

# OPEN JUSTICE IN THE TECHNOLOGICAL AGE\*

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*This speech explores the role of open justice in a new technological age. While courts have been public places for centuries, the advent of new technologies and social media has driven courts towards direct community engagement in order to preserve open justice. The reduction in official press reporting of court cases has meant there is an information vacuum that is being filled through social media and online content. This phenomenon results in information being published without deference to editorial opinion regarding its newsworthiness or the accuracy of content. The proliferation of online commentary has the potential to undermine the right to a fair trial for many. While courts must continue to be vigilant in ensuring certain information is suppressed in some cases, it must also engage with social media to ensure open justice. The Supreme Court of Victoria has a presence on Twitter and Facebook and may soon pilot a project where a retired Supreme Court judge would blog on certain legal issues. These are all steps to ensure that the Supreme Court continues to safeguard open justice in a new technological paradigm.*

## I INTRODUCTION

The concept that ‘justice must be done and must be seen to be done’ is a fundamental tenet of Australian democracy. Historically, this meant that most courtrooms, most of the time, were open to the public. In reality, for most of the last half century, relatively few members of the public have used that open door and court reporters have acted as the intermediary between the justice system and the wider community. With the rise of new media technologies, the traditional methods of guaranteeing open justice for the community are rapidly changing. Open justice now increasingly means the ability of the community to access information about the courts through the internet and social media. There are implications from this development for the traditional relationship between the courts and the media. There are challenges driving the courts towards direct community engagement in order to preserve the operation of open justice.<sup>1</sup>

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1 In 2012, the Supreme Court of Victoria produced a Report on Strategic Communications, which has informed parts of this paper. The author would like to acknowledge the contributions of Marco Bass, Media Consultant, to the production of that report.

## II OPEN JUSTICE IN LEGAL AND POLITICAL THEORY

The rationale behind the concept of open justice is an important democratic and constitutional principle. 19th century English philosopher Jeremy Bentham was among the first to articulate a theoretical basis for what he called the ‘sturdy’ English tradition of holding court proceedings in public and for what we now call ‘open justice’.<sup>2</sup> Deeply suspicious of the only arm of democratic government not to be held publicly accountable through elections, Bentham championed the practice of open courts as an important check on the performance of judges.<sup>3</sup> He reasoned that judges would only act in a fair, unbiased and just manner if their actions were subject to public review and criticism. He wrote: ‘Environed as he sees himself by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to it from a thousand mouths. ... Without publicity, all other checks are fruitless’.<sup>4</sup>

Bentham also suggested that ‘publicity’ supervises and forces judges to ensure the adequate administration of justice, so as to avoid public accusations of incompetence.<sup>5</sup> For Bentham, it was therefore ‘publicity’, or open justice, that raised the quality of justice dispensed by judges and in turn made the judiciary worthy of its standing as a democratic institution.<sup>6</sup>

Australian and English jurisprudence has made this link between open justice and the legitimacy of the judiciary as a democratic institution more explicit. Lord Atkinson emphasised that the public trial was the ‘best security’ for winning public confidence in the impartiality and efficiency of the justice system.<sup>7</sup> The High Court of Australia has said that open justice is an essential aspect of the constitutional character of the courts and ‘tends to maintain confidence in the integrity and independence of the courts’.<sup>8</sup>

Because the courts are a branch of democratic government, and openness is a fundamental feature of democracy, public access to court proceedings is a basic

2 Peter Wright, ‘The Open Court: The Hallmark of Judicial Proceedings’ (1947) 25 *Canadian Bar Review* 721, 721.

3 Jeremy Bentham, ‘Bentham’s Draught for the Organisation of Judicial Establishments, Compared with that of the National Assembly, with a Commentary on the Same’ in John Bowring (ed), *The Works of Jeremy Bentham* (William Tait, 1843) vol 4, 305; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 52 (Kirby P).

