

WHY SHOULDN'T AUSTRALIAN COURT PROCEEDINGS BE TELEVISED?

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The price of justice is eternal publicity
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I. INTRODUCTION

In late 1993 the Australian Broadcasting Corporation televised two documentaries which contained footage of court proceedings.¹ These broadcasts

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1 An hour-long documentary, titled "So Help Me God" was filmed in Campbelltown Local Court in Sydney over a period of six weeks. Television cameras recorded not only proceedings in the courtroom, but also in the Magistrate's chamber, solicitors' interview rooms, the cells, the foyer and the precincts of the Court. The program was televised on 29 September 1993. The Four Corners television program broadcast on 24 October

coincided with the live televising of the trials of Lorena Bobbitt and Erik and Lyle Menendez² in the United States.³ Both the Australian documentaries and the United States trials generated public discussion in Australia, focusing on the desirability of the televising of court proceedings.⁴ The broadcasts of these courtroom documentaries,⁵ together with supportive statements made by prominent lawyers,⁶ and most importantly, the recommendations of the Access to Justice

1993, featured an investigative report on child abuse titled "Kids at Risk". The program included footage of proceedings in the Children's Care Court in Kempsey, New South Wales.

- 2 The trial of a battered wife who had dismembered her husband, and the trials of two brothers charged with the murder of parents who had allegedly sexually abused them, respectively.
- 3 The preliminary hearing of charges brought against OJ Simpson for the murder of his former wife and her friend received unprecedented live television coverage in the United States in July 1994 (see R Lusetch, "A Nation is Glued to Screens as LA Law Meets the Simpsons" *Weekend Australian*, 2-3 July 1994, p 12). Largely as a result of these trials the number of subscribers to Court TTV, the Cable network which has shown these trials live, is reported to have leapt from 2.5 million in 1991 to over 14 million in 1994: P Clark, "Remotes Tune to Court, OJ On the Big Three" *Age*, 7 July 1994.
- 4 See, for example: M Date, "Through the Eyes of the Law" *Sydney Morning Herald*, 27 September 1993; P Adams, "The Trials of Justice" *Weekend Australian*, 25-26 September 1993, p 2; and J Lyons, "Justice as Entertainment: America's New Show Trials" *Weekend Australian Magazine*, 21-22 May 1994, p 12.
- 5 Australian courtroom proceedings had been televised on very few prior occasions. The first known occasion was in February 1981 when Mr Barrett SM, the Coroner in the First Colonial Inquiry into the Death of Azaria Chamberlain, invited television cameras to record and televise his findings: New South Wales Law Reform Commission Issues Paper, *Proceedings of Courts and Commissions Television Filming, Sound Recording and Public Broadcasting, Sketches and Photographs*, 1984 at 34. In June 1981, the Australian Broadcasting Corporation televised a Four Corners program showing proceedings in two courts at the Sydney Central Court of Petty Sessions: *ibid* at 35. In July 1981, part of the proceedings in a Hobart Court of Petty Sessions was televised. The presiding magistrate, Mr Sikk SM allowed the opening statements by the prosecution and the defence to be televised: *ibid*. In November 1981 a Four Corners program on "Burglary in Australia" showed part of an Adelaide District Court's burglary trial: *ibid*. On 31 March 1992, Mr Justice Millhouse of the South Australian Supreme Court permitted photographers and television cameras to record proceedings in a civil case: R Duncan, "Media Access to Courts in South Australia" (1992) 12(2) *Communications Law Bulletin* 23. Television cameras were also permitted to record ceremonial sittings of the Federal Court in Brisbane in December 1993 and in Adelaide in May 1994. In May 1994 proceedings in the Practice Court of the Supreme Court of Victoria were filmed for use as background material for an interview to be shown on Australian Broadcasting Commission's Lateline program. For other instances, see New South Wales Law Reform Commission Issues Paper, *ibid* at 36; "Odds and Ends: Court-Room TV" [1981] *Reform* 101; and S Walker, *The Law of Journalism in Australia*, The Law Book Company, (1989) pp 29-30.
- 6 In July 1993, in an address to the National Family Court Conference in Sydney, Chief Justice Black of the Federal Court of Australia suggested that the time had come to examine whether television should be allowed into the courtroom and if so on what terms. (See further discussion of Black CJ's views, note 9, 215, 230 *infra*). Shortly after being sworn in as Victoria's new Chief Magistrate, Mr Nicholas Pappas observed that he was not "immediately opposed" to the televising of court proceedings, though he did perceive some disadvantages. Noting that "the law has to be in a position to respond to the changing needs of the community", Mr Pappas indicated a preference for a television channel dedicated to reporting court cases in full. The Federal Minister for Justice, Mr Duncan Kerr MP was reported to see "no reason why court proceedings should not be televised given that the print media had always had access": S Henry, "New Chief Magistrate Advocates Cases on TV" *The Australian*, 25 November 1993, p 5. On 30 January 1994 Mr Pappas added: "[t]he fact is that courts are open....To artificially restrict the electronic recording of particular things that are said to be an open part of society is unusual": *Age*, 31 January 1994. On 7 July 1994, Mr Pappas was reported to be wanting "to begin public debate and explore the possibilities and limits to opening courts to televising" by "planning a test broadcast" within weeks and stating that "he intended to allow cameras in permanently if limits could be agreed upon": A Messina, "Lights, Camera, Action: They're in Court and So Are You" *Age*, 7 July 1994, p 1. The Victorian Attorney-General, Ms Wade is reported to have expressed

Advisory Committee,⁷ now make it appropriate for the issue to be extensively analysed and debated.

In the Sackville Report, the Committee concludes that the broadcasting of court proceedings should be permitted,⁸ and recommends that:

The Federal Court of Australia should consider the establishment of an experimental program to allow the broadcasting of proceedings. It should be established subject to guidelines stipulated by the Court.⁹

The Committee also recommends that “[t]here should be no broadcasting of proceedings in the Family Court”,¹⁰ and that “[t]he broadcasting of tribunal proceedings should be considered after the evaluation of the experimental program in the Federal Court”.¹¹

If the Committee’s recommendations are implemented at the Federal level they will provide State and Territory authorities with an opportunity to observe and assess the desirability of following suit. The recommendations do not, however, have a direct bearing on television camera access to state or territory courts. The Sackville Report noted that:

The Federal Court does not presently have a criminal jurisdiction that involves the use of juries...We recognise that the broadcasting of criminal jury trials would be likely to attract the most public interest. Nonetheless, the project is of sufficient importance to warrant the Federal Court taking the lead. We would encourage State courts that have criminal jury trials to adopt a similar experimental program.¹²

A. The Current Position

The televising of Australian court proceedings is not specifically prohibited by statute, although a number of statutory provisions regulate or restrict the scope of any televising of court proceedings. These provisions include those prohibiting the

support for the concept of court televising: A Messina, “Tricky First hour for Chief Magistrates” *Age*, 25 November 1993, p 7, but more recently has expressed concern that television reports may show excerpts of judicial proceedings out of context, and has stressed the need to “avoid courts being used for entertainment and voyeurism or in a way that prejudiced the outcome of an individual case”: *Age*, 7 July 1994, p 1.

