

Television Courtroom Broadcasting and Eye Tracking: An Irish Solution to the U.S. Supreme Court Research Challenge?

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Television courtroom broadcasting is an important and topical issue. Debate frequently centers on the possible effects, positive and negative. This layer of television courtroom broadcasting analysis has also troubled the U.S. Supreme Court in three camera cases, where it called for more empirical research. One of these areas of research relates to distraction effects (*i.e.* are courtroom participants distracted by cameras in the courtroom?). Research undertaken in Ireland in a successful demonstration of eye tracking technology in an Irish courtroom paves the way for answering one of the specific research challenges set by the U.S. Supreme Court. This is the challenge of whether or not the participants in the courtroom are distracted by the television cameras in the courtroom. These issues are discussed in this article.

I - Introduction

Discussion in relation to television courtroom broadcasting is always evocative of the O.J. Simpson and more recent celebrity cases, the trial of Michael Jackson's doctor being the latest. This article will focus on something more specific than the headline arguments for and against television courtroom broadcasting. Essential to the arguments on either side is the issue of effects, whether effects of the physical camera equipment in court, the psychological effects of being filmed and also the effects of the television courtroom broadcast footage. Proponents and opponents each argue that there are, or are not effects, caused by television courtroom broadcasting.¹ Occasionally, they go even further and specify speculated effects, be they positive or negative.² However, a more sophisticated layer of consideration relates to asking whether we know what the effects are, or how we might go about researching the effects. The effects issue and the related research challenges are what the author is most interested in researching.

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¹ For example, proponents argue that television courtroom broadcasting will be educational and informative. Opponents argue that there are distraction effects. As examples of references to arguments, see for example, N. Rose, "Cameras-shy Prosecutor Hits Out" (2002) 8 (2), Law Society Gazette (accessed online: date published 22 August, 2002); J.B. Weinstein and D.L. Zimmermann, "Let the People Observe Their Courts" (1977) 61 *Judicature* 156.

² Educational effects, for example, would be positive. Distraction effects would be negative. Even these arguments are generally referred to in the literature by way of opinion arguments, and generally overall opinion pieces, and not in dedicated articles on one single argument or in empirical research of any single particular effect. It is difficult, for example, to find articles solely dedicated to, for example, the educational effects of television courtroom broadcasting, and also to research of the educational effects.

One of the specific concerns of both the U.S. Supreme Court and commentators is that introducing a television camera into a courtroom may distract some or all of the courtroom participants, sometimes referred to in the literature as courtroom actors.³ This is known as the “distraction effects” or “adverse distraction effects” argument. The objective of this article is to examine how Irish research may provide a basis for a solution to the distraction effects concern raised by the U.S. Supreme Court. This issue is important for a number of reasons. It is possible that a jury decision or a witness’s testimony may change or be inhibited if the jury or a witness are distracted by a television camera arriving, being set up, using conspicuous red lights and lighting, or simply being in the courtroom focusing upon them. Another potential distraction may be the operator of the television camera. If television cameras are to be used in a courtroom setting, definitive answers to these questions are necessary.

As part of the author’s research, a successful initial demonstration experiment was undertaken in an Irish court to prove that eye tracking technology can be used to track and record where participants in a courtroom actually look. The technology allows us to definitively verify whether courtroom actors do or do not look at a television camera, where they look in the courtroom, how frequently, and for how long. Equipped with this information we can determine if distraction and adverse distraction occurs, and if so, in what circumstances. This will ultimately impact on the legal and policy debate. For example, if distraction is deemed to be adverse, and occurs for witnesses, this could lean heavily against permitting any television courtroom broadcasting *per se*, or alternatively only in courts where witnesses are involved. This is an example of how proper research allows for a comprehensive discussion of the real impact of television courtroom broadcasting. Certain research results may lean towards permitting certain forms of television courtroom broadcasting and not others.

This article provides an analysis of what the basis for all policy and legal discussion of television courtroom broadcasting should be, namely the necessity of proper effects research. All arguments, whether for and against, rely on mooted effects. The importance of effects research is acknowledged by the U.S. Supreme Court and will be considered in Part II. Unfortunately, the effects research, and more importantly the lack of sustained research, is all too often ignored. The author highlights in Part III how one aspect of the

³ Indeed, courtroom broadcasting is not the only research to investigate those who participate in the courtroom legal process. For the purposes of this article courtroom actors means the courtroom participants.

debate (*i.e.* distraction effects) can be researched through the use of eye trackers. This initial research has already been undertaken in Ireland and indicates one of the ways to answer the U.S. Supreme Court research challenge.

II - The Supreme Court Challenge

Despite the importance of effect issues, it is surprising that the U.S. Supreme Court has only referred to television camera issues on three occasions. The two seminal American decisions are *Estes v. Texas*⁴ and *Chandler v. Florida*.⁵ The most recent case is *Hollingsworth v. Perry*.⁶ Indeed, the only common theme of these cases is that the Supreme Court is aware that there are substantial research gaps. The U.S. Supreme Court therefore set a research challenge for more empirical research to be undertaken into the effects concern. Unfortunately, despite such a challenge being set as far back as 1965, there have been relatively few attempts to address the research gaps empirically. (See effect issues referred to by the U.S. Supreme Court in Appendix 2). The first televised court case was even earlier in 1953.⁷ However since then, there appears to be just over twenty scientific, methodical and empirical studies of television courtroom broadcasting effects issues. These are welcome, but obviously insufficient. (See empirical research listed in Appendix 1).

⁴ *Estes v. Texas* 381 U.S. 532 (1965) at 541 [hereinafter *Estes*]. See also *Tumey v. Ohio*, 273 U.S. 510 (1927) [hereinafter *Tumey*]; *In re Murchison*, 349 U.S. 133 (1955); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Turner v. Louisiana*, 379 U.S. 466 (1965). Chief Justice Warren in *Estes* at 562 and at 550, referring to the *Tumey* case 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.” Obviously certain equipment (*e.g.* types and size of camera, lighting, cables) have changed over time. However, the effects research challenge still remains. This was indicated first in *Estes* and reiterated in the *Hollingsworth* in 2010. See *Estes, ibid* at 541, 542, 599, 592, 552, 565, 569, where reference is made to Keating, “Not ‘Bananas,’ Not ‘Peyton Place,’ but the U.S. Senate,” *New York Times Magazine*, (25 April 1965) 67 at 72 [original citation reference as referred to in *Estes*]. Keating commented in relation to a stockholders meeting that “[s]ome stockholders seemed very much aware that they were on camera.” *Estes, ibid.* at note 24, at 569. *Ibid.* at 569-570, footnote 24, at 569, refers to R. Tinkham, “Should Canon 35 be Amended? A Question of Proper Judicial Administration” (1956) 42 A.B.A. Journal 843 at 84, who refers to examples of how people react when they know they are on television. *Estes* also refers to Gould, *New York Times* (11 March 1956), S2, at X 11, col. 2 [original citation reference, *Estes*], 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.” *Ibid.* at 569, 603-604, 611-612, 616, 587, 588, 589, 604, 615.

⁵ *Chandler v. Florida*, U.S. 560 (1981) [hereinafter *Chandler*].