4 Bentham, above n 3, 317.

5 *Ibid.*

6 *Ibid.*

7 *Scott v Scott* [1913] AC 417, 463. This was the seminal case on open justice and the foundation for the modern principle. The case, which involved a woman’s petition for a decree of nullity of marriage on the grounds of her husband’s impotence, was heard in camera. When she sent copies of the transcript to various people in order to vindicate her reputation, she was charged with contempt. The House of Lords held that the order to hear in camera was made without jurisdiction. There was no valid reason for hearing the case in camera. The general principle is that courts must administer justice in public. *Scott v Scott* was followed by the High Court of Australia in *Dickason v Dickason* (1913) 17 CLR 50, and open justice is now a fundamental feature of our legal system.

8 *Russell v Russell* (1976) 134 CLR 495, 520.

democratic right, which the courts should actively support.<sup>9</sup> Secondly, public confidence is vital to the legitimacy of the judiciary as an institution and to the maintenance of the rule of law. Public confidence is important to the judiciary because judges are separate from the Parliament and the executive — the government of the day. The community cannot simply remove judges they are unhappy with through the ballot box. Thus, the authority of the judicial branch is based on public confidence in the ability of judges to uphold the rule of law in an objective and impartial manner, free from outside influence. In order to be convinced of the probity of the actions of judges, the public must be able to observe and understand the judicial process.<sup>10</sup> It is therefore the duty of judicial officers to maintain public confidence in the institution of the judiciary by facilitating access to information about courts and court proceedings.<sup>11</sup>

These two fundamentals — openness and public confidence — are the starting point and the purpose of the court's relationship with the media. They also underpin and drive reform of the court's relationship with both the media and the community. Faced with declining dedicated traditional media coverage and intense public scrutiny under the gaze of interactive and fast-paced new media forums, the courts have found it necessary to develop strategies of direct community engagement to preserve both open justice and public confidence in the judiciary.

### III NEW MEDIA

It is probably stating the obvious to say that we are in the midst of a communications revolution. 'Internet accessibility has increased to an average of 28.7 per cent globally, representing more than a 400 per cent increase in the last 10 years'.<sup>12</sup> Not only are computers commonplace, but we can tweet, blog, text, participate in online forums, and receive alerts and emails on our iPhones and tablets.<sup>13</sup> 'Nationally, the number of people now using smartphones to access social media increased to 67 per cent (up from 53 per cent in 2012), while the use of tablets to access social networks almost doubled nationally from 18 per cent in 2012 to 35 per cent this year'.<sup>14</sup>

The decentralisation of the press into a variety of new media forums is starting to have a noticeable effect on the circulation and revenues of traditional print

9 Chief Justice John Doyle, 'The Courts and the Media: What Reforms Are Needed and Why?' (1999) 1 *UTS Law Review* 25, 26–7.

10 *Ibid.*

11 *Ibid.*

12 Elizabeth Greene and Jodie O'Leary, 'Ensuring a Fair Trial for an Accused in a Digital Era: Lessons for Australia' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media: Challenges in the Era of Digital and Social Media* (Halstead Press, 2012) 101, 101.

13 *Ibid.*

14 Sensis, 'VIC Residents Are Australia's Biggest Users of Social Media on Smartphones while SMBs Miss an Opportunity to Connect' (Media Release, 21 May 2013) <<http://about.sensis.com.au/Media-Releases/?ItemID=1222>>.

and television media.<sup>15</sup> Newspapers in particular have a declining and ageing readership as younger viewers seek online content through Twitter and online news sites.

In 2011, *The Age* had over 197,000 weekday newspaper subscriptions. Today *The Age* weekday newspaper circulation stands at just over 142,000. *The Age* Twitter account has over 150,000 followers. The weekday *Herald Sun* has circulation figures of just over 416,000 and the *Herald Sun* Twitter account has just over 62,000 followers. Reduced circulation figures have led to redundancies and restructures at newspaper outlets.<sup>16</sup>

What constitutes open justice is now moving away from the ability of a citizen to sit in a court or read a newspaper or view the television news. The courts must look to new media forums if they are to reach a wider cross-section of the community and effectively inform them about the justice system.

