal process.'<sup>280</sup> W Pogorzelski and TW Brewer point out that almost two thirds of footage was out-of-court footage. Also, there was no increase of in public opinion. SL Alexander<sup>281</sup> also found the court footage was mostly used to supplement conventional stories. While DA Harris notes that Tru TV carried more amounts of TCB, he raises many questions of the broadcasts.<sup>282</sup> He also finds that confidence in the justice process did not increase.<sup>283</sup> RE Roberts<sup>284</sup> finds no evidence of increase in education.

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<sup>275</sup> CD Vinson and JS Ertter, 'Entertainment or Education, How Do Media Cover the Courts?,' (2002) 7:4 Press/Politics 80.

<sup>276</sup> T Keller, 'Cameras in Courtrooms: An Analysis of Television Court Coverage in Virginia' (PhD thesis University of Tennessee 1992).

<sup>277</sup> R Enter, 'The Image of the Judiciary: A Semiotic Analyse of Broadcast Trials to Ascertain its Definition of the Court System' (PhD thesis, New York University 1993).

<sup>278</sup> MT Johnson and C Krafka, *Electronic Media Coverage of Federal Civil Proceedings, An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeal* (Federal Judicial Centre 1994) 34. N=90.

<sup>279</sup> MT Johnson and C Krafka, *ibid* 36.

<sup>280</sup> *ibid*.

<sup>281</sup> SL Alexander, "'Mischievous Potentialities': A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit, Florida, 1989' (PhD thesis, University of Florida 1990).

<sup>282</sup> DA Harris, 'The Appearance of Justice: Court TV, Conventional Television, and the Public Understanding of the Criminal Justice System' (1993) 35 Arizona Law Review 785, as referred to in RER Stewart, 'The Changing Relationship Between Camera and the Courts' (MA thesis, Florida Atlantic University 1998) 28.

<sup>283</sup> DA Harris, *ibid*.

### **TCB Inevitably Educational**

The issue arises as to whether TCB is or can be inevitably educational. The New York study was predicated on the belief that TCB permitted by the study would be educational.<sup>285</sup> Yet no official research sought to verify whether there were education-effects. W Petkanas notes that since the New York experimental law was passed, no educational effects have been proven.<sup>286</sup> No education-effects were researched.

That TCB access and filming may be permitted does not always mean that the footage will be used for educational purposes, in the most educationally amenable form, or that it will not be re-used in less educationally amenable forms afterwards.<sup>287</sup> Even assuming educational quality TCB programming content is pushed out, various issues arise. These important considerations include whether it is watched; what the take up level may be; what the quality of viewing may be; what the impact may be; whether there may be education-effects achieved; how much; if it is significant; if there is a sufficient success rate compared to the effort (and risks) expended; if pushing 'educational' content by itself is a sufficient tool to educate;<sup>288</sup> if it is a sufficient tool to increase (or restore) confidence in the judicial process. These are serious questions, and that is even before we address any issue of what it is exactly that we wish to educate about or communicate in the educational message pushed out to the assumed TCB audience.

The consideration of how TCB may educate is really only in its infancy. Considerable and more normative research is required, and over a longer period. In addition, we need to incorporate research of form issues which arise with TCB. Our capacity for considered educational issues, and arguments, should not remain underscored by opinion, presumptions and soundbites.<sup>289</sup> Another issue is that TCB may predominantly show

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<sup>284</sup> Re Roberts, 'An Empirical and Normative Analysis of the Impact of Televised Courtroom Proceedings' (1998) 51 SMU Law Review 621.

<sup>285</sup> W Petkanas, 'Cameras on Trial: An Assessment of the Educational Affects of News Cameras in Trial Courts' (PhD thesis, New York University 1990) 3.

<sup>286</sup> *ibid.* The first phase of the study was in 1987 and he was writing in 1990, *ibid* 49.

<sup>287</sup> R Kennedy makes the point that scientific environmental statistics and data is often used for a purpose different to that which was originally intended. R Kennedy, 'Information and Communications Technology and Institutional Design for Climate Change' draft version, 13. 2nd UNITAR/Yale Conference on Environmental Governance and Democracy: Strengthening Institutions to Address Climate Change and Advance a Green Economy, New Haven, Connecticut, September 2010.

<sup>288</sup> R Kennedy, above asks that '[d]isclosure by itself is not a sufficient tool of governance,' in relation to ICT and environmental issues, *ibid* 39.

<sup>289</sup> Note comments in relation to rushing to judgements and the need for proper evaluated judgement in RK Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (University of Chicago Press 2000) 5.

criminal trial. In addition it ignores all of the legal process issues before and outside of the courtroom trial. RK Sherwin states that ninety percent of civil and criminal cases end in negotiated outcomes.<sup>290</sup>

### **Internet Use of TCB (iTCB)**

The advent of internet or iTCB raises a number of potential issues and changes to the TCB debate. Unfortunately, there is very little legal-policy discussion nor effect research as yet. However, we can consider some of these issues. While there is little by way of comparative analysis as yet of iTCB, it is clear that some of the internet broadcast or streaming of legal cases is organised by or controlled by the court or court service.<sup>291</sup> Such iTCB content may also be distributed on the court's own website. This means that television stations or networks are potentially taken out of the loop.

While research is needed, it may be that a large amount of the iTCB content is significantly longer than might otherwise be broadcast on a TV programme. If this transpires to be confirmed by further research, courts might have to consider what the implications may be of, for example, more court cases and more of those cases being broadcast via iTCB versus television TCB. If more gavel to gavel (G2G) TCB is considered on iTCB, it may be argued perhaps that iTCB is (potentially) more educational.

Certain television TCB footage is also edited, presented, used as background only to a presenter story or a voiceover, preceded/interspersed/followed by expert commentary. This does not appear to be the case with at least some of the iTCB footage. Courts and legal-policymakers may be interested to know what legal-empirical research may reveal in relation to comparing these forms of TCB in their considerations of these important issues.

The form or format of iTCB also means that it can be described as a pull-medium. The audience has to, for example, locate the court website and find the relevant page on the website to look at the footage of a given case. This can occur at a time and place chosen by the audience member. In contrast, television is referred to as a push-medium, whereby the television content is broadcast or pushed out to the audience at pre-selected network times and on pre-selected programmes. It may be that in addition to the potential form and content differences, the audience member may be paying more (active) attention to

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<sup>290</sup> RK Sherwin, *ibid* 245.

<sup>291</sup> Note, that the UK Supreme Court TCB footage is broadcast via the Sky News website.

what they have found to watch on their PC or laptop than to, for example, a TCB news story which just appears to be included on a news broadcast that happens to be on the family TV.

These are all issues which would benefit further research in order to assist courts and legal-policymakers. One of the questions which potentially faces courts and legal-policymakers is whether iTCB is more or less educational than television based TCB. The research of this question may also have implications for the legal-policy, legal rights and arguments in relation to TCB generally. The US Supreme Court in *Estes*<sup>292</sup> and *Chandler*<sup>293</sup> could not have foreseen the arrival of the internet<sup>294</sup> nor iTCB, which could mean that court concerns need to be updated and re-calibrated. The more recent US Supreme Court TCB case of *Hollingsworth*<sup>295</sup> expressly states that it does ‘not address other aspects ... such as those related to the broadcast of court proceedings on the internet, as this may be premature.’<sup>296</sup> One could suggest that just as the three US Supreme Court TCB cases are effectively calling for or challenging for more legal-empirical effects-research on the TCB question, the US Supreme court in *Hollingsworth* is careful to keep its powder dry as it awaits further cases and more appropriate normative effects-research to the iTCB and internet issues which will arise. One of the *Estes* opinions also refers to, ‘continuous and unforeseeable change ... techniques of public communication ... the variables may be modified tomorrow ... in the light of future technology.’<sup>297</sup> Courts and not just those in the US may be compelled to consider the implications, effect and legal-empirical research regarding iTCB and its potential for education-effects. Ultimately, time, further legal-empirical research and caselaw will also determine whether the proponent arguments become more compelling in light of the iTCB educational argument and validatory legal-empirical research which may follow.

## Conclusion

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<sup>292</sup> *Estes v Texas* 381 US [1964] 532.

<sup>293</sup> *Chandler v Florida* 449 US [1981] 560.

<sup>294</sup> It is not an understatement to suggest that courts and policymakers are only coming to terms with some of the new issues raised by the internet and web 2.0. For example, see P Lambert, *Social Networking, Law, Rights and Policy* (Clarus 2014).

<sup>295</sup> *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 18 January 2014. See ‘US Judge Overturns Gay Marriage Ban’ Irish Times < [www.irishtimes.com](http://www.irishtimes.com) > accessed 5 August 2010, regarding ultimate trial decision.

<sup>296</sup> *ibid* 7. Neither does this research, given the time and resources available, the wider issues of courtroom broadcasting and is rather limited to television courtroom broadcasting, in particular the research and effect issues.

<sup>297</sup> *Estes v Texas* 381 US [1964] 603-604 (Stewart J). Minority opinion.



There is little TCB education-effects research. The importance of validation and replication issues are underrepresented in the literature. Only W Petkanas sought to carry out research at the beginning and at the end. However, the baseline issue appears wholly ignored in the general and legal-empirical research and the literature generally. A particular issue is that most studies do not carry out any baseline research and before the TCB study period begins. For example, it appears that the New Zealand study, while aware of legal-empirical issues, only engaged cross-disciplinary researchers at or near the end of the TCB study.<sup>298</sup> This could be a very important first stage of any such TCB study, and indeed should be carried out over an extended period prior to TCB.<sup>299</sup> What is meant by ‘education’ is generally not considered. None of the studies undertook exactly similar research or used identical methodologies.

Courts and legal-policymakers in legitimately considering TCB issues, ideally will seek to assess what the education-effects research to date may illuminate. If they do, they will unfortunately see that there is little legal-empirical research of the TCB education-effects question. Clearly more legal-empirical research would assist in these considerations and the wider TCB discussion. Overall, the research does not demonstrate that TCB education-effects are achieved. Future research might consider the benefit of developing more nuanced definitions and understandings to assist consideration of the normative TCB educational issues.

As RE Reeves Stewart notes, if ‘television’s portrayal of the courtroom is inaccurate or contrived for entertainment purposes, such as syndicated courtroom reality shows like *Judge Judy*, then the viewing public will have an unrealistic perception of the system.’<sup>300</sup> She adds that ‘[i]f the viewer only comes into contact with the justice system through unrealistic infotainment programming, the viewer will conclude that the programming excludes typical court behaviour. This will lead to low confidence in the system.’<sup>301</sup>

The media do have potential to educate but it remains, as of yet, uncertain whether the educational potential is outweighed by other media interests and indeed other competing legal rights such as Constitutional rights). How TCB goes about educating (and

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<sup>298</sup> Media Coverage of Court Proceedings Pilot Evaluation Committee, *Media Coverage of Court Proceedings, Introduction and Research Findings*, August 1998, Introduction.

<sup>299</sup> Possibly a year or more before TCB is introduced may be advisable as opposed to a rushed or premature exercise a week or two before TCB is introduced and when all participants are fully aware of what is happening and or equipment or re-fitting is occurring already.

<sup>300</sup> RER Stewart, above 24.

<sup>301</sup> *ibid.*

measuring success) has not been fully considered.<sup>302</sup> There has been no analysis of what amounts to ‘educational’ in the context of TCB. Arguably it will only be when this occurs that we can begin to properly evaluate which of the various types and forms of TCB come within the definition of ‘educational’ – and which may not. Indeed, it may be necessary also to attempt a definition of ‘educational’ in this context. Only at that stage may the implications for the justice system become apparent. If we want to test for education-effects, we need to define what we mean by educational and also in terms of what audience and what forms of TCB.

Overall, our research in investigating the TCB issues and arguments are limited. It is difficult to consider any of the arguments, in particular effects arguments, as having been justified or validated. On examination, there are many flaws and gaps in the arguments and research. We need to begin research of the argument that TCB is educational, as this impacts so significantly on the TCB debates.

W Petkanas notes that the ‘ongoing [TCB] debate is not resolved, but the legislatures of many states have agreed that informing the public via television news outweighs any risks that the critics of television raise.’<sup>303</sup> By emphasising the word ‘any’ one can ask if this means that absolutely all risks are discounted. One could suggest that there is a need for a due diligence assessment of the risks and of the research at any given time, whenever deciding upon TCB access issues. It would seem that there is no detailed due diligence in some instances, and a limited assessment in others. Overall, our consideration of the research needs to be more expansive.

The New York study was ‘prompted by a perceived need for educating the public and increasing public respect for, and confidence in, the judiciary.’<sup>304</sup> The politician promoting the law states that he ‘would venture to say that ninety nine percent of the electorate have never seen a judge or prosecutor in action.’<sup>305</sup> This is an example of debate and policy being decided on beliefs and opinions, and without referencing the research in relation to effects; (generally) without mandating any particular effects-research; and without referencing an identified problem which the introduction of TCB may be the solution to.

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<sup>302</sup> How seriously TCB threatens its role of education (particularly) in the context of TCB is questionable.

<sup>303</sup> W Petkanas, above 11.

<sup>304</sup> *ibid* 11.

<sup>305</sup> *ibid*.

While there are studies which tend to show public misconceptions about the legal and justice system,<sup>306</sup> or at least parts of it, there is seldom a deliberate effort to assess these before and after the introduction of TCB. This applies equally to education-effects, informational effects and confidence effects. Parliamentary broadcasting sometimes appears in debates in relation to permitting TCB. However, there do not appear to be research studies whereby greater educational, information and or confidence effect have been manifest after parliamentary broadcasting. W Petkanas also wonders why it is assumed that ‘if we increase familiarity we would necessarily increase confidence’<sup>307</sup> Further considerations still remain, such as whether the educational aspects of TCB programmes are in the foreground<sup>308</sup> or background of the TCB programme and what are the effects. It will be interesting to see how the TCB educational question may be influenced by the arrival of iTCB. Legal-empirical research holds the potential to assist the strengthening of the educational argument in certain iTCB circumstances. It is also only a matter of time before detailed consideration of iTCB comes to be argued and considered in superior court decisions. When these judgements come to be decided, hopefully there will be a fulsome body of nuanced legal-empirical effects-research available to assist the courts, as well as legal-policymakers generally.

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<sup>306</sup> See references W Petkanas, *ibid* 12-13.

<sup>307</sup> *ibid* 118-119.

<sup>308</sup> See, for example, M Gillespie and J Toynbee, *Analysing Media Texts* (Open University Press and McGraw Hill 2006) 109.



## CHAPTER 19: TOWARDS EDUCATION & AUDIENCE RESEARCH MODELS

### Introduction

One of the strongest arguments for proposing TCB, and arguably the prototypical argument, is that introducing TCB will have educational-effects on the viewing audience. This educational question, as to whether there are or are not actual TCB educational-effects, may be an important question for courts and legal-policymakers whom have to consider TCB issues. The educational question may be important and appeal to a wider field of interest to include media, lawyers, litigation parties and defendants, the public and academics. Despite its import, many issues arise when considering, researching and seeking to answer the educational question. While the overall question remains, analysis suggests that there are many nuances and issues which a serious and sustained TCB research effort may need to consider. Some of the particular issues which may be addressed in dealing with the educational TCB question and issues to consider in undertaking normative TCB educational-effects research are referred to below. To better assist courts and legal-policymakers it might be fruitful to look at new and comparative educational and audience research models. In terms of researching education and TCB audience effects, we may have to consider defining what is meant by education and effect. We may be looking for informative effects; education-effects; viewing habit effects; reaction effects; different effects on different members of the audience; situational and viewing effects; differential effects between different TCB forms; cross comparative effects between jurisdictions; cross comparative effects between cultures; TCB forms; etc. There are audience based research studies and research tools which may potentially be applied to TCB.

### The Education-Effects Question

When we look at the TCB education-effect question most of the general research and popular discussion does not answer the question of whether TCB is in fact educational. Given that the TCB education-effects question can become very nuanced, as indeed many questions of legal-policy do, a further question is what forms of TCB may be educational/most educational. Neither courts, legal-policymakers or those suggesting TCB education-effects follow through on research of TCB to establish or backup the point. The New York study, for example, professes that there may be potential educational-effects but does not in fact research for such effects.<sup>1</sup> Consequently, it does not find any such effects. Some general discussion research which may include reference to potential education-effects, influences the replies of (some of) the courtroom

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<sup>1</sup> See New York State Committee to Review Audio-Visual Coverage of Court Proceedings, *An Open Courtroom, Cameras in New York Courts* (Fordham University Press 1997).

participants. These replies are essentially opinions and self-reports. Such respondents are not in a position to show whether or not TCB is informative or educational to the audience out-of-court. Such replies can be provided in advance of a given TCB pilot, during the pilot or after the pilot but without carrying out or being aware of any TCB educational related research for the TCB pilot. A further consideration is that in order to undertake such educationally focused research (and in order to design such research) the assistance of a cross-disciplinary research team of legal and other researchers would ideally be required. Overall there are a limited number of TCB legal-empirical education-effects studies thus far.<sup>2</sup> The research appears to ignore a range of important issues in relation to the potential education-effects. The US Supreme Court concerns refer to education issues briefly, but do not develop the nuances nor suggest a research strategy. A research strategy should ideally be developed to address the TCB educational question.

### **Research Strategy Issue**

A research strategy could involve a number of elements. For example research, courts and legal-policymakers may need to consider defining and scoping what is meant by educational TCB. In effect, such legal-policy and research should be concerned to define and scope what it is that it is seeking to establish or disprove with the TCB education-effects research. These issues are also of potential interest to the public generally as well as the proponents and opponents of TCB. Addressing the TCB education question may well mean that TCB researchers need to consider how to measure for education-effects before and after TCB is introduced. Difficult but important issues may also arise in distinguishing education-effects as between different forms of TCB/TCB footage. A particularly interesting issue beginning to increase in importance is the question of whether push-TCB via television is more or less educational than pull-TCB via the internet (iTCB). Entertainment form TCB may differ in effects greatly from more considered form TCB. Longer footage may differ in effect from short news snippet TCB. The gathering of baseline data can be particularly useful, if not necessary, for some of these types of research. This could also assist longer term TCB studies. ‘The information television presents about the criminal justice system is often misleading and frequently wrong.’<sup>3</sup> This thesis is not about the multiple portrayals of the legal system in the diverse facets of the media. However, we do need to pose questions. Obviously we need to consider whether TCB educates, and how we go about testing and researching the proposition that it educates. If TCB can educate, it is also relevant to distinguish different

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<sup>2</sup> Indeed, there may be some connection between the education issues and the media, communications and form issues.

forms of TCB to consider which form or forms may educate best. This may ultimately have legal-policy implications for courts, legal-policymakers and other interested parties.

*Forms of TCB:* The popular debate and literature do not refer to TCB form issues. Education and information effects/potential effects may be unlikely to be equal all of the time, and equal across all forms of TCB. This should be investigated through research because educational issues and form issues are more sophisticated and complex than the superficial popular educational arguments to date. Different styles and forms of TCB need to be considered in the research of education-effects. When we undertake sustained research into the issues of TCB, there may come a stage when proponents and opponents of TCB, will have to state their preference for particular TCB forms over others. The depth of research thus far has been far too limited (and in many instances problematic). Proponents and opponents have not had to consider the different forms of TCB. This is a serious gap in the TCB discussion. We may also consider different TCB forms because each form has different characteristics. Take the example of DA Harris where he states that a sixty second 'news clip cannot properly educate the public on the workings of the system.'<sup>4</sup> The audience effects from the various different 'coverage and style[s]' of TCB remain at issue.<sup>5</sup> Courts and legal-policymakers might consider whether a two minute TCB news clip (without in-court audio), can be the same as a full gavel to gavel (G2G) trial (civil or criminal) which will have full in-court footage and in-court audio. While arguing that television can be used as an educational medium, A DUBY admits that '[o]nly if TV has more to offer educationally than other tools have, or if it makes a specific contribution to education, can its expensive use be justified.'<sup>6</sup> The TCB arguments do not address or assess the benefits of one form of CB over another. Neither do they distinguish between different forms of TCB viz a viz education. There are subtle but important gaps in the debate as well as the TCB effects-research. Even if TCB is educational (but which has not yet been verified by a body of research to be the case), we also need to go beyond this. We need to examine the level and extent of this education-effect, and compare it with other potentially competing issues and methods of education and broadcasting.

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<sup>3</sup> DA Harris, 'The Appearance of Justice: Court TV, Conventional Television, and the Public Understanding of the Criminal Justice System' (1993) 35 *Arizona Law Review* 785, 786.

<sup>4</sup> *ibid.*

<sup>5</sup> R Surette, *Media, Crime and Criminal Justice: Images and Realities* (Wadsworth Publishing Company 1998), as referred to in RER Stewart, 'The Changing Relationship Between Camera and the Courts' (MA thesis, Florida Atlantic University 1998) 31.

<sup>6</sup> A DUBY, 'Using Television as an Educational Medium' (1991) 28 *Educational Media International* 190.

*Opportunity for Validation of Educational TCB:* Despite the possibility of sustained TCB education-effect research elsewhere, this has not occurred. TCB is only permitted in Britain in the England and Wales Supreme Court and Court of Appeal and certain Scottish courts and not at all in Ireland. However, Ireland and the UK could seek to look to other countries where its TCB has been evaluated in terms of the education-effect. Interestingly, proponents of TCB do not appear to advocate TCB education-effect research. However, if Irish and UK courts and legal-policymakers were to look for such educational research, there is no available body of such effects-research. Should the argument for attaining access to courtrooms be to educate, one would think there should be examples and research of educational TCB. Unfortunately, there is no sustained research thus far attempting to address this issue. A question arises as to how we judge and assess TCB education-effects. The standard may arguably be in relation to its overall educative effect. There are legal-policy issues in terms of deciding if we wish to educate generally, or educate in relation to a specific instant case. RE Reeves Stewart also refers to how trials are increasingly used as a form of entertainment.<sup>7</sup> Entertainment and entertainment-TCB require to be better understood, and indeed compared to other TCB forms. Of course, educational and entertaining CB may not always be distinct and clearly delineated. However, if one suggests that TCB will be educational, then one might be queried to show that people watching TCB are already educated by such broadcasting. Unfortunately, the educational question is not as yet validated by sufficient research of the issue to satisfy or be of assurance to courts and legal-policymakers. Perhaps the UK Lord Chief Justice of England and Wales' recent confirmation of a halt to the expansion of any UK TCB and a call for effects-related research is a recognition that there is a lack of sufficient legal-empirical TCB research and sufficient policy-based rules in relation to such TCB as there may exist, which includes the education effects and effects on certain participants.<sup>8</sup> Interestingly, while the Lord Chief Justice refers to the *Pistorius*<sup>9</sup> case and witnesses, TCB witness issues can occur in-court (eg distraction) and out-of-court (eg reluctance or failure to report or to attend court).

*'Information' and 'Education':* In terms of addressing the gaps and raising the sophistication of the research debate regarding TCB, we may begin to clarify and define whether we are referring to potential *information* effects or potential *education*-effects. It is also important to note that being informative may not always be educational. Being

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<sup>7</sup> RER Stewart, 'The Changing Relationship Between Camera and the Courts' (MA thesis, Florida Atlantic University 1998) iv.

<sup>8</sup> See F Gibb, 'Britain Rethinks Cameras in Court' *Times* (London, 16 May 2014).

<sup>9</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.



educational may be something quite different from being informative. These concepts should not always be referred to with exact equivalence or interchangeability. TCB in documentary or news broadcasting forms may be informative, but may not be educational. We need to begin defining what we are referring to, if we are serious about TCB research and expanding meaningful TCB audience education-effects research.

TCB research should be broad and sophisticated enough to analyse and distinguish between a variety of effects and discern the main or predominant intentions and effects. It may also be the case that TCB forms may be informative or educational, but this may not be the main aim, intention or actual effect. Effects may also be co-incidental or side effects. An interesting point is whether an unintended education-effect could justify TCB. The issue of multiple effects is not addressed. If we are suggesting that TCB is educational, then we need to devise ways to examine whether it is in fact educational, ie was the aim and purpose successfully achieved, and if so, the extent to which it arises. Overall, when TCB has been permitted for educational reasons, it has not yet been validated at the end of the study period. Indeed, there is frequently no attempt to test for educational results and effects whatsoever eg New York. Some may consider this concerning, given the legal-rights issues at stake.

A further complicating issue is that of examining what people may mean when justifying TCB on the basis of being informative. It is unclear what this means exactly. Potentially, it could mean that it is identical with being educational, or it may mean something else entirely. If imparting 'information' were to be considered a lower threshold than imparting TCB education-effects, important potential and legal-policy implications arise. W Perkanas suggests that there is an issue as to what is meant and understood by the phrase 'public understanding.'<sup>10</sup> The author points out that significant issues need to be addressed in terms of defining what is meant by 'information' and 'educational' in the context of TCB. While television can inform, it is 'informally allocated [a] role of public informer.'<sup>11</sup> There is a danger that the proposed TCB education-effects are considered in a rather informal manner despite the importance of the issue.

Educational television is generally associated with childrens' educational television.<sup>12</sup> Adult television programming is less frequently contemplated in terms of (information and or) education-effects. In terms of suggested education-effects of adult TCB, we

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<sup>10</sup> W Petkanas, 'Cameras on Trial: An Assessment of the Educational Affects of News Cameras in Trial Courts' (PhD thesis, New York University 1990) 116.

<sup>11</sup> D McQuail, *McQuail's Mass Communications Theory* (5th edn, Sage 2005) 35.

might be more exacting in describing and assessing how it will educate. We also need to start defining and expanding upon what is meant by educational adult TCB. Indeed, without proper descriptors and definitions, it may be queried how courts and legal-policymakers are to assess whether there may be positive, or indeed significant, education-effects being achieved by TCB. Even the limited research to date, which appears scant, needs to incorporate these more nuanced points. Courts and legal-policymakers and the general debate in terms of TCB policy issues, are arguably ill informed to date. They would be better served with normative and contemporary research of TCB education-effect issues which seeks to overcome what Professor MM Feeley describes as the ‘self-serving assertions’ and ‘hot air’ to date.<sup>13</sup>

*Defining TCB Educational-Effects:* W Petkanas considers educational TCB effects<sup>14</sup> and the New York understanding of what ‘being educational’ means. It sets out four markers of educational TCB. Educational TCB may,

- increase public knowledge of the judicial system;
- increase public confidence;
- educate; and
- inform.<sup>15</sup>

Unfortunately, the New York study never examines for education-effects nor the four component markers above. These ought be considered in future TCB pilots.

*A Threshold Amount of TCB Education-Effect:* Assuming that TCB is educational, one question is whether there will be a significant amount of education in quantifiable or justifiable terms. A follow on issue is whether this is sufficient in terms of legal rights issues, and in the context of the effort and investment made, to justify TCB. One may query if a particular legal-policy course is justified solely on the out-of-court educational issues. One study has found that viewers were unable to recall more than twenty five

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<sup>12</sup> D McQuail, *ibid* 35 and references throughout.

<sup>13</sup> Professor MM Feeley of Boalt Hall, reviewing P Lambert, *Television Courtroom Broadcasting Effects: The Empirical Research and the Supreme Court Challenge* (University Press of America 2013).

<sup>14</sup> W Petkanas, ‘Cameras on Trial: An Assessment of the Educational Affects of News Cameras in Trial Courts’ (PhD thesis, New York University 1990).

<sup>15</sup> However, by referring to education, the definition becomes circular. It is also not clear if referring to ‘inform’ means increasing awareness or, for example, increasing the mere ‘push’ content available.

percent of the news items they had viewed.<sup>16</sup> The same study concluded that both radio and television audiences do not recall many of the news items they see.<sup>17</sup> Furthermore, changes in the medium or form do not increase the rate of overall recall.<sup>18</sup> If this was repeated in the context of some form(s) of TCB, this could mean that there is no great recall rate. So, the level of TCB education-effect could be minimal for TCB in different less amendable forms. Potentially, courts and legal-policymakers might have to consider whether there is a minimum threshold of education-effects required in order to proceed with TCB.

*What TCB Educates About (Specific Versus General TCB Education):* A separate, although perhaps more complicated issue, is differentiating case-specific educational motives from issue-specific educational motives. In some instances one may wish to educate the public about a specific case. One is permitting a specific case to be broadcast, hoping that the public are educated in relation to that case. This may well be the case when individual judges are asked to consider permitting TCB. Arguably the *Pistorius*<sup>19</sup> case is one such example. The original intended *Hollingsworth*<sup>20</sup> matter might be another example. However, there seems to be no research on this point ie the motivation of judges who permit TCB generally or specifically for education. In other instances, one may be less concerned with the specifics of the case being broadcast, but rather that the main issues and themes involved in the case are broadcast via TCB. This may be the case when considering TCB at the legal-policy level, such as when creating procedures, codes or general court rules permitting and or regulating TCB (or forms of TCB). The TCB education-effect question involves the nuanced consideration of whether TCB is seeking to educate in relation to the legal and jury process or the specific instant case. It has been said that if broadcasters are to become educators ‘then the responsibility is to inform the public about the trial process in general, the administrative complexities of the justice system, and the daily routine of dealing with often overcrowded court dockets.’<sup>21</sup> This suggests a general education purpose, not education on a specific instant case. However, our testing and evaluation of educational TCB may depend on what the end motivation is. There is no extensive TCB legal-empirical research on what is being educated about, the case, the process, policy objectives (eg punishments, sentencing,

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<sup>16</sup> J Stauffer, R Frost, and W Rybolt, ‘The Attention Factor in Recalling Network Television News’ (1983) 33 *Journal of Communications* 29.

<sup>17</sup> *ibid.*

<sup>18</sup> *ibid.*

<sup>19</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>20</sup> *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 19 January 2014.

society norms), etc. The depth of TCB educational discussion, and education-effects research, needs to expand.

*Effective TCB Education and Learning:* We might consider how we decide that particular courtroom broadcasts are, to use the words of D McQuail, ‘communicating effectively.’<sup>22</sup> The concern is whether TCB is successful at educating. Television continues to change and evolve and ‘it would be risky to try and summarise its features in terms of communicative purposes and effects.’<sup>23</sup> Having the aim of education or having push educational TCB, does not mean that education is actually achieved. Some of the features of television as a medium are that many events are relayed ‘live’; others are relayed ‘with the aim to create an illusion of ongoing reality’; and that it aims to create a sense of ‘intimacy and personal involvement.’<sup>24</sup>

*Education and Broadcasting Rules:* A Biondi feels that substantive safeguards and restrictions can ensure that the ‘educational purpose of showing how the machinery of justice works can easily be satisfied by selecting and showing trials which do not involve particularly sensitive or private issues.’<sup>25</sup> However, it sometimes appears that celebrity, sensational and criminal trials are the ones that are the predominant focus of TCB in the US. Equally, he feels that it is not proper that only criminal trials be televised.<sup>26</sup> Civil cases and trials may be educational.<sup>27</sup> Again, most US cases broadcast are criminal trials. In terms of what is broadcast, A Biondi feels that trials should be broadcast in entirety, in particular to ‘avoid any interference in the editing stage.’<sup>28</sup> He also appears to be against live TCB televising on the basis of distortion and sensational effects. Only if courts adopt precautionary safeguards ‘can television really “contribute to the public understanding of the rule of law and to the comprehension of the functioning of the entire judicial

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<sup>21</sup> S Barber, *News Cameras in the Courtroom: A Free Press – Fair Trial Debate* (Ablex 1987) 88.

<sup>22</sup> D McQuail, *McQuail’s Mass Communications Theory* (5th edn, Sage 2005) 10.

<sup>23</sup> S Barber, above 34.

<sup>24</sup> *ibid.* Social learning refers to ‘the numerous way in which television can be used to “teach” values and aspirations. At the most general level this relates to ideas about discourse and representation, but more specifically [J] Lull points to the active ways in which parents, for example, may comment upon particular representations to discuss the issues they raise with their children. The concept is closely related to the public sphere and working through.’ See M Briggs, above 160. Lull refers to J Lull, ‘The Social Uses of Television’ (1980) 6:3 *Human Communication Research* 197, as referred to in Briggs, above 160.

<sup>25</sup> A Biondi, ‘TV Camera Access in the Courtroom: A Comparative Note’ [1996] *Yearbook of Media and Entertainment Law* (YMEL) 150.

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*

<sup>28</sup> *ibid.*

system.”<sup>29</sup> In many instances TCB has been permitted without, or with very minimum, pre-defined rules and safeguards. In the US, the rules also vary significantly between states and court levels.<sup>30</sup> Assessment of the TCB educational message is quite nuanced.

*TCB, Education and Cultural/Country Differences:* There are also cultural and country differences to consider. For example, not everyone spends the same amount of time viewing television and there appear to be marked differences between countries. As an example, D McQuail refers to research of viewing habits and differences in time spent watching television across different jurisdictions.<sup>31</sup> Programming and viewing are generally segmented into national markets.<sup>32</sup> Indeed, there are many popular instances where individuals express their opinion that certain examples of TCB in the US would not be desirable and or permitted in Europe.

*The TCB Audience to be Educated:* An important legal-policy issue relates to who it is that is to be educated. This is not considered in the general TCB literature. To refer to the potential education-effects generally is simplistic and ignores the nature of the television media and the potential audiences. Television is particularly concerned with attracting or focusing in on particular audience segments.<sup>33</sup> Teaching is also a conscious intentional function<sup>34</sup> with particular defined tasks and goals in focus. These may not be the same aims which a commercial TCB station or programme is focused upon. Alternatively, it may only be a sub-theme, while the more dominant themes are ratings and commercial success. We have to date ignored the whole sector of out-of-court TCB effects-research. The audience for TCB needs to be better researched. We need to advance beyond mere ratings. There are some materials on ratings during particular popular TCB broadcasts of celebrity or unusual criminal trials. However, there appears no research body as to why audience members watch particular trials, nor TCB generally. There is no ethnographic (in situ) research to examine how people actually view TCB, and what they may be doing at the time.<sup>35</sup>

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<sup>29</sup> *ibid.*

<sup>30</sup> D McQuail comments that ‘the distinction between message and meaning is a significant one.’ D McQuail, above 340. He adds that we cannot simply “read off” the meanings that are somehow “embedded” in the texts or transmitted to audiences. These meanings are not self-evident and certainly not fixed. They are also multiple and often ambiguous.’ *ibid.*

<sup>31</sup> *ibid.* 35. The US was 238 minutes per day; UK 235 minutes per day; etc.

<sup>32</sup> See M Briggs, above 122.

<sup>33</sup> A Hart, ‘Understanding Television Audiences’ (1992) 18 *Journal of Educational Television* 12.

<sup>34</sup> A Duby, ‘Using Television as an Educational Medium,’ above 192.

One reporter is quoted by P Thaler, as saying that television ‘increases [public] interest’ and even people who do not use print coverage are engrossed in the television coverage.<sup>36</sup> The journalist also feels that many people watched the *Steinberg* case for its entertainment value, not its news value.<sup>37</sup> There are issues to be explored in relation to TCB education-effects. Other research may also be applied to TCB. One query relates to what the ‘needs’ of the audience may be.<sup>38</sup> Research might be directed to what the audience may experience from media messages of TCB.<sup>39</sup> Much may depend on the viewer activity, which appears not to be a research focus.<sup>40</sup> Aspects of this include whether the audience may be active or passive. Indeed, the growing question regarding the differences and effects of iTCB and television TCB could include differences between how active/passive an iTCB viewer may be as compared to a television TCB viewer. Education-effects may depend on what is referred to as active viewing.<sup>41</sup> These all raise more nuanced and normative issues to consider in terms of TCB education-effects and the depth of the research that may be required.<sup>42</sup> G Creeber notes that,

‘there is now a body of evidence to suggest that the news is influential on public opinion in a range of specific and measurable ways. So, for example, a number of studies have demonstrated that news clearly sets an agenda ... priorities and opinions .... Overall, audience studies focusing on television news in particular (now a dominant news source for most people) indicate that people watch television news more inadvertently and with less attention than other forms of television ... This has led researchers to use various qualitative methods to explore in some detail the way in which television news does impact on viewers. So, for example, ... research suggests that what he calls the “episodic” framing of most news stories (which focus on events themselves rather than the causes or history of those events) makes it difficult to understand the social causes of issues like crime or poverty, and instead to attribute blame only to the individuals themselves ... suggest that television news can be important in creating and reinforcing fairly simple associations ... that stick in people’s minds.’<sup>43</sup>

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<sup>35</sup> This is not an impossible task. In fact there are a large number of studies and methodologies utilised in the existing study of the audience which can assist.

<sup>36</sup> P Clark of The Daily News, in P Thaler, ‘The Impact of the Television Camera on Courtroom Participants: A Case Study of the Joel Steinberg Murder Trial’ (PhD thesis, New York University 1990) 185.

<sup>37</sup> P Thaler, above.

<sup>38</sup> D McQuail, above 85.

<sup>39</sup> See general discussion and references in D McQuail, above 126-127.

<sup>40</sup> See M Gillespie and J Toynbee, *Analysing Media Texts* (Open University Press and McGraw Hill 2006) 101 ff.

<sup>41</sup> See *ibid* 102.

<sup>42</sup> Our experience, prior knowledge and even expectations and assumptions also potentially impact upon the meaning of TCB.

Other audience research can also be incorporated for TCB research.

*TCB Audience Choice and Selection:* Increasingly, the audience has more choice and options in terms of what they can access through mainstream media channels, but also through new communications technologies. In addition, many communications channels are no longer one way, but are rather interactive with communications and messages going both ways, whether alone or in addition to traditional one-way messages. Furthermore, there is now an increase in private communications or private ‘media making’ with the likes of camcorders, PCs, digital cameras, etc.<sup>44</sup> The internet is also very much a part of the media and communications revolution.<sup>45</sup> D McQuail refers to the point that frequently the audience have a low salience for many communicators.<sup>46</sup> There are potential impacts in relation to TCB education-effects that may need to be considered.

*TCB and Audience Fragmentation:* Audience consumption has become even more fragmented with increasing channel hopping, zapping and grazing, with for example the advent of satellite television, the ability to record programmes, cable channels, etc.<sup>47</sup> In addition, these developments have helped to ‘customise the consumption of programmes and genres alike, making it difficult (especially at a time when “classic” television is increasingly being recycled) to align ... readings of programmes and genres with contemporary audiences and viewing populations.’<sup>48</sup> ‘At the same time, the proliferation of generic channels like Comedy Central, the Sci-Fi Channel, MTV, CNN News and TCM alongside alongside viewing practice such as zapping – which ... entails the rapid deployment of *genre-recognition skills* [emphasis added] – suggest that genre ... remains central to television, its organisations, and its viewers and consumers.’<sup>49</sup> Even if TCB is educational, a matter for courts and legal-policymakers to contemplate is whether the TCB education-effect may be quite limited or de minimis. If there is a parallel with television parliamentary broadcasting, generally it does not have a significant audience. Other than content in news programming, most extended parliamentary broadcasting programming does not even rate on standard ratings barometers. In Ireland the main parliamentary broadcasting programme is called Oireachtas Report. Figures obtained from RTE (the main broadcaster) reveal that during one period the audience ratings

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<sup>43</sup> G Creeber, ed, above 108 and references therein.

<sup>44</sup> See generally D McQuail, above 39.

<sup>45</sup> See *ibid* 39-40.

<sup>46</sup> *ibid* 295.

<sup>47</sup> See G Creeber, above 6.

<sup>48</sup> *ibid.* Feuer, ‘Genre and Television’ in Allen (ed), *Channels of Discourse, Reassembled: Television and Contemporary Criticism* (Routledge 1992) 158, as referred to in G Creeber, above 6.

varied between a low of 8,400 and high of 101,200 per programme.<sup>50</sup> These are low compared to other programmes. Increasing multiplication of broadcast channels<sup>51</sup> also raises the risk of smaller audiences for quality or educational TCB.

*TCB and Expanding Legal Education:* B Currie<sup>52</sup> refers to legal education and an increasing acceptance of non-legal materials for legal teaching and training. This is arguably more evident in certain countries. An example of this increasing reliance on non-traditional legal materials, is the development of legal-psychology and legal-psychiatry courses in law schools and or cross disciplinary legal courses. Many legal courses will now use established texts in the area of statistics, for example. Perhaps more familiar to those interested in the criminal legal process, is the increasing use of psychology and psychology experts in profiling, witness evaluation, eyewitness identification, jury selection, etc. B Currie writes that,

‘The most significant development in American legal education since 1870 is the movement toward reorganization of courses along functional lines and toward the broadening of law school studies to include non legal materials, chiefly from the social sciences, which are relevant to legal problems.’<sup>53</sup>

Perhaps the most striking thing about this comment that it was made in 1955. That a particular line of contemporary study relies on legal-empirical research and ‘social sciences,’ for example, using media and communications studies research and methodologies to study TCB, which might be described by some as non conventional, does not mean that it should not be pursued. Rather the more important argument is that it would be overly conservative not to pursue such an avenue in the interests of expanding our knowledge and understanding of legal and legal-psychology issues such as TCB. A more recent example in Ireland is the use of sentencing statistics and databases.<sup>54</sup>

*TCB Programme Environment:* Research has been carried out into what is referred to as the media programme environment.<sup>55</sup> This refers to comparisons with other programmes which are available at the same time and or on other channels. That could affect (relative) levels of appreciation by the audience. We might investigate the different forms

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<sup>49</sup> *ibid.*

<sup>50</sup> 19 January 2010 to 8 July 2010. Details obtained on 11 August 2010. On file with author.

<sup>51</sup> D McQuail, above 320.

<sup>52</sup> See, for example, B Currie, ‘The Materials of Law Study’ (1955) 8:1 *Journal of Legal Education*, 62 ff.

<sup>53</sup> B Currie, *ibid* 1.

<sup>54</sup> See < <http://irishsentencing.ie> > accessed 19 January 2014.

<sup>55</sup> See D McQuail and S Windahl, above 159.



of TCB and compare this to the types, times and forms of comparable and competing programmes.

*TCB and the Competing Content Environment:* Future TCB research which examines the content and effects, may also analyse the comparable or competing programmes available. This assists to properly examine the form and effects of particular TCB programmes. Competing programmes help to define the form of a particular programme, as well as make statements in relation to the likely audience. Also, the times and scheduling arrangements at which such programmes are available, are also useful indicators in the study of TCB. When we talk of education and informative value, we may also consider definitions, different programming forms, different TCB forms, different newspaper forms and different radio forms, and how these influence the type and level of educational and or informative value that can be expected. Three forms of television are described in the literature, namely, documentary, drama and actuality.<sup>56</sup> Meaning can depend on the type of programme being presented.<sup>57</sup> As P Sorlin describes it, '[c]onsumption is, in fact, determined by the context in which it occurs.'<sup>58</sup> Therefore, the type/class of programme against which Tru TV, for example, competes, helps to form public impressions. Arguably, the class of programme it competes against in the US is not what we traditionally identify as educational.<sup>59</sup> DA Harris suggests that '[v]iewers choose whether to watch [Tru TV], and the network may therefore compete with other programming sources.'<sup>60</sup> These issues might be better researched in more contemporary and normative TCB effects-research to assist courts and legal-policymakers.

*The TCB Content:* The footage and content of TCB has received little attention.<sup>61</sup> Of the legal-empirical research studies highlighted above very few examine content. We need to examine in detail the content of particular TCB programmes in each of the different forms. This will help us to understand TCB in each of these forms and also the different messages being carried in the respective forms. Comparative research would be beneficial. We ideally need to understand the message(s) in order to understand the effects on the audience, and the likely TCB education-effects on the audience of different TCB forms. We do not know that TCB is educational, as is so often claimed. The

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<sup>56</sup> P Sorlin, *Mass Media* (Routledge 1994) 43.

<sup>57</sup> *ibid.*

<sup>58</sup> *ibid.*

<sup>59</sup> See M Alvarado, R Gutch and T Wollen, *Learning the Media: An Introduction to Media Teaching* (Macmillan 1987) 41, 53, 105-118, 135 ff.

<sup>60</sup> DA Harris, 'The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System' (1993) 35 *Arizona Law Review* 817.

pictures that are presented have the capacity to form a variety of different meanings and impressions upon those who see them. No proper or sustained out-of-court audience research has yet been conducted for sufficient TCB education-effects research. One might also remember that it is not just the pictures that are presented to the viewer that can have an effect. Headlines, adverts, voiceovers and trailers that may precede or follow the programme have effects also. There is then the angle or line of the presenter and what they say (verbally and otherwise). More research would be of assistance. However, if the research that exists, most did not find TCB education-effects.

*TCB Content Analysis:* RE Reeves Stewart indicates that normally television news programmes cover stories in fifteen – thirty second slots and tell the who, what and where of the story in question.<sup>62</sup> However, trial broadcasts ‘focus on the details of the crime being prosecuted, the strategy and approaches of the lawyers and the details surrounding the alleged criminal; practically no information is given on the how and why of the court proceedings.’<sup>63</sup> One of the avenues for examining the TCB education-effect question is to undertake detailed body of content analysis of particular TCB broadcast and TCB content. This should be across all TCB experiments. This can be used in many possible ways to analyse particular TCB broadcasts, compare TCB broadcasts, and lead in to research of potential audience effects. In the New York study, W Petkanas finds that ‘there seemed to be little difference in most of the trial reporting with cameras and without them. However, ... [n]o comparative research has yet been done to determine if there are any differences, and if so, just what they are.’<sup>64</sup> There is benefit to advancing this type of research as well as content analysis comparisons of different forms of TCB. While it can be difficult and time heavy to find and then examine real TCB audience members for educational and other effects, it can be possible to play particular TCB broadcasts to sample audience subjects. Content analysis can help to identify particular important issues in the TCB case. The audience subjects can be examined for their appreciation or education in relation to these particular issues. Similar to the eye-tracking models earlier whereby the broadcast content shown to include and exclude the TCB cameras within the footage, the audience subjects can be divided between TCB camera-present and TCB camera-absent. This can assist to research potential audience subjects on educational type issues between the different broadcast footage.

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<sup>61</sup> W Pogorzelski and TW Brewer, ‘Cameras in Court, How Television News Media Use Courtroom Footage’ (November-December 2007) 91 *Judicature* 125.

<sup>62</sup> RER Stewart, above 57.

<sup>63</sup> *ibid.*

<sup>64</sup> W Petkanas, *ibid* 63. See AR Paddon below.

*TCB Content Objectivity:* Particular issues of research and contention may be raised in relation to the nature of TCB content. For example, some may ask if we have yet measured and assessed the objectivity<sup>65</sup> of TCB and the objectivity of different styles of TCB; whether some styles are more objective; how much TCB is news; and how much TCB is factual, quality, accurate, complete, significant, relevant, impartial, neutral, etc.<sup>66</sup> Perhaps ‘visuals and camera shots ... lead the viewer in certain evaluative directions.’<sup>67</sup> Some may suggest that TCB may give disproportionate impressions or representations. It might also give a negative picture, or possibly misrepresent susceptibility to (certain types of) crime. It might be queried if it neglects or ignores particular points or issues, or favours a particular issue.<sup>68</sup> Perhaps also violent crime and personal crime news may be over-represented on TCB.<sup>69</sup> Non-verbal communication<sup>70</sup> in TCB can also be researched.<sup>71</sup> TCB opponents may suggest that ‘dramatising’<sup>72</sup> elements are added to (some) TCB. They may ask how much it may rely on ‘reconstructive’ and added audiovisual content.<sup>73</sup> Expert commentary is also an issue to consider.

Questions which arise may be what the aim and the effect of voiceovers may be; and whether re-created drama content appears to be ‘actual’ footage. It can sometimes be suggested that even where real court scenes are included, they appear brief, and ‘most of a documentary-drama will be the product of full directorial management of scripted action and speech.’<sup>74</sup> How TCB cameras can change and pan back and forth, or pan to and from footage of CB would be a useful analysis. Cutting, editing and montage<sup>75</sup> effects can also mean that what is presented is not the full and continuous actual footage of the courtroom. For example,

‘Editing, or the techniques used to regulate the relationship between camera shots, moves the story forward, cutting the passage of time between actions and events when it is important dramatically that the viewer should not know what happens next or when events become irrelevant to the narrative ... The omission of intervals of both story and plot

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<sup>65</sup> See discussion in D McQuail, above 355-358.

<sup>66</sup> See general discussion in RER Stewart, above 355-357.

<sup>67</sup> *ibid* 358.

<sup>68</sup> See generally RER Stewart, *ibid* 358.

<sup>69</sup> *ibid* 358-359.

<sup>70</sup> See reference on Non Verbal Communication in McQuail, above 362.

<sup>71</sup> RER Stewart/McQuail, *ibid*.

<sup>72</sup> To use the words of G Creeber, above 44.

<sup>73</sup> To also use the words of G Creeber, *ibid*.

<sup>74</sup> See G Creeber, *ibid*.

<sup>75</sup> See M Gillespie and J Toynbee, *Analysing Media Texts* (Open University Press and McGraw Hill 2006) 94.

duration in the *viewing time* is known as *ellipsis* or *elliptical editing*. Ellipsis also refer to the shortening of plot duration by omitting intervals of story duration.<sup>76</sup>

Editing or ‘stitching together of individual shots controls the timing and pace of the narrative. This is a powerful tool which can slow down or speed up the pace and rhythm of the narrative. Editing can help create suspense, curiosity or surprise ... Conventional film and television narratives use the techniques of “continuity editing” to stitch shots together to create an apparently invisible, seamless flow, give the impression of a continuity of time and space, and knit the spectator into the narrative.’<sup>77</sup> ‘The *frequency* with which any one event is presented by the plot is another feature.’<sup>78</sup> The scene includes settings, props, lights, costumes, make up, ‘figure movement’ and behaviour, acting.<sup>79</sup>

The climax is the ‘dramatic highpoint of conflict, excitement or tension, followed by release.’<sup>80</sup> ‘Does the use of visual information or live footage lead towards a certain impression? So, for example, if two different interpretations are accompanied by visual information, does this make that interpretation seem more persuasive as an account?’<sup>81</sup> ‘Most of these forms of analysis demand not only a detailed examination of television news, they also require us to know more about the topics represented than we can glean from the newscast. In order to evaluate what is being represented ... we need to know what information or perspective is being excluded from the story.’<sup>82</sup>

A number of methodical issues and questions arise.<sup>83</sup> In order to generalise, we need to examine what is typical rather than the unusual.<sup>84</sup> A ‘*sample* of news programmes ... large enough to establish clear patterns, and to minimise ... untypical ... news coverage as a whole. If we are looking at coverage of a particular event, it is helpful to look at coverage of other comparable events as a point of comparison. If we are looking at more general features of television news, then we need to ensure that our sample is spread across a reasonable period, so that the nature of the coverage will not be distorted by any

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<sup>76</sup> *ibid.* Emphasis in original.

<sup>77</sup> *ibid.* 95.

<sup>78</sup> See *ibid.* Emphasis in original.

<sup>79</sup> See *ibid.* 96. To analyse the structure of a media narrative we might consider, cause and effect logic connecting events; characters and motives; temporal order, duration and frequency of events and how time is represented; how the plot manipulates and communicates spatial information as well as how narrative space and movement in space are constructed and made meaningful. *ibid.* 96

<sup>80</sup> See *ibid.* 97, and references therein.

<sup>81</sup> E Creeber, above 109.

<sup>82</sup> *ibid.*

<sup>83</sup> *ibid.*

<sup>84</sup> *ibid.*

one (possibly unusual) news content.<sup>85</sup> TCB effects-research could benefit from being more extensive. ‘Once we have chosen a sample, we need to establish a systematic procedure for analysis. This may involve developing a coding frame, which comprises a set of criteria for categorising each news item or news programme.’<sup>86</sup> The coding categories should be relevant to the particular research question or issue.<sup>87</sup> When we consider someone being presented, we may categorise appearance according to items such as: quoted but not seen; quoted next to photograph; shown speaking on the camera; etc.<sup>88</sup>

We may examine the media news text, and after that the wider context within which the news is produced.<sup>89</sup> We need to ‘[a]naly[s] narrative structure and narrational processes.’<sup>90</sup> In reviewing, analysing and testing for TCB effects and meanings, we can examine specific examples of proposed educational programming and the text of such programming, and not just superficially such as referring to the existence of the programme per se, but rather to get into the details of the programme and its content and texts. How much comment comes from the presenter, from first hand speakers, from commentators and from experts.<sup>91</sup> It is important to know and understand not just what is said (and not said) but also who is saying it. The legal-empirical studies above show that this seldom occurs thus far. Following on, we may also need to understand whether one source predominates and predominates unduly.

We need a ‘close analysis of language to dig out the latent or hidden meanings ... beneath media texts.’<sup>92</sup> We need much more content analysis.<sup>93</sup> ‘[A]n effective claim or account concerning the media combines theory and evidence in a way that is *coherent*,

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<sup>85</sup> *ibid.*

<sup>86</sup> *ibid.*

<sup>87</sup> *ibid.*

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.* 109. Internally there can be a number of levels of decision-making and a variety of institutional, professional or ideological pressures on programme-makers, *ibid.* In addition, the other additional influences and pressures can be examined, such as ownership and control, *ibid.* ‘[M]apping narrative structures ... share[d] certain basic features ... we need to watch out for how stories can impose as well as create certain meanings – including ... cues [to] us.’ Gillespie and Toynbee, *Analysing Media Texts* (Open University Press and McGraw Hill, 2006) 115.

<sup>90</sup> *ibid.* ‘Analysing narrative structures requires an essentially static lens, while studying processes of narration captures the movement-by-movement activities in which viewers engage. In analysing film texts we also need to consider the use of specific film techniques.’ *ibid.*

<sup>91</sup> See comments *ibid.* 132.

<sup>92</sup> *ibid.* 137.

<sup>93</sup> See *ibid.* 138 ff.

*comprehensive and empirically adequate.*<sup>94</sup> In terms of educational TCB, no one has shown and verified education-effects, nor explained how and when predefined education-effects will be achieved. The ‘analysis of media texts is central to understanding the ways in which meanings are organised and circulated in society.’<sup>95</sup> It is important to analyse programming, the media and texts because it is widely believed that media content can influence politics, individuals, groups and society generally.<sup>96</sup> The information explosion ‘has resulted in pressure to communicate information as efficiently and economically as possible, resulting in compression styles.’<sup>97</sup> There is research into how newspaper texts are edited.<sup>98</sup> Research of TCB production processes, which appears to be omitted to date, may assist courts and legal-policymakers as well as researchers.

*News Use of TCB:* One of the issues arising is whether most TCB footage will be used predominantly for news footage. In addition, we may assess whether it is used mostly in news programming as backdrop or whether pictures and in-court audio is also used. G Creeber describes the backdrop and uses of television,

‘Television news generally presents itself as a “window on the world”, in which the events of the day are transparently revealed for all to see. Although we may praise or criticise television fiction for being realistic or unrealistic, many people assume that, in the case of news, such judgements are unnecessary. Thus news is not merely seen as like reality but as unmediated reality itself, beamed directly into people’s homes. If this were really so, it follows that there would be little reason for anyone to study television news, since to study it would merely be to study the world it reveals. For us to analyse the news is therefore to assume that, like other television genres, the news is a form of representation (or, as it is called in semiology, signification) and that the images and words it uses are, like TV drama, the result of creative and interpretative processes. It is to assert that making television news is ... a matter of “putting reality together.”’<sup>99</sup>

‘Television news (and the news media in general) has been studied from a number of perspectives ... rang[ing] from ... social-science-based approaches ... to forms of analysis that come from the humanities (in which TV news is examined as a text).’<sup>100</sup> ‘In general

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<sup>94</sup> See *ibid* 141. Emphasis in original.

<sup>95</sup> Gillespie and Toynbee, *ibid* 187.

<sup>96</sup> See *ibid* 187.

<sup>97</sup> A Durant and M Lambrou, *Language and Media* (Routledge Taylor & Francis Group 2009) 195.

<sup>98</sup> For example T van Dijk, *News as Discourse* (Lawrence Erlbaum Associates 1988); A Bell, *The Language of News Media* (Blackwell 1991) as referred to in A Durant and M Lambrou, above 195, and indeed the discussion therein.

<sup>99</sup> G Creeber, above 104.

<sup>100</sup> *ibid*.

sociological terms, we can identify three road frameworks that inform the analysis of the social role of television news.<sup>101</sup> ‘The liberal pluralist model [sees] television news provid[ing] useful information and thus plays an important role in strengthening democracy and citizenship.’<sup>102</sup> We are also ‘accustomed’ to news and news presentation and news routines.<sup>103</sup> We thus expect or have an expectation as regards the genre of news, news formats and news programming content.<sup>104</sup>

The ‘objectivity’<sup>105</sup> of TCB footage is an issue which deserves greater examination, but particularly across TCB forms. Television news content has been examined both quantitatively and qualitatively, structure, narrative, news ‘text,’ news audiences,<sup>106</sup> textual analysis, and content analysis.<sup>107</sup> This infrequently occurs for TCB. In terms of specific aspect of research of news programmes (and TCB), items to study may include, TCB as news; TCB as a generic form (visual elements, verbal/sound elements, narration, differentiation); TCB news as dramatisation (representatives); TCB news and truth (impartiality versus bias, conflict, eyewitness ideology, fact versus fiction); audience/effects.<sup>108</sup> In the South Africa *Pistorius*<sup>109</sup> case, research may yet be devoted to the effects of such issues as close-ups, TCB camera panning, some witness being shown and others not per their right of election, yet the public in the courtroom being shown, the family of the victim, in particular the mother of the deceased being shown and in close-up

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<sup>101</sup> *ibid.*

<sup>102</sup> *ibid* 104, bold emphasis in original. ‘Within this framework, more news is good news, both in the sense that a range of different news organisations is needed to guarantee a healthy diversity of providers, and because it is assumed that the presence of television news in TV schedules should be sufficient to guarantee wide access to serious news programming.’ *ibid.*

<sup>103</sup> See *ibid*, 108.

<sup>104</sup> An interesting point is the general agreement that news coverage should have some proportion and relation to the importance of event, there is little clear definition in terms of what ‘importance’ actually is or what makes one event more important than other. See *ibid.* One might have regard to whether the importance differs between the public’s perception versus the media’s view. The media also make judgement in terms of what they perceive the audience will want or will see. *Tru TV* does not go into any detail whether in terms of the importance of cases broadcast to the media and the audience. We can look at what is included in TCB (as we can with news programming content), for example, we can also look at what items and event are not included in TCB, and similarly news programmes; we can consider and examine ‘how stories are told’ (*ibid*); is there equal weight (*ibid*) between different news broadcasts and between news media generally; who is quoted (*ibid*) and from where; what are the sources (*ibid*) for the stories; what are the wider implications of news stories, for example crime (*ibid* 109); how is the story actually told eg the narrative, visuals (*ibid*); is live footage used and if so, does this ‘lead towards a certain impression?’ (*ibid*).

<sup>105</sup> See *ibid* 106.

<sup>106</sup> *ibid* 106.

<sup>107</sup> *ibid* 110.

<sup>108</sup> See G Creeber, *ibid* 110, originally adapted from Hartley, *Uses of Television* (Routledge 1999) 229-231.

<sup>109</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

images, the admonitions given by the judge at various stages, applications in relation to particular content being broadcast on TCB, various rule changes occurring during the case as a result of TCB and TCB footage.

*TCB News Accuracy:* We often trust the news to be accurate and truthful.<sup>110</sup> However, while ‘audiences *rely* upon television news, even if this *trust* is frequently betrayed by incomplete, incomprehensible and biased reporting.’<sup>111</sup> Part of the reason news is trusted is because of the prime institutional and scheduling status given to the news bulletin and also because of the trust and familiarity with the news presenter.<sup>112</sup> DA Harris comments of how news summaries of courts may be incomplete. ‘The whole event will be summarized in two minutes by a reporter with little or no knowledge of the legal process. Thus the person interested in a case depends on a highly derivative, filtered source of information.’<sup>113</sup> He adds that ‘[b]y contrast, those who see [Tru TV] can make up their own minds about the case and the evidence, [Tru TV’s] virtually uncut live coverage of trial testimony allows anyone to see the trial as if present. The viewer sees an almost unmediated version of the proceedings, rather than interpretations of the event.’<sup>114</sup>

*Who Educates with TCB?:* There is also the whole aspect of the broadcaster. For example, is the best broadcaster for CB a public service broadcaster?<sup>115</sup> It may be that content and presentation may differ. Tru TV, which began as Court TV, started in 1991.<sup>116</sup> Why do people tune in to Tru TV CB? The answer may lie in one of the many ads in the US for Tru TV at the time of the *Simpson* case. One example was a newspaper advert three quarters of which was a picture of Simpson.<sup>117</sup> It contained the phrase ‘[w]atching the real life drama of justice’ (emphasis added). S Brill, the founder of Tru TV,<sup>118</sup> contends that TCB has nothing to do with the insatiable media circus. Perhaps one may ask of Tru TV can be viewed as wholly distinctly separate from other media.<sup>119</sup>

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<sup>110</sup> M Briggs, *Television, Audiences and Everyday Life* (Open University Press and McGraw Hill) 17.

<sup>111</sup> M Briggs, *ibid* 29. Emphasis in original.

<sup>112</sup> *ibid* 41.

<sup>113</sup> DA Harris, ‘The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System’ (1993) 35 *Arizona Law Review* 819, footnotes omitted.

<sup>114</sup> M Briggs, *ibid*.

<sup>115</sup> See discussion in relation to public service broadcasting in D McQuail, above 178 ff.

<sup>116</sup> DA Harris, above 786.

<sup>117</sup> *New York Times* (New York) 19 July 1994.

<sup>118</sup> S Brill, ‘The Eye That Educates’ *New York Times* (New York) 15 July 1994). Brill was the founder of US Tru TV channel (then called Court TV).

<sup>119</sup> For other research concurring with this view read the account of the Steinberg case; the position of court cameras in the media; and also his reflection on American culture, P



RE Reeves Stewart finds that while Tru TV makes a better effort than others to educate, ‘there are still gaps of information missing from this education.’<sup>120</sup> Tru TV is not educational programming, rather it is ‘infotainment programming,’ which she defines as ‘educational programming told through an entertainment medium.’<sup>121</sup> Infotainment is the largest educational ‘outlet’ but ‘infotainment programs are not immune to ratings and therefore need to appeal to a wide audience. This need to garner ratings often leads back to airing the sensational.’<sup>122</sup> Some of the other criticisms of Tru TV are that it focuses exclusively on trials, which are atypical of the overall criminal justice system, and are only a small part of the justice system, and ignores civil cases completely.<sup>123</sup> The trials aired are invariably sensational trials.<sup>124</sup> The main content, such as murder, rape and theft in actuality only account for ten percent of overall crimes.<sup>125</sup> Stewart also feels it necessary to remind us that Tru TV is not a public service broadcaster.<sup>126</sup>

DA Harris states that Tru TV ‘is not a public service venture or a broadcasting outlet devoted to educating the public without regard to profits. Rather it is a commercial venture, just like traditional broadcast and cable networks; it airs advertising. It differs from traditional networks in what it offers viewers – trials and other proceedings in real courts. [It] may help to educate and inform the public, but it does so with the aim of selling of its advertisers’ products.’<sup>127</sup> Commercial business influences<sup>128</sup> also cannot be ignored. In New Zealand’s TCB study, court staff had to intervene between competing television stations in a dispute over footage and pooling.<sup>129</sup> In addition, court staff were also pressed by media representatives to indicate in advance whether a competing station was going to film a case and there also appeared to be competition for the best ‘visuals’ in certain instances.<sup>130</sup> ‘[C]ontemporary news ... is dominated by deadlines, urgency, live feeds, twenty-four-hour news channels, internet news and new news consumption

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Thaler, *The Watchful Eye American Justice in the Age of the Television Trial* (Praeger Press 1994).