7 Access to Justice Advisory Committee, *Access to Justice: an Action Plan*, 23 May 1994 (The Sackville Report).

8 *Ibid* at [20.32]. In general, the Report’s references to “broadcasting” are intended to cover both television and radio: *ibid* at 443, footnote 5.

9 Action 20.1, *ibid* at [20.33]. Two days after the Sackville Report was released, the Federal Court’s Chief Justice Black publicly expressed his support for this recommendation stating, “I believe a strong case does exist for the Federal Court to consider the establishment of the experimental programme to allow the broadcasting of proceedings as recommended by the Committee”: Chief Justice Black, “Letting the Public Know: The Educative Role of the Courts”, presented at The Ninth Sir Richard Blackburn Lecture, The Law Society of the Australian Capital Territory, 25 May 1994, p 13. The 38 judges of the Federal Court are to discuss the issue at a meeting in September. Chief Justice Black is reported to have said that if the plan were approved, there might be a “practical application” at the end of the year. (A Messina, “Federal Court to Consider TV Move” *Age*, 15 July 1994, p 7).

10 Action 20.3, *ibid* at [20.47].

11 Action 20.4, *ibid* at [20.48].

12 *Ibid* at [20.33].

publication, printing, broadcasting or televising of materials that might identify a juror;¹³ those which forbid the publication of an account of certain types of proceedings in such a way as to identify a party, a witness, a person related to, or associated with, or in any way concerned in the proceedings;¹⁴ those dealing with sexual offences;¹⁵ as well as statutory powers of courts to make orders prohibiting the publication of court reports on the grounds of "public decency and morality".¹⁶ In some jurisdictions in relation to some courts, there also exist wider court powers to prohibit the publication of material which, in the judge's opinion ought not to be published,¹⁷ which would, or would be likely to prejudice a trial;¹⁸ which is required "in the interests of the administration of justice";¹⁹ or which is required to prevent "undue hardship".²⁰ In addition, courts possess statutory powers²¹ to deny public access to certain proceedings.²²

The publication or broadcast of court proceedings is also subject to the law of contempt of court, which has been described as the Australian legal system's principal strategy for controlling media publicity relating to court cases.²³ The Australian law of contempt is found in the common law, pursuant to which, "[a]ny act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts' is a contempt of court".²⁴ Under Australian contempt law the television broadcast of court proceedings, the accompanying commentary, the filming of court proceedings, and even the mere presence of television cameras in court may be held to constitute one or more of the several categories of contempt.²⁵ Arguably the most significant contempt of court principle in relation to the televising of court proceedings is "contempt in the face of the court". This category of contempt law is concerned with words and actions which may disturb the conduct of judicial proceedings. It is largely on the basis that tape recorders, television cameras and other cameras are perceived to have

13 For example, *Jury Act 1977* (NSW), s 68; *Juries Act 1967* (Vic), s 69.

14 For example, *Family Law Act 1975* (Cth), s 121(1); *Children's Services Ordinance 1986* (ACT), s 170(1); and *Adoption of Children Act 1984* (Vic), s 121(2).

15 For example, *County Court Act 1958* (Vic), s 81(1); *Magistrates' Court Act 1989* (Vic), s 126 (1)(d); and *Evidence Act 1910* (Tas), s 103AB. For further discussion see S Walker, note 5 *supra*, pp 29-30.

16 For example, *Judicial Proceedings Reports Act 1958* (Vic), s 3(1)(a); *Evidence Act 1939* (NT), ss 57(1)(a) and (1)(ii); and *County Court Act 1958* (Vic), s 81(1). See also, the discussion of statutory prohibitions in the Sackville Report, note 7 *supra* at 446.

17 For example, *County Court Act 1958* (Vic), s 80(1).

18 For example, *Evidence Act 1910* (Tas), s 103A.

19 See, *Evidence Ordinance 1971* (ACT), ss 82 and 83(1), and *Magistrates' Court Act 1989* (Vic), s 126(1)(b).

20 *Evidence Act 1929* (SA), s 69a(1). See also, *Magistrates' Court Act 1989* (Vic), s 126(1)(c) which provides that a court may prohibit publication in order not to "endanger the physical safety of any person".

21 For example: *County Court Act 1958* (Vic), s 81(1); *Children (Criminal Proceedings) Act 1987* (NSW), s 10(a); and *Magistrates' Court Act 1989* (Vic), s 126. Also see discussion in S Walker, note 5 *supra*, pp 10-14.

22 As to the courts' general power to close proceedings, see: *infra* at section II I(i) and (ii).

23 M Chesterman, "Controlling Courtroom Publicity: Common Law Strategies" (1985) *International Legal Practitioner* 47 at 51.

24 *R v Gray* [1900] 2 QB 36 at 40, per Lord Russell CJ.

25 See *infra* at section III.

“considerable potential to distract the operations of the court”²⁶ through physical disruption as well as through psychological pressure on court participants, that their unauthorised use²⁷ in court is said to constitute a contempt.²⁸ Contempt of court is discussed further, below.²⁹

The common law principles of contempt of court and the statutory powers of Australian courts outlined in the previous paragraph are, however, only partly responsible for the exclusion of television cameras from Australian courtrooms. The de-facto prohibition of the televising of court proceedings exists largely as a result of the exercise by the courts of their inherent power to regulate their own proceedings.³⁰ Such discretionary power is, however, restricted by the importance attached to the principle of open justice. For example, the New South Wales Court of Appeal has held that “the inherent jurisdiction could not exceed what is necessary for the administration of justice...”³¹

B. The Issue

In order to consider why court proceedings are not televised in Australia, and whether it is desirable that this prohibition should continue, this article undertakes an assessment of the competing arguments and conflicting rights in light of the overseas³² and limited Australian³³ experience. An examination of the arguments of those opposed to the televising of court proceedings reveals that the dangers which they have perceived are either no longer relevant, unfounded, disproved, capable of being overcome through appropriate regulation, or simply not relevant to Australia. The acceptance of the arguments put forward by proponents of the televising of court proceedings is shown to have led to the lifting of the ban on the televising of court proceedings in the United States. It also forms the basis for the recommendations made by the Bar Council of England and Wales in 1989, that

26 Australian Law Reform Commission, *Contempt*, Report No 35, 1987 at [126].

27 Authorised use being, the tape recording of the official transcript, and the specifically authorised use of cameras.

28 See S Walker, note 5 *supra*, p 20. Also see, discussion of contempt law principles in the Sackville Report, note 7 *supra* at 445.