#### IV THE CITIZEN JOURNALIST

There is likely to be a number of consequences stemming from this shift towards new media for the traditional relationship between the courts and the media. It seems likely that the courts will lose some, if not eventually all, of the expertise of dedicated newspaper court reporters. At the beginning of 2012, the ABC halved its court coverage commitment to one reporter. Also in 2012, very senior and experienced legal affairs reporters at *The Age* and *Herald Sun* retired. There are now very limited numbers of specialist legal affairs reporters.

At the same time, the ubiquitous nature of portable digital devices has given every citizen the opportunity to publish information. These ‘citizen journalists’ are able to blog or tweet about court cases or post a message on Facebook. They might write for a private online publication or simply enjoy stimulating debate on their own personal blogs and social media sites.

#### V CHARACTERISTICS OF SOCIAL MEDIA

There are a number of common characteristics of the new media that distinguish its product from traditional journalism. One of the key differences between the traditional court reporter and the citizen journalist is that the citizen journalist is ‘unlikely to be subject to any form of editorial control or commercial pressures, or bound by any ethical code’.<sup>17</sup> Typically, the citizen journalist will publish

15 Robert A Arcamona, ‘Bloggers, Other Alternative Media, and Access to Press Conferences’ (2011) 27 *Communications Lawyer* 12, 12.

16 Figures obtained directly from *The Age* and the *Herald Sun* by the Supreme Court Media Liaison Officer in October 2013.

17 Jonathan Barrett, ‘Open Justice or Open Season? Developments in Judicial Engagement with New Media’ (2011) 11 *Queensland University of Technology Law and Justice Journal* 1, 13.

their work immediately without deference to an editorial opinion regarding the newsworthiness or accuracy of the content.<sup>18</sup>

Another key difference is the mode of expression used by citizen journalists. Traditional news mediums have criticised the ‘vehement’ and ‘caustic’ discourse of new media, which they claim also frequently contains ‘factual error[s]’ and ‘defamatory content’.<sup>19</sup>

Some commentators have also suggested that the internet has created an ‘anonymity problem’.<sup>20</sup> ‘Not only is the language used commonly offensive’, but there seems to be a ‘belief among participants [in online forums] that any information should be distributed without restraint’, and that the customs and etiquette of society do not apply to the digital world.<sup>21</sup> Some blogs and tweets are written as if the author is having a personal chat with a friend over coffee. However, the potential audience for online content is in the millions. More so, once uploaded on to the internet the reach of the material is seemingly infinite.

In addition to their informal nature, new media outputs are permanent, and therefore ‘remain searchable [online] long after they are published’.<sup>22</sup> They are also ‘often interactive and additive, so that an initial publication may be incrementally supplemented, with each contribution to the composite output traceable and permanent’.<sup>23</sup> This means that the author immediately loses control of the public message as soon as a comment or tweet is posted.

The rise of new media has also been described as a process of decentralisation. Traditional media are ‘typically associated with concentrations of ... persuasive capacity in a limited number of corporate hands. They possess “immense power” to “shape people’s understandings and therefore their opinions”’, but they are also a well-defined and readily identifiable group.<sup>24</sup> ‘In contrast, new media actors are commonly individuals’ or are part of small groups.<sup>25</sup> Because they are not attached to a large organisation, new media actors are essentially controllable ‘only to the extent that their access to social media can be restricted’.<sup>26</sup> It is also difficult to trace the identity of online publishers and keep track of what is being said.

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

19 Barrett, above n 17, 13, quoting Stanley Fish, ‘Anonymity and the Dark Side of the Internet’, *The New York Times* (online), 3 January 2011 <<http://opinionator.blogs.nytimes.com/2011/01/03/anonymity-and-the-dark-side-of-the-internet/?php=true&type=blogs&tr=0>>.

20 Barrett, above n 17, 14.

21 Ibid.

22 Ibid 15.

23 Ibid.

24 Ibid 16, quoting Elizabeth Handsley, ‘The Media and Misconceptions about the Judiciary’ (2001) 6 *Media and Arts Law Review* 97, 103.

25 Barrett, above n 17, 16.

26 Ibid.

These changes have affected the traditional relationship between the courts and the media and in turn the court's efforts to protect fundamental aspects of the justice system: openness, public confidence in the judiciary and the right to a fair trial.

