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FOLLOWING DIGITAL MEDIA INTO THE COURTROOM: PUBLICITY AND THE OPEN COURT PRINCIPLE IN THE INFORMATION AGE

Shauna Hall-Coates*

ABSTRACT

Despite the pervasive integration of technology into various social institutions, one public body—the courtroom—has largely resisted such efforts. This separation is collapsing, however, as trial spectators increasingly arrive at court expecting to use their handheld digital devices inside to publish information about trials in real-time on live-blogging platforms. Consequently, Canadian courts have been forced to grapple with what role, if any, digital media is to play within their walls as this new information age puts pressure on a centuries-old legal tradition.

This article examines the debate on the use of digital devices in the courtroom from the perspective of the “open court principle,” as articulated in both law and general jurisprudential theory. It argues that using digital media as a platform to disseminate courtroom narratives has the potential to strengthen many of the open court principle’s foundational values, including accessibility, judicial accountability, and freedom of speech. These benefits may nonetheless come at a cost to the open court’s normative functions, since multiple, non-linear courtroom narratives created by digital media can undermine the publication of clear, determinate norms around which people can structure their lives. Accordingly, this article suggests that in deciding whether to permit digital media use in the courtroom, the justice system must determine which of the democratic values that underpin the open court principle ought to be given decisive weight in modern society.

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INTRODUCTION

An incontrovertible truth of the modern age is that technology has been, and will undoubtedly continue to be, one of the defining characteristics of 21st century life. In Canada, individuals increasingly live their lives with the Internet literally at their fingertips, as the proliferation of digital technologies in increasingly diminutive forms has made it possible to stay connected at any time and from any location. Yet despite the pervasive integration of technology into various social institutions, one dimension of civil society—the courtroom—has remained relatively immune from technology’s noisy demands for recognition. Walk into any courtroom today, critics venture, and it will look stunningly similar to those of the past; the judge will be sitting behind the bench, the jury in its box, and the witness on the stand.¹ As everyone settles into his or her place selected by centuries of ritual and status quo, the courtroom may even appear as a sanctuary from the trappings of digital technology, so doggedly pursued outside its walls.

This segregation between the courtroom and digital technology is nonetheless collapsing, as trial spectators increasingly arrive to court expecting that they will be able to use their digital devices inside to publish information about the trial in real-time through social media such as Twitter and other live-blogging platforms. Moreover, despite the judicial system’s wariness of digital media technologies, their integration into the courtroom is strongly supported on the basis of the “open court” principle—that venerated ideal within the English justice system that holds court proceedings must be open to the public and that publicity as to those proceedings must be unconstrained. As a result, courts across Canada have been forced to grapple with what role, if any, digital media technology is to play within the modern casting of the open court principle, and who, if anyone, is given recourse to its use in the courtroom.

Entering this critical fray, this article examines the debate on both sides of the coin for the inclusion and exclusion of digital devices and the attendant use of social media within the courtroom, based primarily on its accordance with the

¹ Chief Justice Beverley McLachlin, “The Relationship Between the Courts and the Media” (Speech delivered at Carleton University, 31 January 2012), online: <www.scc-csc.ca/court-cour/judges-juges/spe-dis/bm-2012-01-31-eng.aspx>.

theoretical and legal underpinnings of the open court principle as they exist at the level of both Canadian law and general jurisprudential theory. At its root, this article rejects critics' suggestion that social media use within the courtroom merely acts as the 21st century equivalent of the reporter's pen and paper, and thus does not represent a radical break from past journalistic practices. On the contrary, this article argues that these platforms create wholly new and challenging courtroom narratives, characterized by the immediacy, interactivity, abundance, and permanence of the information disseminated through them. Likewise, since the Internet has democratized information dissemination, these courtroom narratives may be increasingly relayed in jurisdictions where it is permitted, such as Nova Scotia, by anonymous civilians who remain deeply unaccountable to a professional or organizational body in a manner commensurate with the accredited media.

Accordingly, the revolutionary nature of this information dissemination platform exposes both digital media's promises and problems in relation to the normative values that support the open court principle. The normative values underpinning the open court principle are complex, and deliberation on them is found in canonical Supreme Court of Canada case law, as well as in the writings of legal philosophers and critics such as Jeremy Bentham, Lon L. Fuller, and Jeremy Waldron. Distilled to their bare essence, the values of the open court principle centre on the self-legitimization of the judicial system in a democratic system of governance and the self-determination of individuals in a functioning democracy. This latter value involves the dual-pronged ability of citizens to self-govern according to a clear understanding of their legal entitlements and obligations within a democratic order, while simultaneously being free to publicly question the efficacy and legitimacy of these same laws to which they know that they are coercively beholden.

Using digital media as a platform to disseminate courtroom narratives has the potential to strengthen many of the open court principle's foundational values, including accessibility, accountability of the judiciary, and freedom of speech. However, even as digital publicity in all its multiple, non-linear narratives has the profound ability to increase discursive debate, it undermines the

publication of clear, determinate norms around which people can structure their lives. This argument is heavily steeped in humans' troublesome online truth-seeking practices and in critics' suggestions that digital media is a constant, and perhaps unavoidable, purveyor of misinformation in society. Accordingly, this article suggests that in deciding whether to integrate digital media use within the courtroom, the justice system must determine which of the democratic values that underpin the open court principle ought to be given decisive weight in modern society. Once the judicial door has been opened to use of digital media, it is legally and practically difficult to close the door, given that the test to obtain a common law publication ban is onerous, and cries of censorship target judges who refuse to accommodate the multiplicity of perspectives that social media's proponents celebrate. Consequently, the wariness of some Canadian courts to welcome digital media technology into their fold may be prudent in light of this technology's capacity to problematize fulfillment of the very core values they hold as sacrosanct.

I. THE OPEN COURT PRINCIPLE AND PUBLICITY OF LAW

In any constitutional climate, the administration of justice thrives on exposure to light—and withers under a cloud of secrecy.

—JUSTICE FISH IN *TORONTO STAR NEWSPAPERS LTD V ONTARIO*²

A. The Open Court Principle and the Integrity of the Justice System

At its crux, the open court principle holds that the public is to enjoy free access to the courts of justice and is presumptively entitled to attend and observe any court hearing.³ The open court principle is often said to rest on the maxim that justice can “only be truly done if it is seen to be done.”⁴ Legal philosophy has long drawn this connection between the concept of justice and the value of transparency, insisting that the former is meaningless without the latter.⁵

² *Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41 at para 1, [2005] SCR 188 [*Toronto Star*].

³ McLachlin, *supra* note 1.

⁴ *R v Sussex Justice*, [1924] 1 KB 256 at 259.

⁵ The open court principle is said to have received rhetorical support from legal scholars like Sir Matthew Hale, William Blackstone and Jeremy Bentham: see e.g. Allen M Linden, “Limitations on Media Coverage

Throughout history, theorists including 19th century English philosopher Jeremy Bentham were skeptical of the court system because it was, and is, the sole arm of democratic government not held publicly accountable through the electoral process.⁶ Insistence that the courts remain open to public scrutiny thus functioned as a check on what would otherwise be the untrammelled and unaccountable exercise of power by unelected judges.⁷

Capturing this sentiment, Bentham wrote in an oft-quoted passage,

In the darkness of secrecy, sinister intent and evil in every shape have full swing. Only in proportions as publicity has place can the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against profligacy. It keeps the judge himself while trying under trial.⁸

Implicit in Bentham's words is the aforementioned maxim that holds justice rests on public perception, as the legitimacy of judicial power arises from the public's collective confidence in the legal system's capacity to serve as an impartial and independent arbiter of rights. The Supreme Court of Canada wrote these observations into law in *Vancouver Sun (Re)*, noting,

Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.⁹

of Legal Proceedings: A Critique and Some Proposals for Reform" in Phillip Anisman & Allen M Linden, eds, *The Media, The Courts and the Charter* (Toronto: Carswell, 1986) at 302.

⁶ Hon CJ Marilyn Warren, "Open Justice in the 'Technological Age'" (2013) 40 *Monash UL Rev* 45 at 46.

⁷ *Ibid.* Likewise, in Peter W Hogg & Allison A Bushnell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps *The Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35 *Osgoode Hall LJ* 75 at 77, the authors note that under the *Charter* judges "neither elected to their offices nor accountable for their actions are vested with the power to strike down laws that have been made by the duly elected representatives of the people." Concern for the legitimacy of judiciary in the face of its amplified democratic power in the post-*Charter* era may be correspondingly said to be particularly acute.

⁸ Jeremy Bentham, *Rationale of Judicial Evidence*, ed, John Stuart Mill (Edinburg: Bowring, 1827) at 355.

⁹ *Vancouver Sun (Re)*, 2004 SCC 43 at para 25, [2004] 2 SCR 332.

Publicity is therefore a critical component of the justice system's claim to legitimacy because it makes the judiciary itself worthy of standing as a democratic institution, despite its exclusion from an electoral process that normally mediates the relationship between citizens and the state.¹⁰

Although the open court principle protects the self-legitimizing interests of the justice system, it also protects the right of citizens to receive a fair trial under section 11(d) of the *Canadian Charter of Rights and Freedoms*.¹¹ Crucially, a closed court system runs the risk that parties who wield social or political power, including the government, could use it to “circumvent public policies, accountability, and basic notions of procedural fairness.”¹² Concern for the abuse of the administration of justice is particularly acute in the criminal law context where a prosecuting government threatens an accused's constitutionally protected liberty interests with infinitely larger resources at its disposal.¹³

Publicity, once again, steps into frame as a mechanism to safeguard procedural integrity, as Bentham noted that having a trial conducted in public view compels judges to ensure justice is properly administered in their courtrooms to avoid public accusations of incompetence or impropriety.¹⁴ In *R v Legal Aid Board*, Lord Woolf of the English Court of Appeal summed up this sentiment in similar terms:

[The open court principle] enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. [...] If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt

¹⁰ Warren, *supra* note 6 at 46.

¹¹ David M Paciocco, “When Open Courts Meet Closed Government” (2005) 2 Sup Ct L Rev 385 at 387.

¹² Trevor C Farrow, “Public Justice, Private Dispute Resolution and Democracy” (2008) Comparative Research in Law & Political Economy, Research Paper No 18/2008 at 49, online: <digitalcommons.osgoode.yorku.ca/clpe/192>.