<sup>120</sup> RER Stewart, above 1-2.

<sup>121</sup> M Briggs, above.

<sup>122</sup> *ibid* 22.

<sup>123</sup> See *ibid* 30.

<sup>124</sup> *ibid* 31.

<sup>125</sup> *ibid*.

<sup>126</sup> *ibid* 31.

<sup>127</sup> DA Harris, above 801.

<sup>128</sup> G Creeber, above 112.

<sup>129</sup> K Allan, J McGregor and S Fontaine, *The Impact of Television, Radio and Still Photography Coverage of Court Proceedings, Final Report, A Report Prepared for the Department For Courts* (Department of Human Resource Management, Faculty of Business Studies, Massey University, April 1998) 202. (New Zealand).

<sup>130</sup> K Allan, J McGregor and S Fontaine, *ibid*.

patterns, which facilitate instantaneity.<sup>131</sup> News values<sup>132</sup> of the organisation and the news policy<sup>133</sup> of the organisation. News value often requires or involves, for example, good pictures; short dramatic occurrences ‘which can be sensationalised’; novelty value; open to simple reporting; occur on a grand scale; are negative, violent, crime, confrontation or catastrophe; are highly unexpected or is what one would expect; content relevant to the audience; there are similar events in the news; contain human interest.<sup>134</sup>

All of this poses ‘threats and risks to the accuracy of news journalism since being accurate in news that is often disseminated globally has to embrace and work with the constraints of new time pressures.’<sup>135</sup> Europe has a greater reliance on public service broadcasters than the US.<sup>136</sup> Public service broadcasting is meant to lean much more towards information and education.<sup>137</sup> Courts and legal-policymakers may consider the implications for TCB effects-research.

Many earlier models of communication and the audience referred to almost a single receptive non-critical audience. More frequently this is expanded upon by greater research of the audience, different audience segments or groups and also research of individual audience members.<sup>138</sup> One example is ethnography research. We now also think of active readers and ‘active engagement’, as opposed to passive spectators, when we consider the audience.<sup>139</sup> ‘[I]nfotainment’ is often criticised.<sup>140</sup> Infotainment programming, for example reality television, is cheaper to produce than action programmes or studio based drama programmes.<sup>141</sup> Television genres are subject to market and commercial pressures – and influence, which can impact upon their content and texts.<sup>142</sup> A producer or television station may decide to foreground certain genre elements, such as entertainment or news, over other elements such as education.<sup>143</sup> The

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<sup>131</sup> Creeber, above 112.

<sup>132</sup> *ibid.*

<sup>133</sup> *ibid.*

<sup>134</sup> *ibid.*

<sup>135</sup> *ibid.*

<sup>136</sup> See, for example, D Creeber *ibid.* 115.

<sup>137</sup> *ibid.*

<sup>138</sup> See *ibid.* 14.

<sup>139</sup> See *ibid.* 15.

<sup>140</sup> *ibid.* 115 ff.

<sup>141</sup> According to figures referred to in Creeber, *ibid.* 24.

<sup>142</sup> See G Creeber, *ibid.* 7.

<sup>143</sup> Television programme makers might classify, label or promote a particular programme as being a particular genre does not mean that the audience should automatically accept the categorisation proffered. There should also be at least some element of ‘genre criticism.’ To use the words of D Creeber *ibid.* 10.

television market is increasingly competitive.<sup>144</sup> This may have potential effect on TCB forms.

*Entertainment:* Reality-TCB programmes might be primarily entertaining. Real TCB cases may have to compete against this. Possibly reality programming, including reality-TCB programming, is becoming more ‘daring.’<sup>145</sup> D McQuail, a leading communications researcher, states that television is ‘primarily considered a medium of entertainment.’<sup>146</sup> ‘At its most basic level, television is a scientifically managed institution for the mass production of entertainment ... that systematically produces permutations of the everyday and the spectacular. Those permutations are designed to capture audiences and deliver them to advertisers, in the case of commercial networks, or government, in the case of public stations. Genres combine the memorandum and the commodity; one ensures standardisation, the other marketability.’<sup>147</sup> One of the constraints of television is that it requires visuals.<sup>148</sup> One possibility is that this could mean that (some) TCB may have to be visually compelling. Context and contextualisation of CB<sup>149</sup> suggest further examination. Another feature of the mass communication process is that the ‘symbolic content or message of mass communication is typically “manufactured” in standardized ways (mass production) and is reused and repeated in identical forms. It has generally lost its uniqueness and originality through reproduction and overuse.’<sup>150</sup> One may ask whether TCB differentiates itself.

*Testing and Defining Educational TCB:* We might need to consider defining ‘education’ in the TCB context so that there is agreement as to what actually is being examined. In addition, we may require definitions so that we can compare results and build up a body of sustained TCB legal-empirical research. Such comparisons may be across contemporaneous studies and also across longitudinal studies. As there are a number of potential meanings that can be taken, it should not be automatically assumed (or claimed) that the meaning that is intended (eg education), is the one that will be assimilated by the audience viewer. There is research in terms of childrens’ educational and childrens’ educational television. We might consider when education is achieved; whether there is a minimum threshold; whether this is sufficient to ‘push’ educational content; whether it

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<sup>144</sup> See references and comments in D Creeber *ibid* 33.

<sup>145</sup> RER Stewart, above 1.

<sup>146</sup> D McQuail, above 35.

<sup>147</sup> D Creeber, above 159.

<sup>148</sup> *ibid* 112.

<sup>149</sup> M Briggs refers to the point that there is a lack of contextualisation in relations to audience research and television viewing, M Briggs, *Television, Audiences and Everyday Life* (Open University Press and McGraw Hill) 15.

will be used/received as intended; or whether there may be a sufficient amount of pull and reception to demonstrate that education is achieved. Social learning can occur in various contexts, locations and ‘patterns of viewing.’<sup>151</sup> We should consider assessing the content of TCB as well as examining how and where it is viewed. Those concerned with TCB issues, including courts and legal-policymakers, may need to delve deeper into how the audience uses TCB programming before it can be considered that there are education-effects.

*Education, Meaning and TCB Content:* We may need to consider what the footage of TCB actually means.<sup>152</sup> Past media literature assumes a transmission model, where the mass media merely transfer a message to the audience. It is now accepted that this transmission model is more complex and nuanced. Yet many popular TCB commentators rely on a similar TCB education-transmission model in relation to TCB audience education. Contemporary research advanced beyond this simple ‘transmission model,’ yet TCB discussion and research has not. More detailed focus might instead look at the process and making of TCB programming and the message within the footage. Research might also refer to what the TCB audience recipients do once they receive the TCB footage.<sup>153</sup> This makes the proponents of popular TCB transmission model of education and TCB education-effects more difficult to accept.

*Education, Television and TCB Usage:* The TCB research and literature does not appear to examine what the audience may do with the TCB footage. Courts, legal-policymakers as well as interested parties should be able to consider what legal-empirical research reveals in terms of what the audience, and the public, does with TCB. We should ideally also be able to consider whether other (television and other) media may be effected by it; what happens TCB and content after it is viewed eg is it discussed, where, and with what effects. In one study, there was a greater degree of ‘learning’ associated not with the footage but rather with the ‘increase in interpersonal communication about the legal system.’<sup>154</sup> These types of considerations are not yet represented in the TCB discussion.

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<sup>150</sup> See D McQuail, above 55.

<sup>151</sup> M Briggs, *Television, Audiences and Everyday Life* (McGraw Hill/OUP 2010) 105.

<sup>152</sup> See similar question regarding the meaning of video evidence in M Gillespie and J Toynbee, *Analysing Media Texts* (Open University Press and McGraw Hill 2006) 36.

<sup>153</sup> See discussion in D McQuail, above 55 ff. Also 63. J Fiske also refers to a plurality of meaning, so that there is not just one meaning or some automatic meaning that the (whole of the) audience will receive and understand. J Fiske, *Television Culture* (Methuen 1987), as referred to in D McQuail, above 118.

<sup>154</sup> RER Stewart, ‘The Changing Relationship Between Camera and the Courts’ (MA thesis, Florida Atlantic University 1998) 33, referring to D Brown, J Duane and B Fraser, ‘Media

In one survey during a high level of TCB, sixty six percent felt they had a greater understanding of the legal system, with thirty three percent saying they did not learn anything.<sup>155</sup> However, surveys seem to suggest that while confidence in the system may increase, the actual amount learned is relatively little.<sup>156</sup> The interview section of W Petkanas's research reveals that there was scepticism in relation to the value of TCB.<sup>157</sup> A question for TCB research and for TCB education, is why the audience may watch TCB. Possibly, for example, an 'interest, or base level of understanding, could lead to furthering this interest by seeking out specific programming, such as programs only found on [Tru TV].'<sup>158</sup> However, there appears to be no relevant TCB research as yet on the motivation for watching TCB.

*The One TCB Audience, One TCB Effect Suggestion:* It may be important that there may not be just one unique audience, and that different TCB audiences as well as TCB forms may exist. Equally, the audience may not be one static closed set with a distinct beginning and end<sup>159</sup> waiting for TCB broadcasts. The audience may be much more nuanced and divided. If we knew more details of who, why and how the audience views TCB, there may be TCB legal-policy<sup>160</sup> implications such as TCB form, scheduling, programming, length, slow motion, close-ups, distraction, etc.

It is perhaps over simplistic to assert that all TCB will educate, or that all TCB is the same. Equally, it may be over simplistic to suggest that all audiences will be equally receptive in their viewing and understanding of TCB. Such assertions ought to be verified and investigated. Relying on Constitutional legal texts alone does not achieve this. We may be wider and more open in our approach to understanding the arguments

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Coverage and Public Opinion of the OK Simpson Trial: Implications for the Criminal Justice System' (1997) 2:2 Communications Law and Policy 261.

<sup>155</sup> Times Mirror telephone survey, referred to in A Paul, 'Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About Real Law?' (1997) 58 Ohio State Law Journal 655, as referred to in RER Stewart, above 34. The survey is available at < <http://people-press.org/reports/pdf/19940204.pfd> > accessed by Stewart 26 October 2005. N = 1,200.

<sup>156</sup> RER Stewart, above 33-35.

<sup>157</sup> W Petkanas, above 98.

<sup>158</sup> RER Stewart, above 57.

<sup>159</sup> See comments of S Moores, *ibid* 1-3. The audience can also be defined in terms of that once off broadcast. We can also look at the audience location, context, reception and temporality. See S Moores, *ibid* 19 ff, 27-31, 34. We must also acknowledge differences between media. S Moores, above 47. As with agenda setting and textual research, and research regarding different audiences and audience segments, watching is never without experience and pre-suppositions. See B Chang, *Deconstructing Communications* (Minnesota University Press 1996) 56. He also states that 'reading is never innocent.' There are various audience measurement techniques. See S Moores, above 1-3.

<sup>160</sup> To use the words of S Moores, *Interpreting Audiences: The Ethnography of Media Consumption* (Sage 1993) 106.

and effects of TCB. In doing so we should appreciate the wider cross-disciplinary research possibilities available. In relation to the audience, some of these include research on eye-tracking, legal-psychology, communication, media, public opinion, attitudinal change, and information content in TCB communications.<sup>161</sup>

The media sometimes involves many audience segments.<sup>162</sup> So it can be over simplistic to assume that TCB will, for example, educate *the* audience. Each medium of communication can demand different attention<sup>163</sup> on the part of the audience. Different forms can also demand different attention levels. Interesting comparisons arise as between television TCB and internet iTCB. These points are not yet acknowledged in terms of the TCB question. We might begin to study the attention levels required of the TCB audience for TCB generally and different TCB forms with eye-tracking. There may be implications to consider for TCB education-effect legal-policy if we discover that eye-tracking research reveals that people look at various types of TCB programming differently.

Different audiences of the same programme<sup>164</sup> may take varied meanings from a TCB programme. P Dahlgren<sup>165</sup> refers to there being a 'plurality of meaning' and a 'diverse nature of sense-making.' People can receive the same programme differently. There is a certain degree of subjectivity which will always be present. In addition, audience reception of television can be 'socially bounded'<sup>166</sup> in that people do not make up meanings or interpretation without some reference to their social location. In addition, meaning can also be 'situational.'<sup>167</sup> Some research points to a close relationship between recall and prior knowledge held by individuals.<sup>168</sup> It may be difficult for viewers to identify whether their recognition of a story comes from a particular news programme or

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<sup>161</sup> See for example H Mowlana, *Global Information and World Communication* (2nd edn, Sage 1997) 11. See this work also in relation the political use of information and also how information and communications are now international in nature. Advertising has also become much more international, *ibid* 97.

<sup>162</sup> See R Dimelby and G Burton, *More Than Words, An Introduction to Communication* (3rd edn, Routledge 1998) 176.

<sup>163</sup> See D McQuail and S Windahl, *Communication Models for the Study of Mass Communication* (2nd edn, Longman 1993) 46.

<sup>164</sup> On audiences generally see, for example, P Drummond and R Paterson, *Television and Its Audience: International Research Perspectives: A Selection of Papers from the Second International Television Studies Conference* (British Film Institute 1986).

<sup>165</sup> P Dahlgren, 'What's the Meaning of This? Viewers' Plural Sense-Making of TV News' (1988) 10 *Media, Culture and Society* 285, 285, also 290, 298.

<sup>166</sup> *ibid* 190.

<sup>167</sup> *ibid* 291.

<sup>168</sup> B Findahl and O Hoiijer, 'Some Characteristics of News Memory and Comprehension' (1985) 29:4 *Journal of Broadcasting and Electronic Media* 379. See also G Gunter, A Furnham and G Gietson, above 16; A Hart, above 270.

from pre-existing knowledge or another news source.<sup>169</sup> EE Slotnick and JA Segal when referring to the US Supreme Court, suggest that there is more than one audience.<sup>170</sup> The issues surrounding the TCB audience to be educated are more complex than popular ‘transmission’ TCB model suggests.

*The TCB Media Audience:* Each of the different media forms addresses a different audience. This factor may be addressed in the planning and execution of research, as well as commenting upon same. Another complicating factor is that frequently the respective audiences for each form or medium will cross over. This may also be recognised in TCB education-effects research.

*TCB Audience Uses:* Other issues arise when we talk of audiences. We use terms such as ‘watching’ and ‘viewing,’ which imply passivity on the part of the audience.<sup>171</sup> There is a similar emphasis on what television does to people as opposed to, or in addition to, a focus upon what the audience does with television ie uses of television.<sup>172</sup> The audience use of TCB content is not yet properly addressed. There exists a large amount of research in relation to the media audience.<sup>173</sup> Some of this research has investigated media consumption in specific social contexts. This research might also be extended to cover courtroom broadcasts. For example, viewing undertaken alone, in a family setting or somewhere else entirely may differ in effect. We do not appear to know which particular members of a family view TCB. We do not know why individuals do so. We do not know why they tune into particular TCBs as opposed to others. These answers could help courts and legal-policymakers to understand how much of actual court proceedings and practice the TCB audience actually decodes, understands and assimilates from TCB.

*TCB, Meaning, Social Meaning and Use:* In terms of television and viewer meaning, there is a further issue regarding the ‘complicated relation between the television

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<sup>169</sup> P Neuman, ‘Patterns of Recall Among Television News Viewers’ (1976-7) 40 Public Opinion Quarterly 115, 117. There is also an issue with ‘aided recall’ studies. Compare also the eyewitness identification research.

<sup>170</sup> EE Slotnick and JA Segal, *Television News and the Supreme Court: All the News That’s Fit to Air?* (Cambridge University Press 1998) 8. *ibid.* Another issue for TCB research, is that each of the different media forms addresses a different audience. This factor must be addressed in the planning and execution of research, as well as commenting upon same. Another complicating factor is that frequently the respective audiences for each form or medium will cross over. This must also be recognised.

<sup>171</sup> A Hart, ‘Understanding Television Audiences’ (1992) 18 Journal of Educational Television 5, 6.

<sup>172</sup> These are perhaps more fundamental issues to be addressed than can be addressed in the design of individual studies.

<sup>173</sup> See for instance S Moores, *Interpreting Audiences: the Ethnography of Media Consumption* (Sage 1993).

programme, social reality, the viewers and their lives and thoughts.’<sup>174</sup> Often one meaning may be intended, but this is not always guaranteed to be achieved as it is possible that unexpected meanings emerge.<sup>175</sup> A Hart also states that ‘meaning is not only in the programme but also in the *reading*.’<sup>176</sup> Also, because media is viewed as a social activity or social resource,<sup>177</sup> we should have regard to how the audience carries out its viewing and reception activities. Some people may also view news and TCB as a resource to the community/audience. Perhaps it can be argued that it does not matter whether or not there is a guarantee that a certain amount of the population will view television (or CB) or that there will be a certain level of educative or information value produced. The media are described as being relevant to the public for a number of reasons or social uses, namely, as a source of information, as a source of social identity and as a means of entertainment or diversion.<sup>178</sup>

A significant amount of media consumption occurs during personal leisure periods.<sup>179</sup> In some research individuals who indicated that they watched the news to relax or get away from it all were found to have significantly lower rates of recall.<sup>180</sup> This may reduce the potential for pertinent TCB information to be transferred to the audience as they are in a more relaxed or non-serious frame of mind. How, why and when TCB is used are all issues of legal and legal-policy concern.

It should also not be assumed that TCB viewing occurs in isolation. Quite often a person may be doing one or even more tasks or activities at the same time, such as reading, cooking, eating, etc. People can also view television in family contexts. These ‘parallel activities’ may interfere, or reduce the opportunity for information to be taken in by the viewer. Viewing habits also differ between social groupings, with elderly people often watching television news more frequently than younger groups.<sup>181</sup> Television also does

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<sup>174</sup> *ibid* 32. See also CK Ogden and IA Richards, *The Meaning of Meaning* (Keegan Paul 1946), referred to in B Findahl and O Hoijer, above 31.

<sup>175</sup> KB Jensen, ‘News as Social Resource: A Qualitative Empirical Study of the Reception of Danish Television News,’ above 296.

<sup>176</sup> A Hart, above 15. Emphasis in original.

<sup>177</sup> See J Lull, ‘The Social Uses of Television’ (1980) 6 *Human Communications Research* 197. J Lull identifies some of the social uses of television as including: environmental; regulative; communication facilitation; affiliation/avoidance; social learning; and competence/dominance. *ibid*.

<sup>178</sup> See KB Jensen, ‘News as Social Resource: A Qualitative Empirical Study of the Reception of Danish Television News,’ above 60.

<sup>179</sup> In relation to education and leisure time see K Nessmann, ‘Media Education in Leisure Time’ (1985) 11 *Journal of Educational Television* 33.

<sup>180</sup> K Neuman, above 119.

<sup>181</sup> KB Jensen, ‘News as Social Resource: A Qualitative Empirical Study of the Reception of Danish Television News,’ above 297. It is also indicated in research that while there are



not occur in a vacuum but rather in the context of the complex behaviour taking place in the home.<sup>182</sup> The family is often television's natural audience<sup>183</sup> but we do not yet know if TCB is viewed (or viewed mainly) in a family setting.

*TCB Audience Size and Ratings:* Media scholars can be adept at defining distinct audiences and measuring audience ratings. Various audience measurement techniques exist.<sup>184</sup> These assist in measuring audience ratings. Research might consider what media ratings may tell us about the audience and popularity for different TCB forms. This research does not appear to have been commenced as yet. There are many criticisms that can be levelled against the amount and types of TCB research, one of which is that frequently we do not know how many people follow TCB. Even where figures are available for particular TCB broadcasts, this does not tell us the composition of the audience. Neither does it tell us how TCB produces and conveys meaning to its audience, nor how successful it is at doing this. Unfortunately, research has not frequently examined ratings issues in the wider context of TCB effects.<sup>185</sup>

*Recall of TCB:* Sustained research into recall of TCB is absent. Another factor impacting upon recall and information uptake rates is audience attention,<sup>186</sup> motivation and ability to recall. Another is the individual cognitive ability to process visual and audiovisual data. There are other factors which compete for audience attention eg listening to the radio at home or listening on a crowded train (these are referred to as 'contextual factors').<sup>187</sup> A separate point is that some people use the media more than others. Some may be avid

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super-themes and sub-themes, those with a lesser amount of education will more frequently rely upon the super-themes. Also, people can often repeat the political themes presented by the stories or journalists. See *ibid* 297. See also references in M Schudson, 'The Sociology of News Production' (1989) 11 *Media, Culture and Society* 263, 269. See also B Findahl and O Hoijer, 'Some Characteristics of News Memory and Comprehension' (1985) 29 *Journal of Broadcasting and Electronic Media* 389. The super-themes can belong to or represent a wider social philosophy or agenda. The later audience is able to identify and associate with this political agenda.

<sup>182</sup> J Lull, above 199.

<sup>183</sup> *ibid* 198.

<sup>184</sup> Some referred to in S Moores, such as, set meter, diary and people meter techniques. S Moores, above 1-3.

<sup>185</sup> In one week period CNN coverage of the preliminary hearings in the Simpson case made 14 of the top 15 highest TV slots. The week of 4-10 July was the highest week that CNN had had since the Gulf War. The other four main broadcasters also broadcasting the case, namely CBS, ABC, NBC and Fox, carried six times the CNN audience, amounting to 29.6 million - 31.8 million American homes. 'Simpson Hearing Gives CNN A Boost' (Seattle Post-Intelligencer 15 July 1994). Also, 'Once we have surrendered our senses ... to the private manipulation of those who would try to benefit from taking a lease on our eyes and ears ..., we don't really have any rights left' as referred to in M McLuhan, 'Understanding Media' quoted in A Hall, above 7.

<sup>186</sup> J Stauffer, R Frost and W Rybolt, 'The Attention Factor in Recalling Network Television News' (1983) 33 *Journal of Communications* 29, 36.

news readers and watchers, while others may never watch the television news. Some may be avid TCB viewers. There may also be differences between recall and comprehension.<sup>188</sup> We should also consider that memory processes can be compartmentalised. For example, an individual may not recall a particular story on the economy. However, when assisted and queried about the economy [they] may easily recall the story. News stories consists of ‘Events,’ which occur in places, involving ‘Principals,’ and encompass a ‘Cause’ and ‘Consequence.’<sup>189</sup> The latter two items appear to be recalled least of all because they are more complex items and involve perhaps a greater amount of attention on the part of the viewer. Places and principles are more easily recalled. If applied to the TCB debate, potentially places or the events leading up to a case (such as a crime scene and the principle parties), may be recalled more easily. RH Wicks<sup>190</sup> also refers to categorises of words and pictures used in research studies which can be described as either ‘high-imagery’ (eg objects such as a tree or football) or ‘low-imagery’ (eg theory, sociology, atheist). Recall increases over time for the high-imagery items but declines for the low-imagery ones. This could mean that underlying court procedures, legal issues and arguments were recalled and understood to a lesser extent.

*TCB Audience Attention:* There is also research which suggests that media communicators, despite their potential, are more interested in catching and keeping visual and aural attention.<sup>191</sup> They are simply concerned with media numbers and ratings for commercial reasons. The emphasis is not on communication or message transfer. So while it may be possible for the media to educate through TCB, an issue is what happens in actuality when TCB is permitted. Unfortunately we do not yet know. There should have already been sustained studies investigating whether the TCB media focus on ratings and popularity over education and social utility. There are two discontinued pilots of TCB in the US, namely the first Federal pilot and the one in New York.<sup>192</sup> The Federal pilot was discontinued because the judges felt that the media were selective in choosing certain media friendly cases and ignoring all of the many other types of cases. The media leans towards promoting ‘TV arousal.’<sup>193</sup> There is an interesting point to be developed in

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<sup>187</sup> Referred to in ML DeFleur, L Davenport, M Cronin and M DeFleur, above 1011.

<sup>188</sup> See B Findahl and O Hoijer, above 381.

<sup>189</sup> *ibid* 381 ff.

<sup>190</sup> RH Wicks, above 670.

<sup>191</sup> See D McQuail and S Windahl, above 56.

<sup>192</sup> D Stepniak, *Audio-Visual Coverage of Courts* (Cambridge University Press 2008) 102.

<sup>193</sup> In the words of G Comstock et al, *Television and Human Behaviour* (Columbia University Press 1978), as referred to in D McQuail and S Windahl, above 67.

terms of whether some iTCB may be a reaction to this, or seen as providing a better option in terms of potential educational TCB (eTCB).

*TCB Audience Segments:* Marketing and market research are highly sophisticated. It can also be highly developed in segmentisation of the public and consumers. This recognition and the models of research which accept that the public comprised of sub-groups can equally apply to those watching TCB.<sup>194</sup> Eye-tracking can be applied to TCB research of different TCB audience segments.

*TCB Effects Beyond the Viewing Audience:* When we consider the out-of-court TCB effects, commentators generally refer to the effect on the TCB viewing audience. However, it is possible that effects may extend wider to the non-viewing public. Consider some examples. Lunchtime or water cooler conversation at work can centre around a particular TCB broadcast that day or the day/night before. Some people may have seen it, but some people may not have. However, the TCB broadcast and the comments and interpretation of those who did view it, may influence and effect the non-viewers. Another example may be that the non-viewers could be influenced to go and watch the subsequent days of the TCB case being broadcast – or possibly snippets, repeats or archive copies, if available. The effects of TCB on the wider public has to be considered. Normative TCB effect issues have yet to be fully considered.

*TCB Audience Reception:* In attaining a greater understanding and appreciation of what programming content is received by the audience (or public)('reception'), we can use some of the tools and methods of media ethnography. These seek to understand what a real audience in a particular social context feels about particular programming.<sup>195</sup> The reception research investigates meaning not in the message or communication itself, nor the media organisation, but rather in the audience who receive the communication.<sup>196</sup> For example, the researcher may spend time with the audience research subjects in their work and or home setting, and over an extended period. They observe and record specific pre-determined list of actions and reactions. This is significantly more time consuming and involved than mere rating techniques. It is important, however, because it goes beyond simple ratings. Ratings ask how many people watch a particular programme. Ethnography and other research techniques examine what an audience gets out of and

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<sup>194</sup> See *ibid* 124 ff. See also See D McQuail and S Windahl, above 151 and references therein.

<sup>195</sup> See S Moores, above 3 and references therein. See also references and descriptions throughout.

<sup>196</sup> See D McQuail and S Windahl, above 145 ff. Some of these tools build on previous tools in anthropology and sociology for example.

understands from programmes. Courts and legal-policymakers do not yet have information available to them to consider what individuals and individual audiences do with TCB content.

*TCB Audience Understanding:* TCB audience research also refers to nuanced research differentiating the message offered; receivable; received; registered; and internalised by the audience.<sup>197</sup> TCB footage might be analysed in such detail in order that we can better understand what educational or other message TCB broadcasting contains, offers, is receivable, is received, is actually registered with viewers and what, if anything, they learn. Unless we start analysing TCB we are left with the presumptive, unvalidated and popular arguments which are of minimal legal and legal-policy benefit.

*TCB Audience Uses:* Other audience issues arise. Terms such as ‘watching’ and ‘viewing’ TCB imply passivity on the part of the audience.<sup>198</sup> There is a similar emphasis on what TCB may do to people as opposed to a focus upon what the audience does with TCB ie uses of TCB.<sup>199</sup> The audience use of TCB content could be a beneficial area of focus to address in further research. A large amount of media research exists.<sup>200</sup> Some of this research investigates media consumption in specific social contexts. This research might be extended to TCB. For example, TCB viewing undertaken alone, in a family setting or somewhere else entirely may potentially differ in their effects. TCB research does not address which particular members of a family view TCB; why they may do so; why they may tune into particular TCB broadcasts as opposed to others; and the potential effect issues. This line of research could help us to understand how much of actual court proceedings and practice the audience actually understands from TCB. Eye-tracking can test where the audience members are looking on the TCB on screen. It can test for focus, distraction, attention and where on the broadcast they most frequently watch. This audience research can be in a research setting to maximise subject participation. Further research can be based in the home setting to compare the audience normal/comparative viewing of TCB and other programme viewing. Eye-tracking may also be used, for example, to examine if the audience member at home look away from the TCB on television, how frequently and for how long.

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<sup>197</sup> *ibid* 152.

<sup>198</sup> A Hart, ‘Understanding Television Audiences’ (1992) 18 *Journal of Educational Television* 5, 6.

<sup>199</sup> These are perhaps more fundamental issues to be addressed than can be addressed in the design of individual studies.

<sup>200</sup> See for instance S Moores, *Interpreting Audiences: the Ethnography of Media Consumption* (Sage 1993).

*International Flows of TCB Broadcasts:* While there has been research, such as that referred to and summarised by H Mowlana,<sup>201</sup> international flows of information and communications, there has been no research yet into the international flow of US TCB broadcasts, and the effects of same. While this can be done for all TCB wherever it occurs, it appears that most internationally viewed CB originates in the US. While referring to a separate issue a representative of TV3 in Ireland uses the term ‘an American format.’<sup>202</sup> Some research has found that heavy viewers overestimate the proportion of people employed as lawyers. Separately research also estimates that there is approximately ten times more crime on television than in real life.<sup>203</sup> Public tolerance and views of crime can be affected by media and statistical presentation.<sup>204</sup> Qualitative research involves long term first hand observation close to the study subject, the primary methods being participant observation, case studies<sup>205</sup> and interviews.<sup>206</sup> Later studies have also focused on the media organisations.<sup>207</sup> There appears no research of the international flow of, for example, US TCB and the effects of same. While eye-tracking research of the TCB audience can occur, it is also possible to begin comparing certain international TCB audience effects via eye-tracking.

*TCB Content Research:* Other techniques of measuring audience effects can focus on analysing the content of the broadcast.<sup>208</sup> Text and content analysis are important because ‘[e]ven statements which may appear purely descriptive will in most cases be performative in the sense that they are designed to produce a specific effect in the recipient(s).’<sup>209</sup> This is particularly well suited to research of programmes which can be recorded and analysed. The text of the programme is available. Equally the text of the previous TCB broadcasts may also be available. The reading and analyse of texts of TCB is open for research. We can analyse and decode the language and meaning of TCB. This may also assist in differentiating forms of TCB further. In addition, we may get an appreciation of accuracy of different TCB forms. Eye-tracking is already used to research printed text and cross-media content. TCB audience eye-tracking research may

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<sup>201</sup> See H Mowlana, above 66 ff.

<sup>202</sup> Interviewed on Orla Barry’s *The Green Room* (Newstalk 15 May 2010).

<sup>203</sup> G Gerbner et al, ‘TV Violence Profile No. 8: The Highlights’ (Spring 1977) 27:2 *Journal of Communication*, as referred to in H Mowlana, above 73-74.

<sup>204</sup> See K Stenson and D Cowell, *The Politics of Crime Control* (Sage 1991) 3.

<sup>205</sup> KB Jensen, and NW Jankowski, *A Handbook of Qualitative Methodologies for Mass Communication Research* (Routledge 1991) 44.

<sup>206</sup> *ibid* 100. The methodological stages are data collection; analysing qualitative data; aids to analysis; analytical procedures; and finally reporting the qualitative research.

<sup>207</sup> See *ibid* 84.

<sup>208</sup> See, for example commentary of S Moores, above 1-3, 5-7. Also see Teun A van Dijk, ‘The Interdisciplinary Study of News as Discourse’ in KB Jensen and NW Jankowski, above 108.

be possible. We can look at the content of TCB.<sup>210</sup> We could examine the ‘visual communication’<sup>211</sup> and non-verbal communications of TCB. N Fairclough refers to the visual images and sound effects of television. Other considerations also arise, such as layout and visual impact.<sup>212</sup> Text analysis of TCB is recommended. However, situational research of the various TCB audiences is also recommended.<sup>213</sup> The particular practice of viewing also contributes to the effects of TCB. The existing recorded ‘texts’ of TCB programmes do not appear to have been extensively studied in a body of research in terms of victims, accused and participants to see if TCB content labels, stigmatises or alienates. Also, we might research whether these existing texts assist, for example, in further alienating outgroups in society or amplifying and labelling convictions, behaviour or attitudes.<sup>214</sup> If most TCB is crime focused, we might want to consider what the effects may be. An analysis of existing TCB footage might show that some of it enforces existing consensus and opinions on particular issues.<sup>215</sup> We may look at the textual language and scripts of TCB. This means studying the spoken and written language,<sup>216</sup> vocabulary, semantics, sentence grammar, smaller units, sound system, writing system, textual organisation, and connection between sentences.<sup>217</sup> In addition, we may examine the ‘visual communication’<sup>218</sup> and non-verbal communications of TCB, or as N Fairclough refers to it, the visual images and sound effects as parts of the text. Newspapers, for example, combine words with photographs, maps, diagrams, etc. However, other considerations also arise, such as layout and visual impact.<sup>219</sup> These are relevant issues for TCB effect-research.

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<sup>209</sup> KB Jensen and NW Jankowski, above 34.

<sup>210</sup> See N Fairclough, *Media Discourse* (Edward Arnold 1995) 17. This means studying the spoken and written language, vocabulary, semantics, sentence grammar, smaller units, sound system, writing system, textual organisation, and connection between sentences. See *ibid* 57.

<sup>211</sup> KB Jensen and NW Jankowski, above 37.

<sup>212</sup> N Fairclough, above 17. See also E Loftus, *Eyewitness Testimony*, above 72 referring to non verbal influences.

<sup>213</sup> These are known as cultural studies. *ibid* 27 ff.

<sup>214</sup> See S Cohen, *Folk Devils and Moral Panics* (Paladin 1973); the works of Thomas Szasz; and, for example, D Stenson and K Cowell, *The Politics of Crime Control* (Sage 1991) 9, 130. Also see C Hamilton, ‘Moral Panic Revisited: Part One’ (2005) 15 *Irish Criminal Law Journal* 8 ff (part 1), and 15 ff (part 2). Amplification research or deviance amplification is referred to by Lemert in 1951, referred to in C Hollin, *Psychology and Crime* (Routledge 1989) 12. This is part of labelling theory.

<sup>215</sup> See studies referred to in K McQuail and N Windahl, above 29. Also see 47.

<sup>216</sup> See N Fairclough, *Media Discourse* (Edward Arnold 1995) 17.

<sup>217</sup> See *ibid* 57.

<sup>218</sup> KB Jensen and NW Jankowski, above 37.

<sup>219</sup> N Fairclough, above 17. See also E Loftus, *Eyewitness Testimony*, above 72 referring to non verbal influences.

*Attention and Salience of TCB Audience:* There is also research in relation to media effects and how much attention the audience places on particular content and also how important (salience) the content is to them.<sup>220</sup> One measure for salience is whether the programme was so important that a person discussed it with others or told others about it. Research can be linked to the media usage patterns of the public eg we might assess what a person seeks out to watch and listen to. Why, for example, does a person (or audience) seek out TCB or particular TCB forms? Possibly the audience for push TCB (eg Tru TV) may differ from pull TCB (eg iTCB). Also, while TCB (like all media content) is frequently consumed in private, it is then differentiated between full viewing, viewing while doing some activity, listening only, and also alone or in a group.<sup>221</sup> It is important to be aware of and differentiate these differences and levels of attention. TCB (like all media content) may be differentiated between full viewing, viewing while doing some activity, listening only, and also alone or in a group.<sup>222</sup> It is important to be aware of and differentiate these differences in TCB research.

*The TCB Message and What TCB is Communicating:* Other audience message research examines the message offered; receivable; received; registered; and internalised.<sup>223</sup> TCB content footage needs to be analysed and broken down so that we can begin to understand what message TCB contains, offers, is receivable, is received, is actually registered with viewers and what, if anything, the learn. Unless we start analysing TCB we are left with the same presumptive and opinion based arguments. Eye-tracking of TCB audience members adds a new opportunity to examine the educational potential, aims, purpose, message intended and effects resulting from TCB.

TCB communications research could refer to researching and understanding what we are communicating, how we are communicating and why we are communicating.<sup>224</sup> None of

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<sup>220</sup> See K Kraus and D Davis, *The Effects of Mass Communication on Political Behaviour* (Pennsylvania State University Press 1980) 132 ff.

<sup>221</sup> See N Fairclough, above 49.

<sup>222</sup> *ibid.*

<sup>223</sup> *ibid* 152.

<sup>224</sup> See R Dimbelby and G Burton, *More Than Words, An Introduction to Communication* (3rd edn, Routledge 1998) preface. See also B Chang, *Deconstructing Communication* (Minnesota University Press 1996), who queries whether we can get to a single true understanding of communications message and meaning, see for example 49. D Stenson and K Cowell, also refer to the point that even in crime discussions, there is debate as to how to define crimes, see D Stenson and K Cowell, *The Politics of Crime Control* (Sage 1991) 10. It is also increasingly noted that an audience is not always passive and receiving all of what is communicated or intended to be communicated, rather an audience is 'active,' see J Downing, A Mohammadi and A Sreberny-Mohammadi, *Questioning the Media* (Sage 1995) 205, 212. A person, or audience, will view particular media content and

these have been researched for TCB. Eye-tracking provides one useful way to research this area. We are not yet in a position to say that we understand what is communicated by TCB. We have not researched the communication process of TCB, what is communicated by TCB, nor communications as between the different forms of TCB. At a basic headline level, and without distinguishing between different TCB forms, we might research what, how and why TCB communicates. The Lasswell Formula<sup>225</sup> describes the communications process by means of the following questions, namely who, says what, in which channel, to whom, and with what effect.<sup>226</sup> It might be questioned whether TCB is educational, if we do not ask what is being communicated, how is it being communicated and why is it being communicated. It may be simplistic to suggest, that all forms of TCB will educate, or that all forms of TCB communicate similarly. Even when we, or a presenter, are not speaking or moving, we are still communicating. 'One cannot not communicate.'<sup>227</sup> Television messages are rarely neutral.<sup>228</sup> It is important that we properly understand what the different forms of TCB communicate, what is sent, and ultimately what is received. Some messages can be clear and overt, but others are not as obvious.<sup>229</sup> Exploring the many avenues of effects is import in overcoming speculation and opinion in relation to TCB effects. We could consider applying communications research models to TCB. For example, who films/broadcasts TCB; what does TCB say; in which TCB form; to which audience; and with what effect. The TCB message is under-researched. There are also different forms of TCB and, therefore, potentially different TCB messages and audiences.

We can examine the non verbal communications (eg gestures, non word verbal noises) of recorded TCB broadcasts. Also, we might consider how popular forms of TCB may shape our views, or reinforce existing views.<sup>230</sup> Media materials or programmes can be described as text.<sup>231</sup> It is possible to examine their content, meaning and message. This is sometimes referred to as textual analysis, and can be applied to TCB programmes similar to other programmes. For example, it is relevant for courts and legal-policymakers to appreciate how a TCB programme may be put together; what happens when we analysis the images; what happens when we examine the type of camera; what we learn when we

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programmes for particular uses and gratifications, *ibid* 212, and at particular times, the time of reception, *ibid* 214, 493.

<sup>225</sup> Referred to in D McQuail and S Windahl, above 13.

<sup>226</sup> These were researched with various analysis techniques, such as, content studies, content analysis, media analysis, audience analysis and effect analysis.

<sup>227</sup> K Watzlawick et al, referred to in R Dimbleby and G Burton, above 1.

<sup>228</sup> R Dimbleby and G Burton, above 23.

<sup>229</sup> See *ibid* 24.

<sup>230</sup> Advancing on communications comments of D Dimbleby and G Burton, above 163.

<sup>231</sup> *ibid* 166–167.



examine the editing of a TCB programme; what happens when we do this systematically across TCB forms. If we begin such an exercise we might start to understand what different TCB programmes and forms communicate and what messages they have.

TCB and TCB forms, just like other programmes, have particular languages, language forms and styles, and each of which can be spoken and or visual.<sup>232</sup> Courts and legal-policymakers may not be expected to know anything about TCB communications and messages without seeking to examine them and having research available to them. Issues also arise in relation to how the TCB style used, contributes to the message taken by the viewer and the effect on the viewer, whether intended or otherwise.<sup>233</sup> Communications and media studies long recognise the selection process for stories and programming. This selection or editing is known as gatekeeping.<sup>234</sup> No gatekeeping analysis appears to be suggested yet in relation to TCB forms, TCB programmes and TCB channels.

There are many definitions and descriptions of communications and communications theory. In essence it refers to researching and understanding *what* we are communicating, *how* we are communicating and *why* we are communicating.<sup>235</sup> None of these have been researched for TCB. Unfortunately, we cannot yet say that we understand what is communicated by TCB. Nor can we say that we have researched the communication of TCB and what is communicated by TCB. Neither can we say that we have undertaken any examination of communication in any of the different forms of TCB. At a basic headline level, and without distinguishing between different TCB forms, we need to start research into what, how and why TCB is communicating.<sup>236</sup> It is perhaps naive to refer 'CB' generically and purport that CB is one all encompassing broadcast genre or legal genre. There are many forms of, what is referred to as, TCB, and all forms of, issues, points, considerations and arguments in relation to TCB needs to be separated out.

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<sup>232</sup> ibid 169 ff.

<sup>233</sup> See ibid 167.

<sup>234</sup> See chapter in D McQuail and S Windahl, above 166.

<sup>235</sup> See R Dimbelby and G Burton, *More Than Words, An Introduction to Communication* (3rd edn, Routledge 1998) preface. See also B Chang, *Deconstructing Communication* (1996, Minnesota University Press), who queries whether we can get to a single true understanding of communications message and meaning, see for example 49. D Stenson and K Cowell, also refer to the point that even in crime discussions, there is debate as to how to define crimes, see D Stenson and K Cowell, *The Politics of Crime Control* (Sage 1991) 10. It is also increasingly noted that an audience is not always passive and receiving all of what is communicated or intended to be communicated, rather an audience is 'active,' see J Downing, A Mohammadi and A Sreberny-Mohammadi, *Questioning the Media* (Sage 1995) 205, 212. A person, or audience, will view particular media content and programmes for particular uses and gratifications, ibid 212, and at particular times, the time of reception, ibid 214, 493.

<sup>236</sup> Referred to in D McQuail and S Windahl, above 13.

Consider that even when we, or a presenter, are not speaking or moving, we are still communicating. ‘One cannot not communicate.’<sup>237</sup> Consider also that communications and messages communicated are rarely neutral.<sup>238</sup> It is therefore even more important that we properly understand what the different forms of TCB communicate, and within the communication what messages are being sent - and received. This is further emphasised by the point that some messages can be clear and overt, but others are not as obvious and are covert.<sup>239</sup> Without proper investigation we might easily miss some of the TCB messages in the different forms.

*TCB Communication Models:* We should begin research by applying the above communications research models to TCB. For example, we can apply the models, and applying some of the study methods from communication may indicate we can utilise certain for these for the different issues of analysis which arise, for instance,

<b>Who films/ broadcasts TCB?</b>	<b>What does the TCB say?</b>	<b>In which TCB form?</b>	<b>To which audience?</b>	<b>With what effect?</b>
<i>Communicator</i>	<i>Message</i>	<i>Medium</i>	<i>Receiver</i>	<i>Effect</i>
Research model: Control Studies of TCB	Research model: Content analysis of TCB and TCB forms	Research model: Media analysis of TCBs	Research model: Audience analysis of TCB	Research model: Effects analysis of TCB

There are various forms or categories of broadcaster (or Communicator). Research of the TCB message (or messages) is underdeveloped. Different forms of TCB may also mean different TCB messages, and therefore possibly different out-of-court and audience effects.<sup>240</sup>

The potential audience for some of the forms of TCB in a media environment could also mean that it is critically important that we do understand the messages being

<sup>237</sup> K Watzlawick et al, referred to in R Dimpleby and G Burton, above 1.

<sup>238</sup> R Dimpleby and G Burton, above 23.

<sup>239</sup> See *ibid* 24.

<sup>240</sup> An additional area of research would be to identify and track the non verbal communications (eg gestures, non word verbal noises) of a taped television courtroom broadcast.

communicated by each of them. For example, how does mass media or popular forms of TCB shape our views and also how do they reinforce existing understandings we may have?<sup>241</sup> The content, texts<sup>242</sup> textual analysis of TCB if further examined in a purposeful body of research, as opposed to individual stand alone studies, will assist court and legal-policymaker understanding of the nuances of TCB. This may assist in understanding what it is different TCB programmes and forms communicate and what messages they have. The components of different TCB forms can all contribute to different effects.<sup>243</sup> One critique may be that we cannot expect to know anything about TCB communications and messages without seeking to examine them. The particular TCB programme style can contribute to audience effects.<sup>244</sup> The process of audience selection of different TCB programming forms is little understood. Traditional media and communication concepts such as creation, editing and gatekeeping are also little understood in the TCB environment.<sup>245</sup> In the news context this is carried out by news editors or producers.

*TCB Structure/Content:* The structure of TCB, be it courtroom broadcasts, CB in news programming, CB in documentaries, etc, may be studied. Studying the structure and superstructures<sup>246</sup> is required. N Fairclough refers to public affairs media, which includes news, documentary, magazine programmes, dealing with politics, social affairs, science, etc.<sup>247</sup> as well as the constant tension between information and entertainment.<sup>248</sup>

TCB deserves detailed normative research attention.<sup>249</sup> TCB content may be examined for accuracy, objectivity and effects. Part of this would be textual and content specific, while some would examine the audience(s). However, the courtroom participants should not be ignored, as they will have opinions on the content actually broadcast as well as offering a gauge as to accuracy and objectivity on the content. The TCB discussion could

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<sup>241</sup> Advancing on communications comments of R Dimbleby and G Burton, above 163.

<sup>242</sup> *ibid* 166–167. For example, examining how individual TCB programmes may be put together; what happens when we deconstruct or analysis the images; what happens when we examine the type of camera; what do we learn when we examine the editing of a TCB programme; what happens when we do this systematically across different TCB forms.

<sup>243</sup> Eg particular communication languages, forms, styles, what is spoken and what is visualised, see *ibid* 169 ff.

<sup>244</sup> See *ibid* 167.

<sup>245</sup> See chapter in D McQuail and S Windahl, above 166.

<sup>246</sup> See *ibid* 114.

<sup>247</sup> N Fairclough, above 3.

<sup>248</sup> *ibid* 8. These superstructures include the Headline, Lead-in, Main Events, Context, History, Verbal Reactions and Comments. There is also in some instances the advance adverts and trailers. KB Jensen and NW Jankowski (eds), above 114. Structures also in newspaper articles, for example, Headline, Lead, Satellite (paragraphs) and Wrap Ups, the order of which is always fixed. N Fairclough, above 85.

<sup>249</sup> See *ibid* 38.

benefit from sustained content analysis of TCB, and in particular the content of each of the different TCB forms.<sup>250</sup>

*TCB Broadcasting Styles:* Equally important in terms of research is the style<sup>251</sup> of the broadcast. There are many alternative ways of saying something, describing something or conveying meaning. The style of and form of TCB should be scrutinised. In terms of broadcasting styles there can be backgrounding and foregrounding of content and of texts. There are also, for example, many ways of presenting visual content, such as camera angles can be CU (closeup), MS (medium shot), WS (wide shot) and MCU (medium close up).<sup>252</sup> In one study it was felt to have a normalising effect in relation to a particular topic.<sup>253</sup> Camera-perspective-bias is also an area of comparison for TCB.

*Participants/Witness Memory and Recall:* Eyewitness research identifies three stages, namely acquisition, retention and retrieval.<sup>254</sup> These correspond to the sequence of the event witnessed. The event occurs as follows: witnessing the incident, the waiting period prior to giving evidence, and finally giving evidence. This, if applied to TCB, could look like,

- Acquisition (witnessing the TCB broadcast);
- Retention (the waiting period prior to using, discussing, retrieving or recalling the TCB broadcast), and
- Retrieval (finally using, discussing, retrieving or recalling the TCB broadcast eg discussing or talking about it or answering research or a survey in relation to the TCB content viewed).

There has been ongoing research and classification of the factors influencing eyewitness memory. It is clear that no similar research exists in the study of TCB. It is also clear that the rather superficial literature relating to TCB needs an altogether greater level of details and sophistication. Take, for example, some of the variables identified in relation to eyewitness memory, such as, social,<sup>255</sup> situational,<sup>256</sup> individual<sup>257</sup> and interrogational.<sup>258</sup> C Hollin indicates that the ‘study of eyewitness memory [is] concerned

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<sup>250</sup> Content analysis of mass media and communications is increasingly common and is very helpful in appreciating different media and different media and programming forms.

<sup>251</sup> See KB Jensen and NW Jankowski, above 115.

<sup>252</sup> See N Fairclough, above 111.

<sup>253</sup> *ibid.*

<sup>254</sup> See C Hollin, *Psychology and Crime* (Routledge 1989) 153.

<sup>255</sup> Attitudes, conformity, prejudice, status of interrogator and stereotyping.

<sup>256</sup> Complexity of event, duration of event, illumination and time delay.

<sup>257</sup> Age, cognitive style, personality, race, sex and training.

<sup>258</sup> Artists sketches, computer systems, ID parades, mugshots, photofits.

with the effects of these variables at the stage of acquisition, retention, and retrieval ... [and] has generated a vast body of research.<sup>259</sup> TCB research in some respects is highly unsophisticated. It relies almost predominantly on self assessment surveys. Even in terms of witness research, TCB has not identified (or even sought to identify) any factors or variables which would influence each of the different courtroom participants in terms of their eg memory recall being affected by (a) TCB cameras being in the courtroom and/or (b) their being involved in media TCB. One of the argument of some TCB proponents is that TCB is/will be educational. This is again unresearched. No factors have been proposed as to who, why, how, when or if TCB is educational. One of these variables may be the particular TCB form being utilised. Education may be tested across the TCB forms to better assist courts when they continue to consider these TCB issues.

*TCB and Police Programmes:* N Fairclough<sup>260</sup> undertook research of *Crimewatch* UK and found that it consists of re-enactments, interviews, public appeals, photocalls, incidents, lost property, etc, and also researched the effects of and relationships affected. He notes that the music is reminiscent of police crime dramas. He comments that such programmes might contribute to moral panics. He also categorises the various elements of the broadcast. This includes the voiceovers, again which has never been considered as relevant to TCB effects, and which deserves to be included in such research. The re-enactments serve a dual function of identification/information but also entertainment. The programme also focuses on certain types of crimes, the ones that lend themselves to dramatisation.

*Different TCB Effects Communicated:* The original model of communicating messages was that a single message was transmitted, received and understood directly. It is now recognised as being more complex. D McQuail and S Windahl<sup>261</sup> refer to this stating 'the original basic model of communication, with its emphasis on purposive transmission of message, and the seemingly purposeless flow of mass communication' has evolved. The effects of TCB can be varying and subtle. Our research and examination of TCB effects can (a) be significantly more detailed, (b) not rely as heavily on self-reports, and (c) should rely on as many sources of relevant research as possible. Again we have to first define what we mean by an effect when researching audience effects. We can be looking

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<sup>259</sup> See C Hollin, above 154.

<sup>260</sup> N Fairclough, above 150 ff.

<sup>261</sup> D McQuail and S Windahl, above 9. It is also recognised in media research that there may not just be direct contemporary effects. There can also be longer term effects and indirect effects. Impacts can relate to the degree of attention of the media to particular issues. See *ibid.*

for informative effects; education-effects; viewing habit effects; reaction effects; different effects on different members of the audience; situational and viewing effects; differential effects between different TCB forms; cross comparative effects between jurisdictions; cross comparative effects between cultures; etc. There are audience based research studies and research tools which can assist TCB research.<sup>262</sup>

*News TCB:* We might consider how useful news snippets of TCB are. Many interested parties could be interested to know if they are educational. Eye-tracking research can begin to assist us in addressing these questions. Consider, for example, the eye-tracking research undertaken by M L-H Vo and WX Schneider<sup>263</sup> into the information we obtain from mere glimpses. They found,

‘strong evidence for the influence of flashed scene previews on the guidance of eye movements which indicated that participants were able to generate, store, and make use of initial scene representation for subsequent target search ... the results ... add to the growing evidence that initially generated scene representations can be stored across saccades continuously exhibiting their influence on eye movement control.’<sup>264</sup>

However, one group was found to process information faster than the other group.<sup>265</sup> This may have possible implications for TCB. P Dahlgren states that,

‘[t]here are a number of strategies for the analysis of meaning in TV news stories. Research can focus on both trying to delimit the possible range of meanings available ... alternatively the meanings of the programmes can be probed from a broader cultural perspective. In both cases attention is paid to the manner in which sense is encoded and communicated by the news stories; and the overall programme form ... concern with TV news as a structured discourse - rather than as a collection of discreet informational facts - is paramount. Meaning is understood to be predicated upon the unified ensemble of

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<sup>262</sup> It is also said in a lot of research that while there are super-themes and sub-themes, those with a lesser amount of education will more frequently rely upon the super-themes. Also, people can often repeat the political themes presented by the stories or journalists. See KB Jensen, above 297. See also references in M Schudson, ‘The Sociology of News Production’ [1989] 11 *Media, Culture and Society* 263, 269. See also B Findahl and O Hoijer, ‘Some Characteristics of News Memory and Comprehension’ [1985] 29 *Journal of Broadcasting and Electronic Media* 389. This means that the super-themes belong to or represent a wider social philosophy or agenda. The later audience is able to identify and associate with this political agenda. See J Lull, above 198, 199.

<sup>263</sup> M L-H Vo and WX Schneider, above, the EyeLink eye-tracker described at 179.

<sup>264</sup> *ibid* 187.

<sup>265</sup> *ibid* 191. The information shown to the groups was different, see 192, *ibid*.

elements which constitute the news programmes (or any other cultural production, for that matter).<sup>266</sup>

Effects for news TCB may have to be considered in terms of the other items and components of the news bulletin.

*TCB, Eye-Tracking and Education:* Eye-tracking can also be considered in relation to TCB educational-effect research. It may be utilised to see where TCB audience subjects are looking. Examples may include how much they look at the TCB footage on screen; how much they look away at other things or people in the room; how much they look at particular items in the TCB footage; how the TCB viewing compares to other TV programme footage, other education related footage and entertainment footage.

### **Conclusion**

It is clear that there has been no proper research of TCB distraction-effects, nor has there been a proper consideration and understanding of the various TCB audience effects. Various studies can be undertaken with eye-trackers in relation to out-of-court effects. Just some of the potential studies can consider the following.<sup>267</sup> The sustained out-of-court effects on society are generally ignored by TCB research.<sup>268</sup> S Barber highlights the need to focus on audience effects of TCB.<sup>269</sup> There is little audience effects-research of TCB since.

This work also highlights that there is significant and respected research and experience in a variety of other research fields to the TCB question. The TCB effects discussion needs to be expanded because it has not advanced since the first TCB broadcasts. Following on from existing studies and research of news effects, we can undertake research of TCB to see the extent of the audience research; audience recall of news content; and audience comprehension of particular items of news.<sup>270</sup>

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<sup>266</sup> P Dahlgren, above 288.

<sup>267</sup> We should also appreciate that such TCB eye-tracking audience effects studies, while beneficial, are not going to provide every answer immediately. This is because they are focused on particular individual broadcasts. The real import may be from longer term or wider audience effects research.

<sup>268</sup> E Borgida, K DeBona and LA Buckman, 'Cameras in the Courtroom, The Effects of Media Coverage on Witness Testimony and Juror Perceptions' (1990) 14:5 *Law and Human Behaviour* 489, 490.

<sup>269</sup> *ibid* 95 ff.

<sup>270</sup> See D McQuail and S Windahl, above 85.

Another avenue of research relates to the gratification uses of the audience of the media and audience appeal.<sup>271</sup> Overall, the out-of-court effects of TCB are not properly addressed. While not a focal point of the US Supreme Court research challenge, it needs to be addressed in future sustained research. The audience/public motivation for watching<sup>272</sup> TCB might be considered. This is relevant to investigate to consider better whether TCB educates or which form may educate best. It may be that the public prefers some forms of TCB over others. We have significant TCB research yet to pursue.

The source and credibility of the media source and form is also important.<sup>273</sup> How accurate is TCB? Is it accurate or an ‘illusion of truth’<sup>274</sup>? P Thaler notes that audience effects research is neglected.<sup>275</sup> He suggests that further studies should research the relationship between media coverage and public opinion and effects on the court process.<sup>276</sup> He refers to S Barber who describes the audience research to date as anecdotal.<sup>277</sup>

W Petkanas suggests research recording and showing TCB to audiences. The audience subjects may be interviewed afterwards.<sup>278</sup> No reference is made to eye-tracking. He further suggests another study with one group viewing TCB footage, while another reads reports of the same case.<sup>279</sup> Eye-tracking may also help with other research issues. For example, T-R Valikoski<sup>280</sup> notes that many responses to in-court research questions of attentional focus issues (in this instance prosecutors) does not provide evidence of cognitive processes, only reported indications of attentional effects.

The actual footage and segments broadcast potentially can have effects. One aspect we might begin research of, is the use and integration of different footage segments; presenter discussion, analysis, etc. Whether there is continuity, discontinuity, visual momentum<sup>281</sup> and what effects occur for the viewer are also relevant focuses for research.

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<sup>271</sup> See *ibid* 134, 141.

<sup>272</sup> In relation to motivation research, note SF Davis, *Handbook of Research Methods in Experimental Psychology* (Blackwell 2003) 389 ff.

<sup>273</sup> D McQuail and S Windahl, above 109.

<sup>274</sup> To use the words of Esposito, above 53.

<sup>275</sup> P Thaler, above 179.

<sup>276</sup> *ibid*.

<sup>277</sup> *ibid*.

<sup>278</sup> W Petkanas, ‘Cameras on Trial: An Assessment of the Educational Affects of News Cameras in Trial Courts’ (PhD thesis, New York University 1990) 118.

<sup>279</sup> *ibid*.

<sup>280</sup> T-R Valikoski, ‘The Criminal Trial as a Speech Communication Situation’ (thesis, University of Tampere, Finland 2004) 178.

<sup>281</sup> See CD Wickens, M Vincow and M Yeh, above 383, 402.



We might ask ‘what do you ... see?’<sup>282</sup> in the context of the audience of TCB. Eye-trackers can help us to see what the audience focuses upon in a given picture or broadcast. In the featured court scene, we can examine whether the audience viewer is distracted by the visible TCB cameras.

J Holsanova et al used eye-tracking to research the effects of reading information graphics in a newspaper study.<sup>283</sup> They found that different spatial layouts had a significant effect on readers’ eye movement behaviour.<sup>284</sup> They indicate that the results are important in contributing to the study of attention issues.<sup>285</sup> Research identifies different reading and scanning speeds with different tasks and purposes.<sup>286</sup> We may start undertaking research into attention, education, information, etc, in relation to the TCB audience.

One of the problems to date is that predominantly TCB research focuses on potential effects inside the courtroom (in-court). It ignores any substantial or sustained reference and consideration to audience effects and effects on persons outside of the courtroom (out-of-court).<sup>287</sup> The query arises as to whether courts and legal-policymakers can rely on the research and research effort to date. Legal-psychology, eye-tracking, media and communications studies should be applied to the audience-effect TCB issues too. Courts, legal-policymakers as well as those concerned with the effects and arguments of TCB will be interested to see further information and research regarding the educational nuances of TCB. This is particularly so in relation to the potential for TCB, or particular TCB forms, to educate, and policy preferences that may occur.

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<sup>282</sup> See SMI article of this heading available at < www.smi.com > accessed 19 January 2014.  
<sup>283</sup> ibid 1-12. The main measures of online reading compared were reading order; reading time; and text-graphic integration. ibid 8.  
<sup>284</sup> ibid 1, 10.  
<sup>285</sup> ibid 1.  
<sup>286</sup> See references in R Khosla, J Simola, J Salojarvi and I Kojo, ‘Using Hidden Markov Model to Uncover Processing States from Eye Movements in Information Search Tasks’ (2008) 9 Cognitive Systems Research 237-251, and 238. R Khosla et al researched different instructional tasks, namely, word search, question - answer task and finding subjectively most interesting answer, and tracking time for the various tasks. ibid 238-240. They also refer to different subject states, namely, scanning, reading and decision state. ibid 245-246, and 249. The decision state suggested a more careful analysis, ‘Reading Information Graphics: The Role of Spatial Contiguity and Dual Attention Guidance’ (2008) 22 Applied Cognitive Psychology 1 at 248.  
<sup>287</sup> There is one study, however, which found that where viewer reaction to a particular case was gauged via a questionnaire in Arizona. One thousand questionnaires were used with a twenty five percent response rate. Ninety five percent watched the trial more than once and eighty four percent agreed with the guilty verdict. See (30 November 1987) New Law Journal 13 ff, as referred to in W Freedman, *Press and Media Access to the Criminal Courtroom* (Quorum 1988) 46.



## CHAPTER 20: INTERNATIONAL, PUBLIC AND JUDICIAL RESEARCH

### Introduction

While the author provides the main TCB baseline related research in Ireland with the original and current judicial surveys, the author felt that it was necessary to expand beyond this by undertaking a three-way analysis. The author wanted to research judicial, media/press and audience/public issues. The issue of audience research and of public attitudes in Ireland have not been researched and have not been investigated in any representative studies. The author sought to begin this broader baseline research. This is the first such research in Ireland. This public out-of-court research is referred to below. It is also recommended that funding be made available to continue this public research, as this will provide a valuable baseline for policy discussion and debate, as well as more importantly, a baseline for audience/public effects-research in the event that any form of TCB is introduced in Ireland in future. Unfortunately, the television and newspaper responses to the questionnaires were not sufficient to report upon here. However, this is definitely an area which demands to be researched in future.<sup>1</sup> This would better assist courts and legal-policymakers in individual cases and general policy as regards TCB. The author also undertook an international survey in relation to TCB in various jurisdictions. Many countries were contacted and thirty responses were received. These are referred to below.

### International TCB Survey

The author also undertook an international survey in relation to TCB during 2014. Thirty country jurisdictions replies to the survey were received.<sup>2</sup> The responses to the query ‘in your jurisdiction, is there TCB or television cameras in court,’ were as follows,

- 7 jurisdictions said Yes<sup>3</sup>;
- 13 jurisdictions said No.<sup>4</sup>

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<sup>1</sup> On Irish audience issues generally, see for example, MJ Kelly and B O’Connor, *Media Audiences in Ireland: Power and Cultural Identity* (University College Dublin Press, 1997). There is also a wider research to compare also, for example, P Moy, M Pfau and Kahlor, ‘Media Use and Public Confidence in Democratic Institutions’ (1999) 43 *Journal of Broadcasting & Electronic Media* 137.