## **VI A REDUCTION IN DEDICATED COVERAGE OF THE COURTS**

I will address each of these aspects in turn, starting with the challenges for the court's traditional mode of relating with the media. With the decline in the number of court reporter roles, the courts are losing the main source of dedicated and coherent media coverage of court proceedings and justice sector matters. Court reporters have traditionally developed strong relationships with court media liaison officers in order to gain access to information, interviews and assistance. Due to their high professionalism, experience and interest in an ongoing relationship with the courts, court reporters exercise care with the accuracy of information they publish. Court reporters are also typically assigned to particular courts for long periods of time and so build up a body of research and knowledge about the legal system. The quality of reporting produced is often very high. The court reporters are also acutely aware of the risk of contempt and the need for compliance with suppression orders. They are familiar with the court's register of suppression orders.

The explosion in new media means the courts can no longer rely solely on the traditional media to interpret complex court proceedings and guarantee open justice for the public. The courts will have to devise strategies to reach the public in a more direct manner if they are to effectively implement the open justice principle.

Secondly, the courts are losing personal and local connections with journalists that have a vested interest in performing a gatekeeping role over the quality and accuracy of reporting on the courts. The internet and social media attract large numbers of citizen and professional publishers on a global scale. There is the consequence that the courts are now faced with unknown entities that often have little ethical or commercial incentive to render a considered, fair and accurate report of the courts or legal issues. As the boundaries of the court-media relationship are no longer clearly defined, it has also become more difficult for courts to identify who they should engage with and how they should engage in order to deliver a targeted and coherent message to the public.

## **VII PUBLIC CONFIDENCE**

The court reporters and traditional media that remain are taking up new media tools and using them to complement traditional electronic and print modes of communication. Coupled with the content produced by the blogs, tweets and

online comments of citizen journalists, traditional and new media are now working together to create a fast-paced, active and responsive 24 hour news cycle on high profile cases and justice sector matters.

The courts are facing more scrutiny than they ever have before. Court decisions are now constantly reviewed, questioned and critiqued by a myriad of different sources and commentators.<sup>27</sup> On the face of it, this would seem to mean that new media has enabled the full and proper operation of the open justice principle. But if the purpose of open justice is to maintain public confidence in the judiciary, then the problems of accuracy and objectivity already highlighted, might hinder rather than help public understanding of the judiciary. This problem is exacerbated by the minimalist nature of some types of social media.

The social media platform Twitter limits its contributors to 140 characters per post. It is extremely difficult for journalists, whether they are professional or untrained, whether or not they are subject to editorial and ethical constraints, to reduce complex legal issues into a fair and accurate report of 140 characters. The space constraints also mean that Twitter contributors tend to focus selectively on the most sensational aspects of the story without providing any context to the sensational and sometimes inflammatory tweet. Sensationalism and selectivity in reporting of the courts is nothing new and was occurring long before the rise of social media. But Twitter does present a new challenge for the courts, especially given concerns that traditional media might focus more explicitly on the sensational elements of stories in an attempt to arrest the decline of the print and television medium.

Recently, the Court of Appeal of the Supreme Court of Victoria heard the appeal of Adrian Bayley against his publicised sentence for the rape and murder of Jill Meagher.<sup>28</sup> Upon the Court of Appeal announcing its decision, Twitter posts stated that the Court had dismissed the appeal after only ten minutes of deliberation. These posts were misleading and misrepresented the thorough, considered and objective nature of the judicial process.

On publishing its judgment, the Court said:

After the hearing of the application the court adjourned at the end of argument for a short period. We then announced our decision, namely refusal of the application and that we would publish our reasons at a later time. This was not an unusual course in criminal appeals, especially since the introduction of the criminal appeal reforms. The court was in a position to dispose of the application expeditiously because of the materials filed and the prior preparation and discussion of the court members during the days beforehand. After hearing argument from counsel on both sides over [approximately one and a half hours] ... the court was in a position to determine the matter. This was a case where the applicant was sentenced to one of the sternest sentences for this type of offending. There were also

27 See generally Pamela D Schulz, *Courts and Judges on Trial: Analysing and Managing the Discourses of Disapproval* (Lit Verlag, 2010).

