OPEN JUSTICE OR OPEN SEASON? DEVELOPMENTS IN JUDICIAL ENGAGEMENT WITH NEW MEDIA

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Abstract

The principle of open justice underpins the trial procedures of common law systems but is subject to exceptions, including name suppression orders that in the main seek to ensure trials are fair. A degree of tension between the judiciary and the media is inevitable when publication of information is prohibited or postponed, but a relationship of interdependence tends to subsist between the courts and traditional media. The emergence of new media has disrupted the status quo, challenging both the traditional media's unique news publication capacity and the courts' practical ability to suppress information.

This article focuses on the potential for juries being adversely influenced by digital information extraneous to the trial process, and is structured as follows: relevant principles are identified; the relationship between traditional media and the courts, and impact of new media are then outlined; responses to the challenges presented by new media follows, and conclusions are drawn. The article draws on Australasian precedent, in particular, recent developments in New Zealand case law and legislation relating to information suppression.

I INTRODUCTION

The principle of open justice underpins the trial procedures of common law systems but is subject to exceptions, such as name suppression orders,[2] that in the main seek to ensure trials

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are fair. The law will not undertake an exercise in futility, which would bring its own authority and processes into disrepute,[3] and so, while 'justice certainly should appear blind, [it] should not appear stupid'.[4] Consequently, where information is already in the public domain, generally it will not be appropriate to grant a suppression order,[5] even if that information could adversely affect jury decision-making. It might be assumed, therefore, that 'suppression orders have no place in the age of the internet where information may be distributed and disseminated widely, quickly and anonymously',[6] and published for domestic reading on overseas websites. Indeed, Michael Chesterman has queried whether any legal regime 'which purports to control the flow of information to the public is bound in due time to look like King Canute?'[7]

Judicial concerns about the publication of prejudicial information have been expressed since the eighteenth century,[8] and, while 'gossip spread rapidly well before the days of the Internet',[9] the emergence of new media – blogs, Facebook, Twitter, and so forth – has greatly increased the likelihood of court-imposed restrictions on publishing information being breached. However, while the law may struggle with the technological challenge, it is not powerless. Even when prohibited information has been published on an overseas website, a domestic court is not bound to concede its authority and allow rules made by Parliament for the maintenance of fair trials and protection of victims to break down simply because technology has problematised enforcement. Suppression orders, for example, may not prevent the spread of knowledge, but nevertheless may have a limiting effect.[10] Furthermore,

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2 Des Butler and Sharon Rodrick, *Australian Media Law* (Lawbook Co, 3rd ed, 2007) 172 fn 96 note that name suppression orders are interchangeably referred to as non-publication orders. This article focuses on name suppression but should be relevant to other forms of judicial control over information, notably contempt and sub judice.

3 See, for example, *Zanzoul v R* [2008] NZSC 38 (9 May 2008) [2].

4 *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716, 736 (High Court of New Zealand).

5 *Lewis Wilson & Horton Ltd* [2000] 3 NZLR 546, 568 (Court of Appeal).

6 See *Police v Slater* (Unreported, District Court at Auckland, Harvey J, 14 September 2010) [93].

7 Michael Chesterman, 'OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt with in Australia and America' (1997) 45 *American Journal of Comparative Law* 109, 142-143.

8 Ibid 142.

9 See New Zealand Law Commission, *Suppressing Names and Evidence*, Issues Paper 13 (2008) 26.

10 Ibid 27.

the recent convictions of social media users in Australia,[11] New Zealand,[12] and the United Kingdom[13] for breaching court instructions, not only illustrates the difficulties of suppressing information in the era of new media, but also demonstrates that appropriate court orders may not be breached with impunity.

A degree of tension between the courts and the media is inevitable when publication of trial information is prohibited or postponed. Factors exacerbating that tension include an apparent propensity for lower courts to issue suppression orders unnecessarily,[14] and a culture of aggressive intrusion, particularly, on the part of television news.[15] Nevertheless, a relationship of interdependence tends to subsist between the courts and the traditional media. New media have disrupted the status quo, challenging both the traditional media's unique news publication capacity and the courts' practical ability to suppress information.

This article focuses on the potential for juries being adversely influenced by digital information extraneous to the trial process, and is structured as follows: relevant principles (open justice, fair trial, freedom of expression, and privacy) are identified; the role of traditional media and the impact of new media on judicial control of information are then outlined; responses to the challenges presented by new media follows, and conclusions are drawn. The article draws on Australasian precedent, in particular, recent developments in New Zealand case law and legislation regarding information suppression.

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[11] See *Hogan v Hinch* [2011] HCA 4 (10 March 2011) in which a bid was rejected to have a conviction for breaching a publication prohibition order declared unconstitutional.

[12] See *Slater* (Unreported, District Court at Auckland, Harvey J, 14 September 2010) and *Slater v Police* (Unreported, High Court of New Zealand, White J, 10 May 2011) in which a blogger was convicted of breaching name suppression orders.

[13] See *Attorney General v Fraill* [2011] EWCA Crim 1570 [Judge CJ, Ouseley and Holroyde JJ 16 June 2011] in which a juror's conviction for contempt of court, by virtue of making contact with an accused via Facebook, was upheld.

[14] See Andrew T Kenyon, 'Not Seeing Justice Done: Suppression Orders in Australian Law and Practice' (2006) 27 *Adelaide Law Review* 279, 280-281; Butler and Rodrick, above n 1, 188; New Zealand Law Commission, above n 8, 5. Due to the variation in relevant judicial powers across States, experience of judicial suppression of information is not uniform. Nevertheless, Australian Press Council, *Annual Report No. 30: Year Ending 30 June 2006* (2006) 16 noted: 'The impression that most observers have is that the courts are issuing suppression orders with increasing frequency in many jurisdictions.'

[15] Simon Mount, 'The Interface between the Media and the Law' [2006] *New Zealand Law Review* 413, 414 observes: 'In terms of news content, the defining characteristic of the past 25 years has been greater willingness, particularly among the electronic media, to push the traditional boundaries.'

II FUNDAMENTAL PRINCIPLES

A *Open Justice and Exceptions*

Public access has long been a definitive characteristic of the common law trial process,[16] and this principle of open justice has been universalised, notably through its incorporation into the *International Covenant on Civil and Political Rights* ('*ICCPR*').[17] Open justice 'requires that proceedings should be held in open court, to which the public and press are admitted'.[18] The principle 'is primarily concerned with the sound functioning of the judicial process in the public interest'.[19] The House of Lords' decision in *Scott v Scott*[20] is generally considered to provide the definitive common law statement on exceptions to the principle of open justice,[21] which 'are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done'.[22] Consequently, 'it must be shown

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16 'The origins of the proceeding which has become the modern criminal trial in Anglo-American justice can be traced back beyond reliable historical records ... What is significant for present purposes is that, throughout its evolution, the trial has been open to all who cared to observe.' See *Richmond Newspapers Inc v Virginia*, 448 US 555, 564 (Burger CJ) (1980).

17 See *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14, which provides that 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. In turn, the *ICCPR* is considered a 'powerful influence' on the courts in developing the common law: Chief Justice J J Spigelman. 'Seen to be Done' (2000) 74 *Australian Law Journal* 290, 292. Claire Baylis, 'Justice Done and Justice Seen to be Done – the Public Administration of Justice' (1991) 21 *Victoria University of Wellington Law Review* 180, 210 describes ratification of the *ICCPR* as giving the 'Publicity Principle' constitutional status in New Zealand.

18 New Zealand Law Commission, above n 8, 3.
See also *Court Suppression and Non-publication Orders Act 2010* (NSW) s 6, which provides: 'In deciding whether to make a suppression order or non-publication order, a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.'

19 *Television New Zealand v Rogers* [2008] 2 NZLR 277, 312 (Supreme Court).

20 *Scott v Scott* [1913] AC 417.

21 See also Hewart CJ's statement 'that justice should not only be done, but should manifestly and undoubtedly be seen to be done' in *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259.