<sup>2</sup> The countries surveyed are Australia, Belgium, Bulgaria, China, Czech Republic, Denmark, El Salvador, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Malta, Mexico, New Zealand, Norway, Senegal, Republic of Serbia, Singapore, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, UK, US, Uruguay. Details of all replies with author.

<sup>3</sup> These were Czech Republic (but subject to rules), Estonia, Hungary, Italy (rules apply), New Zealand, South Africa, US (but different forms and rules apply; not all courts).

<sup>4</sup> These were Belgium, Bulgaria (explicitly prohibited), Denmark, El Salvador, Finland, France (prohibited), Greece (prohibited), Ireland, Senegal, Singapore, Sweden (prohibited), Switzerland (generally prohibited; may be local exceptions to both), Uruguay. Some of these also have explicit prohibitions. Study undertaken during 2014.

In addition,

- 1 jurisdiction said generally No, but that the High Court permits iTCB<sup>5</sup>;
- 3 jurisdictions said that it is up to court<sup>6</sup>;
- 2 jurisdictions said generally No but exceptions may apply<sup>7</sup>;
- 1 jurisdiction said that there are proposals but that these are heavily opposed<sup>8</sup>;
- 1 permits limited TCB, namely in Supreme Court (iTCB) and Court of Appeal (UK). However, the UK Lord Chief Justice has halted any extension and is reviewing the issues.

This re-emphasises the disparate nature of official reactions to TCB issues, and restrictions. Unfortunately, however, it is more difficult to see what knowledge and appreciation of the effect-issues and the available legal-empirical research may exist.

### **Public**

There does not appear to be any official or representative surveys of the attitudes of the public in Ireland towards TCB issues. Funding was sought for a survey of public attitudes in Ireland.<sup>9</sup> The proposed survey was based upon some similar survey questions in other jurisdictions, for example, the public survey conducted in New York.<sup>10</sup> This would have been useful in gauging attitudes of the public in Ireland on a representative scale, and also in terms of comparing the results with similar surveys elsewhere. It would also have been useful in terms of being baseline research ie carried out prior to the possible introduction of TCB in Ireland (if this was ever to occur). Unfortunately, no funding was available. The author commissioned a significantly shortened public attitudinal survey in relation to TCB issues in Ireland. This was based on some areas of the original survey proposed above. The survey consisted of two questions, each containing four sub parts. It was carried out on 6 - 8 September 2010 by redc research.<sup>11</sup> 1,000 telephone interviews were conducted of an over eighteen age group representative sample of the Irish population.<sup>12</sup> The survey gauged attitudes to the justice and court system and attitudes towards TCB.

### **Public Attitudes Towards TCB in Ireland**

This question used an Agree/Disagree scale (Agree Strongly; Agree Slightly; Neither Agree nor Disagree; Disagree Slightly; Disagree Strongly) for four statements. The first

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<sup>5</sup> Australia.

<sup>6</sup> China, Spain, Taiwan.

<sup>7</sup> Malta, Norway.

<sup>8</sup> Slovenia.

<sup>9</sup> For example, Broadcasting Commission of Ireland.

<sup>10</sup> See the Marxist Institute for Public Opinion Poll, December, 1996, contained in the *New York Cameras in New York Courtrooms report, New York State Committee to Review Audio-Visual Coverage of Court Proceedings, An Open Courtroom: Cameras in New York Courts* (Fordham University Press 1997).

<sup>11</sup> Lambert - RedC Courts Public Survey, 8 September 2010. Survey results with author.

<sup>12</sup> *ibid.*

statement gauged attitudes to the statement ‘Television cameras in the courtroom should be allowed.’ The percentage score agreeing was 52 percent and disagreeing was 39 percent. The second statement gauged attitudes to the statement ‘Television cameras in the courtroom are a source of entertainment and should not be allowed.’ The percentage score agreeing was 43 percent and disagreeing was 39 percent. The third statement gauged attitudes to the statement ‘Television in the courtroom would increase the public’s understanding of the justice system.’ The percentage score agreeing was 60 percent and disagreeing was 32 percent. The fourth statement gauged attitudes to the statement ‘Television in the courtroom would increase the accuracy of the news coverage of a trial.’ The percentage score agreeing was 66 percent and disagreeing was 24 percent. This is the first representative survey of public attitudes in Ireland towards TCB. However, there is understood to have been an online poll survey carried out by an Irish Times online poll in 2008. The question asked was ‘Should court proceedings be televised?’ While no figures are given for Yes and No, it is understood that the majority replied No, and there was a margin difference of eight percent. However, the actual figures are unavailable.<sup>13</sup>

### **Confidence in the Justice System in Ireland**

The first question used a confidence scale of 1–10 (1 not at all confident; 10 extremely confident) for four statements. The first statement gauged confidence in ‘The justice and court system in Ireland.’ The score out of 10 was 4.96. The second statement gauged confidence in ‘The accuracy of the legal news reports in newspapers.’ The score out of 10 was 5.23. The third statement gauged confidence in ‘The accuracy of the legal news reports on TV.’ The score out of 10 was 5.83. The fourth statement gauged confidence in ‘The accuracy of the legal news reports in online websites and forums.’ The score out of 10 was 4.94. P Newenham<sup>14</sup> refers to the 2007 Garda Public Attitudes survey. This is also professionally undertaken. 78 percent of respondents believed that the criminal justice system was too lenient.<sup>15</sup> 49 percent felt that victims get a raw deal from the criminal justice system.<sup>16</sup> In a similar Garda survey in seventy eight percent felt that the criminal justice system was too lenient on offenders.<sup>17</sup> P Newenham also refers to a small

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<sup>13</sup> Reported in P Newenham, ‘Televising the Courts: An Exploration of Opinions of Irish Media and Legal Professions’ (Masters in Journalism, DCU 2008) 57. Unpublished. Referring to Sergeant P Kennedy and Garda C Browne, *Garda Public Attitudes Survey 2007* (Garda Research Unit, Research Report No 12/07). The author sought unsuccessfully to obtain this survey from the Irish Times.

<sup>14</sup> P Newenham *ibid* 12-13.

<sup>15</sup> *ibid*.

<sup>16</sup> *ibid* 13.

<sup>17</sup> C Brown, *Garda Public Attitudes Survey 2008* (Garda Research Unit, Research Report No 1/08) 60.

business survey where only 2 percent had confidence in the judicial system.<sup>18</sup> However, this may require to be contextualised. An EU Eurobarometer survey found that 32 percent of Irish people do not believe that the European Parliament is listening to them.<sup>19</sup>

## Overview

41 percent strongly agrees that television in the courtroom would increase the accuracy of news coverage of a trial, and with 25 percent agreeing slightly. 35 percent agreed that television in the courtroom would increase the public's understanding of the justice system, with 25 percent agreeing slightly. The figures decreased again when asked whether they agreed with the statement 'television cameras in the courtroom should be allowed.' 31 percent agreed strongly and 22 percent slightly agreed. That is a total of 55 percent. However, 14 percent disagreed slightly and 24 percent disagreed strongly. This total is 38 percent. The professional survey company state that '[t]wo thirds agree that TV in the courtroom would increase the accuracy of trial news coverage, with a similar number also agreeing it would increase the public's understanding. However, just over half believe that cameras should be allowed, with over two in five agreeing they should not be allowed.'<sup>20</sup> The age profile 18 – 20 four appears to be agreeing most that TCB would improve accuracy and understanding.

There is no confirmation in the survey that audience or public confidence in the judicial system would increase as a result of TCB.<sup>21</sup> However, it would be interesting to explore in greater depth in future research, which courts and types of cases the public would favour for TCB. The budget for same is beyond the current exercise. It would also be important for future research to examine the educational issues and what the public feel would be educational and why. Again, the current budget did not permit research of the educational issue in the survey. Indeed, this is something which needs to be researched in all jurisdictions permitting or considering permitting TCB.

Overall, confidence levels were relatively lower accuracy of reporting. It was also low for confidence in the justice and court system. Over 1 in 4 had little or no confidence in the justice system. Interestingly, people in Dublin were the least likely to have confidence in the accuracy of reporting on television.

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<sup>18</sup> P Newenham, above.

<sup>19</sup> Conducted between January – February 2009, reported in S MacConnell, 'Four in 10 of Irish Polled Believe European Parliament Listens' *Irish Times* (Dublin, 28 August 2009).

<sup>20</sup> *ibid.*

<sup>21</sup> Note KL Cripe, 'Empowering the Audience: Television's Role in the Diminishing Respect for the American Judicial System' (1998–1999) 6 *UCLA Entertainment Law Review* 235.

The age group 24 – 34 had a particular lack of confidence in newspaper reports of court proceedings. Younger people in particular were more likely to have a lack of confidence in online reporting. The male profile in Connaught Ulster had the least confidence in the justice system. While speculation, there have been a number of police scandals and related cases in Donegal, one of the counties in the instant profile area.

### **Reservations**

There are a number of issues that may be pointed out. Given that the survey was significantly shortened some very pertinent related questions were not asked. Also, we are not able to consider the potential reasons for some of the replies in greater detail as there are no follow on questions. It is recommended that the survey be repeated at regular intervals. It is additionally recommended that more detailed and related questions also be asked on a regular basis in future.

### **Judicial Research**

P Newenham notes that the only legal-empirical research in relation to TCB in Ireland was the author's judicial research in 1996.<sup>22</sup> While there is no TCB in Ireland, survey research such as the author's 1996 research and later research of 2010 (see below), are a significant contribution to baseline research, and the general discussion and debate in Ireland. A further judicial survey was conducted in relation to Irish judicial attitudes in the Republic of Ireland to TCB.<sup>23</sup> This repeated and expanded upon the earlier research of the author. Judges in Ireland were asked if they were in favour, in principle, of permitting TCB in Irish courts. 77.50 percent responded negatively, while 22.50 percent were in favour.<sup>24</sup> Originally 66.6 percent of Irish judges responded negatively to this question.<sup>25</sup> Therefore, if we approximate the figures against TCB in Ireland, the 67 percent of judges in 1996 has increased to 78 percent. The judicial opposition to TCB in Ireland has increased. A majority of Irish judges continue to oppose TCB.

### **Description**

The study was timely in terms of the Irish issues in relation to TCB which are touched upon in the thesis, as well as developments in the UK Supreme Court and Court of

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<sup>22</sup> P Newenham, above 35.

<sup>23</sup> The questionnaire and results are set out in the Appendices. Conducted during February and March 2010.

<sup>24</sup> Part Question A-3(2010).

<sup>25</sup> P Lambert, 'Judicial Questionnaire on Courtroom Broadcasting' (1997) 15 Irish Law Times 50; also P Lambert, 'Courtroom Television Broadcasting' (1997) 2:5 Communications Law 180.

Appeal and the proposed second Federal courts study in the US. In addition, it is timely to undertake such research as it partly replicates a similar study undertaken by the author of Irish judicial attitudes in the summer of 1996 to TCB.<sup>26</sup> The author has undertaken the first representative survey of public attitudes in Ireland in relation to TCB. It was also felt beneficial to be able to make certain international comparisons in the current judicial research. Therefore, certain parts of a judicial study in New York were repeated (or adapted as appropriate) in the present study.<sup>27</sup> Unfortunately, there is no similar extensive UK judicial survey to compare.

Part 1 Questions 6–10(d) of the current judicial study were taken from a survey to judges in New York.<sup>28</sup> It is interesting to compare the Irish and US replies. The questions in Part 2 of the present judicial study come from the original Irish survey of the author.<sup>29</sup> The author repeats the original survey to also compare current and original results. Certain additional questions were also included in the current judicial study, as it was felt they could provide useful information, in particular in relation to forms and different court levels in Ireland.

### **Northern Ireland and UK**

The author sought to expand the survey to Northern Ireland and the UK. Unfortunately, officials in Northern Ireland indicated that matters such as TCB are viewed as policy issues upon which the judiciary do not normally comment nor participate in. Despite initial interest and extensive contacts, the UK (England and Wales) judiciary were unable to engage in the extended research at this time.<sup>30</sup> It would have been interesting to compare the results of the current study with what is effectively a different, albeit neighbouring, legal jurisdiction.<sup>31</sup> Perhaps this might be revisited in future.

There does not appear to be any comparable study of judicial attitudes to TCB in the UK. However, eight ‘judges’<sup>32</sup> did respond to a UK ‘consultation’ undertaken by the Department of Constitutional Affairs. While there is no breakdown provided in terms of

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<sup>26</sup> Published in 1997, *ibid.*

<sup>27</sup> See *New York State Committee to Review Audio-Visual Coverage of Court Proceedings, An Open Courtroom, Cameras in New York Courts* (Fordham University Press 1997) 95 ff.

<sup>28</sup> Which was published in 1997, *ibid.*

<sup>29</sup> Undertaken during the summer of 1996 and published in 1997. P Lambert, ‘Judicial Questionnaire on Courtroom Broadcasting’ above.

<sup>30</sup> Details and correspondence with author.

<sup>31</sup> Correspondence request dated 3 February 2010 and response dated 9 February 2010 with author.



the judges, the highest responses for each type of court were in favour of prohibiting TCB, with a majority against cameras in all but two levels of court.<sup>33</sup> The author was involved in extensive communications with the Judicial Office in the UK but the efforts were unsuccessful at this stage.

### **Media Attitudes**

The author also drafted media research questionnaires focussing on newspapers and television media in Ireland. While some of these were distributed there was a very low return rate. It was, therefore, decided that the low level of replies should not be reported in detail in this work.

### **Survey**

At the time of the current judicial survey, there were 144 judges in the Republic of Ireland (as indicated by the official courts website<sup>34</sup>). The survey questionnaire was sent to all 144 judges. The questionnaires and cover letter were sent in personally addressed envelopes to judges in their court offices. One difficulty was that some judges moved about, whether 'on circuit' or as moveable judged. These judges did not appear to have an official fixed court office address. The court offices kindly assisted in forwarding the questionnaire to these judges. However, it is possible that a particular judge or judges did not receive the questionnaire or did not receive it on time. The same list of 144 judges were also sent a follow up reminder letter in case they had not yet returned to questionnaire. The author appreciates the various replies received from the judiciary.

The original 1996 survey had 27 completed questionnaire replies out of a then population of 92 judges. Three additional judges replied by saying that they had decided not to complete the questionnaire. These 3 judges identified themselves. They did not have to. There was, therefore, a reply rate of 29.35 percent (N=27).

In the current study 5 judges replied by indicating that they were not responding to the questionnaire. One indicated that he/she has no experience of TCB in court and therefore could not assist (N1). One judge apologised for not being able to reply due to current pressure of work with a legal Tribunal but indicated that the research was 'interesting and

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<sup>32</sup> Included in the 8 are 2 coroners, 2 lay magistrates and 3 tribunal chairs. See *Broadcasting Courts, Response to Consultation* (CP(R) 28/04, 30 June 2005) Response to Consultation Carried Out by the Department for Constitutional Affairs, 45.

<sup>33</sup> See responses to Question 5, *ibid* 9.

<sup>34</sup> Located at < [www.courts.ie](http://www.courts.ie) > accessed 1 February 2010.

worthwhile' (N2). Another judge declined in part because they had 'no views' on TCB, had not seen any televised trials and doubted 'that cameras will ever spend much time in [his/her District Court]' (N3). One judge declined after having carefully considering the matter (N4). One judge indicated he was originally in favour of academic judicial research. However, recent examples of 'certain public commentators' using such research in a less considered manner and in a manner embarrassing the judiciary, has changed their mind (N5).

Judges N1, N2, N3, N4 and N5 identified themselves in correspondence. They did not have to do so. One postal questionnaire was returned unanswered, possibly by the court office. Six separate postal letters were received advising that a particular judge was 'on circuit' and would be advised of the research questionnaire on their return or advising (in response to the follow up reminder letter) that the questionnaire was already replied to.

There were 43 questionnaires returned completed (J1 – J43). One judge apologised for a delay in returning the questionnaire (J1). Judges J1, J2, J3, J14 and J42 identified themselves. This was not necessary and judges were advised that the questionnaire was anonymous. One judge completed parts of the questionnaire but indicated time pressure in terms of not being able to complete it all (J4). Therefore, there was a response rate of 29.86 percent to the current study (N=43)(Total 144). This is a similar percentage to the 1996 survey, despite the judicial population increasing from 92 to 144 during the intervening period.<sup>35</sup>

## Results

Full details of the survey are set out in the Appendices, as are comparisons with the New York<sup>36</sup> survey results and the original Irish survey results (of 1996).<sup>37</sup> No pretence is made that the views expressed are representative of the entire judiciary in Ireland. Nevertheless, there was a strong proportionate response rate to both Irish judicial surveys. The original *Questionnaire on Courtroom Television Cameras* comprised of four sections: A, B, C and D. The current survey comprised two main sections, Part 1 and Part 2. The first replicated questions previously used to investigate judicial attitudes in New

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<sup>35</sup> From 1996 to 2010.

<sup>36</sup> *New York State Committee to Review Audio-Visual Coverage of Court Proceedings, An Open Courtroom: Cameras in New York Courts* (Fordham University Press 1997).

<sup>37</sup> P Lambert, 'Judicial Questionnaire on Courtroom Broadcasting' (1997) 15 *Irish Law Times* 50; also P Lambert, 'Courtroom Television Broadcasting' (1997) 2:5 *Communications Law* 180.

York (Part 1). The second section replicated sections A, B, C and D from the original Irish survey of the author (Part 2). The main results can be summarised as follows.

### **Ireland/New York**

- In terms of access generally, 62.79 percent Strongly Agreed that TCB cameras should not be permitted in criminal courts (Part 1 Question 7(d)). In terms of civil cases 57.50 percent Strongly Agreed that TCB cameras should not be permitted (Part 1 Question 7(h)). Combined with Somewhat Agree, the total was 62.50 percent (Part 1 Question 7(h));
- Later 78.57 percent Strongly Opposed television coverage of criminal trials (Part 1 Question 10(a)). Combined with the 4.76 percent Somewhat Opposed, the total was 83.33 percent. In terms of civil trials, 64.28 percent were Strongly Opposed, with 9.52 percent Somewhat Opposed. The combined total was 73.80 percent (Part 1 Question 10(b)). 67.50 percent Strongly Opposed televised pre-trial civil arguments. 95 percent Strongly Opposed televised children/juvenile cases. 95.12 percent Strongly Opposed televised family cases. (Part 1 Questions 10(d) – (e));
- In terms of different court levels, the results are clearly against, albeit varying somewhat (Part 1 Questions 10(h) - (o)). 68.29 percent Strongly Opposed televised District Courts; 71.79 percent Strongly Opposed televised Circuit Courts; 66.67 percent Strongly Opposed televised High Courts; 58.97 percent Strongly Opposed a televised Supreme Court; 71.79 percent Strongly Opposed a televised Special Criminal Court; 64.10 percent Strongly Opposed a televised Court of Criminal Appeal; 62.50 percent Strongly Opposed televised appeal cases; and 74.36 percent Strongly Opposed a televised Central Criminal Court. These questions were specific to Ireland. The lowest opposition level, therefore, is approximately 60 percent. Eventhough TCB is permitted in the new UK Supreme Court, there was approximately 60 percent opposition by Irish judges to televising the Irish Supreme Court. Most judicial surveys ignore the issue of different types of courts and different forms of TCB;
- Judges were concerned about the commercial exploitation of judicial proceedings by the television industry (Part 1 Question 8(e)). 66.67 percent Strongly Agreed and 21.43 percent Somewhat Agreed (combined 88.10 percent). They were somewhat less concerned in relation to the newspaper industry;
- A number of judges stressed they were against TCB. However, *if* permitted, most were in favour of controls and restrictions. For example, Part 1 Question 9(a) asked if cameras were permitted, would they favour delayed broadcasting, 81.82 percent said Yes. In New York the replies were 50:50;
- Various questions referred to the media generally. For example, Part 1 Question 6(a) asked whether television coverage increases the accuracy of news accounts of judicial proceedings. The highest answer in Ireland was 30 percent Strongly Disagree, as compared with a highest answer of 38 percent Somewhat Agree in New York;

- Part 1 Question 6(b) asked if television coverage has enhanced public understanding of judicial proceedings. The highest reply was 35 percent Somewhat Agree. In New York the highest reply was thirty five percent Somewhat Agree. In Ireland there was a combined 45 percent for Somewhat Disagree and Strongly Agree. This compared with 45 percent in New York;
- When asked if television coverage is more likely to serve as a source of entertainment than education for the viewing public, 47.50 percent Strongly Agreed and 35 percent Somewhat Agreed. This combined as 82.50 percent. In New York 41 percent Strongly Agreed and 39 percent Somewhat Agreed. The combined New York total was 80 percent. New York experimented with, and then discontinued TCB. New York can also be contrasted with a more liberal attitude to TCB in California;
- Judges were also asked if television coverage transforms sensational criminal trials into mass-marketed commercial products (Part 1 Question 6(f)). 74.38 percent Strongly Agreed and 17.95 percent Somewhat Agreed, combining as 92.33 percent. The equivalent results in New York were 57 percent Strongly Agree and 30 percent Somewhat Agree. The combined total was eighty seven percent;
- When asked whether television had a positive effect on the civil and criminal justice systems (Part 1 Questions 6(j) and (k)), the results differed for each. In terms of the civil justice system, the result was 30.77 percent Somewhat Agree (highest answer). The highest answer differed for the criminal justice system, namely, 35.90 percent Strongly Disagree;
- 64.10 percent Strongly Disagreed that judges should have discretion to allow criminal cases to be televised (which differed from the New York result) (Part 1 Question 7(a)). This figure receded to 54.05 percent Strongly Disagree in relation to civil cases (Question 7(f)).

### **TCB Access**

In terms of access generally, 62.79 percent Strongly Agreed that TCB should not be permitted in criminal courts (Part 1 Question 7(d)). In terms of civil cases 57.50 percent Strongly Agreed that TCB cameras should not be permitted (Part 1 Question 7(h)). Combined with Somewhat Agree, the total was 62.50 percent (Part 1 Question 7(h)).

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A number of judges stressed they were against TCB. However, *if* permitted, most were in favour of controls and restrictions. For example, Part 1 Question 9(a) asked if TCB was permitted, would they favour delayed broadcasting, 81.82 percent said Yes. In New York the replies were 50:50.

## Ireland

Part 2 Section A contained seven questions requiring Yes/No answers, gauging judicial opinion on this subject generally and some viewing habits.

Part 2 Section B contained twelve Agree/Disagree view type questions. Part 2 Section C contained eleven questions and respondents answered each item on a four point response scale ranging from Strongly Agree (1) to Strongly Disagree (4). Closed questions were chosen for these sections because they were easy for respondents to answer and also easy to analyse the results thereof. Part 2 Section D differed in that it provided four vignette situational questions (eg in relation to eyewitness identification) where respondents had to choose the correct/most correct answer from a choice of (a) through (d). This was based upon research, literature and legal-empirical findings in the fields of media, communications and psychology-law. The rationale for this section in particular was to test the awareness of respondents to literature within these fields and particularly of the issues involved in eyewitness testimony, as that it provides one of the main stimuli and models upon which to research the in-court effects of TCB can be modelled. The questions, sections and response forms in Part 2 of the Questionnaire are summarised below.<sup>38</sup>

**Summary of Part 2 Question Response Forms**

Section	Question Response Form
Part 2 A	Yes/No answers
Part 2 B	Agree/Disagree answers
Part 2 C	Strongly Agree (1) to Strongly Disagree (4)
Part 2 D	Correct/most correct answer from a choice of (a) through (d)

Many respondents gave uninvited answers. The author was taken by the number of respondents who chose to sign their response or offer uninvited comments. Judges were made aware at the outset that the questionnaire was being conducted on an anonymous and confidential basis. Other factors which may have increased the response rate in addition to anonymity were self addressed and stamped envelopes for replies, a

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<sup>38</sup> One should note, however, that some Part 2 Section B questions are presented below in Part 2 Section C, and vice versa. All those answers presented in Part 2 Section B refer to questions taken as correct or true (or with very strong support in the communications field as being true). All of those answers presented under Part 2 Section C are likewise taken from the communications and legal-psychology fields, but are opinion in essence, albeit with support within large sections of the field.

personalised letter to each judge and that each judge was informed that results would be made available in a future publication ie their work was not disappearing.

### **Section A**

This section contains questions designed to discover judicial viewing habits (eg did they view *Simpson* (criminal) case?) and gauge judicial opinions towards courtroom cameras (are they in favour?; why/why not?). Part 2 Question A-1 asked if judges had viewed the OJ Simpson case. [65] percent indicated yes both in 1997 and in 2010. Those who did not, were asked if they deliberately chose not to. 42.86 percent indicated Yes (N=14).

Many of the proponent and opponents of television courtroom television broadcasting argue that there will be or will not be effects of such broadcasting. However, while there has been effects-research, the research is rather limited, particularly more methodical and legal-empirical research. It was interesting to ask judges if they had seen or were aware of any TCB research. Part 2 Question A-2 asked if they had seen any research on the TCB audience. 92.31 percent indicated No. In 1997 95.83 percent had replied No.

A similar question asked if they had seen any research on the effects of TCB (Part 2 Question A-3). 92.31 percent replied No. This question was not asked in 1996. Part 2 Question A-4 asked if judges were in favour of permitting TCB cameras into Irish courts. 76.92 indicated No. This is a percentage increase on the 77.50 No reply in 1996. In percentage terms opposition has hardened somewhat. It is close to eighty percent.

### **TCB Viewing**

43 responses were received for this section. Of this 64.10 percent indicated that they had seen the Simpson case. 35.90 percent did not (Part 2 Question Part 2 A-1). Those who did not view the Simpson case were asked if this was a deliberate choice. 46.67 percent agreed it was.

#### **Part 2 Question A-2:**

‘Have you seen any research on the TCB audience?’

92.31% answered No.

#### **Part 2 Question A-3:**

‘Have you seen any research on the effects of TCB?’

Again, 92.31 percent answered No.

#### **Part 2 Question A-4:**

'In principle, are you in favour of permitting television cameras into Irish Courts?'

77.50 percent said No.

Asked if they were in favour, in principle, of permitting TCB in Irish courts 77.50 percent responded negatively, while 22.50 percent were in favour (Part Question A-3). Part 2 Question 7 (Part 2 Question A-7) asked if respondents had been influenced by TCB in any other jurisdiction. 51.61 percent replied Yes, with 48.39 percent saying No. Predominantly, these answers referred to the US.

The New York study found that judges favoured broadcasting. (Question 5). In another US study, albeit in 1970, 92 percent of 483 judges felt that TCB should not be allowed.<sup>39</sup>

Obviously this may have changed since. US Federal courts, however, maintained a ban on TCB, even after a trial study. Indeed this looked like continuing for some considerable time given the reaction at the end of the first Federal courts pilot programme which ended in 1994. However, the Judicial Conference of the United States decided in a close vote (14 to 12) to permit Federal *appeals* courts to decide individually whether or not to permit broadcasting.<sup>40</sup> Recently, however, there was an announcement that a decision had been made to undertake a second experimental period of broadcasting in US Federal courts.<sup>41</sup> There was evidence of a judicial retreat from granting cameras access since the *Simpson* (criminal) case.<sup>42</sup> In California a bill, AB 2023, was introduced to ban TCB outright.<sup>43</sup> The public are also less than happy with TCB at least in this instance.<sup>44</sup> At the time of the

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<sup>39</sup> Referred to in J Hoyt, 'Courtroom Coverage: the Effects of Being Televised' (1977) 21:4 *Journal of Broadcasting*, 487, 488.

<sup>40</sup> See 'Inadmissible' (March 1996), *Texas Lawyer* 3; 'Courtroom Cameras: Appeals Court to Decide' (*Pennsylvania Law Weekly* March 1996) 8; 'Appeals Courts Can Let Cameras Cover Arguments' (*The Legal Intelligencer* March 1996) 4; M Goldstein, 'US Judicial Conference Votes to Allow Cameras Into Appellate Courts' (March 1996) *New York Law Journal* 1; J Groner and R Barbieri, 'Federal Judiciary Opens Window to Cameras in Court' (*The Recorder* March 1996) 1. But note also Alden, 'Televising of Federal Hearing is Permitted: Judge Allows First Use of Cameras Since 1994' (March 1996) *New York Law Journal*, and J Groner, 'Who Rule? Which Rules, Cameras in Court Decision Tests Power of Judicial Conference' *Legal Times* (March 1996).

<sup>41</sup> See 'Judiciary Approves Pilot Project for Cameras in District Courts' US Courts website, 14 September 2010 < [www.uscourts.gov/news/NewsView/10-09-14/Judiciary\\_Approves\\_Pilot\\_Project\\_for\\_Cameras\\_in\\_District\\_Courts.aspx](http://www.uscourts.gov/news/NewsView/10-09-14/Judiciary_Approves_Pilot_Project_for_Cameras_in_District_Courts.aspx) > accessed 19 January 2014.

<sup>42</sup> 'Klausner, Speaking at Forum, Says More Judges in County are Barring Cameras From Courts' (*Metropolitan News Company* 22 March 1996) 1.

<sup>43</sup> J Martineau, 'Lawyers, Broadcasters Join Forces to Support Continued Use of Television Cameras in Courtrooms' (*Metropolitan News Company* 19 March 1996) 13. The Bill failed however, see A Lewis, 'Panel Rejects Outright Ban on Cameras in Courtroom' *SF Daily Journal* (San Francisco, 11 April 1996).

<sup>44</sup> Sunday Independent/IMS poll *Sunday Independent* (Dublin, 8 October 1995) 8, 15; D Yaffe, 'TV Trial Restrictions Urged: Task Force Nixes Call for Outright Ban, Even Though Most Judges Want It' *The Recorder* (26 February 1996). She also noted that two-thirds of LA Judges are in favour of a complete camera ban; M Maher, 'Opposition to Court

original 1996 study 47 US states permit some type of camera access with three prohibiting TCB.<sup>45</sup>

Part 2 Questions A-5 and A-6 presented a problem. Respondents were meant to answer *either* Part B Question A-5 *or* Part 2 Question A-6, whichever being contingent upon one's answer in Part 2 Question A-4. If a respondent was in favour of courtroom TCB cameras in Part 2 Question A-4 s/he would answer Part 2 Question A-6 only. Alternatively if one was not in favour, one would answer Part 2 Question A-5 and leave Part 2 Question A-6 blank. Overall it was felt that if one was not in favour there would be few areas upon which to voice praise of courtroom cameras, and vice versa.

Part 2 Questions A-5 and A-6 each comprised of parts (a) - (f). There were 19 judges who correctly answered Part 2 Question A-5 or Part 2 Question A-6. Twelve judges incorrectly answered both, and one did not answer either question. Therefore, with regard to those who incorrectly answered both Part 2 Question A-5 and Part 2 Question A-6, the survey decided to ignore whichever answer was inconsistent with Part 2 Question A-4.<sup>46</sup>

Those who responded negatively in Question A-4 and correctly went on to answer Part 2 Question A-5 answered as follows.

**Part 2 Question A-5(a): 'Courtroom television cameras would adversely affect ...':**

No	Question	Answer
A-5(a)	Courtroom participants:	100 percent Yes 0 No answers  <i>Specifically these were:</i>
A-5(a) (i)	Witnesses	80 percent Yes 20 percent No
A-5(a) (ii)	Lawyers	81.81 percent Yes 18.18 percent No
A-5(a) (iii)	Judiciary	77.78 percent Yes 22.22 percent No
A-5(a) (iv)	Parties	80 percent Yes 20 percent No
A-5(a) (v)	Combination	100 percent Yes 0 No

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Television Proposals Grow' *Irish Times* (Dublin, 20 October 1994); J Williamson, 'Embarrassed By Media's Gory Pandering in OJ Case' *Seattle Times* (Seattle, 17 July 1994).

<sup>45</sup> JF Rooney, 'Panel OK's Cameras in US Appeals Courts; Seen as Unlikely Here' *Chicago Daily Law Bulletin* (Chicago, 13 March 1996) 1.

<sup>46</sup> This may be revisited in future for re-analyse.



**Part Question A-5(b): Integrity of Judicial Proceedings<sup>47</sup>**

No	Question	Answer
A-5(b)	'Courtroom television cameras would downgrade the integrity of judicial proceedings':	100 percent Yes 0 No

**Part 2 Question A-5(c): Educational**

No	Question	Answer
A-5(c)	'Courtroom television cameras would not prove in actuality to be educational':	100 percent Yes 0 No

This is interesting. It is also relevant in terms of previous chapters referring to the lack of legal-empirical research of possible education-effects.

**Part 2 Question A-5(d): Increase Pressure on the Judiciary via Supervisory Effort Required**

No	Question	Answer
A-5(d)	'Courtroom television cameras would increase pressure on the judiciary via the supervisory effort required':	100 percent Yes 0 No

**Part 2 Question A-5(e): Increase Pressure on Court Personnel via Supervisory Effort Required**

No	Question	Answer
A-5(e)	'Courtroom television cameras would increase pressure on court personnel via the supervisory effort required':	100 percent Yes 0 No

**Part 2 Question A-5(f): Merely Satisfy Curiosity**

No	Question	Answer
A-5(f)	'Courtroom television cameras would merely satisfy curiosity':	100 percent Yes 0 No

**Part Question A-5(g): Gross Simplification of Procedure**

No	Question	Answer
A-5(g)	'Courtroom television cameras prove to be a gross simplification of the procedure':	90 percent Yes 10 percent No

Those who responded favourably in Part 2 Question A-4 and correctly went on to answer Question A-6 answered as follows,

**Replies to Part 2 Question A-6: ‘Courtroom television cameras would ...’:**

No	Question	Answer
A-6(a)	help reinforce our belief in justice:	75 percent Yes 25 percent No
A-6(b)	prove to be educational for the public:	100 percent Yes 0 No
A-6(c)	affirm moral, spiritual and cultural values:	28.57 percent Yes 71.43 percent No
A-6(d)	strengthen social bonds and social control:	62.50 percent Yes 37.50 percent No
A-6(e)	aid the public in understanding sentencing decisions:	87.50 percent Yes 12.50 percent No
A-6(f)	have <i>no</i> detrimental effects: [emphasis in original]	20 percent Yes 80 percent No

Should the decision on permitting TCB remain within collective judicial discretion, it seems TCB access would not be affirmed in Ireland.

### **Part 2 Section B: Media Awareness**

- In terms of potential restrictions 84.61 percent felt that if TCB were to be permitted, broadcasters must provide more than only brief snippets (Part 2 Question B-1). The similar reply was 76 percent in 1996. It should be remembered that one of the reasons for the discontinuance of TCB after experimental periods in New York and also in Federal courts, was the almost sole reliance on brief snippets of courtroom footage;
- 81.58 percent felt that courtroom TCB cameras hold the potential for increased contempt of court (Part 2 Question B-1). 57.69 made the same reply in 1996, so this reply has increased since the original survey;
- In 1996 48 percent agreed that courtroom TCB cameras should only be permitted if no courtroom participant (judge, juror, witness, lawyer, party) objects (Part 2 Question B-3). This reply has increased to sixty percent in the current study;
- Part 2 Question B-6 asked if the news media manipulate news so as to make it appear more entertaining and attractive. 94.59 percent Agreed (N=37). This was 100 percent in 1996 (N=26);
- When we think of TCB it does not occur in a vacuum. One issue to consider is what television slots and times courtroom broadcasts occur. Another is the length of the filmed coverage actually broadcast. Beyond the content and scheduling, we also need to consider comparable and competing programming on television. Part 2 Question B-9 asked if

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<sup>47</sup> Generally, note CE Smith, *Courts and Trials: A Reference Handbook* (ABC-CLIO 2003).

'meaning' depends on the influence of programming environment, that is, comparisons with other programmes available at approximate times on other channels. In 1996 66.67 percent Agreed. In 2010 83.33 percent Agreed;

- In terms of legal-psychology issues a number of questions focuses on this issue. Part 2 Question B-11 asked if expert psychological testimony can be relevant with regard to eyewitness capability and credibility. 68.57 percent replied Agree. When asked if witness assertions of confidence are probably the least important factors for diagnosing the accuracy of eyewitness identification (Part 2 Question B-13), 70.59 percent replied Agree.<sup>48</sup> It is interesting pose the question of how reliable self-reports and opinion-reports are in terms of TCB research. Such studies are criticised in other fields. However, eye-tracking may help to verify such reports and also independently measure distraction-effects;
- The questions in Part 2 Sections B and C are based upon views in the communications field. Half are recognised and accepted theories in this field, while the other half are more opinions common within this field. Judges were being queried to see if they agreed with them and also if they were familiar with these views. The answers presented in Part 2 Sections B and C are legitimate concerns for any future TCB and TCB research;
- Section 2 Section B consists of twelve statements each requiring Agree/Disagree answers. Section C offered eleven statements requesting respondents to answer Strongly Agree (SA), Agree (A), Disagree (D) or Strongly Disagree (SD). Some judges did not answer all of the questions in each section or said they did not know or made some other similar statement. Some questions were scaled to measure judicial orientation towards the issues involved with TCB and associated issues. The remainder are questions testing judicial familiarity with recognised concepts from the communication field, which also are relevant to the debate regarding TCB and TCB research;
- Section 2 Question B-2 states: TCB holds the potential for increased contempt of court. Answers were 81.58 percent Agreed, and 18.42 percent Disagreed. It is often assumed that the dangers of prejudice is in some way limited to jurors. This assumption that judges are in some way isolated is not necessarily true. (One judge in the 1996 survey notes (separately from the survey) the possibility that the prejudicial media reporting of the *People (DPP) v Z* case<sup>49</sup> was a factor in the length of the sentence as originally handed down. (On appeal the sentence was reduced as being too severe). By the same token it may be queried whether the judiciary are to be presumed less amenable than other people to influence by TCB. It should also be remembered, as pointed out above, the location issues. For example a judge may be statistically more likely to be distracted by cameras in the courtroom, than a lawyer, where the camera is located at the back of the courtroom or otherwise behind the lawyers. The visual cone-of-vision and location issues above show that a judge may be statistically more likely to be visually distracted by cameras in the courtroom, than a lawyer, where the

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<sup>48</sup> See A Heaton-Armstrong, E Shepard, GH Gudjonsson and D Wolchover (eds), *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (OUP 2006).

<sup>49</sup> *People (DPP) v Z* CCA IE 14 March 1996.

camera is located at the back of the courtroom or otherwise behind the lawyers. Judges seemed to be familiar with some of the literature, concerns and issues in legal-psychology, and while there is not TCB in Ireland, it may be that the Irish judiciary would appreciate the more nuanced and normative issues arising in TCB effects-research. Generally respondents were aware of the dangers of increased contempt and moral panic inherent in TCB. Overall it is significant that all of these issues were recognised and supported by the judges.

### **Self-Reports, Opinion-Reports and Observer-Reports**

Self-reports and opinion-reports are not the most accurate indicator of TCB effects. 55.88 percent Agreed and 20.59 percent Strongly Agreed that confidence of a lawyer in not being affected by cameras in the courtroom is not the most accurate indicator of his/her not being so affected. This was 71.42 percent and 14.28 percent respectively in 1996. Again, eye-tracking is significantly more accurate and verifiable for distraction-effects.

### **Results**

Part 2 Question B-3 states: TCB should only be permitted if no courtroom participant (eg judge, juror, witness, lawyer, party) objects in any given instance. Answers were 60 percent (A) and 40 percent (D). Only half of the states in the US permitting courtroom (at the time of the original survey) broadcasting require participant consent.<sup>50</sup> However, the second Federal study requires consent.<sup>51</sup> A majority in the survey also said coverage should be other than mere snippets. Therefore, any TCB would have to be extensive in nature or gavel to gavel.

### **Legal-Psychology and Judges**

Studies in legal-psychology provide us with models to examine TCB effects. These questions tested judges' familiarity and concurrence with some of these studies. In the last section there were four questions. These presented an eyewitness<sup>52</sup> event scenario and identification opportunity, all based on the legal-psychology research literature. The correct consensus answer to Part 2 Question D-1 was option (b). This was chosen by 68.42 percent (in 2010) and 41.67 percent (in 1997). The correct consensus answer to Part 2 Question D-3 was option (c). This was chosen by 24 percent (in 2010) and 16

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<sup>50</sup> Slater, book review (1987) 31:4 JOBEM 479. Also S Barber, *News Cameras in the Courtroom* (Ablex 1987).

<sup>51</sup> See Judicial Conference Committee on Court Administration and Case Management Guidelines for the Cameras Pilot Project in the District Courts < <http://www.uscourts.gov/uscourts/News/2011/docs/CamerasGuidelines.pdf> > accessed 19 January 2014.

<sup>52</sup> See A Heaton-Armstrong, E Shepard, GH Gudjonsson and D Wolchover (eds), *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (OUP 2006).

percent (in 1997). The correct consensus answer to Part 2 Question D-4 was option (c). This was chosen by 61.54 percent (in 2010) and 56.25 percent (in 1997).

**Percentage of Judges Selecting Each Alternative Response for  
Each Question in Part 2 Section D**

Question	Option (a)	Option (b)	Option (c)	Option (d)
D-1	10.53 percent	<b>68.42 percent</b>	15.79 percent	5.26 percent
D-2	6.67 percent	<b>43.48%</b>	13.04 percent	0
D-3	56 percent	8 percent	<b>24 percent</b>	12 percent
D-4	26.92 percent	7.69 percent	<b>61.54 percent</b>	6.25 percent

The correct answers are highlighted in bold italics.

### Results: Part Question D-1: Cross Race Identification

- Identifications across race are less likely to be accurate.<sup>53</sup> Part 2 Question D-1 related to this issue of cross race identifications, as opposed to same race identifications. 68.62 percent correctly chose answer (b). The original 1997 survey had a figure of 41.67 percent. Therefore, there was a large increase. This also compares with 55 percent in the original study conducted by E Loftus.<sup>54</sup> She also used this question in another survey involving two separate samples. The correct answer was chosen by 54 percent and 57 percent respectively.<sup>55</sup> GL Rahaim and SL Brodsky also used this question<sup>56</sup> but used instead an Oriental American and a white person as the victims. This also involved two samples, (registered potential) jurors and lawyers, ‘yielding an average of 39 percent correct answers for jurors and 58 percent correct answers for lawyers.’<sup>57</sup> B Cutler and S Penrod provide a

<sup>53</sup> GL Rahaim and SL Brodsky, ‘Empirical Evidence Versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy’ (1982) 7:1 Law and Psychology Review 1, 2, and references at n 3, at 2. It is often claimed ‘that the media have effects, that they influence people and society. Others are less sure. Between these positions others suggest “that the media play an important role in influencing what the public *thinks about*, even though the media may not determine *what we think*.’ This is the agenda setting theory, see EM Rogers, foreword in SA Lowery and ML DeFleur, *Milestones in Mass Communication Research: Media Effects* (Longman 1985); and ch 12 therein. This is also the view of DL Shaw and ME McCombs, ‘The Agenda Setting Function of the Media’ (1972) 36 Public Opinion Quarterly 176, and also other writings. Also HA Shugart, ‘Ruling Class: Disciplining Class, Race, and Ethnicity in Television Reality Court Shows’ (2006) 17 Howard Journal of Communications 79.

<sup>54</sup> E Loftus, *Eyewitness Testimony* (Harvard University Press 1979, 1996) 172. Note generally also, D Ergun, G Deason, E Borgida, and G-U Charles, ‘Race and Redirecting: What the Print Media Conveys to the Public About the Role of Race’ (2008) 64 Journal of Social Issues 619.

<sup>55</sup> KA Deffenbacher and EF Loftus, ‘Do Jurors Share a Common Understanding Concerning Eyewitness Behaviour?’ (1982) 6:1 Law and Human Behaviour 26.

<sup>56</sup> GL Rahaim and SL Brodsky, above 10, 13.

<sup>57</sup> *ibid* 10-13. This is not to suggest that the author here advocates research into jury deliberations, indeed judicial statements in *People (Attorney General) v Lange* Haugh J, IEHC, [1967] IR 369, 377 and *O’Callaghan v Attorney General*, O’Flaherty J, IEHC, [1993] 2 IR 17, 27 emphasises the finality and confidentiality of such deliberations. Note also concerns expressed by Lynch J in *People (DPP) v Courtney*, *Irish Times* (28 January

very good introduction to this general area.<sup>58</sup> There is also an Irish case involving cross race identification where it appears there was an unsuccessful attempt to introduce psychological evidence.<sup>59</sup> However, the appeal was successful as the court was satisfied in any event that the verdict was unsatisfactory. On the case in question, while the proposed evidence was not officially introduced, was there some recognition of its existence in any event by the court? The court also expressly notes that the decision not to hear the psychological evidence was [only] ‘in this appeal.’ It is possible for other courts to hear such evidence. Indeed on a general note, as the demographic population of Ireland is changing, it may well be that in time there is a natural rise in cases before the courts which involve cross race identification issues;

- Obviously the knowledge and appreciation of judges, lawyers and the public are important issues for cross race identification when these issues come to court. However, given that this has been widely researched, it is a good indication of whether or not judges are familiar with research issues and research studies which are applicable to the cross race identification and by extension the TCB issues.

### **Part 2 Question D-2: Stress/Fear**

- This question comes from GL Rahaim and SL Brodsky.<sup>60</sup> The results for this question in the present study are as follows. The correct answer was D-2-B. In the original study this was picked by 61 percent of jurors and 73 percent of lawyers. In this study it was picked by approximately 44 percent. While less than the original study, this was still the highest picked answer.<sup>61</sup>

### **Part 2 Question D-3: Weapon-Focus**

- The literature in relation to weapon-focus is relevant to TCB as there is a similar potential of a TCB camera-focus effect. In the study, 24 percent of judges correctly answered option (c). Option (a) was chosen by 56 percent. In GL Rahaim and SL Brodsky’s survey 57 percent were correct in the juror group and 60 percent in the lawyer group.<sup>62</sup> This is quite a

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1993). But note report of permission granted to CBS in the US to film actual jury deliberations, ‘Jury Deliberations To Air?’ (19 February 1996) National Law Journal A8.

<sup>58</sup> B Cutler and S Penrod, *Mistaken Identification: the Eyewitness, Psychology, and the Law* (Cambridge University Press 1995) 104. Also A Heaton-Armstrong, E Shepard, GH Gudjonsson and D Wolchover (eds), *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (OUP 2006).

<sup>59</sup> *People (DPP) v Christo*, IE CCA (31 January 2005), and as referred to in L Heffernan, *Evidence: Cases and Materials* (Thomson Round Hall 2005) 320.

<sup>60</sup> GL Rahaim and SL Brodsky, above 13.

<sup>61</sup> Unfortunately this question was not included in the 1996 study. Therefore, no comparison is possible. There was an error discovered in the wording of option 2(c) of Part 2 Question D-2 in 1997, thus undermining the whole question. Therefore, Part 2 Question D-2 was not considered further originally. The original questionnaire was pre-tested to see its effect and make alterations. No judge nor anyone in pre-testing noticed this error in the original survey.

<sup>62</sup> GL Rahaim and SL Brodsky, above 9.

substantial difference. In addition, eyewitness testimony is shown to strongly influence jury deliberation<sup>63</sup>;

- Weapon-focus is the idea that ‘the presence of a weapon during a crime attracts the attention of the witness to the weapon, leaving less attention to the perpetrator’s facial and physical characteristics... [in studies subjects] focus more often and for longer periods of time on the weapon in comparison to the other objects appearing in the scene.’<sup>64</sup> One study found a substantial contrast between 46 percent of subjects giving correct identifications in the weapon-hidden scenario, compared with 26 percent giving correct identification in a line-up test in the weapon-present group<sup>65</sup>;
- N Mehrkens Stebley in a meta-analytic review of the research at the time of her review concludes that a ‘significant overall difference between weapon-present and weapon-absent conditions was demonstrated, with weapon-present leading to reduced identification accuracy.’<sup>66</sup> In one study involving psychologists, ninety percent ‘agreed that in a crime situation a victim is likely to focus on a gun, which will interfere with his or her ability to remember the criminal’s face.’<sup>67</sup>

#### Part 2 Question D-4

- This question was answered correctly by 61.54 percent. It was based upon a question in KA Deffenbacher and EF Loftus<sup>68</sup> where in the first sample seventy one percent chose the correct answer while 54 percent did so in the second sample.<sup>69</sup> Two questions in Part 2 Section B relate to this area. When asked if expert psychological testimony is relevant with regard to eyewitness capability and credibility 35.29 percent Agreed. However 64.70 percent Disagreed. (Part 2 Question B-11). Judges were then asked if expert psychological testimony *can be* relevant with regard to eyewitness capability and credibility (original emphasis). This time 68.57 percent Agreed and 31.46 percent Disagreed. The following question (Part 2 Question B-13) states that witness assertions of confidence are probably the least important factors for diagnosing the accuracy of eyewitness identifications. 70.59 percent Agreed and 29.41 percent Disagreed. Wells and Murray suggested from their

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<sup>63</sup> E Loftus, ‘Reconstructing Memory: the Incredible Eyewitness’ (1974) 8 *Psychology Today* 116; GL Rahaim and SL Brodsky, ‘Empirical Evidence Versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy’ (1982) 7:1 *Law and Psychology Review* 1.

<sup>64</sup> E Loftus *ibid* n 37.

<sup>65</sup> *ibid*.

<sup>66</sup> NM Stebley, ‘A Meta-Analytic Review of the Weapon-Focus Effect’ (1992) 16:4 *Law and Human Behaviour* 413.

<sup>67</sup> Conducted by AD Yarmey and HPT Jones, ‘Is Eyewitness Identification a Matter of Common Sense?’ in S Lloyd-Bostock and BR Clifford (eds), *Evaluating Witness Evidence* (Wiley 1993) as referred to in E Loftus, G Loftus and J Messo, ‘Some Facts About “Weapon-Focus”’ (1987) 11:1 *Law and Human Behaviour* 55, 55-56. See also E Loftus, *Eyewitness Testimony* (Harvard University Press 1979, 1996) 175.

<sup>68</sup> KA Deffenbacher and EF Loftus, above Q 13, at 29.

<sup>69</sup> See, in relation to this section in general, CA Luus and GL Wells, ‘The Malleability of Eyewitness Confidence: Co-witness and Perseverance Effects’ (1994) 79 *Journal of Applied Psychology* 714; BE Bell and EF Loftus, ‘Trivial Persuasion in the Courtroom:

review of the results of thirty one studies that ‘the eyewitness accuracy-confidence relationship is weak under good laboratory conditions and functionally useless in forensically representative settings.’<sup>70</sup> Indeed, studies indicate that jurors place greater emphasis on the testimony of confident witnesses, even though indications are that confidence is not a reliable indication of accuracy or at least a weak indicator of accuracy.<sup>71</sup> Professor Penrod states that an eyewitness may be ‘100 percent confident and still be 100 percent wrong.’<sup>72</sup> ‘[D]espite the generally accepted belief that eyewitness confidence and eyewitness accuracy should be related, the bulk of the empirical evidence collected in laboratory and field experiments over the past 25 years indicates that eyewitness confidence is generally not a good predictor of eyewitness accuracy.’<sup>73</sup> Seldom do commentators critically and independently assess the TCB self-reports and opinion-reports. Eye-tracking can begin to do so;

- Part 2 Section C Question 11 referred to the accuracy of a lawyer’s confidence in not being affected by courtroom TCB cameras. Respondents answered 20.59 percent (SA), 55.88 percent (A) and 20.59 percent (D) that such confidence was not the most accurate indicator of his/her not being so affected by camera presence in court. Deutscher<sup>74</sup> found that there can often be discrepancies between reported attitudes in interviews and actual attitudes and behaviour as indicated from observations of that behaviour. W Philips Davidson also identifies what he calls a ‘third person effect’ in which individuals overestimate the effect of media on others, believing it to have little if any affect upon themselves. These areas suggest opportunity for research into TCB effects.<sup>75</sup>

### Public Baseline Research

While the author provides the original TCB related research in Ireland with the 1996 and current judicial surveys, the author felt that it was necessary to expand beyond this by undertaking a three-way analysis. The author wanted to research judicial, media/press and audience/public issues. The issue of audience research and of public attitudes in

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The Power of (a Few) Minor Details’ (1989) 56:5 *Journal of Personality and Social Psychology* 669.

<sup>70</sup> GL Wells and DM Murray, ‘Eyewitness Confidence’ in GL Wells and EF Loftus (eds), *Eyewitness Testimony: Psychological Perspectives* (Cambridge University Press 1984) 165.

<sup>71</sup> CR Hollin, *Psychology and Crime* (Routledge 1989) 165. Also GL Rahaim and SL Brodsky, above n 32, at 8.

<sup>72</sup> See B Cutler and S Penrod, above n 37, at 4, 112. Also note C Fennell, *The Law of Evidence in Ireland* (Butterworth 1992) 141, 164. Generally note L Heffernan, *Evidence: Cases and Materials* (Thomson Round Hall 2005).

<sup>73</sup> JS Shaw III, KA McClure and JA Dykstra, ‘Eyewitness Confidence from the Witnessed Event Through Trial,’ chapter in M Togliola, JD Read, DF Ross, RCL Lindsay (eds), *The Handbook of Eyewitness Psychology Vol 1: Memory for Events* (Erlbaum 2007) 371.

<sup>74</sup> I Deutscher, ‘What We Say/What We Do’ (Scott, Foresman 1973), referred to in KB Jensen and NW Jankowski (eds), *A Handbook of Qualitative Methodologies for Mass Communication Research* (Routledge 1991) n 15, at 61.

<sup>75</sup> WP Davidson, ‘The Third Person Effect in Communication’ (1983) 47:1 *Public Opinion Quarterly* 1, referred to in JM Innes and H Zeitz, ‘The Public View of the Impact of the



Ireland have not been researched and have not been investigated in any representative studies. The author sought to begin this baseline research. This is the first such research in Ireland. This public out-of-court research is referred to below.<sup>76</sup> Unfortunately, the television and newspaper responses to the questionnaires were not sufficient to report upon here. However, this is definitely an area which demands to be researched in future.<sup>77</sup>

### **Public Research**

There does not appear to be any official or representative surveys of the attitudes of the public in Ireland towards TCB issues. Funding was sought for a survey of public attitudes in Ireland.<sup>78</sup> The proposed survey was based upon some similar survey questions in other jurisdictions, for example, the public survey conducted in New York.<sup>79</sup> This would have been useful in gauging attitudes of the public in Ireland on a representative scale, and also in terms of comparing the results with similar surveys elsewhere. It would also have been useful in terms of being baseline research ie carried out prior to the possible introduction of TCB in Ireland (if this was ever to occur). Unfortunately, no funding was available. The author commissioned a significantly shortened public attitudinal survey in relation to TCB issues in Ireland. This was based on some areas of the original survey proposed above. The survey consisted of two questions, each containing four sub parts. It was carried out on 6 - 8 September 2010 by redc research.<sup>80</sup> 1,000 telephone interviews were conducted of an over 18 age group representative sample of the Irish population.<sup>81</sup> The survey gauged attitudes to the justice and court system and attitudes towards TCB.

### **Public Attitudes Towards TCB in Ireland**

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Mass Media: a Test of the "Third Person" Effect' (1988) 18 *European Journal of Social Psychology* 437.

<sup>76</sup> It is also recommended that funding be made available to continue this public research, as this will provide a valuable baseline for policy discussion and debate, as well as more importantly, a baseline for audience/public effects-research in the event that any form of TCB is introduced in Ireland in future.

<sup>77</sup> On Irish audience issues generally, see for example, MJ Kelly and B O'Connor, *Media Audiences in Ireland: Power and Cultural Identity* (University College Dublin Press 1997). There is also a wider research to compare also, for example, P Moy, M Pfau and Kahlor, 'Media Use and Public Confidence in Democratic Institutions' (1999) 43 *Journal of Broadcasting & Electronic Media* 137.

<sup>78</sup> For example, Broadcasting Commission of Ireland.

<sup>79</sup> See the Marxist Institute for Public Opinion Poll, December, 1996, contained in the *New York Cameras in New York Courtrooms report, New York State Committee to Review Audio-Visual Coverage of Court Proceedings, An Open Courtroom: Cameras in New York Courts* (Fordham University Press 1997).

<sup>80</sup> Lambert - RedC Courts Public Survey, 8 September 2010. Survey results with author.

<sup>81</sup> *ibid.*

This question used an Agree/Disagree scale (Agree Strongly; Agree Slightly; Neither Agree nor Disagree; Disagree Slightly; Disagree Strongly) was used for four statements. The first statement gauged attitudes to the statement ‘Television cameras in the courtroom should be allowed.’ The percentage score agreeing was fifty two percent and disagreeing was thirty nine percent. The second statement gauged attitudes to the statement ‘Television cameras in the courtroom are a source of entertainment and should not be allowed.’ The percentage score agreeing was 43 percent and disagreeing was 39 percent. The third statement gauged attitudes to the statement ‘Television in the courtroom would increase the public’s understanding of the justice system.’ The percentage score agreeing was 60 percent and disagreeing was 32 percent. The fourth statement gauged attitudes to the statement ‘Television in the courtroom would increase the accuracy of the news coverage of a trial.’ The percentage score agreeing was 66 percent and disagreeing was 24 percent.

This is the first representative survey of public attitudes in Ireland towards TCB. However, there is understood to have been an online poll survey carried out by an Irish Times online poll in 2008. The question asked was ‘Should court proceedings be televised?’ While no figures are given for Yes and No, it is understood that the majority replied No, and there was a margin difference of eight percent. However, the actual figures are unavailable.<sup>82</sup>

### **Confidence in the Justice System in Ireland**

The first question used a confidence scale of 1-10 (1 not at all confident; 10 extremely confident) was used to four statements. The first statement gauged confidence in ‘The justice and court system in Ireland.’ The score out of ten was 4.96. The second statement gauged confidence in ‘The accuracy of the legal news reports in newspapers.’ The score out of ten was 5.23. The third statement gauged confidence in ‘The accuracy of the legal news reports on TV.’ The score out of ten was 5.83. The fourth statement gauged confidence in ‘The accuracy of the legal news reports in online websites and forums.’ The score out of 10 was 4.94.

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<sup>82</sup> Reported in P Newenham, ‘Televising the Courts: An Exploration of Opinions of Irish Media and Legal Professions’ (Masters in Journalism, DCU 2008) 57. Referring to Sergeant P Kennedy and C Browne, Garda, *Garda Public Attitudes Survey 2007*, Garda Research Unit, Research Report No 12/07. The author sought unsuccessfully to obtain this survey from the Irish Times.

P Newenham<sup>83</sup> refers to the 2007 Garda Public Attitudes survey. This is also professionally undertaken. 78 percent of respondents believed that the criminal justice system was too lenient.<sup>84</sup> 49 percent felt that victims get a raw deal from the criminal justice system.<sup>85</sup> In a similar Garda survey in 78 percent felt that the criminal justice system was too lenient on offenders.<sup>86</sup> P Newenham also refers to a small business survey where apparently only two percent had confidence in the judicial system.<sup>87</sup> However, this may require to be contextualised. An EU Eurobarometer survey found that 32 percent of Irish people do not believe that the European Parliament is listening to them.<sup>88</sup>

### Overview

41 percent strongly agrees that television in the courtroom would increase the accuracy of news coverage of a trial, and with 25 percent agreeing slightly. 35 percent agreed that television in the courtroom would increase the public's understanding of the justice system, with 25 percent agreeing slightly. The figures decreased again when asked whether they agreed with the statement 'television cameras in the courtroom should be allowed.' 31 percent agreed strongly and 22 percent slightly agreed. That is a total of 55 percent. However, 14 percent disagreed slightly and 24 percent disagreed strongly. This total is 38 percent. The professional survey company state that '[t]wo thirds agree that TV in the courtroom would increase the accuracy of trial news coverage, with a similar number also agreeing it would increase the public's understanding. However, just over half believe that cameras should be allowed, with over two in five agreeing they should not be allowed.'<sup>89</sup> The age profile 18 – 24 appears to be agreeing most that TCB would improve accuracy and understanding.

There is no confirmation in the survey that audience or public confidence in the judicial system would increase as a result of TCB.<sup>90</sup> However, it would be interesting to explore in greater depth in future research, which courts and types of cases the public would favour for TCB. The budget for same way beyond the current exercise. It would also be

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<sup>83</sup> P Newenham *ibid* 12-13.

<sup>84</sup> *ibid*.

<sup>85</sup> *ibid* 13.

<sup>86</sup> C Brown, *Garda Public Attitudes Survey 2008*, Garda Research Unit, Research Report No 1/08, 60.

<sup>87</sup> P Newenham, *above*.

<sup>88</sup> Conducted between January–February 2009, reported in S MacConnell, 'Four in 10 of Irish Polled Believe European Parliament Listens' *Irish Times* (Dublin, 28 August 2009).

<sup>89</sup> *ibid*.

<sup>90</sup> Note KL Cripe, 'Empowering the Audience: Television's Role in the Diminishing Respect for the American Judicial System' (1998-1999) 6 *UCLA Entertainment Law Review* 235.

important for future research to examine the educational issues and what the public feel would be education and why. Again, the current budget did not permit research of the educational issue in the survey. Indeed, this is something which needs to be researched in all jurisdictions permitting or considering permitting TCB.

Overall, confidence levels were relatively low accuracy of reporting. It was also low for confidence in the justice and court system. Over one in four had little or no confidence in the justice system. Interestingly, people in Dublin were the least likely to have confidence in the accuracy of reporting on television.

The age group 25 – 34 had a particular lack of confidence in newspaper reports of court proceedings. Younger people in particular were more likely to have a lack of confidence in online reporting. The male profile in Connaught Ulster had the least confidence in the justice system. While speculation, there have been a number of police scandals and related cases in Donegal, one of the counties in the instant profile area.

### **Reservations**

There are a number of issues that may be pointed out. Given that the survey was significantly shortened some very pertinent related questions were not asked. Also, we are not able to consider the potential reasons for some of the replies in greater detail as there are no follow on questions. It is recommended that the survey be repeated at regular intervals. It is additionally recommended that more detailed and related questions also be asked on a regular basis in future.

### **Comments**

Overall, there are significant amounts of research which judges are not familiar with and which point the way in relation to TCB research and issues, particularly forms of TCB, effects of TCB on participants and effects on the audience. While the US Supreme Court is not familiar with the eye-tracking opportunities, it seems likely that Irish, Scottish and England and Wales judges may not be familiar either. This is the first research in Ireland to tackle the out-of-court TCB issues. It seeks to gauge public attitudes towards permitting TCB in Ireland.

It is very important also because it is the first baseline public research in relation to any potential TCB in Ireland. This baseline research should be continued. (The baseline research should also be expanded to other issues in relation to potential TCB, including, for example, the courtroom communication process in Ireland, effects and processes in

court in Ireland, etc). In terms of the instant research, the public attitudinal survey notes that the ‘public are pretty much split down the middle when it comes to the idea of allowing TV cameras in the courtroom, with just over half agreeing they should be allowed, and just under [half] stating that they shouldn’t be allowed.’<sup>91</sup> There is therefore, according to this research, no clear public view in Ireland positively advocating TCB in Ireland. This is interesting, if not curious, given that the majority feel that TCB would lead to more accurate reporting of cases. It is important to note, however, that further research is needed to explore why the public feel that accuracy and or education would be achieved or be increased.