28 *Bayley v The Queen* [2013] VSCA 295 (21 October 2013).

questions raised by the applicant as to the construction of the *Sentencing Act 1991*. We were assisted by submissions from counsel on both sides. We refused leave to appeal ...<sup>29</sup>

Blogs and comments online regarding high profile cases highlight the intensity of the public review of the judiciary in the technological age. There is evidence of the ‘anonymity problem’ and lack of editorial control. *Plaintiff M70/2011 v Minister for Immigration and Citizenship* demonstrates the point.<sup>30</sup> In this case, the High Court held that the federal government’s legislative solution to the asylum seeker issue was invalid. The ABC routine online report on the case attracted about 170 comments, some of which quickly descended into criticism of other commentators and the judiciary. One comment said:

Sorry but we have the courts basically saying that anyone who rocks up to Australia can waste our courts [sic] time, get legal aid ... We have people smugglers using legal aid ... thanks to the courts. ... Time to ... get the courts out of the process ... as our courts are making a mockery of policy.<sup>31</sup>

This train of commentary illustrates how a story can take on a life of its own on the internet. Some of the commentary also demonstrates a lack of understanding of the role of the courts in our democracy and the independence of the judiciary from government policy making. This misunderstanding is perpetuated by the permanence and popularity of online content.

The Australian Survey of Social Attitudes conducted in 2007 supports the conclusion that the public’s knowledge and experience of the courts is quite limited.<sup>32</sup> The survey shows that although the Australian community places high value on the work of the courts, it generally has low confidence in them, particularly with regards to sentencing and criminal matters.<sup>33</sup> Perhaps reflecting the community’s concerns regarding sentencing decisions, the survey concluded the public has more confidence in the courts’ ability to protect the right of defendants in criminal trials than the ability to protect the rights of victims.<sup>34</sup> This finding points to the need for more community education and communication on the part of the courts to explain judicial decision-making processes.

These are some of the challenges that social media and the internet have posed for the courts in educating the community about the judicial process. But the story is not entirely negative. There are a number of benefits associated with new media reporting of the courts and in particular the use of new media technologies by the courts themselves.

29 Ibid [2] (citations omitted).

30 (2011) 244 CLR 144 (*Malaysia Solution Case*’).

31 Jeremy Thompson, ‘High Court Scuttles Malaysia Swap Deal’, ABC News (online), 31 August 2011, comment by ‘Budovski’ <<http://www.abc.net.au/news/2011-08-31/high-court-rules-on-asylum-seeker-challenge/2864218>>.

32 Timothy Phillips et al, *The Australian Survey of Social Attitudes, 2007* (Australian National University, 2007), discussed in Sharyn Roach Anleu and Kathy Mack, ‘The Work of the Australian Judiciary: Public and Judicial Attitudes’ (2010) 20 *Journal of Judicial Administration* 3, 3.

33 Anleu and Mack, above n 32, 5–9.

34 Ibid 8.

## VIII OPPORTUNITIES FOR THE COURTS

Firstly, new media forums enable a wider range of views to reach the public domain than those disseminated by the commercial media. Through the internet and websites, academics and community groups, who might not otherwise be approached by the mainstream media, are able to publish resources and information about court decisions.

Secondly, new media has increased opportunities for the courts to engage with the community directly and deliver information in an unmediated form to the public through the internet, Twitter or blogs. The opportunity for the public to see what the courts do unmediated by journalists and editors will enhance public education about the role of the judiciary. It also enables the courts to reach younger generations.

Thirdly, there are arguments that instantaneous reporting from the courtroom will increase accuracy of reporting and public interest in court proceedings. If journalists tweet, file or blog from the courtroom, they can inform the public of what occurs at court more quickly than traditional media forums.<sup>35</sup> Journalists can potentially engage more public interest in court proceedings if they are given updates as events occur. This could increase the openness of and access to the courts.