¹³ Dana Adams, “Access Denied? Inconsistent Jurisprudence on the Open Court Principle and Media Access to Exhibits in Canadian Criminal Cases” (2012) 49 Alta L Rev 177 at 180.

¹⁴ Warren, *supra* note 6 at 46.

having to be invoked, with the expense and the interference with the administration of justice which this can involve.¹⁵

In this way, the open court principle defends the interests of the accused by ensuring procedural protections are granted, including adherence to the principles of natural justice, while keeping the judicial players—the judge, jury, and counsel—“intellectually honest” by guaranteeing their actions are a matter of public record.¹⁶

B. Freedom of Information: Autonomy and Public Discourse

As David Paciocco notes, the concept of open court is misleading if it is thought of simply in terms of enabling the public’s physical “access to [the] wood-paneled rooms” of the courthouse.¹⁷ Although the “first facet” of open court is the public’s right to attend trials and court proceedings,¹⁸ the principle is fundamentally an expansive liberty doctrine that covers the public’s freedom to access and disseminate information about the law, including judicial proceedings.¹⁹ The Supreme Court of Canada has explicitly recognized this informational freedom as fundamental to the fair functioning of the legal system and to the democratic system of governance as a whole. In *Named Person v Vancouver Sun*, Justice Bastarache wrote:

Information is at the heart of any legal system. Police investigate crimes and act on information they acquire; lawyers and witnesses present information to courts; juries and judges make decisions based on that information; and those decisions, reported by the popular and legal press, make up the basis of the law in future cases. *In Canada, as in any truly democratic society, the courts are expected to be open, and information is expected to be available to the public.*²⁰

¹⁵ *R v Legal Aid Board, ex parte Kaim Todner (a firm)*, [1999] QB 966 at para 4 (CA).

¹⁶ Willard Z Estey, “Freedom of Expression vs The Individual’s Right to Privacy,” (Speech delivered at the Empire Club of Canada, Toronto, 21 April 1994) in *The Empire Club of Canada: Addresses 1993–1994* (Toronto: The Empire Club of Canada, 1994) 412 at 426.

¹⁷ Paciocco, *supra* note 11 at 388.

¹⁸ *Vickery v Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 SCR 671 at para 49, 104 NSR (2d) 181 [*Vickery*].

¹⁹ Paciocco, *supra* note 11 at 388.

²⁰ *Named Person v Vancouver Sun*, 2007 SCC 43 at para 1, [2007] 3 SCR 253 [emphasis added].

Hence, whereas the first facet of the open court principle underscores the physical permeability of the courthouse, its second facet underscores its conceptual permeability, as information originating inside the courthouse flows outward into full public view under this doctrine. In practical terms, this “common law right of access” means that any non-privileged information that a court receives or produces should be available to the public,²¹ including any “material that is relevant to [a court proceeding’s] resolution.”²² While accounts of witness testimony, interim deliberations, and final judgments are all made a matter of public record in the name of this principle, evidence relied upon during a court proceeding, including executed search warrants²³ and trial exhibits,²⁴ is also made available to the public on this basis.

By protecting freedom of information, the open court principle fundamentally enables the public to achieve two interrelated, democratic social values. Firstly, the publicity of legal information informs citizens as to the extent of their legal rights and obligations.²⁵ This knowledge enables people to understand how the justice system might deal with future legal issues arising from their rights, should they ever find themselves facing a court of law.²⁶ Secondly, armed with this knowledge, citizens can publically question the efficacy and legitimacy of these laws to which they now know they are coercively beholden.

The Supreme Court of Canada’s decision in *R v Mentuck* illustrates this point by focusing on the twin values of self-governance and public discourse borne out of the open court principle.²⁷ In *Mentuck*, an accused murderer was arrested after the RCMP conducted an undercover “Mr. Big” sting operation. This policing method remains controversial because it induces self-conscription of criminal suspects at the hands of the state.²⁸ Fearing that public knowledge of the operational methods employed by the officers would undermine the effectiveness

²¹ *Vickery*, *supra* note 18 at para 77.

²² *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 1, 211 DLR (4th) 193.

²³ *Nova Scotia (AG) v MacIntyre*, [1982] 1 SCR 175, 49 NSR (2d) 609.

²⁴ *Canadian Broadcasting Corp v R*, 2010 ONCA 726, 102 OR (3d) 673.

²⁵ *Edmonton Journal v Alberta (AG)*, [1989] 2 SCR 1326 at para 10, 103 AR 321 [*Edmonton Journal*].

²⁶ *Ibid.*

²⁷ *R v Mentuck*, 2001 SCC 76, [2001] 3 SCR 76 [*Mentuck*].

²⁸ See e.g. *R v Hart*, 2014 SCC 52, [2014] 2 SCR 544.

of future investigations, the prosecutors sought a publication ban to suppress this information. The Supreme Court unanimously denied this request, stating that the public airing of these techniques was vital to public edification and deliberation. Writing for the Court, Justice Iacobucci stated:

As this Court recognized in *Irwin Toy Ltd. v. Quebec (Attorney General)* [citations omitted], “participation in social and political decision-making is to be fostered and encouraged” [as] a principle fundamental to a free and democratic society. [...] Such participation is an empty exercise without the information...about the practices of government, including the police. In my view, a publication ban that restricts the public’s access to information about the one government body that publicly wields instruments of force and gathers evidence for the purpose of imprisoning suspected offenders would have a serious deleterious effect. There is no doubt as to how crucial the role of the police is to the maintenance of law and order and the security of Canadian society. But there has always been and will continue to be a concern about the limits of acceptable police action. The improper use of bans regarding police conduct, so as to insulate that conduct from public scrutiny, seriously deprives the Canadian public of its ability to know of and be able to respond to police practices that, left unchecked, could erode the fabric of Canadian society and democracy.²⁹

Elsewhere in the judgment, Justice Iacobucci underscored the deliberative function of informational freedom, noting that a ban on the information fundamentally “prevents the public from *being informed critics* of what may be controversial police actions.”³⁰ In reaching this conclusion, the Supreme Court reveals its self-perceived obligation to provide the public with the information necessary to enable individuals to organize their thought, behaviour, and speech around the state’s coercive powers. The open court principle thus plays an essential function in the democratic order by educating the public on their legal rights, while simultaneously facilitating public discussion regarding the nature and limit of these civic entitlements and obligations.

Pushing the analysis of these dual democratic functions of the open court system further, Lon L. Fuller’s naturalist account of law in *The Morality of the Law* (1964) highlights the value of legal transparency by grounding it in a relationship

²⁹ *Mentuck*, *supra* note 27 at para 51.

³⁰ *Ibid* at para 50 [emphasis added].

of reciprocity between the lawmaker and the legal subject. In Fuller's account of the law, citizens are not simply members of a submissive population, blindly following the will of the state.³¹ Instead, they are legal agents capable of purposive action in society and ordered by law as a distinctive mode of governance separate and apart from rule by men.³² As a mode of governance, law crucially presupposes legal subjects' agency and communicates both recognition and respect for law by constituting itself in full observance of eight intrinsic, formal attributes, which Fuller describes as the law's "internal morality."³³ Among Fuller's eight canons is the formal principle of "clarity" or "publicity," which holds that laws must be made public to citizens in a meaningful way.³⁴ Publicity consequently demands that the state govern with clear and determinate legal norms that are not kept "hidden away in the closets of bureaucracy"³⁵ or contained within the shadows of deliberate state obfuscation.³⁶

Although *The Morality of the Law* includes few references to courtroom procedure,³⁷ Fuller's concept of publicity emphasizes the values of self-governance and deliberative democracy that publicity makes possible in a manner that both echoes and deepens the Supreme Court's analysis of the open court principle in *Mentuck*. In order to appreciate what Fuller brings to the debate over the use of digital media in Canadian courtrooms, first one must understand that a profound sense of reciprocity exists between the legal subject and the lawmaker in Fuller's account of the law. As a result, for the law to be *law* it must convey itself to legal subjects in a formal manner that recognizes the subject's capacity

³¹ Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (Oregon: Hart Publishing, 2012) 1 at 2.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Jeremy Waldron, "The Rule of Law and the Importance of Procedure" (2010) New York University Public Law and Legal Theory Working Papers, Paper 234 at 1, online: <lsr.nellco.org/nyu_plltwp/234>.

³⁶ Critics including David Dyzenhaus have pointed out that Fuller's account of publicity involves a moral requirement on the part of the lawmaker to engaged in reasoned justification of the law's content; see e.g. David Dyzenhaus, "The Rule of Law as the Rule of Liberal Principle" in *Ronald Dworkin*, ed, Arthur Ripstein (New York: Cambridge University Press, 2007) at 74. This supposition accords with Fuller's position that when individuals are compelled to explain and justify their decisions the effect is to "pull these them towards goodness"; see "Positivism and Fidelity to Law – A Reply to Professor Hart" (1950) 71 *Harv L Rev* 630 at 636. An analysis of reasoned justification in Fuller's work is beyond the scope of this article, but it is worth underscoring that Fuller's concept of publicity has received a series of varied jurisprudential interpretations given its evocative and indeterminate nature.

³⁷ Waldron, *supra* note 35 at 8.

for self-governance, free from direct state intervention.³⁸ Moreover, in providing discursive space for the self-application of its norms, the law demonstrates respect for individuals' inherent human dignity as beings capable of self-determination and self-control.³⁹ Fuller writes:

To embark on the enterprise of subjecting human conduct to rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules and answerable for his defaults. Every departure from the principles of law's morality is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey...your indifference to his powers of self-determination.⁴⁰

As the law constitutes itself in recognition of humans' capacity for self-governance, it operates "by using, rather than short-circuiting, the agency of ordinary human individuals. [It] count[s] on people's capacities for practical understanding, for self-control, for self-monitoring and modulation of their own behavior in relation to norms that they can grasp and understand."⁴¹ Correspondingly, it is only when the law constitutes itself in a formal manner that affirms its commitment to human autonomy that individuals gain a reciprocal obligation to recognize the law *as* law and follow its demands.⁴²

Since law constitutes itself based on a "dignitarian conception of the legal subject as an agent capable of monitoring and freely governing his [or her] own conduct,"⁴³ publicity is valued for providing citizens with clear, determinative

³⁸ Waldron points out that citizens' obedience to law is rarely the result of physical coercion, as litigants often pay court awards without the intervention of bailiffs and criminally accused persons show up to court on their own recognizance: see Jeremy Waldron, "How Law Protects Dignity" (2012) 71:1 Cambridge LJ 200 at 206.