Just as the US Supreme Court empirical research challenge needs to be addressed, we need to undertake significant research in Ireland, particularly prior to any actual introduction of any form of TCB in Ireland - or any jurisdiction. The research gaps, wherever located, need to be addressed. As has already been pointed out, part of this involved cross-disciplinary research and examining comparative research, whether legal or otherwise. Indeed the Law Reform Commission while referring to jury issues, state that ‘[t]here is a lack of research on the operation and composition of juries in this jurisdiction. For that reason the Commission is mindful in recommending reform of the law there is no data to support reform directions, over than consultation, anecdotal evidence and comparative research.’<sup>92</sup>

There is also research in relation to the development of new methods of survey a research of confidence in justice.<sup>93</sup> Recent research suggests that we need to ‘finalise our conceptual map of the issues.’<sup>94</sup> It also states that future research should develop the “‘conceptual map” of issues relevant to trust in justice,’ and develop ‘survey measures capturing the key concepts in this map.’<sup>95</sup> B McConnell feels that UK parliamentary broadcasting has led to politicians playing and acting up for the camera.<sup>96</sup> Alice Miles, a Times correspondent, says that parliamentary broadcasting has not increased public

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<sup>91</sup> *ibid.*

<sup>92</sup> Law Reform Commission, *Consultation Paper on Jury Service* (LRC CP 61-2010) 58, as referred to in M Coen, ‘Elephants in the Room: The Law Reform Commission Consultation Paper on Jury Service - Part 1’ (2010) 20:3 *Irish Criminal Law Journal* 1, 2.

<sup>93</sup> See M Hough, M Yordanova, D Markov and M Ilcheva, *Justis*, ‘Scientific Indicators of Confidence in Justice: Tools for Policy Assessment’ (12 June 2009) < [www.eurojustis.eu/fotoweb/22.pdf](http://www.eurojustis.eu/fotoweb/22.pdf) > accessed 19 January 2014.

<sup>94</sup> *ibid* iv.

<sup>95</sup> *ibid* 1, 3.

<sup>96</sup> B McConnell, ‘Cameras in Court’ (16 November 1990) *New Law Journal* 1622.

confidence in the political system, and may have undermined it.<sup>97</sup> The UK official discussions also refer to the potential witness intimidatory effects of TCB.<sup>98</sup>

Part 2 Question B-6 states: TCB has the potential for increased moral panic. 38.89 percent Agreed, and 61.11 percent Disagreed. Since some judges were unfamiliar with the term moral panic it is useful to return to S Cohen's original definition.<sup>99</sup>

'Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylised and stereotypical fashion by the mass media.'

M Green also describes moral panics in the media, creating their own accounts and momentum while others refer to a collective overreaction to a perceived breakdown in social order or to a perceived social problem.<sup>100</sup> There is also literature regarding how radio and television give more attention to violence and deviance<sup>101</sup> and also figures relating to the modern fascination or pre-occupation with crime.<sup>102</sup>

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<sup>97</sup> P Hoult, 'Press Round-Up: OJ Ko As Pilot Allows Cameras Into Court of Appeal' (9 September 2004) *Law Society Gazette* 10.

<sup>98</sup> Department of Constitutional Affairs [UK] *Broadcasting Courts, Consultation Paper CP 28/04* (November 2004) 45.

<sup>99</sup> S Cohen, *Folk Devils and Moral Panics* (Paladin 1973) 9. Also J Meade, 'Organized Crime, Moral Panic and Law Reform: the Irish Adoption of Civil Forfeiture' (2000) 10 *Irish Criminal Law Journal* 11. Criswell also acknowledges moral panics, A Criswell, *A Study of Modern Television, Thinking Inside the Box* (Palgrave MacMillan 2006) 62.

<sup>100</sup> M Green, 'Social Contexts and Uses of Research: Media, Education and Communities' in KB Jensen and NW Jankowski (eds), *Handbook of Qualitative Methodologies for Communication Research* (Routledge 1991) 216, 218. Also S Weber and Dixon (eds), *Growing Up Online: Young People and Digital Technologies* (Palgrave Macmillan 2007). Also see JM McLeod, 'Community Deviance: the Effects of Television News Coverage of Social Protest' (1995) 39 *Journal of Broadcasting and Electronic Media* 4; S Moores, *Interpreting Audiences: the Ethnography of Media Consumption* (Sage 1993) 136; HO *Report of the Working Group on the Fear of Crime* (London HO, Standing Conference on Crime Prevention) (1 December 1989). There is another book on this topic, namely, E Goode and N Ben-Yehuda, *Moral Panics: the Social Construction of Deviance* (Blackwell 1994). Note also A McRobbie and SL Thornton, 'Rethinking Moral Panic for Multi-Mediated Social Worlds' (1995) 46:4 *British Journal of Sociology* 559, on why the model should be updated; J Meade, 'Organized Crime, Moral Panic and Law Reform: the Irish Adoption of Civil Forfeiture' (2000) 10 *Irish Criminal Law Journal* 11; P Rawlings, "'A Complete System of Knavery": Folk Devils, Moral Panics and the Origins of Financial Regulation' (2008) 61 *Current Legal Problems* 325.

<sup>101</sup> See RV Ericson, PM Baranek and JBL Chan, *Representing Order: Crime Law and Justice in the News* (OUP 1991) on how radio and television give more attention to violence and deviance, 244 ff.

<sup>102</sup> See figures referred to in P Schlesinger and H Tumber, *Reporting Crime: the Media Politics of Criminal Justice* (Clarendon 1994), n 10 at 140.

- Part 2 Question B-6 states: that the news media manipulate news so as to make it appear more entertaining and attractive. 94.59 percent Agreed, and 5.40 percent Disagreed.<sup>103</sup> Detective Superintendent Ray Payne states with regard to the (UK) *Crimewatch* programme that ‘If it wasn’t entertainment and it wasn’t watchable they just would not run it. Or if they did run it, they’d run it at some obscure time in the middle of the afternoon when nobody’s watching ... I think the public service element of it would take very much a back seat’<sup>104</sup>;
- Part 2 Question B-7 states: the increased flow of information often has the negative effect of increasing knowledge within certain groups far more than in others.<sup>105</sup> 55.88 percent Agreed. 44.12 percent Disagreed;
- Part 2 Question B-8 states: the existence of more media has resulted in less diversity not more. This related, inter alia, to media ownership, control<sup>106</sup> and competition issues.<sup>107</sup> 60.61 percent Agreed, and 39.39 percent Disagreed;

<sup>103</sup> See for example RV Ericson, PM Baranek and JBL Chan, above 27, 216-217, 346-247. Note also P Schlesinger and H Tumber, *Reporting Crime: The Media Politics of Criminal Justice* (Clarendon 1994) 142 and 263. Also note Newcomb, ‘Media Institutions: The Creation of Television Drama’ in KB Jensen and NW Jankowski (eds), *A Handbook of Qualitative Methodologies for Mass Communication Research* (Routledge 1991) 93; N Christie, *Crime Control as Industry* (Routledge 1993) 36, 73, 144, 166-247; *Report of the Commission on the Newspaper Industry* (Dublin: Government Publication, 1996).

<sup>104</sup> Reported in P Schlesinger and H Tumber, above, n 10 at 142.

<sup>105</sup> As shown by CJ Hamelink, ‘Information Imbalance Across the Globe’ in Downing et al, below, 293. This could also be applied within any given industrialised culture to various strata of society. This question was motivated by a section on information gaps as effects in M McQuail and S Windahl, *Communication Models* (2nd edn, Longman 1993), n 11, 122-126, 203.

<sup>106</sup> See various chapters in J Downing, A Mohammadi, and MA Sreberny-Mohammadi, *Questioning the Media* (2nd edn, Sage 1995). MJ Reddy, ‘The Conduit Metaphor - A Case of Frame Conflict in Our Language About Language’ quoted in Erickson et al, *Representing Order Crime, Law and Justice in the News* (OUP 1991) n 15 at 43. Also MJ Reddy, ‘The Conduit Metaphor - A Case of Frame Conflict in Our Language About Language’ in A Ortony (ed), *Metaphor and Thought* (2nd edn, Cambridge University Press 1993) 164. Note also H Shaughnessy and C Fuente-Coba, *The Cultural Obligations of Broadcasting* (European Institute for the Media 1990); C Tongue, *Report on the Tole of Public Service Television in a Multi-media Society*, Committee on Culture, Youth, Education and the Media A4-0243/96 and the debate in the European Parliament with regard to same, as referred to by M Foley, ‘Change in EU Treaty Sought to Save Public Service TV’ *Irish Times* (Dublin, 16 September 1996), and C Newman, ‘Future of Public TV Debated’ *Irish Times* (Dublin, 20 September 1996).

<sup>107</sup> With regard to concentration of media ownership, see Schlesinger and H Tumber, *Reporting Crime: the Media Politics of Criminal Justice* (Clarendon 1994) n 10 at 7; B Bagdikian, ‘The Empire Strikes Back’ 153-157 and JD Lasica, ‘Photographs That Lie’ 135-141 [note also discussion of camera perspective bias herein], both in RE Hiebert (ed), *The Impact of Mass Media: Current Issues* (Longman 1995). Note also chapter on competition law in E Barendt, *Broadcasting Law: Comparative Analysis* (Clarendon Press 1995) 121-143 and M McGonagle, *A Textbook on Media Law* (Gill and MacMillan 1996, and later edition) 52-53, 278-281. Also, ME Price and M Raboy (eds) *Public Service Broadcasting in Transition: A Documentary Reader* (Kluwer 2003). The countries with the strongest traditions of public service broadcasting have generally been smaller nations that are concerned with protecting their national languages and cultures, according to D McQuail, ‘Western European Media, The Mixed Model Under Threat’ in J Downing et al, above 147-164, 157. Note *Green Paper on Broadcasting* (Dublin: Government Publications, 1995) 3,

- Part 2 Question B-9 states: meaning depends on the influence of programming environment, that is, comparisons with other programs available at proximate times on other channels.<sup>108</sup> Note for instance, that different people can make different sense out of the exact same programme. Furthermore, ‘the sense people make of TV news is socially bounded-viewers do not just ‘make up’ interpretations in isolation from their social location, yet the relevant categories of social location seem to be on the order of “sub-cultures” rather than the more traditional and broader notions of social class.’<sup>109</sup> 83.33 percent Agreed, 16.67 percent Disagreed. Generally, no research seeks to review and compare TCB content and forms with comparator content and forms. This is important, particularly if we are serious about investigating the educational issues involved in TCB;
- Part 2 Question C-3 states: the continuous flow in TV communication reduces time for reflective thought.<sup>110</sup> Answers were 21.05 percent (SA), 71.05 percent (A). This was partly included because there is research which refers to the time and type of attention and its impact on recall. Part 2 Question C-4 states: television commentary raises expectations even when nothing is happening.<sup>111</sup> Answers were 28.20 percent (SA), 64.10 percent (A), 7.69 percent (D). Part 2 Question C-5 states: fighting for audience share puts greater emphasis on entertainment values as opposed to hard news content.<sup>112</sup> Answers were 61.54 percent (SA), 35.90 percent (A), 2.56 percent (D). A typical example may be the popular

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231, 237-238; A O’Meara and K O’Meara, *Headlines and Deadlines* (Blackwater Press 1995) 2; *Report of the Commission on the Newspaper Industry* (Dublin: Government Publications, 1996), n 16 at 23-24 and also terms of reference number one, 29-32, two, 33-39 and four, 47-48, in particular 4.7 and 4.10; ME McCombs RG Picard, JP Winter and S Lacy (eds), *Press Concentration and Monopoly* (Ablex, 1988), B Bagdikian, *The New Media Monopoly* (Beacon Press 2004).

<sup>108</sup> D McQuail and S Windahl, *Communication Models* (2nd edn, Longman 1993) n 11 at 154. See also reference to reception research in P Dahlgren, ‘What’s the Meaning of This? Viewers’ Plural Sense - Meaning of TV News’ (1988) 10 *Media Culture and Society* 285-301, 290.

<sup>109</sup> See P Dahlgren, *ibid* 290.

<sup>110</sup> This is indicated in, for instance, PM Greenfield, *Minds and Media: The Effects of Television, Computers and Video Games* (Fontana 1984) 82. Also S Weber and S Dixon (eds), *Growing Up Online: Young People and Digital Technologies* (Palgrave Macmillan 2007); A Duby, ‘Using Television as an Educational Medium’ (1991) 28:4 *Educational Media International* 190, 193; ML DeFleur, L Davenport, M Cronin and M DeFleur, ‘Audience Recall of News Stories Presented by Newspaper, Computer, Television and Radio’ (1992) 69:4 *Journalism Quarterly* 1010.

<sup>111</sup> That this is so, is noted in KB Jensen and NW Jankowski (eds), *Handbook of Qualitative Methodologies Mass Communication Research* (Routledge 1991) n 15 at 211, and in a reference to K Lang and GE Lang referred to therein.

<sup>112</sup> See D Hallin, ‘Whatever Happened to the News?’ in RE Hiebert (ed), *The Impact of Mass Media: Current Issues* (Longman 1995) n 18 at 159-162; ‘Profit and Quality Are Inseparable, Leading CEO’s,’ *ibid* 163-170; M Hoyt, ‘When the Walls Came Tumbling Down’ at *ibid* 199-207; T Koppel, ‘The Worst is Yet to Come’ at *ibid* 449-453. Also, for example, P Schlesinger and H Tumber, *Reporting Crime: The Media Politics of Criminal Justice* (Oxford: Clarendon 1994) n 10 at 147 and AA Berger, *Media Analysis Techniques* (Sage 1982) 149; *Green Paper on Broadcasting* (Dublin: Government Publications 1995) 155. See also J Malcolm, *The Journalist and the Murderer* (Bloomsbury 1991); Snow, referred to in J Kirby, ‘The Globalisation of Media and Judicial Independence’ [1996] 1 *Communications Law* 115. Also M Briggs, *Television, Audience and Everyday Life* (McGraw Hill OUP 2010).



style television makes even the mundane appear exciting. Generally also, J Katz makes the comment that ‘anyone who writes (or reads) knows that all stories aren’t covered, all questions aren’t asked, all answers aren’t included. Journalists present facts not laterally but in a sequence of importance. This is in itself a subjective process.’<sup>113</sup>

There has been no selection and gatekeeping research yet in relation to TCB and TCB content and programming. The process of TCB has not yet been researched and documented.

- Part 2 Question C-9 states: TV viewing is mainly undertaken during periods of leisure spent at home.<sup>114</sup> Answers were 33.33 percent (SA) and 63.89 percent (A). Any proper consideration of the educational arguments and issues need to incorporate research into the context of the TCB and viewing. Where we are, who we are with, what we are doing, the time of viewing, the competing programmes, etc, are all important issues when we are considering the issues of educational-TCB;
- Part 2 Question C-10 states: reading requires a type of attention which television does not always demand.<sup>115</sup> Studies of eye fixation during reading have shown ‘longer fixations on information about causes and consequences than on circumstantial information. This is assumed to indicate that causes and consequences are “higher order elements” requiring more cognitive activity to comprehend than other information ... In news comprehension there may be very little time for that because of fast rate delivery.’<sup>116</sup> We do not yet know who watches TCB nor what a TCB audience member may look at in particular. This also links in with the educational issue surrounding TCB. What elements of a TCB broadcast need to be looked at and or listened to in order for education to be achieved? What is it that we want to educate? There are potential differences between different TCB forms. Courts and policymakers may consider how we might know when (educational) TCB has been a success. Answers were 53.85 percent (SA), 46.15 percent (A) and 0 (D).

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<sup>113</sup> See J Katz, ‘Guilty’ (September 1995) *Wired* 130, quoted in L Greenhouse, ‘Telling the Court’s Story: Justice and Journalism at the Supreme Court’ [1996] 105 *Yale Law Journal* 1548, 1548, in a most interesting essay. Also EE Slotnick and JA Segal, *Television News and the Supreme Court: All the News That’s Fit to Air?* (Cambridge University Press 1998).

<sup>114</sup> That this is so is testified to by David Marley, who calls for more investigation of this specific type of media consumption, referred to in S Moores, *Interpreting Audiences: the Ethnography of Mass Consumption* (Sage 1993) n 15 at 31. Also J Lull, ‘The Social Uses of Television’ (1980) 6:3 *Human Communication Research* 197, 198, 207. Studies referred to in S Lowery and ML DeFleur, *Milestones in Mass Communication Research: Media Effects* (Longman 1985) 333.

<sup>115</sup> See S Moores, *ibid* n 15 at 47, also the view of PM Greenfield, above, a 20, n at 1, 29; Edmund Curran, of the *Belfast Telegraph*, in I Kenny, *Talking to Ourselves: Conversations with Editors of the Irish News Media* (Kenny 1994) 181; M Briggs, above.

<sup>116</sup> See B Findahl and O Højjer, ‘Some Characteristics of News Memory and Comprehension’ (1985) 29:4 *Journal of Broadcasting and Electronic Media* 370, 390-391.

Generally respondents were aware of the dangers of increased contempt and moral panic inherent in TCB. Indeed, many agreed that the media despite any altruistic capabilities, are in fact more concerned in entertainment and market share.

The judiciary were less aware that actual diversity in programme content has not kept pace with the opportunity presented by technological advances. Instead the concentration of the media is strongly felt to be leading to less diversity and pluralism. Within such an environment it is infinitely more difficult for TCB to approach an educational and considered form.

A substantial majority also recognised that meaning can be affected by competing programmes; that television is free flowing as opposed to static (as with reading); that presenters raise emphasis, at important and non-important times and that television is used during leisure time. How compatible education is with leisure periods has yet to be addressed with regard to the issue of TCB. As emphasised in chapters 18 and 19, the educational issues have not been properly investigated or validated.

One may have thought, however, that there would have been a stronger number of SA answers for Part 2 Question C-10, a question probably more self evident than some of the other questions. Overall it is significant that all of these issues were recognised and supported by the judges. Anyone advocating TCB access will have to address these issues, among others, instead of merely *suggesting* that TCB would be educational and leaving it at that. Furthermore, such persons could legitimately be challenged to show where TCB has proved to be educational elsewhere (ie outside Ireland).

### **Part 2 Section C: Opinion Testing**

82.05 percent of judges Agreed that credibility of presenters in the eyes of viewers are important qualities in persuasion (Part 2 Question 2). 17.95 percent Strongly Agrees. This combined to 100 percent of the Strongly Agree, Agree, Disagree and Strongly Disagree. In 1996 the replied were 69.23 percent (Agree) and 30.77 percent (Strongly Agree). 55.88 percent Agreed and 20.59 percent Strongly Agreed that confidence of a lawyer in not being affected by cameras in the courtroom is not the most accurate indicator of his/her not being so affected. This was 71.42 percent and 14.28 percent respectively in 1996. However, self-reporting is not the most accurate indicator. Again, eye-tracking is significantly more accurate and verifiable for distraction-effects.

## **Results**

- Part 2 Question C-2 states: credibility of presenters in the eyes of viewers are important qualities in persuasion. Answers were 25 percent (SA) and 36.11 (A). Part 2 Question C-1 states: at present there is not an increase in the incidence of crime but an increase of the more horrific and violent crimes. This was answered 17.95 (SA), 82.05 (A). It should be mentioned that this was answered at the time of a celebrity type murder trial (Lillis). However the original 1996 survey was also answered during two famous trials. These were in relation to crime journalist Veronica Guerin and Garda (policeman) Gerry McCabe. All had intense coverage. Albeit, one cannot be certain that this was a factor prominent in respondents' minds<sup>117</sup>;
- Part 2 Question C-6 states the media in America have too much freedom. Answers were 36.67 percent (SA), 20 percent (A), 36.67 (D).<sup>118</sup> Part 2 Question C-7 was the same question as it refers to Ireland, ie the media in Ireland have too much freedom. This was answered as 20.59 percent (SA), 20.59 percent (A), 55.88 percent (D) and 2.63 percent (SD). Part 2 Question C-8 refers to Britain, the media in Britain have too much freedom.<sup>119</sup>

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<sup>117</sup> The question may also have relevance to Q B-6 in regard to moral panic. These murders have put intense focus on crime and organised crime in particular. The legislative responses may indeed be close to moral panic. Shortall, for one, sees 'these rushed political response[s]' as potentially ineffective due to their haste, referred to in *Irish Times* (Dublin, 25 July 1996). The *Irish Times* in an editorial of the same date, 'Editorial' *Irish Times* (Dublin, 25 July 1996), began with the following: 'It was a disarmingly honest admission from Junior Minister Gay Mitchell in the immediate aftermath of the murder of Veronica Guerin. "Within the Dail," he declared, "there is a relatively small number of people who understand the extent of the problem." Yet within days of that acknowledgement, the same members of the same House, the overwhelming majority of whom for so long had not bothered to know, were virtually at one on the measures which are to be taken on the criminal justice system. From ignorance and indifference, there is a leap overnight to certitude, driven by the fury of public opinion. One is reminded of the remark of Andrew Bonar Law, "There goes the mob. We are its leaders. We must follow.'" Note also the criticisms made by the same Gay Mitchell in the Dail of the judiciary, *Irish Times* (Dublin, 26 July 1996, and also criticisms of the *Irish Times* itself, *Irish Times* (Dublin, 27 July 1996). A police spokesperson in Britain warned people, and older people particularly, against believing media reporting as being representative of crime statistics in general. These reports lead to apprehension and fear which, while not unwarranted, are disproportionate to the actual risk of becoming a crime victim. Interviewed on BBC 1 main evening news, BBC (10 September 1996).

<sup>118</sup> Just one example in the literature of this view is RE Hiebert (ed), *The Impact of Mass Media: Current Issues* (Longman 1995). He goes so far as to say that the US media 'have more freedom than in any other country in the world' 77-79. Also quoted is a poll of journalism students at the University of Maryland which found that most also held this view, *ibid*.

<sup>119</sup> See especially ch V (Programme Standards) and ch II (Broadcasting Freedom), in E Barendt, *Broadcasting Law: A Comparative – Study* (Clarendon 1995), but note 243. Whether or not this amounts to too much may be more a subjective view. However, it also depends on what one is comparing ie libel laws, constitutional freedom of the press/individual, etc. G Hollinglierry of the *Sun* states that 'there is a multitude of stories which the crime reporter now has to cover. It is a very wide field indeed ..., you have gone from smash-and-grab and the odd murder story into this vast field of crime that's developed in the last twenty years. Where one thought in your last days of covering crime it would end up as a sinecure, you find "that there is more and more crime to cover and many offices are increasing their coverage and their crime teams."' In P Schlesinger and H Tumber, *Reporting Crime: the Media Politics of Criminal Justice* (Clarendon 1994) n 10 at 184.

Answers were 26.67 percent (SA), 16.67 percent (A) and 53.33 percent (D). It would appear that the US media do indeed have more freedom, at least as regards TCB;

- However, it may be argued that the answers to this set of three questions might well differ depending on context. I Kenny advocates the view that libel laws in Ireland are over-restrictive.<sup>120</sup> Indeed, defamation law has recently been reformed.<sup>121</sup> One could have any of defamation, contempt, sensationalism, oligopolistic tendencies, freedom of information, privilege etc, in mind and the results may vary accordingly;
- Part 2 Question B-1 states: if TCB is to be permitted there should be a stipulation preventing the broadcasters from providing only brief snippets of the proceedings. A strong 84.61 percent Agreed, while 15.38 percent Disagreed. How one could implement this is potentially problematic. It also crosses over with the area and consideration of TCB forms (see chapter 7);
- Part 2 Question B-3 states: TCB should only be permitted if no courtroom participant (eg judge, juror, witness, lawyer, party) objects in any given instance. Answers were 60 percent (A) and forty percent (D). Only half of the states in the US permitting courtroom (at the time of the original survey) broadcasting require participant consent<sup>122</sup>;
- Part 2 Question B-4 said: one of the effects of TCB will be that of establishing the parameters of debate about the criminal justice system:<sup>123</sup> 38.89 percent (A) and 61.11 percent (D).

There is an argument that TCB could work in Ireland because the media here are more responsible and display less sensationalism. Equally a country without tabloids and the accompanying media culture, such as the Netherlands, would be in a better position to provide meaningful TCB. However, in the Netherlands, where cameras are permitted, TCB occurs infrequently. One observer feels that this is because the public are not interested in seeing the courts through television. Such information as they require is

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Draper of the *Daily Express* argues that the abolition of capital punishment has ‘knocked the drama out of murder,’ P Schlesinger and H Tumber, *ibid.* P Schlesinger and H Tumber at 146, also suggest that the increase in the number of offences (in statutes) is responsible for the lessening of emphasis on reporting crime. Grober notes that murder accounted for 26.2 percent of the crimes that the Chicago Tribune reported, yet murder accounted for only 0.2 percent of the crimes on the police index; non violent crimes (eg theft) were forty seven percent of crimes on the police index, but just four percent of those crimes covered by the Tribune. In P Schlesinger and H Tumber, *ibid.*

<sup>120</sup> I Kenny, *Talking to Ourselves: Conversations with Editors of the Irish News Media* (Kenny Bookshop and Gallery 1994) 7-8 and also at 25-26, 126, 356, 265-267 therein. See also speech of Douglas Gageby, former editor of the Irish Times, at the AT Cross National Media Awards *Irish Times* (Dublin, 30 November 1994).

<sup>121</sup> See Defamation Act 2009 (31 of 2009).

<sup>122</sup> Slater, book review (1987) 31:4 *JOBEM* 479. Also S Barber, *News Cameras in the Courtroom* (Ablex 1987).

<sup>123</sup> See for instance the section on media agenda setting generally in D McQuail and S Windahl, *Communication Models for the Study of Mass Communications* (2nd edn, Longman 1993) n 11 at 104, 104-110, but note 14-15. Also L Lull, ‘The Social Uses of Television’ (1980) 6:3 *Human Communication Research* 197, 202-203.

already provided by ‘respectable’ media organisations.<sup>124</sup> Unfortunately, the media in Ireland do not have the luxury of a separate language with which to resist the arguably diminishing standards of other English language media interests.

A majority also said coverage should be other than mere snippets. Therefore, any TCB would have to be extensive in nature or gavel to gavel. (The results of Part 2 Question B-3 could be argued to be in stark contrast. It was almost a tie as to whether broadcasting would be contingent upon courtroom participant consent). Whatever direct influence TCB may or may not have, at least some judges felt that such broadcasting would set the agenda (agenda-setting) of what aspects of the justice system would come under focus. While TCB *may* be educational this would not mean that there are other disadvantageous effects which also require balancing, such as a disproportionate focus on eg crime/violent crime, thus setting one particular agenda or fear within the community.

### **Part 2 Section D Headline**

Studies in law-psychology provide us with models to examine TCB effects. These questions tested judges’ familiarity and concurrence with some of these studies. In the last section there were four questions. These presented an eyewitness<sup>125</sup> event scenario and identification opportunity, all bases on empirical and psychology literature. The correct consensus answer to Part 2 Question D-1 was option (b). This was chosen by 68.42 percent (in 2010) and 41.67 percent (in 1997). The correct consensus answer to Part 2 Question D-3 was option (c). This was chosen by 24 percent (in 2010) and 16 percent (in 1997). The correct consensus answer to Part 2 Question D-4 was option (c). This was chosen by 61.54 percent (in 2010) and 56.25 percent (in 1997).

### **Results Part Question D-1: Cross Race Identification**

Identifications across race are less likely to be accurate.<sup>126</sup> Part 2 Question D-1 related to this issue of cross race identifications, as opposed to same race identifications. 68.62

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<sup>124</sup> BFA de Haan, above.

<sup>125</sup> See A Heaton-Armstrong, E Shepard, GH Gudjonsson and D Wolchover (eds), *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (OUP 2006).

<sup>126</sup> GL Rahaim and SL Brodsky, ‘Empirical Evidence Versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy’ (1982) 7:1 *Law and Psychology Review* 1, 2, and references at n 3 at 2. It is often claimed ‘that the media have effects, that they influence people and society. Others are less sure. Between these positions others suggest “that the media play an important role in influencing what the public thinks about, even though the media may not determine what we think.”’ This is the agenda setting theory, see EM Rogers, foreword in SA Lowery and ML DeFleur, *Milestones in Mass Communication Research: Media Effects* (Longman 1985) and ch 12 therein. This is also the view of DL Shaw and ME McCombs, ‘The Agenda Setting Function of the Media’ (1972) 36 *Public Opinion Quarterly* 176, and also other writings. Also, HA Shugart, ‘Ruling Class: Disciplining Class, Race, and Ethnicity in Television Reality Court Shows’ (2006) 17 *Howard Journal of Communications* 79.

percent correctly chose answer (b). The original 1997 survey had a figure of 41.67 percent. Therefore, there was a large increase. This also compares with 55 percent in the original study conducted by E Loftus.<sup>127</sup> She also used this question in another survey involving two separate samples. The correct answer was chosen by 54 percent and fifty seven percent respectively.<sup>128</sup> GL Rahaim and SL Brodsky also used this question<sup>129</sup> but used instead an Oriental American and a white person as the victims. This also involved two samples, (registered potential) jurors and lawyers, 'yielding an average of 39 percent correct answers for jurors and 58 percent correct answers for lawyers.'<sup>130</sup> B Cutler and S Penrod provide a very good introduction to this general area.<sup>131</sup> There is also an Irish case involving cross race identification where it appears there was an unsuccessful attempt to introduce psychological evidence.<sup>132</sup> However, the appeal was successful as the court was satisfied in any event that the verdict was unsatisfactory. On the case in question, while the proposed evidence was not officially introduced, was there some recognition of its existence in any event by the court? The court also expressly notes that the decision not to hear the psychological evidence was [only] 'in this appeal.' It is possible for other courts to hear such evidence. Indeed on a general note, as the demographic population of Ireland is changing, it may well be that in time there is a natural rise in cases before the courts which involve cross race identification issues.

Obviously the knowledge and appreciation of judges, lawyers and the public are important issues for cross race identification when these issues come to court. However, given that this has been widely researched, it is a good indication of whether or not judges are familiar with research issues and research studies which are applicable to the cross

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<sup>127</sup> E Loftus, *Eyewitness Testimony* (Harvard University Press 1979, 1996) 172. Note generally also, D Ergun, G Deason, E Borgida and G-U Charles, 'Race and Redirecting: What the Print Media Conveys to the Public About the Role of Race' (2008) 64 *Journal of Social Issues* 619.

<sup>128</sup> KA Deffenbacher and EF Loftus, 'Do Jurors Share a Common Understanding Concerning Eyewitness Behaviour?' (1982) 6:1 *Law and Human Behaviour* 26.

<sup>129</sup> GL Rahaim and SL Brodsky, above 10, 13.

<sup>130</sup> *ibid* 10-13. This is not to suggest that the author here advocates research into jury deliberations, indeed judicial statements in *People (Attorney General) v Lange* (Haugh J) [1967] IR 369, at 377 and *O'Callaghan v Attorney General* (O'Flaherty J) [1993] 2 IR 17 at 27 emphasises the finality and confidentiality of such deliberations. Note also concerns expressed by Lynch J in *People (DPP) v Courtney*, reported in *Irish Times* (Dublin, 28 January 1993). But note report of permission granted to CBS in the US to film actual jury deliberations, 'Jury Deliberations To Air?' (19 February 1996) *National Law Journal* A8.

<sup>131</sup> B Cutler and S Penrod, *Mistaken Identification: the Eyewitness, Psychology, and the Law* (Cambridge University Press 1995) 104. Also A Heaton-Armstrong, E Shepard, GH Gudjonsson and D Wolchover (eds), *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (OUP 2006).

race identification and by extension the TCB issues.

**Percentage of Judges Selecting Each Alternative Response for  
Each Question in Part 2 Section D**

Question	Option (a)	Option (b)	Option (c)	Option (d)
D-1	10.53 percent	<b>68.42 percent</b>	15.79 percent	5.26 percent
D-2	6.67 percent	<b>43.48 percent</b>	13.04 percent	0
D-3	56 percent	8 percent	<b>24 percent</b>	12 percent
D-4	26.92 percent	7.69 percent	<b>61.54 percent</b>	6.25 percent

The correct answers are highlighted in bold italics.

### **Part 2 Question D-2: Stress/Fear**

This question comes from GL Rahaim and SL Brodsky.<sup>133</sup> The results for this question in the present study are as follows. The correct answer was D-2-B. In the original study this was picked by 61 percent of jurors and 73 percent of lawyers. In this study it was picked by approximately 44 percent. While less than the original study, this was still the highest picked answer. Unfortunately this question was not included in the 1996 study.<sup>134</sup>

### **Part 2 Question D-3: Weapon-Focus**

Twenty four percent correctly answered option (c). Option (a) was chosen by 56 percent. In GL Rahaim and SL Brodsky's survey 57 percent were correct in the juror group and sixty percent in the lawyer group.<sup>135</sup> This is quite a substantial difference. In addition, eyewitness testimony is shown to strongly influence jury deliberation.<sup>136</sup> Weapon-focus is the idea that 'the presence of a weapon during a crime attracts the attention of the witness to the weapon, leaving less attention to the perpetrator's facial and physical characteristics... [in studies subjects] focus more often and for longer periods of time on

<sup>132</sup> *People (DPP) v Christo*, Court of Criminal Appeal, 31 January 2005, and as referred to in L Heffernan, *Evidence: Cases and Materials* (Thomson Round Hall 2005) 320.

<sup>133</sup> GL Rahaim and SL Brodsky, above 13.

<sup>134</sup> Therefore, no comparison is possible. There was an error discovered in the wording of option 2(c) of Part 2 Question D-2 in 1997, thus undermining the whole question. Therefore, Part 2 Question D-2 was not considered further originally. The original questionnaire was pre-tested to see its effect and make alterations. No judge nor anyone in pre-testing noticed this error in the original survey.

<sup>135</sup> GL Rahaim and SL Brodsky, above 9.

<sup>136</sup> E Loftus, 'Reconstructing Memory: the Incredible Eyewitness' (1974) 8 *Psychology Today* 116-119; GL Rahaim and SL Brodsky, 'Empirical Evidence Versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy' (1982) 7:1 *Law and Psychology Review* 1.

the weapon in comparison to the other objects appearing in the scene.<sup>137</sup> One study found a substantial contrast between 46 percent of subjects giving correct identifications in the weapon-hidden scenario, compared with 26 percent giving correct identification in a line-up test in the weapon-present group.<sup>138</sup> N Mehrkens Stebley in a meta-analytic review of the research at the time being of her review (March 1991) concluded that a ‘significant overall difference between weapon-present and weapon-absent conditions was demonstrated, with weapon-present leading to reduced identification accuracy.’<sup>139</sup> In one study involving psychologists, 90 percent ‘agreed that in a crime situation a victim is likely to focus on a gun, which will interfere with his or her ability to remember the criminal’s face.’<sup>140</sup>

#### **Part 2 Question D-4**

This question was answered correctly by 61.54 percent. It was based upon a question in KA Deffenbacher and EF Loftus<sup>141</sup> where in the first sample 71 percent chose the correct answer while 54 percent did so in the second sample.<sup>142</sup> Two questions in Part 2 Section B relate to this area. When asked if expert psychological testimony is relevant with regard to eyewitness capability and credibility 35.29 percent Agreed. However 64.70 percent Disagreed. (Part 2 Question B-11). Judges were then asked if expert psychological testimony *can be* relevant with regard to eyewitness capability and credibility (original emphasis). This time 68.57 percent Agreed and 31.46 percent Disagreed. The following question (Part 2 Question B-13) states that witness assertions of confidence are probably the least important factors for diagnosing the accuracy of eyewitness identifications. 70.59 percent Agreed and 29.41 percent Disagreed. GL Wells and DM Murray suggested from their review of the results of 31 studies that ‘the eyewitness accuracy-confidence relationship is weak under good laboratory conditions and functionally useless in forensically representative settings.’<sup>143</sup> Indeed studies indicate that jurors place greater

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<sup>137</sup> E Loftus *ibid* n 37.

<sup>138</sup> *ibid*.

<sup>139</sup> NM Stebley, ‘A Meta-Analytic Review of the Weapon-Focus Effect’ (1992) 16:4 *Law and Human Behaviour* 413.

<sup>140</sup> Conducted by AD Yarmey and HPT Jones, ‘Is Eyewitness Identification a Matter of Common Sense?’ in S Lloyd-Bostock and BR Clifford (eds), *Evaluating Witness Evidence* (Wiley 1993), as referred to in E Loftus, G Loftus and J Messo, ‘Some Facts About “Weapon-Focus”’ (1987) 11:1 *Law and Human Behaviour* 55, 55-56. See also E Loftus, *Eyewitness Testimony* (Harvard University Press 1979, 1996) 175.

<sup>141</sup> KA Deffenbacher and EF Loftus, above Q 13 at 29.

<sup>142</sup> See, in relation to this section in general, CA Luus and GL Wells, ‘The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects’ (1994) 79 *Journal of Applied Psychology* 714; BE Bell and Ef Loftus, ‘Trivial Persuasion in the Courtroom: The Power of (a Few) Minor Details’ (1989) 56:5 *Journal of Personality and Social Psychology* 669.

<sup>143</sup> GL Wells and DM Murray, ‘Eyewitness Confidence’ in GL Wells and EF Loftus (eds), *Eyewitness Testimony: Psychological Perspectives* (Cambridge University Press 1984) 165.



emphasis on the testimony of confident witnesses, even though indications are that confidence is not a reliable indication of accuracy or at least a weak indicator of accuracy.<sup>144</sup> Professor Penrod states that an eyewitness may be ‘100 percent confident and still be 100 percent wrong.’<sup>145</sup> ‘[D]espite the generally accepted belief that eyewitness confidence and eyewitness accuracy should be related, the bulk of the empirical evidence collected in laboratory and field experiments over the past 25 years indicates that eyewitness confidence is generally not a good predictor of eyewitness accuracy.’<sup>146</sup>

Part 2 Section C Question 11 referred to the accuracy of a lawyer’s confidence in not being affected by courtroom TCB cameras. Respondents answered 20.59 percent (SA), 55.88 percent (A) and 20.59 percent (D) that such confidence was not the most accurate indicator of his/her not being so affected by camera presence in court. Deutscher<sup>147</sup> found that there can often be discrepancies between reported attitudes in interviews and actual attitudes and behaviour as indicated from observations of that behaviour.

W Philips Davidson also identifies what he calls a ‘third person effect’ in which individuals overestimate the effect of mass communication on *others*, and believing it to have little if any effect upon themselves. Both of these areas suggest opportunity for research into effects of TCB.<sup>148</sup>

### Summary and Conclusion

This is the first research in Ireland to tackle the out-of-court TCB issues. It gauges public attitudes towards permitting TCB in Ireland. It is very important also because it is the first baseline public research in relation to any potential TCB in Ireland. This baseline research should be continued. (The baseline research should also be expanded to other issues in relation to potential TCB, including, for example, the courtroom communication process in Ireland, effects and processes in court in Ireland, etc).

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<sup>144</sup> CR Hollin, *Psychology and Crime* (Routledge 1989) 165. Also GL Rahaim and SL Brodsky, above, n 32 at 8.

<sup>145</sup> See B Cutler and S Penrod, above, n 37 at 4, 112. Also note C Fennell, *The Law of Evidence in Ireland* (Butterworth 1992) 141-145, 164. Generally, note L Heffernan, *Evidence: Cases and Materials* (Thomson Round Hall 2005).

<sup>146</sup> JS Shaw III, KA McClure and JA Dykstra, ‘Eyewitness Confidence from the Witnessed Event Through Trial’ chapter in M Toglia, JD Read, DF Ross and RCL Lindsay (eds), *The Handbook of Eyewitness Psychology Vol 1: Memory for Events* (Erlbaum 2007) 371.

<sup>147</sup> Deutacher, *What We Say/What We Do* (Scott, Foresman 1973) referred to in KB Jensen and NW Jankowski (eds), *A Handbook of Qualitative Methodologies for Mass Communication Research* (Routledge 1991) n 15 at 61.

<sup>148</sup> WP Davidson, ‘The Third Person Effect in Communication’ (1983) 47:1 *Public Opinion Quarterly* 1, referred to in JM Innes and H Zeitz, ‘The Public View of the Impact of the Mass Media: a Test of the “Third Person” Effect’ (1988) 18 *European Journal of Social Psychology* 437.

In terms of the instant research, the public attitudinal survey notes that the ‘public are pretty much split down the middle when it comes to the idea of allowing TV cameras in the courtroom, with just over half agreeing they should be allowed, and just under [half] stating that they shouldn’t be allowed.’<sup>149</sup> There is therefore, according to this research, no clear public view in Ireland positively advocating TCB in Ireland. This is interesting, if not curious, given that the majority feel that TCB would lead to more accurate reporting of cases. It is important to note, however, that further research is needed to explore why the public feel that accuracy and or education would be achieved or be increased.

Just as the US Supreme Court empirical research challenge needs to be addressed, we need to undertake significant research in Ireland, particularly prior to any actual introduction of any form of TCB in Ireland – or any jurisdiction. The research gaps, wherever located, need to be addressed. As has already been pointed out, part of this involved cross-disciplinary research and examining comparative research, whether legal or otherwise. Indeed the Law Reform Commission while referring to jury issues, state that ‘[t]here is a lack of research on the operation and composition of juries in this jurisdiction. For that reason the Commission is mindful in recommending reform of the law there is no data to support reform directions, over than consultation, anecdotal evidence and comparative research.’<sup>150</sup>

There is also research in relation to the development of new methods of survey a research of confidence in justice.<sup>151</sup> Recent research suggests that we need to ‘finalise our conceptual map of the issues.’<sup>152</sup> It also states that future research should develop the “‘conceptual map” of issues relevant to trust in justice,’ and develop ‘survey measures capturing the key concepts in this map.’<sup>153</sup>

B McConnell feels that UK parliamentary broadcasting has led to politicians playing and acting up for the camera.<sup>154</sup> A Miles, a Times correspondent, says that parliamentary broadcasting has not increased public confidence in the political system, and may have

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<sup>149</sup> *ibid.*

<sup>150</sup> Law Reform Commission, *Jury Service* (LRC CP 61-2010) 58, as referred to in M Coen, ‘Elephants in the Room: The Law Reform Commission Consultation Paper on Jury Service – Part 1’ (2010) 20:3 *Irish Criminal Law Journal* 1, 2.

<sup>151</sup> See M Hough, M Yordanova, D Markov and M Ilcheva, ‘Scientific Indicators of Confidence in Justice: Tools for Policy Assessment’ (12 June 2009) *Justis* < [www.eurojustis.eu/fotoweb/22.pdf](http://www.eurojustis.eu/fotoweb/22.pdf) > accessed 19 January 2014.

<sup>152</sup> *ibid* iv.

<sup>153</sup> *ibid* 1, 3.

<sup>154</sup> B McConnell, ‘Cameras in Court’ (16 November 1990) *New Law Journal* 1622.

undermined it.<sup>155</sup> The UK official discussions also refer to the potential witness intimidatory effects of TCB.<sup>156</sup>

Overall, there are significant amounts of research which judges are not familiar with and which point the way in relation to TCB research and issues, particularly forms of TCB, effects of TCB on participants and effects on the audience. While eye-tracking is not expressly referred to in the survey instrument, there is no reason to believe the views of the Irish judiciary would differ from the US Supreme Court, and the research challenge. The Irish judicial consensus remains opposed to TCB in Ireland. Since 1996 judicial attitudes in Ireland have hardened against the introduction of TCB in Ireland. The international survey confirms that internationally, just as across the US, opinions and forms of TCB can vary. More nuanced comparative examination of different TCB forms and TCB form effects would be beneficial.

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<sup>155</sup> P Houlst, 'Press Round-Up: OJ Ko As Pilot Allows Cameras Into Court of Appeal' (9 September 2004) *Law Society Gazette* 10.

<sup>156</sup> Department of Constitutional Affairs [UK] *Broadcasting Courts, Consultation Paper* (CP 28/04 November 2004) 45.



## CHAPTER 21: FUTURE RESEARCH CONSIDERATIONS

### Introduction

This chapter now ties the above research and chapters together in terms of summarising the issues, challenges and recommendations for future TCB effects-research. The context of the research remains important. For example, if the US Supreme Court, or any other courts, were to have to deal with a TCB related case tomorrow and were obliged to consider effect issues as they may well have to, the amount and conclusiveness of the legal-empirical effects-research available to them is still less than determinative of the concerns to be of great assistance to such courts. Further research is ideally needed. Even beyond the judiciary, those whom may be interested in the TCB questions would also be better informed with more normative legal-empirical effects-research. The above analysis indicates how little TCB effects-research there is, and how there are numerous gaps in the TCB effects-research that does exist. The suggested research avenues in the foregoing chapters may assist TCB effects research. We should also address a number of other problems which have afflicted the research generally to date. These general themes are referred to variously elsewhere throughout the work,<sup>1</sup> and summarised below.

The US Supreme Court effects-research challenge theme in the three cameras cases of *Estes*,<sup>2</sup> *Chandler*<sup>3</sup> and *Hollingsworth*<sup>4</sup> is not referred to in the discussion and debate. It is not catered for in research design issues.<sup>5</sup> We should seek to address the US Supreme Court effects-research challenge. The debate or policy discussion is diminished for its absence. Such research effort requires an interdisciplinary approach. A legal caselaw analysis alone is unable to answer the US Supreme Court challenge. It has also been highlighted above, that the US Supreme Court has not delved into how to address the challenges and the effects concerns. This work has sought to identify certain of the gaps and set out suggested definitions, baseline parameters, etc, which may assist more sustained research of TCB effects, and which will assist in answering the US Supreme Court challenge. Carrying out such research is the next stage. The author recommends such research and the funding of such valuable research.

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<sup>1</sup> However, a detailed analysis of all such issues would require significantly greater resources than available for the current work. It is strongly recommended that future research collect (to the extent that they are still available), assess and compare the general research studies.

<sup>2</sup> *Estes v Texas* 381 US [1964] 532.

<sup>3</sup> *Chandler v Florida* 449 US [1981] 560.

<sup>4</sup> *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 19 January 2014.

<sup>5</sup> Indeed, there is little general empirical research of the impact of news coverage and, for example, juror behaviour. JS Carroll, 'Free Press and Fair Trial: the Role of Behavioral Research' (1986) 10 *Law and Human Behavior* 187.

## **Methodology**

While many aspects of such research have been highlighted above, and indeed baseline research has been carried out by the author in Ireland,<sup>6</sup> as well as the first demonstration of eye-tracking technology in a courtroom for TCB effects-research. This was specifically in relation to the research of distraction-effects on courtroom participants as may be caused by TCB cameras and television operators in the courtroom.<sup>7</sup> Earlier, the thesis asks an important but overlooked question, namely what is CB and TCB actually are. The research effort, and indeed the overall US Supreme Court effects-research challenge have not addressed these definitional issues. There is still no overall characterisation or classification of CB and TCB forms.

## **Distraction-Effects and Eye-Tracking**

There are various potential effects which can occur inside the courtroom. One of these is distraction of the courtroom participants which may be caused by the TCB cameras and or the operators of those cameras in the courtroom. The author's proof-of-concept demonstration shows how eye-tracking technology can be relevant to the US Supreme Court challenge and how we may begin empirical and recorded research of distraction-effects in court. Such research can be undertaken for any one or more of the different courtroom participants. The author strongly recommends that such research be followed through and indeed associated funding to enable such research.

We might address the US Supreme Court distraction-effects research concerns. Any debate or policy discussion is diminished for its absence. The implications are international and not simply national to Ireland. The thesis indicates how little distraction-effects research there is, and how there are numerous gaps in the effects-research that does exist. The US Supreme Court effects-research concerns throughout the three cameras cases is not referred to in the general discussion and debate. It is not catered for in research design.<sup>8</sup>

The thesis focuses on effects-research issues with TCB. It advocates that significant TCB definition, scoping and research be undertaken to address the effects concerns, gaps and

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<sup>6</sup> But with obviously more baseline research to do.

<sup>7</sup> Significant research effort, and funding, is now required in order to begin the first TCB eye-tracking effects-research experiments and trials.

<sup>8</sup> Indeed, as noted above, there is little general empirical research of the impact of news coverage and, for example, juror behaviour. JS Carroll, 'Free Press and Fair Trial: the Role of Behavioral Research' (1986) 10 *Law and Human Behavior* 187.

challenges. The focus is more specific than the wider and less defined topics of courtroom broadcasting (CB) or TCB arguments per se.

The research effort of the effects of TCB (and by implication the legal, legal-policy and arguments discussion), is not sufficiently developed. The research effort and results fall far short of what we should expect. The literature also notes the lack of empirical research. Only by critically examining the research to date is it possible to fully appreciate this, and to look at how we might address it. The author therefore undertook an extensive review of the literature and research literature to date. This was wider than the attention given by any of the individual commentators on courtroom broadcasting (CB) generally.

Some of the many and varied problems with the existing effects-research are examined, some highlighted for the first time. Most TCB research is not defined. No body of sustained research currently validates any of the arguments whatsoever or any prior research. Empirical studies are typically the most rigorous and more considered of effects-research studies. Unfortunately, these are the ones least frequently undertaken. The issues of the location of the TCB cameras and the location of the courtroom participants, and its importance for effects-research, are identified by the author for the very first time.

The thesis contributes to the legal, legal-policy and argument discussion, by identifying for the first time the common theme within the three US Supreme Court TCB camera cases. This is the US Supreme Court's challenge and requirement that more empirical research be undertaken to examine the effects of TCB. While identifying this challenge for the first time is significant, the author goes further. Issues that the US Supreme Court has not yet identified as research challenges are also dealt with by the author. Further still, the author identifies some specific research challenges and how we might go about researching them with legal-empirical research. The distraction research challenge referred to by the US Supreme Court caselaw can be advanced with the use of eye-tracking technology. This requires both legal and technical expertise. As the US Supreme Court appears to implicitly acknowledge, addressing the challenges, is not solely a legal issue or solely an empirical issue. The research solutions are cross-disciplinary. Addressing effects concerns on legal arguments alone is inadequate. The US Supreme Court's appreciation of this point needs to be reflected in discussion and considerations in both Ireland and the UK in future. The solution proposed by the author

to the distraction research problem referred to by the US Supreme Court (and yet to be considered in Irish or UK caselaw) may be beneficial both here and internationally.

The thesis research and recommendations and the linking of cross-disciplinary research is supported by the US Supreme Court; the effects-research to date – such that it exists; and also related legal cross-disciplinary research.<sup>9</sup>

There are various potential effects which can occur inside the courtroom. One of these is distraction of the courtroom participants which may be caused by the TCB cameras and or the operators of those cameras in the courtroom. Neither the US Supreme Court, nor commentators, have recognised that as broadcasting technology may change, so too can the research tools available. One example of an advanced research tool is an eye-tracker. Eye-tracking (the study of eye movement and gaze) was not considered in the US Supreme Court decisions. Neither has it been considered in the general literature in relation to TCB. Eye-tracking will assist in conducting research of effects of TCB, and in such way as the US Supreme Court may not have even considered possible. Eye-tracking can greatly assist in addressing the research challenge set by the US Supreme Court. The US Supreme Court is not aware of eye-trackers and did not refer to eye-tracking in any way whatsoever. Eye-tracking can be used for conducting in-court effects-research, in particular research of distraction-effects. There are also many advantages of eye-tracking, including being able to track distraction-effectively and being able to record the results.

The author's proof-of-concept demonstration indicates how eye-tracking technology is relevant to the US Supreme Court challenge and how we may begin empirical and recorded research of distraction-effects in court. Such research can be undertaken for any one or more of the different courtroom participants. The author strongly recommends that such research be followed through and indeed associated funding to enable such research. The author undertook the initial in-court proof-of-concept demonstration of eye-tracking technology for in-court distraction-effects caused by TCB. This demands to be taken to the next level of research in future. Distraction, visual cone-of-vision, participant and observer locations need to be incorporated into eye-tracking and location research. Camera perspective bias research offers research avenues for TCB research in

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<sup>9</sup> Eg certain Harvard Law Review research. Legal research in family law, criminology and recently sentencing in Ireland also rely increasingly upon empirical research. The thesis and the thesis propositions are equally valid.



and of itself, but is also an example of TCB camera perspective bias and eye-tracking research. Similarly, with camera focus issues. It also exemplifies cross-disciplinary psychology-legal research. Eye-trackers are a central tool for TCB effects-research.<sup>10</sup>

It has long been realised that eyewitness identification can be fallible, but sustained research is illuminating why this may be so and in what circumstances. Surely then, such evidence is pertinent to cases where there exists a strong reliance upon eyewitness identification. Psychological research into the court process dates back at least to 1908.<sup>11</sup> More recently such research has centred upon eyewitness testimony and factors affecting eyewitness identifications, for example, E Loftus in her book *Eyewitness Testimony*.<sup>12</sup>

There is evidence of the weapon-focus effect, as already discussed. It has been hypothesised by the author,<sup>13</sup> that there might be a similar effect caused by television courtroom cameras, distracting (or attracting) the (full) attention of court participants. E Loftus has empirical evidence of weapon-focus<sup>14</sup> using a corneal reflection device<sup>15</sup> to discover where and for how long individuals focus their attention.

Such an experiment could also be constructed for TCB cameras. That the opportunity for such research has been left untapped is an indictment on those involved in such broadcasting.<sup>16</sup> This area provides only one avenue of potential research into TCB, others coming from the fields of psychology-law, media and communications studies.

Further research should also address the nuanced but important issues of direct central visual cone-of-vision distraction; peripheral visual cone-of-vision distraction; and indirect visual cone-of-vision distraction of courtroom participants.

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<sup>10</sup> Eye-trackers have also been used in another novel legal context, namely tobacco effects litigation and forms of court mandated health advertisements. An important legal article in the Harvard Law Review also undertaken empirical inter-disciplinary research.

<sup>11</sup> C Hollin, *Psychology and Crime* (Routledge 1989) n 47, 152 ff, 171-180. B Hughes, 'Psychology in Court, An Overview' (1998) 1 Galway Student Law Review. LS Wrightsman, *The Psychology of the Supreme Court* (OUP 2006).

<sup>12</sup> EF Loftus, *Eyewitness Testimony* (Harvard University Press 1979, 1996). See also A Heaton-Armstrong, E Shepard, GH Gudjonsson and D Wolchover (eds), *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (OUP 2006).

<sup>13</sup> P Lambert, 'Cues, Cameras and Courtroom Actors: Resisting the Temptation of Courtroom Television Cameras' (January 1996) Irish Law Times 13.

<sup>14</sup> E Loftus, G Loftus and J Messo, 'Some Facts About "Weapon-Focus"' (1987) 11:1 Law and Human Behaviour 55, n 43 at 55.

<sup>15</sup> As originally used by GR Loftus and NH Mackworth, 'Cognitive Determinants of Fixation Location During Picture Viewing' (1978) 4:4 Journal of Experimental Psychology 565.

<sup>16</sup> Some might suggest that such research could prove detrimental to these interests in promoting or ensuring continued TCB. Indeed in anticipation of such research ever coming forth in the future, the network interests have been reported as preparing to undermine the results of such studies. See RL Hughes, 'Chandler v Florida: Cameras Get Probation in Courtrooms' (1982) 26:1 Journal of Broadcasting 43, n 82 at 442.

## **Courtroom Design**

As L Mulcahy notes, we ‘frequently assume that if all else is equal, the judgment given in one place would be the same as the judgment reached in another.’<sup>17</sup> The thesis earlier raises the query as to why we assume that there are/are not TCB effects, and that any effects will be the same across all forms of TCB. Equally, it is unfortunately assumes that all TCB is the same, and that all TCB effects are the same. There a less than considered body of research regarding all of the different categories (and personality types) of the TCB participants. One of the issues to be considered in TCB effects-research and TCB eye-tracking distraction-effects research is the research of courtroom design. This can be incorporated into TCB distraction-effects research with eye-tracking. There can frequently be an assumption of ‘judicial space as neutral,’ however L Mulcahy suggests instead that ‘the shape of a courtroom, the configuration of walls and barriers, the height of partitions within it, the positioning of tables, and even the choice of materials are crucial to a broader and more nuanced understanding.’<sup>18</sup> Can we assume that one form of TCB may have distraction-effects but other forms are immune. TCB courtroom design in association with TCB eye-tracking, visual cones-of-vision and location-effects research can potentially enhance our discussion and understanding.

## **Ireland**

There is no courtroom broadcasting (CB) nor TCB in Ireland. As a consequence, therefore, there is no research of actual TCB effects. No Irish (or UK) caselaw exists in relation to CB or TCB, or in relation to CB or TCB effects issues. There is no explicit policy or rule in relation to same. In addition, the general the climate appears to be against such broadcasting in Ireland. There appears no representative research in the UK. However, the US Supreme Court research challenge and the related issues are also relevant here.

The author ploughed the furrow of research in Ireland in 1996. The author expands upon this with further valuable research. The intention was not only to repeat and expand the 1996 research (valuable in and of itself) but also to undertake comparison, and to develop it in a three-way manner. This was intended to encompass research of attitudes of the judiciary; the television and newspaper media; and the general public in Ireland. The author was successful in two of these endeavours, namely, in relation to the judiciary and the first representative public attitudinal TCB survey in Ireland. While the media

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<sup>17</sup> L Mulcahy, ‘Architects of Justice: the Politics of Courtroom Design’ (2007) 16 *Social & Legal Studies* 383, 384.

<sup>18</sup> *ibid* 384.

responses were disappointing, this might be more successful in future research. Such a valuable research endeavour is highly recommended by the author.

The only empirical research in relation to TCB and TCB effect issues in Ireland was that of the author in 1996. This was in the form of a judicial questionnaire regarding TCB issues. The extensive and varied research undertaken as part of this current research is the only additional effects related research in Ireland. In terms of the judiciary specifically, the current research has found that judicial attitudes in Ireland have not become any more favourably inclined towards permitting TCB since 1996. While the author repeats and expands the judicial research of 1996 again currently (thus the first replicated research in Ireland or the UK), the judicial research is also compared with relevant research from New York. The author, therefore, introduces a valuable comparative element to the current research. While the author's current research (and past research) are all important in and of themselves, this research is extremely valuable in terms of establishing baselines and parameters for any future research in Ireland.

The Law Reform Commission does not address the effects issues or the US Supreme Court research challenge. Baseline research issues were also not referred to. It was not directly addressing TCB issues. The Law Reform Commission does not refer to arguably the optimum argument for TCB, namely, education-effects. There is no reference to the US Supreme Court challenge or any of the empirical research issues – in particular the baseline research issues before TCB occurs. It also ignores any reference to form issues.

The most significant research in Ireland remains the author's judicial research of 1996, now repeated and significantly expanded in content and comparison currently. In addition, the author undertakes the first public research relating to TCB effects and opinion issues in Ireland. The author sought to expand the research to the media in Ireland, but the response levels were disappointing. While this was unfortunate, the author's research is a vastly significant step in establishing the baselines and parameters for TCB effects-research in Ireland. This is a necessary prerequisite, notwithstanding the omissions of other jurisdictions. The other significant point is the suggestion of eye-tracking technology for in-court TCB effects-research by the author. This suggestion, as well as the successful proof-of-concept demonstration, are seminal in terms of TCB and TCB effect discussion anywhere. New Zealand research found most judges were distracted by TCB cameras. New York and New Zealand research found that most of the public would be less willing to testify as witnesses if there was TCB. The author's

research also found that Irish judges were against permitting TCB in Ireland, and that there was no public impetus for TCB.

### **Models**

The thesis highlights and explores how the TCB concerns of today (such as the UK Lord Chief Justice) and of previous superior cases (such as the US Supreme Court) require more nuanced normative TCB effects-research. One of the bigger conceptual issues for such research will be to identify categories of TCB, categories of TCB issues and to develop appropriate research models.

### **iTCB**

The development of iTCB is relatively recent, yet in time may come to be seen as one of the most significant game changers to the TCB discussion. iTCB potentially has very different out-of-court viewing audience effects from television mediated TCB. For instance, the content of iTCB may vary quite significantly from that of TCB and particular forms of TCB. Internet mediated iTCB holds the potential to have more footage, longer footage, more in-court voice footage and less edited, voiced-over and snippets of courtroom proceedings than TCB.

There is also a significant issue in terms of courts and court services being (more) in control of the operation and use of the CB and CB content in iTCB situations. Courts and legal-policymakers adopting iTCB retain more control. They have more opportunity to mandate prior baseline legal-empirical research and to mandate ongoing legal-empirical research as the project continues inside the courtroom. Courts and legal-policymakers have more opportunity with iTCB to afford appropriate time to consider all of the legal, legal-policy, risk and effect issues and to adopt the necessary legal-empirical research. This is sometimes difficult if TCB has to be considered in the white heat of an individual TCB access request in an instant case; in open discussions with media representatives which creates the pressure of an assumed acceptance and momentum to broadcast which might not necessarily be the case; and outside the pressure of lobbying by certain media organisations (which is most recently evident in the UK). It is also worth noting that the technological aspect iTCB offers the potential of additional types of research which may not be possible with TCB. Some of this research can be directly carried out by (or on behalf of) the courts and or courts service. Ultimately, iTCB may hold the potential for being more educational than television mediated TCB. This will certainly be an important issue of consideration for future courts and legal-policymakers.

### **Future Research and Questions to be Addressed**

It is surprising that more research has not been undertaken into the effects of TCB, given that the US Supreme Court first called for empirical research studies as far back as the *Estes*<sup>19</sup> case in 1965. However, the flaws and challenges can be addressed. Genres and formats research also helps us to recognise and distinguish different programmes. TCB research is criticised for involving only basic and cursory research methodologies, in particular self-reports and opinion-reports. We should not rely on self-reports and opinion studies alone. Research possibilities exist to deal with this.

Studies also need to be compared to each other, replicated and verified. Longitudinal research need to be undertaken also. This does not occur to date. We need more research, and in particular using psychology, media, communications, camera perspective bias, eye-tracking distraction research and baseline research. Live courtroom broadcasting effects and implications need to be researched. Research needs to examine what occurs in courts normally and then how TCB uses and portrays this. We need a more robust and scientifically based research following the lead of other fields of research, such as legal-psychology. No explicit definitions and forms are properly distinguished in the research literature. The location issues identified, need to be incorporated in the research effects-research in future. We also need to begin detailed comparative research. These provide an abundance of relevant research opportunities.