## IX A FAIR TRIAL

Openness is only one aspect of maintaining public confidence. Another purpose of the open court principle is ‘to protect trial fairness by preventing abuses of judicial authority’.<sup>36</sup> Trial by jury is one of the ultimate democratic protections ‘in countries sharing the common law tradition’.<sup>37</sup> Paradoxically, in some cases, ‘openness can operate to impair trial fairness’ by making it difficult to find ‘an impartial jury’.<sup>38</sup> Pre-trial publicity about the proceedings before the court may unfairly influence jurors in favour of or against an accused.<sup>39</sup>

‘Courts have responded by recognising that, in some cases, the open justice system must yield to these concerns [of fairness]’.<sup>40</sup> The courts therefore sometimes limit pre-trial publication of information through suppression orders.<sup>41</sup>

35 Marilyn Krawitz, ‘Stop the Presses, But Not the Tweets: Why Australian Judicial Officials Should Permit Journalists to Use Social Media in the Courtroom’ (2013) 15 *Flinders Law Journal* 1, 11.

36 Beverley McLachlin, ‘Courts, Transparency and Public Confidence — To the Better Administration of Justice’ (2003) 8 *Deakin Law Review* 1, 4.

37 *Ibid.*

38 *Ibid.*

39 *Ibid.* 5.

40 *Ibid.*

41 *Ibid.*

Typically, these orders are made to ensure a fair trial. For example, if the media publish information about the prior criminal history or other criminal charges of the accused it will be prejudicial. Sometimes court information is suppressed to protect the identity of a protected witness or an undercover police officer or the disclosure of security information. There can be many other reasons such as protecting the identity of victims, often in sex cases.

The question is how the tension between concerns for both fairness and openness are to be resolved — how much and what kind of information needs to be suppressed to preserve a fair trial? In answering these questions, ‘the courts must find a way to preserve all the values at stake to the maximum extent commensurate with fairness and maintenance of confidence in the justice system’.<sup>42</sup>

The general position is that derogations from open justice can never be a matter of routine. The court will ask the question: is there nothing that can be done to relieve unfairness to an accused from prejudicial publicity?

Where information is already in the public domain, generally speaking the courts will not grant a suppression order. Some might argue that “suppression orders have no place in the age of the internet where information may be distributed and disseminated widely, quickly and anonymously”, and published for domestic reading on overseas websites.<sup>43</sup>

Yet even then, judges are divided as to when an accused person should not be put to trial because of the prejudice of publicity.

*R v Glennon [No 2]*<sup>44</sup> concerned a former priest who was convicted of a number of sex offences against children in multiple trials. A radio commentator, Derryn Hinch breached suppression orders made by courts to protect Glennon’s right to a fair trial. The Victorian Court of Appeal split 2:1, saying Glennon had been prejudiced by the publicity. On appeal to the High Court of Australia, the judges split 4:3 saying Glennon had not been prejudiced, and that his next trial could proceed.

*R v Dupas [No 3]*<sup>45</sup> concerned a serial killer who was convicted of murdering a number of women. On his last conviction, he appealed asserting that he had been subjected to unfair publicity covering his earlier trials for murder and rape, and the circumstances of the death of the victim. There were other aspects of his appeal. He wanted his prosecution stayed or stopped forever. However, again the Court of Appeal split 2:1 on the point, saying Dupas’ trial should not be stayed. One judge said it was an extreme case, but the community could not afford to acknowledge that the media could render an accused unable to be tried.<sup>46</sup> Another of the judges had confidence in jurors ‘to distinguish between evidence, on the one

42 Ibid 10.

43 Barrett, above n 17, 2, quoting *Police v Slater* (Unreported, District Court at Auckland, Judge David J Harvey, 14 September 2010) [93].

44 (2001) 7 VR 631.

45 (2009) 28 VR 380.