22 *Scott* [1913] AC 417, 437.

that the paramount object of securing that justice is done would really be doubtful of attainment if the order were not made'.[23]

Supplementing the common law,[24] the *Australian Constitution* provides a fundamental grounding both for open justice and its restriction,[25] and numerous statutes at a State level provide for varied exceptions to the general principle.[26] In addition to the rules of contempt,[27] name suppression orders, 'are preventative strategies' issued in order 'to ward off prejudice that might otherwise impair the fairness of a specific trial on account of publicity that might influence the jury'.[28] In New Zealand, a court's powers to restrict open justice in criminal proceedings have been codified,[29] although the broad language in which the discretion is couched renders it ostensibly unfettered.[30] However, since 'the starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly … the prima facie presumption as to reporting is always in favour of openness'.[31] Since criminal proceedings typically distress, embarrass and

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23 Ibid 439.

24 For an outline of the common law grounds for a court sitting in camera, see Butler and Rodrick, above n 1, 166-173.

25 Notably *Australian Constitution*, ch III. Butler and Rodrick observe: 'The precise extent to which these sources of constitutional rights impact on open justice, and restrict legislation derogates from it, is yet to be determined authoritative by the High Court,': Ibid 163. In *Hogan v Hinch* [2011] HCA 4 (10 March 2011), Darryn Hinch, a controversial media personality, challenged the constitutional validity of the since repealed *Serious Sex Offences Monitoring Act 2005* (Vic) under which he was convicted for illegally revealing a sex offender's name. The High Court rejected arguments that the relevant provisions wrongly diminished the integrity of Victorian courts; that Chapter III implied all court proceedings should be public; and the prohibition provisions infringed the implied constitutional guarantee of free political communication.

26 Butler and Rodrick, above n 1, 178. See ibid 178-188 for an analysis of the relevant statutes in different States.

27 On contempt in Australia, see ibid 219-294, and John Burrows and Ursula Cheer, *Media Law in New Zealand* (LexisNexis NZ, 6th ed, 2010) 515-592 for a discussion of relevant New Zealand law.

28 Michael Chesterman, Janet Chan and Shelley Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (Law and Justice Foundation of New South Wales, 2001) 138.

29 *Criminal Justice Act 1985* (NZ) s 138(5).

30 See ibid s 140 and comments in *Lewis* [2000] 3 NZLR 546, 558.

31 *R v Liddell* [1995] 1 NZLR 538, 546-547 (Court of Appeal).

Elizabeth Handsley, 'The Media and Misconceptions about the Judiciary' (2001) 6 *Media and Arts Law Review* 97, 103 notes that 'journalists do not appear typically to see it as their role to provide a balanced

cause other adverse personal consequences, some damage which is 'out of the ordinary and disproportionate to the public interest' or 'very special circumstances',[32] must be present 'other than the normal kind of consequences that flow from being accused of serious offending'.[33] Although it has been suggested that 'a fair trial trumps all',[34] the presumption of innocence is not enough in itself to justify name suppression.[35]

A shift in emphasis from privileging a fair trial to open justice is exemplified in New Zealand's approach to name suppression. In 1975, a short lived amendment to the *Criminal Justice Act 1954* (NZ) gave automatic name suppression unless and until the accused was found guilty of the offences charged.[36] Afterwards, the courts remained endowed with the power to make any order necessary for the administration of justice,[37] including conferral of a total 'black out' order.[38] The *Criminal Justice Act 1985* (NZ) substituted the courts' inherent jurisdiction with a broad statutory power.[39] The Criminal Procedure (Reform and Modernisation) Bill 2010 (NZ), following recommendations of the New Zealand Law Commission,[40] establishes guidelines for courts when suppressing information, which they have previously resisted,[41] and generally limits their discretion. The omnibus Bill is

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or accurate picture'. For a statutory response to reporting unfairness, see *Evidence Act 1929* (SA) s 71B(1), which makes it an offence to fail to report the outcome of a trial with similar prominence, when the accused has been identified during the trial.

32 *Victim X* [2003] 3 NZLR 220, 238 (Court of Appeal).

33 *Jackson v R* [2010] NZCA 506 (10 November 2010) [16]. In *Rowley v Commissioner of Inland Revenue* [2011] NZSC 76 (7 July 2011) the Supreme Court declined an application for leave to appeal based on the argument that two accountants charged with fraud would lose revenue if their names were published, thereby jeopardising their ability to fund their defence.

34 *R v B* [2009] 1 NZLR 293, 296 (Court of Appeal).

35 *Nobilo v New Zealand Police* (Unreported, High Court of New Zealand, Harrison J, 17 August 2007) [11].

36 Mount, above n 15, 439.

37 Baylis, above n 17, 194.

38 See *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 (Court of Appeal).

39 *Criminal Justice Act* s 138(5).

40 New Zealand Law Commission, *Suppressing Names and Evidence* Report 109 (2009) [R3].

41 New Zealand Law Commission, above n 8, 19.

controversial,[42] but the specific information suppression provisions are likely to bring more certainty to the law in this area and further promote the principle of open justice.

B *Freedom of Expression*

As liberal democracies of the British Commonwealth, Australia and New Zealand share the philosophical traditions of the Anglophone Enlightenment that assert individual rights, including freedom of expression. John Milton identified this right in his *Areopagitica* as the 'liberty to know, to utter, and to argue freely, according to conscience'.[43] Freedom of expression is not, then, merely about utterance, it is also about the right to consume information, which has traditionally been generated by newspapers and broadcasters as 'important facilitator[s] of free speech'.[44] In the United States, the Supreme Court has described freedom of thought and speech as 'the matrix, the indispensable condition, of nearly every other form of freedom',[45] and the Supreme Court of Canada has observed:[46]

> Freedom of expression is… one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.

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42 See, for example, Chief Justice of New Zealand, *Criminal Procedure (Reform and Modernisation) Bill* (2011) <http://www.parliament.nz/NR/rdonlyres/3B5775F7-696A-4009-9155-5A95BA81EBF4/187527/49SCJE_EVI_00DBHOH_BILL10451_1_A174996_ChiefJustic.pdf>

43 Quoted by Michael Stapleton, *The Cambridge Guide to English Literature* (Cambridge University Press, 1983) 28.

44 Butler and Rodrick, above n 1, 1.

45 *Palko v Connecticut*, 302 US 319, 326-327 (1937).
In *Handyisde v United Kingdom* [1976] ECHR 5, [49] the European Court of Human Rights said: 'Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man … without which there is no "democratic society".'

46 *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573, [12].

The right to freedom of expression is enshrined in the *ICCPR* to which both Australia and New Zealand are signatories.[47] This fundamental principle has been incorporated into the bills of rights of the Australian Capital Territory,[48] Victoria,[49] and New Zealand.[50] Beyond the State bills of rights, a right to communicate on political and government matters, at least, is derivable from the *Australian Constitution*.[51]

In Canada, the Supreme Court has held that a common law right to order a publication ban must be formulated to reflect the principles of the *Canadian Charter of Rights and Freedoms*.[52] Consequently, in *Dagenais v Canadian Broadcasting Corp* it was held that the common law rules governing name suppression had improperly privileged a right to a fair trial over freedom of expression.[53] Free speech can be seen as a more recently established principle that runs parallel to open justice,[54] which is ancient and 'one of the most pervasive axioms of the administration of justice in common law systems'.[55] However, both principles have the effect of challenging court-imposed restrictions on the flow of information.

The *New Zealand Bill of Rights Act* may not have precipitated a dramatic departure from the common law, as seen in the United Kingdom following *Sunday Times v United Kingdom*,[56] nevertheless New Zealand courts have ineluctably moved towards privileging

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47 See *ICCPR* art 19.

48 See *Human Rights Act 2004* (ACT) s 16.

49 See *Human Rights and Responsibilities Act 2006* (Vic) s 15.

50 See *New Zealand Bill of Rights Act 1990* (NZ) s 14.

51 See *Australian Constitution* ss 7 and 24, as discussed in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 573-574. Unlike in the United States, in Australia and New Zealand, the need is not present 'to constitutionalise common law doctrines'. See Chief Justice J J Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (2006) 29(2) *University of New South Wales Law Journal* 147, 152.

52 *Canada Act 1982* (UK) c 11, sch B pt 1.

53 *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835.

54 Butler and Rodrick, above n 1, 162 describe open justice as 'a manifestation of freedom of expression'. That may be plausible today, but the former appears to have preceded the latter.