⁶ *Hollingsworth v. Perry*, 558 U.S. (2010), available at <<http://www.supremecourt.gov/opinions/09pdf/09A648.pdf>> (date accessed: 22 August 2011) [hereinafter *Hollingsworth*].

⁷ 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 Trial Debate* (New York: Ablex, 1987) at 10-11.

Chandler referred to research and empirical evidence research.⁸ *Hollingsworth* also referred to the lack of empirical evidence. The dissenting opinion found:

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 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 U. S. 560, 578–579 (1981). Cf. M. Cohn & D. Dow,⁹ *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. Cf. *Chandler, supra*, at 581.¹⁰

Cohen and Dow, whose research was cited by the minority, only found four social science studies that had been completed between 1953 and 1998.¹¹ This could hardly be definitive or acceptable as a sufficient body of research on effects issues in relation to television courtroom broadcasting. However, the fact that the minority sought to refer to empirical research, is an acceptance and endorsement that social science research is relevant. The author identifies twenty three pieces of methodical and empirical research, which includes the four found by Cohen and Dow (See Appendix 1).

In addition to the lack of effects research studies, research studies conducted to date present many problems. The purpose of the current text does not allow a full detailed discussion of these, although those interested may wish to look at Appendix 3. However, a brief summary of some of the issues relevant for the purposes of this article will be summarised next. Firstly, there has been no proper research conducted to date on camera distraction effects. Many other problems exist. It is therefore impossible to be definitive on what each and every effect is, positive and negative.

⁸ *Chandler, supra* note 5 at 560–589 and 566, referring to *In re Petition of Post-Week Stations, Florida Inc.*, 370 So. (2d.) 764, at 781 (1979). *Chandler, ibid.* at 578, 559–560, 578, note 12 at 560 and 581.

⁹ Referring to M. Cohn and D. Dow, *Cameras in the Courtroom: Television and the Pursuit of Justice* (New York: Rowman & Little, 2002). (Note: republished by different publisher).

¹⁰ *Hollingsworth, supra* note 6 at 6–7, *per* Breyer J.

¹¹ *Ibid.* at 62 *et seq.* The four studies are E. H. 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) [hereinafter California Report]; M.T. Johnson and C. Krafka, *Electronic Media Coverage of Federal Civil Proceedings, An Evaluation of the Pilot Program in Six 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 Behaviour* 489.

Secondly, there is no prior or baseline effects research. Kowinski and Johnson agree that the introduction of cameras to the courtroom does have effects and does change the “status quo.”¹² However, they do not stipulate what the status quo is. It is important to begin research before cameras are introduced to gather baseline research data. Without baseline data prior to cameras, and data after cameras are introduced, it is not possible to compare data to look for effects. This seldom, if ever, occurs in the existing courtroom broadcasting effects research. To examine and research change effects we need to take baseline data measurements. Otherwise, effect comparisons are difficult if not impossible to carry out. The lack of baseline research is a major problem with the research studies that have been conducted thus far. Hopefully, the proposed second federal experiment in the United States will gather data in the particular courts chosen for the experiment prior to the introduction of television courtroom broadcasting.¹³

Kowinski and Johnson suggest that the most “telling” argument in favour of television courtroom broadcasting is the “experience” of the number of states that permit television courtroom broadcasting.¹⁴ However, there are many forms of courtroom broadcasting permitted and the issue is still a matter of contention in many respects. It also ignores the recent Maryland study.¹⁵ This particular study was not overly positive either towards television courtroom broadcasting or about the positive effects of television courtroom broadcasting.

Another problem is that no research seeks to repeat and validate any specific previous research studies. In effect the research studies are all individual stand alone studies.¹⁶ If we seek to use best practice and methodologies used in other empirical research, we should have many studies which seek to repeat, replicate and validate each of the television courtroom broadcasting studies. Unfortunately, no study seeks to do this. It is also unfortunate that much of the research (particularly the non-empirical research) does

¹² A. Kozinski, and R. Johnson, “Of Cameras and Courtrooms” (2010) 20 *Fordham Intell. Prop. Media & Ent. L.J.* 1107 at 1110 [hereinafter Kozinski and Johnson].

¹³ See “Courts Selected for Federal Cameras in Court Pilot Study” <http://www.U.S.courts.gov/news/NewsView/11-06-08/Courts_Selected_for_Federal_Cameras_in_Court_Pilot_Study.aspx>, (date accessed: 22 August 2011). Also note commentary, for example, T. Mauro, “Restrictive Rules Announced for Federal Courts Camera Experiment” *Legal Times* (8 June 2011) <<http://legaltimes.typepad.com/blt/2011/06/restrictive-rules-announced-for-federal-courts-camera-experiment.html>>, (date accessed: 22 August 2011).

¹⁴ Kozinski and Johnson, *supra* note 12 at 1114.

¹⁵ Braverman *et al.*, *Report of the Committee to Study Extended Media Coverage of Criminal Trial Proceedings in Maryland* (Maryland: 1 February 2008).

¹⁶ See, for example, Appendix 1 in terms of empirical stand alone studies.

not record sufficient data to enable later researchers to repeat and validate the earlier study results. Some general research, for example, may say it found no effects, but does not say what research (if any) was undertaken, who was interviewed, what questions were asked, where the cameras were located in a given courtroom or where courtroom participants were located.¹⁷

In addition, most if not all of the general studies rely on self reports, opinion reports and questionnaires.¹⁸ Arguably, this is the biggest problem with the research to date. Kowinski and Johnson appear happy to rely on self reports and survey data alone.¹⁹ Just over twenty empirical studies is not a sufficient body of research. This is self evidently diminutive in the context of the U.S. Supreme Court calling for empirical research as far back as 1965 in *Estes*. It is also insufficient given the issues and concerns raised. In particular it is insufficient because there is, as yet, no definitive answers to the effects provided because of the lack of research.

Frequently, commentators and proponents/opponents assume that there is only one form of broadcasting. This lack of awareness of different types of broadcasting filters into the arguments, *e.g.* all television courtroom broadcasting will be educational. However, there are many different types and forms of television courtroom broadcasting. The U.S. Supreme Court implicitly refers to different types or forms of television courtroom

¹⁷ For example, the Judge Baker Report in relation to the case of *State v. Zamora* (Florida, 1977), does not contain any quantified data. Referred to in S. Barber, *New Cameras in the Courtroom: A Free Press – Fair Trial Debate* (New Jersey: Ablex, 1987) at 70. The report is also unavailable officially (personal correspondence with Florida court service). As yet a full compilation of all of the non-empirical studies appears absent in the literature. This is an issue which should be addressed.