46 Ibid 397 [63] (Nettle JA).

hand, and rumour, gossip, and whatever else the media may have reported, on the other'.<sup>47</sup> The judge referred to the Faraday School kidnapping, the Russell Street bombing, the Walsh Street murders and other well publicised cases<sup>48</sup> to make the point 'that it should not be too readily assumed that juries find it "impossible" ... to discharge their responsibilities in accordance with their oath'.<sup>49</sup> Otherwise, the judge suggested that individuals such as Jack the Ripper, Charles Manson, Ronald Biggs and even Osama Bin Laden would not face trial.<sup>50</sup> Dupas appealed to the High Court and failed. The High Court spoke of the 'social imperative' of bringing people charged with criminal offences to trial.<sup>51</sup>

Yet these cases were concerned with traditional media: newspapers and television. In a short time the courts have become more robust when it comes to digital media. In 2008 a judge prohibited the broadcasting of the television programme *Underbelly* until a trial, about to commence, was finished. *Underbelly* was a dramatised, colourful entertainment about the notorious individuals said to be participants in the Melbourne gangland wars of the 1990s and 2000s. The judge also ordered that *Underbelly* not be broadcast on the internet. The following night a television station broadcast the programme across Australia but not Victoria. Once broadcast, *Underbelly* was accessible on the internet, and so it was available to the world, despite the Court order. General Television Corporation appealed the order. The Court of Appeal essentially continued the restriction.<sup>52</sup> However, it became notorious that *Underbelly* could be purchased interstate or downloaded. The Court was criticised and probably regarded as naive in trying to protect fair trials relating to individuals portrayed or implicated in *Underbelly*.

In 2009, a judge ordered that major media organisations take down from their websites any articles relating to Tony Mokbel until after his trial for murder. The media groups appealed. The Court split 2:1 and lifted the order.<sup>53</sup> The two majority judges said the internet was different from the traditional media: the internet is permanent, accessible, and information can only be found by searching.<sup>54</sup> The view adopted was that the internet order went 'far beyond that which might reasonably be required' to protect the right of Mokbel to a fair trial.<sup>55</sup>

These cases demonstrate the changes in approaches by the courts, but also the challenges the courts face in balancing open justice and the right to a fair trial in the digital age.

Nevertheless, the courts have an obligation to find ways to protect the right to a fair trial in spite of the challenges posed by new media. The Victorian approach has been to seek control of information flowing to jurors, rather than the flow of

47 Ibid 434 [205] (Weinberg JA).

48 Ibid 441–2 [243]–[249].

49 Ibid 442 [250].

50 Ibid 442 [251].

51 *Dupas v The Queen* (2010) 241 CLR 237, 251 [37].

52 *General Television Corporation Pty Ltd v DPP (Vic)* (2008) 19 VR 68.

53 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248.

54 Ibid 272 [94] (Warren CJ and Byrne AJA).

55 Ibid.

information to the public at large. This will be the main challenge in ensuring a fair trial in the digital age. There is an increasing risk that jurors will use new media tools to research information about defendants during a trial. In the United Kingdom there has already been a case of a juror exchanging messages on Facebook with an accused during a drug trial. The juror was convicted of contempt and sentenced to eight months jail.<sup>56</sup>

As younger generations join the jury pool, 'reliance upon [the internet] for information-gathering can only increase'.<sup>57</sup> Education and clear directions to juries will be the key to addressing these issues. Some judges 'propose new juror instructions that specifically itemize the types of prohibited new media activities'.<sup>58</sup> Others have suggested asking jurors 'to sign written pledges to avoid juror Internet use during trial'.<sup>59</sup>

## X THE COURTS' RESPONSE

The courts must develop constructive strategies to engage with new technology if they are to guarantee open justice for all members of the community. Open justice in the technological age means the ability of the community to view or access information about court proceedings through the internet or social media as well as through traditional print and electronic mediums.