29 *Infra* at section II E.

30 *Attorney General v Leveller Magazine Ltd* [1979] AC 440. On the nature of this inherent power see: K Mason, “The Inherent Jurisdiction of the Court” (1983) *Australian Law Journal* 449. The use of this inherent jurisdiction by a court to prohibit the publication of part of its proceedings is considered in: *R v Tait and Bartley* (1979) 24 ALR 473; 46 FLR 386.

31 *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 at 270. In *Trung Dong Nguyen v The Magistrates' Court of Victoria*, (unreported, Supreme Court of Victoria, No 7182 of 1993, Coldrey J, 3 September 1993) in determining the scope of the exercise by a Magistrate of such power under the *Magistrates' Court Act 1989* (Vic), s 136, Coldrey J, applied *R v Leicester City Justices* [1991] 2 QB 260. See *infra* at section II I(ii).

32 This article considers the position in England / Wales and the United States. For a summary of the position elsewhere, see: The Public Affairs Committee of the General Council of the Bar, *Televising the Courts: Report of a Working Party*, May 1989 at [3.1]-[3.4] (The Caplan Report, named after its chairman, Jonathan Caplan, QC).

33 See note 5 *supra*.

television cameras be permitted into British courtrooms on an experimental basis.³⁴ When analysed in light of such findings, Australia's de-facto prohibition of courtroom televising is found to be unwarranted, undesirable, and indefensible under applicable legal principles.

In concluding that the televising of courtroom proceedings is desirable, this article stresses its proven educative and informative value, its positive effect on trial participants and most importantly, television's unique potential to provide to virtually every member of the community an opportunity for first-hand observation and scrutiny of the judicial process. In thus ensuring a more genuine open justice, the televising of court proceedings serves to maintain or even enhance public confidence in the legal system.

It is suggested that the televising of Australian court proceedings should be permitted, not simply because perceived dangers may be discounted or minimised, and numerous benefits proven, but principally because open justice requires that the administration of justice be conducted in open courts unless it can be established that justice cannot otherwise be done.³⁵

The televising of court proceedings would be subject to existing laws and principles which regulate access to courts and the publication of court proceedings. It is suggested that general guidelines should also be adopted in order to avoid certain potential dangers which are peculiar to this form of court reporting. Such

34 A Working Party of the Public Affairs Committee of the General Council of the Bar of England and Wales was set up in April 1988, "to inquire into the feasibility and desirability of televising court proceedings in England and Wales": The Caplan Report, note 32 *supra*, p 1. In their report, the Working Party unanimously recommended that the *Criminal Justice Act* 1925, s 41, be amended or repealed to enable supervised pilot projects of courtroom televising to be undertaken: *ibid* at [7.1]. The recommendation that existing laws be amended to permit a two-year program of pilot projects to be set up, was approved by the Bar Council in 1990: see *Explanatory Memorandum to the Court (Research) Bill* 1990 (Eng) reproduced in, Justice Caplan QC, "Televising the Courts-Case for Reform" (1992) *Journal of Media Law & Practice* 176 at 177. To implement this proposal, the Bar Council sponsored the *Courts (Research) Bill* 1990 (Eng) in February 1991: reproduced in The Caplan Report, *ibid* at 177-8. The express purpose of the Bill, as it related to televising was: "to enable research or experimentation...to be carried out...where such research or experimentation is presently prohibited. The prohibitions would not be repealed by the Bill, but would be disapplied in cases where, pursuant to rules of court, pilot projects or more comprehensive pieces of research were approved". See the *Explanatory Memorandum to the Court (Research) Bill*, reproduced in The Caplan Report, *ibid* at 177. The Bill proposed an amendment to s 41 of the *Criminal Justice Act* 1925 (Eng), (discussed: *infra* at section II A (ii) to ensure that its prohibition on photography in court "would not apply to the televising of court proceedings conducted in accordance with arrangements made by rule of court". The Bill was introduced in the House of Commons as a private members Bill by Dr Mike Woodcock. It was debated with vigour on 22 February 1991. See: United Kingdom, House of Commons, 1990-91, Debates, Official Report, Sixth Series, Vol 186, pp 549-67 and 578-615. The debate provides a valuable summary of arguments for and against the introduction of court televising. The absence of forty members from the division on the question "that the question be now put", resulted in a ruling that the question was not decided: *ibid* at 615. On 1 March 1991 the order for second reading was read and not moved: *ibid* at 1282. In this way, the Bill failed to reach the second reading. For arguments in favour of the Bar Council's proposals, see The Caplan Report, *ibid* at 124; for arguments in favour of televising in general, see M Dockray, "Courts on Television" (1988) 51 *Modern Law Review* 593. For the arguments of opponents, see B Hytner QC, "Televising the Courts-Case Against Reform" (1992) *Journal of Media Law & Practice* 174 and J Morton (ed), "Editorial - Tele-Justice" (1989) 139 *New Law Journal* 705.

35 See discussion *infra* at section II I (ii).

guidelines would be designed to, avoid physical disruption; ensure that the dignity and decorum of proceedings is not adversely affected; and to minimise, if not eliminate, any adverse psychological pressure on participants. In recognition of the fact that in some cases further restrictions, or even the prohibition of televising, may be warranted, judges and magistrates should be provided with clearly defined discretionary powers to regulate, restrict or prohibit the filming or broadcasting of certain proceedings. The onus of establishing the existence of grounds calling for the exercise of such discretionary powers should fall on those seeking such orders.

II. THE PRINCIPAL ISSUES OF THE DEBATE

Those opposed to the televising of proceedings argue that the presence of television cameras in court is physically disruptive, distracts other participants and interferes with the dignity and decorum of proceedings. Opponents also argue that the broadcasting of proceedings generates prejudicial publicity, thereby adversely affecting the administration of justice, invades participants' privacy, and distorts and creates misconceptions about the judicial process. Proponents of the televising of court proceedings dismiss these objections as unfounded; they point to the benefits of a televised public trial. Such benefits are said to include, its educative value and informative function; the opportunity it gives for personal observation; the positive effect on trial participants; the greater public access to; and confidence it generates in the legal system; and other side benefits to the judicial process.