55 Spigelman, above n 51, 150.

56 The finding in *Sunday Times v United Kingdom* (1979) 2 EHRR 245 that the common law of contempt was incompatible with *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 10 led to the *Contempt of Court Act 1981* (UK) c 49, which Lloyd LJ observed in *Attorney-General v Newspaper Publishing plc* [1988] Ch 333, 382 effected 'a permanent shift in the balance of public interest away from the protection of the administration of justice and in favour of freedom of speech'.

freedom of expression over judicial restrictions on the flow of information.[57] A similar development is likely in Australia, particularly in those States with bills of rights.[58] Curial secrecy, it seems, is in retreat.[59] However, a further principle, that of privacy, must also be taken into account.

C Privacy

Protecting the privacy of victims of crimes, particularly children and victims of sexual assaults, is the principal motivation for many suppression orders.[60] In these circumstances, arguments that the public has an interest in knowing the identity of, say, a sexually abused child, are unpersuasive.[61] However, while public and media interest typically focuses on the perpetrator of crimes, revelation of the accused's identity can effectively identify the victim. There is some support in New Zealand for privacy as a discrete ground for suppressing the identity of an accused person,[62] not merely to protect the victim. However, the Court of Appeal has held that 'privacy interests of accused persons are generally displaced by the need for a public judicial process while that process runs its course'.[63] Furthermore, the New Zealand Law Commission rejected privacy as a separate ground for name suppression,[64] a recommendation so far followed by Parliament.[65] In short, while prospects exist for broader

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Unlike the United Kingdom, none of the Australian States or New Zealand has codified or restricted common law contempt via legislation.

[57] Compare *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48, 60 (High Court of New Zealand, full court) and *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, 558 (Court of Appeal).

[58] See Butler and Rodrick, above n 1, 162.

[59] Mount, above n 15, 431 notes the 'increasing weight on freedom of expression in New Zealand courts – particularly the higher courts'.

[60] See, for example, *Criminal Law (Sexual Offences) Act 1978* (Qld) s 6 and *Criminal Justice Act* s 139.

[61] According to the New Zealand Press Council: 'In cases involving children and young people editors must demonstrate an exceptional public interest to override the interests of the child or young person.' See New Zealand Press Council, *Statement of Principles* [3] http://www.presscouncil.org.nz/principles_2.php.

[62] See *R v B* [2009] 1 NZLR 293, 304-305 (Court of Appeal).

[63] *R v Mahanga* [2001] 1 NZLR 641, 648.

[64] New Zealand Law Commission, above n 40, 28.

[65] Legal protection of privacy in Western legal systems is basically derived from conceptions of either human dignity or liberty. Thus James Q Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (2003) 113 *Yale Law Journal* 1152, 1161 observes: 'Continental privacy protections are,

dignity-derived privacy concepts developing in the future, at present, privacy is principally relevant to the protection of victims, and not those accused of crimes.

III THE MEDIA

In preceding part, the potentially conflicting principles (open justice, fair trial, freedom of expression and privacy) relevant to judicial control of information were outlined. In this part, practical ways in which these principles affect the media are identified. Furthermore, the impact of the emergence of new media, both on traditional media and the courts, is considered.

A *Traditional Media and the Courts*

Due to their divergent interests – the media's desire for access to information and the courts' concerns for ensuring a fair trial – a degree of tension between the two institutions seems inevitable.[66] Nevertheless, relations between the courts and media may be generally characterised as interdependent, even collaborative.[67] Thus, Justice Frankfurter said:[68]

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at their core, a form of protection of a right to respect and personal dignity', whereas American law 'is much more oriented toward values of liberty'. As Australasian jurisdictions adopt bills of rights, it is possible that concepts of privacy, derived from human dignity, might take a more prominent role in jurisprudence. However, as Mount, above n 15 , 442 notes, the *New Zealand Bill of Rights Act 1990* (NZ) has had an 'expansive influence on press freedom', a development which may be problematic for individual privacy.

[66] In *Dagenais* [1994] 3 SCR 835 [81]–[85], Lamer CJ rejected a 'clash model' of freedom of expression and an accused right to a fair trial, and indicated how a trial could be made fairer by open reporting.

[67] In *Skelton v Family Court at Hamilton* [2007] 3 NZLR 368, 394 (High Court of New Zealand), Justice Heath noted the potential effect the release of information might have on a fair trial but left it to the editorial policy of the media to exercise restraint; otherwise, self-censorship. As William Akel, Steven Price and Robert Stewart, *Media Law: Rapid Change, Recent Developments* (New Zealand Law Society, 2008) 19 note: 'Accepting that the onus of protecting fair trial rights is partly in the hands of media organisations, as opposed to wholly in the hands of the court, is an interesting step. We are yet to see whether those organisations will take up the challenge in other proceedings.'

[68] *Pennekamp v State of Florida*, 328 US 331, 335–6 (1946).

> The freedom of the press, in itself, presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press.

For Lord Diplock, because the media ensure ‘the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy’,[69] and so ‘it is through the media that the courts acquire their credibility and account to the wider community’.[70] Idealising, perhaps, the judiciary-media relationship, Linda Greenhouse says:[71]

> … these two institutions [are], to some degree, partners in a mutual democratic enterprise to which both must acknowledge responsibility. The responsibility of the press is to commit the resources necessary to give the public the most accurate and contextual reporting possible about the Court, its work, its members, and its relationship with other branches of government. The Court’s responsibility is to remove unnecessary obstacles to accomplishing that task.

Since only a small proportion of the population might attend a particular trial, the media are said to act as surrogates for the public,[72] ‘although it must be borne in mind that only those proceedings which are regarded as newsworthy will attract media attention’.[73]

News is ‘perishable’,[74] and so its newsworthiness and consequent commercial value atrophy if publication is delayed. But whether there is a pressing public interest in ‘immediacy compared with deferred reporting’ is not obvious.[75] And so, as Chief Justice Spigelman observes:[76]

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69 *Attorney-General v Leveller Magazine Ltd* [1979] 1 All ER 745, 750.

70 Roderick Campbell, ‘Access to the Court and its Implications’ (1999) 1 *University of Technology, Sydney Law Review* 127, 127.

71 Linda Greenhouse, ‘Telling the Court’s Story: Justice and Journalism at the Supreme Court’ (1996) 105(6) *Yale Law Journal* 1537, 1539.

72 *Liddell* [1995] 1 NZLR 538, 547.

73 Butler and Rodrick, above n 1, 163.

74 *Berryman v Solicitor-General* [2005] 3 NZLR 121, 133 (High Court of New Zealand). Cf Seneca’s ‘veritas odit moras’ (truth abhors delay).

75 *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563, 574 (Court of Appeal).

76 *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 528 (11 April 2005).

> When the media come before the Court invoking high-minded principles of freedom of speech, freedom of the press or the principle of open justice, it is always salutary to bear in mind the commercial interest the media has in maximising its access to private information about individuals.

Analogous to the classical agency question,[77] whose interests, it may be asked, do the media pursue in promoting open justice; their own or those of the public? Without suggesting a causative connection, the trend towards privileging open justice over secrecy runs parallel with a greater concentration of corporate media power and an increasing aggressiveness in reporting, particularly on the part of television news.[78] New media have emerged in the context of Web 2.0 technology to disrupt this already complex field.[79]

B *New Media*

Contemporary electronic systems 'present a new means of communication that is so dramatically different from print and print-associated technologies that a new paradigm is now with us'.[80] These developments in digital communication technology have enabled the emergence of new media. Principal features of new media include new patterns of organisation and production ('wider realignments and integrations in media culture, industry, economy, access, ownership, control and regulation'), computer-mediated communications ('email, chat rooms, avatar-based communication forums, voice image transmissions, the World Wide Web, blogs etc., social networking sites, and mobile telephony') and new ways of distributing and consuming ('media texts characterised by interactivity and hypertextual formats').[81] Features of new media that are particularly relevant to judicial control of information include: the ability of anyone to publish; a culture of licence; and the free and continuous availability of new media outputs.

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[77] See, for example, Reinier Kraakman, John Armour and Henry Hansmann, 'Agency Problems, Legal Strategies, and Enforcement' (Discussion Paper No 631, Harvard Law School John M Olin Center for Law, Economics and Business 2009) http://lsr.nellco.org/harvard_olin/631.