¹⁸ Of the studies which directly engage courtroom participants, the California Report, *supra* note 11, is one of the few studies to ask self report and opinion questions, but to seek to balance and substantiate the self reports by using third part non-participant observers in the courts in addition. However, this appears to have not been universally the case in the Short Report research. Also, the research suffers from the flaw that it is not clear how the monitors measured and verified the opinion and self reports. Most research does not seek to verify or substantiate the opinion and self reports, whether through monitors or otherwise. Television courtroom broadcasting (TCB) research needs to move beyond self report and non validated research. The author's suggestion in relation to eye tracking research is the first positive suggestion as to how opinions, self report and also monitor research can all be measured and examined independently. Opinion and self report research should also be verified with follow on and replication studies. Validation is the point that no research validates previous research. In effect the research studies are all individual stand alone studies. If we seek to use best practice and methodologies used in other empirical research, we should have many studies which repeat each of the television courtroom broadcasting studies. Unfortunately, no study seeks to repeat, replicate and validate and previous study. It is also unfortunate that much of the research (particularly the non empirical research) does not record sufficient data to enable later researchers to repeat and validate the earlier study results. Some general research, for example may say it found no effects, but does not say what research (if any) was undertaken; or not say who was interviewed; or not say what questions were asked; or no say where the cameras were located in a given courtroom; *etc.* Some of the empirical research also has problems *e.g.* not identifying where the camera and courtroom participants are located.

¹⁹ Kozinski and Johnson, *supra* note 12 at 1115.

broadcasting. It refers, for example, to different types of cases, regular versus sensational, closed circuit, educational and also newspaper press versus television.²⁰ However, the Court in the *Estes* case did not explicitly refer to forms of courtroom broadcasting. Neither the research nor the literature to date has explicitly referred to this issue. Unfortunately, there is also no dedicated research scoping the forms of television courtroom broadcasting. It is argued, therefore, that further research is required in relation to this issue.

The argument in this article is that distraction effects have not been properly researched. It is therefore suggested that with new technology such as eye trackers, which will be discussed in the next section, we can begin to empirically address some of the research questions and challenges set by the U.S. Supreme Court. While eye trackers can be used for both in-court and out-of-court research, they are perhaps most relevant to in-court research of effects on courtroom actors as regards particular distraction effects. It is ironic that while some of the U.S. Supreme Court's comments and those of Kowinski and Johnson²¹ focus on how television technology may develop in the future, neither the U.S. Supreme Court nor commentators since have recognised that research and research tools also change and develop. Indeed, research tools have improved vastly since the first television courtroom broadcast in 1953. Eye tracking technology can track and record where courtroom actors are looking and whether they are distracted during court proceedings. Eye tracking is an important tool for in-court distraction effects research. It needs to be used.

III - Television Courtroom Broadcasting, Distraction and Eye Tracking

Eye tracking, which involves, the study of eye movement and gaze, was not directly considered in the three U.S. Supreme Court decisions already examined above. The case in *Estes* centred on a televised fraud case. The case of *Chandler* related to the televising of the prosecution of police officers for conspiracy to commit burglary, grand larceny, and possession of related equipment. The *Hollingsworth* case related to a proposal to televise a gay rights case in California. In addition, eye tracking has not been considered, as far as the author can find, in the vast general literature in relation to television courtroom broadcasting. However, eye tracking technology can be instrumental in conducting effects research into television courtroom broadcasting. It allows us to examine the actual effects

²⁰ *Estes*, *supra* note 4 at 590-591.

²¹ Kozinski and Johnson, *supra* note 12 at 1134.

referred to by the Supreme Court.²² This includes in-court effects (*e.g.* distraction) and out-of-court effects (*e.g.* audience effects; education, *etc.*²³). We are in a position to begin research of actual effects issues without having to rely solely on limited self reports and opinion reports. Let us consider some of these avenues below.

Eye tracking can greatly assist in addressing the research challenge set by the U.S. Supreme Court. The device used in an eye tracking study is known as an eye tracker. Eye tracking studies the eye position and direction of focus.²⁴ The data can also be recorded, played back, *etc.* The study of gaze²⁵ and visual attention has been studied for a considerable period of time.²⁶ Eye tracking research techniques²⁷ have been used repeatedly in advertising, marketing, psychology, eyewitness accuracy studies, internet usage research, health, *etc.* The literature on eye tracking is growing rapidly.²⁸ Duchowski refers to various eye tracking case studies²⁹ and applications.³⁰ Examples include, psychology, marketing,

²² Referred to in *Estes, Chandler and Hollingsworth*. See *supra* notes 4, 5 and 6.

²³ Unfortunately, proponents do not set out what they mean by informative or educational television courtroom broadcasting. Therefore, how are we to measure whether educational aims are achieved? The starting point should be to identify a definition and parameters and to then see if these are achieved. An example of an educational eye tracking (and content analysis) study is V.M.G. Barrios *et al.*, "AdELE: A Framework for Adaptive E-Learning Through Eye Tracking" <<http://www.iicm.tu-graz.ac.at/home/cguetl/publications/2004/Garcia%20et%20al.%202004%20-%20IKNOW.pdf>> (date accessed: 21 October 2011).

²⁴ See, for example, R.J.K. Jacob and K.S. 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* (Amsterdam: Elsevier Science, 2003) at 573-605. Such research relies on sophisticated software (see reference in Radach and Deubel, *ibid.*, 88-91). Detailed experience and expertise with software, computers, computer science and statistics can also be a prerequisite to undertaking such studies (see Radach and Deubel, *ibid.* 171) and hardware tools, as well as calibration of those tools (see comments in relation to calibration issues, in Radach and Deubel, *ibid.* 87-99 and 301). See also V. Sundstedt, "Eye Tracking in User Studies" (New Orleans: S.I.G.G.R.A.P.H., 2009) <<http://www.siggraph.org/s2009/>> (date accessed: 22 August 2011) and also <<http://www.scss.tcd.ie/Veronica.Sundstedt/>> (date accessed: 12 June 2010) [hereinafter Sundstedt].

²⁵ See Overview, Fixation 2010 conference, previously available at www.fixation2010.se/overview (date accessed: 30 April 2010).

²⁶ For a brief review and introduction to visual attention research, see A. Duchowski, *Eye Tracking Methodology, Theory and Practice* (London: Springer, 2007) at 3-13 [hereinafter Duchowski].

²⁷ *Ibid.* at 52-86 regarding eye tracking techniques generally.

²⁸ J. Nielsen, and K. Pernice, *Eyetracking Web Usability* (Berkeley: New Riders, 2009); M. Wedel, and R. Pieters, *Eye Tracking for Visual Marketing* (Hanover: Now Publisher, 2008); J.M. Spector, *Handbook of Research on Educational Communications and Technology* (New York: Taylor and Francis, 2008). See also J.M. Henderson, ed., *Real-World Scene Perception* (New York: Taylor and Francis, 2005); G. Hatfield, *Perception and Cognition: Essays in the Philosophy of Psychology* (Oxford: Clarendon Press, 2009); C. Bundesen and T. Habekost, *Principles of Visual Attention: Linking Mind and Brain* (Oxford: Oxford University Press, 2008); P. Shah and A. Miyake, *The Cambridge Handbook of Visuospatial Thinking* (Cambridge: Cambridge University Press, 2005) [hereinafter Shah and Miyake].

²⁹ Duchowski, *supra* note 26 at 181 *et seq.* See also C. Morimoto and M.R.M. Mimica, "Eye Gaze Tracking Techniques for Interactive Applications" (2005) 98 *Computer Vision and Image Understanding* 4 at 24.