A. Physical Disruption

One of the early arguments against the televising of court proceedings and one which continues to be used in Australia to distinguish between the presence of the press and the presence of television cameras, is that cameras interfere with court proceedings and distract participants.³⁶

(i)

The physical disruption of courts by cameras was largely responsible for the prohibition of cameras in United States' courtrooms. In 1965, as a result of moves to restrict the media's coverage of trials, only two American States, Oklahoma and Colorado, permitted cameras in their courts.³⁷

The media's coverage of the 1935, New Jersey trial of Bruno Hauptmann for the kidnapping and murder of Charles Lindbergh's 20 month old son,³⁸ turned already existing disquiet regarding the media's coverage of trials,³⁹ into a movement

36 Australian Law Reform Commission, note 26 *supra* at [126]; discussed *infra* at section IIA (iv).

37 WE Francois, *Mass Media Law and Regulation*, (4th ed, 1986) p 364 and NT Gardner, "Cameras in the Courtroom: Guidelines for State Criminal Trials" (1985-6) 84 *Michigan Law Review* 475.

38 *State v Hauptmann* (1935) 115 NJL 412.

39 R Kielbowicz, "The Story Behind the Adoption of the Ban on Courtroom Cameras" (1979) 63 *Judicature* 14 at 15-7.

seeking to regulate media coverage of court proceedings and prohibit photographic coverage of trials. The large and disruptive presence of the media at the trial⁴⁰ was widely criticised⁴¹ and ultimately led the American Bar Association's House of Delegates to prohibit⁴² photographic coverage of court proceedings.⁴³ Canon 35

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- 40 The media presence in the courtroom is reported to have included 141 newspaper reporters and photographers, 125 telegraph operators, and 40 messengers: see unattributed New York newspaper report of 9 January 1935, cited by AH Robbins, "The Hauptmann Trial in the Light of English Criminal Procedure" (1935) 21 *American Bar Association Journal* 301 at 304. It was said that "messenger boys and clerks employed by the press ran about during the trial": *State v Hauptmann*, note 38 *supra* at 827. "Witnesses jurors and anyone remotely associated with the trial were reportedly fair game for the press": WE Francois, note 37 *supra* at 330. Restrictions placed on media representatives by the trial judge were not adhered to by everyone: the New York Times reported that although Justice Trenchard, "had placed all camera men in the court, both still and motion picture men, on their honor not to take pictures while court was in session", one motion picture camera had operated during the trial, contrary to the judge's directions, and without his consent: Staff Correspondent, "Wilentz Demands Suppression of Newsreels Taken by 'Trickery' During Trial Sessions" *New York Times*, 2 February 1935, p 1 at 7; see also, R Kielbowicz, note 39 *supra* at 19.
- 41 See O Hallam, "Some Object Lessons on Publicity in Criminal Trials" (1937) 62 *American Bar Association Reports* 453 at 456-62. The behaviour of print journalists and lawyers was also widely criticised: see discussion in R Kielbowicz, note 39 *supra* at 19-20.
- 42 Canons of the American Bar Association have been described as "a system of principles of exemplary conduct and character...not having the force of law": *Lyles v State* (1958) 330 P 2d 734 at 738, and as mere expressions of the Bar Association's views, having no binding effect on the courts: *Estes v Texas* (1965) 381 US 532 at 535. See also "Proceedings of the 1963 Mid-Year Meeting of the House of Delegates" (1963) 49 *American Bar Association Journal* 385 at 396. Canon 35 was, however, passed by the House of Delegates, described by Mr Justice Harlan as, "not only the governing body of the American Bar Association; [but] because of the presence of representatives of all State Bar associations, the largest and most important local bar associations and of other important national professional groups,...a broadly representative policy forum for the profession as a whole": *Estes v Texas*, *ibid* at 596, n 1- Appendix to Opinion of Mr Justice Harlan, concurring. It is therefore not surprising that the recommendations contained in Canon 35 were ultimately adopted by all States with the exception of Colorado and Oklahoma: see WE Francois, note 37 *supra* at 364.
- 43 Widespread criticism of the media's behaviour in reporting this trial led the American Bar Association's Special Committee on Publicity in Criminal Trials to undertake a study of the publicity surrounding the trial: see American Bar Association Convention, 1935, discussed in R Kielbowicz, note 39 *supra* at 21. The Committee subsequently advised the American Bar Association to seek the cooperation of the press in order to "secure fair and reasonable restriction upon news procurement, distribution and comment...": see O Hallam, note 41 *supra* at 508. For the text of the *Report of Special Committee on Publicity in Criminal Trials*, see *ibid* at 477-508. The Committee recommended, "[t]hat no use of cameras or photographic appliances be permitted in the courtroom, either during the session of the court or otherwise": *ibid* at 507. This recommendation, in turn, led to the setting up of a Special Committee on Cooperation Between the Press, Radio and Bar Against Publicity Interfering with Fair Trial and Judicial and Quasi-Judicial Proceedings (the Baker Committee), to seek "standards of publicity in judicial proceedings and methods of obtaining observance of them": see "Report of the Special Committee on Cooperation Between the Press, Radio and Bar as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings" (1936) 61 *American Bar Association Reports* 800-02. See also (1936) 22 *American Bar Association Journal* 79 and H Nelson and D Teeter, *Law of Mass Communication-Freedom and Control of Print and Broadcast Media*, Foundation Press, (4th ed, 1982) p 433. The Committee's 1937 report described the Hauptmann trial as: "the most spectacular and depressing example of improper publicity and professional misconduct ever presented to the people of the United States in a criminal trial" ("Report of the Special Committee on Cooperation Between the Press, Radio and Bar as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings" (1937) 62 *American Bar Association Reports* 851 at 861). The Baker Committee was unanimous in recommending that "the use of cameras in the courtroom should be only with the knowledge and approval of the trial judge": *ibid* at 862. The lawyers and journalists on the committee could not, however, agree as to whether the consent of counsel and participants was also required: *ibid* at 862-4. In spite of this, the American

of the American Bar Association's Canons of Professional and Judicial Ethics was amended in 1952 to also prohibit the use of television cameras and to note the perceived distracting effect on witnesses.⁴⁴ As amended it read:

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court and create misconceptions with respect thereto in the minds of the public and should not be permitted...⁴⁵

The effect of television camera coverage of trials was considered by the United States Supreme Court in *Estes v Texas*.⁴⁶ The Supreme Court ordered a new trial on the ground that media presence and behaviour had disrupted the proceedings, and thus had deprived the defendant of due process.⁴⁷

(ii)