[78] See Mount, above n 15, 413-414.

[79] For the differences between Web 1.0 and Web 2.0, see Tim O'Reilly, *What is Web 2.0*, O'Reilly Media (2005) <http://oreilly.com/web2/archive/what-is-web-20.html>.

[80] Justice David Harvey, 'Privacy and New Technologies' in Steven Penk and Rosemary Tobin (eds), *Privacy Law in New Zealand* (Thomson Reuters, 2010) 321, 322.

[81] Martin Lister et al, *New Media: A Critical Introduction* (Routledge, 2nd ed, 2009) 13.

1 *Everyone Can Publish*

Universal access to publishing tools breaks down barriers to entry. 'The internet allows everyone to be a publisher. Anyone who has an opinion can post it on the internet'.[82] In terms of mass communication, a blog is no different from traditional media: 'It fulfils the concept of 'publishing' and 'publication'. It makes information available to a wider audience'.[83] However, unlike journalists, a blogger needs no professional competence, is unlikely to be subject to any form of editorial control or commercial pressures, or bound by any ethical code other than one self-imposed by the blogger. Typically, she will publish her work immediately. Thus, Anupam Chander observes:[84]

> Where earlier courts were likely to defer to the editorial decisions of news intermediaries to determine whether information was truly newsworthy, in the age of the Internet, there may be no editorial function before information is released to the public at large. Where the costs of newsprint and the limited space available in a limited set of papers once required the careful exercise of discretion in decisions about what to publish, blogs are available for free to self-appointed editors who do not face such constraints. Blog worthiness is not the same as newsworthiness.

2 *Licence of Expression*

Traditional media normally retain their print or broadcast character when they publish online: for example, the BBC and *The New York Times* do not jettison balance and temperance when their websites become the medium of communication. However, much new media discourse is 'vehement' and 'caustic' and contains both 'factual error' and 'defamatory content'.[85]

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82 *Slater* (Unreported, District Court at Auckland, Harvey J, 14 September 2010) [11].

83 Ibid [15].

84 Anupam Chander, 'Youthful Indiscretion in an Internet Age' in Saul Levmore and Martha C Nussbaum (eds), *The Offensive Internet: Privacy, Speech and Reputation* (Harvard University Press, 2010) 124, 131.

85 Stanley Fish, 'Anonymity and the Dark Side of the Internet' on Stanley Fish, *Opinionator* (3 January 2011) <http://opinionator.blogs.nytimes.com/2011/01/03/anonymity-and-the-dark-side-of-the-internet/?nl=todaysheadlines&emc=thab1>

Online anonymity may be 'something of an internet myth',[86] but the Internet does manifest an anonymity problem,[87] particularly with regard to blogging.[88] Not only is the language used commonly offensive, there is a strong belief among participants that any information should be distributed without restraint;[89] that the norms of terrestrial society should not apply to the dematerialised world.[90] In this context, court-imposed restrictions on information low may be contrary to the expectations of new media actors.

Within voluntary, closed communities of discourse, absolute freedom of expression may constitute a reasonable expectation, but many forms of online expression are open to everyone. For Geoffrey Stone, the nature of the utterance is of principal importance, rather than the method of communication; he argues:[91]

> If speech is sufficiently valuable to merit [constitutional] protection when it is spoken over a backyard fence or published in a local newspaper, then (at least presumptively) it is also sufficiently valuable to be protected when it is disseminated on the Internet.

However, whereas the sphere of 'close communication' between friends and family should and generally does fall outside legal purview, 'open communication' to the entire world is worthy of legal attention. Disclosing an accused's name at a dinner party is qualitatively

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86 *Slater* (Unreported, District Court at Auckland, Harvey J, 14 September 2010) [93].

87 See, generally, Saul Levmore, 'The Internet's Anonymity Problem', in Saul Levmore and Martha C Nussbaum (eds), *The Offensive Internet: Privacy, Speech and Reputation* (Harvard University Press, 2010) 50, 50-67.

88 Martha C Nussbaum, 'Objectification and Internet Misogyny' in Saul Levmore and Martha C Nussbaum (eds), *The Offensive Internet: Privacy, Speech and Reputation* (Harvard University Press, 2010) 68, 78-79.

89 For example, Anonymous, a group of online activists for the free flow of information, is thought to have conducted a denial-of-service attack against the New Zealand Department of Internal Affairs websites because the Department had 'begun offering internet providers software that lets them block access to a list of websites known to host child pornography'. See Tom Pullar-Strecker, 'Internal Affairs Websites Knocked out in Cyber Attack' *The Dominion Post* (Wellington) A3.

90 Margaret Wertheim, 'The Pearly Gates of Cyberspace' in Nan Elin (ed), *Architecture of Fear* (Princeton Architectural Press, 1997) 295, 296 observes that, with quasi-religious zeal, 'today's proselytizers of cyberspace proffer their domain as an ideal 'above' and 'beyond' the problems of the material world'.

91 Geoffrey R Stone, 'Privacy, the First Amendment, and the Internet' in Saul Levmore and Martha C Nussbaum (eds), *The Offensive Internet: Privacy, Speech and Reputation* (Harvard University Press, 2010) 174, 175.

different from posting the name online.[92] A blog may, in practice, have fewer readers than guests around a dinner table, but the potential audience is measured in millions of people. As the *Chambers* case showed,[93] and, provided a sufficiently accurate search query is conducted,[94] retrievable and open for reading by strangers. Some tweets or blogs, attracting no readers, constitute an utterance without audience, but, because they are open communications, the audience cannot be predicted, they may 'go viral'.

3 *Availability of Outputs*

In addition to their open nature, new media outputs are permanent artefacts that remain searchable long after they are published.[95] Furthermore, they are often interactive and additive,[96] so that an initial publication may be incrementally supplemented, with each contribution to the composite output traceable and permanent. For example, in *Slater*, Justice Harvey observed how 'a blog occupies a continuum of comment where a particular posting or item may start on one day but may continue and develop over a period of time'.[97] Blogs may, then, be distinguished from both static webpages and traditional media. These qualities make new media more challenging from a perspective of courtroom secrecy and so, perhaps, deserving of special, restrictive treatment.

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92 *Slater* (Unreported, District Court at Auckland, Harvey J, 14 September 2010) [134].

93 Paul Chambers, a junior accountant, was prosecuted under anti-terrorism laws for apparently threatening to blow up Robin Hood Airport, East Yorkshire, in a tweet to his followers. The message was retrieved by the airport's security manager searching the Internet for references to the airport. For an account, see Lauren Davis, 'Paul Chambers Loses Appeal in Twitter Joke Trial' on *Index on Censorship* (11 November 2010) http://www.indexoncensorship.org/2010/11/paul-chambers-lose-appeal-in-twitter-joke-trial/.

94 Searches of this nature are problematic because a mass communication medium is used to convey a message to a select audience of 'followers'. The analogy might be drawn to an eavesdropper on a dinner party disclosure, if it were not for that fact that current technology enables anyone with a modem to eavesdrop on the 'conversation'.

95 As Harvey, above n 81, 324 observes: 'The ability to locate information using search engines returns us to the print-based properties of fixity and preservation, and also enhances the digital property of "the document that does not die".'

96 *Slater* (Unreported, District Court at Auckland, Harvey J, 14 September 2010) [12].

97 Ibid [13].

C *New v Traditional Media*

Free media are vital to democratic societies because their freedom endows them with the power to hold government to account. 'Power in a democracy implies responsibility in its exercise. No institution in a democracy, either governmental or private, can have absolute power.'[98] And yet, traditional media have been described as 'the last significant area of arbitrary public power',[99] and are typically associated with concentrations of economic and persuasive capacity in a small number of corporate hands.[100] They possess 'immense power' to 'shape people's understandings and therefore their opinions'.[101] For lawmakers and courts, traditional media are at once potent allies and potential adversaries, but, friend or foe, are readily identifiable for legal action. In contrast, new media actors are commonly individuals, albeit often collaborating with many others,[102] and are essentially controllable only to the extent that their access to social media can be restricted.