³⁹ Fuller is not alone in linking the law's determinative content with the recognition of human autonomy. Joseph Raz similarly wrote in "The Value of the Rule of Law," "[o]bservance of the rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting people's dignity includes respecting their autonomy, their right to control their future": see e.g. "The Rule of Law and its Virtue" in *The Authority of Law: Essays on Law and Morality* (UK: Clarendon Press, 1979) at 221.

⁴⁰ Lon Fuller, *Morality of Law* (New Haven: Yale University Press, 1969) at 162.

⁴¹ Waldron, *supra* note 35 at 206.

⁴² Rundle, *supra* note 31 at 3.

⁴³ Waldron, *supra* note 35 at 18.

legal norms around which to structure their lives.⁴⁴ At its crux, publicity lends stability and reliability to citizens' lives insofar as they are able to anticipate the legal outcomes of their actions.⁴⁵ The freedom enjoyed on the basis of publicity has consequently been termed a *private* one, as legal clarity, determinacy, and predictability offer individuals the personal freedom to pursue a course of conduct by reference to their calculation of its legal risks and rewards.⁴⁶ As a result, critics have held that the clear articulation of law's normative content is vital to the rule of law, insofar as it provides certainty to the lives of citizens while simultaneously conveying respect for their powers of self-determination.⁴⁷

Individualistic self-governance aside, the publicity of law has additionally been cited by critics as having a broader, more collective social function in a democratic order. Within this critical fray, Jeremy Waldron criticizes interpretation of Fuller's formalist principles as relating solely to self-governance at the expense of collective action.⁴⁸ In "The Rule of Law and the Importance of Procedure," Waldron disapproves of a simplistic account of law as determinate content, dispatched by the sovereign for public edification and obedience. He writes, "[the] fallacy of modern positivism, it seems to me, is its exclusive emphasis on the command-and-control aspect of law, or the norm-and-guidance aspect of law, without any reference to the culture of argument that a legal system frames, sponsors and institutionalizes."⁴⁹

For Waldron, the law is not simply a source of inflexible and entrenched command, but "a matter of argument" in and of itself.⁵⁰ Put differently, the law is not simply determined by a judge and passed down to the subject from on high. Rather, the law is fundamentally shaped in and beyond the courtroom when

...ordinary people and their representatives take advantage of [the legal system's] aspiration to systematicity and integrity in framing their own legal arguments.... These are not just arguments about what the law *ought to be*—made, as it were, in a sort of lobbying mode. They are

⁴⁴ Colleen Murphy, "Lon Fuller and the Moral Value of the Moral of Law" (2004) 24 Law & Phil 239 at 241.

⁴⁵ *Ibid.*

⁴⁶ Waldron, *supra* note 35 at 18.

⁴⁷ *Ibid.*

⁴⁸ *Ibid* at 20.

⁴⁹ *Ibid.*

⁵⁰ *Ibid* at 17.

arguments of reason presenting competing arguments about what the law *is*. Inevitably, they are controversial: one party will say that such-and-such a proposition cannot be inferred from the law as it is; the other party will respond that it can be so inferred if only we credit the law with more coherence.... And so the determination of whether such a proposition has legal authority may often be a matter of contestation.⁵¹

According to Waldron, recognizing that the law is the site of civic contestation and resistance to dominant interpretations underscores a second dignitarian aspect of law, as it conceives of

...people who live under [law] as bearers of reason and intelligence. They are thinkers who can grasp and grapple with the rationale of the way they are governed and relate it in complex but intelligible ways to their own view of the relation between *their* actions and purposes and the actions and purposes of the state.⁵²

As laws are the subject of constant interpretation and debate, legal publicity serves a discursive function in democratic society by enabling “active engagement in the administration of public affairs, the freedom to participate actively and argumentatively in the way that one is governed.”⁵³ Public institutions are thus compelled under this democratic concept of the law—as the Supreme Court appeared to identify in *Mentuck*—to “sponsor and facilitate reasoned argument in human affairs.”⁵⁴ Ultimately, as publicity of the law lends predictability, stability, and determinacy to human lives by revealing its positive content in the eyes of the sovereign, it simultaneously subjects these laws “to scrutiny and opens them to public criticism, political demonstrations, active and passive resistance, and friction.”⁵⁵

⁵¹ *Ibid* [emphasis in original].

⁵² *Ibid* [emphasis in original].

⁵³ *Ibid* at 18.

⁵⁴ *Ibid*.

⁵⁵ David Luban, “The Rule of Law and Human Dignity: Reexamining Fuller’s Canons” (2010) 2 *Hague J on Rule L* 29 at 35. Moreover, in **Part IV** of this article we will see how publicity as defined legal content and deliberative legal discourse can come into tension with one another through the involvement of digital media in the courtroom.

C. Freedom of Speech and the Open Court Principle

Each aspect of the open court principle discussed above, including its preservation of physical access to the courtroom and the promotion of informational freedom in the service of self-governance and deliberative discourse, converge with its constitutional protection in the freedom of expression guarantee under section 2(b) of the *Charter*. Section 2(b) guarantees freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.⁵⁶ The protection of a free press within section 2(b) is vital to the functioning of the open court principle because, despite jurisprudential veneration, it is widely accepted that few Canadians have the time, resources, or will to attend court personally.⁵⁷ Open in principle but closed as a matter of practicality, the justice system eludes its transparency promise without the intervention of an intermediary dedicated to the dissemination of legal information.

The mass media, with its traditional hegemonic control over channels of information access and distribution, thus became the purveyor of legal information regarding court proceedings. In *Edmonton Journal v Alberta (AG)*, the Supreme Court explicitly acknowledged the open court principle's sustenance through media involvement:

Those who cannot attend rely in large measure upon the press to inform them about court proceedings—the nature of the evidence that was called, the arguments presented, the comments made by the trial judge—in order to know not only what rights they may have, but how their problems might be dealt with in court. [...] Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. *Practically speaking, this information can only be obtained from the newspapers or other media.*⁵⁸

⁵⁶ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 2(b).

⁵⁷ Adams, *supra* note 13 at 178.

⁵⁸ *Edmonton Journal*, *supra* note 25 at para 10 [emphasis added].

Acting as the public's "proxy"⁵⁹ or "surrogate"⁶⁰ in the courtroom, the media gathers the information necessary for public self-governance and deliberation, while simultaneously policing the administration of justice to prevent abuse by judicial actors.⁶¹

Since it is "through the press that the vitally important concept of the open court is preserved,"⁶² the freedom of expression guarantee under section 2(b) has come to explicitly protect the role of the press in gaining access to court proceedings. In *Canadian Broadcasting Corp v New Brunswick (AG)*, Justice La Forest stated:

That the right of the public to information relating to court proceedings, and the corollary right to put forward opinions pertaining to the courts, depend on the freedom of the press to transmit this information is fundamental to an understanding of the importance of that freedom. The full and fair discussion of public institutions, which is vital to any democracy, is the *raison d'être* of the s. 2(b) guarantees. Debate in the public domain is predicated on an informed public, which is in turn reliant upon a free and vigorous press. *The public's entitlement to be informed imposes on the media the responsibility to inform fairly and accurately.* This responsibility is especially grave given that the freedom of the press is, and must be, largely unfettered.⁶³

Honing in on the press' unfettered access to the courts, this guarantee encompasses not only the right to transmit news, information and beliefs, but the right to gather this information "independent from any state imposed restrictions on content, form or perspective except those justified under s. 1 of the *Charter*."⁶⁴ Under section 2(b), the public is also granted the reciprocal right to demand and receive information regarding court proceedings from the media, which in turn

⁵⁹ *Vickery*, *supra* note 18 at para 80.

⁶⁰ *Edmonton Journal*, *supra* note 25 at para 57.

⁶¹ On this latter point, the Supreme Court in *Edmonton Journal*, *supra* note 25 at para 58 found that media's presence in the courtroom also inspires confidence in litigants that the proper procedures are being followed and the results reached are fair.

⁶² *Vickery*, *supra* note 18 at para 81.

⁶³ *Canadian Broadcasting Corp v New Brunswick (AG)*, [1996] 3 SCR 480 at para 23, 182 NBR (2d) 81 [emphasis added] [*CBC v NB*].

⁶⁴ *Canadian Broadcasting Corp v Lessard*, [1991] 3 SCR 421 at para 65, 67 CCC (3d) 517.

will form the content of their own constitutionally protected free speech. Again in *Canadian Broadcasting Corp v New Brunswick (AG)*, Justice La Forest held:

Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.⁶⁵

Put another way, section 2(b) protects “listeners” and “speakers,” both of whom have an equal right to claim unfettered access to information, even if such information is learned second-hand, and to discuss it freely.⁶⁶ Ultimately, without the twinned protection of freedom of access and expression under section 2(b), the open court principle would be stifled in all its democratic aims.

II. DIGITAL MEDIA AND THE MODERN COURTROOM

*The evening news has become men in suits and women in pearls reading Twitter to your grandparents. Twitter is faster than print media, more in depth than television, and compared to traditional newswire, it's real-time reaction to events, news, and headlines.*⁶⁷

—BARRY RITHOLTZ

A. Publicity and Mass Media in the Modern Age

In the modern age, the open court principle is undergoing a marked transformation as technology has come to saturate all levels of society, causing vital aspects of human activity—including human communication and the mass media—to acquire a digital dimension.⁶⁸ Humans live in an era in which information production, distribution, and storage have migrated online. Once

⁶⁵ *CBC v NB*, *supra* note 63 at para 23.

⁶⁶ *Edmonton Journal*, *supra* note 25 at para 10.

⁶⁷ Barry Ritholtz, “Twitter is Becoming the First and Quickest Source of Investment News”, *The Guardian*, (23 April 2013), online: www.theguardian.com/technology/2013/apr/23/twitter-first-source-investment-news.