The physical disruption of courts due to the primitive state of television camera technology also helps to explain why television cameras are prohibited in British courtrooms. While a number of common law and statutory provisions empower British courts to restrict or prohibit the filming, sound recording and broadcasting of court proceedings,⁴⁸ it is the *Criminal Justice Act, 1925 (Eng)*⁴⁹ which has been

Bar Association's Committee on Professional Ethics and Grievances proposed certain additions to the Canons of Professional and Judicial Ethics, including Canon 35, prohibiting photographic coverage, which were passed by the House of Delegates without discussion: discussed further in O Hallam, note 41 *supra*; R Kielbowicz, note 39 *supra* at 22; and MK Platte, "TV In The Courtroom: Right of Access?" (1981) 3 *Communications and the Law* 11 at 12. Thus in 1937 the American Bar Association adopted Canon 35 of the American Bar Association's Canons of Judicial Ethics: "Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the minds of the public and should not be permitted"; published in (1937) 62 *American Bar Association Report* 1134-5. See also Appendix to opinion of Mr Justice Harlan in *Estes v Texas*, note 42 *supra* at 596.

44 "Proceedings of the House of Delegates: Mid-Year Meeting, February 25-26, 1952" (1952) 38 *American Bar Association Journal* 425 at 427.

45 Canons of Judicial Ethics, *American Bar Association: Judicial Canon 35* (1952); see *Estes v Texas*, note 42 *supra* at 592. Canon 35 underwent minor amendments in 1963; see note 42 *supra*, (1963) 49 *American Bar Association Journal* at 396, footnote 26; and "Canon 35 Reaffirmed" (1963) 49 *American Bar Association Journal* 357. It remained in force until 1972, when it was replaced by Canon 3A(7), which in turn was repealed in 1982. For a summary of the history of Canon 35 see the appendix to the opinion of Mr Justice Harlan in *Estes v Texas*, *ibid* at 596 ff.

46 Note 42 *supra*; (1965) 85 S Ct 1628.

47 *Estes v Texas*, *ibid* at 534-51, per Clark J. The 1962 trial of the flamboyant and politically connected Texan financier, Billie Sol Estes on fraud and false pretence charges, generated great public and media interest: see, RP Lindsey, "An Assessment of the Use of Cameras in State and Federal Courts" (1984) 18 *Georgia Law Review*, 390 at 397, footnote 45.

48 See, Caplan Report, note 32 *supra* at [1.4]. Also see, C Walker, and D Brogarth, "Televising The Courts" (1989) 153 *Justice of the Peace* 637; and N Lowe, and G Borrie, *Borrie and Lowe's Law of Contempt*, Butterworths, (2nd ed, 1983) pp 20-1. On the courts' inherent power to control their own proceedings, see, *Attorney General v Leveller Magazine Ltd* [1979] AC 440; and discussion *supra* at section IB and *infra* at section II I (ii).

49 *The Criminal Justice Act (Eng) 1925*, 15 & 16 *Geo 5*, c 49, s 41, provides:

held largely responsible for the prohibition on court televising. Although it was enacted 11 years before the first English television broadcasts, this provision has been interpreted not only to prohibit photography and sketching in English courtrooms, but also to extend to television and moving pictures.⁵⁰ According to the Caplan Report:⁵¹

The subsequent application of s 41 to television (which in 1925 was only in an early and unsuccessful experimental stage) was an unforeseen consequence which has never received the consideration it deserved.⁵²

Similarly, Dockray suggests that:

While Parliament seems to have managed in 1925 to prevent court proceedings being televised, it did so without first considering the merit of that ban: Parliament debated only the very different merits of still pictures.⁵³

(iii)

Technological advances are such that filming of court proceedings no longer needs to be disruptive. Recognition of this, contributed in large measure to the lifting of the ban on court televising in the United States. Presently forty-seven American States permit television cameras in their courts on a permanent or experimental basis,⁵⁴ and a three year experiment, which allows cameras in a limited number of federal civil courts, commenced in 1991.⁵⁵ While the Supreme Court of the United States in *Estes*⁵⁶ had declared that the physical distraction and

No person shall:

- (a) take or attempt to take in any court any photograph, or with a view to publication make or attempt to make in any court any portrait or sketch, of any person, being a judge or witness in, or a party to, any proceedings before the court whether criminal or civil; or
- (b) publish any photograph, portrait or sketch taken or made in contravention of the foregoing provisions of this section or any reproduction thereof.

50 *Re St Andrew's* (Const Ct) [1977] 3 WLR 286; and *Re Barber v Lloyds Underwriters* [1987] 1 QB 103, 105. See also, *Interpretation Act 1978* (Eng), s 6.

51 Note 32 *supra*.

52 *Ibid* at [2.2].

53 M Dockray, note 34 *supra* at 597-8.

54 See Radio-TV News Directors Association, *News Media Coverage of Judicial Proceedings with Cameras and Microphones: A Survey of the States*, 1 January 1994. See also SL Alexander, "Cameras in the Courtroom: A Case Study" (1991) 74 *Judicature* 307 at 310 and AC Laing, "Televising the Courts in the UK" (1989) 7 *Media Law* 46.

55 See WE Francois, note 37 *supra* at 365. A largely favourable report on the pilot program, which was conducted in two appeals courts and trial courts in six States, was presented to the United States Judicial Conference's Committee on Court Administration and Case Management by the Federal Judicial Center. The Report concluded that cameras had little effect in court and reported generally favourable comments from judges and lawyers: "Judges More Favourable Toward Camera Coverages; Three-Year Experiment Ends" *The Legal Intelligencer* (Washington), 17 November 1993. The Committee has, however, postponed making a decision on whether to recommend allowing proceedings to be televised, recommending instead that the pilot program be extended for a further six months: R Schmidt, "Federal Judges Defer Decision on Cameras in the Courtroom" *Legal Times*, 13 December 1993. See also SL Alexander, note 54 *supra*; P Raymond, "The Impact of a Televised Trial on Individuals' Information and Attitudes" (1992) 75 *Judicature* 204; and HJ Reske, "Cameras Experiment One Year Old" (1992) 78 *American Bar Association Journal* 28.