³⁰ *Ibid.* at 203 *et seq.* 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* (New York: Marcel Dekker, 2008), 573.

advertising, ergonomics;³¹ law enforcement and policing;³² neuroscience and psychology;³³ industrial engineering, aviation, driving and visual inspection;³⁴ marketing and advertising.³⁵ Mercedes use eye tracking technology for driver fatigue alert systems.³⁶ There are potential applications in security and computer security.³⁷ There are also many potential mass market applications,³⁸ e.g. domestic applications such as eye tracking remote control of electronic devices in the home. Computer games development is another area where eye tracking is utilised.³⁹ Eye tracking applications can allow us to input instructions into technology devices with our eyes.⁴⁰ For example, a person's gaze can be used to give instructions or point to instructions.⁴¹ Companies and researchers Use eye tracking research to track internet use and adverts. Do viewers look at the advert, for how long, or do they miss the advert entirely because of its location? Where is the best location for the advert? Eye tracking addresses these important commercial issues. There are various eye tracker manufacturers.⁴²

It is argued that eye tracking should be applied to the problem of television courtroom broadcasting research. In this way, part of the U.S. Supreme Court research

³¹ Duchowski, *supra* note 26 at 205. See also M. Bingemann, "Eye-Tracking Device Watches You Watching Ads" *PC World Business* (10 May 2007), previously available at <www.pcwprld.idg.com.au/article/182716/eye-tracking_device_watches_watching_a> (date accessed: 30 April 2010).

³² See for example <<http://www.setcan.com/eyelock.html>> (date accessed: 12 August 2011) referring to the EyeLock training system which comprises a forward focus camera and two eye trackers, all of which are incorporated in a pair of glasses that a police trainee wears.

³³ Duchowski, *supra* note 26 at 207, and 207 *et seq.*

³⁴ *Ibid.* at 241 *et seq.*

³⁵ E.g. advert design and placement, label and product design and placement on the television, internet, *ibid.* at 261 *et seq.* Also see K. Lillington, "IBM Plots the Future at Tech Summer Camp" *Irish Times* (29 July 2005) referring to IBMs WebgazeAnalyser for research how people read internet pages. Other applications include computer science (Duchowski, *supra* note 26 at 275), medical research, diagnostics, surgery, sports and performance, human machine interactions, market research, psycholinguistics, ophthalmology, ergonomics (see <<http://www.smi.com>> (date accessed: 22 August 2010), visual systems and linguistics; gaming, medical instruments, vehicles, vehicle safety, computer interaction, medical diagnostics, video conferencing, information kiosks, interactive advertising (referred to by Tobii, at <www.tobii.com> (date accessed: 22 August 2011), disability (J.S. 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>> (date accessed: 22 August 2011).

³⁶ See Eye Tracking, at the blog <<http://jeffnolan.com/wp/2010/03/25/eye-tracking/>> (date accessed: 22 August 2011). 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 at 377.

³⁷ 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>> (date accessed: 22 August 2011).

³⁸ See <<http://www.eyetracking.com>> (date accessed: 22 August 2011).

³⁹ For example see Sundstedt, *supra* note 24.

⁴⁰ Duchowski, *supra* note 26 at 205.

⁴¹ *Ibid.* at 206.

⁴² For example: Tobii, EyeTracking Inc, SMI, Arrington Research, Asley, SensoMotoric Instrument (SMI), and Polhemus.

challenge, *i.e.* whether television cameras in the courtroom cause distraction effects, can be addressed. In Part III A and B, the author will examine two specific issues in relation to eye tracking technology and legal applications. The first issue relates to existing links between the law and psychology which refers to and utilises eye tracking technology. This is because in dealing with the important concerns raised by the U.S. Supreme Court, we cannot simply rely on legal principles alone. Appropriate research should involve cross disciplinary research fields where relevant. Lawyers alone may not be the best people to undertake all effects research in relation to the examination of the effects of television courtroom broadcasting. Psychology is one such field which can assist in cross disciplinary research. The fact that the law has often relied on psychology and psychological expertise should not be ignored. In the past, psychology has been relied upon to answer certain legal related problems, one example being eyewitness identification. As eye tracking research is recommended for distraction research, it is useful in the first section to highlight some of the uses and applications of eye tracking in existing psychology research. The second section will consider how eye tracking might be employed in researching distraction effects in relation to television cameras in court.

A - Eye Tracking, Law and Psychology

Eye trackers are increasingly used in psychology and eyewitness identification research. Sheree and Holmes used eye trackers recently to examine how eyewitnesses recognise suspect photograph line-ups.⁴³ Loftus in researching the weapons focus effect, used a corneal reflection device, which is a type of eye tracker,⁴⁴ to discover where and for how long individuals could focus their attention.⁴⁵ Eye tracking is used in psychology research to investigate the effects of cameras and camera perspective bias in recorded police interviews and confessions.⁴⁶ This is partly driven by the knowledge that there are false convictions, and false confessions captured on video recordings of suspect interrogations.⁴⁷

⁴³ 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" (Proceedings of the 2010 Symposium on Eye-Tracking Research & Applications, Austin, 22-24 March, 2010).

⁴⁴ As originally used by G.R. Loftus and N.H. Mackworth, "Cognitive Determinants of Fixation Location During Picture Viewing" (1978) 4 (4) *Journal of Experimental Psychology* 565.

⁴⁵ E. Loftus, G. Loftus and J. Messo, "Some Facts About 'Weapon Focus'" (1987) 11 (1) *Law and Human Behaviour* 55 at 55-62.

⁴⁶ This is also noted by L.J. Ware, *Monitoring Visual Attention in Videotaped Interrogations: An Investigation of the Camera Perspective Bias* (MSc Thesis, Ohio University, 2006) at 35 [hereinafter Ware].

⁴⁷ That is, police suspect interview interrogations. See, for example, Ware, *ibid.*; G.D. Lassiter and A.A. Irvine, "Videotaped Confessions: The Impact of Camera Point of View on Judgements of Coercion" (1986) 16 *Journal of Applied Social Psychology* 286 [hereinafter Lassiter and Irvine]; H.C. Schmidt, *Effects of Interrogator Tactics*

One result of this research is that different camera angles and focus orientations of the interview camera can alter significantly how viewers of such film footage rate the genuineness and voluntariness of the video recorded suspect offered “confessions.” The manner in which the evidence is filmed can influence judgements of guilt.⁴⁸ It has been found that mock jurors can be influenced by the camera angle from which the interrogation is filmed.⁴⁹ This is now known as camera perspective bias. Ware has also examined camera perspective bias and used eye trackers to monitor visual attention.⁵⁰ In addition, Ware refers to studies which demonstrate that camera perspective with sole focus on the suspect creates a bias in judgements of voluntariness and guilt.⁵¹ This has become more significant since the advent of the Innocence Project, which applies D.N.A. technology and techniques to past cases where the defendant still protests their innocence. It found that a quarter of the D.N.A. exoneration cases originally relied strongly upon false confessions.⁵²