In New Zealand what was broadcast was a mix of courtroom footage, out of court footage and re-cut file footage. There was also significant editing. What are the implications for courts and legal-policymakers? There can be a large difference between what is filmed and what may be broadcast. The TCB process needs to be researched and documented. From the foregoing analysis it is clear that significant research already undertaken in other areas and related areas can be applied to TCB issues. What is also clear is that even looking at the TCB arguments, apart from the issue of there being no validations of any arguments, there has been no proper consideration of what each of the arguments actually means. When properly considered, the various TCB arguments lead to queries and consideration about the meaning and parameters of each argument. For example, some of these queries and parameters for some of the TCB issues include,

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<sup>19</sup> *Estes v Texas* 381 US [1964] 532.

#### Distraction and Eye-Tracking

- The author's novel suggestion and successful proof-of-concept which indicates that eye-tracking technology can be used to measure and record the distraction-effects on courtroom participants, all need to be followed up with further research.

#### Irish Baselines

- The author has indicated the importance of gathering research data well before TCB is introduced.
- The research of the author which began this research in 1996 and 2010 needs to be expanded and repeated.
- The public and audience research needs to be repeated and expanded.
- The process of the court also needs to be researched prior to TCB being introduced.

#### Education and the Television Audience

- Is education possible through broadcasting of the courts?
- Is education a primary or secondary media interest?
- What effect on the potential educational value of TCB will ensue if it is only a secondary or subsidiary interest?
- How does the educational potential differ amongst the various types of TCB?
- At what stage is there a sufficient amount of educational potential/effect to make TCB, or particular forms of TCB, worthwhile?

#### Communication Models

- Does courtroom broadcasting fit within an existing communications model?
- How does one construct a new communications model for TCB, if this is necessary?
- How does TCB communicate to the reader (audience)?
- What does it communicate?
- How are cases selected for broadcast and what are the various stages of this selection/gatekeeping?
- What influences viewers to watch TCB?

#### The Media Audience

- How extensive is the TCB audience?
- What forms of TCB are watched?
- What influences selection of TCB and why are particular selections made?
- Does the audience differ among the various types of TCB?
- What, if anything, does the audience learn?
- Which forms of TCB does the audience learn most from?
- How does the audience react to TCB in news programmes, docu-dramas, documentaries, etc, and how does the audience react as between light entertainment and serious presentations within those categories?

#### Agendas

- Is TCB reflective of the court process?
- Is TCB reflective of the types of cases?
- Is TCB reflective of the actual cases covered?
- Do agendas surface in any of the forms of TCB as exists, and in which forms of TCB in particular?
- Do others use what has been broadcast on TCB to serve or enhance their own agendas?
- How does courtroom broadcasting affect existing agenda setting?

#### Language

- What language or languages are used in TCB and TCB programmes?
- What are the consequences for meaning and understanding by using different languages and texts while ignoring others?
- When more than one language or text is present, what is the effect of one being subordinate to another?
- What other things within TCB convey meaning apart from that which is said (ie the main text)?

#### Confidence

- Can self-report studies of themselves accurately indicate the effects of TCB?
- How does one overcome the limitations of the self-report and confidence problems?

#### Weapon-Focus

- How can weapon-focus and other psychological research, such as stress, impact upon the study of TCB effects?
- How can existing studies be adapted to study courtroom broadcasting?
- How can existing studies form the basis for creating studies specific to TCB?

#### Other Issues

- What influence should the views of courtroom participants have on the decision to broadcast generally, and also upon the decision to broadcast individual cases in particular?
- What does the research so far reveal?
- Is the research adequate? If not, why not?
- Does an educational/entertainment distinction exist between the various forms of TCB and what are the implications?
- What are the effects of television courtroom cameras on the courtroom participants?
- What are the effects of TCB on the courtroom participants?
- What are the effects of TCB on the audience?
- Should criteria or minimum guidelines be outlined for the content and process of television courtroom broadcasts and TCB forms?

### **Wider Research Opportunities**

If we proceed to follow the suggestion of eye-tracking TCB research in relation to the in-court participant distraction concerns, this experience will also open up further research opportunities. The distraction-effects are focused inside of the courtroom. However, much of the popular discussion, popular argument and certain of the judicial commentary relate to effects, or potential effects, outside of the courtroom.

The above research can be extended outside of the courtroom and can look to media and communications type research in order to consider what the effect and viewing habits may be of those members of the public whom watch TCB cases. Eye tracking can be particularly useful as a normative TCB research tool for out-of-court audience issues. Courts, legal-policymakers, researchers, television stations and those engaging in the popular TCB discussion would be assisted to know how focuses, how passive, how distracting and diverted might be the attention of the TCB audience members when watching TCB programmes. This is a level of in-depth research which has not been

possible before in relation to TCB. Some of the other possible things we might discover is whether audience members are more attentive to TCB programming than other programming; what particular things they may focus on more in the TCB programmes; whether things that courts, researchers or proponents may consider to be important in TCB programmes receive a certain level of, or any, attention by the viewing audience members; whether attention, focus, etc, vary as between one type of TCB programme and another type (or form) of TCB. Extended TCB eye tracking can assist in developing and progressing such research.

### **Education-Effects Research**

Extended out-of-court eye-tracking can also be applied to the TCB educational question. One of the arguments used by proponents of TCB, particularly the media, is that it is or will be educational. None of the research to date bears this out, albeit partly because most of the research is not considered. In fact no proponent of TCB has shown any study where TCB has been shown to be educational. The media is well aware of media research, and media effects-research methodologies and techniques.

*Media and TCB Communications:* While worthwhile research, on a significant scale, into effects has yet to be undertaken, other pertinent areas should not be ignored. The whole issue of TCB cameras should not be divorced from other facets of the media and communications field. The exact location of TCB forms within the communications compendium is also awaiting definition.

- *Media and TCB Research:* TCB is naturally popular and emotive issue. It also poses significant legal, social and ethical issues. It is because of this that there have been so many arguments and issues raised by those supporting and opposing TCB. There are clearly many issues and concerns to be addressed and hopefully resolved. However, as S Barber<sup>20</sup> highlighted the TCB research carried out during the period 1975–1981 did not answer these questions. In fact most of the questions and issues were ignored completely in the research. The present author feels that nothing significant has changed in the research since that date. Therefore, the research and the proponents of TCB (and others) can be accused of not being serious in examining the effects of TCB, or indeed any of the other issues which relate to this topic. We might also ask generally why there has been so little research, and also why the research is so limited and primitive. Courts while legitimately and responsibly concerned about the issues involved with TCB may not always be the best entity to conduct such research. In many instances courts have been pushed into permitting access. Where

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<sup>20</sup> S Barber, above 92-93.



they have permitted access they have not been provided with additional resources to properly achieve the research task. There has been no adequate separate budget to conduct a wide and meaningful study of effects, etc, particularly on an ongoing basis. Not every court or series of courts has been able to carry out research. Judges may not always be aware of the wider research opportunities, and it is clear that judges themselves are not professionally trained social scientists and researchers of many of the particular issues involved. Many of the studies require scientific, communications, psychological and statistical experience. In many instances media organisations will have experience or knowledge of some of these issues and research opportunities but have never volunteered their knowledge to the courts. Indeed, in some instances the media themselves are best placed to carry out some of this research;

- *TCB and Media Gatekeeping:* There are many studies in existence which examine the form and content of particular media product/output, be it programming, print or radio. Some of this research also examines the personnel, processes and decisions through which information must go through before becoming the final report or broadcast content. No similar research has been conducted into the TCB process and what stages, personnel, criteria and decisions influence and mould what TCB cases and forms reach the ultimate viewing audience. If such studies have been and continue to be carried out for a whole variety of television and newspaper content, this can also be done for TCB. The answer is that some of those who should be conducting or requesting such research may be unaware of it (eg courts), or alternatively those who are aware of and are familiar with such research (eg the media) are unwilling to carry it out or to assist others to carry it out. The current research is less than optimistic, as has already been pointed out because it is so confined and limited both in terms of its scope and methodologies. A related criticism is that much obvious published and available research and also existing research methodologies have been ignored. Whatever one can say about whether or not judges should be aware of such research avenues, certainly the media proponents of TCB and at least some of the (academic) commentators who have published papers on the overall theme of TCB should have averred to and carried out research using the supplementary research themes and methodologies. Therefore, this is not just a flaw of the research to date, but it is a criticism of most of those involved in and commenting upon TCB and TCB research;
- *Media:* N Furlough develops research into media discourse, and relies, amongst other things to media studies, social theory, linguistic and sociolinguistic analysis, conversation analysis, semiotic analysis, critical linguistic and social semiotics, social-cognitive analysis and cultural-generic analysis.<sup>21</sup> In TCB debates most effects-arguments focus on what effects occur with the main courtroom participants, namely the lawyers, judge, jury, etc. However, there are other participants in courtroom broadcasting. These include reporters, court personnel, presenters, editors, experts, the audience(s), and other interested parties eg

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<sup>21</sup> N Fairclough, *Media Discourse* (Edward Arnold 1995) 20–34.

politicians, academics.<sup>22</sup> Even after a particular case may be filmed, it may be significantly packaged and presented, especially where this is in a non-live TCB form. For example, a media television text may be mediated and worked on by journalists, presenters, various editors, and various technical staff.<sup>23</sup> It may also go through numerous drafts and versions, a news story may be amended eight times.<sup>24</sup>

### Other Research Considerations

Numerous other research issues and considerations arise. These include but are by no means limited to the following.

- *Definitions:* The author provides a first considered definition of TCB. It is defined as follows: TCB as such relates to TCB cameras in the courtroom, filming courtroom proceedings for live and or contemporaneous television push broadcast to the general public. This definition excludes relayed or closed circuit TCB (in other courts or similar locations). It also excludes radio, pull internet, recording media, juryroom, still photography and archival recording courtroom broadcasting. Further research (and discussion) of the effects of TCB need to work from specific definitions of what is be referred to and researched. Without control definitions, any such commentary and effects-research is undermined. Future research needs to being defined and scoping all of the forms of courtroom broadcasting; forms of TCB; and any sub-forms;
- *Data Collection:* The California *Cameras in the Courtroom: Report on Rule 980* report of 2000 notes that all media applications contained incomplete information.<sup>25</sup> It also refers briefly to media education issues.<sup>26</sup> Any research going forward need to be rigorous in the collection of valuable data, all of which is required in order to properly research the many and varied effects issues;
- *TCB Baseline Data:* We need to begin research and data gathering prior to the introduction of TCB. This is a significant and important point which has not been addressed previously. Research ought to begin before the cameras enter the courtroom. This is the optimum time to begin baseline data gathering. Significant data is otherwise lost, and some of which cannot be gathered after the cameras have entered. The baseline for effects-research needs to begin before the potential effect changes which cameras may introduce. TCB research generally ignores the gathering of important baseline and parameters data in effects-research. Generally, the research where it exists tends be during or after the study, and gathers no baseline data before cameras are introduced. If a policy

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<sup>22</sup> Some of these are referred to by Norman Fairclough when he refers to the media generally. *ibid* 39.

<sup>23</sup> Parts of which are referred to in N Fairclough, above 3. See also above 48.

<sup>24</sup> Referred to in N Fairclough, above 48.

<sup>25</sup> Administrative Office of the Courts, Research and Planning Unit, *Cameras in the Courtroom, Report on Rule 980* (May 2000) 3. The report also says that '[e]very media request form received was missing at least one piece of requested information.' *ibid* 13.

decision is made to study or introduce TCB, then the exercise of establishing the baselines and parameters should be commenced *prior to* the cameras change being introduced ie before the cameras are introduced;

- Baseline and parameter research is a prerequisite for properly considered experimentation with TCB. It is essential that this research and data gathering be undertaken over an extended period before TCB cameras are introduced into courtrooms. The author's research ensures that Ireland has started *some* of the baseline parameter research process which has been missed by other jurisdictions. RA McQueen and C Knussen,<sup>27</sup> writing about research and research methods, state that 'any research involving changes or manipulations within an organisation runs the risk of interfering with and undermining normal organisational processes, practices and procedures.' Yet in terms of TCB, some people argue still that there are not and will not be any in-court effects whatsoever. RA McQueen and C Knussen continue that there must be a strong rationale for the research and also that an ethics committee may be unlikely to approve the research if disruptive or unscientific.<sup>28</sup> However, cameras have been introduced into many courtrooms without any research beforehand nor a plan in relation to how to undertake subsequent research, where this is potentially envisaged. There is also strong legal rationale advanced<sup>29</sup> in terms of why courtrooms and court processes should be altered or affected in order to study with cameras. Such experiments are undertaken in live and often sensitive cases, and sometimes over the objections and wishes of courtroom participants. Decisions in relation to experiments are made without consideration of the different form issues. Studies can be undertaken in non-live and non-real cases prior to real cases;
- The research to date ignores a very important issue, namely, the lack of baseline research. Establishing a baseline is important.<sup>30</sup> Where experiments have been permitted there is no baseline research undertaken prior to the introduction of the cameras. We need to begin incorporating baseline research and data gathering prior to introducing TCB cameras to the courtroom. This data will then be used in assessing the effects of the cameras once they are subsequently introduced. Part of the US Supreme Court challenge is to properly research for the effects of introducing TCB cameras. However, if we do not collect data and measurements in the courtroom prior to the introduction of the cameras, we have lost many measurements against which to gauge the areas where there are potential effects caused as a result of introducing cameras and or camera operators. This pertinent gap in the effects-research needs to be addressed;

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<sup>26</sup> *ibid* 13

<sup>27</sup> In relation to research methods, see *ibid* 14.

<sup>28</sup> *ibid*.

<sup>29</sup> Note discussion in R O'Malley, 'A Change to the Scheduled Viewing: Does Ireland Need to Change Its Approach to Courtroom Television or Does the Camera Really Add Ten Years?' (1999) 2 *Trinity College Law Review* 57.

<sup>30</sup> D Barlow, M Nock and M Hersen, *Single Case Experimental Designs, Strategies for Studying Behaviour for Change* (Pearson 2009) 65-72.

- *Substantiation and the Body of Research*: A significant body of research may be developed for each effect hypothesis, so that we can then build up our knowledge on specific effect and also compare studies like for like. Without this, each study effectively remains isolated, stand alone and limited to its own facts. It can have no general applicability. The generalisation of studies to date, many with flaws, is one of the most significantly disturbing aspects of the courtroom broadcasting debate. There is not enough valid and empirical research to make any generalisations. This flaw is not previously addressed in the literature;
- *Methodology*: While we need to develop a hypothesis and then research that hypothesis in effects studies, we also need to adopt modern research methodologies. For example, research methods and methodologies<sup>31</sup>; interviewing<sup>32</sup>; content analysis<sup>33</sup>; meaning<sup>34</sup> and messages<sup>35</sup>; cross jurisdictional issues<sup>36</sup>; forms<sup>37</sup>; news narratives and framing<sup>38</sup>; real/factual television<sup>39</sup>; media research<sup>40</sup>; production and process issues<sup>41</sup>;

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<sup>31</sup> N Gilbert, *Researching Social Life* (Sage 2008); M Garner, C Wagner and B Kawilich (eds), *Teaching Research Methods in the Social Sciences* (Ashgate 2009); DJ Greenwood and M Levin, *Introduction to Action Research: Social Research for Social Change* (Sage 2007); A Crisell, *A Study of Modern Television: Thinking Inside the Box* (Palgrave MacMillan 2006).

<sup>32</sup> HJ Rubin and IS Rubin, *Qualitative Interviewing: The Art of Hearing Data* (Sage 2005).

<sup>33</sup> R Franzosi (ed), *Content Analysis*, Sage Benchmarks in Social Science Research Methods (Sage 2008); I Hutchby, *Media Talk: Conversation Analysis and the Study of Broadcasting* (OUP 2006).

<sup>34</sup> A Durant, *Meaning in the Media: Discourse, Controversy and Debate* (CUP 2010).

<sup>35</sup> B Winston, *Messages: Free Expression, Media and the West from Gutenberg to Google* (Routledge 2005); 'ch 8: How Are Messages Formulated? The Linguistics of Lines and Between the Lines' in JP Ginnekan, *Understanding Global News: A Critical Introduction* (Sage 1998).

<sup>36</sup> D Newsom, *Bridging the Gap in Global Communication* (Blackwell 2007); S Ting-Toomey and LC Chung, *Understanding Intercultural Communication* (Roxbury 2005); 'Chapter 2: Media Globalization' in E Deveraux, *Understanding the Media* (Sage 2007); P Golding and P Harris (eds), *Beyond Cultural Imperialism: Globalization, Communication and the New International Order* (Sage 1997); C Barker, *Global Television: An Introduction* (Blackwell 1997); JV Ginnejan, *Understanding Global News: A Critical Introduction* (Sage 1998); DC Hallin and P Mancini, *Comparing Media Systems: Three Models of Media and Politics* (CUP 2004); DA Cai, *Intercultural Communication* (Sage 2010).

<sup>37</sup> N Lacey, *Narrative and Genre: Key Concepts in Media Studies* (MacMillan 2000).

<sup>38</sup> KS Johnson-Cartee, *News Narratives and News Framing, Constructing Political Reality* (Rowman & Littlefield); H Tumber, *News: A Reader* (OUP 1999); O Boyd-Barrett and T Rantanen (eds), *The Globalization of News* (Sage 1998); R Fowler, *Language in the News: Discourse and Ideology in the Press* (Routledge 1991); J Curran and M Gurevitch (eds), *Mass Media and Society* (Hodder 2005); A Bell, *The Language of News Media* (Blackwell 1991).

<sup>39</sup> A Hill, *Restyling Factual TV: Audiences and News, Documentary and Reality Genres* (Routledge 2007); A Hill, *Reality TV: Audiences and Popular Factual Television* (Routledge 2005).

<sup>40</sup> I Bertrand and P Hughes, *Media Research Methods, Audiences, Institutions, Texts* (Palgrave Macmillan 2005); ES Herman and RW McChesney, *The Global Media: The New Missionaries of Corporate Capitalism* (Continuum 1997, reprinted 2004); E Deveraux, *Understanding the Media* (Sage 2007); A Hansen (ed), *Mass Communication Research Methods* (Sage 2009).

<sup>41</sup> RL Nabi and MB Oliver, *The Sage Handbook of Media Processes and Effects* (Sage 2009); 'Chapter 4: Media Production and Media Professionals' in E Deveraux, *Understanding the Media* (Sage 2007); D Giles, *Media Psychology* (Lawrence Erlbaum 2003); 'Chapter 1:

audience<sup>42</sup> and audience groupings<sup>43</sup>; television uses and consumption<sup>44</sup>; education issues and research<sup>45</sup>; audience and memory<sup>46</sup>; research study comparisons and validation issues<sup>47</sup>; effects-research<sup>48</sup>; influence<sup>49</sup> and agenda influences; and location.<sup>50</sup> These all have implications for TCB effects-research;

- *Forms and Research of TCB*: An obvious overall research point is to itemise all of the various issues at a headline level, particularly since this has not been undertaken before. This would help to give a proper and full impression of the full extent of the research effort that actually faces researchers and those involved with TCB issues. Then in terms of specific types of research it will be possible to see what needs to be done to research the particular TCB arguments. This will also assist in enhancing the sophistication and depth of the research carried out in future. As mentioned already, a specific project involves identifying many of those studies, research and techniques from other disciplines which can be and which should be utilised for courtroom broadcasting research. An understanding of proper research, the scientific and procedural methodologies, internal checks and balances, and validation and replication processes used for general and scientific research is a fundamental starting point for all future TCB research. In considering the suggested

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Making the News' in G Philo, *Seeing and Believing: The Influence of Television* (New York 1990); 'Chapter 3: The Production of News Language' in A Bell, *The Language of News Media* (Blackwell 1991).

<sup>42</sup> B Gunter and D Machin (eds), *Media Audiences* (Sage 2009); SE Bird, *The Audience in Everyday Life: Living in a Media World* (Routledge 2003); MA Hogg and GM Vaughan, *Social Psychology* (Pearson 2008); PJ Schulz (ed), *Communication Theory: Volume 1, General Approaches to Communication and the Processing of Communication on the Intra-Individual Level* (Sage 2010); K Ross and V Nightingale, *Media and Audiences: New Perspectives* (OUP 2003); K Schroder, K Drotner, SKline and C Murray, *Researching Audiences* (Arnold 2003); W Brooker and D Jermyn (eds), *The Audience Studies Reader* (Routledge 2003); C Brunson and J Caughie (eds), *Television and New Media Audiences* (OUP 1999); S Seiter, *Television and New Media Audiences* (Clarendon 1999).

<sup>43</sup> 'Chapter 3: Occupational Groups,' 'Chapter 4: Special Interest Groups,' and 'Chapter 5: Residential Groups,' in G Philo, *Seeing and Believing: The Influence of Television* (New York 1990); I Ang, *Desperately Seeking the Audience* (Routledge 1991); SM Livingston, *Making Sense of Television: The Psychology of Audience Interpretation* (Pergamon 1990).

<sup>44</sup> D Gauntlett and A Hill, *TV Living: Television, Culture and Everyday Life* (Routledge and British Film Institute 1999); B Mullan, *Consuming Television: Television and Its Audience* (Blackwell 1997); RE Frank and MG Greenberg, *The Public's Use of Television: Who Watches and Why* (Sage 1980).

<sup>45</sup> C Lacey and D Longman, *The Press as Public Educator: Cultures of Understanding, Cultures of Ignorance* (University of Luton Press 1997); SD Stein, *Learning, Teaching and Researching on the Internet: A Practical Guide for Social Scientists* (Longman 1999).

<sup>46</sup> CC Williams, 'Not All Visual Memories Are Created Equal' (2010) 18 *Visual Cognition* 201.

<sup>47</sup> RW Preiss, BM Gayle, N Burrell, M Allen and J Bryant (eds), *Mass Media Effects Research: Advances Through Meta Analysis* (Lawrence Erlbaum 2007).

<sup>48</sup> J Bryant and S Thompson, *Fundamentals of Media Effects* (McGraw Hill 2002).

<sup>49</sup> G Philo, *Seeing and Believing: The Influence of Television* (New York 1990).

<sup>50</sup> L Ewing and G Rhodes, 'Have You the Look? Gaze Direction Affects Judgements of Facial Attractiveness' (2010) 18 *Visual Cognition* 321; HJV Rutherford and JE Raymond, 'Effects of Spatial Cues on Locating Emotional Targets' (2010) 18 *Visual Cognition* 389; TA Brown and MP Munger, 'Representational Momentum, Spatial Layout, and Viewpoint Dependency' (2010) 18 *Visual Cognition* 780.

beneficial education-effects of TCB the research which needs to be conducted has to incorporate existing research results and the methodologies used, to begin researching,

- *Whether television, as opposed to print [journalism] better informs the public about a particular case;*
  - *Then within TCB forms we need to investigate which form(s) better inform the public about a particular case;*
  - *What are the impacts of TCB restrictions?;*
  - *What effect do TCB restrictions have on education?;*
  - *What are the effects of and broadcasting content/text of each of the different forms of TCB?;*
  - *Which forms of TCB are the most balanced?;*
  - *What are the different effects of different courtroom filming forms and different television broadcasting forms?;*
  - *What types of case predominate TCB?;*
  - *Can this lead us to any conclusions or better understanding of the issues and effects of TCB?;*
  - *What led the media not to take up the opportunity to undertake TCB frequently, when permitted to do so in an extensive New York pilot scheme, and which was one of the factors leading to the non-renewal of the scheme?*
  - *How do courtroom participant effects differ between different TCB forms?;*
  - *How do courtroom participant effects differ between different courtroom participants per each of the different TCB forms?;*
  - *How do viewing audience effects differ between different TCB forms?;*
  - *How does TCB differ between different jurisdictions?*
  - *Where, and to what extent, does there exist (or support for such a right exist) for a general right to TCB?*
  - *Where do the boundaries of judicial discretion, both generally and individually, lie?*
  - *Who else besides media interests are proactively in favour of TCB?*
  - *Does open justice and public access mean that courts have to use technology when a particular court cannot hold everyone who is interested in attending a particular case?*
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- Even if potential effects may be difficult to gauge, does this mean the arguments about effects and potential effects are redundant. Clearly, also, because of the important issues at stake, we need more expansive research studies into TCB. Specific cognisance needs to be taken of identifying and examining each of many and varied TCB forms. It is likely that different forms will have different effects. While the list identified previously (and set out again below) is the authors own observations, specifically detailed research is required into

the different forms and differentiations. Quite simply how can anyone seriously argue in favour of or against courtroom broadcasting without being clear on what form they are specifically referring to. Once the forms are identified sufficiently it will increasingly become evident where particular research can be carried out into, and comparatively between, the different forms;

- *Sentencing Effects Research:* One avenue for future research, which may be interesting in terms gauging the effects of TCB upon judges, is to study sentencing decisions where TCB was present and where it was not present. Any discrepancies between the two study groups would also be an effect which would not be observable from limited self-reports and questionnaires. It may also be useful to have a body of such studies from a variety of jurisdictions. One reason would be to compare different TCB forms. A second reason is that some jurisdictions have more stringent sentencing guidelines than others. This may be a factor which would reduce the possibility of, for example, longer sentences where TCB occurred. Therefore, if such an effect is present it may take a number of studies before it presents itself. This is a particularly interesting point given that there are, to a large extent, more stringent sentencing guidelines in the US than elsewhere, and it is in the US where most TCB occurs. A similar case for such research can be made in relation to conviction rates as has been made for TCB sentencing research;
- *Parliamentary Broadcasting:* There is also considerable scope for comparative research between existing TCB and television parliamentary broadcasting. Little, if any, comparative research has been undertaken anywhere. Even where a particular jurisdiction does not permit courtroom broadcasting it may be possible to conduct research into existing parliamentary broadcasting (where permitted). Particular avenues include audience research, participant research and the generally fixed and/or restricted forms of television parliamentary broadcasting. Indeed given that generally television parliamentary broadcasting is so regulated and restricted, why are advocates of TCB (a) not complaining about the restrictions placed on TCB; and/or (b) advocated for such forms of TCB which are significantly more liberal, and unrestricted, than is the case with television parliamentary broadcasting as it is generally understood and practised in most jurisdictions where it exists. Television parliamentary broadcasting also permits detailed research of education issues and the potential for education-effects and benefits. One of the particular areas of research obviously has to involve details study of the use and possibilities surrounding miniturised, fixed and rotating, and sliding cameras. Also interesting would be study of the restrictions on the end content use which apply to parliamentary broadcasting;
- While the existence of parliamentary courtroom broadcasting is frequently used as an argument for permitting TCB, it is seldom noted what the effects of parliamentary broadcasting are. Also ignored is the actual content of parliamentary broadcasting. The actual audience for parliamentary broadcasting is also ignored. When one examines parliamentary broadcasting figures it is noted that the actual audience figures are

comparatively low. A research report in Ireland relating to these issues, which the author understands remains to be published, states as follows,

‘Audience Projections

In other countries where there is a parliamentary channel it is significant that even where access is almost universal, the hour-by-hour audiences (the “share”) for parliamentary channels is so small that it is often not measurable by standard industry methods and few countries even attempt to measure or estimate the size of their audience in this fashion.

BBC Parliament uses an audience figure which represents the total number of viewers who tune in to the channel at any point, over an extended period of time (this is known as “reach”). Taken over a month this estimate of “reach” is approaching 1.3 million viewers from a total UK population 60.5 million.

Just over half of the total TV audience for BBC Parliament comes from the Freeview DTT platform. This information may be contrasted with a viewing figure which is shown in the BBC annual report as being 0.0 percent.

Using BBC Parliament as a comparator the audience “reach” for the Oireachtas Channel might eventually rise to 100,000 viewers per month.<sup>51</sup>

- In the UK, parliamentary broadcasting figures do not register on the normal programme ratings measures. In Ireland the main parliamentary broadcasting programme is called *Oireachtas Report*. Figures obtained from RTE (the main broadcaster) reveal that during the period 19 January 2010 to 8 July 2010 indicate that the audience ratings varied between a low of 8,400 and high of 101,200 per programme.<sup>52</sup> These are low compared to other programmes. There has been some consideration of an Oireachtas TV channel.<sup>53</sup> A number of courts audio record their cases, including the US Supreme Court.<sup>54</sup> A useful study would be to see the extent to which the media use these recordings (where permitted) or where third parties uses them, and for what purposes. We also need to look at the makeup of the television parliamentary and TCB audiences;
- Given the strong arguments put forward in favour of TCB such as greater openness, understanding and education-effects, we should study in detail these specific effects arguments in the context of television parliamentary broadcasting. Equally, we should try to

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<sup>51</sup> Details with author.

<sup>52</sup> Details obtained on 11 August 2010. On file with author.

<sup>53</sup> See S Hegarty, ‘Drama and Intrigue, Vanity and Hysteria – It’s “Oireachtas Report”’ *Irish Times* (Dublin, 20 February 2010).

<sup>54</sup> See the Oyez Project < [www.oyez.org](http://www.oyez.org) >. Generally, note, J Goldman, ‘Multimedia for Research and Training – The Oyez Oyez and the History and Politics Out Loud Projects’ (1998) 16 *Social Science Computer Review* 30.



discover what misconceptions exist in relation to the political process and parliament, and to what extent this is clarified by television parliamentary broadcasting. Television parliamentary broadcasting may prove a very useful tool for examining arguments into possible grandstanding effects by particular participants. One of the most widely publicised and courtroom broadcast cases viewed was the *Simpson* (criminal) case. Yet the majority of the literature and books after the case did not seek to study or analysis the effects of TCB. We may also consider the different types of educational benefits. It is limited to assume there is only one form of being ‘educational’ or one form of educational TCB. The content analysis and comparative programming analysis as referred to elsewhere above can include the types of cases, where and the actual presentation of these cases, the amount of time given to different types of cases, etc;

- We can also consider which forms of TCB are preferable and why. These are some of the issues which should and can be investigated. There are so many different types of TCB rules, restrictions, procedures that these should be examined and compared to understand their rationales and to recommend which rules and restriction should apply in any given case pursuant to the policy decisions being pursued. We can also conduct research into the content of TCB programmes to date. TCB advocates feel that broadcasting is more accurate than newspaper reports. This could be tested to some extent in the context of parliamentary broadcasting effects. There is significant research to be carried out into effects inside and outside the courtroom, both in terms of positive and negative effects. Another area of research is to see what links or influences there may be between sentencing, TCB and conventional media reporting. There is no general TCB in Ireland, yet on the very limited number of occasions where cameras have been permitted into Irish courts, it appears that no research or studies were contemplated or undertaken, either by the judiciary or the media themselves;
- *Bias*: Another issue also arises in relation to the construction of effects type studies and questionnaires. Apart from the fact of other supporting research, it is common to seek to cross validate and cross compare results within a study itself. It appears that none of the studies to date have sought to do this in terms of, for example, issues of bias. Possibly courtroom participants may be more or less likely to indicate effects or non-effects if they are in favour of or alternatively not in favour of TCB. A courtroom participant who may have objected to TCB may react differently to TCB and may indicate an observable difference in their answers from other courtroom participants. A courtroom participant who may have their features digitally blocked may act, react or answer differently from other courtroom participants, or from identical courtroom participants in another case who may not have their features blocked. None of the many opportunities for internal comparison and validation have been utilised in the studies to date.<sup>55</sup> It is possible to construct studies in such a way as to test for pre-existing biases held by courtroom participants. A

supplementary point to the effects-research issues is that at least some of the effects may not show up on or be possible to gauge and test for in questionnaires and self-report studies (at least on their own). As a simple example a courtroom participant may react to, look at or be affected by TCB without their realising it. It is not possible for self-report studies or questionnaires alone to satisfactorily test for such effects. We need to carry out research under additional and other research methodologies. These are not necessarily new as they have been used for a long period in other areas of study. Many other pertinent and relevant research areas and research methodologies appear not merely to have been ignored, but not even considered in conducting research into TCB, both in terms of effects type research and also research into other areas of TCB. Eye-tracking brings clear benefits to the TCB question;

- *More Accurate Reflection of Courts:* Certain TCB proponents when arguing in favour of permitting TCB indicate that it provides a greater and more accurate picture of what happens in the court. They say that because the pictures are actually shown that such broadcasting is therefore more accurate. In addition, because there are pictures shown this is clearly better than any possible reports in newspapers. Such arguments can be queried and the existing research criticised for not seeking to test these propositions. Research may build upon or following other relevant research, which seeks to show whether and which forms of TCB are better and more accurate than particular forms of newspaper court reporting. Similar research could also seek to investigate which forms of TCB show more of actual court proceedings, noting for example differences in voiceovers, reporting and commentary. It is also implicit in TCB arguments that because of the pictures, such broadcasting is more educational. Also implicit is that TCB is more informative. Existing research is flawed to the extent that it has not sought to demonstrate or substantiate these propositions. None of the research to date, at least none of the research thus far reviewed, had ever sought to refer to the different TCB forms, to describe the form of TCB being studied, or to distinguish at a general level between the different TCB forms. Surely, before we can make any decisions or conclusions in relation to TCB and the various issues it raises we may have as much information, analysis and research as possible;
- *Personality Type:* The research to date in relation to TCB does not take into account that effects can depend upon the personality type of the courtroom participant or viewer. Research in relation to other areas, sometimes including television,<sup>56</sup> takes into account the personality type of the individual research subjects before going on to examine the effects

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<sup>55</sup> Obviously, many of these studies will draw the simple and obvious comparison between courtroom participants of X% of lawyers being in favour of courtroom broadcasting as compared to Y% of judges.

<sup>56</sup> D Zillman, 'Television Viewing and Psychological Arousal' chapter in J Bryant and D Zillman, *Responding to the Screen: Reception and Reaction Processes* (Erlbaum 1991). Also, RA McQueen and C Knussen, *Introduction to Research Methods and Statistics in Psychology* (Pearson 2006) 16.

of particular stimuli.<sup>57</sup> Without doing so, would be similar to saying that we are testing to see if a given potential effect eg education in the context of TCB, was the same for every person. Individual also vary in their individual backgrounds and experiences.<sup>58</sup> Again, while this is examined in other research, it is still ignored in the context of TCB research. It is suggested that it is over simplistic to suggest or assume that TCB and cameras in the courtroom will have the exact same effect across all courtroom participants and across all categories of courtroom participants. There is already suggestions in terms of introducing emotional intelligence issues into law school teaching<sup>59</sup>;

- *General Applicability*: Researchers need to advise those reading them if they feel that the particular study is generalisable.<sup>60</sup> The official studies in particular, especially opinion and self-reports, do not consider whether the results should be applicable to other court cases and other courtroom participants. In terms of audience type issues, the general applicability is also ignored. Unfortunately, unless all studies begin to incorporate proper assessments and qualification, commentators will continue to misinterpret the research findings, and also make generalisations which are not backed up by the actual research they cite or refer to;
- *What Is Being Researched*: The opinion-reports, self-reports and observer-reports are particularly prone to ignoring the basic first step of research, which is to identify the effect or effect hypothesis<sup>61</sup> being researched. It is the effect hypothesis that is being identified and tested.<sup>62</sup> The research question which is formulated becomes the ‘anchor’ of the research.<sup>63</sup> The research question then needs to be even more refined before the research study can be prepared and begun<sup>64</sup>;
- *Review*: Research will undertake a review of the pre-existing literature and research as this scopes and assists the proposed research.<sup>65</sup> However, very few general studies will ever undertake a literature or prior art review. This is extraordinary, given that the US Supreme Court challenge calling for further empirical research. The knowledge that empirical

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<sup>57</sup> Other examples refer to emotional issues, for example, K Klein and A Boals, ‘Expressive Writing Can Increase Working Memory Capacity’ (2001) 130 *Journal of Experimental Psychology: General* 520.

<sup>58</sup> As an example, see S Wortley and J Hagan, ‘Just Des(s)erts? The Racial Polarization of Perceptions of Criminal Injustice’ (1997) 31 *Law and Society Review* 637. Also, PJ Dean, HE Lombard and S Wilkes, ‘Committal of a Patient Due to Media Influence? A Case Report’ (2001) 35 *Australian and New Zealand Journal of Psychiatry* 129.

<sup>59</sup> PJ Cain, ‘A First Step Toward Introducing Emotional Intelligence into the Law School Curriculum: The “Emotional Intelligence and the Clinic Student” Class’ (2003–2004) 14 *Legal Education Review* 1.

<sup>60</sup> On generalisability issues see M Mitchell and J Jolley *ibid* 26; and RA McQueen and C Knussen, above 8.

<sup>61</sup> *ibid* 47 ff. Also RA McQueen and C Knussen, above 229 ff, 6, 344. Also KF Punch, *Developing Effective Research Proposals* (Sage 2006).

<sup>62</sup> C Spatz and EP Kardas, *Research Methods in Psychology* (McGraw Hill 2008), see chapter on measurement, 93-124.

<sup>63</sup> RA McQueen and C Knussen, above 19.

<sup>64</sup> *ibid* 20. Also, ‘Part II Research Designs, Methodological Issues, and Analytic Procedures’ in SF Davis, *Handbook of Research Methods in Experimental Psychology* (Blackwell 2003) 39 ff.

methods and studies were being called for would in many instances influence the path and detail of the general (and empirical) research. This is something we need to rectify with future research;

- *Reliability and Validity of the Research:* Frequently the research effort to date is ill planned, recorded and or implemented. A research study needs to reveal sufficient information and data in terms of the hypothesis, what is being measured (researched) and how, in order for us to assess its credibility and reliability. We also need to be able to consider whether it can have wider general applicability and how it compares or supports other research results. ‘A reliable test gives the same score again and again when it is applied to the same situation ... reliable tests are characterized by consistency.’<sup>66</sup> The TCB general research is often unclear what it is about. Why does most general research rely upon opinion and self-report questionnaires? The literature indicates that if we wish to know why people do what they do or what they think, experimental designs should be used.<sup>67</sup> However, if we want to know what people think, we should use non experimental designs, such as survey research.<sup>68</sup> Unfortunately, by relying so heavily upon self-report and opinion-report questionnaires only, the general research assumes that questionnaire can answer and resolve all TCB effect issues. There are many inherent limitations to these studies (eg bias, inaccurate replies, expected responses, unknown answers, etc). In addition, survey designs do not allow the establishment of causality (cause and effect).<sup>69</sup> Research studies, and the level of detail and description provided, needs to be as equivalent as possible in as many respects as possible in order for conclusions to support each other.<sup>70</sup> Predominantly, the TCB research does not seek to justify itself or previous research. Therefore, future research needs to address and reveal its methodology, reliability and validity<sup>71</sup> in terms of measuring the effects and variables being studied;
- *Effects and Effects Sensitivity:* There is no discussion in the research to date of the adequacy and sensitivity of the research measurements to find and measure any particular effects being researched.<sup>72</sup> In a given instance, it is possible that there are effects but that the methodology used, and or the research study design, is inadequate to find and gauge the effects. Commentators, deliberately or inadvertently, have fallen into the mistake of assuming that because a study they are reading does not prove a particular effect hypothesis that therefore means that the effect is not there. This entirely depends on an assessment of the study in question and how adequate and sensitive it is. There are clear

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<sup>65</sup> ibid 22, 335.

<sup>66</sup> C Spatz and EP Kardas, above 107.

<sup>67</sup> RA McQueen and C Knussen, above 469.

<sup>68</sup> ibid.

<sup>69</sup> ibid 474.

<sup>70</sup> RA McQueen and C Knussen, above 66.

<sup>71</sup> M Mitchell and J Jolley, above 71 ff. Note, there are also different types of questionnaires models, see ibid 477 and 488. Also, RA McQueen and C Knussen, above 15, 58; WJ Ray, *Methods Toward A Science of Behavior and Experience* (Wadsworth/Thomson Learning, 2003) 300-301; D Langdridge, *Introduction to Research Methods and Data Analysis in Psychology* (Pearson 2004) 31-36.

misrepresentations of many of the research studies – which may have occurred with or without motivation. Legal-policymakers, commentators and those designing research studies in future need to be very transparent in addressing and explaining the effect sensitivity issues. These are critical in good research, but equally importantly in third party understanding of the results achieved. An effect hypothesis eg distraction caused by the courtroom camera, can be proven or not proven. Depending on design, we need to be cognisant that a finding of effect of hypothesis not found, does not mean in every instance that there is no actual effect;

- A measuring technique may not be adequate or may not be sensitive enough in relation to a particular potential effect. We need to choose the best methods to test for effects.<sup>72</sup> Questionnaires which are opinion-reports and self-reports should not be assumed and relied upon as the best method for testing all effects on all courtroom participants in-court and all audience and public issues out-of-court. That is not to say not to do away with questionnaires, but we need significant amounts of additional and complimentary research. In terms of in-court distraction-effects, eye-tracking is one such method. Where we do utilise self-reports, we need to first ask if the self-report (method) will provide accurate answers.<sup>74</sup> Also, the research should state the advantages and disadvantages<sup>75</sup> of the self-report questionnaires eg reliability issues. Invariably this has not occurred. A further issue not yet addressed either in the research to date, and across the research, is statistical significance.<sup>76</sup> Further research is needed to assess significance issues in general studies to date. Where this is not possible because of flaws and gaps, we need to learn lessons for future research. We also need to begin comparing effects studies, sometimes called meta-analysis<sup>77</sup>;
- *Records*: Unfortunately some general studies cited in the commentary and literature is not available, or not easily accessible. The bigger issue, however, is that in many general studies that are available, there is insufficient information and data incorporated into the study, and or included in the official report of the study. We, therefore, are not able to properly assess the validity of the study not fully accept is proffered results. It is also an inadequate basis for policy decision. On occasion also, a particular study may not even indicate how many responses were received and what the questions were. It may also be unclear who the exact courtroom respondents were.<sup>78</sup> Studies need as many scientific measurements as possible, need systematic record keeping, objectivity and scientific basis

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<sup>72</sup> RA McQueen and C Knussen, above 139.

<sup>73</sup> See *ibid* 120 ff.

<sup>74</sup> *ibid* 474.

<sup>75</sup> See for example, *ibid* 477. Also RA McQueen and C Knussen, above 361.

<sup>76</sup> See C Spatz and EP Kardas, above 263. SF Davis, *Handbook of Research Methods in Experimental Psychology* (Blackwell 2003) 83 ff.

<sup>77</sup> SF Davis *ibid* 98. Also D O'Sullivan, 'Meta-Analysis' in GM Breakwell, S Hammond, C Fife-Schaw and JA Smith, *Research Methods in Psychology* (Sage 2006) 466 ff.

<sup>78</sup> On sample size issues see M Mitchell and J Jolley, above C-6. Also WJ Ray, *Methods Toward A Science of Behavior and Experience* (Wadsworth/Thomson Learning 2003) 299–300.

for assessment and generalising.<sup>79</sup> Just because questionnaires may be less expensive, easier and quicker,<sup>80</sup> does not mean that we should forego other complimentary and in many instances better research methods for TCB;

- *Administering the Research:* It is noted that many of the general questionnaire surveys are (designed and) administered by judges and or courts personnel. One of the problems with this is that they may have been participants in the instant case being examined themselves. Also, they would not be the best qualified to design the research instruments. However, there is also an issue in terms of the ability of judges particularly being in the best position alone to be able to undertake and administer<sup>81</sup> the survey. This also applies to court personnel. This is an issue which requires very careful consideration.<sup>82</sup> Future research needs to investigate and address this issue;
- *Analysis and Results:* It is not always transparent that a proper and where necessary professional level of analysis has been undertaken as part of the research studies. This is necessary.<sup>83</sup> It is required to properly come to conclusions in terms of a given set of results and also to draw comparisons and policy implications;
- *Research Over Time:* There is no general or sustained empirical research which researched effects over an extended and ongoing period of time. Longitudinal research<sup>84</sup> of this type assists in assessing effect per se, but also in establishing that particular effects, or effect levels, are not dependent on other variables, such as a sensational case, personality, etc;
- *TCB and Communications:* The study of communications and communications processes is one area which can assist our development of baseline research of the in-court effects of TCB.<sup>85</sup> JH Power provides one map of communications processes, tiers and research.<sup>86</sup> He also provides a description and diagram of the social foundation of human communications theory.<sup>87</sup> The activities of the courtroom, the relationships and the matters communicated are all deserving of analysis prior to introducing TCB cameras. Many markers and features of communications research<sup>88</sup> assist this research;
- *Courtroom Discourse:* Part of the process of gathering baseline research prior to introducing TCB cameras is the process of examining the discourse within the courtroom. B Bogoch examines courtroom discourse in relation to gender issues.<sup>89</sup> This includes quantitative analyses of terms used for address, intrusions, judges taking over of

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<sup>79</sup> See *ibid* 426-435; C-9.

<sup>80</sup> *ibid* 479.

<sup>81</sup> *ibid* 499.

<sup>82</sup> WJ Ray, *Methods Toward A Science of Behavior and Experience* (Wadsworth/Thomson Learning 2003) 289 ff.

<sup>83</sup> M Mitchell and J Jolley, above 500.

<sup>84</sup> RA McQueen and C Knussen, above 61.

<sup>85</sup> JH Powers provides one example of research and descriptions of communications research. See JH Power, 'On the Intellectual Structure of the Human Communication Discipline' (1995) 44 *Communication Education* 191.

<sup>86</sup> *ibid*.

<sup>87</sup> *ibid* 205.

<sup>88</sup> See *ibid* 205.

examinations, challenging comments, etc.<sup>90</sup> F Viljoes also undertakes analysis of the language of the courtroom.<sup>91</sup> This indicates that it is feasible to begin the research of baselines in the courtroom before, during and after TCB;

- There is also various research in relation to legal language and legal content from the perspective of making legal language more comprehensible and plain English.<sup>92</sup> This is another indication that research and coding of legal communication in the courtroom is possible. T-R Valikoski undertook very detailed empirical in-court research of the criminal trial as a speech communication situation in Finland.<sup>93</sup> This research is very useful in considering how we might undertake pre-camera in-court research. For example, she refers to research on the principle of orality in the courtroom and how oral speech is used for achieving various goals.<sup>94</sup> We might, for example, record how these goals are achieved before, during and after the introduction of the TCB cameras. Does the process change? Is the process extended? In order to make these (and other) comparisons, we first need to make our baseline research recordings. As T-R Valikoski points out, there are very few speech communication studies on the courtroom in Europe.<sup>95</sup> There are even less in terms of TCB effects-research. It is, therefore, applicable to look widely at other fields. Research is needed to adapt the most applicable research to the baseline problem and the effects-research gaps of TCB. T-R Valikoski provides a map of the macro and micro levels of communication in the courtroom.<sup>96</sup> The research utilises observation and questionnaires of prosecutors.<sup>97</sup> In terms of considering the activities of prosecutors, reference is required to their role as provided in relevant law and legal procedural regulations.<sup>98</sup> Judicial action is additionally guided by Constitutional principles<sup>99</sup>;
- Related areas for studying communication speech comes from linguistics, psychology, sociology and social psychology.<sup>100</sup> Some research has found that lawyers accommodate their language to meet the defendants language during courtroom questioning, but changed

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<sup>89</sup> B Bogoch, 'Courtroom Discourse and the Gendered Construction of Professional Identity' (1999) *Law and Social Inquiry* 329.

<sup>90</sup> *ibid* 329.

<sup>91</sup> F Viljoen, 'Look Who's Talking, In the Courtroom, Too!' (1992) 109 *South African Law Journal* 64. A separate stream of research includes JW Wright II and LA Hosman, 'Language Style and Sex Bias in the Courtroom: The Effects of Male and Female Use of Hedges and Intensifiers on Impression Information' (1983) 48 *Southern Communications Journal* 137.

<sup>92</sup> For one example, see RC Wydick, 'Plain English for Lawyers' (1978) 66 *California Law Review* 727.

<sup>93</sup> T-R Valikoski, *The Criminal Trial as a Speech Communication Situation* (University of Tampere, Finland 2004).

<sup>94</sup> *ibid* 13.

<sup>95</sup> *ibid* 24.

<sup>96</sup> *ibid* 16-17, and in particular Figure 1.

<sup>97</sup> *ibid* 17.

<sup>98</sup> *ibid* 19-21.

<sup>99</sup> *ibid* 24.

<sup>100</sup> *ibid* 24, 26.

during the presentation of the plea stage.<sup>101</sup> Other judicial parties also changed their language to different stages of the trial.<sup>102</sup> We do not know if the media and or TCB cameras alter the actions and communications of those in the courtroom. In terms of beginning the process of such assessment research, we should establish baseline data research studies. 'Trials have different tasks and phases of action which are accomplished through communication.'<sup>103</sup> Research can analyse what phases are portrayed in TBC. If we undertake baseline research, we can begin to research for changes in the respective phases which are associated with TCB. Some of the measures used by T-R Valikoski include length of speech,<sup>104</sup> length of case,<sup>105</sup> differentiating stages of case,<sup>106</sup> expectations, observation compared to expectations.<sup>107</sup> The survey was to discover how the court activity as a speech communication situation was experienced by the prosecutors.<sup>108</sup> The two can then be compared. Interestingly, one of the items mentioned most frequently by prosecutors was eye contact and moving in the courtroom.<sup>109</sup> The results found that prosecutors pay attention to non verbal elements in the courtroom<sup>110</sup>;

- One of the roles of the judge in a case is to 'direct the discussions in the courtroom by regulating the content of the messages and ensuring that discussions keep to the point.'<sup>111</sup> The role of the judge as baseline and when TCB cameras are introduced, and any changes and effects, have not been examined. It is argued that once it is decided to pilot TCB, then the courts in which it is to be introduced should be researched and examined in detail prior to the introduction of the cameras.<sup>112</sup> In T-R Valikoski's research she found that only fifteen of the fifty eight prosecutors referred to a specific descriptions of taking the injured parties into consideration when speaking in the court.<sup>113</sup> It is noted previously in this research that the defendants are one of the least researched courtroom participants in terms of TCB effects. T-R Valikoski notes further research that found that habitual offenders preferred a formal and quick trial,<sup>114</sup> while witnesses preferred smooth and natural communication relationships in the court.<sup>115</sup> Another issue is also raised. If a courtroom

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<sup>101</sup> ibid 28, referring to K Aronsson, L Jonsson and P Linell, 'The Courtroom Hearing as a Middle Ground: Speech Accommodation by Lawyers and Defendants' (1987) 2 Journal of Language and Social Psychology 99.

<sup>102</sup> ibid.

<sup>103</sup> ibid 36.

<sup>104</sup> ibid 69-70.

<sup>105</sup> ibid 70-72.

<sup>106</sup> ibid, for example, 75 ff.

<sup>107</sup> ibid 123.

<sup>108</sup> ibid 98.

<sup>109</sup> ibid 102-104.

<sup>110</sup> ibid.

<sup>111</sup> ibid 119.

<sup>112</sup> ibid 136.

<sup>113</sup> ibid 127.

<sup>114</sup> ibid, referring to K Aronsson, L Jonsson and P Linell, 'The Courtroom Hearing as a Middle Ground: Speech Accommodation by Lawyers and Defendants' (1987) 2 Journal of Language and Social Psychology 99.

<sup>115</sup> ibid, referring to J Haapasalo, 'Types of Offence Among the Cleckley Psychopaths' (1994) 38 International Journal of Offender Therapy and Comparative Criminology 59; and T-R



participant is changed or affected in their communication, this may then affect the communication, etc, of others<sup>116</sup>;

- T-R Valikoski also points out that the judicial process is wider than just the trial in the courtroom.<sup>117</sup> She also points out the problems with the use of observers for analysing effects in the courtroom, for example, that it depends on the observer's understanding of courtroom activities.<sup>118</sup> If the observer is not familiar with courtroom activity or courtroom communication, they may not be able to gauge all effects before them. The issue of emotional arousal also needs to be gauged and researched in future effects-research<sup>119</sup>;
- There is also little research of the lexical aspects of cross examination and the meanings created for jurors.<sup>120</sup> One study begins to use corpus linguistic and discourse analytics to study courtroom lexication.<sup>121</sup> While there is other research using hedges, intensifiers,<sup>122</sup> discourse analysis, ethnography, pragmatics, psychology, forensic linguistics, role perceptions and expectations, surveys, interviews, focus groups, experiments, etc, there is little research of the impacts upon the legal process.<sup>123</sup> *Linguistics in the Courtroom: A Practical Guide*<sup>124</sup> is another guide which may be useful in advancing in-court language effects research for TCB. SE Lowndes undertakes research of barrister discourse, and its effects upon witness testimony.<sup>125</sup> She uses conversation analysis and discourse analysis techniques. IE Carranza also examines courtroom discourse and the markers within the discourse.<sup>126</sup> In particular she researches attorney/judge discourse with witness, and closing

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Valikoski, 'The Communicative Nature of Finnish Criminal Trials from the Perspective of the Witness' (annual convention of National Communication Association (NCA), Seattle, Washington 9-12 November 2000).

<sup>116</sup> ibid 204.

<sup>117</sup> T-R Valikoski, *The Criminal Trial as a Speech Communication Situation* (University of Tampere, Finland 2004) 18.

<sup>118</sup> ibid 105.

<sup>119</sup> ibid 46.

<sup>120</sup> J Cotterill, 'Collocation, Connotation, and Courtroom Semantics: Lawyers' Control of Witness Testimony Through Lexical Negotiation' (2004) 25 *Applied Linguistics* 513. The authors undertook research of cross examinations in assault cases in the UK.

<sup>121</sup> ibid.

<sup>122</sup> JW Wright II, and LA Hosman, 'Language Style and Sex Bias in the Courtroom: The Effects of Male and Female Use of Hedges and Intensifiers on Impression Information' (1983) 48 *Southern Communications Journal* 137.

<sup>123</sup> S Hale, 'Themes and Methodological Issues in Court Interpreting Research' (2006) 5 *Linguistica Antverpiensia* 205. In relation to psychology research issues see, for example, BE Bell and EF Loftus, 'Trivial Persuasion in the Courtroom: The Power of (A Few) Minor Details' (1989) 56 *Journal of Personality and Social Psychology* 669. Note also KA MacFarlane, 'Understanding Justice: Criminal Courtroom Interpretation in Eighteenth-Century London and Twenty-First-Century Toronto' (2007) 20 *TTR* 271; D Archer, *Questions and Answers in the English Courtroom (1640–1760): A Sociopragmatic Analysis* (Benjamins 2005).

<sup>124</sup> RR Butters, 'Linguistics in the Courtroom: A Practical Guide' (2008) 37 *Language and Society* 300.

<sup>125</sup> SE Lowndes, *Barristers on Trial: Comprehension and Misapprehension in Courtroom Discourse* (Queens University Belfast 2004), available at [Dissertation Abstracts international](http://Dissertation Abstracts international).

<sup>126</sup> IE Carranza, 'Discourse Markers in the Construction of the Text, the Activity, and the Social Relations: Evidence from Courtroom Discourse' (2004) *Current Trends in the Pragmatics of Spanish* 203.

argument discourse.<sup>127</sup> The Bloody Sunday Inquiry process was examined, inter alia, for key words were used and reported, witness answers, etc.<sup>128</sup> An obvious area of research for TCB is to examine a cross section of cases before TCB, and then one stream of cases where TCB is introduced, and a parallel stream which continues without broadcasting;

- *Research Designs:* Frequently TCB studies are undermined by their methodology.<sup>129</sup> Greater rigour and planning<sup>130</sup> needs to be adhered to in future. Studies need to state their methods. They need to be empirical and scientific,<sup>131</sup> otherwise it is difficult if not impossible to say that suggested results are anything other than supposition and opinion. It is also difficult if not impossible to justify a particular cause and effect if the effect is not disentangled and isolated from other possible effects or variables.<sup>132</sup> Court cases are complex events and processes, and therefore, require great particularity in terms of researching such effects.<sup>133</sup> We need proper data on effects, and not mere opinions and interpretations of effects and what occurred<sup>134</sup>;
- *Hypothesis to Research:* In future, it may not be sufficient for TCB research to simply begin as an afterthought after the study has concluded or after it has begun - as has happened in many instances previously. Of importance, however, is that actual effect hypothesis for each of the areas of concern, are actually set out and methodically researched from there.

## Conclusion

The above can serve as only a brief introduction to how we might begin the baseline research so that we have measures to compare in terms of effects before TCB cameras are introduced with data recoded when they are so introduced. T-R Valikoski carried out speech communication research which focused upon the criminal trial situation.<sup>135</sup> We also need to assess the reliance on observations in the few studies where observation has been used as a method of effects-research in terms of assessing its credibility, such as

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<sup>127</sup> *ibid.*

<sup>128</sup> M Bondi, 'Key-Words and Emotions: A Case Study of the Bloody Sunday Inquiry' (2007) 54 *Linguistic Insights – Studies in Language and Communication* 407. R Galatolo and P Drew, 'Narrative Expansions as Defensive Practices in Courtroom Testimony' (2006) 26 *Text & Talk* 661.

<sup>129</sup> In relation to research methods, see RA McQueen and C Knussen, *Introduction to Research Methods and Statistics in Psychology* (Pearson 2006); GM Breakwell, S Hammond, C Fife-Schaw and JA Smith, *Research Methods in Psychology* (Sage 2006); FJ Gravetter and L-AB Forzana, *Research Methods for the Behavioral Sciences* (Wadsworth/Thomson Learning 2003).

<sup>130</sup> M Mitchell and J Jolley, *Research Design Explained* (Wadsworth, Thomson Learning, 2001) 469. Also RA McQueen and C Knussen, above Part 3.

<sup>131</sup> See comments on scientific method in RA McQueen and C Knussen, above 5.

<sup>132</sup> See *ibid* 56 regarding variables.

<sup>133</sup> See comments *ibid* 7.

<sup>134</sup> Note comments in *ibid* 12 ff.

<sup>135</sup> T-R Valikoski, above 15.

examining and comparing whether locations is a relevant factor.<sup>136</sup> Eye-tracking research can be used to test the validity of observation for discovering TCB effects. As previously pointed out by the author, much of this suggested research would individually be deserving of an entire thesis. Some of it will also require a variety of interdisciplinary skills.

We could examine the self-reports and opinion-reports in the light of a new body of TCB eye-tracking for distraction-effects. The author advances the legal discussion and legal-policy considerations of TCB, by identifying the US Supreme Court TCB effects-research concerns. This requires significant research – and more than one thesis.<sup>137</sup>

The sophistication of research needs to develop. In addition, all research going forward needs to define and identify which TCB form, and sub-form, it is investigating, and for which issue or effect. There is a requirement for an overall map of courtroom broadcasting forms.

The thesis has recommended the use of eye-tracking technology for addressing part of the US Supreme Court challenge. This is very new and novel technology. As far as the author can ascertain, eye-tracking has never been considered in any courtroom on any issue. Certainly it has not been addressed, nor considered, in any of the US Supreme Court TCB cases nor the related TCB effects-research. The literature on (television) courtroom broadcasting has not considered or referred to the utility of eye-tracking technology.

The thesis has come to address the research challenge set by the US Supreme Court and also to ensure that the research effort into the effects of TCB advances beyond the criticism that '[s]ocial scientists measure the intelligence of monkeys more effectively than courts have attempted to ascertain the effects of television in the courtroom.' It is time to move beyond limited self-reports and opinion-reports and embrace modern empirical research, including eye-tracking technology.

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<sup>136</sup> In relation to observation research, note RA McQueen and C Knussen, *Introduction to Research Methods and Statistics in Psychology* (Pearson 2006) 9 ff. Also *ibid* 355-357.

<sup>137</sup> While the author identifies the US Supreme Court distraction concerns in relation to TCB, the author also proposes that there are also significant research challenges in relation to each of the other forms of CB generally. We must begin our research study from definitions and a holistic map of the court process and the TCB process.

The thesis commends eye-tracking research to examine the distraction of participant in TCB. The thesis assists to pave the way for addressing the US Supreme Courts, concerns and in a manner which is recorded, verified, defined and comparable. In future, we should be able to compare distraction-effects studies and verify the results of distraction-effects studies. The author thus develops a thesis significant across TCB.

Law is dynamic and varied. Legal researchers can look at ‘law in action’ and ‘the application of laws to issues.’<sup>138</sup> This can encompass ‘aspects of socio-legal studies and comparative law.’<sup>139</sup> The subject of TCB is overall very ‘dynamic.’<sup>140</sup> Unfortunately, it ‘is surprising how little in-depth analysis is available about the relationship between the media and the courts.’<sup>141</sup> There is arguably less in relation to the nicher issue of in-court TCB distraction-effects. The present work endeavours to shed some light of the problem and also on one of the potential solutions, namely, eye-tracking research methods. TCB The thesis presents an exploration and original analysis to the continuing problem. It also suggests and explores a solution in relation to facet of the TCB concerns, namely the in-court distraction-effects which may be examined with eye-tracking solutions. Courts and legal-policy needs to be better informed in future for courts and legal-policymakers.

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<sup>138</sup> S Prince, ‘Is Court TV A Favourable Proposition: A Normative and Comparative Analysis of the Transmission of Courtroom Proceedings on Television?’ (PhD thesis, University of Exeter 2003) 10.

<sup>139</sup> *ibid.*

<sup>140</sup> *ibid* 11.

<sup>141</sup> *ibid* 16.

## CHAPTER 22: CONCLUSIONS

### Introduction

There has been a lot of popular opinion based discussion in relation to TCB issues. Some of the discussion focuses on arguments for and against permitting TCB. Frequently these arguments rely on a proposition that there will or will not be particular effects ensuing from such TCB. Yet TCB needs a ‘proper, evidence-based assessment’ according to Lord Thomas, the Lord Chief Justice of England and Wales recently,<sup>1</sup> to move beyond mere popular opinions which are generally unsubstantiated. The thesis focuses on TCB effects-research, effects issues, the adequacy of available effects-research and makes suggestions for particular normative TCB effects-research. For example, the TCB distraction-effects arguments involve a concern of concern of courts, litigants and popular discussion that TCB cameras and or TCB cameras plus camera operators, will distract some of the participants inside the courtroom.<sup>2</sup> This concern was highlighted by the US Supreme Court.<sup>3</sup> The suggestion is made in the thesis that eye-tracking research if properly applied and incorporated into the TCB discussion, can advance our level of knowledge and assessment of the proposed TCB distraction-effects. Advancing on this suggestion, the thesis undertakes an actual demonstration of eye-tracking in a real courtroom.<sup>4</sup> The proposals in relation to the benefits of eye-tracking technology for in-court TCB distraction effects-research are novel. Equally, the in-court proof-of-concept demonstration of TCB related eye-tracking is new. Pursuing this avenue of research can also lead to a programme of wider TCB effects research and ultimately arrive at answers to the longstanding concerns voiced in the popular discussion, and by courts and legal-policymakers. The thesis refers to the debate and some of the issues arising in this jurisdiction.<sup>5</sup> Interestingly, a lay litigant recently sought to have his defamation case

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<sup>1</sup> F Gibb, ‘Britain Rethinks Cameras in Court’ *Times* (London, 16 May 2014).

<sup>2</sup> Therefore, such issues as courtroom broadcasting, TCB generally and the legal arguments for and against are beyond the scope of this work.

<sup>3</sup> *Estes v Texas* 381 US [1964] 532; *Chandler v Florida* 449 US [1981] 560; and *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 19 January 2014.

<sup>4</sup> Advancing to further studies can be in mock courtrooms, non-live courtroom and like scenarios. It is not presently suggested include live courtrooms.