Arising from their presumed role as proxy for the public in open justice, traditional media are commonly granted privileges in the judicial process, whether formally[103] or via the accommodating relationships that often exist between reporters, police and prosecutors.[104] Some bloggers may be accepted into the mainstream;[105] otherwise, new media actors are considered members of the public and denied the privileges accorded to traditional media. Such privileging and exclusion may exacerbate an already antagonistic relationship between

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[98] *Pennekamp v State of Florida*, 328 US 331, 335–6 (1946).

[99] *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 725.

[100] See, generally, Erik Barnouw et al, *Conglomerates and the Media* (New Press, 1998).

[101] Handsley, above n 31, 103.

[102] On the socially valuable potential of online collaboration though social media, see, for example, Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, 2006); Clay Shirky, *Here Comes Everybody: the Power of Organizing without Organizations* (Penguin Press, 2008); Clay Shirky, *Cognitive Surplus: Creativity and Generosity in a Connected Age* (Penguin Press, 2010).

[103] See, for example, *Criminal Justice Act* s 138(3), which provides that (undefined) accredited news media reporters may normally remain when a judge orders a court to be cleared.

[104] See, generally, Richard V Ericson, Patricia M Baranek and Janet B L Chan, *Negotiating Control: A Study of News Sources* (University of Toronto Press, 1989).

[105] For example, the White House has accredited qualifying bloggers since 2005. See Laura Freschi, 'World Bank to Bloggers: Drop Dead', on Laura Freschi, *Aid Watch* (8 April 2011) http://aidwatchers.com/2011/04/world-bank-to-bloggers-drop-dead/.

traditional and new media.[106] Contemporary information and communications systems 'create new forms of contention between ordinary individuals, who now possess tremendous new opportunities to communicate and create, and the information industries, who want to expand markets and maximise profits from the same technologies'.[107] 'Bloggers both 'route' around the traditional media and 'glom' on … through routing around and glomming on to mass media, blogs interact with mass media and affect and influence it'.[108]

A complex dynamic exists between new and traditional media, and all branches of government should tread carefully here: the potential to privilege corporate media over individuals is real and may unjustifiable. Individuals are no longer passive consumers of traditional media products; they can themselves actively contribute to newsgathering and publication, and freedom of expression mutates in step. The role of new media in civil society is far from settled, but that role is increasingly significant, and cannot be ignored.[109] Despite their negative features, new media have the potential for constituting an important element of the Fourth Estate,[110] about which Thomas Carlyle said:[111]

> Whoever can speak, speaking now to the whole nation, becomes a power, a branch of government, with inalienable weight in law-making, in all acts of authority. It matters not what rank he has, what revenues or garnitures: the requisite thing is, that he have a tongue which others will listen to; this and nothing more is requisite.

It is inevitable that some, perhaps a significant proportion of, new media actors will always constitute an anarchic or antinomial fringe, but, as judges and their support staff, such as

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[106] See, for example, Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Content* (Penguin Press, 2004) and James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press, 2008).

[107] Jack M Balkin, 'How Rights Change: Freedom of Speech in the Digital Era' (2004) 26 *Sydney Law Review* 5, 6.

[108] Ibid 8. 'Glom', from Scots dialect, means to add on to.

[109] On the (contested) role of social media in popular uprisings, see, for example, Malcolm Gladwell, 'Small Change: Why the Revolution Will Not Be Tweeted' *The New Yorker* (online) 4 October 2010 http://www.newyorker.com/reporting/2010/10/04/101004fa_fact_gladwell.

[110] '[Edmund] Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all.' See Thomas Carlyle, *Sartor Resartus and on Heroes* (JM Dent, 1908) 392.

[111] Ibid 392-393.

justice ministry communications advisers,[112] have in recent decades engaged with traditional media,[113] so appropriate engagement with new media should also be considered.

IV RESPONSES TO NEW MEDIA

The Courts can embrace the new media technologies in order to improve open justice. The Supreme Court of Ohio, for example, 'uses streaming video technology to broadcast all oral arguments and select Court programs and events live on the Internet' and also provides searchable audio and video archives.[114] Daniel Stepniak argues that 'open justice … cannot be said to be satisfied by merely allowing members of the public and the media to attend hearings';[115] indeed, 'dissemination of information regarding court proceedings may be said to be too important to be left entirely to the media'.[116] However, even if courts do 'disintermediate' the flow of information to the public, some information must still be kept secret to ensure juries make their decisions in accordance with the evidence presented to them in court. For judges, 'this is familiar territory, reflective of long established common law principles',[117] but it is territory made more difficult to traverse by the emergence of new media which enable jurors to access information in novel ways, but also to actively participate in social media.

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112 See Butler and Rodrick, above n 1, 216 on the role of court appointed Public Information Officers.

113 As the Court of Appeal observed in *R v Thompson* [2005] 3 NZLR 577, [39] of New Zealand practice: 'Television in the courtroom is now a regular feature of the juridical landscape.'

114 See Supreme Court of Ohio, *The Supreme Court of Ohio and the Ohio Judicial System* http://www.sconet.state.oh.us/videostream/.

115 Daniel Stepniak, 'Court TV – Coming to an Internet Browser Near You (Update, Developments and Current Issues)' (Paper presented at the 23rd AIJA Annual Conference on Technology, Communication, Innovation, Museum of New Zealand, Wellington, 7-9 October 2005) 3 http://www.aija.org.au/ac05/presentations/Stepniak.pdf.

116 Ibid 19. In this regard, Stepniak argues: the media lacks 'interest in providing in depth coverage of a range of proceedings' and 'resources to cover all the cases about which arguably the public ought to be informed'; it is unreasonable to expect 'the mass media to act as a de facto reporting service for courts' or 'to adequately and correctly report on cases which are often lengthy, highly specialised, complex and particularly in view of the decreasing reliance on oral evidence, difficult to follow, without court assistance and information,': Ibid 19-20.

117 *Attorney General v Fraill* [2011] EWCA Crim 1570 [Judge CJ, Ouseley and Holroyde JJ 16 June 2011], [27].

A The Problems with Juries

If, unlike laypersons, judges and magistrates are immune to the influence of extraneous evidence, having jurors decide the facts of criminal cases appears to jeopardises the administration of justice. Involving juries in fewer cases reduces the risk of an unfair trial occurring. Taken to its logical conclusion, if there were no jury trials, there would be no conflict between the imperatives of open justice, freedom of expression and a fair trial. Of course, the right to be heard by a jury of one's peers is central to the common law trial system.[118] It seems uncontroversial that petty matters[119] or highly complex fraud cases should be heard by judges only since the expectation of a jury trial is outweighed by 'the right of those 12 citizens not to be diverted from the pursuit of their lives for an unreasonably long period of time'.[120] However:[121]

> As a matter of general principle, it is most important to use juries in those trials where the matters alleged are most serious, most grievously offend community values, and most affect the rights of citizens in a free and liberal democratic society.

It seems implausible that juries might be eliminated from such trials if loyalty to common law traditions is to be maintained. And it is these trials that attract most public interest, even prurience.

Once juries are charged with deciding issues of fact, various means can be used to ensure a fair trial. In contrast to other common law systems, the 'United States approach is to

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118 See Theodore F T Plucknett, *A Concise History of the Common Law* (The Lawbook Exchange, 5th ed, 2001) 106-138 on the development of the jury system.

119 However, deciding which cases are serious enough to warrant jury trial may controversial. Broadly, in terms of Criminal Procedure (Reform and Modernisation) Bill cl 48, the right to a trial by jury will apply only when the penalty for the offence is or includes imprisonment for more than three years (currently three months). This requires an amendment of *New Zealand Bill of Rights Act* s 24(e) and 'would be the first amendment placing restrictions on any of the rights and freedoms in the NZBORA since its enactment in 1990'. See Jonathan Temm, *Criminal Procedure (Reform and Modernisation) Bill* (22 February 2011) New Zealand Law Society http://www.lawsociety.org.nz/__data/assets/pdf_file/0019/35146/criminal-procedure_-reform-modernisation.pdf.