Most recorded criminal investigation interviews adopt a suspect focused angle only. This is as opposed to focusing on the police officer or focusing on both of them at the same time. This enhances the salience of the suspect and also the perceived voluntariness of any confession.⁵³ Lassiter and Irvine showed the same interview recorded on different cameras to show the suspect only, the police officer only, and both equally.⁵⁴ The research study subjects then viewed one of the videos, depending on which group they were in. The individuals who saw the suspect only video perceived less coercion than individuals who saw the video where the suspect plus police officer was present.⁵⁵ Other research also confirmed that suspect focus only videos yielded significantly higher ratings for perceived guilt and voluntariness.⁵⁶ As a result of the Lassiter and Irvine study, police practice in

and Camera Perspective Bias on Evaluations of Confession Evidence (MSc thesis, Ohio University, 2006) at 3 [hereinafter Schmidt]; and G.D. Lassiter, L.J. Ware, J.J. Ratcliff and C.R. Irvin, G.D. Lassiter, L.J. Ware, J.J. Ratcliff and C.R. Irvin, “Evidence of the Cameras Perspective Bias in Authentic Videotaped Interrogations: Implications for Emerging Reform in the Criminal Justice System” (2009)14 (1) *Legal and Criminological Psychology* 157 [hereinafter Lassiter *et al.*].

⁴⁸ Schmidt, *ibid.*

⁴⁹ Lassiter and Irvine, *supra* note 47 as cited in Schmidt, *ibid.* at 9-10.

⁵⁰ Ware, *supra* note 46.

⁵¹ W.A. Geller, *Police Videotaping of Suspect Interrogations and Confessions: A Preliminary Examination of Issues and Practices* (Washington D.C.: National Institute of Justice, 1992); S.M. Kassir, “The Psychology of Confession Evidence” (1997) 52 *American Psychologist* 221; and G.D. Lassiter, “Illusory Causation in the Courtroom” (2002) 11 *Current Directions in Psychological Science* 204; each as cited in Ware, *supra* note 46 at 10.

⁵² See The Innocence Project <<http://www.innocenceproject.org>> (date accessed: 10 September 2011) and as cited in Schmidt, *supra* note 47 at 11.

⁵³ Schmidt, *ibid.* at 25-26.

⁵⁴ Lassiter and Irvine, *supra* note 47 at 286-276 as cited in Schmidt, *ibid.* at 26.

⁵⁵ *Ibid.*

⁵⁶ See for example G.D. Lassiter, P.J. Munhall, R.J. Ploutz-Snyder and D.L. Breitbecher, “Illusory Causation: Why It Occurs” (2002) 13 *Psychological Science* 299 as cited in Schmidt, *ibid.* at 28.

New Zealand was changed to ensure that there was no suspect only video recordings, and that suspect and questioner were always in frame.⁵⁷ Pressure is increasing to change policies in other jurisdictions as well.⁵⁸

B - Eye Tracking and In-Court Distraction Effects

Despite the potential indicated by the above studies, there is no eye tracking literature in relation to television courtroom broadcasting. None of the studies even refer to eye tracking. The previously considered U.S. Supreme Court cases referred to various subtle, discrete⁵⁹ and potential effects,⁶⁰ such as effects on witnesses,⁶¹ judges⁶² and defendants.⁶³ Generally, defendant effects are one of the least researched areas of television courtroom broadcasting and therefore needs further investigation.⁶⁴ Eye trackers can be used to perform this empirical research. Some of the questions that eye tracking research could help answer are as follows: should eye tracking be applied to research distraction effects on the various courtroom participants? Do they look at the television camera? If so, for how long? What are the effects on the courtroom participants? Do different effects arise for different courtroom participants? If so, what are the implications? How do in-court television cameras affect different courtroom actors while they are undertaking tasks?⁶⁵ The literature to date does not incorporate any analysis of the roles of the different courtroom actors into discussion or research of the different effects issues being examined. It is argued that effects research needs to become more nuanced and sophisticated to begin researching the complex issues.

Many important questions are not yet addressed and answered yet. Eye tracking is also relevant to camera location issues. What difference does the location of the camera have on the different courtroom actors? Are there different effects for camera only versus camera and cameraman? Are there different effects for different types of camera? The location of the

⁵⁷ Schmidt, *ibid.* at 31.

⁵⁸ For example it is advocated for US, Australia, Canada and UK, on foot of the New Zealand "success," see Lassiter *et al.*, *supra* note 47.

⁵⁹ Schmidt, *supra* note 47 at 544-545 and 595-596.

⁶⁰ Estes, *supra* note 4 at 545, 547, 551, 592, 593, 609-610, 612 and 613.

⁶¹ *Ibid.* at 547.

⁶² *Ibid.* at 548, 549, 550, 565 and 614.

⁶³ *Ibid.* at 532 for example.

⁶⁴ *Ibid.* at 549 and 551-567.

⁶⁵ Note generally Wickens *et al.* who refer to task analysis issues and research, see C.D. Wickens, M. Vincow and M. Yeh, "Design Applications of Visual Spatial Thinking: The Importance of Frame of Reference" in Shah and Miyake, *supra* note 32, 383 at 385 *et seq* [hereinafter Wickens *et al.*]. See also P. Shah, E. Freedman and I. Vekiri, "The Comprehension of Quantitative Information in Graphical Displays" in Shah and Miyake, *supra* note 28 at 426, 476 and 450 *et seq.* regarding task demands.

different courtroom participants and the location of the television camera and television operator (if there is one) can have significant implications with regard to understanding the effects of television courtroom broadcasting. This includes both in-court and out-of-court effects. While this is largely ignored to date, eye tracking research can help to overcome the problem of location issues. In most research, the location and height of the cameras is not considered or even documented, so we cannot assess and compare different cases or research studies on these points. Research studies should record where each of the cameras and courtroom participants are located.

Different angles and frames can have different effects and meanings.⁶⁶ These various factors in the television courtroom broadcasting field need to be examined. Different frames can have different costs and benefits as well as advantages and disadvantages.⁶⁷ We need to begin examining and contrasting these for television courtroom broadcasting.

Many issues of confidence and ratings come up in relation to television courtroom broadcasting research, but there is not adequate research into these issues. It does not always or properly gauge and define what confidence and ratings mean. Many opportunities arise to examine these issues with eye tracking technology. For example, an eye tracker and an observer could both look at a particular courtroom actor and try to examine how many times they focus their attention or look at the television camera in the courtroom. Indeed, a second observer could also look at the courtroom actor and try and record their perceptions during the case or after the case.⁶⁸ The various results could then be compared. The observers would also be tested for their confidence ratings.⁶⁹ This would assist in dealing with the problem in most television courtroom broadcasting 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.⁷⁰ This type of research method

⁶⁶ Wickens *et al.*, *ibid.* at 398.

⁶⁷ *Ibid.* at 401.

⁶⁸ California Report, *supra* note 11.

⁶⁹ The California Report did attempt to have observers in court to ascertain if the courtroom actors 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 actor is (a) distracted by and (b) focuses at the television camera. Schmidt used a press button system once the subject perceived a target effect. For discussion see Schmidt, *supra* note 47 at 30.