<sup>5</sup> While there is no TCB in Ireland the intention was not only to repeat and expand the earlier research (valuable in and of itself) but also to undertake comparison, and to develop it in a three-way manner. This was intended to encompass research of attitudes of the judiciary; the television and newspaper media; and the general public in Ireland. The thesis was successful in two of these endeavours, namely, in relation to the judiciary and the first representative public attitudinal TCB survey in Ireland. As a consequence, therefore, there is no research of actual TCB effects. No Irish (or UK) caselaw exists in relation to CB or TCB, or in relation to CB or TCB effects issues. There is no explicit policy or rule in relation to same. In addition, the general climate appears to be against such broadcasting in Ireland. There appears no representative research in the UK. While the media responses

broadcast via TCB.<sup>6</sup> In addition, the thesis replicates the seminal research in relation to judicial opinions in Ireland in relation to TCB. The thesis undertook the first representative public attitudes survey in relation to TCB in Ireland. It will be a beneficial baseline. In addition, the thesis undertakes an international survey in relation to the prevalence of TCB.

## Discussion

The thesis is relevant and important because the issue of TCB is ever more prominent in the legal-media landscape. Following the iconic *Simpson* (criminal) TCB case, there is a regular stream of TCB celebrity and notoriety type cases, such as Woodward, Michael Jackson's doctor and the more recent *Pistorius*<sup>7</sup> case in South Africa. It is perhaps even more important because courts and legal-policymakers in various countries (and across court levels) are under increasing pressure to accommodate some form of TCB in their courtrooms. This is evident in the US, Canada, Australia, the UK and elsewhere. In dealing with such considerations (whether on a general planned legal-policy level or in the pressure of an individual instant case) it might have been assumed that there would be a ready and reliable legal-empirical research literature available to assist courts when they have to consider these important issues. Courts and judges come to consider these issues from a legal-policy perspective in addition to individual cases where there may be applications to permit TCB.<sup>8</sup> Consideration is also given by the thesis to the distinction between planned and instant access issues. Arguably less considered TCB may occur in an instant case where a judge may be asked to permit TCB in that case and unilaterally

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were disappointing, this might be more successful in future research. Such a valuable research endeavour is highly recommended by the thesis. The only prior empirical research in relation to TCB and TCB effect issues in Ireland was that of the author in 1996. This was in the form of a judicial questionnaire regarding TCB issues. The extensive and varied research undertaken as part of this current research is the only additional effects related research in Ireland. In terms of the judiciary specifically, the current research has found that judicial attitudes in Ireland have not become any more favourable towards permitting TCB since 1996. While the author repeats and expands the judicial research of 1996 again in 2010 (thus the first replicated research in Ireland or the UK), the judicial research is also compared with relevant research from New York. The author, therefore, introduces a valuable comparative element to the current research. While the author's current research (and past research) are all important in and of themselves, this research is extremely valuable in terms of establishing baselines and parameters for any future research in Ireland.

<sup>6</sup> J McCarthy, 'Teacher Argues For Libel Court Case to be Televised' *Sunday Times* (Dublin 13 July 2014). Judge Keane will hear the application on 24 November 2014.

<sup>7</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>8</sup> There may also be appeals as a consequence of what TCB may have occurred – or what TCB may be about to occur. An example of the later individual access applications is soon to occur in Ireland. See J McCarthy, 'Teacher Argues For Libel Court Case to be Televised' *Sunday Times* (Dublin 13 July 2014). Judge Keane was meant to hear the application on 24 November 2014. The *Pistorius* case is another example, *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

decides to permit some form of TCB. In such instances, such as the *Pistorius*<sup>9</sup> case and Irish case,<sup>10</sup> the individual judge may have less opportunity to consider all of the issues, particularly in terms of the available TCB research, the effects issues, how to minimise particular adverse effects and how to maximise particular positive effects, etc. The pressures on the individual judge may be most enhanced in isolated TCB access applications.

The thesis reviews and analyses the available TCB effects-research. For all of the popular discussion and interest in TCB, the review finds that there is no large body of properly considered and reliable legal-empirical TCB research on the effects issues, and not one sufficient to ensure that today's judges in dealing with TCB can arrive at assured answers and decisions as to particular TCB effect issues. For example, while popular discussion and court cases voice concerns that there may be in-court TCB distraction risks and concerns, the available research literature is insufficient to allow judges to answer the distraction question, both in terms of legal decisions and or legal-policy. The thesis suggests that more nuanced normative research is required. One of the criticisms of the TCB discussion is that the TCB effects-research 'measure[s] the intelligence of monkeys more effectively than courts [or others] have attempted to ascertain the effects of television in the courtroom.'<sup>11</sup> In considering the limited amount of research to date, the thesis considers and identifies many problems with such research, in particular the overreliance on self-reports and opinions which are open to bias and being undermined by a lack of independent verification. The thesis suggests the benefit of undertaking more contemporary and normative legal-empirical research of the TCB effect issues. Various models are also suggested. There should be a programme of regular ongoing legal-empirical research of the TCB effects concerns.

TCB research generally ignores the gathering of important baseline and parameters data in effects-research. Generally, the research where it exists tends to be during or after the study, and gathers no baseline data before cameras are introduced. If a decision is made to study or introduce TCB, then the exercise of establishing the baselines and parameters should be commenced prior to the cameras being introduced. Baseline and parameter research is essential as a prerequisite for any properly considered experimentation with

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<sup>9</sup> *ibid.*

<sup>10</sup> F Gibb, 'Britain Rethinks Cameras in Court' *Times* (London, 16 May 2014).

<sup>11</sup> J Hirschhorn, 'Cameras in the Courtroom? No' (1980) 7:3 *Barrister* 7 and 9.

TCB. It is essential that this research and data gathering be undertaken over an extended period before TCB cameras are introduced into courtrooms.<sup>12</sup>

One of the central concerns in relation to TCB is that TCB cameras or TCB camera plus operators will distract the various participants in court who are required as part of the judicial courtroom process. This includes witnesses, the jury, judges, lawyers, parties and court staff. This is the concern in relation to TCB distraction-effects.<sup>13</sup> The legal-empirical research effort since 1965 has been insufficient to answer the various TCB distraction-effect arguments and concerns. While there are some studies, these are too few and individually isolated. The studies do not seek to verify or replicate each other. The research knowledge is not built up with study upon study. Each such study stands in isolation. The research effort of the distraction (and other) effects of TCB is underdeveloped, and by implication the legal, legal-policy and discussion in the popular arguments.<sup>14</sup> A body of normative legal-empirical TCB research can seek to address these issues.

The many and varied problems with the existing effects-research are examined, some for the first time. Most research is not defined. No body of sustained research validates any of the arguments or any prior research. TCB legal-empirical studies are typically the most rigorous and more considered of effects-research studies. Unfortunately, these are the ones least frequently undertaken. The issues of the location of the TCB cameras and the location of the courtroom participants, and its importance for effects-research, are identified by the thesis for the first time. We need to start recording more TCB effect relevant data than is generally recorded to date. Without such data, it is difficult to be assured in relation to particular conclusions of effects.

The thesis explores the common theme within the three US Supreme Court television camera cases.<sup>15</sup> It identifies some specific research concerns and how we might go about

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<sup>12</sup> The thesis research ensures that Ireland has started some of the baseline parameter research process which has been missed by other jurisdictions.

<sup>13</sup> While it is not expressly stated in the literature reviewed, there is some recognition that different concerns arise. Essentially many of the effects concerns are graduated concerns relative to the individual categories of courtroom participants. This should be more expressly developed in future normative TCB effects-research.

<sup>14</sup> The research effort and results fall far short of what we should expect. Only by (critically) examining the research to date is it possible to fully appreciate this, and to look at how we might address it. The author therefore undertook an extensive review of the literature and research literature to date. This was wider than the attention given by any of the individual commentators on courtroom broadcasting (CB) generally.

<sup>15</sup> This is the US Supreme Court's challenge that more legal-empirical research be undertaken to examine the effects implications of TCB. While identifying this challenge for the first



researching them with proper legal-empirical research. The distraction research concerns referred to by the US Supreme Court caselaw can be tackled with the use of eye-tracking technology. This requires both legal and technical expertise. As the US Supreme Court appears to implicitly acknowledge, addressing the concerns is not solely a legal issue or solely a legal-empirical issue. The research solutions are cross-disciplinary. Addressing TCB effects concerns with legal arguments alone is inadequate. The US Supreme Court's appreciation of this point needs to be reflected in the discussion. The models proposed by the thesis to the TCB distraction research problem referred to by the US Supreme Court (and yet to be considered in Irish or UK caselaw) may assist the wider discussion and consideration of these issues.<sup>16</sup>

Neither the US Supreme Court, nor commentators, have recognised that as broadcasting technology may change, so too can the research tools available. While media technology has changed, the normative research models and legal-empirical research technology has also changed. Today, we have more TCB research technology, research tools and comparative research knowledge than at any time previously. The optimum normative TCB in-court distraction-effects research capabilities today are greater than relying on mere opinion. We are better able to research distraction-effects today than we were in 1965.<sup>17</sup> One of the better ways to research where a person is looking involves research tools called eye-trackers.<sup>18</sup> Eye-tracking was not considered in the US Supreme Court decisions. Neither has it been considered in the general literature in relation to TCB. Eye-tracking can assist in conducting research of distraction-effects of TCB, and in such way as the US Supreme Court may not have even considered possible. The US Supreme Court is not aware of eye-trackers. If applied to the problem of TCB distraction-effects in the courtroom, we can now record and see where the individual (mock) courtroom participants are looking. We can begin to see if they are distracted by the TCB cameras

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time is beneficial, the author goes further. Issues that the US Supreme Court has not yet identified as research concerns are also dealt with by the thesis.

<sup>16</sup> The author's research and recommendations and the linking of cross-disciplinary research is supported by the US Supreme Court; the effects-research to date – such that it exists; and also related legal cross-disciplinary research, for example, recent research published in the eminent Harvard Law Review. Legal research in family law, criminology and recently sentencing in Ireland also rely increasingly upon empirical research. The thesis and the thesis propositions are equally beneficial.

<sup>17</sup> Just because certain TCB now involves miniaturised cameras, does not mean that distraction cannot occur. Indeed, even without actual distraction-effects, there may still be other inhibiting effects, particularly on the non-professional persons whom may be in court.

<sup>18</sup> An eye-tracker involves very small cameras worn by a person and which record where the person is looking. The result is a recorded video showing exactly where, and for how long, the person is actually looking. An icon or a '+' sign on the screen (or still image) shows where the exact point of visual focus is. We can tell exactly where someone is looking in the (courtroom) scene.

or the TCB camera plus camera operator in the courtroom. We can also apply eye-tracking research to different types of TCB and TCB cameras, from small to large, from fixed to moving, etc. The thesis suggests that these graduated-effects need to be considered. It is hoped that future TCB distraction-effects research will aim to be more normative and progressive than previous TCB research. There are valid and verifiable research opportunities available. Just as L Mulcahy seeks to ‘develop the limited literature on court’<sup>19</sup> architecture and design, the thesis seeks to develop the limited TCB distraction-effects literature, consideration of the concerns and how we may go about better normative legal-empirical research to overcome the problems identified with the previous research. Eye-tracking can be used for conducting in-court distraction-effects research. There are many advantages of eye-tracking, including being able to track distraction effectively and being able to record the results. The thesis undertook a proof-of-concept demonstration of eye-tracking technology for in-court distraction-effects caused by TCB. Distraction, visual cone-of-vision, participant and observer location data, and graduated-effects need to be incorporated into TCB distraction-effects research.<sup>20</sup>

TCB eye-tracking also introduces the possibility of wider effects-research.<sup>21</sup> The prototypical argument for TCB is that it is, or will be, educational. It is surprising how little educational definition and empirical effects-research appears in the general literature. The varied and diverse issues which are involved in educational TCB have received less than considered analysis. Education-effects are not defined. The overall body of education-effects research into TCB is surprisingly small. The thesis reviews and critiques the research, and indeed lack of defined research. It focuses on some of the challenges and the pertinent normative avenues for future research into educational TCB effects.

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<sup>19</sup> L Mulcahy, ‘Architects of Justice: the Politics of Courtroom Design’ (2007) 16 *Social & Legal Studies* 383, 385.

<sup>20</sup> Camera-perspective-bias research offers research avenues for TCB research in and of itself, but is also an example of: TCB camera-perspective-bias; and eye-tracking research. Similarly, with camera focus issues. It also exemplifies cross-disciplinary psychology-legal research. Eye-trackers have also been used in another novel legal context, namely tobacco effects litigation and forms of court mandated health advertisements. An important legal article in the *Harvard Law Review* also undertakes empirical inter-disciplinary research.

<sup>21</sup> We may, for example, begin to research out-of-court issues such as the TCB educational question and whether the TCB audience may be educated by TCB programming content, what it is that the TCB audience looks at in TCB programming content, and whether distraction issue or other household or family activities distract from the audience member focus on particular TCB programmes, and also whether there are differences in viewing activities as between different forms of TCB. The focus is more specific than the wider and less defined topics of courtroom broadcasting (CB) or TCB arguments per se. The thesis

No form of TCB has been proven to educate. Courts and legal-policymakers should assess and consider whether the research is comprehensive. They might also consider the implications of there not being a sufficient body of research. The US Supreme Court has not addressed how we should research the education-effects issues. The baseline and parameters for this legal-empirical research was left unaddressed. There is no sustained body of legal-empirical research of the education-effects of TCB. Even the argument that TCB is educational is over simplistic.<sup>22</sup> The literature does not distinguish between different types of (educational) TCB. Possibly some TCB forms may better educate than others. Some may not educate at all.

There is very little TCB education-effects research. No validation and replication occurs. Baseline issues are ignored. What is meant by ‘education’ is not properly addressed. The previous studies do not use similar research or methodologies.<sup>23</sup> Educational considerations include whether education is achieved; whether it is significant; whether it is sufficient; whether there is a sufficient success rate compared to the effort (and risks) expended; whether pushing ‘educational’ content by itself is a sufficient tool to educate; if it is a sufficient tool to increase (or restore) confidence in the judicial process. These are serious questions, and that is even before we address any issue of what it is exactly that we wish to educate about or communicate in the educational TCB message pushed out to the audience. The legal rights arguments may have to be recalibrated as a consequence of educational form issues. The outcome of any legal and Constitutional argument may differ depending on what TCB form or forms are being looked at. For example, some TCB forms will lend themselves more to being educational and others will not. It may be possible to carry out research to identify which are more educational – and critically why. This knowledge should feed into and enhance the level of debate and (political and judicial) policymaking in relation to decisions regarding permissible TCB and permissible TCB forms (if so permitted).

TCB can occur in an environment where more reflection may have been afforded to the TCB question. A particular jurisdiction may embark on considering (some of) the TCB

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focuses on effects-research issues with TCB. It advocates that significant TCB definition, scoping and research be undertaken to address the effects concerns, gaps and challenges.

<sup>22</sup> There are issues which arise in any proper consideration of education-effects, even before conducting research and analysis for education-effects of TCB.

<sup>23</sup> The limited research available suggests that ‘confidence’ did not increase as a result of TCB (W Petkanas); that there was no ‘change in ‘attitude’ (AR Paddon); no educational-effect nor any enhanced knowledge about the court procedures (K Netteburg); and no enhanced usage of TCB (J Ossinger).

issues and if it decides to pursue TCB, it may document particular rules regarding permissible TCB in that jurisdiction. While the range of such documented rules, procedures, etc, may vary, at least there is a less temporal pressure and more opportunity for detailed consideration of all of the issues, positive and negative.<sup>24</sup> From a legal-policy and legal-rights perspective, the adoption of court policies and (mandated) research in relation to TCB would seem preferable to individualised judicial decisions in live case scenarios. The pressures and changes in the *Estes*<sup>25</sup> and *Pistorius*<sup>26</sup> cases indicate a need for more considered TCB policy and less ad hoc instant TCB decision making.

While there is an amount of legal and popular discussion of TCB, there are relatively few superior and conclusive legal precedents as regards the TCB effects and concerns.<sup>27</sup> The primary TCB superior court cases are reviewed, namely, the US Supreme Court TCB jurisprudence. Despite the obvious importance of TCB issues, it is perhaps surprising that there are only three US Supreme Court cases considering TCB.<sup>28</sup> The thesis analysis shows that one of the constant themes in these cases is an acknowledgement that more legal-empirical research may be needed to arrive at more assured answers to the TCB concerns. This might be described as the US Supreme Court TCB legal-empirical research challenge, namely that more legal-empirical research addressing and answering many of the TCB concerns be pursued. While the US Supreme Court has referred to its desire for more TCB legal-empirical research, the thesis review notes that little has happened in terms of undertaking a structured body of such research.<sup>29</sup> TCB is as debated

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<sup>24</sup> Having said that, as the thesis identifies, even in such considered legal-policy scenarios, the level and volume of legal-empirical effects-research available to courts and legal-policymakers is less than optimum.

<sup>25</sup> *Estes v Texas* 381 US [1964] 532.

<sup>26</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>27</sup> Indeed, some court decisions seek to sit on the issue without making any precedential or longterm decisions, partly until more TCB research and cases are available. The US Supreme Court case in *Hollingsworth* appears to be an example of this, especially in relation to iTCB streaming. See *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 19 January 2014.

<sup>28</sup> *Estes v Texas* 381 US [1964] 532; *Chandler v Florida* 449 US [1981] 560; and *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 19 January 2014.

<sup>29</sup> Some of the reasons include: cost; legal-empirical research being frequently cross-disciplinary in nature and thus difficult for lawyers (or judges) alone; much of the literature and analysis of the TCB question being limited to opinions and self-reports which lack independent verification research; the popular discussion being frequently limited to superficial populist positions; that individualised judicial consideration of TCB access in an instant trial case being a less than considered and optimum environment for considered analysis and effects-research; and also perhaps that a segment of the populist discussion involves argument and lobbying for TCB access (such as Sky TV in the UK) and as such may sometimes be less interested in advancing a detailed effects-research strategy, whether by support, involvement, encouragement and or funding. A detailed analysis of the possible reasons for the lack of such research is beyond the scope of this particular thesis.

today as it was in the *Estes*<sup>30</sup> case in the US Supreme Court in 1965. The same arguments and concerns that arose in 1965 exist today. For various reasons, the legal-empirical research required to confirm and validate the respective effects which judges, legal-policymakers and society have been concerned about, whether in Ireland or elsewhere, has not been carried out. It is unfortunate, therefore, that the debate surrounding TCB still frequently rests upon subjective arguments and personal opinions.

Some TCB today involves miniaturised television cameras. One suggestion may be that because the actual size of some television cameras have reduced over time, that there are no TCB distraction-effects. However, there is no research or statistics to show that miniature TCB cameras are universally, or even predominantly, used. No court rules reviewed expressly stipulate that the smallest and potentially least disruptive form of TCB be adopted. Traditional TCB concerns can arise, from TCB cameras per se, from TCB camera plus operator, arriving late at a courtroom with a shoulder held camera, and even for the TCB camera operator to move about in the courtroom. There is also no research comparing the distraction-effects between situations where full sized TCB camera versus TCB miniaturised cameras are used. In terms of a normative analysis, one would consider that such research would be of beneficial assistance to courts and legal-policymakers.

There are potentially many forms of TCB.<sup>31</sup> Researching the different TCB form issues may further assist courts and legal-policymakers in their important considerations and indeed deliberations. Some popular discussion advocates TCB because it is, or will be, educational. Yet, proponents/opponents do not demonstrate why or how it will be educational, do not furnish examples of actual prior educational TCB or indicate in what circumstances different TCB forms will be educational. These various issues are explored in the thesis. This has added importance given the potential for iTCB to potentially be more educational than (some) other TCB forms. The thesis reveals the importance of identifying particular forms. Some forms may be potentially more educational than others. One cannot say (television) courtroom broadcasting per se is educational, without identifying which form of TCB one is discussing.

The thesis suggests categorises for different forms of courtroom broadcasting (CB) and TCB. The lack of categories and definitions to date is unfortunate. TCB forms need to

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<sup>30</sup> *Estes v Texas* 381 US [1964] 532.

<sup>31</sup> See Abbreviations. Consider, for example, streamed internet TCB (iTCB), entertainment reality TCB (rTCB), etc.

be properly defined and examined in future research. Other than referring to the arguments vaguely, there is no systemised analysis or definition. To be effective, the research and definitions needs to be more precise. The legal and policy concerns cannot be addressed without proper research. None of the TCB arguments really address the fact that there are different ways to film courtroom proceedings, that there are different ways to present and edit the content footage and different ways to broadcast it to the public. The body of TCB arguments has not addressed the different TCB forms. One cannot assess the overall issues of TCB without referring to specific forms. Not every argument applies to every form. The TCB effect-issues are much more complex than the general literature suggests.

None of the TCB literature or cases explicitly indicate that there are different forms and, therefore, potentially different effects. We need to be cognisant of the particular TCB form employed, in order to appreciate the potentially different issues and effects pertinent to that form. Not all forms are the same, and we should not presume that they are. Equally we should not presume that all TCB effects are the same. Research needs to be specific and tailored to the form of TCB involved.<sup>32</sup> The thesis forms research shows how little we really know about TCB. The arguments, whether for or against, do not seek to base themselves in any particular forms of TCB. They often assume that all such broadcasting is the same, regardless of court, type of case, the legal rights issues, broadcaster, programme forms, scheduling, etc. This approach is no longer tenable. Equally, different legal rights arguments can be recalibrated depending on the instant TCB form.

The UK Lord Chancellor states that ‘our priority must be that justice is done.’<sup>33</sup> This may favour certain TCB forms over others. ‘If permitting broadcasting was likely to have an impact on people’s willingness to take part in proceedings, or to make participation even more of an ordeal, there would need to be very strong arguments in its favour.’<sup>34</sup> This raises various implications for law and legal-policy following the problems following the *Pistorius*<sup>35</sup> case.

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<sup>32</sup> The different TCB news programmes need to be researched. There may be significance of extended G2G TCB versus brief news snippets. The first Federal pilot study found that there was an average broadcast length of fifty six seconds of courtroom footage per court story. (See above).

<sup>33</sup> Lord Falconer, Department of Constitutional Affairs, *Broadcasting Courts, Consultation Paper* (DCA CP 28/04 November 2004) 5.

<sup>34</sup> *ibid.*

<sup>35</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

Courtroom View Network (CVN) provides gavel to gavel (G2G) coverage of civil cases without commentators or editing techniques. This is quite a different type of TCB than Tru TV (formerly Court TV). All legal and policy considerations in future need to focus on the forms. There is no research on the effects or prevalence of the different TCB forms, starting with gavel to gavel (G2G) TCB. No research appears dedicated to effects of live TCB broadcasting versus other TCB forms. No effects (in-court or out-of-court) or educational research appears to have been undertaken at all in Scotland or the UK. This is despite limited instances of TCB. Ireland does not have TCB. The caselaw in Ireland does not address TCB or TCB effects issues. While the thesis has begun empirical research in Ireland wider and more complex research is needed.

However, it is perhaps in the area of iTCB that some of the most important out-of-court effects-research may be carried out in future. The nuances of the similarities and differences between existing TCB forms and the new iTCB form call for particular research. The thesis suggest that there may be much to commend iTCB to courts and legal-policymakers over current TCB form, not least more control, longer programming and even gavel to gavel (G2G), less (if any) editing and ultimately a greater potential at least for actual education effects.<sup>36</sup>

Media and communications genres and formats research also helps us to recognise and distinguish different TCB programmes. TCB research is criticised for involving only basic and cursory research methodologies, in particular self-reports and opinion-reports. We should not rely on self-reports and opinion studies alone. Studies also need to be compared to each other, replicated and verified. Longitudinal research need to be undertaken also. We need more research, and in particular using legal-psychology, media, communications, camera-perspective-bias, eye-tracking distraction research and baseline research. Live courtroom broadcasting effects and implications need to be researched. Research needs to examine what occurs in courts normally and then how TCB uses and portrays this. We need a more robust based research following the lead of other fields of research, such as legal-psychology. No explicit definitions and forms are properly distinguished in the research literature. The eye-tracking and location issues identified, need to be incorporated in the research effort in future. We also need to begin detailed comparative research. There can be a large difference between what is filmed and what may be broadcast. The TCB process needs to be researched and documented. The

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<sup>36</sup> One can envisage that in future certain data protection issues may have to be considered in relation to some iTCB content.

issues of direct central visual cone-of-vision distraction; peripheral visual cone-of-vision distraction; and indirect visual cone-of-vision distraction of courtroom participants all need to be considered in further TCB effects-research.

## **Conclusion**

The thesis has recommended the use of eye-tracking technology. This is very new and novel technology. As far as the author can ascertain, eye-tracking has never been considered in TCB considerations heretofore. Certainly it has not been addressed, nor considered, in any of the US Supreme Court TCB cases nor the related TCB effects-research. The TCB literature has not considered or referred to the utility of eye-tracking technology. The TCB effects referred by the US Supreme Court which appear most relevant for eye-tracking research are distraction-effects caused by the TCB cameras (and operators) in the courtroom (ie in-court effects). Eye-trackers allow ‘continuous measurement of eye movements.’<sup>37</sup> Eye-tracking will assist the future consideration and research of TCB distraction-effects (and attraction-effects) research. However, wider research opportunities may also present themselves, such as education-effects and audience-effects.

The thesis advances the international discussion and policy considerations of TCB, by identifying the US Supreme Court TCB effects-research challenge. This requires significant research – and more than one thesis. While the thesis identifies the US Supreme Court concerns in relation to TCB, the thesis also proposes that there are also significant research challenges in relation to each of the other forms of CB and TCB generally. The sophistication of research needs to develop. In addition, normative research needs to better define and identify which TCB form, and sub-form, it is investigating, and for which issue or effect. There is a requirement for an overall map of courtroom broadcasting forms. We should begin our research study from definitions and a holistic map of the court process and the TCB process.

The time has come to address the TCB effect-concerns to ensure that the TCB effects-research advances beyond the criticism that ‘[s]ocial scientists measure the intelligence of monkeys more effectively than courts have attempted to ascertain the effects of television in the courtroom.’ It is time to move beyond limited self-reports and opinion-reports and embrace modern normative legal-empirical research, such as eye-tracking. The thesis

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<sup>37</sup> ‘An Affordable Future for Eye-Tracking in Sight’ at < [www.physorg.com/news63294534.html](http://www.physorg.com/news63294534.html) > accessed 19 January 2014.



commends eye-tracking research to examine the distraction of witnesses in TCB. Recent UK and US discussion indicates the need for the forms research identified by the thesis. The thesis proposes a method for addressing some of the US Supreme Courts issues, concerns and challenges and in a manner which is structured, defined and comparable across the respective research. In future, we should be able to compare effects studies and verify the results of effects studies, across studies and across jurisdictions. We should be able to conduct certain TCB effects-research studies across jurisdictions.

In summary, each chapter could be deserving of an entire thesis on its own right. The core theme remains a normative analysis of the legal-policy issues, concerns, challenges and some of the normative opportunities available regarding the TCB effects-research and concerns. The thesis explores the legal-empirical research concerns of the US Supreme Court in relation to TCB distraction-effects and explores the current opportunity for normative TCB distraction-effects research. It proposes how we may begin to address TCB distraction-effects concerns today, in particular through eye-tracking. Without expanding the TCB research effort, our understanding will remain limited and opinion-based at best and our courts and legal-policymakers restricted in their considerations, decisions and policies. Ultimately, important legal-rights may not be (fully) respected and vindicated. Eye-tracking is used to optimise advertising and adverts. It is also used increasingly to optimise safety and safety design. The thesis suggests that TCB eye-tracking should now be used to optimise the research of TCB distraction-effects and other effects and concerns. This will help to optimise our normative consideration of TCB, TCB access, TCB risks and concerns and, in certain circumstances, to assist better design of TCB. Better TCB design may encompass better choices of TCB models which reduce risk, distraction, etc, and or have greater potential to be educational. That these are all contemporary concerns is reiterated by such things as the *Pistorius*<sup>38</sup> case, a recent Irish TCB access application<sup>39</sup> and the recent comments from the Lord Chief Justice of England and Wales.<sup>40</sup>

The thesis also makes clear how the prior research which is over-reliant on opinions (particularly self-reports, opinion-reports and observer-reports) is not the best evidence for courts, participants or legal-policymakers to base their decisions on. In contrast, research tools have advanced since the original TCB broadcasts and also the three US

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<sup>38</sup> *State v Oscar Pistorius* Pretoria, South Africa, Case No C13/255/13.

<sup>39</sup> J McCarthy, 'Teacher Argues For Libel Court Case to be Televised' *Sunday Times* (Dublin 13 July 2014). Judge Keane was meant hear the application on 24 November 2014 but it appears the application did not go ahead or was at least unsuccessful.

<sup>40</sup> F Gibb, 'Britain Rethinks Cameras in Court' *Times* (London, 16 May 2014).

Supreme Court cases dealing with TCB matters. Eye-tracking offers the ability to definitively produce a body of legal-empirical evidence and research which can tell exactly where (mock) courtroom participants are looking, and including looking are TCB cameras in courtroom settings, and thus examine exactly the courtroom distraction-effect issues. Finally, the research potential identified in the thesis hold the potential to finally and definitively answer the issue involved in the TCB in-court distract-effects. Courts and legal-policymakers would finally have proper evidence upon which to base their decision making. The problematic research and evidence of the past will be finally advanced upon. The calls of the US Supreme Court and the senior UK judiciary will finally have evidence based research answers available to them when needed.

## Appendices



## Appendix 1

### Scope and Carveouts

#### No Side Adopted

The thesis does not seek to advocate the acceptance or rejection of TCB per se. No particular view or argument on either side of the debate is adopted.<sup>1</sup>

#### Scope Exclusions

At a headline level, this work focuses on one aspect of *television* courtroom broadcasting, namely, the effects-research issues as concern courts and legal-policymakers considering TCB. Therefore, the thesis is not about the general topic of courtroom broadcasting, which implies all courtroom broadcasting. It does not summarise the extensive and varied literature about courtroom broadcasting. There is already an extensive general literature available elsewhere.<sup>2</sup> Court proceedings can be broadcast on radio, both live and recorded. It is CB not TCB. Radio courtroom broadcasting, while interesting and deserving of research, is excluded from this work.<sup>3</sup> It is not TCB. This is also necessary due to the limited time, scope and budget available. There also appears to have been no research focus on the effects of radio courtroom broadcasting. This particular form is arguably complicated by ‘real’ radio courtroom broadcasting of court proceedings, as opposed to real actors reading from a transcript of the actual proceedings. Radio courtroom broadcasting would also appear to be less popular or frequent than TCB. This also limits, to some extent, the scope for radio effects-research. There is simply less radio courtroom broadcasts to examine. Therefore, radio courtroom broadcasting is excluded from the scope of this work. Arguably, however, the topic of radio courtroom broadcasting deserves greater definition and research. Court proceedings can be broadcast on the internet, which has occurred in some limited instances. Again, this can be live or recorded. The instances of internet courtroom broadcasting are relatively limited. The author is also unaware of any research into the effects of internet courtroom broadcasting, which reduces the scope for analysis. Internet courtroom broadcasting is included but it is also outside of the above definition of TCB. However, this is an area which deserves to be defined and researched in future. Internet courtroom broadcasting can be referred to as ICB or iCB. It is also important to appreciate that this can also be described and differentiated from TCB as it is a ‘pull’ facility. The public audience can search and look up whatever ICB they wish (so long as it is uploaded to the internet by, for example, the court service). It is more ‘user’ friendly than TCB which is ‘pushed’ by television broadcasters to the pre-selected audience(s) or pre-selected audience scheduling slots. It also appears that the first courtroom footage was shown in movie theatres. This is now more or less limited to historic only. There does not appear to be any definitions or effects-research in relation to such broadcasting. Courtrooms can also be broadcast or relayed on closed circuit television to predefined locations, such as other rooms, courts or buildings. Examples include, relay to larger spillover areas to accommodate additional physical attendees or relays to other courthouses. Technically this is television filming and coverage. However, this is relayed, and is not generally (push) broadcast. It is not TCB as defined above. It is also closed and limited to viewing at fixed predefined locations only. Such filming or relaying is not publically broadcast. It is not ‘pushed’ or made available to a general public television viewing audience.<sup>4</sup> There is very little general literature on relayed or closed circuit TCB. The

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<sup>1</sup> Indeed, SR Pasternack also makes clear that his is a different research focus, see SR Pasternack, ‘The Effects of Perceived Community Pressure on Simulated Juror Guilt Attributions: A Study’ (PhD thesis, University of Tennessee, Knoxville December 1982) 2-3.

<sup>2</sup> See generally S Barber, *News Cameras in the Courtroom: A Free Press – Fair Debate* (New York 1987); W Freedman, *Press and Media Access to a Criminal Courtroom* (Quorum Books 1988); D Stepniak, *Audio-Visual Coverage of Courts* (Cambridge University Press 2008).

<sup>3</sup> Note, however, experiments with digital recordings of cases in certain US Federal courts. See ‘Project Expanded: More Courts Offering Digital Audio Recordings Online’ US Courts, The Federal Judiciary < [www.uscourts.gov/newsroom/2009/digitalAudio.cfm](http://www.uscourts.gov/newsroom/2009/digitalAudio.cfm) > accessed 22 April 2010.

<sup>4</sup> ‘Push’ means pushing or making media content available to the public viewing audience over a public television network. The content is pushed out to the public. In this case television courtroom footage pushed over publically available television network channels. This is to be differentiated from ‘pull’ content which is more audience focused. With pull

author has found no research on relayed or closed TCB effects. It occurs significantly less frequently than public push TCB. This work, therefore, does not cover relayed or closed circuit courtroom broadcasting.<sup>5</sup> Courtroom cases are, on occasion, recorded and made available, generally for purchase, on electronic recording media (eg videos, tapes, CDs and DVDs). However, the effects of these do not appear to have been researched or analysed. It does feature on occasion in the educational arguments for permitting courtroom broadcasting. However, recording media issues are beyond the scope of this work. It is not TCB as defined above. This is also necessary due to the time, scope and budget available. It is also justified by the fact that most of the discussion and effects-research (where it exists) relates almost entirely to push TCB. It is further justified by the fact that TCB is more frequent than other forms of courtroom broadcasting. There is equally a greater general literature available relating to TCB. However, this issue is deserving of definition and research in future. This thesis, by necessity, also excludes the recent advent of juryroom courtroom broadcasting. It is a very recent activity. There does not appear to be a significant literature yet available and the author is unaware of any significant effects-research focus on juryroom courtroom broadcasting.<sup>6</sup> It is also questionable whether this form of courtroom broadcasting will extend beyond the US. Indeed, it is questionable whether it will ever become popular across the US states. It is, therefore, beyond the scope of the current thesis. Again, it is deserving of definition and research in future. Court activity can also be captured via still camera photography. These pictures can feature in TCB or publication in newspapers, magazines and journals. Such instances may be infrequent. There appears little, if any, dedicated literature to such photography, nor its effects. Still photography is outside the scope of this thesis. However, it deserves to be defined and researched in future. This thesis also excludes courtroom filming for purposes other than contemporaneous push television broadcast. This would exclude, for example, reconstruction or dramatised reconstruction of courtroom proceedings for contemporary television broadcast. This could occur, for example, in a celebrity trial if TCB cameras were not permitted into the actual courtroom. Again, this area is lacking definition and research as of yet. Courtroom cases can also be filmed for historical, archival and record purposes. It is not intended for contemporaneous broadcast to the public. Such courtroom filming is not within the focus of this thesis. Such activities do not appear to be defined or researched thus far. Some TCB, uses TCB cameras that belong to the television station (or producer). In other instances, the cameras belong to the court or court service. The general literature, and effects-research, does not adequately address nor differentiate these distinctions as of yet. This is not addressed as a stand alone issue as it is beyond the scope of the present thesis. However, it is deserving of definition and research in future. While I shall refer occasionally to the position elsewhere in terms of what (if any) TCB is permitted, such a cross jurisdictional review of TCB law and practice is not the purpose of, nor within the scope of, this thesis. Therefore, the following are not covered within the scope of this thesis, namely, courtroom broadcasting (CB) generally; history of TCB; general literature on TCB; general TCB arguments; movie theatre courtroom broadcasting; radio courtroom broadcasting (RCB); internet television courtroom broadcasting (iTCB); closed circuit courtroom broadcasting (CCB); the relay of courtroom broadcasting footage other than through a pushed television broadcast to the public (RYCB); the distribution and use of courtroom broadcasting footage on CD, DVD or other electronic media recording or storage devices (recording media courtroom broadcasting (MCB); still photography of courtroom proceedings (PCB); juryroom television courtroom broadcasting (jTCB); TCB for archival or record keeping purposes (record keeping television courtroom broadcasting (ACB). Some of these can be considered as distinct forms of courtroom broadcasting. This is the first occasion where such forms are differentiated and identified in the literature, at least as far as the author can identify. These need to be properly defined and researched for all courtroom broadcasting discussion and research in future. The lack of definitions to date is unfortunate, if not remiss. This thesis is not about the

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content the individual is more active and seeks and pulls the content they want, such as from the internet or mobile communications devices. The pull content is more relevant and interesting to the user. Telecommunications and broadcasting regulations generally focus on push content as opposed to pull content.

<sup>5</sup> It is understood that certain criminal courts in the new criminal courts complex in Dublin, when facilitating jury selection, utilises closed circuit television cameras between the courtroom and the jury waiting room. While this would not initially appear to fall within the author's definition of TCB, it is a subject which may well be deserving of consideration.

<sup>6</sup> However, see generally, PA Joy, and KC McMunigal, 'Clients, Lawyers, and the Media' (2004-2005) 19 *Criminal Justice* 77. A TV station also sought access to an execution, see DJ DeBenedictis, 'Cameras Banned, Pens Allowed: San Francisco Judge Refuses TV Station's Request to Tape Inmate Execution' (August 1991) *ABA Journal* 16.

history of the general topic of courtroom broadcasting (CB). This has been summarised elsewhere already, particularly in the US.<sup>7</sup> It will instead focus on effects-research issues with *television* courtroom broadcasting. It also advocates that significant TCB definition and research be undertaken to address the effects-research gaps and challenges. Neither is this thesis about the various proponents and opponents of TCB arguments (whether legal, Constitutional<sup>8</sup> or otherwise). It does not examine or assess the various TCB arguments. To the extent that these shall be referred to, it is only to highlight the lack of TCB definition, research and validation of any of the arguments, for or against, TCB. The arguments continue to be strongly ventilated. That the arguments continue, suggests that no conclusions have yet been reached. There are significant amounts of popular commentary in relation to (television) courtroom broadcasting. While this is much wider and more divergent from the focus of this thesis, it is worth mentioning at least in passing. Some of the literature<sup>9</sup> relates to general commentary, historical issues, description, (briefly) comparative, significantly argumentative (in terms of advocating or arguing for or against courtroom broadcasting, or some types of courtroom broadcasting), referring to specific cases or applications, particular courtroom participants, legal rights, media rights/right of access, defendant or party issues, rules, regulations and exceptions, facilitation or adaptation for courtroom broadcasting, or referring to peripheral but related issues. It is surprising how little definition and empirical effects-research appears in the general literature. Media reporting issues are also beyond the focus of this thesis, as are the media arguments specific to TCB.<sup>10</sup> While referred to, the different forms of media and television reporting are not the core or specific focus of this thesis.<sup>11</sup> Generally, contempt of court issues are beyond the scope of this thesis.<sup>12</sup> General media effects, other than in relation to TCB, are not the main focus of the thesis. The general issues in relation to pre-trial publicity are also outside the focus of this thesis.<sup>13</sup> There is also a general commentary in relation to the images and portrayal of law.<sup>14</sup> While crossing with the current thesis, it is not the main focus. Legal documentaries and reconstructions on television are also beyond the core focus of the present thesis.<sup>15</sup> None of the general literature reviewed, refers to TCB or the definitions or forms of courtroom broadcasting. None of it refers to empirical research. However, there is some discussion and argument in relation to general effect issues.<sup>16</sup> While referred to in various instances, this thesis is not about the advantages and disadvantages of courtroom broadcasting, nor of TCB per se.<sup>17</sup> Pursuing the issues referred to above, would take this research in a totally different direction. The actual focus of this thesis remains effects-research driven. Therefore, such issues will not feature at all, or only in passing, as they are not the primary focus. While the author identifies the US Supreme Court challenge in relation to TCB, the author also proposes that there are also significant research challenges in relation to each of the other forms of CB generally

## Scope

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<sup>7</sup> See, for example, S Barber, above; D Stepniak, above.

<sup>8</sup> Thaler also explicitly makes the distinction between constitutional and legal issues on the one hand, and the television and its psychological impact. See P Thaler, 'The Impact of the Television Camera on Courtroom Participants: A Case Study of the Joel Steinberg Murder Trial' (PhD thesis, New York University 1990) 5.

<sup>9</sup> See Appendix 2 for a sample of this general literature.

<sup>10</sup> Generally, see for example, RD Rotunda, 'Reporting Sensational Trials: Free Press, a Responsible Press, and Cameras in the Courts' (1998) 3 *Communications Law and Policy* 295.

<sup>11</sup> Generally see, for example, CA Tuggle and S Huffman, 'Live Reporting in Television News: Breaking News or Black Holes?' (2001) 45 *Journal of Broadcasting & Electronic Media* 335; J Katz, 'What Makes Crime "News"?' (1987) 9 *Media Culture and Society* 47.

<sup>12</sup> However, it is referred to briefly when discussing Irish sections.

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*

<sup>15</sup> However, see DM Glatt, 'Trial by Docudrama: Fact or Fiction?' (1990) 9 *Cardoza Arts and Entertainment Law Journal* 201; M Reith, 'Viewing of Crime Drama and Authoritarian Aggression: An Investigation of the Relationship Between Crime Viewing, Fear, and Aggression' (1999) 43 *Journal of Broadcasting & Electronic Media* 211.

<sup>16</sup> See Appendices.

<sup>17</sup> On that topic, note for example, DF O'Scannlain, 'Some Reflections on Cameras in the Appellate Courtroom' (2007) *Journal of Appellate Practice and Process* 323.

The overall topic of courtroom broadcasting is extensive and emotive. This work cannot cover all aspects of all courtroom broadcasting. It is, therefore, necessary to confine it. This work is confined to one aspect of TCB effects, namely, the TCB normative effects-research and concerns.<sup>18</sup> While there is reference to the general TCB discussion, focusing on the general issues, arguments and or the general effects concerns, would take the work beyond the normative effects-research and concerns focus. There is, in any event, already an extensive general literature available elsewhere.<sup>19</sup> Court proceedings can be broadcast on radio, both live and recorded. It is CB but not TCB. Radio courtroom broadcasting, while interesting and deserving of research, is excluded from the thesis.<sup>20</sup> This is also necessary due to the limited time, scope and budget available. There also appears to have been no research focus on the effects of radio courtroom broadcasting.<sup>21</sup> As indicated above, courtrooms can also be broadcast, or relayed, on closed circuit television to other locations, for example, other rooms, courts or buildings. Sometimes this includes relay to larger spillover areas to accommodate additional physical attendees or relays to other courthouses.<sup>22</sup> Technically this is television filming and coverage. However, this is relayed, and is not generally (push) broadcast. It is also closed and limited to viewing at fixed pre-defined locations only. Such filming or relaying is not publically broadcast. It is not 'pushed' or made available to a general public television viewing audience.<sup>23</sup> There is little general literature on relayed or closed circuit TCB. The author has found no research on relayed or closed TCB effects. It occurs less frequently than public push TCB. The thesis does not cover relayed or closed circuit courtroom broadcasting.<sup>24</sup> The thesis, by necessity, also excludes the recent advent of juryroom courtroom broadcasting. There does not appear to be a significant literature yet available and the author is unaware of any significant effects-research focus on juryroom courtroom broadcasting.<sup>25</sup> It is also questionable whether this form of courtroom broadcasting will extend beyond the US. Indeed, it is questionable whether it will ever become popular across the US states. It is, therefore, beyond the scope of the current thesis. However, it is deserving of definition and research in future. This thesis is not about the history of the general topic of courtroom broadcasting (CB). This has been summarised elsewhere already, particularly in the US.<sup>26</sup> Neither is this work about the various TCB arguments.<sup>27</sup> That the arguments continue to be

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<sup>18</sup> There are many types of courts, as well as many different types of television programmes. Equally, there are many different styles of presentation, filming and editing which focus on law and the courts. Beyond the courtroom, there are many different ways to view courtroom broadcasting footage and many different types of viewing audience. The boundaries of courtroom broadcasting are wide. Arguably, the boundaries are still expanding.

<sup>19</sup> See generally S Barber, *News Cameras in the Courtroom: A Free Press - Fair Debate* (New York 1987); W Freedman, *Press and Media Access to a Criminal Courtroom* (Quorum Books 1988); D Stepniak, *Audio-Visual Coverage of Courts* (Cambridge University Press 2008).

<sup>20</sup> Note, however, experiments with digital recordings of cases in certain US Federal courts. See 'Project Expanded: More Courts Offering Digital Audio Recordings Online' US Courts, The Federal Judiciary < [www.uscourts.gov/newsroom/2009/digitalAudio.cfm](http://www.uscourts.gov/newsroom/2009/digitalAudio.cfm) > accessed 22 April 2010.

<sup>21</sup> This particular form is arguably complicated by 'real' radio courtroom broadcasting of court proceedings, as opposed to real participants reading from a transcript of the actual proceedings. Radio courtroom broadcasting would also appear to be less popular or frequent than TCB. This also limits, to some extent, the scope for radio effects research. There is simply less radio courtroom broadcasts to examine. Therefore, radio courtroom broadcasting is excluded from the scope of this work. Arguably, however, the topic of radio courtroom broadcasting deserves greater definition and research.

<sup>22</sup> *Hollingsworth* was originally envisaged as a form of relayed transmission to other courts. *Hollingsworth v Perry* 558 US [2010] < [www.supremecourt.gov/opinions/09pdf/09A648.pdf](http://www.supremecourt.gov/opinions/09pdf/09A648.pdf) > accessed 18 January 2014.

<sup>23</sup> See above regarding what is meant by 'push,' n 4.

<sup>24</sup> Certain criminal courts utilise closed circuit television cameras between the courtroom and the jury waiting room. See n 5.

<sup>25</sup> However, see generally, PA Joy and KC McMunigal, 'Clients, Lawyers, and the Media' (2004-2005) 19 *Criminal Justice* 77. A TV station also sought access to an execution, see JD DeBenedictis, 'Cameras Banned, Pens Allowed: San Francisco Judge Refuses TV Station's Request to Tape Inmate Execution' (August 1991) *ABA Journal* 16.

<sup>26</sup> See, for example, S Barber, above; S Stepniak, above.

<sup>27</sup> Thaler also explicitly makes the distinction between constitutional and legal issues on the one hand, and the television and its psychological impact. See P Thaler, 'The Impact of the



strongly ventilated, however, suggests that no conclusions have yet been reached. While divergent from the focus of this thesis, there are significant amounts of general commentary in relation to TCB.<sup>28</sup> Media reporting issues are also beyond the focus of this thesis, as are the media arguments specific to TCB,<sup>29</sup> as are general contempt of court issues;<sup>30</sup> pre-trial publicity;<sup>31</sup> and general commentary in relation to the images of and portrayal of law.<sup>32</sup> While crossing with the current thesis, it is not the main focus. Legal documentaries and reconstructions on television are also beyond the core focus of the present thesis.<sup>33</sup> None of the general literature reviewed refers to definitions or forms of courtroom broadcasting. Generally it does not refer to empirical research. However, there is some discussion and argument in relation to general effect issues.<sup>34</sup> While referred to in various instances, this thesis is not about the advantages and disadvantages of TCB per se.<sup>35</sup>

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Television Camera on Courtroom Participants: A Case Study of the Joel Steinberg Murder Trial' (PhD thesis New York University 1990) 5.

<sup>28</sup> Some of the literature relates to general commentary, historical issues, description, (briefly) comparative, significantly argumentative (in terms of advocating or arguing for or against courtroom broadcasting, or some types of courtroom broadcasting), referring to specific cases or applications, particular courtroom participants, rights, media rights/right of access, defendant or party issues, rules, regulations and exceptions, facilitation or adaptation for courtroom broadcasting, or referring to peripheral but related issues. It is surprising how little definition and empirical effects research appears in the general literature.

<sup>29</sup> Generally, see for example, RD Rotunda, 'Reporting Sensational Trials: Free Press, a Responsible Press, and Cameras in the Courts' (1998) 3 *Communications Law and Policy* 295; CA Tuggle and S Huffman, 'Live Reporting in Television News: Breaking News or Black Holes?' (2001) 45 *Journal of Broadcasting & Electronic Media* 335; J Katz, 'What Makes Crime "News"?' (1987) 9 *Media Culture and Society* 47.

<sup>30</sup> However, it is referred to briefly when discussing Irish sections.

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*

<sup>33</sup> However, see DM Glatt, 'Trial by Docudrama: Fact or Fiction?' (1990) 9 *Cardoza Arts and Entertainment Law Journal* 201; M Reith, 'Viewing of Crime Drama and Authoritarian Aggression: An Investigation of the Relationship Between Crime Viewing, Fear, and Aggression' (1999) 43 *Journal of Broadcasting & Electronic Media* 211.

<sup>34</sup> See Appendices.

<sup>35</sup> On that topic, note for example, DF O'Scannlain, 'Some Reflections on Cameras in the Appellate Courtroom' (2007) *Journal of Appellate Practice and Process* 323.



**Appendix 2**  
**General (Non-Empirical) Research Literature**

**Barber**

The seventeen non scientific or non-empirical research studies listed by Susanna Barber are,<sup>1</sup>

- Washington Bench Bar Press Committee;
  - *Report to the Supreme Court of Florida Re. Conduct of Audio-visual Trial Coverage, State v Zamora* (1977);
  - *Report to the Supreme Court of Florida Re.: Audio-visual Trial Coverage, State v Herman* (1978);
  - Judge Mounts, *Report to the Supreme Court of Florida Concerning Audio-visual Trial Coverage, State v Martin*;
  - P Goldman and R Larson, 'News Cameras in the Courtroom During *State v Solorzana*: End to the Estes Mandate?' (1978) 10 Southwestern University Law Review 2001;
  - Judge G Humphries, *Report on Pilot Project on the Presence of Cameras and Electronic Equipment in the Courtroom, Louisiana* (1979);<sup>2</sup>
  - Wisconsin Supreme Court Committee;
  - Hawaii State Bar Association;
  - Massachusetts Advisory Committee;
  - JR Weisberger, 'Cameras in the Courtroom, the Rhode Island Experience' (1983) 17:2 SUF-Folk University Law Review 299;
  - Connecticut Chief Court Administrator;
  - Florida Conference of Circuit Court Judges, *Report in Re: Petition of Post-News-Week Stations, Florida, Inc, For Change in Code of Judicial Conduct* (1978);
  - D Strawn, R Buchanan, M Meeske and B Prior, *Report to the Florida Supreme Court In Re: Petition of Post-Newsweek Stations, Florida, Inc, For Change in Code of Judicial Conduct* (1978);
  - Florida State Courts Administrator, *Florida Conference of Circuit Judges Report In Re: Petition of Post-News-Week Stations, Florida, For Change in Code of Judicial Conduct* (1978);
  - Washington State Superior Court Judges' Association Committee on Courts and Community, *Cameras in the Courtroom – A Two Year Review in the State of Washington* (1978);
  - K Netteburg, *Does Research Support the Estes Ban on Camera in the Courtroom?* (May 1980) 63:10 Judicature 467;
  - Cleveland Bar Association Study.
- (Note, not all references furnished in original).

**Strickland and Moore**

They refer to<sup>3</sup>:

- [Judicial Planning Coordination Unit;]
- Office of the State Courts Administrator, *A Sample Survey of Attitudes of Individuals Associated with Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts Between July 5, 1977 and June 30, 1978* (November 1979);
- EH Short and Associates, *Evaluation of California's Experiment with Extended Media Coverage of Courts, Administrative Office of the Courts* (September 1981);
- *Cameras in the Courtroom – A Two-Year Review in the State of Washington released by the Washington State Superior Court Judge's Association Committee on Courts and Community in 1978*;
- X Raker, *An Evaluation of the Experiment* (1983) examines cameras and recorders in Arizona's trial courts;

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<sup>1</sup> S Barber, *News Cameras in the Courtroom: A Free Press – Fair Trial Debate* (Ablex, 1987) 71.

<sup>2</sup> Unavailable from Louisiana courts service, correspondence with author.

- *Report of the Committee on Audio-Visual Coverage of Court Proceedings* (New York, May 1994);
- X Ellsworth, 'Start of Year Long Experiment in RI Went Well, Presiding Judge Says' (2 October 1981) *Providence Journal* (RI);
- X McCollum, 'Extension is Urged for Cameras in Court' (27 February 1983) *Hartford (Conn) Courant*;
- X Schechet, 'Supreme Court Extends Trial of News Cameras in Courtrooms' *Wichita-Eagle Beacon* (27 December 1985);
- X Sherman, 'Court Cameras: A Gain' *Times-Argus* (Barre, Vt) (3 December 1983).

(Note, not all references furnished in original).

#### Research Cited by Courtroom View Network (2009)

The studies listed on behalf of Courtroom View Network<sup>4</sup> are:

- Florida pilot program begun in 1977 and approved in *In re Petition of Post-Newsweek Stations* 370 So 2d 764 (Fla 1979);
- California experiment permitted in 1980 resulting in the EH Short and Associates report;
- California Task Force on Photographing, Recording and Broadcasting in the Courtroom (10 May 1996);
- Alaska Judicial Council, *News Cameras in the Alaska Courts: Assessing the Impact* (January 1988);
- Judicial Information Officer, Superior Court of Maricopa County, *Cameras and Recorders in Arizona's Trial Courts* (February 1983);
- Hon MJ Sponzo, *Report of the Chief Court Administrator on the 'Cameras-In-The-Court' Experiment in the State of Connecticut* (1 May 1983);
- C Robert Taylor et al, *Report of the Bar-Bench-Press Conference of Delaware on Television in the Courtroom* (16 March 1981);
- H Schwartz, *Memo[randa] to Justices of [Kansas] Supreme Court* (3 October 1984; 5 November 1985);
- Hon GE Humphries, Jr, District Judge, State of Louisiana, *Report on Pilot Project on the Presence of Cameras and Electronic Equipment in the Courtroom* ('dated on or about 1979');
- Supreme Judicial Court of the State of Maine, *Administrative Order: Cameras in the Courtroom*, Dkt No SJC-228 (11 July 1994);
- Maryland Judicial Conference, *Official Transcript of Proceedings*, Murphy CJ, presiding (8 May 1980);
- Herbert F Travers, Justice, Mass Superior Court et al, *The Advisory Committee to Oversee the Experimental Use of Cameras and Recording Equipment in Courtrooms to the Supreme Judicial Court* (16 July 1982);
- *Report of the Minnesota Advisory Commission on Cameras in the Courtroom* [undated];
- Administrative Office of the Courts of Nevada, *Final Statistical Report: Cameras in the Courtroom in Nevada* (7 May 1981);
- Norman W Shibley et al, *Report and Recommendations of the Ad Hoc Committee of the Bar Association of Greater Cleveland on the Effect of Cameras in the Courtroom on the Participants in Such a Trial* (May 1980) *Cleveland Bar Journal* 172 (transmitted to the Ohio Supreme Court);
- Hon Ralph B Hodges, Chief Justice, Oklahoma Supreme Court et al, *Recommended Proposal of the Committee on Radio and Television in the Courtroom* [undated];

<sup>3</sup> RA Strickland and RH Moore, 'Cameras in State Courts: A Historical Perspective,' [1994] 78 *Judicature* 128-135.

<sup>4</sup> Boies, Schiller and Flexner LLP, *Memorandum, Prepared for the Committee on Court Administration and Case Management (Hon. John R Tunheim, Chair), The Judicial Conference of the United States, Submitted on Behalf of Courtroom View Network* (6 June 2009) < [www.google.ie/url?sa=t&source=web&cd=1&ved=0CBMQFjAA&url=http%3A%2F%2Fwww.courtroomview.com%2Fnews%2FCVN%2520White%2520Paper%2520\(6%25206%252009\)%2520\(with%2520exhibits\).pdf&ei=Gb2MTOuSFMOV4gbL2uWnCG&usq=AFQjCNEdysCcE\\_qallKgbw3EvomZW\\_7DTg&sig2=UJyaEtrpo493UfAhGO9kSw](http://www.google.ie/url?sa=t&source=web&cd=1&ved=0CBMQFjAA&url=http%3A%2F%2Fwww.courtroomview.com%2Fnews%2FCVN%2520White%2520Paper%2520(6%25206%252009)%2520(with%2520exhibits).pdf&ei=Gb2MTOuSFMOV4gbL2uWnCG&usq=AFQjCNEdysCcE_qallKgbw3EvomZW_7DTg&sig2=UJyaEtrpo493UfAhGO9kSw) > accessed 12 September 2010.

- Hon James A Noe, *Cameras in the Courtroom – A Two Year Review of the State of Washington* (11 September 1978);
- Committee of the Supreme Court of the State of Wisconsin, *Report of the Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom* (1 April 1979).

(Note, not all references furnished in original).

**Summary of Main Courtroom Broadcasting Studies (General)**

**General Non Empirical Studies of Courtroom Broadcasting**

<b>Author (if given)</b>	<b>Title</b>	<b>Year (if any)</b>	<b>Cited</b>	<b>Official (O)/ Private (P) Research</b>
X	Washington Bench Bar Press Committee	1975	B	O
Judge Baker	Report to the Supreme Court of Florida Re. Conduct of Audio-visual Trial Coverage, <i>State v Zamora</i>	1977	B	O
Judge Sholts	Report to the Supreme Court of Florida Re: Audio-visual Trial Coverage, <i>State v Herman</i>	1978	B	O
Judge Mounts	Judge Mounts, Report to the Supreme Court of Florida Concerning Audio-visual Trial Coverage, <i>State v Martin</i>	1978	B	O
Goldman and Larson	News Cameras in the Courtroom During <i>State v Solorzana</i> : End to the Estes Mandate? Southwestern University Law Review	1978	B	P
Judge Guy Humphries	Report on Pilot Project on the Presence of Cameras and Electronic Equipment in the Courtroom, Louisiana	1979	B	O
Wisconsin Supreme Court Committee	Report of Wisconsin Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom (1 April 1979)	1979	B	O
Florida Conference of Circuit Court Judges	Report in Re: Petition of Post-News-Week Stations, Florida, Inc, For Change in Code of Judicial Conduct	1978	B	O
D Strawn, R Buchanan, M Meeske and B Prior	Report to the Florida Supreme Court In Re: Petition of Post-Newsweek Stations, Florida, Inc, For Change in Code of Judicial Conduct	1978	B	O
Florida State Courts Administrator	Florida Conference of Circuit Judges (1978) Report In Re: Petition of Post-News-Week Stations, Florida, For Change in Code of Judicial Conduct	1978	B	O
Washington State Superior Court Judges' Association Committee on Courts and Community	Cameras in the Courtroom – A Two Year Review in the State of Washington	1978	B S&M	O
Office of the	A Sample Survey of Attitudes of Individuals	1979	S&M	

State Courts Administrator	Associated with Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts Between July 5, 1977 and June 30, 1978, November, 1979			
Kermit Netteburg	Does Research Support the Estes Ban on Camera in the Courtroom? [1980] Judicature 467	1980	B	P
Cleveland Bar Association Study	Report and Recommendations of the Ad Hoc Committee of the Bar Association of Greater Cleveland on the Effects of Cameras in the Courtroom on the Participants in Such a Trial	1980	B	
X Ellsworth	Start of Year Long Experiment in RI Went Well, Presiding Judge Says, Providence Journal (RI) (2 October 1981)	1981	S&M	
X	Hawaii State Bar Association	1982	B	
Massachusetts Advisory Committee	Report of the Advisory Committee to Oversee the Experimental Use of Cameras and Recording Equipment in Courtrooms to the Supreme Judicial Court of Massachusetts (16 July 1980)	1982	B	O
JR Weisberger (Rhode Island)	'Cameras in the Courtroom, the Rhode Island Experience' (1983) SUF-Folk University Law Review 299	1983	B	P
Connecticut Chief Court Administrator	Report of the Chief Court Administrator on the 'Cameras-in-the-Courtroom' Experiment of the State of Connecticut	1983	B	O
X Raker	An Evaluation of the Experiment (1983) examines cameras and recorders in Arizona's trial courts	1983	S&M	
X McCollum	Extension is Urged for Cameras in Court (Hartford (Conn) Courant, 27 February 1983)	1983	S&M	
X Sherman	'Court Cameras: A Gain,' Times-Argus (Barre, Vt) (3 December 1983)	1983	S&M	
X Schechet	'Supreme Court Extends Trial of News Cameras in Courtrooms,' Wicheta-Eagle Beacon (27 December 1985)	1985	S&M	
JR Burull	'An Analysis of First Amendment Cable Television Cases in the Federal and State Courts, 1969-1989' (PhD thesis, University of Wisconsin, Madison, 1990)	1990	L	G
Korni Swaroop Kumar	'Murder and the News Media' (PhD thesis, Temple University 1993)	1993	P	
	<i>Report of the Committee on Audio-Visual Coverage of Court Proceedings</i> (New York)(May 1994)	1994	S&M	
RE Reeves Stewart	'The Changing Relationship Between Cameras and the Courts' (MA thesis, Florida Atlantic University 1998)	1998	L	

B: Barber  
G: Goldfarb  
C&D: Cohen and Dow  
L: Lambert (herein)  
S&M: Strickland and Moore  
CVN: Court View Network





### Appendix 3 A Suggested Categorisation TCB Forms

#### **Forms of Courtroom Broadcasting**

It is important that future research addresses the absence of an overall map or matrix of (television) courtroom broadcasting to date. Future research needs to be located on such a map. Research might start from such a definitional map of TCB. The map allows research to identify which particular form of courtroom broadcasting is being researched in any given instance. Within the particular form in question, we can then identify which particular effect we are researching within that form. For example, we could examine and research education-effects of the radio courtroom broadcasting (RCB) form and the education-effects of the TCB form, and then compare them. Such a global map also assists our formation of definitions. It could be considered, for example, that particular TCB arguments might need to be considered in the context of the particular TCB form (and or sub-form) to which it relates. It may be that trial cases are different from appeal cases. Criminal cases may be different from civil cases. Showing brief snippets may differ from showing extended coverage. Research challenges remain to be addressed. If we are considering effects on courtroom participants, we might say which participant is being investigated, and how. It is important to say what camera types are involved, where the camera is located, etc. (This also ties in with eye-tracking distraction-effects research). Even a brief review of the literature to date, indicates that even some of these simple points on the map of TCB are absent. This is unfortunate. The implication is that some of the historical research may be flawed. It is incomplete. We do not know where on the map such research is. We realise also that particularly relevant factors have not been gauged, coded and incorporated into particular research studies. It also means the replication of such research is not possible. A map of courtroom broadcasting clarifies our understanding of the research issues. We can also gauge its quality. The debate and research to date is so basic and limited (in definitions, methods and in what is ignored), that no firm conclusions whatsoever can be drawn. This is the first research that the author is aware of which seeks to identify and map the different *forms of* TCB. Future discussion, and research, needs to appreciate and address the different forms of courtroom broadcasting. Equally, no argument in future, whether in favour of TCB or against TCB, can be considered to have merit without addressing and defining the different courtroom broadcasting forms. Current TCB research is limited in focus, technique and methodology. Comparisons to other research fields indicate how basic the TCB research has been to date – if and where it exists. Many people are already aware of most of the headline general TCB arguments, and equally some of the Constitutional legal rights issues. No one, however, is able to say how, why or which of any of the respective arguments have been substantiated and validated. In fact, none have been validated. Many people would have difficulty defining and differentiating different forms of TCB, as the literature has ignored this issue to date. For example, take the proposition that (all<sup>5</sup>) TCB will educate. How will it educate? Why will it educate? Who will it educate? What forms will educate? What forms educate best? How do we know some, or any, of them will educate? We might consider what amount (or standard) of educative value is required for TCB to be legitimised as being educational, or alternatively for any of the countervailing arguments to be outweighed. We should perhaps better consider how to define ‘education’ and to measure for ‘educational TCB’ effects.