120 New Zealand Law Commission, *Juries in Criminal Trials*, Report 69 (2001) 2.

121 Ibid 52.

control the jury, rather than the publicity',[122] so that voir dire is used in what may be an intensive selection process, and, once empanelled, juries are commonly sequestrated to immunise them from external influences.[123] Australasian processes tend to seek control of information flowing to jurors, although this inevitably requires some control of jurors themselves. Thus New South Wales, Queensland and Victoria have criminalised unauthorised investigations by jurors.[124]

The features of a jury trial that serve to ensure its integrity include the rules of evidence and jurors' determining their verdict solely on the evidence adduced during the trial.[125] Common law courts 'have developed over many centuries a series of elaborate procedures and rules for channelling, and in some respects restricting, the flow of information made available to jurors' which 'ensure that jurors decide the case upon the evidence that is allowed to be adduced in the trial and which has been tested in accordance with the common law mechanism of trial'.[126] From a layperson's perspective, these restrictive rules may constitute a counter-intuitive way of searching for the truth. Indeed, research has shown that

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122 Spigelman, above n 51, 162.

123 For a comparison of Australian and United States practices, see Chesterman, above n 6, 109-147.

124 See *Jury Act 1977* (NSW) s 68C, *Jury Act 1995* (Qld) s 69A and *Juries Act 2000* (Vic) s 78A respectively. *Jury Act 1995* (Qld) s 69A was introduced in the aftermath of the concerns generated by CrimeNet website. *Jury Act 1997* (NSW) s 68C was introduced after the decisions in *R v K* [2003] NSWCCA 406 (23 December 2003) and *R v Skaf* [2004] NSWCCA 37 (6 May 2004). See also Justice Virginia Bell, 'How to Preserve the Integrity of Jury Trials in a Mass Media Age' *Supreme and Federal Courts Judges' Conference* January 2005 http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwPrint1/SCO_speech_bell_270105.

125 See *R v Connor, R v Mirza* [2004] 1 All ER 925 where their Lordships made various relevant observations, including: 'It is obvious that jurors come to the jury box with a background of ideas and social and educational influence which may affect what they do and it is quite impossible to assume that either they or even judges can be utterly devoid of the influence of outside ideas' (Lord Slynn, 945); 'The system as a whole does what it can, within the limits that are humanly possible, to ensure that juries will indeed cast aside their prejudices and reach a true verdict according to the evidence' (Lord Hope, 946); 'The jurors … are specifically required not to discuss the case with others or to be influenced by anything they hear or read outside the courtroom.' (Lord Hobhouse, 968); and 'the jurors are expected – perhaps for the only time in their lives – to decide the issues without prejudice' (Lord Rodger, 974).

126 Chief Justice J J Spigelman, 'The Internet and the Right to a Fair Trial' (Speech delivered at the 6th World Wide Common Law Judiciary Conference, Washington DC, 1 June 2005) www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman010605, See also Bell, above n 128.

'juries simply did not seem to appreciate the importance, or did not understand the logic, of restricting themselves to the information presented by the parties and the judge'.[127] The possibility has always existed, then, that, in a search for the truth, jurors might carry out their own research beyond the admissible evidence adduced during the trial.[128] It is incumbent on judges to instruct and, ideally, to explain to juries why they should restrict their deliberations to the evidence presented to them in court. Empirical research indicates that jury decision-making is characterised by a very high level of conscientiousness in following the judge's instructions and in endeavouring to understand the law and to apply it to the facts fairly,[129] but jurors, particularly younger panel members, may nevertheless seek out publicity about the trial and conduct their own investigations.[130]

'In terms of risk to a fair trial, the potential impact of the Internet on criminal proceedings therefore depends on the likely conduct of jurors. If information is available on the Internet but jurors do not conduct their own investigations, there is no greater risk of prejudice than with traditional media reports.'[131] However, 'the access that the Internet affords to information across a range of specialist fields makes the risk more likely to eventuate'.[132] 'The reality is that there is no simple and fool-proof way for a trial judge to address the availability on the internet of prejudicial material about the defendant'.[133]

Information prejudicial to a fair trial has always been available to curious and disobedient jurors. 'The internet is only the most recent technological challenge requiring a new course of pragmatic adaptation of our procedures'.[134] Internet searches have been likened to research conducted in a State Library for newspaper articles,[135] but access to

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127 Warren Young, Neil Cameron and Yvette Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings* Preliminary Paper 37 Vol 2 (New Zealand Law Commission, 1999) 59.

128 See, for example, *Skaf* [2004] NSWCCA 37 (6 May 2004) where two jurors carried out their own investigation of the crime scene.

129 Young et al, above n 131, 53.

130 See, for example, Richard Ackland, 'Courts in Lag Behind Digital Wave' *The Sydney Morning Herald* (online version) 4 March 2011 http://www.smh.com.au/opinion/society-and-culture/courts-in-a-lag-behind-contemptible-digital-wave-20110303-1bgam.html.

131 New Zealand Law Commission, above n 8, 178.

132 Bell, above n 128.

133 *R v B* [2009] 1 NZLR 293, 311 (Court of Appeal).

134 Spigelman, above n 130.

135 *News Digital Media & Fairfax Digital Ltd v Mokbel* [2010] VSCA 51 (18 March 2010) reported by Kate Hagan, 'Media Win Historical Material Appeal' *The Age* (online), 19 March 2011

information before and after the emergence of Google as the currently dominant search engine, and Wikipedia as an unprecedented centralised repository of information, is qualitatively, indeed, paradigmatically different from the past.[136] As Chief Justice Spigelman, writing extra-curially, has observed:[137]

> The internet poses a challenge to the ability to ensure that a fair trial has occurred and renders less efficacious some of the mechanisms hitherto adopted to insulate the tribunal of fact from available information about the accused and witnesses or about the events. The internet opens up the prospects of new forms of misbehaviour by jurors during the course of the trial, by directly accessing the internet to acquire information about the events, about an accused or a witness, or for the purpose of checking expert evidence.

Not only can jurors access information with a speed and to a depth previously unimaginable, new media tools, such as blogs, Twitter and Facebook, enable them to publish their thoughts and conclusions. Nevertheless, whatever technology and temptations are available to jurors, the pertinent issue remains whether or not they obey the instructions of the court.

B *Judicial Responses*

Empirical research conducted in Australasia indicates that, although jurors are unlikely to recall and thus be prejudiced by the detail of pre-trial publicity, members of the public become sensitised to publicity about a case when they are empanelled.[138] However, the impact of media publicity both before and during the trial is minimal,[139] with jurors being able to recognise when media coverage of their trial is inaccurate and discount it.[140] These observations have persuaded courts, particularly in New Zealand, that the controls on media

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http://www.theage.com.au/victoria/media-win-historical-material-appeal-20100318-qict.html. However, Googling for information can be seen as 'revolutionarily different' from accessing information via 'a number of levels of complexity' at a library. See Harvey, above, n 81, 324.

136 See the description of web searching at the turn of the millennium in *Beggs v HM Advocate* [2010] HCJAC 27 (9 March 2010) [39] (Lord Eassie).

137 Spigelman, above n 130.

138 Chesterman et al, above n 28, 204.

139 Young et al, above n 131, 59-62.

140 Ibid 61.

are sufficient to protect jurors and ensure a fair trial.[141] However, these findings are contradicted by significantly more comprehensive American research. Indeed, a meta-analysis of 44 empirical studies, involving 5,755 subjects concluded that 'juror pre-trial publicity has a significant impact of juror decision making'.[142] In the light of conflicting findings or lack of relevant data, 'judges must continue to rely to some extent on assumptions and intuition in deciding where to draw the line between the competing values of freedom of expression and the right to a fair trial'.[143] Empirical research may be valuable, but it will always be open to judges to distinguish the facts of the case in hand from the studies,[144] and to assess the risk of prejudice in a particular trial by considering the nature of the information[145] and the persuasiveness of directions to the jury.[146]

Suppression of information orders are not generally aimed at curbing utterance; they are principally concerned with how, often for a finite period of time, a select audience of jurors and potential jury members might process information. In this context, transient information transmitted by, say, a radio bulletin might therefore present less of a risk of influencing a future jury than information that is stored and is retrievable. Consequently, in *Police v PIK*,[147] which involved a youth accused of murder, Justice Harvey permitted contemporaneous broadcasts via traditional media but suppressed 'publication of any accounts of what took place in Court on the internet by way of on-line news publication or stored video, which can be replayed or accessed at a later stage'.[148] Similarly, in *Television*

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141 See *R v Burns (Travis) (No 2)* [2002] 1 NZLR 410, 413 (Court of Appeal) and *R v Burns (Travis)* [2002] 1 NZLR 387, 396 (High Court of New Zealand).