56 Note 42 *supra*. The scene of the trial was described by the New York Times (25 September 1962) in the following terms:

disruption resulting from the filming of a trial “inherently prevented a sober search for truth”,⁵⁷ the Court noted that “the ever advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of television upon the fairness of trials”.⁵⁸ By the mid-1970s, American State Courts began to relax the prohibition on television cameras in courts; permitting televising on an experimental basis, through case by case agreements between the press and the parties, and by establishing guidelines for electronic media coverage of trials.⁵⁹ By this time it could be said that:

...technology had advanced to the point where coverage of events by broadcast media had fewer distractions; no longer were lights needed for more sophisticated cameras. Cameramen could be content to cover trials from a fixed position, rather than roam at will. Microphones were more common and less fear-evoking than in the generation previous.⁶⁰

The findings of a twelve month, Supreme Court of Florida supervised experiment with courtroom televising, between July 1977 and June 1978,⁶¹ led that

A television motor van, big as an intercontinental bus was parked outside the courthouse and the second floor courtroom was a forest of equipment. Two television cameras have been set up inside the bar and four more marked cameras were aligned just outside the gates. A microphone stuck its 12 inch snout inside the jury box now occupied by an overflow of reporters from the press table, and three microphones confronted Judge Dunagan on his bench. Cables and wires snaked over the floor.

Chief Justice Warren of the Supreme Court of the United States, described the trial in the following manner:

The courtroom was filled with newspaper reporters and cameramen, television cameramen, and spectators. At least 12 cameramen with their equipment were seen by one observer, and there were 30 or more standing in the aisles...With photographers roaming at will through the courtroom, petitioner's counsel made his motion that all cameras be excluded. As he spoke, a cameraman wandered behind the judge's bench and snapped his picture': *Estes v Texas*, note 42 *supra* at 553 and photographs in Appendix to Opinion of Warren CJ at 586; see 604-9 for an account of the trial.

57 *Ibid* at 551-2.

58 Two members of the Court suggested that advances in technology could lead to a reappraisal of this position. Mr Justice Harlan observed: “[t]he day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in the courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause”: *ibid* at 595-6. Similarly, Mr Justice Clark noted that: “[w]hen the advances in these arts permit reporting by...television without their present hazards to a fair trial, we will have another case”: *ibid* at 540.

59 VE Limburg, NP Lovrich, CH Sheldon, and E Wasman, “How Print and Broadcast Journalists Perceive Performance of Reporters in Courtroom” (1988) *Journalism Quarterly* 621. See also D Graves, “Cameras in the Courts: The Situation Today” (1979) 63 *Judicature* 24.

60 Limburg et al, *ibid*. Prof Eugene Cerruti of New York Law School argues that the relaxation of opposition to television cameras was largely due to the impact of the televising of the Watergate hearings. The hearings created a public awareness of, and interest in white collar crime, a recognition that public institutions needed to be opened up to media scrutiny, and an associated recognition of a potential viewer market by broadcasters: Conversation with Eugene Cerruti, 10 January 1994.

61 The Judicial Planning Coordination Unit Office of the State Courts Administrator, “A Sample Survey of the Attitudes of Individuals Associated with Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts Between July 5, 1977 and June 30, 1978”. For a discussion see *Chandler v Florida* (1981) 449 US 560 at 564-6, per Burger CJ. For results of experiment see: *Re: Petition of Post-Newsweek Stations, Florida* (1979) 370 So 2d 764 at 766-9.

Court to conclude in *Re: Petition of Post-Newsweek Stations, Florida*⁶² that new technology had removed the physical disruption objection:

....during the pilot program, physical disturbance was so minimal as not to be an arguable factor. Technological advancements have so reduced size, noise and light levels of the electronic equipment available that cameras can be employed in courtrooms unobtrusively.⁶³

In 1981 the Supreme Court of the United States in *Chandler v Florida*⁶⁴ endorsed the view of the Supreme Court of Florida. It ruled that advances in technology, which it had foreseen in *Estes*,⁶⁵ had reduced the disruptive effect of filming for television.⁶⁶ The Court held that while dangers to a fair trial continued to exist, an absolute ban on televising was not justified in the absence of satisfactory proof of such dangers.⁶⁷

Today's television cameras are virtually silent, small enough to fit into a cricket stump, able to be worn by sport referees and jockeys, capable of being operated remotely and no longer require artificial lighting. It is therefore technically possible to obtain broadcast quality videotape, not only without interfering with the proceedings, but without the participants being aware of the camera's presence. Studies undertaken in the United States support this view. For example, an empirical study completed at the University of Florida in 1990⁶⁸ supports the findings of earlier research⁶⁹ and concludes that "the mere presence of television cameras does not tend to a disruption of the judicial process".⁷⁰ Findings such as these were relied on by the Working Party of the Bar Council of England and Wales when it concluded that "both intrusion and disruption can be entirely eliminated",⁷¹ and that, former valid objections to televising, based on physical disruption and distraction of participants, were no longer valid due to technological changes.⁷²

62 *Ibid.* For a summary, see the Caplan Report, note 32 *supra* at 1.

63 Note 61 *supra* at 775, per Sundberg J.

64 Note 61 *supra*. For a discussion of this case see H Nelson and D Teeter, note 43 *supra* at 442 ff.

65 Note 58 *supra*.

66 *Chandler v Florida*, note 61 *supra* at 576.

67 *Ibid* at 578-9.

68 SL Alexander, "Mischievous Potentialities: A Case Study of Courtroom Camera Guidelines, Eighth Judicial Circuit, 1989" PhD dissertation, University of Florida, (1990), cited in SL Alexander, note 54 *supra* at 308.

69 Such as EH Short and Associates Inc, *Evaluation of California's Experiment With Extended Media Coverage of Courts* (September, 1981); The Advisory Committee on Cameras in the Courtroom, *Final Statistical Report. Cameras In the Courtroom in Nevada* (May 1981); and R Baker, *Cameras and Recorders in Arizona's Trial Courts* (1983). Also see report on research by the National Center for State Courts, in H Beisman, "In the Wake of *Chandler v Florida*: A Comprehensive Approach to the Implementation of Cameras in the Courtroom" (1981) 33 *Federal Communications Law Journal* 117 at 122. See also Caplan Report, note 32 *supra* at [4.7] for a summary of relevant studies.

70 SL Alexander, note 54 *supra* at 313.

71 Caplan Report, note 32 *supra* at [4.5].

72 *Ibid* at [4.5], [5.1].