⁶⁸ Omer Tene & Jules Polonetsky, “Big Data for All: Privacy and User Control in the Age of Analytics” (2013) 11 *NW J Tech & Intell Prop* 239 at 240.

online, information is disseminated at a scale and rate hitherto unachievable in a strictly paper-based information economy.⁶⁹ In this digital community, individuals can not only access vast amounts of information in mere seconds, but can also connect to almost anyone, at any time, from any location.⁷⁰ The manner in which communication, connectivity, and access to information is sought has thus transformed, as individuals are increasingly connected via a global network that transcends temporal and geographic borders. The expansive nature of this global information network is, paradoxically, matched by the diminutive nature of the technology through which it is accessed, as humans increasingly come to understand their world through portable electronic devices no larger than a human hand.

As a result of the proliferation of digital technology and social media platforms, more people are producing and disseminating media content today than ever before in human history.⁷¹ With the increased supply of digital media content comes increased demand. As scholar Christina Locke Faubel explains, “[m]obile technologies such as smartphones and laptops enable instant, on-demand news, and as the public rapidly adopts these technologies, the media works to supply coverage as quickly as possible.”⁷² Facing economic and cultural strains and a surge of digital readership, traditional mass media have increasingly ventured online in order to compete in the digital marketplace.⁷³ However, the democratizing nature of the Internet has also simultaneously “blurred the lines between the traditional news media and regular citizens, as [I]nternet access and software make it possible for a single person, with very low overhead, to create content that is available globally.”⁷⁴ Since anyone can now gain instant publicity online, individuals with no formal media affiliation or credentials are able to break

⁶⁹ *Ibid.*

⁷⁰ Hon Amy J St Eve & Michael A Zuckerman, “Ensuring an Impartial Jury in the Age of Social Media” (2012) 11 Duke L & Tech Rev 1 at 3.

⁷¹ Karen Salaz, Thomas Hodson & Chris J Davey, “New Media and the Courts: The Current Status and a Look at the Future” (2010), online: CCPIO <www.ssrn.com/abstract=1666332>.

⁷² Christina Locke Faubel, “Cameras in the Courtroom 2.0: How Technology is Changing the Way Journalists Cover the Courts” (2014) 3 Reynolds Ct & Media LJ 3.

⁷³ Mary Kissel, “The Decline of Print Doesn’t Mean the End of Journalism”, *The Guardian* (29 October 2013), online: The Guardian <www.theguardian.com/commentisfree/2013/oct/29/decline-print-media-journalism-web>.

⁷⁴ Faubel, *supra* note 72 at 30.

news through their digital devices. The fact that the public is now empowered *en masse* to report the news was evidenced in 2013 when eyewitnesses of the Boston Marathon bombing broke news of the incident on Twitter within seconds of its occurrence. In doing so, these private citizens provided firsthand accounts of the event in real-time, well before traditional media outlets like CNN, Reuters, or the Associated Press were on the scene.⁷⁵

In this way, those armed with technology today assume a role traditionally reserved for vocational journalists, eroding the mass media's hegemonic control as the public's informational intermediary. Law professor Teresa Scassa notes:

In an age where journalism was largely the province of organized media outlets, whether in print or broadcast media, journalism could be associated in an almost elliptical manner with the activities of paid journalists. Now, in an era in which almost anyone can participate in collecting and disseminating information without the need for membership, employment or affiliation with a media outlet or a guild, the concept of journalistic purposes has been disassociated from a particular vocation.⁷⁶

As the Internet has given voice to numerous non-traditional information sources, so has society seen the rise of "citizen journalists." These "ordinary users engage in journalistic practices," including current affairs-based blogging, photo and video sharing, and post eyewitness commentary on current events.⁷⁷ Largely enabled by free and public online platforms like Twitter, individuals are able to document events as they unfold in real-time, and disseminate their observations to a wide online audience.⁷⁸ Furthermore, along with the novel medium comes a

⁷⁵ Ritholtz, *supra* note 67.

⁷⁶ Teresa Scassa, "Journalistic Purposes and Private Sector Data Protection Legislation: Blogs, Tweets and Information Maps" (2010) 35 Queen's LJ 733 at para 50.

⁷⁷ Melissa Wall, "Citizen Journalism: A Retrospective on What We Know, An Agenda For What We Don't" (2015) Digital Journalism 1 at 2, DOI: 10.1080/21670811.2014.1002513.

⁷⁸ Twitter, whose mission is to "give everyone the power to create and share ideas and information instantly, without barriers," has 288 million monthly active users, 80% of which access the platform through a mobile device. A "tweet" is a small burst of text limited to 140 characters, transmitted instantly from the author's phone to an author's followers, including members of the general public, professional organizations, companies, celebrities, and major media outlets. Twitter feeds can be embedded in websites, blogs, social networking sites, and other electronic platforms with wide audiences; see e.g. "Twitter Media" (2015), online: Twitter <media.twitter.com>.

novel narrative style, characterized by speed and a subjective tone of voice that can challenge those of the mainstream media.⁷⁹

B. Digital Media in the Courtroom

Despite technology's proliferation in other areas of legal practice, critics charge that up until the 21st century, one "precinct of the law has largely foregone the use of technology: the normative, near-sacred heart—the courtroom."⁸⁰ However, like never before, technology is penetrating the walls of the courtroom to assert its role within. Media law scholar Cathy Packer explains:

The digital communication revolution has arrived in the nation's courtrooms. Journalists and other courtroom observers now head to court with their smartphones, tablets, and other small computers, intending to photograph, blog and tweet the events they observe.⁸¹

Crucially, social media platforms like Twitter, which enables live reporting from the courtroom, can be embedded in online newspapers and blogs, widening the scope of their readership. As Twitter allows individuals to broadcast instant written accounts of judicial proceedings to infinitely larger online audiences, tweeting from inside the courtroom has been said to become "*de rigueur* nowadays among court reporters [...] especially in competitive markets."⁸² Similarly, the President of the Quebec Federation of Journalists recently emphasized the growing role of digital media in court reporting, arguing that "Twitter is the tool of the 21st century and it allows journalists to bring the citizen into the courtroom."⁸³

Responding to the increasing prevalence of digital media technology in courtrooms, legal critics have asserted that the practice of live-blogging a

⁷⁹ Wall, *supra* note 77 at 6.

⁸⁰ Fredric I Lederer, "Technology Comes to the Courtroom, and..." (1994) 43 Emory LJ 1095 at 1096.

⁸¹ Cathy Packer, "Should Courtroom Observers Be Allowed to Use Their Smartphones and Computers in Court? An Examination of the Arguments" (2013) 36 Am J Trial Advoc 573 at 573.

⁸² *Ibid.*

⁸³ The Canadian Press, "Quebec Bans Electronic Communications in Courtrooms", *CTV News* (14 April 2013), online: CTV News <www.ctvnews.ca/canada/quebec-bans-electronic-communications-in-courtrooms-1.1237540>.

courtroom proceeding is simply the modern equivalent of traditional print journalism because this written communication does not include video or audio coverage of the trial, which remain prohibited.⁸⁴ For example, in her defence of live-blogging in court, Cathy Packer notes that some in the American judiciary believe “smartphones and laptop computers [are] the twenty-first century equivalent of the reporter’s pen and paper—not...the equivalent of broadcasting.”⁸⁵ The American Civil Liberties Association echoes this sentiment, arguing that “tweeting and social media are merely a 21st century version of what reporters have always done—gather information and disseminate it.”⁸⁶ Still others have framed live-blogging’s continuity with journalism of the past in the most basic of technological terms, explaining that there is no difference between an individual live-blogging a court proceeding on his or her smartphone and a “person who walks out of the courtroom, gets on a pay phone, and tells someone what is going on, and then walks back into the courtroom. That’s the way media used to do it; this just speeds up the process.”⁸⁷

These characterizations of Twitter and live-blogging, meant to hold in abeyance worries that this technology smuggles the prohibited act of broadcasting into the courtroom, nevertheless fail to capture the profoundly unique aspects of this mode of publishing. At their core, Twitter and other real-time micro-blogging services inject radical immediacy into the reporting of courtroom proceedings, as any sight or speech in the courtroom can be typed and published within milliseconds of its occurrence by an observer. This technology’s immediacy thus allows individuals to access virtual “gavel-to-gavel” coverage of the proceeding unfolding before the observer’s eyes.⁸⁸

⁸⁴ Broadcasting, defined as transmitting film or audio recordings of the proceedings, remains prohibited in all Canadian courtrooms. For more information, see **Part III**.

⁸⁵ Packer, *supra* note 81 at 584.

⁸⁶ Michael Tarm, “Judges, Journalists Clash over Courtroom Tweets; Debate Highlighted by Celebrity Murder Case”, *The Associated Press* (16 April 2012), online: Global News <www.globalnews.ca/news/234500/judges-journalists-clash-over-courtroom-tweets-debate-highlighted-by-celebrity-murder-case>.

⁸⁷ Gary Toohey, “Small Size, Big Problems: Smartphones in the Courtroom”, *Precedent* (Winter 2013) 17, online: Missouri Bar Association <www.mobar.org/uploadedFiles/Home/Publications/Precedent/2013/Winter/smartphones.pdf>.

⁸⁸ Gordon Omand, “Tweeting From Courtroom Impresses Nova Scotia Top Judge”, *Toronto Star* (28 July 2014), online: The Toronto Star <www.thestar.com/news/canada/2014/07/28/tweeting_from_courtroom_impresses_nova_scotia_top_judge.html>.