⁷⁰ See for example reference to same at <<http://www.eyetracker.co.uk/>> (date accessed: 22 August 2011).

allows itself to be adapted to different courtroom actors and also in actual court settings. There are also various types of head mounted eye tracking tools.⁷¹ 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.⁷² In considering different types of television courtroom broadcasting 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.⁷³

For the eye tracking research demonstration conducted by this author, a research assistant wearing the eye tracker (the subject) took up the positions of various courtroom participants,⁷⁴ while the tripod-mounted television camera was located in four different positions within the courtroom.⁷⁵ The subject wearing the eye tracker then looked about in various directions, simulating what a person in that position might see. This exercise was conducted with and without the television audio-visual equipment⁷⁶ being present and visible. The eye tracker and the computer to which it was attached tracked and recorded where the subject looked and what they saw.⁷⁷ It was useful also to take still photographs, which would be of assistance in designing an actual eye-tracking effects experiment.⁷⁸

The research demonstration conclusively showed that eye trackers can be successfully used for researching television camera distraction effects in courts. Some further details in relation to this research demonstration experiment are provided by the author elsewhere.⁷⁹

⁷¹ In terms of head mounted display applications see discussion in Wickens et al., *supra* note 65 at 406 *et seq.*

⁷² Research such as this means that a particular courtroom scene is filmed (with variations) and is then replayed on video *etc.* This means that potentially higher volumes of test subjects can be examined. The more research subjects the greater the generalisability of the effects.

⁷³ See recent research by M.L.H. Vo and W.X. 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.

⁷⁴ As a test of concept, only one of these positions – the witness position – is discussed in this article. The author includes full details of the research in a forthcoming book, P. Lambert, *Television Courtroom Broadcasting: The Supreme Court, Distraction Effects and Eye Tracking*, University Press of America (forthcoming).

⁷⁵ Again, because this is a test of concept, only two of the camera descriptions are described in this article.

⁷⁶ A Sony DVCAM Model DSR 1P television camera and Sachler tripod was used. The camera was neither plugged in nor operating.

⁷⁷ There were two video files created and close to 20,000 still pictures created and recorded from the eye tracker.

⁷⁸ The still photographs were taken on a Sony Cyber-shot 14.1 megapixel camera.

⁷⁹ See 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) *Reynold's Courts and Media Law Journal*, 277, available at <<http://courtsandmedia.org/journal/>> (date accessed: 19 October 2011); 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"

This source also includes some of the still images derived from the video footage of the eye tracking research.

This first in-court demonstration of eye tracking has proved that the concept of eye tracking for television courtroom broadcasting effects research is feasible. However, it is important to note that this is only the first step. The next stage is to design and undertake an actual television courtroom broadcasting effects experiment (and ultimately experiments) using eye tracking.⁸⁰ The demonstration shows that eye tracking can address the U.S. Supreme Court's research challenge by proving definitively whether courtroom participants look at television cameras in court and for how long. This Irish research is the first to deal with and answer the challenge in a valid and demonstrable manner, unlike the mere opinion research heretofore. This Irish research now needs to be taken to the next stage, namely designing and undertaking research experiments.

IV - Conclusion

Schmidt states that the current psychological research into videotaped confessions is motivated by the treatment by the U.S. Supreme Court of confession evidence cases.⁸¹ It is surprising that more research has not been undertaken into the effects of television courtroom broadcasting, given that the U.S. Supreme Court first called for empirical research studies as far back as the *Estes* case.⁸² Each of the issues relating to television courtroom broadcasting that the U.S. Supreme Court identified (see summary in Appendix 2) should be the focus of specific empirical research. It is clear that not all of these issues are addressed in the small number of empirical studies conducted to date. The challenge set by the U.S. Supreme Court still remains.

(British Psychological Society, BPS Cognitive Psychology Section, 27th Annual Cognitive Psychology Section Conference, Cardiff University, 6-8 September, 2010); P. Lambert, "TCB Effects: Eye Tracking and Camera Distraction in Court" (Irish Association of Law Teachers Annual Conference, Limerick, 26-28 November, 2010). See also *Courting Publicity: Twitter and Television Cameras in Court* (United Kingdom: Bloomsbury) <http://www.bloomsburyprofessional.com/1424/Bloomsbury-Professional-Courting-Publicity--Twitter-and-Television-Cameras-in-Court.html> and *Social Networking, Internet and Communications: Privacy and Data Protection 2.0* (Dublin: Clarus Press), forthcoming.

⁸⁰ Of course, eye tracking is only one of many methods for researching television courtroom broadcasting effects. Many methods need to be used in conjunction in order to build up the body of research knowledge required.

⁸¹ Schmidt, *supra* note 47 at 74.

⁸² *Estes*, *supra* note 4 at 532-616.

Judge Kozinski suggests that “[w]e must consider the issue [of television courtroom broadcasting] again, in light of the world today.”⁸³ This author suggests that we must also do so in light of our recognition of current research and current research methods. Indeed, we should not be inflexible in our approach. If research from other fields of research is relevant and can assist us in examining the effects of television courtroom broadcasting, we must embrace it. This includes technologies such as eye tracking and research areas such as psychology.

Researchers use eye tracking in conducting research across a wide variety of fields and applications. We should use eye tracking in addressing the television courtroom broadcasting effects issues identified by the U.S. Supreme Court. This author recommends eye tracking to examine some of the effects of television courtroom broadcasting. Eye tracking provides a direct measure of eye focus.⁸⁴ It permits testing and direct observation of eye fixation, focus and attention.⁸⁵ Eye tracking research also has the advantage that it tracks and records exactly what people see⁸⁶ and also overcomes the limits of opinion reports and self-reports. It can also test and validate opinion reports and self-reports. Another advantage is that “eye 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.”⁸⁷ Eye tracking is the future of television courtroom broadcasting distraction effects research.

The time has come to address the research challenge set by the U.S. Supreme Court and also to ensure that the research effort into the effects of television courtroom broadcasting 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.”⁸⁸ It is time to move beyond limited self reports and opinion reports and embrace modern empirical research, including eye tracking technology.

⁸³ Kozinski and Johnson, *supra* note 12 at 112.

⁸⁴ Armstrong and Olatunji, “What They See is What You Get: Eye Tracking of Attention in the Anxiety Disorders” (2009) Psychological Service Agenda 23.

⁸⁵ Ware, *supra* note 46 at 11.

⁸⁶ See <<http://www.prsresearch.com/prs-tools/>> (date accessed: 25 May 2010).

⁸⁷ *Ibid.*

⁸⁸ J. Hirschhorn, “Cameras in the Courtroom? No” (1980) 7 (3) Barrister 6 at 7-9.

Kowinski and Johnson agree that the cameras in the O.J. Simpson criminal case “changed the proceedings in a host of ways.”⁸⁹ Have we adequately researched the changes and distractions? Eye tracking technology can assist us in doing so, and in a recorded and verifiable manner. The author has identified how Irish research opens the way to begin addressing one of the U.S. Supreme Court’s research challenges and to address the continued debate in relation to adverse effects of television courtroom broadcasting cameras. It is an Irish solution to a universal problem.

⁸⁹ Kozinski and Johnson, *supra* note 12 at 1117.