Historically, the judiciary does not engage with and speak to the public on controversial legal issues. This is because of the role of the judiciary as independent and impartial enforcers of the rule of law. To protect the public's perception of an impartial judiciary, a judge cannot engage in debate about a case which he or she is hearing. Further, 'if judges were to enter the arena of debate upon social, ethical or political issues ... a question would inevitably arise as to their ability to remain impartial should a related issue arise in their courts'.<sup>60</sup>

However, faced with the decline in traditional and dedicated reporting of courts as well as difficulties in maintaining public confidence in the judiciary, there is growing awareness that the courts need to rethink the way in which they educate and disseminate information to the public and journalists. This not only involves a recognition that traditional media technologies have changed, but also a recognition that, with the rise of social media, community expectations of the judiciary in terms of its style of communication have also changed.<sup>61</sup>

56 Jason Deans, 'Facebook Juror Jailed for Eight Months', *The Guardian* (online), 16 June 2011 <<http://www.theguardian.com/uk/2011/jun/16/facebook-juror-jailed-for-eight-months>>.

57 Paula Hannaford-Agor, David B Rottman and Nicole L Waters, 'Juror and Jury Use of New Media: A Baseline Exploration' (Report, Perspectives on State Court Leadership Series, Harvard, 2012) 8.

58 *Ibid.*

59 *Ibid.*

60 Justice Susan Kenny, 'Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium' (1999) 25 *Monash University Law Review* 209, 222.

61 See generally, Schulz, above n 27.

Because of the highly interactive nature of new media, the public have access to and can contribute to the public debate in ways that were previously impossible. With new media, the community has been promised a future of consultation where their concerns are heard and responded to by public figures.<sup>62</sup> The traditional reticence of the judiciary to speak out in the face of criticism may be leading to the increased devaluation of the courts in the mind of the community.<sup>63</sup> Community concerns addressed to the judiciary might be seen by the general public to be gaining no response.

At the community ceremony to open the 2012 Victorian Legal Year the judiciary heard from two high school students as voices of the future. They urged the judiciary to take up new media technologies and speak directly to the public about issues. They said:

As respected members of the justice system, we hope that you can start hearing the opinions of many Australians, young and old. You all have a role in standing up for the community and setting what is right, and now you have an opportunity to hear the voices of the people that you are protecting. If we start using the technology available, hopefully the people who make our laws will become more aware of the opinions of the people they are seeking to protect.<sup>64</sup>

There is momentum amongst courts globally towards using the internet to speak directly to the public. Live web-streaming of trials is viewed as a way to fill the void left by the decline in traditional court reporters. It is also a way for the judiciary to ensure that the public sees an accurate account of court proceedings in an age of decentralised new media. When web-streaming is used, the community can check for themselves what transpires in the courtroom and see in reality what the judiciary actually do when they administer the law. The Supreme Court of Victoria is now web-streaming sentencing remarks in criminal trials and proceedings in selected civil cases.

Courts are also engaging with social media accounts to publish information about judgments and legal and justice sector issues. The Supreme Court of Victoria uses both Facebook and Twitter to increase public understanding about the work of the Court. Court websites are also becoming the centrepiece of the judiciary's communication with the public. The community can now download judgment summaries, judgments and webcasts of trials and sentences on most Court websites. The Supreme Court of Victoria also has a 'retired judge blog' feature on its website, for which a retired judge writes a monthly blog on topical cases that have been handed down by the Court. This represents a historic shift away from traditional judicial reluctance to explain or defend judicial decisions that are made in accordance with the rule of law.

62 Ibid.

63 Ibid.

64 Mieke Foster and Narida Ear, (Speech delivered at the 2012 Community Observance for the Opening of the Legal Year, County Court of Victoria, 30 January 2012). This speech is unpublished and was provided to the author upon request.

## **XI CONCLUSION**

This shift in the communications practices of judges are symptomatic of the challenges and, importantly, the opportunities that new media poses for democratic institutions in the technological age. The traditions of the judiciary, including the setup of the courtroom and even the robes that judges wear, have changed very little over the centuries. However, the means by which courts communicate, and therefore, open justice, has changed dramatically. There is now an expectation that open justice involves the judiciary adopting new media technologies and engaging in a direct dialogue with the community. The judiciary must find a way to meet these expectations whilst at the same time preserve the fundamental aspects of the rule of law — fairness and judicial impartiality. Otherwise, the judiciary risks being left behind and trapped by its own traditions. If so, the courts risk a continued decline in the basis of judicial authority — public confidence.