Moreover, this technology can transmit witness testimony verbatim, easily typed out in short bursts of Twitter prose. Arguments made by lawyers or statements uttered by judges may also intersperse this play-by-play narrative, sometimes juxtaposed with links to photographs of trial exhibits,⁸⁹ or out-of-court videos or images supplied by the author for illustrative purposes.⁹⁰ These feeds also describe the appearance, demeanour, and interactions of the parties, witnesses, and members of the court, capturing what one critic termed a “playful mix of colo[u]rful details and inane minutiae.”⁹¹ The detailed nature of this information thus turns the trial coverage from an editorial or newspaper article into a highly augmented transcript, published on the Internet for the world to see. As a result, certain critics have argued this play-by-play coverage, in its informational immediacy and volume, offers “an alternative perspective on the trial” rather than a continuation of past publishing practices.⁹²

Differing from traditional media by virtue of their continuous and unconstrained streams of information, tweeting and live-blogging diverge from print media in two more critical respects. Firstly, there is no editorial oversight on the information being disseminated for non-members of the accredited media. Critic Adriana Cervantes explains that “[u]nlike judicial opinions, books, articles, and television, Twitter and live-blogs have no editorial oversight. Anyone with email and Internet access can tweet about whatever they want, regardless of validity.”⁹³ As such, trial information that “was once mediated and filtered by

⁸⁹ A salient example is the trial of Senator Mike Duffy, which was live-blogged by numerous news organizations, including the CBC, the *National Post*, and *Maclean's*. *The Hill Times*' coverage included a copy of all the exhibits tendered during the proceedings. See e.g. “Mike Duffy Trial Court Exhibits”, *The Hill Times* (8 April 2015), online: The Hill Times <www.hilltimes.com/2015/04/08/duffy-trial-exhibits/41706>.

⁹⁰ One example came during the recent trial of Dzhorkhar Tsarnaev, the 21-year-old Chechen-American facing the death penalty for the 2013 Boston Marathon bombing. Cameras were not allowed in the federal courtroom in which he was tried; however, live-blogging was permitted by various news outlets. The Twitter feeds of the press were interspersed with a number of photographs, including shots of key locations involved and photographs of the victims. See e.g. Hillary Sargent et al, “Boston’s Ex-Top Cop: Death Penalty ‘Should Be Considered’ in Tsarnaev Trial”, *Boston.com* (8 April 2015), online: Boston.com <www.boston.com/news/local/massachusetts/2015/03/04/live-updates-from-the-dzhokhar-tsarnaev-trial/15TtQaxX3KEmRafWjWi9LI/story.html>.

⁹¹ Thomas Pierce, “Bloggers Join Frenzy at Media-Saturated Libby Trial”, *NPR* (1 February 2007), online: NPR <www.npr.org/templates/story/story.php?storyId=7098188>.

⁹² *Ibid.*

⁹³ Adriana C Cervantes, “Will Twitter Be Following You Into the Courtroom? Why Reporters Should Be Allowed to Broadcast During Courtroom Proceedings” (2011) *Hastings Comm & Ent LJ* 133 at 153.

news organizations can be shared peer-to-peer” without any corporate or organizational oversight.⁹⁴ Equally, authorial control over this information is relinquished once it hits the web because, as Mary Long notes, “[a]ttempts to retract a tweet are pretty pointless. Once it’s out there and endlessly retweeted, which always happens during live-tweeted happenings, particularly ones involving death and destruction, there’s no way to go back to every person that tweet has touched and give them the correct information.”⁹⁵ As tweets and live-blogs can be volleyed around endlessly in multiple, non-linear online discussions, they fundamentally diverge from the largely static narratives of news articles of the past, which circulated in print within a defined geographic area and were put out to pasture in archives once the news cycle moved on.

Secondly, as the trajectory of this information is radically unknown, so too is its fate: it may be “buried in this vast new attention economy if [it] does not capture the imagination quickly and strongly enough; or [it] may be amplified, sustained and potentially morphed as [it is] re-circulated, reworked, and reframed by online networks.”⁹⁶ Legal scholar Geoffrey Leane underscores this point: “This is scattered, one-to-many communication as compared to the one-to-one dialogue of the telephone and few-to-many monologues of mass media. In that sense it can be more inclusive and simply more ‘public.’”⁹⁷ Hence, it appears apt to conclude that, unlike print or editorial news of the past, “[i]n the social media sphere, news is word of mouth on steroids. It knows no boundaries.”⁹⁸

Lastly, as the communicative medium has changed, the complexity and nature of its associated actors are also fundamentally different. The Internet is a sphere of relative anonymity in which individuals are granted a liberating and

⁹⁴ Barb Palser, “The Twitter Death Epidemic” (2012) 34(1) *Am Journalism Rev* 60 at 60.

⁹⁵ Mary C Long, “The Media Needs to Stop Guessing and Set Standards for Live-Tweeting ‘Breaking’ News”, *Adweek* (13 February 2013), online: Adweek <www.adweek.com/socialtimes/media-live-tweeting-news/477605>.

⁹⁶ Luke Goode, “Social News, Citizen Journalism and Democracy” (2009) 11 *New Media & Soc’y* 1287 at 1292.

⁹⁷ Geoffrey WG Leane, “Deliberative Democracy and the Internet: New Possibilities for Legitimising Law Through Public Discourse?” (2010) 23 *Can JL & Jur* 373 at 380.

⁹⁸ Jennifer Alejandro, “Journalism in the Age of Social Media” (2010) Reuters Institute Fellowship Paper, University of Oxford, online: Reuters Institute for the Study of Journalism <reutersinstitute.politics.ox.ac.uk/publication/journalism-age-social-media>.

sometimes toxic⁹⁹ power to create their own identities as they see fit. In the context of Twitter, authorial identities are loosely and impersonally defined. Unlike identity-based services such as Facebook, Twitter does not impose a “real name” policy that compels users to reveal their true identities. Instead, Twitter and other micro-blogging services give users the choice as to how they want to be identified in an effort to aid free speech and association for those who would otherwise risk being personally linked to a controversial topic or group.¹⁰⁰ This ability to speak anonymously is a clear deviation from traditional editorials or mass media journalism, where an author’s authority and integrity rests heavily on his or her byline. Therefore, accountability for one’s speech, characterized by the risk of identification, reputational harm, and real-life consequences, is often an absent threat when it comes to using digital media in court.

C. Electronic Media Policies in Canadian Courtrooms

Turning from the content of live-blogging to the nature of its regulation, the majority of Canadian provinces and territories have updated their policies on electronic device use in court since 2012. However, actual policies and procedures on mobile technology and social media use in Canadian courts can vary greatly across jurisdictions and levels of court. Crucially, each provincial, territorial, and federal court may have different rules on the subject, as there is no limit on their divergence from one another.¹⁰¹ As a result, a “patchwork quilt” of regulation has developed around the use of digital technologies in the courtroom, making it difficult to draw definitive conclusions about its normalization in the judicial context.¹⁰²

⁹⁹ In a recent judgment, Halifax Provincial Court Judge Anne Derrick ruminated on the “harm caused by the callous exploitation of Internet anonymity” in the context of the online cyberbullying of a teen, underscoring online anonymity’s insidious qualities in protecting and promoting socially malevolent conduct: see *R v Y*, 2015 NSPC 14 at para 1, 357 NSR (2d) 340.

¹⁰⁰ Jeffrey Rosen, “The Delete Squad: Google, Twitter, Facebook and the New Global Battle Over the Future of Free Speech”, *New Republic* (29 April 2013), online: New Republic <www.newrepublic.com/article/113045/free-speech-internet-silicon-valley-making-rules>.

¹⁰¹ Dean Jobb, “Resistance to Courtroom Tweeting Based on Myth, Not Reality”, *The Globe and Mail* (31 July 2013), online: The Globe and Mail <www.theglobeandmail.com/globe-debate/resistance-to-courtroom-tweeting-based-on-myth-not-reality/article13523422>.

¹⁰² *Ibid.*

In Canada, courtroom policies on electronic media use differ according to two key areas of debate. Firstly, policies differ on whether transmitting information electronically from inside the courtroom to the outside world is presumptively prohibited but subject to the approval of the presiding judge, or whether it is presumptively permitted, subject to judicial disapproval in exceptional circumstances. For example, Quebec has one of the most notorious blanket bans on electronic device use in its courtrooms. Accredited members of the media, lawyers, and the public alike are all prohibited from communicating observations or information from inside the courtroom via electronic media without the judge's consent.¹⁰³ Saskatchewan courts have similarly imposed a blanket ban on digital media use in the courtroom, unless the court otherwise permits.¹⁰⁴ Under this approach, the accredited media and the general public are on equal footing when it comes to social media use.

Secondly, even where live-blogging and electronic device use are permitted, policies differ as to *who* is allowed to use this technology from one province to the next. For instance, only legal counsel and accredited members of the media are allowed to use electronic devices to disseminate live text-based communication from the courtrooms of Manitoba¹⁰⁵ and the Northwest Territories.¹⁰⁶ Meanwhile, members of the public are not permitted to transmit electronic information from inside the courtroom.¹⁰⁷ The rules in Ontario are slightly softer, as the Superior Court of Justice permits media, as well as counsel, court staff, and members of the legal profession, to use electronic devices in the

¹⁰³ Prior to 2013, Quebec courts allowed journalists to use social media for reporting inside courtrooms. According to an interview given by the Associate Chief Justice of Quebec's Superior Court, Justice Robert Pidgeon, Quebec's ban was implemented in response to illicit photographing during the trial of former appeal court judge Jacques Delisle by journalists inside the courtroom, and to similar incidents in the obscenity trial of Rémy Couture. See Mark Cardwell, "Quebec judges Give the Bird to Tweets," *Canadian Lawyer Magazine* (9 April 2013), online: Canadian Lawyer Magazine: Legal Feed <www.canadianlawyer.com/legalfeeds/1405/quebec-judges-give-the-bird-to-tweets.html>. See also Sidhartha Banerjee, "Quebec bans Twitter from the Courtrooms", *The Globe and Mail* (14 April 2013), online: The Globe and Mail <www.theglobeandmail.com/news/national/quebec-bans-twitter-from-courtrooms/article11197529>.

¹⁰⁴ Saskatchewan Law Courts, "Saskatchewan Law Courts: Twitter and Other Text-Based Forms of Media Communication from Saskatchewan Courtrooms (Interim Protocol)" (nd), online: Saskatchewan Law Courts <www.sasklawcourts.ca/images/documents/Resources/Twitter_Protocol_2012.pdf>.

¹⁰⁵ Manitoba Courts, "Manitoba Courts Electronic Devices Policy" (1 September 2013), online: Manitoba Courts <www.manitobacourts.mb.ca/site/assets/files/1133/electronic_device_policy.pdf>.

¹⁰⁶ Nunavut Court of Justice, "Rules of the Nunavut Court of Justice" (nd), online: Nunavut Court of Justice <www.nucj.ca/rules.htm>.