(iv)

In Australia, the exclusion of television cameras from courtrooms continues to relate to fear of physical disruption. This is illustrated by the distinction drawn, on the one hand, between photography and filming which are banned, and on the other, sketching, which is generally permitted in Australian courts.⁷³ The fear of physical disruption appears to have influenced the Justices of the South Australian Supreme Court.⁷⁴ In 1992, they announced a "uniform policy prohibiting the use of television and other cameras and also prohibiting sketching in the courtrooms",⁷⁵ but, following protests from the media, the judges amended the policy deciding instead to exclude sketching from the prohibition.⁷⁶ As television cameras need no longer be disruptive and sketching may be more disruptive than filming, the distinction between filming and sketching is unfounded.⁷⁷ Justice Anthony Kennedy of the United States Supreme Court provides the following illustration of the irrationality of the distinction between filming and sketching:

I once had a...very celebrated case in the city of Seattle. And the courtroom was packed. And we were at a critical point in the argument. I was presiding. And a person came in with all kinds of equipment and began setting it up. And he disturbed me. He disturbed the attorneys. He disturbed everybody in the room. And he was setting up an easel to paint our picture, which was permitted. If he had a little Minox camera, we would have held him in contempt.⁷⁸

(v)

The Australian High Court,⁷⁹ Northern Territory Supreme Court⁸⁰ and Western Australia Inc Royal Commission experience with closed circuit television shows that not only can cameras be used without interrupting courts proceedings but that cameras can in fact lessen potential interference by enabling proceedings to be viewed from outside the courtroom.⁸¹

73 For example, the Australian Law Reform Commission has observed that "[p]hotography and filming have a considerable potential to distract the operation of the court...On the other hand the Commission sees no reason why making a sketch should automatically be treated as disruptive or in any other way improper": note 26 *supra* at [123]. See also *supra* at section IA.

74 See R Duncan, note 5 *supra*.

75 Press release by King CJ, dated 28 April 1992.

76 Letter to media organisations from King CJ, dated 25 May 1992.

77 See N Lowe and G Borrie, note 48 *supra* at 21.

78 T Mauro, "Camera Shy. The Supreme Court Has Allowed TV Into The Lower Courts. Why Do They Ban It For Themselves?" (1989) *Student Lawyer* 42 at 47.

79 The Australian High Court has installed eight, built-in, permanent, closed circuit television cameras which record proceedings in each of the two main courtrooms, primarily to assist with identification of speakers for the purposes of the transcript, but which also enable proceedings to be transmitted to a press room. See: New South Wales Law Reform Commission, note 5 *supra* at 37; and R Phillips, "Lights, Camera, Cross-Examination: Television Cameras in the Court" (1990, Autumn) *Bar News* 5 at 6; and the Caplan Report, note 32 *supra* at [3.1], [5.9].

80 In 1982, in the case of *R v Chamberlain*, (A/S 19-20-82, Supreme Court of the Northern Territory, Muirehead J) (Michael and Lindy Chamberlain were convicted on 29 October 1982), the Supreme Court of the Northern Territory, with the consent of all parties, permitted closed circuit television transmission of proceedings to a separate room where large numbers of media were present.

81 See further discussion *infra* at section IIB.

(vi)

The United States experience also reveals that any potential for physical disruption is capable of being controlled through regulation. Most American States have detailed guidelines covering the type and location of television lights and cameras, the number of persons associated with the coverage who can be present in court during proceedings, and pooling arrangements.⁸² In Tennessee, for example, only one camera is allowed and the media are responsible for pooling arrangements.⁸³ The Sackville Report recommends the adoption of guidelines such as would:

...[allow] not more than a specified number of television cameras, each operated by not more than a specified number of camera persons' ...[require] the media...to pool equipment and personnel...[provide that] equipment should not produce distracting sound or light [and prohibit] movie lights, flash attachments, or sudden lighting changes.⁸⁴

B. Dignity and Decorum

It has been argued that the presence of television cameras in court and the broadcast of court proceedings as a form of popular entertainment, threaten the dignity and decorum of court.⁸⁵ Studies of courtroom televising have, however, revealed that such fears are largely unfounded. For example, Mr Justice Moore, concluding a Colorado Supreme Court hearing on whether to allow courtroom televising, stated that, "the dignity or decorum of the court was not in the least disturbed".⁸⁶

Television coverage under controlled circumstances may in fact be far more dignified than the current position which permits the presence of large numbers of media representatives in courtrooms.⁸⁷ Judges in the United States are said to have hailed:

...the virtual disappearance of the photographic herd which stalked the steps and hallways of the courthouse waiting to pounce on lawyers and witnesses moving in and out of trial rooms. When the camera can focus on the trial itself the undignified shouting matches outside are no longer necessary.⁸⁸

82 See Radio-TV News Directors Association, note 54 *supra*; New South Wales Law Reform Commission, note 5 *supra* at 57 ff; NT Gardner, note 37 *supra* at 475; and SL Alexander, note 54 *supra* at 310.

83 New South Wales Law Reform Commission, note 5 *supra* at 42.

84 Sackville Report, note 7 *supra* at [20.37].

85 *Supra* section II A(i), A(ii) and *infra* at section 2B(i), 2E and 2F.

86 *Re Hearings Concerning Canon* (1956) 35 296 P 2d 465 at 468.

87 There is evidence from jurisdictions in which filming is permitted which indicates that "print journalists prefer to monitor the trial from the [media] room", rather than from the press bench in court "since they can talk and move there without restriction": N Davis, "Television in our Courts: The Proven Advantages, the Unproven Dangers" (1980) 64 *Judicature* 85 at 92.

88 *Ibid.* See also M Dockray, note 34 *supra* at 602. This is a view supported by Australian Journalist, Paul White of ABC Television's 7.30 Report: E Simper, "Technology of Trial When Reporters Take Liberties in Camera", *Weekend Australian*, 8-9 August 1992, p 22.

The use of electronic technology such as tape recorders to record proceedings,⁸⁹ microphones to enhance audibility, videotape,⁹⁰ closed circuit television and telephone testimony,⁹¹ tele-conferencing and tele-links⁹² and the experimental use of video graphics to assist the jury,⁹³ have become accepted and are not seen to interfere with the dignity and decorum of courts.⁹⁴ The experience of the use of such technology, when coupled with procedural guidelines,⁹⁵ eliminates any basis for the concern that the physical presence of television cameras would threaten the dignity and decorum of court proceedings.

(i)

There are those, however, who suggest that television technology interferes with the dignity and decorum of a court, even when the equipment and personnel are unobtrusive.⁹⁶ The threat to dignity and decorum is said to be inherent in the nature of the television medium:

The medium has both an inherent limitation in the extent of the cover that can be telecast, as well as an inherent tendency for the form and appearance to overshadow the substance. This latter prospect imports a further tendency to induce those participating in the proceedings to give undue attention to form and appearance of their part in the litigious process. Being at the expense of substance, this could distort the process of justice itself.⁹⁷

With respect to television's capacity to distort proceedings, it must be borne in mind, that under Australian contempt law, any reports of court proceedings, if shown not to be a fair and accurate account of proceedings, or tending to undermine public confidence in the administration of justice, may be held to constitute contempt.⁹⁸ Broadcasts which distort proceedings could also be in

89 See *Trang Dong Nguyen v The Magistrates' Court of Victoria*, note 31 *supra*.

90 *Hyslop v Australian Paper Manufacturers Ltd* (No 2) [1987] VR 309. See discussion in JG Starke, "Current Topics" (1988) 62 *Australian Law Journal* 727.