142 Nancy Mehrkans Steblay, Jasmina Beserevic, Solomon M Fulero and Bella Jiminez-Lorente, 'The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review' (1999) 23(2) *Law and Behavior* 219, 230.

143 I L M Richardson, 'Assumptions Underlying Legal Rules' (1999) *New Zealand Law Review* 149, 151.

144 *Burns (Travis)* [2002] 1 NZLR 387, 408.

145 In *R v K* [2003] NSWCCA 406, [54] (23 December 2003) a retrial was ordered after it was shown that certain jurors had conducted searches on the Internet, and the relevant information was considered sufficiently prejudicial. In *R v McLachlan* [2000] VSC 215, [21] (24 May 2000) the 'real risk' of jurors accessing prejudicial information was sufficient to vitiate a fair trial.

146 In *R v Long; ex parte A-G* (Qld) [2003] QCA 77, [8] (28 February 2003) the trial judge's direction to the jury to limit their consideration to evidence presented to the court, and the lack of evidence that any juror had, in fact, conducted an Internet search were found sufficient to ensure a fair trial. See also *Mayer v Serious Fraud Office* [2010] NZCA 511, [9] (12 November 2010) for confidence in jury directions.

147 *Police v PIK* (Youth Court at Manukau, Harvey J, 25 and 26 August 2008) [4].

148 Ibid.

Corporation Pty Ltd v DPP,[149] the court sought 'pinpoint' information suppression by restricting certain forms of online publication.[150] Justice Harvey's decision in the former case attracted the opprobrium of overseas bloggers even though the judge had sought 'to give the proceedings up to *more* scrutiny rather than less'.[151] His aim was to prevent access to searchable Internet files that might adversely influence a specific jury, not to inhibit free expression. However, the decision also had the effect of privileging corporate media, which have a range of publishing options at their disposal, over new media.

In *News Digital Media & Fairfax Digital Ltd v Mokbel & Director of Public Prosecutions*,[152] the Victorian Court of Appeal adopted a different approach. The Supreme Court had ordered Fairfax Digital and News Digital Media to remove from their websites any articles, including some published years previously, containing reference to the accused before his pending trials. However, the majority found the order was unnecessary because the articles 'were not presented in such a way as to be forced upon a visitor to the site' and so potential jurors were unlikely to inadvertently come across the material.[153] The judges also

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[149] In *General Television Corporation Pty Ltd v DPP* [2008] VSCA 49, [69]-[73] (26 March 2008), the Victorian Court of Appeal prohibited General Television 'from publishing on the internet in Victoria the 'Family Tree website' – inside the Underbelly [a television series chronicling gang activity in Melbourne], which looks at the evolving relationships between the key characters' until after the trial and verdict'. The decision was justified on the grounds of the 'serious risk of prejudice' that 'arises by reason of the contemporaneous and graphic nature of Underbelly being available to jurors immediately before and during the conduct of the trial'.

[150] However, since 'more than 40 suppression orders had been made in relation to Mokbel's trial', the overall effect may have similar to a blanket order. See Nicola Shaver, 'Justice Denied by Suppression Order Secrecy' *The Australian* (online version) 23 April 2011 < http://www.theaustralian.com.au/national-affairs/commentary/justice-denied-by-suppression-order-secrecy/story-e6frgd0x-1226043488461>.

[151] Burrows and Cheer, above n 9, 467. Within 24 hours of Justice Harvey's initial ruling in *PIK* (Youth Court at Manukau, Harvey J, 25 and 26 August 2008), an online search for the suppressed names returned 95 results. See New Zealand Law Commission, above n 8, 61 and Amy Elvidge, *Trying Times: the Right to a Fair Trial in the Changing Media Environment* (LLB Thesis, University of Otago, 2008), 35 fn 190 for details of the methods used to breach the name suppression order.

[152] *News Digital Media & Fairfax Digital Ltd v Mokbel* [2010] VSCA 51 (18 March 2010) is subject to restricted reporting. Information is derived from Hagan, above n 139. Justice Buchanan dissented, finding the Supreme Court was warranted in making the order to counteract a risk of prejudice to the accused person right to a fair trial.

[153] Ibid.

noted that articles posted on the newspaper websites were often copied on to websites in Australia and overseas, making their removal from the newspapers' websites redundant. Chief Justice Warren and Justice Byrne reportedly said: 'A more fundamental reason is that the information is available only for those persons who actually search for it.'[154] It was further noted that a Google search on the accused produced 522,000 hits.[155] This observation indicates the futility of seeking to suppress information, but may also intimate the idea that 'the free trade of ideas' establishes 'the best test of truth'.[156]

C *Policy Responses*

As noted,[157] New South Wales, Queensland and Victoria have enacted legislation to criminalise juror investigations. Other policy responses include requiring new media to adhere to the codes of ethics that govern traditional media, making internet service providers (ISPs) responsible for their users' breaches of suppression orders, and providing more information about suppression orders.

1 *Codes of Ethics*

New Zealand's Minister of Justice has argued that cyberspace is 'a bit of a Wild West … because bloggers and online publishers are not subject to any form of regulation or professional or ethical standards', and has charged the Law Commission with investigating whether new media should be subject to the codes of ethics of traditional media.[158]

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[154] Ibid.

[155] A search of Google pages from Australia for 'Tony Mokbel', conducted on 23 March 2011, provided a far more modest 14,300 results.

[156] See *Abrams v United States* 250 US 616, 630 (1919) (Holmes J, dissenting; Brandeis, J, concurring). For critique of the marketplace of ideas proposition, see Stanley Ingber, 'The Marketplace of Ideas: A Legitimizing Myth' (1984) 1 *Duke Law Journal* 1, 1-91. Candida Harris, Judith Rowbotham and Kim Stevenson, 'Truth, Law and Hate in the Virtual Marketplace of Ideas: Perspectives on the Regulation of Internet Content' (2009) 18 *Information & Communications Technology Law* 155, 155-184. Chaim Kaufmann, 'Threat Inflation and the Failure of the Marketplace of Ideas: The Selling of the Iraq War' (2004) 29 *International Security* 5, 5-48.

[157] See, above n 128.

[158] Simon Power, 'Law Commission to Review Regulatory Gaps around 'New Media'' (Media release), 14 October 2010. The Law Commission expects to report back in late 2011.

Broadcasters are subject to Codes of Broadcasting Practice issued by the Broadcasting Standards Authority, an independent Crown entity,[159] pursuant to the *Broadcasting Act 1989* (NZ). Fundamental principles include 'good taste and decency' and balance of controversial issues of public importance.[160] The industry funded New Zealand Press Council is 'an industry self-regulatory body and provides an independent forum for resolving complaints about the press'.[161] One of the Press Council's basic principles is: 'Publishers should be bound at all times by accuracy, fairness and balance … In articles of controversy or disagreement, a fair voice must be given to the opposition view'.[162]

Besides the improbability of either the Broadcasting Standards Authority or the Press Council having the capacity to enlist and regulate numerous bloggers,[163] unlike journalists, many bloggers are partisan and do not present themselves otherwise. Expecting them to show the balance of national news organisations is unreasonable. Conversely, some bloggers may demonstrate similar ethical behaviour to traditional media (many bloggers are also professional journalists) and therefore be willing to trade-off freedom form regulation for accreditation. However, the more pertinent question is not how to implement a seemingly impracticable policy, but whether the assumption that cyberspace (from the perspective of administration of justice) really is a 'Wild West'. The fact that bloggers, such as Darryn Hinch and Cameron Slater, were successfully prosecuted and were not emulated in breaking the law by the countless other social media users who could have done so, indicates a willingness to comply with existing norms by the overwhelming majority of bloggers.

The Internet may, in certain circumstances, behave as a self-regulating ethical system.[164] However, long before the advent of the Internet, dissidents, such as distributors of

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159 Independent Crown entities are legislatively established bodies corporate which are generally independent of government policy. See *Crown Entities Act 2004* (NZ) s 7(1)(a).

160 *Broadcasting Act 1989* (NZ) s 4(1).