¹⁰⁷ *Ibid.*

courtroom; however, members of the public can only do so with judicial permission.¹⁰⁸ There is consensus around at least one regulatory aspect: regardless of region, no court observer in Canada—journalist or layperson—is allowed to record audio or video of the proceedings or to take photographs in court without prior judicial permission.

On May 15, 2014, Nova Scotia officially (albeit quietly) adopted one of the most permissive policies on courtroom use of electronic devices in Canada.¹⁰⁹ This new policy allows journalists and members of the public to bring electronic devices, including laptops and cell phones into most Nova Scotia courts, including the Supreme Court and the Court of Appeal, for the purposes of live publishing or live communication, including texting, blogging, or tweeting.¹¹⁰ In crafting this policy, Nova Scotia consciously decided against implementing a more restrictive, ask-for-permission-first rule. Instead, the courts have placed the onus on the presiding judge to implement, justify, and enforce any electronic device ban.¹¹¹ In less than one year, the use of Twitter in Nova Scotia courtrooms has had a significant impact in the province. Case in point: its use during the sexual assault trial of criminal defence lawyer Lyle Howe made national headlines after Chief Justice Joseph Kennedy of the Nova Scotia Supreme Court lauded the role of this technology in expanding the audience and the quality of the trial's coverage.¹¹²

¹⁰⁸ Superior Court of Justice (Ontario), “Consolidated Provincial Practice Direction” (1 July 2014), online: Superior Court of Justice (Ontario) <www.ontariocourts.ca/scj/practice/practice-directions/provincial/#D_Electronic_Devices_in_the_Courtroom>.

¹⁰⁹ The policy states that “subject to any publication ban that may exist, the transmission of text about court proceedings from inside a courtroom while the court is in session, for publication and by any means (including Twitter, Texting, E-mail, Etc.), is allowed unless the presiding Judge orders otherwise.” This policy applies to all Nova Scotia courts, including the Court of Appeal, Supreme Court, Supreme Court Family Division, and Provincial Court: see The Courts of Nova Scotia, “The Use of Electronic Devices in Courthouses”, online: The Courts of Nova Scotia: <www.courts.ns.ca/Media_Information/electronic_devices_policy.htm>. The Federal Court and Federal Court of Appeal similarly allow digital media use by media and spectators: see e.g. Federal Court (Canada) “Media Access Policy” (20 August 2013), online: Federal Court (Canada) <cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/MediaPolicy>.

¹¹⁰ Despite the liberal allowance in most Nova Scotia courtrooms, only legal counsel and media may use electronic devices in youth, family, and mental health courts: *ibid.*

¹¹¹ The Courts of Nova Scotia, *supra* note 109.

¹¹² Keili Bartlett, “Twitter is Now in Session”, *King’s Journalism Review* (26 November 2014), online: King’s Journalism Review <thekjr.kingsjournalism.com/twitter-is-now-in-session>.

III. THE GOOD NEWS: JUSTIFYING DIGITAL MEDIA USE ON THE BASIS OF THE OPEN COURT PRINCIPLE

A. Accountability and Freedom of Information

Live-blogging in the courtroom by journalists and the public is supported on the basis that it further demystifies the judicial process, which, despite the open court principle, “remains shrouded in mysterious ritual” to the eyes of many.¹¹³ As noted in Part I, the notion of transparency has long been entangled with the integrity of the justice system, as the democratic legitimization of judicial power flows from the public’s collective confidence in the legal system as an impartial and independent arbiter of rights. For critics, exposing the courtroom to a virtual audience would have the effect of promoting its accountability to both the general public and to those associated with the case who were unable to attend in person, including family and friends of the parties.¹¹⁴ The logic here is simple: the more open that the process is in terms of witnesses and the more extensive its public record, the less likely it is that judges and members of the court will stray from the proper administration of justice. Support for live-blogging on the basis of increased public oversight is evident in the words of Chief Justice Kennedy, who welcomed digital media into Nova Scotia courtrooms by acknowledging that the “whole premise [of the courts] is based on the fact that we think an informed public will have confidence in [them]. We think that the more they know, the better off we’re going to be. Twitter is the latest technology that allows it.”¹¹⁵

The right to live-blog courtroom proceedings has also been cast as a fundamental issue of access for those positioned outside the courtroom. As digital media can provide information to citizens “with an immediacy and thoroughness never before available,” anyone with Internet access can monitor a trial as it unfolds without having to traverse the physical barriers that have long kept courtrooms both paradoxically open and closed.¹¹⁶ Moreover, given that the

¹¹³ Tarm, *supra* note 86.

¹¹⁴ Emily Ittner, “Technology in the Courtroom: Promoting Transparency or Destroying Solemnity?” (2015) 22 *Comm Law Conspectus* 348 at 365.

¹¹⁵ Bartlett, *supra* note 112.

¹¹⁶ Richard Goehler, Monica L. Dias & David Bralow, “The Legal Case for Twitter” (2010) 27 *Comm Law* 14.

information transmitted about the parties, witnesses, and action can far surpass that of a traditional newspaper article or even a written judgment, the public may be better equipped to make an informed and empathetic analysis of the case. Sujoy Chatterjee explains: “An informed public that knows the names, backgrounds, and socio-economic conditions of the people involved in...court cases will be better equipped to critique a particular court decision in the hope of creating real social change.”¹¹⁷ In this sense, social media’s ability to transmit vast quantities of information, which can be augmented by links and images as discussed in Part II, directly aligns with the democratic ideal of opening up the courtroom for the world to see its contents and to judge its outcome. As Charles Nesson eloquently puts it, tweeting and live-blogging can “facilitate [the] coveted ideal [of the open court principle] and allow the whispers, now made in the inner rooms of our public courthouses, to be proclaimed from the digital roof tops for all to hear.”¹¹⁸

B. Freedom of Expression: Open Court Meets Court of Public Opinion

Conversely, live-blogging during a court proceeding has also been championed as a right of access for those positioned *inside* the courtroom on the basis of the freedom of expression guarantee under section 2(b) of the *Charter*. Specifically, section 2(b) has been used to challenge any distinction between journalists and non-journalists’ permitted use of digital media in court—a division reinforced by some of the policies of different jurisdictions and at different levels of court across Canada, as discussed in Part II. Though the debate in Canada regarding discrimination of access in this regard is nascent, prominent media law scholar Michael Geist has challenged the tendency to privilege the accredited media’s right to live-blog court proceedings to the exclusion of all others on the basis that it fundamentally conflicts with section 2(b)’s inclusive guarantee.

¹¹⁷ Sujoy Chatterjee, “Balancing Privacy and the Open Court Principle in Family Law: Does De-Identifying Case Law Protect Anonymity?” (2014) 23 Dal J Leg Stud 91 at 104. Although Chatterjee made this argument in the context of family law cases, it arguably holds true in other areas of law too.

¹¹⁸ Charles Nesson, “What You Have Said in the Dark: The Evolution of Media in the Courtroom and the New Challenges of Containing the Jury’s Information Space” (2012) 24 St Thomas L Rev 283 at 398.

According to Geist, the Ontario Superior Court's ban on general public tweeting is arguably unconstitutional:

Either everyone should be free to tweet or no one should...but to limit "authorized tweeting" to a special group is "enormously problematic." [This ban] leaves journalism students, freelancers, bloggers, and responsible citizens who wish to attend trials and communicate about them in a situation that is likely to end in a violation of their rights... Presumptively banned from using the same communications medium as reporters, they can be kicked out if they try, and charged with contempt. Under the *Charter*, "everyone" has the right to freedom of expression, including freedom of the press and other media of communication."¹¹⁹

Others have made equivalent arguments on section 2(b) grounds, noting that what previously entitled journalists to act as the exclusive purveyors of courtroom content was their hegemonic control over mass media in a print-based economy.¹²⁰ Since this hegemony has declined in the Internet's wake, the justice system, in upholding section 2(b), is correspondingly compelled to accommodate a world in which everyone has an equal ability to report from the courts.¹²¹ In this vein, critics have pointed out the capricious underpinnings of a ban on the public's live-blogging, contending that

...the policy is simply unfair and arbitrary. [...] [I]n the case of courtrooms, the access provided [to] journalists and non-journalists is basically the same. Indeed, barring exceptional circumstances, courtrooms are open to anyone who can get there. [...] [I]mposing a class structure on attendees in open court is untenable.¹²²

Consequently, if information dissemination is held as a public service and not a consumer good,¹²³ and the media is accepted under section 2(b) as having no freedom of expression rights in the courtroom over and above those of average

¹¹⁹ Joseph Brean, "Ontario Court Ruling Allows Journalists to Live-Tweet Trials, but Violates Free Expression Rights of Every Other Canadian, Critics Say", *The National Post* (31 January 2013), online: The National Post <news.nationalpost.com/2013/01/31/ontario-court-ruling-allows-journalists-to-live-tweet-trials-but-violates-free-expression-rights-of-every-other-canadian-critics-say>.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² Chris Selley, "Ontario Court Runs Around in Effort to Segregate Tweeting", *The National Post* (1 February 2013), online: The National Post <news.nationalpost.com/2013/02/01/chris-selley-ontario-court-runs-around-in-effort-to-segregate-tweeting>.

¹²³ Kissel, *supra* note 73.

citizens, distinctions drawn between the accredited media and the public may indeed prove legally flawed.

Support for live-blogging courtroom proceedings and discrediting class distinctions drawn in this regard also stems from a promotion of the model of discursive democracy outlined above in Part I. Drawing on the work of theorists including Lon Fuller, recall that the Supreme Court of Canada and legal scholars such as Jeremy Waldron held that the fair functioning of the liberal democratic order required civilian access to information and the attendant opportunity to deliberate upon that information critically. Since critics like Waldron suggest the law itself is a site of civic contestation and debate, public institutions like the courts have an obligation to provide citizens with the information they need to actively resist dominant judicial interpretations of their civic rights and obligations. Though previously undiscussed, implicit in this argument is the assumption that the public has access to communal sites of information exchange in which they are able to freely engage in political and social debate regarding the law without government interference or censorship.¹²⁴

The Internet, in its ability to generate infinite knowledge and function as a medium for human interaction free from temporal and spatial boundaries, has been cast as the locus for civic debate in the 21st century.¹²⁵ Generally, the Internet is a sphere of inclusivity and unconstrained dialogue—elements critical to a democratic system of information exchange and argument.¹²⁶ In this light, scholar Geoffrey Leane explains the Internet's normative function as it relates to deliberative discourse:

The grea[t] ambition for the Internet as a communicative medium is that it can facilitate not only access to information and data but also the possibility of narrative exchange and collective will formation—the opportunity to become informed, to argue and to reach reasoned

¹²⁴ Peter Dahlgren, *The Political Web: Media, Participation, and Alternative Democracy* (UK: Palgrave Macmillan, 2013) at 24.