Appendix 1

The literature identifies the following methodical and empirical effects research:

- 1 J. Hoyt, "Courtroom Coverage: The Effects of Being Televised" (1977) *Journal of Broadcasting* 487.
- 2 E.H. 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).
- 3 D.L. Shores Jr., *The Effects of Courtroom Cameras on Verbal Behaviour: an Analysis of Simulated Trial Witness Testimony in Courtrooms Using Television Cameras* (Ph.D Dissertation, University of Florida, 1981).
- 4 S.R. Pasternack, *The Effects of Perceived Community Pressure on Simulated Juror Guilt Attributions: a Study* (Ph.D Dissertation, University of Tennessee, 1982).
- 5 S.M. Kassin, "TV Cameras, Public Self-Consciousness, and Mock Juror Performance" (1983/4) *Journal of Experimental Psychology* 336.
- 6 A. R. Paddon, *Television Coverage of Criminal Trials with Cameras and Microphones: a Laboratory Experiment of Audience Effects* (Ph.D Dissertation, University of Tennessee, 1985).
- 7 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.
- 8 A. Panches, *The Cognitive Effects of Camera Presence on the Recall of Testimony in a Simulated Courtroom Setting* (Ph.D Dissertation, Colorado State University, 1991).
- 9 M.T. Johnson and C. Krafka, *Electronic Media Coverage of Federal Civil Proceedings, An Evaluation of the Pilot Program in Six District Courts and Two Appeal Courts*, (Federal Judicial Centre, 1994).
- 10 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].
- 11 K.L. Netterburg, *Cameras in the Courtroom: Is a Picture Worth a Thousand Words?* (Ph.D Dissertation, University of Minnesota, 1980).
- 12 A. Bukoff, *The Effects of Video Camera Techniques on the Pre-Deliberation Judgements and Perceptions of Role-Playing Jurors* (PhD Dissertation, Kent State University, 1984).
- 13 S.L. Alexander, *'Mischievous Potentialities': A Case Study of Courtroom Camera Guidelines, Eight Judicial Circuit, Florida* (Ph.D Thesis, University of Florida, 1989).

- 14 S. A. Esposito, *O.J. T.V.: A Narrative Analysis of Television's Pretrial Coverage of the O.J. Simpson Case* (Ph.D Thesis, Wayne State University, 1996).
- 15 W. Petkanas, *Cameras on Trial: An Assessment of the Educational Affect of News Cameras in Trial Courts* (Ph.D Thesis, New York University, 1990).
- 16 P. E. Thaler, *The Impact of the Television Camera on Courtroom Participants: a Case Study of the Joel Steinberg Murder Trial* (Ph.D Thesis, New York University, 1990).
- 17 T.D. Keller, *Cameras in Courtrooms: An Analysis of Television Court Coverage in Virginia* (Ph.D Thesis, University of Tennessee, 1992).
- 18 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).
- 19 S. Kohm, *I'm Not a Judge But I Play One on TV: American Reality Based Courtroom Television* (PhD, Thesis, Simon Fraser University, 2004).
- 20 R. E. Reeves Stewart, *The Changing Relationship Between Camera and the Courts* (MA Thesis, Florida Atlantic University, 1998).
- 21 J. Ossinger, *Electronic Access to Courtrooms: Television as an Educational Socializing Agent on the Judiciary* (MA Thesis, The University of Maine, 2006).
- 22 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).
- 23 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 (2008).

Appendix 2

The effects issues identified by the U.S. Supreme Court can be categorised and summarised, in particular under the headline of the respective courtroom actors, as follows,

Lawyers

Effective counsel; Lawyers will look to see if they can confer with their client without, or out of, close-ups; Adverse psychological effects on lawyers.

Juries (In-Court)

Jury awareness.

Jury influence;

- Juror television viewing during trial; Jury prejudice by media; Jury ability to judge fairly; Voting decisions [presumably jury decisions]; Adverse psychological effects on jurors.

Prospective Juries (Out-of-Court)

Prejudice of actual and potential jurors; Make an impartial jury for a re-trial impossible.

Judges

Judge effects; Duties of the trial judge; Politics and elected judges; Adverse psychological effects on jurors.

Defendants

Defendant effects; Objection by defendant; Prejudicial conditions not experienced by other defendants; Singling out certain defendants; Coerced confession (see camera perspective bias issues below).

Parties

Parties generally not mentioned (other than criminal defendants above).

Witnesses

Witness effects; Witnesses awareness; Effect of increasing public awareness of witnesses; Reasonable or feasible for witnesses to object; Witness security; Witness TV viewing; Public recognition/harassment of witnesses; Effect of witness testimony chilling [potentially in-court and out-of-court]; Adverse psychological effects on witnesses.

Court Personnel

Not mentioned.

Courtroom Actors Effects Generally

Attention; Awareness; Undivided attention; Diversion; Effects on courtroom actors; Conscious or unconscious effects; Courtroom actor objections ignored; Accuracy; Over dramatization; Amending testimony; Apprehension; Reluctance; Quality of the testimony; Frightening; Cocky; Personal acting up; Interruptions; Rulings; Concentration; Harassment; Sensibilities; Concentration; Acting up; Dividing actor efforts; Subtle effects; Effect on timid or reluctant witness; Unconscious effects; Act differently; Acting up; Adverse effects from presence of camera; Altered testimony; Unwillingness to testify; Qualitative differences; Playing to audience; Playing to potential clients; Trial management; Peer pressure; Pre-trial publicity; Community pressure; Focus; TV viewing; No longer

calm; Emphasising that the case is special; Popular verdicts; Pre-trial publicity; Bias; Extraneous influence; Knowledge of being televised; Aggravation/escalation; Attitude to testifying; Impact of being filmed and broadcast; Demoralized; Overstatement; Public speaking; Additional responsibility; Direct news media pressure; Influence of public opinion by news media; Psychological effects and reactions.

Other In-Court Issues

General distraction; Actor distraction; Changing behaviour because of awareness; Awareness of being televised; Increasing nervousness; Increasing tension; Acting differently; Not giving full attention; Distortion;

Disruptive; Psychological considerations; Influence on verdicts; Highly publicised trials; Criminal trials; Prejudice; Diverting the trial; Impacting on all participants; Opportunism; Effort of trying not to be effected; Noise of cameras; Appearance of cameras; Undercutting reliability of the trial process; Probable hazards; Criminal trial with notoriety versus a routine trial; Effects on the normal detached atmosphere; The integrity of judicial process; Distorting the trial process. [Neither baseline pre-camera nor with-camera courtroom processes have yet been researched to compare and examine effects].

Audience

Emotional audience; Effects of commercials and intervals; Editing; Commentary; Close ups; Entertainment; Commercial objectives; Effects in re education; Television as the most accurate and comprehensive means of conveying to the public; Only selected trials; Only courts with amenable layouts selected; Sensational cases predominate; Television cannot cover everything and all actions in court, only where [television cameras are] focused.

Public

Conditioning the public; Prejudicing the public; Educational by acquainting with the judicial process; Educational institutions; Influence on public opinion; Giving the public the wrong impression about the trial process; Conditioning the public against the defendants; Edited and selected programming; Influencing opinions before verdict; Effect of the audience who may become jurors or witnesses; Change [public] attitudes.