#### **Sub-Forms of TCB**

All research, and all arguments, need to identify which form of (television) courtroom broadcasting it relates too. After that, the research should identify if it relates to criminal or civil cases, appeal or trial cases. These could be considered as sub-forms of courtroom broadcasting. There are many other sub-forms. Greater granularity of the issues is needed. Without this, the research is much too wide and general. This is particularly so with the definition and research of effects on those inside the courtroom. This is referred to as in-court effects-research.

#### **TCB Wheels of Justice**

The CB categorisation above; the TCB forms above; and the wheels categorisation below, are the first attempt at a global or holistic categorisation of all forms of TCB. None of the general research or caselaw acknowledges that there are different forms of TCB and that there can be different effects. Generally, the legal-empirical effects-research fails to do so also –

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<sup>5</sup> Most arguments in favour of courtroom broadcasting on educational grounds refer to courtroom broadcasting generally and ignore any reference to or considerations of the different forms and sub-forms of courtroom broadcasting.

with the exception of perhaps Reality TCB (R-TCB). In the form wheels below, the form is referred to in the top line in capitals. The variables within that Form Wheel are listed below the heading. In the Law wheel, we see that the law can be civil law or criminal law. This applies similarly to other wheels. The term 'unknown' is included because a particular factor or data set may not be recorded in some contemporary and historical examples of TCB. In some other instances it may not be made available.

### The Wheels of TCB

#### Court Form Wheel

LAW	STAGE	LEVEL	TIMING	FOOTAGE	BY	PURPOSE		
↑	↑	↑	↑	↑	↑	↑		
Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown		
Civil	Pretrial	Supreme	Live	All (G2G)	Court	Educate		
Criminal	Trial	High	Recorded	Any	Station	public		
	Hearing	Circuit	Delay	Sections	Stations	Educate		
↓	Appeal	District	Redact		Pool	students		
		Small Claims				Inform		
		Childrens	↓	↓	↓	Confidence		
		Criminal				Media Rt		
		Appeal				Public Rt		
		Special				Record		
		Criminal				History		
		Central				Other		
		Criminal						
		[Tribunals]				↓		
		[Court martials]						
		↓						

Slot 3 (Levels of Courts) will change from country to country/jurisdiction to jurisdiction. The Slot 3 Levels of Courts above refers to the Irish courts. The Panel 3 Levels of Courts below refers to England and Wales.

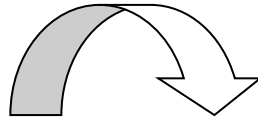
**Court  
Level Panel**

<b>LEVEL</b>
↑
Unknown
Supreme
Court of Appeal
High Court
Queens Bench
Admin.
Family
Divisional
Chancery
Crown Court
County Court
Magistrates
Court
Tribunals
↓

Note 1: Slot 3 (levels of courts) for England and Wales.

**In-Court Effect  
Form Wheel**

<b>LAW</b>	<b>STAGE</b>	<b>PARTICIP'T</b>	<b>CONSENT</b>	<b>BLOCKING</b>	<b>CAMERA LOCATION</b>	<b>CAMERA OPERATOR</b>	<b>FOCUS</b>	<b>IN-COURT EFFECT</b>



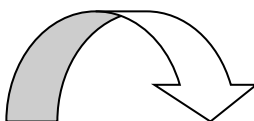
↑	↑	↑	↑	↑	↑	↑	↑	↑
Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown
Civil	Pretrial	Judge	Notified	Can show any	Static	Yes	Anyone	Gen
Criminal	Trial	Juror	Not notified	participants	Moving	No	Only some	distraction
↓	Hearing	Lawyer	Asked	Can show	Location	1+	Pan	Participant
	Appeal	Prosecutor	Not asked	some	Height	↓	Sweep	distraction
	↓	Defender	Needed	participants			Focus	Attention
		Court staff	Not needed	Must block	↓		Zoom	Camera focus
		Witness		certain			Reaction	Act different
		Expert	↓	participants				Psychol.
		Defendant Party			↓		↓	(various)
		Public						Looping
		(in court)						↓
		Press						
		↓						

Note: This does not refer to type of camera; camera location; participant location, all of which are also relevant.

Out-of-Court Effect

Form Wheel

LAW	STAGE	CAMERA LOCATION	FOCUS	PROGRAMME GENRE	TV CONTENT	PARTIC'T	NON PARTIC'T	OUT OF COURT EFFECT



↑	↑	↑	↑	↑	↑	↑	↑	↑
Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown
Civil	Pretrial	Static	Anyone	News	Main	Judge	Audience	
Criminal	Trial	Moving	Only some	Current affairs	Backdrop	Juror	Friends	
	Hearing	Location	Pan	Document.	Film+voice	Lawyer	Groups	
	Appeal	Heights	Sweep	Reality	Film only	Prosecutor	Students	
↓			Focus	Peak	Length	Defender	Public	
			Zoom	Off peak	Lead-in	Witness	Future parties	↓
		↓	Reaction	Ct TV	C'mentary	Expert		
				Public TV	Trailer	Defendant	↓	
			↓	Commercial public TV	Presenter	Party		
				Other	Expert	Public (in court)		
					Main story	Press		
					Body story			
					End filler			
					No music			
					Music type	↓		
					Scheduling			
					↓			

**Control  
Form Wheel**

<b>RULES</b>	<b>APPLICA-- TION</b>	<b>CONSENT</b>	<b>BLOCKING</b>	<b>CAMERA LOCATION SPECIFIED</b>	<b>FOCUS</b>	<b>RESEARCH /STATS</b>	<b>USE/ PURPOSE</b>	<b>EFFECT</b>
↑	↑	↑	↑	↑	↑	↑	↑	
Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	
Yes	Needed	Asked	Can show any	Yes	Anyone	Yes	Educate	
No	Not needed	Needed	participants	No	Only some	No	public	
Rule	In advance	Not needed	Can show some	Law	Pan	Req'd	Educate	
Regs	No hearing	Judge	participants	Rules	Sweep	Not req'd	students	
Rule & regs	Hearing	Juror	Must block	Judge	Focus		Inform	
Presumption	At trial	Lawyer	certain	Ct service	Zoom	↓	Confidence	
	Appeal	Prosecutor	participants	Station	Reaction		Media Rt	
↓	Ct office	Court staff		Cameraman			Public Rt	
	Judge	Witness	Law		↓		Record	
	↓	Expert	Rules	↓			History	
		Defendant	Judge				Other	
		Party	Ct service					↓
		↓	Station					
			Cameraman					
			↓					

**Court**

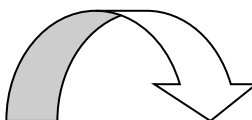
**Form Wheels of of OJ Simpson (Criminal) Case**

<b>LAW</b>	<b>STAGE</b>	<b>LEVEL</b>	<b>TIMING</b>	<b>FOOTAGE</b>	<b>BY</b>	<b>PURPOSE</b>		
Criminal	Pre-trial	LA County Superior Court	Live	All (G2G) Sections	Pool	Unknown		

**In-Court Effect**

**Form Wheel of OJ Simpson (Criminal) Case**

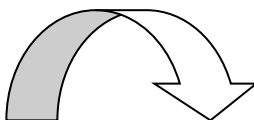
<b>LAW</b>	<b>STAGE</b>	<b>PARTICIP'T</b>	<b>CONSENT</b>	<b>BLOCKING</b>	<b>CAMERA LOCATION</b>	<b>CAMERA OPERATOR</b>	<b>FOCUS</b>	<b>IN-COURT EFFECT</b>



Criminal	Trial	Unknown Judge Juror Lawyer Prosecutor Defender Court staff Witness Expert Defendant Party Public (in court) Press	Unknown Notified Not notified Asked Not asked Needed Not needed	Unknown Can show any participants Can show some participants Must block certain participants	Unknown Static Moving Location Height	Unknown Yes	Unknown Only some Pan Sweep Focus Zoom Reaction	Unknown Gen distraction Participant distraction Attention Camera focus Act different Psychol. (various) Looping
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**Out-of-Court Effect  
Form Wheel of OJ Simpson (Criminal) Case**

<b>LAW</b>	<b>STAGE</b>	<b>CAMERA LOCATION</b>	<b>FOCUS</b>	<b>PROGRAM- -ME GENRE</b>	<b>TV CONTENT</b>	<b>PARTIC'T</b>	<b>NON PARTIC'T</b>	<b>OUT OF COURT EFFECT</b>



Criminal	Trial	Static Location Heights	Unknown  Only some Pan Sweep Focus Zoom Reaction	Unknown  News Current affairs Peak Commercial public TV	Unknown  Main Backdrop Film+voice Film only Length Lead-in C'mentary Trailer Presenter Expert Main story Body story End filler No music Music type Scheduling	Unknown  Judge Juror Lawyer Prosecutor Defender Court staff Witness Expert Defendant Party Public (in court) Press	Unknown  Audience Friends Groups Students Public Future parties	Unknown
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**Control  
OJ Simpson Form Wheel**

<b>RULES</b>	<b>APPLICATI -ON</b>	<b>CONSENT</b>	<b>BLOCKING</b>	<b>CAMERA LOCATION SPECIFIED</b>	<b>FOCUS</b>	<b>RESEARCH /STATS</b>	<b>USE/ PURPOSE</b>	<b>EFFECT</b>
Yes No Rule Regs Rule & regs Presumption	Judge	Judge	Can show some participants  Judge	Unknown  Yes No Judge Ct service Station Cameraman	Only some Pan Sweep Focus Zoom Reaction	No	Unknown	



#### Appendix 4 Eye-Tracking Examples

There are many successful examples of eye-tracking. Perhaps the most important one for current purposes is in relation to legal-psychology (particularly eyewitness identification, weapon-focus and camera-perspective-bias). However, there are many other examples across disciplines. Some of these examples are referred to below.

*Vehicle Safety:* Eye-tracking is being used to monitor drivers in order to develop safety and alert systems for when drivers become drowsy or fall asleep.<sup>1</sup> It, therefore, helps to prevent accidents and even fatalities. Eye Com lists the third most popular use of eye-tracking as safety solutions for driver distraction and drowsiness.<sup>2</sup>

Vehicles can use eye-tracking technology for driver fatigue alert systems.<sup>3</sup> Mercedes and others have developed commercial applications involving eye-tracking with drowsiness and fatigue alert systems for drivers.<sup>4</sup> The possibility of steering a car with eye-trackers is also being researched.<sup>5</sup>

Eye-tracking has also been used in the context of considering driver distraction and mobile phones/devices.<sup>6</sup> This is just one example of 'driver monitoring technology' using eye-tracking.<sup>7</sup> *Driver attention and vigilance is tracked and researched with eye-tracking.*<sup>8</sup>

One recent study refers to the hope that eye-tracking will save lives and improve young peoples' driver safety.<sup>9</sup> Tobii and Six Safety Systems are working on eye-tracking solutions to improve safety for transport operatives in mining, oil and gas industries.<sup>10</sup>

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<sup>1</sup> C Chardinal, 'CES 2006 Video: Delphi Eye-Tracking Distraction System' < [www.gearlive.com](http://www.gearlive.com) > accessed 15 July 2010.

<sup>2</sup> 'Top Five Uses for Eye-Tracking Technology' (Eye com) < <http://eyecomcorp.com/eye-tracking/top-5-eye-tracking-technology/> > accessed 7 July 2012. See also K Kircher, A Kircher and F Claezon, *Distraction and Drowsiness - A Field Study* (VTI 2009) available at < [www.vti.se/publications](http://www.vti.se/publications) > accessed 4 August 2012.

<sup>3</sup> See 'Eye-Tracking' at the blog < <http://jeffnolan.com/wp/2010/03/25/eye-tracking/> > accessed 19 January 2014. Note also Q Ji and X Yang, 'Real-Time Eye, Gaze, and Face Pose Tracking for Monitoring Driver Vigilance' (2002) 8:5 Real-Time Imaging 357.

<sup>4</sup> J Nolan, 'Eye-tracking' (JeffNolan.Com) < <http://jeffnolan.com/wp/2010/03/25/eye-tracking/> > accessed 19 January 2014.

<sup>5</sup> 'Steering a Car With Eye-tracking is the Future - Eye-tracking Update' EyeTrackingUpdate.com, available at < <http://eyetrackingupdate.com/2010/06/17/steering-car-eye-tracking-future/> > accessed 15 July 2012.

<sup>6</sup> LN Boyle et al researched 53 drivers with a driving simulation, eye-tracking and mobile distraction devices. See H Hickey, 'In-Car Driving Coach to Prevent Driver Distraction' Medical News Today < [www.medicalnewstoday.com/articles/197542.php](http://www.medicalnewstoday.com/articles/197542.php) > accessed 23 August 2010, referring to LN Boyle, B Donmez and J Lee, 'Differences in Off-Road Glances: The Effects on Young Drivers' Performance' (2010) 136 ASCE Journal of Transportation Engineering, Special Issue: Applications of Advanced Technologies in Transportation 403.

<sup>7</sup> *ibid.*

<sup>8</sup> Q Ji and X Yang, 'Real-Time Eye, Gaze, and Facial Pose Tracking for Monitoring Driver Vigilance' (2002) 8 Real-Time Imaging 358.

<sup>9</sup> 'Eye-tracking Study May Reduce Teen Crash Rates' (4 January 2012) Eye-tracking Update, accessed 7 July 2012.

<sup>10</sup> Tobii, 'Tobii Eye-Tracking Operator to Enhance Safety Solution by Six Safety Systems' < <http://www.tobii.com/en/group/news-and-events/press-releases/operator-safety-solution-by-six-safety-systems/> > accessed 7 July 2012. Also K Kircher, A Kircher and F Claezon, *Distraction and Drowsiness - A Field Study* (VTI 2009) < [www.vti.se/publications](http://www.vti.se/publications) > accessed 4 August 2012.

J Pohl et al, from Volvo, use eye-tracking to research and advance safety systems in relation to instances of driver visual distraction and preventing accidents involving single vehicle roadway departures (SVRD).<sup>11</sup> They are developing a system to intervene by self-correcting the vehicle back into lane, once the eye-tracking and related systems detect visual driver distraction.<sup>12</sup> They give figures for Germany where 14.5 percent of accidents are SVRD related.<sup>13</sup> Fatalities occur for thirty five percent of this group.<sup>14</sup>

Eye-tracking safety systems also have a function where a visual or audio warning operates, where it is detected that the driver did not look at a speed sign on the road.<sup>15</sup>

M Sodhi et al also research driver distraction and safety issues with eye-tracking.<sup>16</sup> Distraction and tasks have also been examined such as mobile devices.<sup>17</sup> Other eye-tracking distraction research also exists.<sup>18</sup>

J Pohl et al in their research define distraction as 'not watching the road scene ahead.'<sup>19</sup> If we consider this in terms of TCB eye-tracking distraction research, we could say that TCB distraction is, for example, a juror not watching the evidence or not watching the judge/witness/lawyer standing and speaking. One should recall that a juror is in court to perform a particular and time honoured function. Integral and essential to performing that function is the ability to look and consider the evidence, the legal argument made by the lawyers and to listen to the presiding judge, and as appropriate to follow the guidance and direction of the judge. All of these involve looking at the respective courtroom participant whom is speaking at a particular time. If TCB eye-tracking research demonstrates that this juror process is interrupted and distracted by TCB cameras or operators, we therefore have to consider the implications of this for TCB and for TCB location and court design.

A further impact is the consequence for self-report, opinion-report and observer-report research. The TCB eye-tracking distraction footage may help to validate or disprove self-reports, opinion-reports and observer-reports of TCB distraction-effects research. Following this research through could have profound implications, if all or most of the self-report, opinion-report and observational-reporting literature has to be recalibrated in light of new more accurate research.

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<sup>11</sup> J Pohl, W Birk and L Westervall, 'A Driver-Distraction-Based Lane-Keeping Assistance System' (2007) 221 *Journal of Systems and Control Engineering* 541.

<sup>12</sup> See *ibid.*

<sup>13</sup> *ibid* 541.

<sup>14</sup> *ibid* 541. One of the existing systems, known as rumble strips, are not common in all countries, are not uniform in terms of noise and standards and involve on-site infrastructure changes. See *ibid.*

<sup>15</sup> See L Petteuseon, L Fletcher, N Barnes and A Zelinsky, 'An Interactive Driver Assistance System Monitoring the Scene in and Out of the Vehicle' (Proceedings of the 2004 IEEE International Conference on Robotics and Automation, New Orleans, Louisiana, US 2004).

<sup>16</sup> M Sodhi, B Reimer, JL Cohen, E Vastenburg, R Kaars and S Kirschenbaum, 'On-Road Driver Eye Movement Tracking Using Head-Mounted Devices' (Proceedings of the 2002 Symposium on Eye-tracking Research and Applications 2002). Further driver distraction research includes M Sodhi, B Reimer, and I Llamazares, 'Glance Analysis of Driver Eye Movements to Evaluate Distraction' (2002) 34 *Behavior Research Methods, Instruments and Computing* 529.

<sup>17</sup> Such as mirror adjustment and instrument checking. See, for example, M Sodhi and B Reimer, 'Glance Analysis of Driver Eye Movements to Evaluate Distraction' (2002) 34 *Behavior Research Methods, Instruments & Computers* 529; Y Liang, ML Reyes and JD Lee, 'Real-Time Detection of Driver Cognitive Distraction Using Support Vector Machines' (2007) 8 *IEEE Transactions on Intelligent Transportation Systems* 340.

<sup>18</sup> For example, SR Kaufman and LA Abel, 'The Effects of Distraction on Smooth Pursuit in Normal Subjects' (1986) 102 *Acta Oto-laryngologica* 57; S Kemper and J McDowd, 'Eye Movements of Young and Older Adults While Reading with Distraction' (2006) 21 *Psychology and Aging* 32; SB Hutton and D Tegally, 'The Effects of Dividing Attention on Smooth Pursuit Eye-tracking' (2005) 163 *Experimental and Brain Research* 306; N Kathmann, A Hochrein and R Uwer, 'Effects of Dual Task Demands on the Accuracy of Smooth Pursuit Eye Movements' (1999) 36 *Psychophysiology* 158; MLH Vo and WX Schneider, 'A Glimpse is Not a Glimpse: Differential Processing of Flashed Scene Previews Leads to Differential Target Search Benefits' (2010) 18 *Visual Cognition* 171.

<sup>19</sup> J Pohl, above 543.

J Pohl et al indicate one implication where ‘the driver is not able correctly to assess the road scene and will eventually depart from the road.’<sup>20</sup> In a TCB context, if there is TCB in-court distraction, could it be that the juror, for example, is not able to correctly assess the in-court scene and in-court actions and departs from their proper role and function. They may make a decision without correctly and fully assessing all of the evidence and all of the arguments.

In some ways, TCB eye-tracking distraction research has an advantage over road and vehicle research, which have the additional factor to consider of the twists, turns and curves of the road.<sup>21</sup> TCB distraction research will be direct line-of-sight without a moving twisting road.<sup>22</sup>

Referring to in-vehicle distraction, J Pohl et al describe scaling of distraction as follows,

‘A driver has visual focus on the road but wants to change the radio channel. As soon as the visual focus turns to the car stereo the distraction level increases over time. After the task is performed and the driver returns focus to the road, the distraction level reduces back to zero again.’<sup>23</sup>

The distraction process can be plotted. In terms of TCB and researching and plotting TCB distraction-effects, we might consider differences as between TCB and TCB plus operator. Research might consider whether the distraction level ever returns to zero in the later instance. The legal, policy and design issues arising for TCB plus operator creating greater levels of visual distraction may be examined. We may consider the implications of TCB visual distraction returns to zero level distraction, but TCB plus operator remains above zero. Consider, for example, that apart from the lawyer who is standing, the camera operator may be the only other person normally standing in the courtroom. These are real TCB policy considerations that only cross-disciplinary studies allows us to begin considering.

Tobii’s new driver drowsiness system is calibration free.<sup>24</sup> This opens up the possibility for TCB eye-tracking distraction research without the TCB subject being able to be tested without their having to go through an instrument calibration stage. Therefore, the distraction research testing is even more natural. Tobii describe their driver drowsiness eye-tracking system as a commercial ‘driver drowsiness and distraction sensor.’<sup>25</sup> Potentially, in the future we might consider a similar ‘sensor’ for in-court TCB distraction-effects.

*Airline Safety:* Safety is critical to air travel. The area of cockpit instrument panel design as well as pilot distraction are each area where eye-tracking is being used for research. RA Lavine et al<sup>26</sup> researched these vigilance task considerations with eye-tracking. CD Wickens et al<sup>27</sup> carried out research of pilots and instrument display issues with eye-tracking. This type of research is relevant in terms of better design of cockpit instrument panels from a safety perspective.

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<sup>20</sup> ibid 543.

<sup>21</sup> See ibid.

<sup>22</sup> See comments below regarding proximate-central and proximate-central in relation to the in-court proof-of-concept demonstration.

<sup>23</sup> J Pohl, above 543.

<sup>24</sup> Tobii, ‘Tobii Paves the Way for Use of Eye-Tracking in Driver Safety’ < <http://www.tobii.com/en/eye-tracking-integration/global/news-and-events/press-release-normal/archive-2011/eye-tracking-in-driver-safety/> > accessed 7 July 2012, and also demonstration video at < <http://www.youtube.com/watch?v=gvN1eIQ8NLY&feature=youtu.be> > accessed 7 July 2012.

<sup>25</sup> ibid.

<sup>26</sup> RA Lavine, JL Sibert, M Gokturk and B Dickens, ‘Eye-tracking Measures and Human Performance in a Vigilance Task’ (2002) 73 *Aviation, Space and Environmental Medicine* 367.

<sup>27</sup> CD Wickens, J Goh, WJ Horrey and DA Talleur, ‘Attentional Models of Crosstask Pilot Performance Using Advanced Display Technology’ (2003) 45 *Human Factors: The Journal of the Human Factors and Ergonomics Society* 360.

Research also investigates issues such as pilot visual scanning, mid air collision issues<sup>28</sup> and instrument failures.<sup>29</sup> The activity and tasks subjects undertake are also a focus of research.<sup>30</sup> Research also focuses on memory recognition tasks.<sup>31</sup> Nasa also undertakes research of these types of issues.<sup>32</sup>

*Medical:* 'Eye movements are the only means of communication for some severely disabled people.'<sup>33</sup> A Duchowski refers to various eye-tracking examples in neuroscience, legal-psychology.<sup>34</sup> SMI refer to eye-tracking applications in medical research, diagnostics, surgery, psychology, neuroscience research and ophthalmology.<sup>35</sup>

*Security:* There are also potential applications in security<sup>36</sup> and computer security.<sup>37</sup> Eye-tracking is used in law enforcement, security and security training.<sup>38</sup>

*Market research:* There are many market research applications.<sup>39</sup> Eye-tracking is useful to marketing research. The '[d]esign of and as determines how it is perceived and therefore influences recollection of the ad content. A cleverly designed ad can enhance recollection considerably ... [e]ye tracking can contribute considerably to optimizing the ad's impact.'<sup>40</sup>

*Education and Reading:* Researchers use eye-tracking and content analysis to examine education.<sup>41</sup> Eye-tracking is often used to examine reading and reading processes<sup>42</sup> and conversations.<sup>43</sup> The combination of reading and graphics is also

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<sup>28</sup> K Colvin, R Dodhia and RK Dismukes, 'Is Pilots' Visual Scanning Adequate to Avoid Mid-Air Collisions?' (Proceedings of the 13th International Symposium on Aviation Psychology, Oklahoma 2005) 104.

<sup>29</sup> RJ Brou, S Doane, DW Carruth and GL Bradshaw, 'Pilot Expertise and Instrument Failure: Detecting Failure is Only Half the Battle' (Human Factors and Ergonomics Society Annual meeting Proceedings, Perception and Performance 2007) 1306.

<sup>30</sup> C Iani and CD Wickens, 'Factors Affecting Task Management in Aviation' (2007) 49 Human Factors 16.

<sup>31</sup> For an example of memory recognitions tasks see, for example K Mania, S Badariah, M Coxon and P Watten, 'Cognitive Transfer of Spatial Awareness States from Immersive Virtual Environments to Reality' (2010) 7 ACM Transactions on Applied Perception, article 9.

<sup>32</sup> For example, see DC Foyle, A Goodman and BL Hoey (eds), *Nasa Aviation Safety Program Conference on Human Performance Modelling of Approach and Landing with Augmented Displays*, NASA (September 2003).

<sup>33</sup> JS Agustin, as referred to in the eye-tracking blog of Martin Tall (Martin Tall on Gaze Interaction, A Blog on Research and Developments in Eye-tracking and Gaze Interaction) < <http://gazeinteraction.blogspot.com/2009/04/research-paper-on-itu-gaze-tracker-that.html> > accessed 19 January 2014.

<sup>34</sup> *ibid* 207 ff.

<sup>35</sup> See < [www.smi.com](http://www.smi.com) > accessed 3 August 2012.

<sup>36</sup> D Silver and A Biggs, *Keystroke and Eye-Tracking Biometrics for User Identification* (2008) < <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.88.4306> > accessed 19 January 2014.

<sup>37</sup> DL Silver and AJ Biggs, 'Keystroke and Eye-Tracking Biometrics for User Identification,' appears 2006, available at < <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.88.4306> > accessed 19 January 2014.

<sup>38</sup> Referred to by Tobii < [www.tobii.com](http://www.tobii.com) > accessed 19 January 2014.

<sup>39</sup> See < [www.eyetracking.com](http://www.eyetracking.com) > accessed 19 January 2014.

<sup>40</sup> Tobii, Marketing Research. No date.

<sup>41</sup> An example of one study using both eye-tracking and content analysis, see VMG Barrios et al, 'AdELE: A Framework for Adaptive E-Learning Through Eye-tracking' < [www.iicm.tu-graz.ac.at/home/cguetl/publications/2004/Garcia%20et%20al.%202004%20-%20IKNOW.pdf](http://www.iicm.tu-graz.ac.at/home/cguetl/publications/2004/Garcia%20et%20al.%202004%20-%20IKNOW.pdf) > accessed 19 January 2014.

<sup>42</sup> For example, see D Beymer, PZ Orton and D Russell, 'An Eye-Tracking Study of Pictures Influence Online Reading' *Human-Computer Interaction - Interact 2007* < [www.springerlink.com/content/g78x6062m530m/](http://www.springerlink.com/content/g78x6062m530m/) > accessed 17 July 2012.

examined with eye-tracking.<sup>44</sup> Other research also looks at text production and participants looking at keyboards and monitors.<sup>45</sup> eLearning is also an eye-tracking research focus.<sup>46</sup>

*Mass market:* Eye-tracking might also be used to develop more general mass market applications, such as gaze controls for heating, lighting<sup>47</sup> and entertainment systems.

*Advertising:* Advertising already utilises eye-tracking.<sup>48</sup> Companies and researchers use eye-tracking research to track displays. For example, companies using or advertising on the internet can use eye-tracking to test an advert or the location of the advert. A Duchowski also refers to various eye-tracking examples in advertising eg advert design and placement, label and product design and placement, television, internet.<sup>49</sup> Whether viewers look at the advert, for how long, or whether they miss the advert entirely because of its location can be examined. It can examine where might be the best location for the advert. Other research in relation to drivers tests for distraction-effects of looking at advertising billboards.<sup>50</sup> Eye-tracking addresses these important commercial issues.

*Games:* Computer games development is another area where eye-tracking is utilised.<sup>51</sup>

*Generally:* A Duchowski also refers to various eye-tracking examples in industrial engineering and human factors (eg aviation, driving and visual inspection),<sup>52</sup> and computer science.<sup>53</sup>

SMI refer to eye-tracking applications in sports and performance, human machine interactions, market research, neuroscience research, psycholinguistics, ophthalmology, ergonomics, etc.<sup>54</sup>

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<sup>43</sup> R Vertegaal, R Slagter, G Van der Veer and A Niiholt, 'Eye Gaze Patterns in Conversations: There is More to Conversational Agents Than Meets the Eyes' (Conference on Human Factors in Computing Systems, Proceedings of the SIGCHI Conference on Human Factors in Computing Systems, Seattle, Washington 2002) 301.

<sup>44</sup> J Holsanova, N Holmberg and K Holmqvist, 'Reading Information Graphics: The Role of Spatial Contiguity and Dual Attentional Guidance' (2008) 22 *Applied Cognitive Psychology* 1. Note also R Khosla, J Simola, J Salojarvi and I Kojo, 'Using Hidden Markov Model to Uncover Processing States from Eye Movements in Information Search Tasks' (2008) 9 *Cognitive Systems Research* 237.

<sup>45</sup> R Johansson, A Wengelin, V Johansson and K Holmqvist, 'Looking at the Keyboard or the Monitor: Relationship with Text Production Processes' (2009) *Reading and Writing* 835; A Wengelin, M Torrance, K Holmqvist, S Simpson, D Galbraith, V Johansson and R Johansson, 'Combined Eyetracking and Keystroke Logging Methods for Studying Cognitive Processes in Text Production' (2009) 41 *Behavioural Research Methods* 337.

<sup>46</sup> VMG Barrios, C Gutl, AM Preis, K Andrerws, M Pivec, F Modritscher and C Trummer, 'AdeLE: A Framework for Adaptive E-Learning Through Eye-tracking' (2004) < [www.iicm.tu-graz](http://www.iicm.tu-graz.at) > also at < [http://www.eurodl.org/materials/contrib/2005/Christian\\_Gutl.htm](http://www.eurodl.org/materials/contrib/2005/Christian_Gutl.htm) > accessed 19 January 2014.

<sup>47</sup> See 'An Affordable Future for Eye-tracking in Sight' < [www.physorg.com/news63294534.html](http://www.physorg.com/news63294534.html) > accessed 19 January 2014.

<sup>48</sup> M Bingeremann, 'Eye-Tracking Device Watches You Watching Ads' (PC World Business) < [www.pcworld.idg.com.au](http://www.pcworld.idg.com.au) > accessed 3 August 2012. Also < [www.tobii.com](http://www.tobii.com) >; < [www.eyetracking.com](http://www.eyetracking.com) >; DC Richardson and MJ Spivey, 'Eye-Tracking: Research Areas and Applications' *Encyclopedia of Biomaterials and Biomedical Engineering* (2004).

<sup>49</sup> *ibid* 261 ff. K Lillington, 'IBM Plots the Future at Tech Summer Camp' *Irish Times* (Dublin, 29 July 2005), referring to IBMs Webgaze Analyser for research how people read internet pages.

<sup>50</sup> 'Assessment of Distraction Caused by Billboards Using Eye-Tracking System' *Transportation Research Board of the National Academies* (1 June 2007) < <http://rip.trb.org/browse/dproject.asp?n=17496> > accessed 19 January 2014.

<sup>51</sup> For example, see V Sundstedt, 'Eye-Tracking in User Studies' (SIGGRAPH 2009) above.

<sup>52</sup> *ibid* 241 ff.

<sup>53</sup> *ibid* 275.

Further eye-tracking applications exist in visual systems and linguistics. Other eye-tracking applications include uses in relation to gaming machines, medical instruments, computer interaction, medical diagnostics, video conferencing, information kiosks, interactive advertising, etc.<sup>55</sup>

Eye-tracking is increasingly being used in product design across multiple fields. It is also used in relation to virtual reality<sup>56</sup> and sports research.<sup>57</sup> Overall, there are many current applications<sup>58</sup> and many more promised. Eye-tracking is even used in relation to memory and humorous event research.<sup>59</sup>

*Eye-Tracking Manufacturers, Conferences, Courses:* There are various eye-tracker manufacturers. Examples include Tobii,<sup>60</sup> EyeTracking Inc,<sup>61</sup> SMI,<sup>62</sup> Arrington Research,<sup>63</sup> Asley,<sup>64</sup> SensoMotoric Instrument (SMI)<sup>65</sup> and Polhemus,<sup>66</sup> as well as resellers, value added resellers and agents. There are increasing numbers of international conferences relating to eye-tracking. One is the Fixational Eye Movements and Visual Stabilisation conference.<sup>67</sup> Another is Eye-tracking Research and Applications (ETRA).<sup>68</sup> Lund University Humanities Lab offers courses in eye-tracking technology.<sup>69</sup> Various other universities and university departments use eye-tracking as a valuable tool of research.<sup>70</sup> The in-court proof-of-concept demonstration undertaken by the author is beneficial. Eye-tracking and legal-psychology research can begin to address the research gaps in TCB distraction-effects research. The US Supreme Court has noted the lack of legal-empirical research. The three US Supreme Court cases highlight some of the areas for legal-empirical research eg distraction of witnesses, distraction of the jury, etc.

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<sup>54</sup> See < [www.smi.com](http://www.smi.com) > accessed 19 January 2014.

<sup>55</sup> Referred to by Tobii, at < [www.tobii.com](http://www.tobii.com) > accessed 19 January 2014.

<sup>56</sup> C O'Sullivan, M Janott, M Watson and J Dingliana, 'Level of Detail Control for Real-Time Computer Graphics and Virtual Reality: Applications of Eye-Tracking' (First Irish Workshop on Eye-tracking: Abstracts) < <http://isg.cs.tcd.ie/iwet/Abstract14.htm> > accessed 25 May 2010.

<sup>57</sup> JR Wang and N Parameswaran, 'Survey of Sports Video Analysis: Research Issues and Applications' (Proceedings VIP 2005 Proceedings of the Pan-Sydney Area Workshop on Visual Information Processing 2005) 87.

<sup>58</sup> See also D Richardson and M Spivey, 'Eye-Tracking: Research Areas and Applications' in G Bowlin and G Wnek, *Encyclopedia of Biomaterials and Biomedical Engineering* (31 August 2004).

<sup>59</sup> M Strick, RW Holland, R Van Baaren and A Van Knippenberg, 'Humor in the Eye-Tracker: Attention and Distraction from Context Cues' (2010) 137 *Journal of General Psychology* 37.

<sup>60</sup> See < [www.tobii.com](http://www.tobii.com) > accessed 19 January 2014.

<sup>61</sup> See < [www.eyetracking.com](http://www.eyetracking.com) > accessed 19 January 2014.

<sup>62</sup> See < [www.smivision.com/en/gaze-and-eye-tracking-systems/home.html](http://www.smivision.com/en/gaze-and-eye-tracking-systems/home.html) > accessed 19 January 2014.

<sup>63</sup> See < [www.arringtonresearch.com/](http://www.arringtonresearch.com/) > accessed 19 January 2014.

<sup>64</sup> See < [www.asleytracking.com/Site/](http://www.asleytracking.com/Site/) > accessed 19 January 2014.

<sup>65</sup> See < [www.smi.com](http://www.smi.com) > accessed 19 January 2014.

<sup>66</sup> See < [www.polhemus.com](http://www.polhemus.com) > accessed 19 January 2014.

<sup>67</sup> (Fixation 2010, Stockholm, Sweden, 21-22 June 2010). See < [www.fixation2010.se/](http://www.fixation2010.se/) > accessed 19 January 2014. Note also the Communication by Gaze Interaction (COGAIN) eye-tracking project, which aims, inter alia, to advance the technologies, and attempt to reduce the substantial cost of eye-trackers. See 'An Affordable Future for Eye-Tracking in Sight' < [www.physorg.com/news63294534.html](http://www.physorg.com/news63294534.html) > accessed 19 January 2014.

<sup>68</sup> See < <http://etra.cs.uta.fi/> > accessed 19 January 2014.

<sup>69</sup> See Lund Eye-Tracking Academy (LETA) < [www.humlab.lu.se/en/education/leta](http://www.humlab.lu.se/en/education/leta) > accessed 3 August 2012.

<sup>70</sup> For example, the Image Synthesis Group, Computer Science Department, Trinity College, Dublin, and the Department of Psychology, University College Dublin. The ISG was also involved in organising workshops in relation to eye-tracking, see < <http://isg.cs.tcd.ie/iwet/Abstract14.htm> > accessed 25 May 2010.

**Appendix 5**  
**Sample of Court Related Programmes in Ireland and UK**

**Ireland**

**Legal Eagles Programme**

A three part programme entitled *Legal Eagles* was broadcast over three successive Monday evenings on RTE beginning on 8 November 2004. The programme was mostly to do with the life of a barrister. Various barristers were interviewed. The form of TCB utilised was a documentary interview form. Some television courtroom broadcasts were used, but mostly as background shots to the main story. There was one main interim court application (procedural based) filmed from a mostly administrative type court known as the Master's Court. The applicant shown was a trainee barrister.<sup>1</sup> There was a lot of shots of activities immediately outside of the courts, for example the Round Hall of the Four Courts. Therefore, it was still within the court complex. One or two sequences showed a judge coming into court. Most parts of the three programmes, however, consisted of interviews with a variety of barristers and some judges. A number of people were interviewed who had bad personal experiences with the courts. At least three judges were interviewed and one appeared to comment upon a specific case heard by her. Another commented upon how judges were in touch with reality and general social mores.<sup>2</sup> Certainly such interviews are uncommon and even perhaps frowned upon in most jurisdictions where TCB is permitted. Indeed many law officers, such as the Director of Public Prosecution (DPP) in Ireland, have traditionally sought to refrain from making comments in instant cases.<sup>3</sup> This is quite distinct from the trend in certain jurisdictions for judges to provide written summaries of complex cases to the media and even to be available to the media for specific queries from the media on an instant case. These are for clarification and general briefing purposes and not formal on the record comments. It appears that this has been the first occasion that actual proceedings of the Master's Court, or indeed any other court, was broadcast on television. Indeed the programme states that this was the first time that cameras had access to the 'inner workings' of the courts. This may actually be incorrect as the Supreme Court has previously permitted camera access at the beginning of proceedings. However, it does appear that it is the first occasion on which any other court has permitted camera access and filming of a real case. The proceedings, however, were only a preliminary type administrative application and not a full hearing of the case. Administrative and legal points only were being argued in the Master's Court. This is indeed part of the 'inner workings' of the courts. However, will the media really be interested in such issues or feel that their audience will be interested? In the context of permitting TCB, we need to research the gatekeeping effects and processes of programme editors and makers and to research what impact they have on the end product courtroom broadcast which is actually shown on television. What types of cases do they select? What parts of those cases do they select? What parts do they edit out and leave in? The end product of TCB production has not been properly researched or analysed.<sup>4</sup> Another point is that a large number of people may not have consented to being filmed in *Legal Eagles*. This is because many people had their face digitally blocked out. Such digital editing is something which occurs in actual courts in other jurisdictions also, for example, the US. What is noteworthy also is the many instances where the digital imaging was faulty ie a face being blocked but then becoming visible if the person moved; and examples where someone's face was initially evident and was then blocked digitally. The blocking therefore failed its purpose. If this was to occur in a real court setting where, for example, a witness or a juror should have been digitally blocked but was not, or the blocking was delayed, there would certainly be legal arguments resulting. This leads to another issue. The quality of the TCB needs to be considered. Ideally, this will be considered in advance, but it can also be looked at during the process and during and after broadcast. If, for example, certain courtroom participants are to be masked or blocked out, what are the procedures for ensuring this occurs? How is it tested? Is redacting to be implemented? What other safeguards may exist and how are they monitored? Are procedures required pre-broadcast? These are just some of the practical issues arising. What

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<sup>1</sup> Known more commonly as a 'devil.'

<sup>2</sup> This is interesting given that not too long ago one government minister had been critical of judges for not being in touch with reality and/or general social understandings and concerns.

<sup>3</sup> However, there has been perceived pressure to explain decision, and especially decisions not to prosecute. The DPP has expresses some willingness to appease this by explaining reasons for certain decisions in future.

<sup>4</sup> See above.

comparisons are being made to jurisdictions where procedures and rules may exist already? TCB is still very much as hoc in terms of procedures, even where some rules may have been documented. One perhaps telling comment came from one of the professional court photographers interviewed on *Legal Eagles*. He stated that the “papers demand pictures” [for the court stories that they are running]. Can a similar question be asked in relation to television stations and networks? The answer probably has to be in the affirmative. However, such questions make it implicit that the cases and types of cases which are selected by the media are already chosen and it is someone’s job to obtain a picture or film as a backdrop and/or as a focal point in relation to the associated story, which may have already been written. This description can also apply in relation to many forms of TCB. Other comments throughout the programme respectively referred to the “theatre of the courtroom” and how the courts can be “good entertainment” for the casual viewer. The emphasis is therefore on entertaining (and sometimes news) but certainly not education. On a final comment it is not clear that there has been any analysis of how the programme was received generally. However, anecdotal feedback at the time gave the general impression that the programme was not received positively by the legal community. Some media reports suggest that many Irish lawyers were “furious” with the programme.<sup>5</sup> Of course this is just from comments of a small number of the overall legal community in Ireland. It remains to be seen what the impression of the audience who viewed it was, although there are also some comments from the general audience commenting upon the aloofness of (some of) the legal community portrayed in the programme.<sup>6</sup>

### **Primetime Programme**

The second recent programme, dealing mainly with sentencing, was the current affairs programme *Primetime*.<sup>7</sup> It highlighted an apparent inconsistency in judicial sentencing decisions, and included a survey it carried out of reported judicial decisions as reported in provincial newspapers in Ireland. There was no examination of actual decisions, facts, formal legal reports, court files, or appeals that may have occurred in some of these cases. One particular concern with the *Primetime* programme was the balance and editorial of the programme. The programme was presented broadly in two parts. One part focused upon public concerns with justice and judicial consistency in sentencing. If a viewer only watched the first half they would have the distinct and unavoidable impression of a system of justice in Ireland, at least at the lower levels, where justice was inconsistent, discretionary, arbitrary and even perverse. Figures were presented comparing a number of District Court judgments in neighbouring districts for similar type offences. However, there were significant discrepancies in the figures for decisions and sentences given by respective judges, as well as reported judicial comments in relation to the criteria and factors considered by each judge in making their decision.<sup>8</sup> It also appears that there is some evidence that judges may categorise offences differently in terms of level of importance and seriousness. While it is accepted that there are issues to be considered and dealt with, if one did not watch the subsequent part of the programme one would not have discovered that while there are many problems with the justice system, many of these are attributable directly to lack of, amongst other things, resources, procedures, official and administrative backup, scientific and statistical analysis and research; judicial training; and sentencing policies and sentencing guidelines. Indeed, one of the points made in the second part of the programme was that considerable efforts are being made to address areas such as sentencing statistics and guidelines. However, it was indicated that it had taken Scotland approximately ten years to reach the stage where Ireland is perceived to be at now. No other jurisdiction was mentioned which had or was adopting measures similar to those in Scotland, yet Ireland was criticised as being wholly outdated. Therefore, only the second part of the programme gave any contextual setting and analysis of judicial sentencing decisions. One wonders how courtroom broadcasting in Ireland would be practised and presented in Ireland. What difference or effect would the incorporation of courtroom broadcasting footage into the *Primetime* programme have made? Would it depend on what form of courtroom broadcasting was used or incorporated? Overall, the impression of the whole of the programme was reasonable and well balanced.

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<sup>5</sup> L Nolan, ‘Furious Legal Eagles Hit Out at TV “Hatchet Job”’ *Irish Independent* (Dublin, 14 November 2004) available at < [www.irishindependent.ie](http://www.irishindependent.ie) > accessed 4 April 2009.

<sup>6</sup> Note also comments of D Mac Síthigh in his blogs ‘Barred’ at < [www.rhymeswithporridge.com/2008/10/barred/](http://www.rhymeswithporridge.com/2008/10/barred/) > (accessed 4 April 2009) and ‘The Barristers: An Update’ at < [www.rhymeswithporridge.com/2008/12/the-barristers-an-update/](http://www.rhymeswithporridge.com/2008/12/the-barristers-an-update/) > accessed 4 April 2009.

<sup>7</sup> Broadcast on RTE 1 on 13 December 2004.

<sup>8</sup> Or at least as they were presented in the programme.



However, one had to watch the whole programme to appreciate this. The presentation can therefore be criticised. In addition, the points about the audience viewing and reception become important. This point is emphasised earlier. Effects and audience effects can depend on what is viewed and the style and environmental context of the viewing. We cannot presume, as proponent and the media do, that for example all courtroom broadcasting will be educational (see above in relation to some of the flaws and presumptions regarding educational arguments). In addition, any proper consideration and research of courtroom broadcasting needs to begin incorporating content analysis of the actual courtroom broadcasting footage. What does it contain? What is left in? What is left out? Why? How do the content and the arrangement of the content impact upon, or alter, the audience reception and understanding of the courts? There is a clear opportunity for content analysis and audience reception analysis of courtroom broadcasting programmes. Also, what is the impact of scheduling and timing of courtroom broadcasting? Indeed to compound these problems one of the programme trailers commenting upon what would come in the next part of the programme (after having made the case that judges are making completely discretionary decisions which are completely inconsistent with other judges), it refers not to the resource and training issues but instead to judges being appointed who are not adequate and are not experienced. These leaves the audience with the impression that judges act solely on a whim of discretion, are not fit for the job and are also unlike other members of society. This byline is inconsistent with what is actually shown in the subsequent part of the programme. Subsequently the programme comments upon such issues as how judges, when they are appointed, do not have a formal training as a judge or even an induction course upon becoming a judge; judges do not have adequate procedural and backup systems. Judges do not have refreshers in particular areas of law which they will have to deal with but may have had only limited experience in their recent professional career.<sup>9</sup> The programme validly makes the point that there appears to be some level of inconsistency, and that proper resources and training<sup>10</sup> are not provided to judges. It also accepts that while there is judicial discretion, it “needs to be structured.” This is all quite different from the impression created in the first part of the programme and also created in the byline to introduce the second part, which referred to judges who were not adequate, as opposed to judges not receiving adequate professional judicial training – which was the actual point made in the second part of the programme. Could courtroom broadcasting content and courtroom broadcasting trailers and promotional material misrepresent or mislabel the actual cases? Once we properly understand and categorise courtroom broadcasting forms, categories of courtroom broadcasting arguments and issues, we begin to understand how we can conduct meaningful research into courtroom broadcasting. Only then are we really equipped to consider the effectiveness or otherwise of courtroom broadcasting. Only then also are we in a position to understand and properly document the procedures and rules we need to apply to courtroom broadcasting practice. Only once properly researched is commenced do we begin to see which forms of courtroom broadcasting we may have a preference for, and how to move towards such a form. How can we decide which forms and types of courtroom broadcasting we prefer, if we are not able to distinguish them in the first instance? In any court or in any jurisdiction presently considering courtroom broadcasting, it should be able to refer to a large body of considered, well developed and structured and longitudinal research of courtroom broadcasting in established courtroom broadcasting jurisdictions. Unfortunately, this is not the case as the research is lacking and is flawed.

## UK

### **The Trial (1993), Documentaries and Applications**

The first filming in a UK courtroom occurred on 31 May 1993, when a shoplifting and assault case was filmed by Nick Catliff and the BBC in Edinburgh’s Sheriffs Court.<sup>11</sup> The Trial was shown on BBC 2 as a one off example of a documentary type programme which included in-court television footage of a real case. This is reported as the first such

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<sup>9</sup> Many legal professionals specialise in one or more areas of law. Therefore, they may not be up to date with or have recent experience in some of the other areas of law that they may be expected to deal with when acting as judges. The Irish judicial system unlike many forms of professional legal practice does not allow specialism among judges. Only recently is there a move towards a specialised commercial court system in Ireland. Even this system is aimed at the more high value cases, thus many ordinary commercial cases remain in the normal judicial cycle.

<sup>10</sup> This is not unique to Ireland, see for example comments of Lord Justice Brooke in ‘Poor [IT] Technology “Lets Down” UK Courts’ BBC News (20 June 2002).

<sup>11</sup> N Catliff, ‘On Camera Not In Cameras’ (1994) 144 New Law Journal 1597.

broadcast in Britain.<sup>12</sup> It was shown in five episodes and contained footage of criminal trials.<sup>13</sup> One of the reasons for how this was permissible was that the footage was from Scotland, which was not subject to the England and Wales Criminal Justice Act 1925 prohibition.<sup>14</sup> Mark Stephens, a media lawyer, feels that the participants in *The Trial* acted up and were 'playing to the unseen gallery.'<sup>15</sup> It also notes that there was reported to be three cameras with camera operators used in the filming of *The Trial*.<sup>16</sup> The producer of *The Trial* also feels that the Simpson criminal case set back the cause of TCB in the UK.<sup>17</sup> He also feels that serious newspaper reporting of the courts is retreating. It also appears that there as a controlled study in Scotland in 1992, and also separate report.<sup>18</sup> These led to a somewhat more liberal attitude to some forms of TCB in Scotland. Live TCB does not appear to be permitted.<sup>19</sup> CNN applied to film the Harold Shipman inquiry.<sup>20</sup> There was filing of the Marchioness sinking inquiry and also closed circuit filming of the first General Pinochet extradition hearing.<sup>21</sup> Various media outlets also applied unsuccessfully to cover all of the Hutton inquiry regarding Dr David Kelly.<sup>22</sup> In 2005 Sky TV obtained permission to broadcast live a transmission from the in-court stenography in the retrial of Sion Jenkins.<sup>23</sup>

### **The Barristers, 2008**

A further documentary type programme called *The Barristers* was shown in 2008. It was described as a fly-on-the-wall type documentary, as was a previous solicitor's office documentary called *No Win, No Fee* from the BBC in 2008.<sup>24</sup> The *Barristers* focused mainly on student barristers and qualified barristers, how they qualify and their role and progress in court. It was produced by BBC who described it as a series 'where raw emotion meets centuries-old tradition' and also capturing reactions to 'what they [ie the barristers in general] perceive as an attack from Government, which wants to curb their earnings and open up the legal profession to others.'<sup>25</sup> It was also billed as describing, amongst other things, 'a glamorous job which produces Prime Ministers, millionaires and the judges who shape our law.'<sup>26</sup> While it is clearly a documentary type programme, it is also clearly being 'sexed up' to some extent. The programme took eight years of negotiations to get to filming stage.<sup>27</sup> The programme makers had 'years of negotiation' before being permitted to film the programme.<sup>28</sup> Unfortunately, it does not describe what structures, discussions, restrictions, intended formatting style, etc were discussed or indeed agreed upon. It is also unclear who exactly the years of negotiation took place between. If there were any procedures or rules (agreed or otherwise) these were not evident, and therefore cannot be examined in this

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<sup>12</sup> R Verkaik, 'Cameras Cross the Atlantic: The USA's Trial Broadcasters Are Making A Pitch to Televisе UK hearings,' above.

<sup>13</sup> Department of Constitutional Affairs [UK] *Broadcasting Courts, Consultation Paper* (CP 28/04 November 2004) 18.

<sup>14</sup> R Verkaik, above.

<sup>15</sup> Referred to *ibid*.

<sup>16</sup> Referred to in G Langdon-Down, 'Cameras In Court: American Lawyers Switch On To Living Life Through A Lens' (30 September 2004) *Law Society Gazette* 24.

<sup>17</sup> N Catliff, referred to in S Ward, 'Fights, Cameras, Action' (2001) 18 *Law Society Gazette* 22.

<sup>18</sup> Department of Constitutional Affairs [UK] *Broadcasting Courts, Consultation Paper* (CP 28/04 November 2004) 18. It is unclear if they are generally available.

<sup>19</sup> *ibid*.

<sup>20</sup> *ibid*.

<sup>21</sup> *ibid*.

<sup>22</sup> Department of Constitutional Affairs [UK] *Broadcasting Courts, Consultation Paper* (CP 28/04 November 2004) 17.

<sup>23</sup> 'Falconer Close to Rejecting TV Trials as Sky Breaks New Ground in Jenkins Case' (7 July 2005) *Law Society Gazette* < [www.lawgazette.co.uk](http://www.lawgazette.co.uk) > accessed 24 October 2010.

<sup>24</sup> C Baksi, 'Court on Camera' (2008) 13 *Law Society Gazette* 50.

<sup>25</sup> See 'BBC Two Unveils its Autumn 2008 highlights' < [www.bbc.co.uk/pressoffice/pressreleases/stories/2008/07\\_july/10/bbctwoXXXI](http://www.bbc.co.uk/pressoffice/pressreleases/stories/2008/07_july/10/bbctwoXXXI) > accessed 4 April 2009. See also comments of D Mac Sithigh in his blogs 'Barred' at < [www.rhymeswithporridge.com/2008/10/barred/](http://www.rhymeswithporridge.com/2008/10/barred/) accessed 4 April 2009 and 'The Barristers: An Update' < [www.rhymeswithporridge.com/2008/12/the-barristers-an-update/](http://www.rhymeswithporridge.com/2008/12/the-barristers-an-update/) > accessed 4 April 2009.

<sup>26</sup> See Open University, 'The Barristers, About the Series' < [www.open2.net/about\\_the\\_barristers.html](http://www.open2.net/about_the_barristers.html) > accessed 4 April 2009.

<sup>27</sup> C Baksi, above.

instance nor in considering any other potential programmes. There was also another UK docudrama programme called Criminal Justice which was fiction based. However, it has received criticism from the barrister profession for portraying barristers as being ‘underhand, unprincipled and overly aggressive.’<sup>29</sup>

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<sup>28</sup> See *ibid.*

<sup>29</sup> See S Jones, ‘Objection: BBC Drama is Unfair on Us, Says Barristers’ Guardian online < [www.guardian.co.uk/media/2008/jul/03/television.law](http://www.guardian.co.uk/media/2008/jul/03/television.law) > accessed 4 April 2009, and also commented upon by D Mac Síthigh in his blog ‘Barred’ < [www.rhymeswithporridge.com/2008/10/barred/](http://www.rhymeswithporridge.com/2008/10/barred/) > accessed 4 April 2009.



**Appendix 6**  
**Cameras in the Courtroom**  
**Irish Judicial Questionnaire**

**Part 1**

1 How many years have you served on the bench?: \_\_\_\_\_

2(a) In which court(s) have you presided?:

Civil:   
 Criminal:

2(b) At what court level(s)?:

Childrens Court:   
 District Court:   
 Circuit Court:   
 High Court:   
 Supreme Court:   
 Court of Criminal Appeal:   
 Special Criminal Court:   
 Central Criminal Court:

3 In approximately how many jury trials have you presided?:

Civil: \_\_\_\_\_  
 Criminal: \_\_\_\_\_

4 In approximately how many proceedings have you presided in which reporters were present?:

Civil: \_\_\_\_\_  
 Criminal: \_\_\_\_\_

5 Prior to your service on the bench, did you ever serve as a:

Criminal defence counsel?: Yes  No   
 Criminal prosecutor?: Yes  No   
 Civil litigator?: Yes  No

[Questions 1 – 5 have not been compiled yet. Some replies are difficult to match to the questions, while some potentially may reveal particular participants.]

6 Do you agree or disagree with the following statements (please tick the applicable box)?:

**Television coverage ...**

		<b>Strongly Agree</b>	<b>Somewhat Agree</b>	<b>Somewhat Disagree</b>	<b>Strongly Disagree</b>	<b>No Opinion</b>	<b>N (IE)</b>	<b>N (NY)</b>
(a)	Increases the accuracy of news accounts of judicial proceedings	2, 11, 25, 38	1, 3, 6, 14, 21, 26, 28, 33, 36, 39	4, 20, 23, 31, 32, 41	7, 9, 12, 16, 22, 24, 30, 34, 35,	10, 13, 15, 18, 19, 27, 28, 37	N=40	N=349 StA9%

					40, 42, 43			SoA38% SoD24% StD23% NO5%
		<b>10 percent</b>	<b>10 percent</b>	<b>15 percent</b>	<b>30 percent</b>	<b>20 percent</b>		
(b)	Has enhanced public understanding of judicial proceedings <sup>1</sup>	2, 25, 38, 39	6, 9, 11, 13, 14, 18, 19, 21, 27, 28, 29, 33, 36, 37	1, 3, 4, 23, 24, 26, 32, 41	7, 12, 15, 16, 20, 22, 30, 31, 34, 35, 40, 42, 43	10	N=40	N=350  StA10% SoA35% SoD27% StD25% NO3%
		<b>10 percent</b>	<b>35 percent</b>	<b>20 percent</b>	<b>32.50 percent</b>	<b>2.5 percent</b>		
(c)	Is more likely to serve as a source of entertainment than education for the viewing public	4, 7, 9, 10, 12, 14, 15, 18, 19, 10, 22, 27, 29, 30, 31, 33, 40, 42, 43	3, 6, 11, 16, 21, 23, 25, 26, 28, 32, 35, 36, 37, 41	1, 13, 24, 38, 39	2, 34		N=40	N=350  StA41% SoA39% SoD15% StD3% NO2%
		<b>47.50 percent</b>	<b>35 percent</b>	<b>12.50 percent</b>	<b>5 percent</b>			
(d)	Serve as a deterrent against injustice	2, 36	1, 9, 25, 29, 32, 33, 37, 39	3, 6, 14, 15, 24, 28, 40	7, 11, 12, 16, 18, 20, 23, 34, 35, 38, 41, 42, 43	4, 10, 13, 21, 22, 26, 27, 31	N=38	N=346  StA3% SoA22% SoD29% StD39% NO8%
		<b>5.26 percent</b>	<b>21.05 percent</b>	<b>18.42 percent</b>	<b>34.21 percent</b>	<b>21.05 percent</b>		
(e)	Fosters public scrutiny of court proceedings	2, 21, 25, 31, 36, 40	1, 3, 9, 11, 13, 14, 16, 19, 23, 25, 26, 28, 29, 30, 32, 33, 37, 39, 41, 42	4, 6, 12, 15, 24, 38	7, 18, 20, 34, 35, 43	10, 22, 27	N=42	N=346  StA13% SoA50% SoD21% StD12% NO4%
		<b>14.63 percent</b>	<b>48.78 percent</b>	<b>14.63 percent</b>	<b>14.63 percent</b>	<b>7.32 percent</b>		
(f)	Transforms sensational criminal trials into mass-marketed commercial products	3, 4, 6, 7, 9, 10, 12, 14, 15, 16, 18, 19, 20, 22, 26, 27,	11, 21, 23, 24, 28, 36, 39	13	1, 2		N=39	N=351  StA57% SoA30% SoD5%

<sup>1</sup> The original question referred to ‘New York’s judicial system’ see *An Open Courtroom, Cameras in New York Courts*, above 99.

		29, 30, 31, 32, 33, 34, 35, 37, 38, 40, 41, 42,43						StD5% NO3%
		<b>74.38</b> <b>percent</b>	<b>17.95</b> <b>percent</b>	<b>2.56 percent</b>	<b>5.13</b> <b>percent</b>			
(g)	Tends to cause judges to issue rulings they might otherwise not issue	7, 22, 29, 31, 43	10, 13, 14, 15, 21, 23, 33	1, 3, 12, 16, 28, 39	2, 4, 6, 9, 11, 18, 19, 24, 25, 26, 27, 30, 34, 35, 37, 38, 41, 42	20, 32, 36, 40	N=40	N=350  StA10% SoA27% SoD24% StD28% NO11%
		<b>12.50</b> <b>percent</b>	<b>17.50</b> <b>percent</b>	<b>15 percent</b>	<b>45</b> <b>percent</b>	<b>10</b> <b>percent</b>		
(h)	Poses a potential threat to judicial independence	7, 16, 20, 22, 31, 39, 41, 42, 43	10, 11, 18, 19, 21, 23, 28, 33	1, 3, 6, 13, 26, 30, 32	2, 4, 9, 11, 14, 15, 24, 25, 27, 29, 34, 35, 36, 37, 37, 40		N=40	N=350  StA17% SoA28% SoD23% StD25% NO7%
		<b>22.50</b> <b>percent</b>	<b>20 percent</b>	<b>17.50</b> <b>percent</b>	<b>40</b> <b>percent</b>			
(i)	Has impaired judicial dignity or courtroom decorum <sup>2</sup>	7, 10, 16, 22, 29, 40, 41, 42, 43	1, 4, 9, 11, 13, 19, 26, 28, 30, 33, 35, 39, 41	3, 6, 21, 37	2, 14, 15, 23, 24, 27, 31, 34, 36, 38	11, 18, 20, 25, 32	N=40	N=350  StA17% SoA22% SoD23% StD27% NO11%
		<b>21.95</b> <b>percent</b>	<b>31.70</b> <b>percent</b>	<b>9.76 percent</b>	<b>24.39</b> <b>percent</b>	<b>14.63</b> <b>percent</b>		
(j)	Has had a positive effect on the <i>civil</i> justice system <sup>3</sup>	36	1, 2, 3, 11, 21, 24, 25, 30, 33, 38, 39, 41	4, 6, 15, 23, 28, 37, 41	7, 11, 16, 20, 22, 34, 35, 40, 43	10 [‘where?’ (J10)]  13, 14, 18, 19, 26, 27, 29, 31, 32	N=39	N=349  StA3% SoA14% SoD22% StD24% NO38%
		<b>2.56</b> <b>percent</b>	<b>30.77</b> <b>percent</b>	<b>17.95</b> <b>percent</b>	<b>23.08</b> <b>percent</b>	<b>25.64</b> <b>percent</b>		
(k)	Has had a positive effect on the <i>criminal</i> justice system <sup>4</sup>	36	2, 3, 11, 14, 21, 25, 32,	1, 6, 15, 23, 28, 30, 37,	4, 7, 11, 16, 20, 22,	10 [‘where?’	N=38	N=350

<sup>2</sup> The original question referred to ‘courtroom decorum in New York’ see *An Open Courtroom, Cameras in New York Courts*, above 99.

<sup>3</sup> The original question referred to ‘positive effect on New York’s *civil* justice system’ see *An Open Courtroom, Cameras in New York Courts*, above 99. (Original emphasis).