¹²⁵ Nico Carpentier, *Media and Participation: A Site of Ideological-Democratic Struggle* (Bristol: Intellect, 2011) at 119.

¹²⁶ Leane, *supra* note 97 at 384.

and rational positions which might become part of a public sphere consensus.¹²⁷

Through platforms like Twitter, which open up inclusive public space for the exchange of information and perspectives, civilians may discover increased opportunities “for political communication and engagement, for political contestation—and thus for agency.”¹²⁸ The emancipatory power of these online communities are further evidenced by the fact that users can overcome traditional barriers to political recognition, including race or gender, in the anonymous world of online discourse.

If live accounts of trials are wellsprings for an informed citizenry, the online public debate that encircles these virtual watering holes may subsequently enrich “both the substantive positions of participants and also their political selves as citizens.”¹²⁹ As enthusiasm for deliberative democracy in liberal societies is “driven by a perceived distance between the drives and motivations of citizens and the political decisions made in their name,” live-blogging in all its informational immediacy may be able to narrow the temporal distance between lawmaker and subject, as the latter is able to instantly respond to the actions of the former.¹³⁰ Emphasizing the narrowing distance between the judge and the public, Charles Nesson suggests:

[The] Internet can provide a vision of the future in which the court is truly recognized as a public place. This is a concept that harkens back to the original idea of trials from a foundational time of our nation, when trials were the cent[re] of community activity....¹³¹

Thus, live-blogging may offer a nexus between conversations about the law both inside and outside the walls of the courtroom, functioning as an inclusive and interactive site for public debate not yet experienced in the often staid world of discourse about the courts.

¹²⁷ *Ibid* at 375.

¹²⁸ Dahlgren, *supra* note 124 at 33.

¹²⁹ Leane, *supra* note 97 at 375.

¹³⁰ *Ibid*.

¹³¹ Nesson, *supra* note 118 at 397.

IV. THE BAD NEWS: THE RISKS OF DIGITAL MEDIA USE IN THE COURTROOM

“When you’re trying to correct things through Twitter alone, it’s a losing battle from the beginning. [...] You end up chasing Tweets that spread faster than you can keep up; it’s like putting toothpaste back in the tube, except the toothpaste is alive and didn’t like it in the tube and is dreaming of Broadway.”¹³²

—DAVID HOLMES

A. Twitter and the Troubling Search for Truth

Despite these strong arguments in favour of live-blogging, problems inherent in its use persist. First and foremost, the Supreme Court has held that the open court principle fundamentally operates on the assumption that the reporting of legal information will be done in an accurate and fair manner.¹³³ Critics, in turn, have argued that this presumption is an indispensable element to the practical operation of the open court principle, insofar as it relieves judges, in the absence of countervailing evidence, of the onerous task of having to vet or screen the integrity of the press when presiding in full view of the media.¹³⁴ The requirement for accurate reporting is undeniably crucial, as the Supreme Court in *Edmonton Journal* recognized that truthful and clear reporting of the law’s content is necessary for individuals to understand their legal obligations and entitlements.¹³⁵ Likewise, returning to the analysis of the law through theorists such as Fuller and Waldron, the clear manifestation of its content affords individuals the critical capacity to apply the law to their own behaviour through self-governance, and lends stability and predictability to the lives of citizens in a manner that underscores their dignity as legal subjects capable of self-determination.

Nonetheless, in a media landscape where Twitter and other live-blogging platforms act as frenetic sources of information, it is apparent that falsehoods will be made in quantities and qualities never before seen, threatening public

¹³² David Holmes, “Meet the Man Behind ‘Is Twitter Wrong?’ Who Helped Debunk Fake Pictures During Hurricane Sandy”, *PandoDaily* (30 October 2012), online: Pando Media <www.pando.com/2012/10/30/meet-the-man-behind-is-twitter-wrong-who-helped-debunk-fake-pictures-during-hurricane-sandy>.

¹³³ *Edmonton Journal*, *supra* note 25 at para 38.

¹³⁴ Adams, *supra* note 13 at 180.

¹³⁵ *Edmonton Journal*, *supra* note 25 at para 10.

perception of the clarity and determinate nature of the law's content. On a basic level, misrepresentations may be made by accident and by anyone: a misquotation, an incorrect name, or a detail that was to remain off the record. However, in the great echo chamber of the Internet, these slips will nevertheless travel in large circles, and critics warn that corrections—if they come—may not come in time to prevent people from walking away with mistaken impressions of reality.¹³⁶ On a more malevolent level, those outside the accredited media may intentionally circulate misinformation, as occurred recently when Oscar Pistorius' supporters took to social media to deliberately recast key facts during his trial for murder.¹³⁷

Similarly, anonymous sources of information may take advantage of the lack of oversight and accountability to skew facts in a manner beneficial to their point of view, either by decontextualizing information to present it in a different light or by emphasizing choice bits of information that are inflammatory outside of the complete narrative.¹³⁸ As these retweeted reframings could still be linked to an established media source, a veneer of credibility may problematically gloss over otherwise unreliable information.¹³⁹ Lastly, between accident and intent lies a host of other troubling states, including insufficient objectivity,¹⁴⁰ voyeurism, gossip, speculation,¹⁴¹ half-truths,¹⁴² and bare sensationalism.¹⁴³ Whatever the method and motive, the risk of distortion is real and the challenges of effectively containing the viral spread of misinformation in large-scale social networks are substantial.¹⁴⁴

This problem raises a secondary concern involving individuals' online truth-seeking behaviour, or lack thereof. Simply put, as the Internet presents individuals

¹³⁶ Lara Pierpoint, "Fukushima, Facebook and Feeds: Informing the Public in a Digital Era" (2011) 24 *The Electricity Journal* 53 at 53.

¹³⁷ Daniel Bitoni, "Courtroom in the Twitter Age: Who to Follow During the Oscar Pistorius Trial", *CTV News* (3 March 2014), online: <www.ctvnews.ca/world/courtroom-in-the-twitter-age-who-to-follow-during-the-oscar-pistorius-trial-1.1711683>.

¹³⁸ Pierpoint, *supra* note 136 at 55.

¹³⁹ *Ibid* at 54.

¹⁴⁰ Leane, *supra* note 97 at 384.

¹⁴¹ Chief Justice Beverley McLachlin, "Courts, Transparency and Public Confidence – To the Better Administration of Justice" (2003) 8 *Deakin Law Review* 1 at 2.

¹⁴² Nesson, *supra* note 118 at 384.

¹⁴³ McLachlin, *supra* note 1.

¹⁴⁴ Nam P Nguyen, Guanhua Yan & My T Thai, "Analysis of Misinformation Containment in Online Social Networks" (2013) 57 *Computer Networks* 2133 at 2133.

with massive quantities of information, their filtering mechanisms—which are premised on their preconceptions, biases, and prejudices—can often become survivalist techniques. Geoffrey Leane explains:

Given the sheer quantity of information available in complex modern societies and now relatively accessible in unprecedented quantities on the Internet, information seekers typically need a filtering process that renders incoming information reasonably manageable, comprehensible, and amenable to analysis. One can self-select filters to suit one's own needs, interests and preferences. But therein lies the corollary problem of too much filtering.¹⁴⁵

On the topic of “too much filtering,” technology critics have warned users about the tunnel vision effect that the Internet has on individuals’ search for truth, noting that while the

...advantage of technology is that it allows people to filter information and customize their selection, this advantage at the same time limits people's exposure. Because the Internet allows users to visit websites that are very specialized and often geared towards specific audiences, the Internet eliminates an element of randomness, reduces exposure to a variety of views and perspectives, and potentially creates a biased worldview.¹⁴⁶

As individuals’ egocentrism may dominate their online information-seeking behaviours, their freedom to “self-select...information sites, news and opinions [may] simply confirm [their] prejudices and [cause them to] become more politically segregated and intolerant.”¹⁴⁷

On this point it is important to emphasize that critics see the self-filtering nature of online information as a break from traditional news media of the past. For instance, Leane writes:

Modern mass media have traditionally served as filtering devices and, whilst self-selecting themselves, at least exposed readers and viewers to some variety of perspectives in, for example, editorial pages of print media. We may choose our newspaper and preferred editorial writers

¹⁴⁵ Leane, *supra* note 97 at 388.

¹⁴⁶ Anabel Quan-Haase, *Technology and Society: Social Networks, Power, and Inequality* (Toronto: Oxford University Press, 2013) at 157.

¹⁴⁷ Leane, *supra* note 97 at 388.

on the basis of our personal predilections but our attention might still be caught by others. [...] There is at least the possibility of inadvertent exposure to contrary arguments and opinions. Not so with pre-chosen Internet sites if one so wishes.¹⁴⁸

Returning to the context of truth-seeking in the midst of misinformation, individuals are unlikely to recognize a falsehood if they do not seek or gain exposure to alternative perspectives and narratives. Therefore, misinformation about the law will be increasingly rooted in the social discourse of live-blogging, as it meets the radical grounds for confirmation bias laid by the Internet.

When competing narratives emerge for a single court proceeding, it may be difficult to discern fiction from fact, particularly as the information travels further away from its original source. In the context of the open court principle, reliance on live-blogging and Twitter as mechanisms for dissemination thus troublingly places the truth-seeking function of the open court principle in direct tension with its deliberative function. The problem is deceptively simple: the more opportunity there is to create multiple narratives regarding judicial proceedings, the more likely it is that misinformation will be produced and that mistakes will be made. As a result, the ability for individuals to self-govern on the basis of legal determinacy, which the publicity principle is supposed to ensure, is fundamentally weakened, as the deliberative conversation surrounding the law amplifies. Furthermore, the problem begs a choice as to which critical facet of the open court principle deserves to be privileged: is it the self-determinative function, which underscores individuals' human dignity in their self-governance, or is it the self-deliberative function, which underscores individuals' human dignity in their engagement in public debate and action?