Other Effects Issues

Limited and non scientific research; Further studies; Body of reliable factual data; Experience effects research; Techniques of public communication; Future technology; Process of televising; Detracting from the trial, justice and constitutional functions; Undermining or effecting the serenity, calm and decorum of the court; Decorum; Increasing publicity; Inadmissible evidence leakage; Re-trial effects; Pre-trial effects; Psychology research; Various. effects; Inconsistency; Dignity; Wide publicity; Heightened publicity; Intrusions; Restrictions; Prejudice; [Television] developing the personalities of the courtroom actors; Dramatisation; Undermining fairness; Diverting the process; Leading to suspicions concerning integrity of trial process; Undercutting integrity of trial process; Dignity and calmness; Effects on other media; More lenient; Editing; Biasing editing; Effects even on unedited film footage; Wrong impression; Unfairness; Educate as to nature of judicial process; Personality, famous. and celebrity; Kind of case; Non-notorious. trial; Effect of television performance; Effects of constitutional dimensions; Prejudice; Prejudice; Something more than juror awareness; Threats; Harassment; Death threats [which has now occurred in the *Hollinsworth* case]; Irreparable harm; Live streaming; Internet; Adequate remedies to effects through an appeal?; Unwillingness to cooperate with future cases; Integrity of trial process; High profile trials; Considered standards and guidelines; 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 television courtroom broadcasting

experiments; High profile publicly divisive cases; Effects of harm in non jury cases; All harm rectifiable on appeal; Integrity of trial; Protective measures; Actual prejudice; Subtle prejudice; Slippery slope.

Appendix 3

Current Research Gaps

General: The research to date is *flawed* and in many instances *absent*. Even where there has been research, it is generally lacking in sophistication and methodology. The author *identifies* many of these research flaws. Significantly more, and more sophisticated, television courtroom broadcasting research is required;

Scope: Definition: “Courtroom broadcasting” is not properly defined in the literature. This should be the starting point for any effects research. The author focuses on television courtroom broadcasting as such relates to *television 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 television courtroom broadcasting. It also excludes radio, pull internet, recording media, juryroom, still photography and archival recording courtroom broadcasting;

Scope: Researching Form and Effects: “Television Courtroom broadcasting” is generally not defined in the literature. Other forms of courtroom broadcasting are not defined either. Any effects research needs to define its scope in terms of the form of courtroom broadcasting, and the specific potential effect being tested. There is no proper evidence of positive or negative effects because we have not properly 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 research conclusions. There is a general absence of research which has been subsequently replicated and verified;

Presumptions: The television courtroom broadcasting arguments are also generally presumptive. One of these, for example, is the presumption that television courtroom broadcasting will be educational. This has not been properly researched or proven to be correct. It is also wrong to generalise all effects are the same for every form of courtroom broadcasting. Could some forms lend themselves to being more educational than others?;

Methodology: The general or non-social science research is almost random and ad hoc. It is often very basic and simplistic in methodology. It does not consider in advance what effect is being examined nor how best to examine that effect. It is not carried out to a standard which might be replicated or validated by further studies. Many studies have not recorded details of questions asked and replies given. There is not sufficient general or empirical research of television courtroom broadcasting, sufficient to answer the arguments;

Forms: Television courtroom broadcasting *arguments* are fundamentally flawed. They ignore the fact that there are different types and forms of television courtroom broadcasting. A forms map needs to identify and categorise these different forms. No argument is verified without research. No argument applies (equally) across *all* forms of television courtroom broadcasting. Should an argument be justified in the context of a particular form (or forms) of television courtroom broadcasting?;

Validation and Replication: Proponents/opponents fail to *research, confirm or validate* any of their arguments. For example, many advocate television courtroom broadcasting because it is, or will be, educational. Yet, proponents never say why, how, in what circumstances, for what forms, etc. it will be educational. Nor do they show any research or validation. There

is no suggestion either as to which television courtroom broadcasting form(s) could be most educational?;

Generally a proposition or argument is only accepted once repeated and verified in tests. This accepted method of study has not been recognised in television courtroom broadcasting debate or research to date. Research going forward should: distinguish between the different forms of television courtroom broadcasting; identify in advance what exactly is being tested; involve those with knowledge and experience of conducting research; be properly conducted and recorded; be in such a manner that the research and methods may be critically examined by other researchers; be able to be replicated; and be validated by other research;

Cameras: It is important to say what camera types are involved, where the camera is located, etc. The height, location, angle, etc. of cameras are important in creating effects, as psychology research is revealing;

Actors: If we are considering effects on courtroom actors, we must say which actors are being investigated, and how. Relevant factors have not been gauged or coded. It also means the replication of such research is not possible. Only certain people are asked. 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. Generally the public in court are not asked. In effect, therefore, most of the courtroom actors who give self reports are legally trained or experienced. Defendants are typically not asked to undertake self report research studies. Also, such studies generally appear not to be drafted by the persons most qualified to draft such questions and research. Nor are additional research fields and techniques generally consulted and incorporated;

Opinions and Self Reports: To rely on questionnaires and self reports as the sole indicator of whether there are effects or not, is wholly inadequate. Unfortunately, too much of the current research relies on self reports of effects upon oneself and opinion reports of perceived effects on other courtroom actors. These studies are “qualitatively inadequate.”⁹⁰ It is suggested that a wider range of research, and wider research tools be Used in future in an effort to better consider the full implications of television courtroom broadcasting;

In-Court and Out-of-Court: Effects on those inside the courtroom can be referred to as in-court effects research. We also need to move outside of the courtroom – and look at the out-of-court effects issues. There has been no proper research into effects on the viewing (and non viewing) audience. We should also focus on the actual courtroom broadcasting television audience, as well as the wider public audience as may discuss and consider cases covered by television courtroom broadcasting. We need many more studies to research the impact of television courtroom broadcasting content and forms;

Production: Just as there are many types of courtroom broadcasting, there are also many different types of television programmes and styles of presentation, filming, editing, etc. This area of research is generally ignored;

Filming: The effects research literature does not adequately address nor differentiate the issues of whether there are differences between commercial courtroom filming and filming undertaken by the court or court service;

⁹⁰ See D. Slater and V.P. Hans, “Methodological Issues in the Evaluation of ‘Experiments’ with Cameras in the Courts” (1982) 30 (4) Communications Quarterly 376

Education: Take the proposition that (all⁹¹) television courtroom broadcasting 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? What amount (or standard of) educative value is required for television courtroom broadcasting to be legitimised as being educational? There is no indication of what is meant by “education,” “educational” and the “message” conveyed via television courtroom broadcasting forms. For example, is the aim to educate the public on the details (or result)(or arguments) of a specific case or is it to educate generally? If the later, what general principles, issues, etc., is it aiming to impart? Is the educational effect to be one of civic information? Is the message that offenders will be pursued and prosecuted (deterrence)? Is the message that we respect the rights of victims? Is the aim to help inform citizens as to what they will face, or may see, should they ever be in court? Is it to legitimise or enhance confidence in the court system? Is it to a confidence justification?

⁹¹ 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.