161 New Zealand Press Council, *The New Zealand Press Council* (2011) http://www.presscouncil.org.nz/index.php.

162 New Zealand Press Council, *Statement of Principles* (2011) [1] http://www.presscouncil.org.nz/principles_2.php.

163 According to Allan Bell, Charles Crothers, Ian Goodwin, Karishma Kripalani, Kevin Sherman and Philippa Smith, *The Internet in New Zealand 2007 Final Report* (The Institute of Culture, Discourse and Communication, AUT University, 2008) i, one in ten New Zealand Internet users keeps a blog. Presumably the countless other users of social media should also be regulated.

164 See for example, Jimmy Wales, 'The Web Can Police Itself Well', *The Guardian Weekly* (London), 11 March 2011, 24 on how, because plagiarists have abused Wikipedia, PlagiPedia and other sites have

samizdat publications,[165] resisted governmental controls: new media tools amplify the possibilities for dissent exponentially in democracies as much as tyrannies. Since most bloggers behave responsibly, it seems needlessly provocative to seek their freedom of expression. As recent case law indicates, the recalcitrant few can be dealt with under existing laws and powers.

2 *Criminalising Internet service providers*

Akin to the problem of file sharing,[166] if the people who actual breach court orders cannot be controlled, government may seek to make responsible those who allow the perpetrators to participate in online activity. Thus, under the Criminal Procedure (Reform and Modernisation) Bill as introduced, it would have become an offence to publish 'any name, identifying information, or other information in breach of a suppression order',[167] with an offender being liable to up to six months imprisonment, if an individual, and a fine of up to NZ$100,000, if a body corporate.[168] This provision would have covered ISPs,[169] which stored material breaching a suppression order, if they knew or had 'reason to believe that the

pooled resources to 'out' plagiarists. Wales, the founder of Wikipedia, concludes 'the internet is capable of correcting its own follies'. See also CrimeNet's attempts to stay within the law. CrimeNet currently charges a minimum search fee of $11 and requires users to undertake 'To not search for details of any person whilst I am a juror in a trial of that person, in a jurisdiction that prohibits such information'. See CrimeNet - Opening a new account <http://www.crimenet.org/>. On robot search programmes that might retrieve suppressed information and the Robot Exclusion Protocol, see Graham Greenleaf, 'Creating Commons by Friendly Appropriation' (2007) 4 *SCRIPT-ed* 117, 122-24 and 130-131 http://www.law.ed.ac.uk/ahrc/script-ed/vol4-1/greenleaf.pdf.

165 See, for example, Martin Machovec, 'The Types and Functions of Samizdat Publications in Czechoslovakia, 1948-1989' (2009) 30 *Poetics Today* 1, 1-26.

166 But see Daniel J Solove, 'Speech, Privacy, and Reputation on the Internet' in Saul Levmore and Martha C Nussbaum (eds), *The Offensive Internet: Privacy, Speech and Reputation* (Harvard University Press, 2010) 15, 26 for an argument why the file-sharing problem is sui generis.

167 Criminal Procedure (Reform and Modernisation) Bill cl 215(1).

168 Ibid cl 215(2).

169 The definition of 'Internet service provider' proposed in Criminal Procedure (Reform and Modernisation) Bill (as introduced) cl 216(5) was sufficiently broad to include Internet content hosts. Compare with definitions in *Broadcasting Services Act 1992* (Cth) sch 5. According to the Explanatory Note, the Bill was intended to apply to 'onshore' ISPs only, a provision that would have disadvantaged domestic ISPs.

material breaches the relevant suppression order or provision',[170] and did 'not, as soon as possible after becoming aware of the infringing material, delete the material or prevent access to it'.[171] Persuasive arguments were put forward against the Bill (as introduced),[172] and these ill-conceived and heavy handed proposals were abandoned. Under the Criminal Procedure (Reform and Modernisation) Bill (as reported from the Justice and Electoral Committee), an ISP will be liable for publishing in breach of a suppression order only if 'the specific information has been placed or entered on the site or system by' the ISP.[173]

3 *Providing More Information*

Des Butler and Sharon Rodrick observe: 'One of the main problems experienced by the media in relation to non-publication orders is discovering whether such orders have been made, varied or revoked.'[174] If staying within the law is problematic for the well resourced traditional media, compliance may be significantly more difficult for others. Indeed, New Zealand's Ministry of Justice has illegally published the names of victims in online reports.[175] It seems then that more useful information needs to be made available to people who might breach suppression orders. There is broad support for establishing national registers of suppression orders,[176] something easier to achieve in New Zealand than in Australia,[177] and

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170 Ibid cl 216(3).

171 Ibid cl 216(2).

172 See, for example, Telecommunications Carriers' Forum, *Submission by the Telecommunications Carriers' Forum on section 216 of the Criminal Procedure (Reform and Modernisation) Bill* 11 February 2011 < http://www.tcf.org.nz/library/69c6338e-d535-4835-abeb-c59d8c7130f7.cmr>

173 Criminal Procedure (Reform and Modernisation) Bill (as reported from the Justice and Electoral Committee) cl 215(3).

174 Butler and Rodrick, above n 1, 188.

175 See John Marshall, *Report of an Inquiry Requested by the Minister of Justice on the Publication of Name of Victims in Judicial Decisions on the Judicial Decisions Online Website of the Ministry of Justice*, 15 April 2011 <http://www.justice.govt.nz/publications/global-publications/j/judicial-decisions-online-inquiry-report>

176 See Butler and Rodrick, above 1, 188-189.

177 New Zealand Law Commission, above n 40, R24 recommended 'the development of a national register of suppression orders should be advanced as a matter of high priority'. The current government supports the idea in principle, but notes 'there are issues that need to be worked through, including who has access to it, the cost of running it, and the practicalities of keeping it up to date'. See Simon Power, 'Government Makes Name Suppression Harder to Get' (media release) 5 October 2010.

this is likely to be most beneficial to traditional media. However, it seems that there needs to be more engagement with the public on an educational level about the need for secrecy and how it is maintained.

V CONCLUSION

In relation to judicial control of trial information, this article has sought to identify competing principles (open justice, fair trial, freedom of expression and privacy) and the dynamic and often tense interactions between key players (judges, traditional and new media). Despite the challenges to curial secrecy presented by contemporary information and communication technology, Australasian courts are engaging with these challenges, albeit with varying degrees of effectiveness and plausibility. The trend of treating jurors as responsible and ethical actors in the trial process, notwithstanding the temptations of Internet searches, is particularly promising. 'If courts continue to attribute to jurors the ability to put prejudicial material out of their minds, it may be expected that, over time, this will have a liberating effect on the law of contempt.'[178] In contrast, legislative measures to criminalise curious jurors seem disproportionate. Nevertheless, as Michael Chesterman cautions, 'nobody involved with the operation of the criminal justice system [should be] lulled into believing that these problems have been or can easily be, satisfactorily resolved on a permanent basis'.[179] Indeed, it may be futile to look for simple solutions to the complex problems inherent in the competing principles of free speech and fair trial, because such answers do not exist.[180] However, resolution of problems that arise seem more likely when discourse between interested parties is open, honest and ongoing. Thus Elizabeth Handsley argues:[181]

> … there is clearly a need for relations between the media and the judiciary to be improved … Each institution needs to find means to co-exist happily with the other. One useful exercise in that process would be for each side to explain as clearly as possible its

[178] Butler and Rodrick, above n 1, 246.

[179] Chesterman, above n 6, 111.

[180] Cate Honoré Brett, 'Control of the Crime Story: Free Speech vs Fair Trial' (New Zealand Journalism Monographs No 1, Department of Mass Communication and Journalism, University of Canterbury, 2001) 66 reporting an observation of Justice David Baragwanath.

[181] Handsley, above n 31, 111.

> concerns with the ways in which the other operates; those explanations should be couched in terms of something other than the self-interest of the institutions giving them.

It time is time for those charged with the administration of justice to engage with new media in a similar way, and to persuade bloggers and the like that freedom of expression must sometimes yield to the imperatives of fair trial and privacy. Many social media actors care deeply about rights and social justice; the challenge is to demonstrate how the particular rules of common law administration of justice contribute to their maintenance. For those who refuse to heed this message, recent case law indicates that suppression laws cannot be broken with impunity.