For theorists like Waldron, the conflict between legal clarity and public conversation arising from the publicity principle comes as little surprise and offers little resolution. Waldron explicitly highlights how these dual values of democratic order can come into tension with one another, writing that the argumentative nature of deliberative democracy "has a price: it probably brings with it a

¹⁴⁸ *Ibid* at 388–389.

diminution in law's certainty."¹⁴⁹ Elsewhere, Waldron explicitly brings Fuller into the fold, asserting:

The tension may be also represented as a tension between various strands of dignity associated with the Rule of Law. Fuller, we saw, associated his formal criteria with a dignitarian conception of the legal subject as an agent capable of monitoring and freely governing his own conduct. [...] But how, it may be asked, can we maintain this mode of respect if law becomes contestable and uncertain as the result of argumentation? Insisting on an opportunity for argumentation respects dignity too but at the cost of diminishing the confidence that we can have in the dignity of law's self-application at the hands of ordinary individuals.¹⁵⁰

Importantly, in Waldron's account there does not appear to be any way in which the deliberative and determinative dimensions of informational freedom can be reconciled. By way of conclusion, he notes:

To say that we should value aspects of governance that promote the clarity and determinacy of rules for the sake of individual freedom, but not the opportunities for argumentation that a free and self-possessed individual is likely to demand, is to slice in half, to truncate, what the Rule of Law rests upon: respect for the freedom and dignity of each person as an active intelligence.¹⁵¹

Consequently, the formal qualities of clarity, predictability, and determinacy simply bend with the "positive freedom" of individuals to actively engage in the administration of public affairs.¹⁵² It is this bending of the truth to accommodate deliberate discourse that appears particularly acute in the context of digital media in the courtroom, as the free flow of information presents itself in all its possibility and forbiddance in this novel form of publicity.

¹⁴⁹ Waldron, *supra* note 35 at 18.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid* at 21–22.

¹⁵² *Ibid.*

B. Publication Bans and Lingering Challenges of Free Expression

Barring digital media use from the courtrooms on the basis that it obscures the truth by creating multiple and potentially divergent narratives is deeply problematic for two reasons. Firstly, the Supreme Court in *Mentuck* held that once information has entered the public domain of the courtroom, access to disseminate this information should be denied only where its publication would present a real and substantial risk to the proper administration of justice (e.g. a risk to the accused's section 11(d) *Charter* right to a fair trial), and where the salutary effects of denying access outweigh the deleterious effects.¹⁵³ In framing this common law test for imposing a publication ban, the Supreme Court held that the risk to the administration of justice must be grave and non-speculative; a generalized assertion of a risk,¹⁵⁴ or a fear based on “common sense and logic alone, without the benefit of real and substantial evidence,”¹⁵⁵ is not sufficient. Finally, under this test, the Supreme Court concluded that publication bans should be ordered only in exceptional cases.¹⁵⁶

This threshold for publication bans—meant to uphold freedom of speech in relation to the open court principle—is thus unquestionably high. To this end, the test may pose issues in jurisdictions like Nova Scotia where live-tweeting is presumptively allowed, but where the judge has concerns that a truthful account of its proceedings may be obscured, distorted, or lost in the volley of tweeting. Such circumstances may arise during highly controversial or sensational cases, where media scrutiny and public attendance are atypically intense. In these circumstances, implementing a ban on publication via digital media based on a desire to preserve a ‘correct’ or uncontested narrative might not rise beyond the level of speculative evidence of harm to the administration of justice. This would be an untenable ground on which to exercise judicial discretion under the *Dagenais/Mentuck* test.¹⁵⁷ Moreover, given the fact that sensational, high-stakes

¹⁵³ *Mentuck*, *supra* note 27 at para 2. This test is commonly known as the *Dagenais/Mentuck* test.

¹⁵⁴ *Toronto Star*, *supra* note 2 at para 9.

¹⁵⁵ *CTV Television Inc v R et al*, 2006 MBCA 132 at para 33, 208 Man R (2d) 244.

¹⁵⁶ *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 842, 20 OR (3d) 816.

¹⁵⁷ In *Canadian Broadcasting Corp v R*, *supra* note 24, the Ontario Court of Appeal discussed the Court's ability to reach beyond the walls of the courtroom and edit the narrative of court proceedings as they are portrayed in the media. In that case, the CBC sought tapes tendered as exhibits in the preliminary inquiry into the death of Ashley Smith, the teen who strangled herself under the watch of Correctional Services.

criminal cases attract most publicity, the judge may be simultaneously under pressure to allow extensive trial coverage to ensure the accused's right to a fair trial under section 11(d) of the *Charter*.

Secondly, judicial attempts to ban social media use on the basis that it leads to multiple, contestable narratives may attract suspicion of censoring the public's freedom of speech. Such bans have been strongly criticized by scholars as obstructionist and self-interested. It is important to see that judicial decisions are, in the words of Elaine Craig, "normative—they make a claim to truth. 'Every judicial narrative is a *claim* of knowledge. [...] When judges narrate, our initial reaction is to treat their narration as an accurate reflection of reality.'"¹⁵⁸ As a result, in a scathing critique of the justice system's attempt to limit trial information to the ultimate judgment at the expense of alternative media's involvement, Charles Nesson wrote:

The courts are trying to contain the news. The courts are trying to manage the content released to the world. The courts are trying to create their vision of trial—a vision of an isolated proceeding in which a record is carefully crafted and submitted as truth. This record provides justification for the judicial result and is ideally not vulnerable to media assaults along the way. The courts are trying to avoid the commenting and critiquing that comes with sensational trial[s]; they are trying to avoid the talking heads.¹⁵⁹

Based on these concerns, judges may find themselves in uncomfortable positions as they attempt to harness digital media's potential, while avoiding unjust infringements on free speech. Thus, out of concern for similar cries of obfuscation or censorship of section 2(b)'s freedom of expression, judges may be

The trial judge granted the application on the condition that the media not broadcast certain portions of the tape showing Smith's actual death, but on appeal the Ontario Court of Appeal held that this was an impermissible attempt to control the content of speech outside the courtroom. At para 50 the Court held that "absent any finding of potential harm or injury to a legally protected interest, *there is nothing in the law that permits a judge to impose his or her opinion about what does not need to be broadcast to the general public*. That would be inconsistent with the constitutional protection our legal order accords freedom of expression and freedom of the press" [emphasis added]. While this case was about televising trial exhibits, it nonetheless underscores that freedom of expression seemingly limits a judge's ability to control the judicial narrative in the hands of others.

¹⁵⁸ Elaine Craig, "Person(s) of Interest and Missing Women: Legal Abandonment in the Downtown Eastside" (2014) 60:1 McGill LJ 1 at 20 [emphasis in original].

¹⁵⁹ Nesson, *supra* note 118 at 398.

forced to cede control over the flow of information in a manner that makes them “just a participant in a connective community, rather than the person in control of a legal process.”¹⁶⁰ Consequently, while the fight may be waged between the normative value of the law’s content and the discursive nature of its debate in the context of the open court principle, freedom of speech under section 2(b) may be the ultimate trump card, particularly in circumstances where the courts have already brought digital media technologies into the fold.

V. CONCLUSION AND LOOKING AHEAD

Ultimately, the unsettled future of digital media in Canadian courtrooms and the patchwork quilt of policies that have sprung up to address judicial concerns in its regard point to the profoundly disruptive potential that this technology has for the justice system. This technology is not, as some critics suggest, merely an extension of pen and paper journalism. It is a new way of thinking about information dissemination—both within and beyond the courtroom—and provides an unrivalled ability to disseminate larger quantities of information to an awaiting public, at a speed and with a sense of immediacy that far surpasses conventional media. It is a form of dissemination that has serious benefits, particularly in its ability to open the courts up to public scrutiny and to demystify proceedings by ensuring more individuals are able to witness a trial unfold before their eyes and at their fingertips. Attempts to stifle the integration of digital media in the courtroom are thus met with valid resistance on the basis of public accountability and accessibility, norms which are at the heart of both the legal system and the democratic system of governance to which it belongs.

At the same time, inherent in digital media’s promises are its problems, especially its fundamental ambivalence regarding the open court principle as the source of both legal clarity and contestation. Accordingly, in deciding whether to allow digital media use in the courtroom, the justice system may need to decide which of the longstanding normative values supporting the open court principle ought to be given decisive weight in modern society. It remains unclear how this quandary will be reconciled, as the current patchwork quilt of policies regarding

¹⁶⁰ Lorne Sossin & Meredith Bacal, “Judicial Ethics in a Digital Age” (2013) 46 UBC L Rev 629 at 630.

digital technology use in Canadian courtrooms suggests that consensus surrounding this choice is elusive.

What is clear, however, is that digital media technology has a profound ability to both complement and complicate the administration of justice in novel ways. As Chief Justice Beverley McLachlin eloquently stated,

The open courtroom remains as essential today as it was in Bentham's time. Yet the omnipresent and immediate reach of modern dissemination networks makes it increasingly apparent that openness may exact costs—costs that require judges and the media to reassess the means by which they further the principle of open justice.¹⁶¹

Regardless of the outcome, an analysis of the open court principle and all its pressing practical concerns in the context of digital media helps, as Jeremy Waldron has written, to “bring our conceptual thinking about the law to life”:

There is a distressing tendency among academic legal philosophers to see law simply as a set of normative propositions and to pursue their task of developing an understanding of the concept of law to consist simply in understanding what sort of normative propositions these are. But law comes to life *in institutions*. An understanding of legal systems that emphasizes argument in the courtroom as much as the existence and recognition of rules provides the basis for a much richer understanding of the values and requirements that law and legality represent in modern political argument.¹⁶²

The open court principle, as it currently stands in practice, demonstrates these nuanced and contextual intersections between theory and practicality as it relates to the deployment of legal institutions on a ground level. For this reason, the open court principle provides an incredibly rich and ongoing topic of conversation, and one that will continue to evolve in the coming years.

¹⁶¹ McLachlin, *supra* note 141.

¹⁶² Waldron, *supra* note 35 at 13 [emphasis in original].