			33, 38, 39	41	24, 26, 31, 34, 35, 40, 42, 43	(J10)]  13, 18, 19, 27, 29		StA5% SoA20% SoD30% StD29% NO16%
		<b>2.56</b> <b>percent</b>	<b>25.64</b> <b>percent</b>	<b>20.51</b> <b>percent</b>	<b>35.90</b> <b>percent</b>	<b>15.38</b> <b>percent</b>		

If you would like to comment further, please include your comments in the space below or on the pages at the end of this questionnaire.

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'The problem is not TV coverage per se. It is the intimidatory behaviour of both TV and press photographers in the precincts of the courts – the so called “media scrum” – who surrounds and harass sometimes nervous and already stressed participants in the proceedings. This may deter witnesses coming forward and may as a result cause justice to be denied. Also excessive coverage, particularly so called “colour pieces” or “profiles” may, and on occasion have, created a risk of jury prejudice’ (J11) (original emphasis).

'Not clear what is meant by “television coverage.” Does this mean reporting or having TV cameras etc, in court during proceedings?’ (J13).

J14 clarifies that their answers in this question relate to television coverage ‘rather than actual recording.’

'I find that [most] accounts of cases in my courts are [most] accurate’ re question 6(a) (J19)

'Double negative: [unhelpful.] Also suggests that in some way judiciary influenced by media pressure. I cannot agree with this’ re question 6(d) (J19).

J21 also put an ‘X’ beside question (e).

'As no television live coverage is permitted; it is difficult to comment but experience is based on a number of American cases observed’ (J29).

'Any editing tends to decrease accuracy/understanding’ (J32).

This is question 6. However, the following comment appears here. ‘Re (8) – for fifteen years I have been au fait only with what goes on in my court. This query would be more appropriately addressed to counsel and solicitors who appear in the courts’ (J36).

7 Do you agree or disagree with the following statements (please tick the applicable box)?:

**Criminal Cases ...**

		<b>Strongly Agree</b>	<b>Somewhat Agree</b>	<b>Somewhat Disagree</b>	<b>Strongly Disagree</b>	<b>No Opinion</b>	<b>N (IE)</b>	<b>N (NY)</b>
(a)	Trial judges should have discretion to allow criminal trials to be televised	27, 31, 33, 38	9, 11, 14, 17, 18, 32, 39	30	3, 4, 6, 7, 8, 10, 12, 13, 15, 20, 22, 23, 24, 25, 26, 28, 29, 34, 35, 36, 37, 40, 41, 42, 43	2, 19	N=39	N=345 StA62% SoA23% SoD6% StD7% NO2%

<sup>4</sup> The original question referred to ‘positive effect on New York’s *criminal* justice system’ see *An Open Courtroom, Cameras in New York Courts*, above 99. (Original emphasis).



		<b>10.26 percent</b>	<b>17.95 percent</b>	<b>2.65 percent</b>	<b>64.10 percent</b>	<b>5.13 percent</b>		
(b)	Television cameras should not be allowed in criminal trials unless the defendant consents	2, 4, 9, 17, 33, 37, 42  <b>21.87 percent</b>	18, 24, 38, 39  <b>12.50 percent</b>	11, 30, 31, 32  <b>12.50 percent</b>	3, 6, 7, 10, 12, 14, 20, 23, 26, 28, 29, 34, 43  22 (J22 added 'No TV at all') <b>43.75 percent</b>	19, 27, 36  (‘See above and below’ (J41) (Not counted)) <b>9.37 percent</b>	N=32	N=343  StA29% SoA14% SoD21% StD31% NO4%
(c)	Television cameras should not be allowed in criminal trials unless both the prosecution and the defendant consent	2, 4, 9, 33, 37, 42  <b>18.75 percent</b>	10, 14, 18, 24, 39  <b>15.62 percent</b>	17, 30, 31, 32, 38  <b>14.28 percent</b>	3, 6, 7, 11, 12, 20, 23, 26, 28, 29, 34, 43  22 (J22 added 'No TV at all') <b>40.62 percent</b>	19, 27, 36  (‘See above and below’ (J41) (Not counted)) <b>9.37 percent</b>	N=32	N=341  StA26% SoA19% SoD20% StD31% NO4%
(d)	Television cameras should not be permitted in criminal trials	1, 2, 3, 4, 5, 8, 9, 12, 13, 15, 16, 19, 20, 22, 23, 24, 25, 26, 28, 29, 34, 35, 36, 37, 40, 41, 42  <b>62.79 percent</b>	10, 30, 39  <b>6.98 percent</b>	11, 17, 27, 31, 33  <b>11.63 percent</b>	6, 7, 14, 21, 32, 38, 43  <b>16.63 percent</b>	18  <b>2.32 percent</b>	N=43	N=344  StA21% SoA15% SoD22% StD38% NO4%
(e)	Television cameras should not be permitted in criminal trials if the victim (or surviving family members) object(s) to camera coverage of the trial	2, 4, 10, 11, 12, 22, 23, 24, 33, 34, 37, 38, 39, 42  <b>45.16 percent</b>	18  <b>3.22 percent</b>	14, 17 (‘except rape, sexual assault’ (J17)).  27, 28, 30, 31, 32  <b>22.58 percent</b>	3, 6, 7, 9, 20, 29, 43  <b>22.58 percent</b>	26, 36  (‘See above and below’ (J41) (Not counted)) <b>6.45 percent</b>	N=31	N=339  StA34% SoA24% SoD16% StD20% NO5%

‘Victims should not have veto of [whether] cameras are to be permitted’ re question 7(e) (J19)

Civil Cases ...

		<b>Strongly Agree</b>	<b>Somewhat Agree</b>	<b>Somewhat Disagree</b>	<b>Strongly Disagree</b>	<b>No Opinion</b>	<b>N (IE)</b>	<b>N (NY)</b>
(f)	Judges should have discretion to allow civil trials to be televised	14, 27, 29, 31, 33, 38  <b>16.21 percent</b>	3, 9, 11, 17, 32, 39  <b>16.21 percent</b>	18, 30  <b>5.40 percent</b>	4, 6, 7, 8, 12, 13, 20, 22, 23, 24, 26, 28, 34, 35, 36, 37, 40, 41, 42, 43  <b>54.05 percent</b>	2, 10, 19  <b>8.10 percent</b>	N=37	N=340  StA59 % SoA22 % SoD6% StD5% NO8%
(g)	Television cameras should not be allowed in civil trials unless the parties consent	1, 2, 4, 9, 10, 11, 17, 24, 33, 37, 42  <b>35.48 percent</b>	14, 18, 39  <b>9.68 percent</b>	30, 32  <b>6.45 percent</b>	6, 7, 12, 20, 23, 26, 28, 31, 34, 38, 43  <b>35.48 percent</b>	19, 27, 29, 36 (‘See above’ (J41). Not counted.)  <b>12.90 percent</b>	N=31	N=333  StA29 % SoA32 0% SoD21 7% StD224 % NO10 %
(h)	Television cameras should not be permitted in civil trials	2, 4, 5, 6, 8, 12, 13, 15, 16, 19, 20, 22, 23, 24, 25, 26, 28, 34, 35, 36, 37, 41, 42  <b>57.50 percent</b>	10, 30  <b>5 percent</b>	11, 17, 18, 39  <b>10 percent</b>	7, 9, 14, 21, 31, 32, 33, 38, 43  <b>22.50 percent</b>	27, 29  <b>5 percent</b>	N=40	N=343  StA15 % SoA15 % SoD22 1% StD38 % NO11 %

If you would like to comment further, please include your comments in the space below or on the blank pages at the end of this questionnaire.

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‘Only cases of major importance are likely to [warrant] TV coverage. No TV should be permitted where witnesses are involved’ (J3).

‘Television cameras should not be allowed in Court – under any circumstances and the foregoing answers should be viewed in that context’ (J7) (original emphasis).

‘Total discretion?’ re Question 7(a) (J14).

Judge 22 put an asterisk beside questions (b), (c), (e) and (g) above. J22 also wrote that ‘The answers marked \* above seem to predicate. Allowing TV coverage – for the avoidance of doubt I am v. strongly against any TV coverage of trials, civil or criminal’ (original emphasis).

‘Delayed broadcast only – otherwise potential irreparable damage to reputation of innocent’ (J32).

‘If cameras were allowed in the courtrooms, only sensational trials would attract coverage. The presence of cameras and nightly television coverage would be likely to affect the conduct of the trial and give rise to the risk of an unfair or unjust outcome’ (J36).

8 **Accuracy of Coverage**

		<b>Strongly Agree</b>	<b>Somewhat Agree</b>	<b>Somewhat Disagree</b>	<b>Strongly Disagree</b>	<b>No Opinion</b>	<b>N (IE)</b>	<b>N (NY)</b>
(a)	In the majority of cases, <i>televised nightly news</i> coverage of court proceedings accurately represents what actually takes place in courtrooms <sup>5</sup>	19, 25	2, 3, 6, 8, 9, 11, 12, 13, 17, 21, 26, 28, 29, 34, 35, 36, 37, 42, 43	1, 4, 14, 18, 20, 22, 24, 30, 33, 38, 39, 40, 41	10, 16, 23, 31, 32	7, 15	N=41	N=349 StA2% SoA21% SoD35% StD34% NO7%
		<b>4.88 percent</b>	<b>46.34 percent</b>	<b>31.71 percent</b>	<b>12.19 percent</b>	<b>4.88 percent</b>		
(b)	In the majority of cases, televised <i>gavel to gavel</i> coverage of court proceedings accurately represents what action takes place in courtrooms <sup>6</sup>  [Gavel to gavel = full length of case, no brief snippets]	11, 14, 15, 27	3, 6, 10, 12, 17, 21, 25, 28, 29, 32, 33, 36, 37, 39, 42	4, 30, 38	23, 43	1, 2, 7, 8, 9, 13, 18, 19, 20, 24, 26, 34, 35	N=37	N=351 StA17% SoA46% SoD16% StD8% NO14%
		<b>10.81</b>	<b>40.54 percent</b>	<b>8.11 percent</b>	<b>5.40</b>	<b>35.13</b>		

<sup>5</sup> The original question referred to ‘takes place in New York courtrooms,’ see *An Open Courtroom, Cameras in New York Courts*, above 101. (Original emphasis).

<sup>6</sup> *ibid.*

		percent			percent	percent		
(C)	In the majority of cases, televised coverage of court proceedings in <i>news feature programmes</i> adequately represents what actually takes place in courtrooms <sup>7</sup>	21	3, 6, 7, 9, 11, 12, 13, 14, 17, 18, 25, 26, 28, 29, 36, 39, 41, 43	1, 4, 20, 22, 24, 30, 32, 33, 37, 40, 42	10, 15, 16, 23, 27, 31, 38	2, 8, 19, 34, 35	N=42	N=346 StA1% SoA31 9% SoD25 % StD31 % NO24 %
		<b>2.38 percent</b>	<b>42.86 percent</b>	<b>26.19 percent</b>	<b>16.67 percent</b>	<b>11.90 percent</b>		
(d)	In the majority of cases, <i>newspaper</i> coverage of court proceedings accurately represents what actually takes place in courtrooms <sup>8</sup>	19	2, 3, 7, 9, 11, 13, 14, 15, 17, 18, 21, 24, 28, 35, 36, 39, 43	1, 4, 6, 8, 22, 23, 25, 26, 27, 29, 30, 32, 33, 37, 40, 41	10, 12, 16, 20, 31, 38, 42		N=41	N=349 StA4% SoA31 % SoD39 % StD23 % NO3%
		<b>2.44 percent</b>	<b>41.46 percent</b>	<b>39.02 percent</b>	<b>17.07 percent</b>			
(e)	I am concerned about the commercial exploitation of judicial proceedings by the <i>television</i> industry	1, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 19, 21, 22, 23, 29, 30, 31, 33, 34, 35, 39, 40, 41, 42, 43	18, 20, 24, 25, 27, 28, 32, 36, 37			2, 14, 17, 26, 38	N=42	N=349 StA52 % SoA28 % SoD8% StD4% NO9%
		<b>66.67 percent</b>	<b>21.43 percent</b>			<b>11.90 percent</b>		
(f)	I am concerned about the commercial exploitation of judicial proceedings by <i>newspaper</i> companies	1, 4, 6, 7, 10, 11, 15, 16, 19, 20, 21, 22, 23,	3, 13, 17, 18, 24, 25, 27, 28, 29, 30, 36, 38	9, 12		2, 14, 26	N=41	N=349 StA30 %

<sup>7</sup> The original question referred to ‘In the majority of cases, televised coverage of court proceedings in *news feature programs* (such as “Prime Time Justice”) adequately represents what actually takes place in New York courtrooms,’ see *An Open Courtroom, Cameras in New York Courts*, above 101. (Original emphasis).

<sup>8</sup> The original question referred to ‘New York courtrooms,’ see *An Open Courtroom, Cameras in New York Courts*, above 101. (Original emphasis).

		31, 32, 33, 34, 35, 37, 39, 40, 41, 42, 43						SoA28 % SoD22 % StD9% NO11 %
		<b>58.54 percent</b>	<b>29.27 percent</b>	<b>4.88 percent</b>			<b>7.32 percent</b>	

If you would like to comment further, please include your comments in the space below or on the blank pages at the end of this questionnaire.

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‘Court journalists operate to a high standard. In high profile cases where other journalists report – standards and accuracy suffer: also tendency to sensationalise’ (J17)

J22 placed an asterix beside question (b). J22 added that “‘Gavel to gavel” coverage does not exist in this jurisdiction. Such foreign coverage as I have seen reinforces my view already given.’

J27 answered question (a) by ticking Somewhat Agree and Somewhat Disagree. (Therefore, not counted).

J31 answered question (b) by ticking Somewhat Agree and Somewhat Disagree. (Therefore, not counted).

‘See 7 above and 9 below’ (J32).

‘Re (6), while the coverage is likely to be accurate, the concern is how the presence of coverage affects the participants (judge, counsel, [accused?])’ (J36).

‘Re (a) and (b) – a good story is a good story. The current [strictures] on reportage during the trial seem to work well. After that the question is whether sensationalism on censorship is more acceptable’ (J36).

9 **If TCB cameras are permitted in criminal trials, do you favour...**

		<b>Yes</b>	<b>No</b>	<b>N (IE)</b>	<b>N (NY)</b>
(a)	Delayed broadcasting (ie after the verdict) instead of contemporaneous broadcasting?	3, 4, 8, 9, 11, 12, 13, 15, 18, 19, 20, 21, 22, 23, 24, 26, 28, 30, 31, 32, 33, 34, 36, 37, 38, 39, 42  <b>81.82 percent</b>	10, 14, 17, 27, 29, 43  <b>18.18 percent</b>	N=33	N=326  Y50% N50%
(b)	Giving the judge a ‘kill switch’ which would allow him or her to stop all audiovisual coverage at appropriate moments? <sup>9</sup>	1, 4, 9, 10, 12, 14, 17, 19, 20, 21, 23, 24, 24, 28, 30, 31, 37, 38, 39, 40, 42  ‘not practical’	11, 18, 22, 27, 29, 32, 33, 34, 36, 43	N=31	N=328  Y72% N28%

<sup>9</sup> The original question referred to ‘allow you to stop,’ see *An Open Courtroom, Cameras in New York Courts*, above 102. (Original emphasis).

		(3) <b>67.74 percent</b>	<b>32.26 percent</b>		
(C)	Installation of a ten (10) second time delay device to prevent inadvertent transmission of certain prohibited testimony or images?	8, 9, 12, 14, 17, 18, 19, 20, 21, 23, 23, 26, 28, 30, 31, 36, 37, 38, 39, 42  'completely inadequate' (J3)  <b>68.96 percent</b>	10, 11, 22, 27, 29, 32, 33, 34, 43  <b>31.03 percent</b>	N=29	N=319  Y77% N23%
	Other (please specify)  'None of the above. I am not in favour of the broadcasting of criminal trials – or indeed civil proceedings' (J2). 'I strongly disagree with TV in [the] courtroom' (J6). '(D) Judge should have power to fix TV company with costs of any proceeding that have to be abandoned due to broadcasting of inappropriate or prohibited material. (E) Both (b) and (c) are inappropriate if it is intended that control switch or device be operated by the judge. It is not the function of the judge to be a TV editor. He/She has enough to do managing the legal issues in the trial, which require his/her total concentration' (J11). 'Look – a judge is not a TV producer. We have enough to do without worrying about a 10 sec delay or a kill switch. A case can be made for radio, but even here it would encourage XXXX' (J12). 'Discretion of judge to omit certain evidence on testimony from broadcast' (J14). '(D) Getting another judge to hear trial' (J16). 'If broadcasting is permitted (over my dead body!) only delayed b'casting after <u>judicial</u> editing' (J22) (original emphasis). 'Do not favour' (J25). 'TV cameras should not be allowed in any circumstances in criminal trials' (J 29). 'All answers are predicated on <u>delayed</u> broadcast, ie after verdict' (J32) (original			N=	

<p>emphasis).</p> <p>‘I do not favour television cameras in my criminal trial’ (J35).</p> <p>‘(D) Taking into account the possibility of an appeal followed by a re-trial’ (J36).</p> <p>‘Not in favour’ (J41).</p> <p>‘At least 19 secs!’ (J42)</p>					
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10 Overall, how do you feel about ...

		Strongly in Favour	Somewhat in Favour	Somewhat Opposed	Strongly Opposed	No Opinion	N (IE)	N (NY)
(a)	Television coverage of <i>criminal</i> trials	31, 38  <b>4.76 percent</b>	17, 32, 33, 39  <b>9.52 percent</b>	11, 30  <b>4.76 percent</b>	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 24, 35, 36, 37, 40, 41, 42, 43  <b>78.57 percent</b>	27  <b>2.38 percent</b>	N=42	N=348  StF16% SoF33% SoO18% StO30% NO3%
(b)	Television coverage of <i>civil</i> trials	31, 38  <b>4.76 percent</b>	1, 3, 11, 17, 29, 32, 33, 39  <b>19.04 percent</b>	10, 18, 24, 30  <b>9.52 percent</b>	2, 4, 6, 7, 8, 9, 12, 13, 15, 16, 18, 19, 20, 21, 22, 23, 25, 26, 28, 24, 35, 36, 37, 40, 41, 42, 43  <b>64.28 percent</b>	27  <b>2.38 percent</b>	N=42	N=345  StF15% SoF33% SoO19% StO24% NO10%
(c)	Television coverage of oral pre-trial arguments in <i>criminal</i> cases	31, 38  <b>4.76 percent</b>	32, 39  <b>19.04 percent</b>	30  <b>9.52 percent</b>	1, 2, 3, 4, 6, 7, 8, 9, 10, 12, 13, 15, 16, 17,  <b>64.28 percent</b>	27, 33  <b>2.38 percent</b>	N=39	N=346  StF10% SoF25% SoO22%

					18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 24, 35, 36, 37, 41, 42, 43			StO40% NO3%
		<b>5.13 percent</b>	<b>5.13 percent</b>	<b>2.56 percent</b>	<b>82.05 percent</b>	<b>5.13 percent</b>		
(d)	Television coverage of oral pre-trial arguments in <i>civil</i> cases	31, 38	1, 3, 29, 32, 39	10, 18, 24, 30	2, 4, 6, 7, 8, 9, 12, 13, 15, 16, 17, 19, 20, 21, 22, 23, 25, 26, 27, 28, 24, 35, 36, 37, 41, 42, 43	27, 33	N=40	N=344  StF10% SoF25% SoO22% StO31% NO11%
		<b>5 percent</b>	<b>12.50 percent</b>	<b>10 percent</b>	<b>67.50 percent</b>	<b>5 percent</b>		
(e)	Television coverage of children and juvenile cases			32, 38	1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 39, 41, 42, 43		N=40	NA
				<b>5 percent</b>	<b>95 percent</b>			
(f)	Television coverage of family cases		38	32	1, 2, 3, 4, 6, 7, 8, 9, 10, 11,		N=41	NA



					12, 13, 15, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 39, 41, 42, 43			
			<b>2.44 percent</b>	<b>2.44 percent</b>	<b>95.12 percent</b>			
(h)	Television coverage of District Court cases	31, 38	17, 32, 33, 39	30	2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 19, 20, 21, 22, 23, 25, 26, 28, 34, 35, 36, 37, 41, 42, 43	1, 11, 18, 24, 27, 29	N= 41	NA
		<b>4.88 percent</b>	<b>9.76 percent</b>	<b>2.44 percent</b>	<b>68.29 percent</b>	<b>14.63 percent</b>		
(i)	Television coverage of Circuit Court cases	38	17, 32, 39	3, 18, 30	2, 4, 6, 7, 8, 9, 10, 12, 13, 15, 16, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 34, 35, 36, 37, 41, 42, 43	1, 11, 27, 33	N= 39	NA
		<b>2.64 percent</b>	<b>7.69 percent</b>	<b>7.69 percent</b>	<b>71.79 percent</b>	<b>10.26 percent</b>		
(j)	Television coverage of High Court	38	3, 11, 17, 32, 39	30	2, 4, 6, 7, 8, 9, 10, 12, 13,	1, 18, 24, 27, 29, 33	N= 39	NA

	cases				15, 16, 19, 20, 21, 22, 23, 25, 26, 28, 34, 35, 36, 37, 41, 42, 43			
		<b>2.56 percent</b>	<b>12.82 percent</b>	<b>2.56 percent</b>	<b>66.67 percent</b>	<b>15.38 percent</b>		
(k)	Television coverage of Supreme Court cases	3, 19, 38	11, 12, 17, 29, 32, 39	30	2, 4, 6, 7, 8, 9, 10, 13, 15, 16, 20, 21, 22, 23, 25, 26, 28, 35, 36, 37, 41, 42, 43	1, 18, 24, 27, 33, 34	N= 39	NA
		<b>7.69 percent</b>	<b>15.38 percent</b>	<b>2.56 percent</b>	<b>58.97 percent</b>	<b>15.38 percent</b>		
(l)	Television coverage of Special Criminal Court cases	38	11, 17, 32, 39	30	2, 3, 4, 6, 7, 8, 9, 10, 12, 13, 15, 16, 19, 20, 21, 22, 23, 25, 26, 28, 29, 34, 35, 36, 37, 41, 42, 43	1, 18, 24, 27, 33	N= 39	NA
		<b>2.56 percent</b>	<b>10.26 percent</b>	<b>2.56 percent</b>	<b>71.79 percent</b>	<b>12.82 percent</b>		
(m)	Television coverage of Court of Criminal Appeal cases	19, 38	11, 12, 17, 18, 29, 32, 39	30	2, 3, 4, 6, 7, 8, 9, 10, 13, 15, 16, 20, 21, 22, 23, 25, 26, 28, 34, 35, 36, 37, 41, 42, 43	1, 24, 27, 33	N= 39	NA



'I am not in favour of bringing cameras into Courts of trial. However, a Court of Appeal whether the Court of Criminal Appeal or the Supreme Court would not [really/only] [afford/affect] the attention of [the/this] [citizen] and therefore the element of education would be more relevant than the element of [primetime] but as there would be no [impact] for lay people in the sense of giving [] [] the integrity of the system of justice will operate would be upheld' (J19).

**Part 2**  
**Section A**

Please tick *YES* or *NO* where appropriate in this section

1 Did you view the *OJ Simpson* case on television?: Yes  No

Y: 1, 3, 6, 7, 9, 11, 12, 13, 14, 15, 16 ('in part'), 17, 20, 21, 23, 27, 29, 31, 35, 36, 37, 38, 39, 41, 42  
"Only TV news coverage of it" (J1).

N: 2, 8, 10, 18, 24, 25, 26, 28, 30, 32, 33, 34, 40, 43

'Save brief eclipses and (edited) reports. I avoided watching what I thought was improper' (J22).

Yes and No were ticked by J19. J19 also indicated that 'I watched bits and pieces as the opportunity arose' (J19).  
(Therefore, not included).

2010:	%	%
N=39		
	64.10	35.90
	(25)	(14)

1997:	%	%
N=26		
	65.38	36.61
	(17)	(9)

*(Answer the following Question ONLY if the answer to the above question was NO)*

If you did not, was this due to a deliberate choice?: Yes  No

Y: 8, 24, 26, 29, 30, 34, 43

N: 2, 10, 15, 18, 28, 33, 38, 40

N=15	%	%
	46.67	53.34
	(7)	(8)

1997

Y100%    N0%    N=8  
(8)

2 Have you seen any research on the courtroom broadcasting television audience?<sup>10</sup>: Yes  No

<sup>10</sup> The original question in 1996 referred to the 'Court TV audience' instead.

Y: 6, 14, 20

N: 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43

‘Only in passing’ (J22)

2010:	%	%
N=39		
	7.69	92.31
	(3)	(36)

1997:	%	%
N=24		
	4.17	95.83
	(1)	(23)

3 Have you seen any research on the effects of courtroom broadcasting?:

Yes

No

Y: 6, 14, 16

N: 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 15, 17, 18, 19, 20, 21, 23, 24, 24, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43

‘Only in passing’ (J22)(not counted)

2010:	%	%
N=39		7.69
	92.31	
	(3)	(36)

1997:	Not asked in 1997	
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4 In principle, are you in favour of permitting television cameras into Irish courts?:

Yes

No

Y: 3, 10, 14, 17, 27, 31, 32, 33, 38

N: 1, 2, 4, 6, 7, 8, 9, 10, 13, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 35, 36, 37, 39, 40, 41, 42, 43

2010:	%	%
N=40		22.50
	77.50	
	(9)	(31)

1997:	%	%
N=26		
	30.77	69.23
	(8)	(18)

If <b>YES</b> in Question 4 <u>go</u> to Question 6	If <b>NO</b> in Question 4 <u>go</u> to Question 5
[ie <u>ignore</u> Question 5]	[Then <u>ignore</u> Question 6, and proceed to Question 7]

[Answer Q 5 **OR** Q6 – NOT Both]

*NB: J1, J2, J6, J7, J9, J12, J13, J15, J16, J17, J20, J25, J26, J28, J35, J39, J40, J41, J43 answered 5 and 6. (Currently ignored answers of J1, J2, J6, J7, J9, J12, J13, J15, J16, J17, J20, J25, J26, J26, J35, J39, J40, J41, J43 Q5 and 6 replies).*

5 Courtroom television cameras would:

(a) Adversely affect courtroom actors:

Yes

No

Y: 8, 10, 21, 22, 23, 24, 36, 37, 42

N:

2010:	%	%
N=9		100
0		
	(9)	(0)

1997:	%	%
N=13		
	100	0
	(13)	(0)

*(please specify)*

(i) Witnesses:

Yes

No

Y: 4, 10, 21, 22, 23, 36, 37, 42

N: 19, 24

2010:	%	%
N=10	80	20
	(8)	(2)

1997:	%	%
N=17		
	94.12	5.88
	(16)	(1)

(ii) Lawyers: Yes  No

Y: 4, 8, 10, 21, 22, 23, 24 ('Some yes, others no' (J24)), 36, 42  
N: 19, 37

2010:	%	%
N=11	81.82	18.18
	(9)	(2)

1997:	%	%
N=16	87.50	12.50
	(14)	(2)

(iii) Judiciary: Yes  No

Y: 8, 10, 21, 22, 23, 36, 42  
N: 4, 37  
(‘Some yes, others no’ (J24))

2010:	%	%
N=9	77.78	22.22
	(7)	(2)

1997:	%	%
N=15	46.67	53.33
	(7)	(8)

(iv) Parties Yes  No

Y: 4, 10, 21, 22, 23, 36, 37, 42  
N: 19, 24

2010:	%	%
N=10	80	20
	(8)	(2)

1997:	Not asked in 1997	
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(v) Combination: Yes  No

Y: 10, 21, 22, 23, 24, 36, 37, 42  
N:

2010:	%	%
N=8	100	0
	(8)	



1997:	%	%
N=13		
	92.31	7.69
	(12)	(1)

(b) Downgrade the integrity of judicial proceedings:

Yes  No

Y: 4, 10, 19, 21, 22, 23, 24, 36, 37, 42

N:

2010:	%	%
N=10	100	0
	(10)	

1997:	%	%
N=15		
	93.33	6.67
	(14)	(1)

(c) Not prove in actuality to be educational:

Yes  No

Y: 4, 10, 19, 21, 22, 23, 24, 36, 37, 42

N:

2010:	%	%
N=10	100	0
	(10)	0

1997:	%	%
N=17		
	88.23	11.76
	(15)	(2)

(d) Increase pressure on the judiciary via the supervisory effort required:

Yes  No

Y: 10, 19, 21, 22, 23, 24, 36, 37, 42

N:

J4 left a '?' for this question (J4)

'There would be more pressure on the judiciary but that is not necessarily a bad thing' (J19)

2010:	%	%
N=9	100	0
	(10)	0

1997:	%	%
N=18		
	66.67	33.33

(12)	(6)
------	-----

(e) Increase pressure on court personnel via the supervisory effort required:

Yes  No

Y: 10, 19, 21, 22, 23, 24, 36, 37, 42

N:

J4 left a '?' for this question (J4)

2010:	%	%
N=9	100	0
	(9)	0

1997:	Not asked in 1997	
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(f) Merely satisfy curiosity:

Yes  No

Y: 4, 10, 19, 21, 22, 23, 24, 36, 37, 42

N:

2010:	%	%
N=10	100	0
	(10)	0

1997:	%	%
N=17	94.12	5.88
	(16)	(1)

(g) Prove to be a gross simplification of the procedure:

Yes  No

Y: 4, 10, 19, 21, 22, 23, 24, 37, 42

N: 36

'Partly' (J19)

2010:	%	%
N=10	90	10
	(9)	(1)

1997:	%	%
N=14	64.28	35.71
	(9)	(5)

6 Courtroom television cameras would:

(a) Help reinforce our belief in justice:

Yes  No

Y: 3, 14, 31, 32, 33, 38

N: 11, 27

2010:	%	%
N=8	75	25
	(6)	(2)

1997:	%	%
N=7		
	85.71	14.28
	(6)	(1)

(b) Prove to be educational for the public:

Yes  No

Y: 3, 11, 14, 27, 31, 32, 33, 38

N:

2010:	%	%
N=8	100	0
	(8)	0

1997:	100%	0%
N=7		7
0		

(c) Affirm moral, spiritual and cultural values:

Yes  No

Y: 33, 38

N: 11, 14, 27, 31, 32

J3 left a '?' for this question (J3)

2010:	%	%
N=7	28.57	71.43
	(2)	(5)

1997:	%	%
N=6		
	33.33	66.67
	(2)	(4)

(d) Strengthen social bonds and social control:

Yes  No

Y: 3, 31, 32, 33, 38

N: 11, 14, 27

2010:	%	%
N=8	62.50	37.50
	(5)	(3)

1997:	%	%
N=6		
	50	50
	(3)	(3)

(e) Aid the public in understanding sentencing decisions: Yes  No

Y: 11, 14, 27, 31, 32, 33, 38

N: 3

(‘Question 6(e) But it does not result in a greater number of members of the public understanding court proceedings, save for those cases which attract a high level of media interest’ (J21))(Nor counted).

2010:	%	%
N=8	87.50	12.50
	(7)	(1)

1997:	%	%
N=7	100	0
	(7)	(0)

(f) Have **no** detrimental effects: Yes  No

Y: 14

N: 11, 27, 32, 38

(J3 left a ‘?’ for this question (J3))(Not counted).

2010:	%	%
N=5	20	80
(1)		(4)

1997:	%	%
N=7	42.86	57.14
	(3)	(4)

7 Have your answer(s) to the above been influenced by courtroom television cameras in any other jurisdiction? Yes  No

Y: 1, 3, 6, 7, 11, 13, 14, 20, 21, 22, 23, 33, 36, 39, 41, 43

N: 2, 16, 18, 19, 24, 25, 26, 27, 28, 30, 31, 32, 35, 38, 40

2010:	%	%
N=31	51.61	48.39
	(16)	(15)

1997:	%	%
N=23	60.87	39.13

(14)	(9)
------	-----

If YES, please specify which: \_\_\_\_\_

- USA (J1, J6, J9, J13, J17, J21, J29, J37).
- US, Italy, Russia, and in the European Court of Human Rights ('webcasts' (J3)).
- USA and Scotland (J7).
- 'Louise (something or other)' [Woodward] (J11).
- 'Well, the OJ case did not help at all' (J12).
- 'TV cameras in the U.S. ensure that trial process is fair, just and considerate to the accused especially in out of state regions' (J14).
- 'OJ trial amongst others' (J20).
- 'Various (but not many, or often or for any prolonged period). My opinion to any TV coverage (as opposed to reporting without images) is bases on principle, logic and experience' (J22).
- 'OJ Simpson. Kennedy rape trial' (J23).
- UK (J33).
- 'OJ Simpson – which I found compelling – as entertainment. Louise ? (Boston), Kennedy (Florida)' (J36).
- 'Scotland and US' (J41).
- US, China, Russia (J43).

**Section B**

**Please tick AGREE or DISAGREE with the following:**

1 If cameras are to be permitted, there should be a stipulation preventing the broadcasters from providing only brief snippets of the proceedings: Agree  Disagree

Y: 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 28, 30, 31, **32**, 36, 37, 38, 39, 40, **22**, 41, 42  
 ('Only answered if TV is forced upon this unwilling judge!' (J22))

N: 13, 14, 24, 26, 27, 29

2010:	%	%
N=39	84.61	15.38
	(33)	(6)

1997:	%	%
N=25	76	24
	(19)	(6)

2 Courtroom television cameras hold the potential for increased contempt of court: Agree  Disagree

Y: 1, 2, 6, 7, 8, 10, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 36, 38, 39, 40, 41, 42  
 N: 3, 9, 11, 12, 14, 26, 37

(J4 left a '?' for this question (J4))(Not counted)

2010:	%	%
N=38	81.58	18.42

	(31)	(7)
--	------	-----

1997:	%	%
N=26		
	57.69	42.31
	(15)	(11)

3 Courtroom television cameras should only be permitted if **no** courtroom actor (judge, juror, witness, lawyer, party) objects in any given instance: Agree  Disagree

Y: 1, 2, 6, 7, 8, 9, 10, 13, 15, 16, 17, 18, 20, **22**, 24, 25, 33, 37, 39, 40, 42  
 ('Question not (suff.) specific' (J22))(Not counted)

N: 3, 11, 12, 14, **19**, 21, 23, 27, 28, 29, 30, 31, 32, 36

'Judges also should have the **trial say based** on sound principles' (J19) [??]

2010:	%	%
N=35	60	40
	(21)	(14)

1997:	%	%
N=25		
	48	52
	(12)	(13)

4 One of the effects of courtroom television cameras will be that of establishing the parameters of debate about the criminal justice system: Agree  Disagree

Y: 6, 10, 14, 17, 18, 21, 26, 28, 29, 31, 32, 33, 38, 39  
 N: 1, 2, 4, 7, 8, 9, 11, 12, 13, 15, 16, 20, 22, 23, 24, 25, 27, 30, 36, 37, 40, 42

(J3 left a '?' for this question (J3))(Not counted).

2010:	%	%
N=36	38.89	61.11
	(14)	(22)

1997:	%	%
N=23		
	43.48	56.52
	(10)	(13)

5 Courtroom television cameras have the potential for increased moral panic: Agree  Disagree

Y: 2, 10, 12, 15, 20, 21, 22, 23, 24, 30, 39, 40, 41, 42  
 N: 1, 3, 6, 8, 9, 11, 13, 14, **16**, 17, 18, 25, 26, 27, 28, 29, 31, 32, 33, 36, 37, 38

(J7 left a '?' for this question (J7))(Not counted).

('Panic??' (J16)

2010:	%	%
N=36	38.89	61.11
	(14)	(22)

1997:	%	%
N=23		
	69.56	30.43
	(16)	(7)

6 The news media manipulate news so as to make it appear more entertaining and attractive:

Agree  Disagree

Y: 1 ('Some media only' (J1)), 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 20, 22 (emphasised with two ticks by J22), 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 37, 38, 39, 40, 41, 42

N: 14, 21

('Some do, some don't' (J36))(Not counted).

2010:	%	%
N=37	94.59	5.40
	(35)	(2)

1997:	%	%
N=26		
	100	0
	(26)	(0)

7 The increased flow of information often has the negative effect of increasing knowledge within certain groups far more than others:

Agree  Disagree

Y: 7, 8, 9, 12, 17, 18, 20, 21, 24, 25, 26, 27, 28, 30, 31, 33, 36, 40, 42

N: 1, 2, 3, 6, 10, 11, 13, 14, 15, 23, 29, 32, 37, 38, 39

('Don't know' (J16))(Not counted).

2010:	%	%
N=34	55.88	44.12
	(19)	(15)

1997:	%	%
N=20		
	75	25
	(15)	(5)

8 The existence of more media has resulted in less

diversity not more:

Agree  Disagree

Y: 1, 4, 7, 9, 14, 15, 17, 18, 20, 21, 23, 24, 26, 27, 30, 31, 33, 37, 40, 42

N: 2, 3, 8, 10, 11, 13, 25, 28, 29, 32, 36, 38, 39

(J12 left a '?' for this question (J12))(Not counted).

('Don't know' (J16))(Not counted)

2010:	%	%
N=33	60.61	39.39
	(20)	(13)

1997:	%	%
N=21	57.14	42.86
	(12)	(9)

9 'Meaning' depends on the influence of programming environment, that is, comparisons with other programmes available at approximate times on other channels:

Agree  Disagree

Y: 1, 3, 10, 13, 14, 17, 18, 21, 24, 25, 26, 27, 28, 30, 31, 33, 38, 39, 40, 42

N: 8, 15, 23, 32

('Question is incomprehensible' (J2)

J7 left a '?' for this question (J7)

J9 left a '?' for this question (J9)

J11 left a '?' for this question (J11)

J12 left a '?' for this question (J12)

'Don't know' (J16)

'Don't understand' (J36)

J37 left a '?' for this question (J37)(Not counted).

2010:	%	%
N=24	83.33	16.67
	(20)	(4)

1997:	%	%
N=18	66.67	33.33
	(12)	(6)

10 Expert psychological testimony is relevant with regard to eyewitness capability and credibility:

Agree  Disagree

Y: 1, 3, 7, 14, 18, 23, 24, 27, 28, 33, 39, 41

N: 2, 6, 8, 9, 10, 11, 12, 15, 16, 17, 20, 21, 25, 26, 30, 31, 32, 33, 37, 38, 40, 42

('In reality experts in all fields nowadays make a living from a point of view: most obvious example – This woman will have back pain for life – she has fully recovered' (J12))



(‘1. See Psychology, 4th edn, [Duronetsky], publ by West, 1991 at page 145 and 146.

2. See Intro to Social Psychology, 2nd Edn., Lippe, publ by Brooks/Cole, 1994 at page 733 ff.’(J14)).

2010:	%	%
N=34	35.29	64.70
	(12)	(22)

1997:	%	%
N=22	50	50
	(11)	(11)

11 Expert psychological testimony *can be* relevant with regard to eyewitness capability and credibility: Agree  Disagree

Y: 1, 3, 7, 8, 9, 13, 14, 16, 18, 20, 21, 23, 24, 26, 27, 28, 30, 31, 32, 33, 37, 39, 40, 41

N: 2, 6, 10, 11, 12, 15, 17, 25, 33, 38, 42

2010:	%	%
N=35	68.57	31.43
	(24)	(11)

1997:	Not asked in 1997	
-------	-------------------	--

13 Witness assertions of confidence are probably the least important factors for diagnosing the accuracy of eyewitness identifications: Agree  Disagree

Y: 1, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 23, 24, 26, 27, 28, 30, 31, 32, 33, 37, 39, 41

N: 2, 17, 20, 21, 25, 29, 33, 38, 40, 42

(J3 left a ‘?’ for this question (J3))(Not counted).

(‘No comment. Far too loose’ (J19))(Not counted).

2010:	%	%
N=34	70.59	29.41
	(24)	(10)

1997:	%	%
N=24	58.33	41.67
	(14)	(10)

(J22 indicated a ‘?’ for questions 7 – 13)(Not counted).

(‘If there was a “strongly disagree” box I would tick it’ re questions 10 – 13 (J36))(Not counted).

**Section C**

Please tick **STRONGLY AGREE** or **AGREE** or **DISAGREE** or **STRONGLY DISAGREE** in this section:

		<b>Strongly Agree</b>	<b>Agree</b>	<b>Disagree</b>	<b>Strongly Disagree</b>	<b>N (IE 2010)</b>	<b>N (IE 1997)</b>
1	At present there is not an increase in the incidence of crime but an increase in the more horrific and violent crimes:	1, 7, 8, 10, 12, 21, 25, 38, 40	3, 11, 15, 16, 20, 24, 26, 30, 31, 32, 33, 37, 42	2, 4, 9, 13, 14, 17, 23, 27, 29, 36, 39, 41	18, 28	N=36	N=26 SA 15.38% (4) A 50% (13) D 15.38% (4) SA 19.23% (5)
		<b>25%</b>	<b>36.11%</b>	<b>33.33%</b>	<b>5.55%</b>		
2	Credibility of presenters in the eyes of viewers are important qualities in persuasion:	8, 10, 12, 18, 21, 40, 42	1, 2, 3, 4, 6, 7, 9, 11, 13, 14, 15, 16, 17, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 36, 37, 38, 39, 41			N=39	N=26 SA 30.77% (8) A 69.23% (18) D (0) SA (0)
		<b>17.95%</b>	<b>82.05%</b>				
3	The continuous flow in TV communication reduces time for reflective thought:	1, 7, 10, 20, 21, 27, 40, 42	2, 3, 4, 8, 9, 11, 12, 13, 16, 17, 18, 19, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 36, 37, 39, 41	6, 14, 38		N=38	N=26 SA 30.77% (8) A 65.38% 17 D 42.31 (11)

		<b>21.05%</b>	<b>71.05%</b>	<b>7.89%</b>			SA (0)
4	Television commentary raises expectations even when nothing is happening:	1, 7, 8, 10, 20, 21, 22, 27, 36, 40, 42	3, 4, 6, 9, 11, 12, 15, 16, 17, 18, 19, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 37, 38, 39, 41	2, 13, 14		N=39	N=25  SA 24% (6)  A 72% (18)  D 4% (1)  SA (0)
		<b>28.20%</b>	<b>64.10%</b>	<b>7.69%</b>			
5	Fighting for audience share puts greater emphasis on entertainment values as opposed to hard news content:	1, 4, 6, 7, 8, 9, 10, 11, 13, 16, 17, 18, 19, 20, 21, 22, 23, 27, 31, 36, 39, 40, 41, 42  (J22 indicated two ticks)	2, 3, 12, 14, 15, 24, 25, 26, 28, 29, 30, 32, 33, 37	38		N=39	N=26  SA 50% (13)  A 46.15% (12)  D 3.85% (1)  SA (0)
		<b>61.54%</b>	<b>35.90%</b>	<b>2.56%</b>			
6	The media in America have too much freedom:	7, 8, 11, 18, 20, 21, 25, 28, 39, 40, 42	14, 22, 23, 24, 33, 41	1, 2, 3, 9, 10, 15, 16, 17, 26, 27, 32, 37	38	N=30	N=22  SA 31.82% (7)  A 50% (11)  D 18.18% (4)

		<b>36.67%</b>	<b>20%</b>	<b>36.67%</b>	<b>3.33%</b>		SA (0)
7	The media in Ireland have too much freedom:	7, 8, 11, 20, 31, 39, 42	18, 21, 23, 27, 28, 33, 41	1, 2, 3, 9, 10, 13, 14, 15, 16, 17, 19, 24, 25, 26, 29, 32, 36, 37, 40	38	N=34	N=26  SA 11.54% (3)  A 26.92% (7)  D 57.69% (15)  SA 3.85% (1)
		<b>20.59%</b>	<b>20.59%</b>	<b>55.88%</b>	<b>2.63%</b>		
8	The media in Britain have too much freedom:	7, 11, 20, 21, 27, 28, 39,42	8, 18, 23, 33, 41	1, 2, 3, 9, 10, 14, 15, 16, 17, 24, 25, 26, 32, 36, 37, 40	38	N=30	N=24  SA 12.5% (3)  A 62.5% (15)  D 25% (6)  SA (0)
		<b>26.67%</b>	<b>16.67%</b>	<b>53.33%</b>	<b>3.33%</b>		
9	TV viewing is mainly undertaken during periods of leisure spent at home:	1, 7, 8, 12, 20, 21, 22, 26, 36, 38, 40, 42	2, 3, 4, 9, 10, 11, 13, 14, 15, 16, 17, 18, 23, 24, 26, 28, 29, 31, 32, 33, 37, 39, 41	27		N=36	N=26  SA 19.23% (5)  A 80.77% (21)  D (0)  SA

		33.33%	63.89%	2.78%			(0)
10	Reading requires the type of attention which television does not always demand:	1, 3, 6, 7, 8, 10, 12, 13, 14, 19, 20, 21, 22, 27, 30, 31, 36, 37, 38, 41, 42	2, 9, 11, 15, 16, 17, 18, 19, 23, 24, 25, 26, 28, 29, 32, 33, 39, 40			N=39	N=26 SA 50% (13) A 46.15% (12) D 3.85 (1) SA (0)
		53.85%	46.15%				
11	Confidence of a lawyer in not being affected by cameras in the courtroom is not the most accurate indicator of his/her not been so affected:	1, 7, 16, 21, 22, 36, 42	2, 3, 11, 13, 15, 17, 19, 20, 23, 24, 25, 27, 28, 32, 33, 37, 38, 39, 41	8, 9, 10, 12, 14, 26, 40	18	N=34	N=21 SA 14.28% (3) A 71.42% (15) D 14.28% (3) SA (0)
		20.59%	55.88%	20.59%	2.94%		

(J12 has 'no view' on questions 6, 7 and 8 (J12).

J22 indicated a '?' for questions 1, 7 and 8 and that these questions were 'not (suff.) specific – on appropriate answer box provided.'

'Don't know' re question 6 (J36).

'Don't know' re question 6 (J19).

'Don't know' re question 8 (J19).

'1. There is an increase in both incidents of crime and the degree of violent [crimes]' (J19)).

#### **Section D**

*This section relates more to eyewitness capabilities than courtroom television cameras. However, I feel that research into eyewitness identification can prove useful for future research into the effects of courtroom television cameras.*

**Tick what you believe to be the correct answer [(a), (b), (c) or (d)] from each of the following:**

1 Two women are walking to school one morning, one of them is Asian and the other is white. Suddenly two men, one black and one white, jump into their path and attempt to grab their purses. Later the women are shown photographs of known purse snatchers in the area. What statement describes your view of the womens' ability to identify the purse snatchers?

(a) Both the Asian and the white woman would find the white man harder to identify than the black man:

28, 38

2010:	%	N=19
	10.53	

1997:	%	N=12
	33.33%	
(4)		

(b) **The white woman will find the black man more difficult to identify than the white man:**

1, 8, 9, 13, 15, 17, 18, 20, 23, 32, 33, 40, 42

2010:	%	N=19
	<b>68.42</b>	
	(13)	

1997:	%	N=12
	<b>41.67</b>	
(5)		

(c) The Asian woman will have an easier time than the white woman making an accurate identification of both men:

16, 21, 28

2010:	%	N=19
	15.79	

1997:	%	N=12
	16.67	
(1)		

(d) The white woman will find the black man easier to identify than the white man:

31

2010:	%	N=19
	5.26	

1997:	%	N=12
	91.67	

(1)

'I cannot answer this question – as I entirely disagree' (J10)

'None of the above – All depends on lighting, opportunity for observation, how they are dressed, eyesight, direction in which assailants ran, etc.' (J11)

J12 indicated as follows for answer 1(a), 1(b), 1(c) and 1(d), namely, 'No it depends. A person may know many people from different groups' (J12)

J14 indicated 'Not is black man had one arm' to question 1(a) and 'ditto' to question 1(b). J 14 also indicated 'Not agree with any statement' to questions 1(a) – 1(d) (J14)

'Depends on the women' (J24)

'Don't know' (J26)

'I don't have a clue' (J27)

'Don't agree with any' (J37)

J39 ticked (a) and (c). These replies are discounted.

2 Two people have witnessed a bank robbery. For some reason one of them felt extremely afraid while the other was not afraid. They both viewed the same robbery for the same amount of time. Which statement below best describes your view of these people's ability to later recognise the robber?

(a) The extremely afraid person will recognise the robber more easily:

15

2010:	%	N=23
	6.67	

1997:	%	N=17
(0)		

(b) **The unafraid person will recognise the robber more easily:**

1, 13, 17, 18, 26, 29, 31, 33, 41, 42

(J12 indicated as follows, namely, 'Not necessarily' (J12)

J39 ticked (b) and (d). Not counted.)

2010:	%	N=23
	<b>43.48</b>	

1997:	%	N=17
(10)	<b>43.48</b>	

(c) The afraid person will recognise the robber more easily but the unafraid person will remember more of the events of the robbery:

20, 21, 38

(J12 indicated as follows, namely, 'It depends' (J12). Not counted.)

2010:	%	N=23
	13.04	

1997:	%	N=17
	5.88	
(1)		

(d) They will have the same amount of difficulty recognising the robber:

8, 9, 10, 14, 16, 23, 27, 32, 40

'Whether they are prepared to testify honestly is the question?' (J27).

2010:	%	N=23
	39.13	

1997:	%	N=17
	26.09	
(6)		

'None of these. Fear has nothing to do with ability to recognise – it may, however, influence the witnesses willingness to admit to recognition' (J11).

- i) Was it summer or winter
- ii) Morning or afternoon
- iii) Height, size, build, clothing – similar or different
- iv) Actual "point of view of each"
- v) Distance from locus; eye-glasses???' (J14).

'Depends on the people' (J24).

'Don't agree with any' (J37).

3 Two women were robbed. One was at gun point, the other was by an unarmed assailant. Each crime was of similar duration. Which of the statements below best describes your view on their ability to identify the assailant?

(a) Both women have the same ability to recognise the person who robbed her:

1, 10, 11, 13, 14, 16, 17, 23, 27, 32, 38, 39, 40, 41

2010:	%	N=25
	56	

1997:	%	N=17
	44	
(11)		

(b) The woman who was robbed at gunpoint will find it easier to recognise her robber:



9, 15

2010:	%	N=25
	8%	

1999:	%	N=17
	8	
(2)		

(c) **The woman who was the victim of the unarmed assailant will find it easier to identify the assailant:**

8, 20, 29, 31, 33, 42

2010:	%	N=25
	<b>24</b>	

1997:	%	N=17
	<b>16</b>	
(4)		

(d) The woman who was robbed at gunpoint will find it easier to identify her robber, but the other woman will remember more of the details of the crime:

18, 21, 28

2010:	%	N=25
	12%	

1997:	%	N=17
	5.88	
(1)		

J12 indicated in relation to question 3 as follows, namely, 'It depends on the person' (J12)

'Depends on the women' (J24).

'Don't know' (J26).

'N/A' (J37).

4 A house was burgled, and the owner gets a brief glimpse of the burglar through the window. At a later lineup the owner attempts to make an identification. Assume there is a 10 percent chance that the owner will be mistaken. Now in addition to the above facts, assume that the owner was first shown photographs by the police, but did not recognise anyone in the photographs. Assume further that the person that the owner later picks out in the lineup was shown in the earlier photographs. The chance of an incorrect identification would then:

(a) Remain about 10 percent:

8, 10, 14, 20, 33, 40, 41

2010:	%	N=26
	26.92	

1997:	%	N=16
	25%	
(4)		

(b) Decrease below 10 percent:

21, 31

2010:	%	N=26
	7.69	

1997:	%	N=16
	12.50%	
(2)		

(c) Increase above 10 percent:

1, 9, 12, 13, 15, 16, 17, 18, 23, 26, 27, 28, 29, 32, 38, 42

2010:	%	N=26
	<b>61.54</b>	

1997:	%	N=16
	<b>56.25</b>	
(9)		

(d) Decrease below 10 percent for women and increase 10 percent for men:

39

2010:	%	N=26
	3.85	

1997:	%	N=16
	6.25	
(1)		

*Thank you very much taking the time to complete this survey.*

'Response declined' for questions 1 – 4 above (J2).

'None of the above – it depends on whether the owner was sufficiently observant in the course of the brief glimpse that he got. The photograph was taken on another occasion, maybe of a different profile, in different lighting, etc. The significance of the failure to recognise the burglar's photograph is that defence counsel could use this to suggest to the tribunal of fact, be it judge or a jury, that the witness testimony was unreliable. The tribunal might or might not agree with that submission which would have to be considered in the light of all the known circumstances. However, factually it would have no impact on the correctness of the identification. Its only impact would be on the evidence of that identification and whether that evidence could be safely relied upon.' (J11) (emphasis in original).

'Upstairs or downstairs [?]' (re question 4)(J14).

'Because person picked out still may not be burglar!! Merely and "image" already seen' (J14).

'I cannot usefully complete this section' (J22).

'Depends on the witness' (J24).

'Not relevant to survey' (J25).

'Given my lack of experience of trials, replies should be seen in that context' (J32).

'I have no practical experience to bring to questions 1 to 4' (J36).

'N/A' (J37).

'Not on your topic' re 1 – 4 (J19).

'I was in the US for some of the OJ Simpson case and couldn't avoid seeing extracts from the Court hearing on the TV in the evenings. I found the whole coverage shocking – especially the media press conferences given by participating lawyers during the course of the trial.

I am convinced from my experience as a Barrister and Judge that TV cameras in the courtroom would have a detrimental effect. Some lawyers would play to the gallery. Since witnesses would be very reluctant to give evidence and would find the experience very challenging. Others would relish the role and would be prone to exaggeration or flamboyance. One only has to look at television coverage of the Dail to see how people play to the gallery (cameras). It cannot be said that the quality of debate has improved!' (J13).

'I have serious reservations about the [ ] of this final two pages, or the efficacy of any answers you might obtain. [...]

The fact of judicial independence is not [often] (or sufficiently) adverted to individual High Court Judges could [ ] [ ] [ ] [cameras] [not count] and may be prevented by rulings of the Supreme Court or Statute.

To summarise my views. As a HC Judge (of 36) I moved only allow cameras into my Court if forced to do so by statute or a ruling of the S.C and [ ] resist to the point of resignation!' (J22) (original emphasis).

'I am strongly against television cameras in any courtroom' (J35).

'I believe that live television coverage of trials would endanger, rather than promote, the just fair and effective administration of justice. Over a decade ago I participated in a discussion at a forum of international judges on the topic. The participants were members of the superior courts in common law and civil law jurisdictions worldwide. To a man (and woman) they were opposed to TV cameras in the courtroom, on the basis of experience' (J36).

'In a nutshell, I would be opposed to TV cameras in this courtroom for a number of reasons, primarily the damaging effect it would undoubtedly have on the core purpose of judicial proceedings' (J37).

#### **Additional Comments**

*Please add any additional comments you may have below:*

'You may be aware that the ECHR broadcasts its hearings on the internet on the afternoon of the day of the hearing.

I was chair of the IT committee of the court which worked for most of my eight years there to introduce this innovation. It is very successful and subject to some relatively modest restrictions. There was initial almost unanimous opposition among the ECHR judges. This eventually was overcome.

The webcasting project is funded by the Irish government through Ireland Aid. ...' (J3).

'1. The last section re eyewitness capabilities is outside the remit of survey as described.

2. Some of propositions put do not make much sense and also calls for knowledge outside the survey eg Questions 7 – 9 page 10' (J6).

'I do not feel qualified to respond to pages 13 and 13. All answers must be read in the context of my implacable opposition to the televising of court proceedings' (J7).

'1. In terms of television coverage inadequate regard in questions to jurors and witness – all are pressurised in court process and jurors value anonymity (and are entitled to it). Failure also to have regard to increased risks of intimidation, due to wider circulation of identity. Also possibility to obtain skills, etc. These factors fundamental objections, especially in criminal trials.

2 In civil cases many people with legitimate claims (eg in personal injury actions) would be inhibited by fear of increased publicity from pursuing them in court – since, as a reality, publicity would, be much wider if television

and newspapers. These factors far more serious than ever present risk of a “circus.” There are a few depths which the media will not plumb’ (J42).

Note: Percentages above are calculated by adjusting the second digit after the decimal upwards where the third digit after the decimal is above five (5).

**Appendix 7**

**Sample Stills from Irish Eye-Tracking In-Court  
Distraction-Effects Proof-of-Concept Demonstration**



**Judge**





















**Lawyer (Standing)**











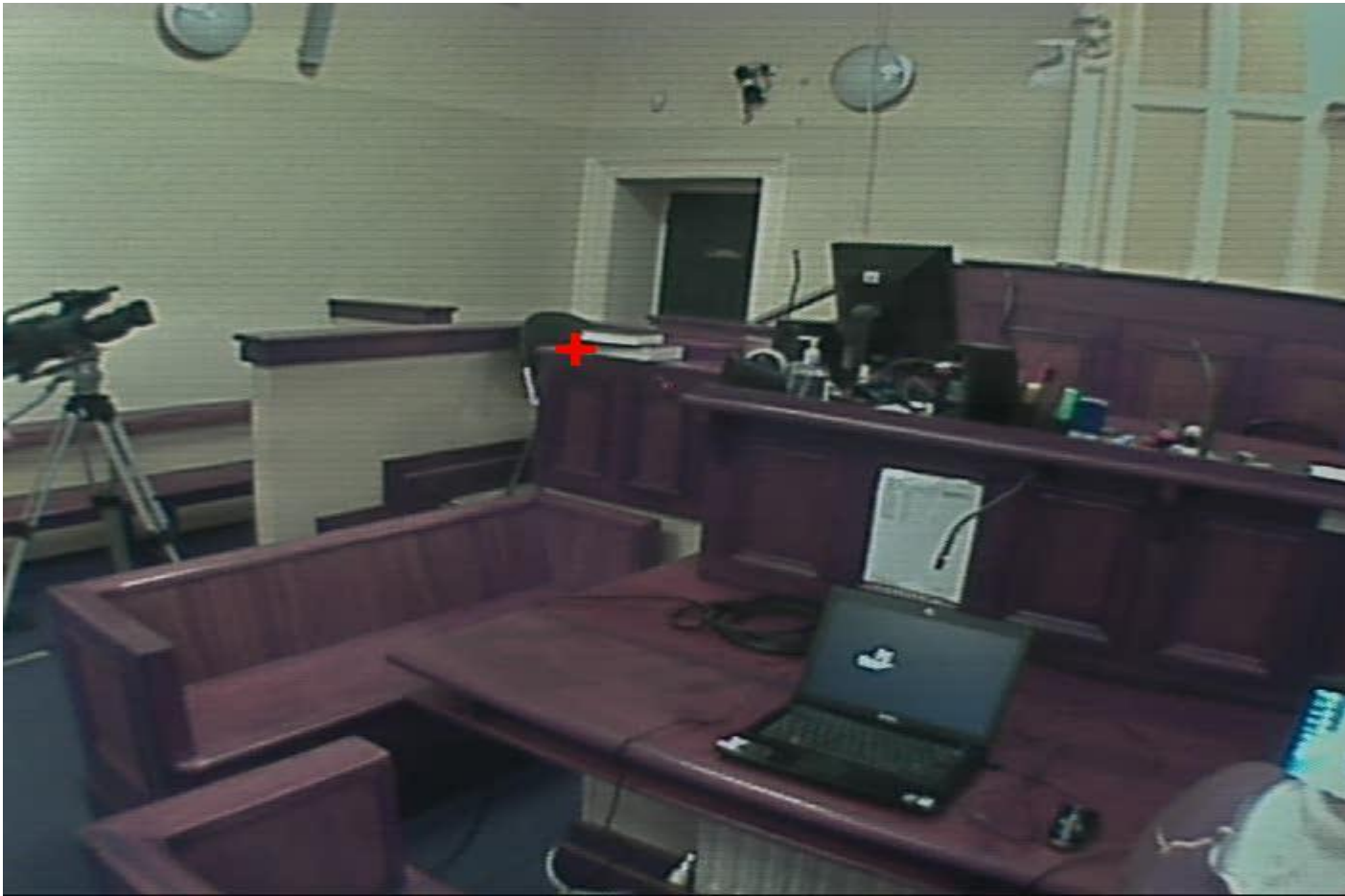
















**Appendix 8**  
**Analysing Television News**

News as a generic form	Visual elements	Studio anchor and décor; graphics and design; actuality footage.
	Verbal/sound elements	Institutional voices (reporters, commentators, anchors); accessed voices ('real' people); effects (music, dubbed sounds).
	Narration	The 'plot' of stories; characters ('we' and 'they' personifications, heroes, villains, victims); action and dialogue within and between stories; sequence as a dramatisation of 'our democracy today.'
	Differentiation	How news is both like and unlike surrounding genres (advertising, talk shows, drama) and media (newspapers, radio, internet).
News as a dramatisation of democracy	Our representatives	Talking heads (decision-making), visualised by location (reporters hanging around in doorways); celebrities (actions and comments), based on bodily recognition.
	Vox pop	'Ordinary' (ie anonymous) people's views – the grab and the sound bite as the chorus of politics.
	National identity	Myths of who 'we' are; policing the boundary of the social ('we' have a government, 'they' have a regime, 'we' love children, 'they' are paedophiles; 'we' are free, 'they' are illegal immigrants).
News as a regime of truth	Impartiality versus bias	How can you tell one from the other?
	Conflict	Truth as a product of "both" sides of a story; truth as violence.
	Eyewitness ideology	News stories are often based on reports, statistics, media releases. But trustworthy reporting is associated with being there in the thick of the action. In practice, the information comes from a 'handout,' while the reporter stands in front of something visually relevant.
	Fact versus fiction	News has eye contact but not music; drama has music but not eye contact.
Who wants to know?		What are you looking for that you do

		not already know? The research question will shape your findings, and your methods will determine your results.
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Extract adapted from Glen Creeber<sup>1</sup>

#### Analysing TCB News

TCB News as a generic form	Visual elements	Studio anchor and décor; graphics and design; actual footage.
	Verbal/sound elements	Institutional voices (reporters, commentators, anchors); accessed voices ('real' people including legal experts); effects (music, dubbed sounds).
	Narration	The 'plot' of stories; characters ('we' and 'they' personifications, heroes, villains, victims); action and dialogue within and between stories; sequence as a dramatisation.
	Differentiation	How news is both like and unlike surrounding genres (advertising, talk shows, drama) and media (newspapers, radio, internet).
TCB News as dramatisation	Our representatives	Talking heads (decision-making), visualised by location (reporters outside); celebrities (actions and comments), recognition.
TCB News and truth	Impartiality versus bias	How can you tell one from the other?
	Conflict	Truth, both sides of a story; violence.
	Eyewitness ideology	News stories are often based on reports, statistics, media releases. Reporting from the thick of the action. Reporter standing in front of something visually relevant.
	Fact versus fiction	News has eye contact but not music; drama has music but not eye contact.
Audience/Effects		What are you looking for that you do not already know? The research question will shape your findings, and your methods will determine your results.

This is from Glen Creeber<sup>2</sup>

<sup>1</sup> See G Creeber, *ibid* 110, originally adapted from Hartley, *Uses of Television* (Routledge 1999) 229-231.

<sup>2</sup> *ibid*.

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