91 See S Walker, note 5 *supra*, p 7.

92 See JG Starke, "Current Topics" (1988) 62 *Australian Law Journal* 109; K Wilson, "Tele-conferencing of Courtroom Evidence" (1991) *Law Institute Journal* 862; JG Starke, "Current Topics" (1988) 62 *Australian Law Journal* 407; and M Dockray, note 34 *supra* at 602.

93 P Conroy, "Trial May Use Video Graphics as Jury Aid" *Age*, 22 February 1993, p 8.

94 Dockray points out that television coverage has not been held to insult or impair the dignity of religious, Parliamentary or Royal occasions: M Dockray, note 34 *supra* at 602. See also Caplan Report, note 32 *supra* at [4.4].

95 It may be appropriate for guidelines to require members of the electronic media to comply with a dress code, to remove logos from equipment, and to restrict their movement about the court. Members of the "So Help Me God" production and film crew reportedly brushed up on the network's guidelines (ABC Media Handbook) in order to be aware of the protocol, before they filmed the documentary: telephone conversation with Tony Moore, Associate-Producer, "So Help Me God", 19 October 1993. The need to educate journalists about courtroom proceedings has also been addressed in the United States: see SL Alexander, note 54 *supra* at 312.

96 LH Abugov, "Televising Court Trials in Canada: We Stand on Guard for a Legal Apocalypse" (1979) 5 *Dalhousie Law Journal* 694 at 714.

97 Chief Justice Sir Laurence Street, "Televising Court Proceedings" Memorandum, 18 March 1982, cited in New South Wales Law Reform Commission, note 5 *supra* at 39.

98 See discussion *infra* at section II C(iii).

breach of Broadcasting Standards,⁹⁹ requiring news programs to be presented “accurately, fairly and impartially”¹⁰⁰ and current affairs programs to be presented with accuracy and fairness and in a way which allows informed public debate on substantial issues affecting the community.¹⁰¹

Additional guidelines may, however, serve to allay any remaining concerns. Thus, for example, broadcasts of court proceedings might be confined to news, current affairs and education programs, and their use might be prohibited in any light entertainment context.¹⁰²

(ii)

Permitting the televising of court proceedings would be consistent with the trend to de-mystify the law and legal processes and to open them to greater public scrutiny.¹⁰³ It is therefore important to distinguish between, on the one hand, those arguments which are concerned with the preservation of dignity and decorum required for an efficient administration of justice, and on the other, those based on resistance to the de-mystifying or popularising of the law, to the opening up of public institutions to scrutiny, or to change per se. On this point Rodell argues that:

Much of the respect even awe in which law and lawyers are generally held by laymen has its source in the aura of solemnity which surrounds the craft from the ponderous language to the musty law books that line lawyers' offices, to especially, the almost religious ritual of the courtroom itself. The late Judge Jerome Frank used to ridicule this ceremonial solemnity of architecture, of judges uniforms, of standardized and stiffly formal court procedure with a symbolic phrase, 'the cult of the robe'. But he knew that judges and lawyers loved it because it made them and their work however trivial on occasion look important and impressive. The idea of opening a courtroom, like a ballpark or convention hall to television offends much of the profession less because of a fear of unfair trials than because of a fear of detracting from the dignity of the court and of themselves.¹⁰⁴

The impact of televising on the dignity and decorum of court proceedings can in fact be quite positive. Wilson has observed that:

...far from detracting from the dignity of the proceedings, television could help ensure it. It would serve as a restraint to breaches in dignity, be they judicial bullying, antics of counsel, or unfair treatment of the accused and witnesses. Even the possibility that there might be television coverage would serve as a restraint.¹⁰⁵

99 Television Program Standards 1990, in force pursuant to *Broadcasting Services Act 1992* (Cth) Part 9.

100 Television Program Standards 1990, Standard 15.

101 Television Program Standards 1990, Standard 24 objectives. See also Standard 24 (5) for specific obligations on licensees.

102 Caplan Report, note 32 *supra* at [5.6]. See discussion in, C Walker and D Brogarth, note 48 *supra* at 640. For Sackville Report comments on this issue, see *infra* at section II I(iv).

103 For a discussion of the assessment of the broadcast of the proceedings of Federal Parliament; see *infra* at section II I(iv).

104 F Rodell, "TV or No TV in Court?" *New York Times Magazine* 12 April 1964, p 16 at 103.

105 J Wilson, "Justice in Living Color: The Case for Courtroom Television" (1974) *60 American Bar Association Journal* 294 at 295. The effect of televising on judges and lawyers is discussed further, *infra* at section II H.

C. Psychological Effect on Participants

While technological advances have virtually eliminated the risk of physical disruption, reservations continue to be voiced about the psychological effect which television coverage can have on participants in judicial proceedings: "it is the mere knowledge that one's testimony is being televised that is most damaging".¹⁰⁶ This alleged adverse effect on participants appears to be the most significant objection to the televising of court proceedings.¹⁰⁷ As Walker observed:

...[the] real point of distinction... between the taking of notes and drawing of sketches on the one hand and, on the other, the use of sound recorders and cameras...is at the level of psychological distress.¹⁰⁸

(i)

Fear of the psychological effect of televising proceedings is not supported by American studies. For example, in its conclusions on the Florida experiment, the Supreme Court of Florida noted:

The fact remains, however, that the assertions [as to adverse psychological effects] are but assumptions unsupported by any evidence. No respondent has been able to point to any instance during the pilot program period where these fears were substantiated. Such evidence as exists would appear to refute the assumptions. The Survey reflects that the assumed influences upon participants during the experimental period were perceived to vary in degree from not at all to slightly. More importantly, there was no significant difference in the presence or degree of these influences as between the electronic and print media.¹⁰⁹

In response to the suggestion that broadcasting could prejudice the administration of justice by affecting the participants, the Caplan Report noted that, while broadcasting may be more immediate and more widely disseminated than written coverage, it does not qualitatively add any extra psychological pressure to the already intimidating atmosphere of the courtroom.¹¹⁰ The Working Party had based its conclusions on American findings such as that of the Supreme Court of Florida, which in 1981 had observed that:

Courtrooms were intimidating long before the advent of electronic media. Trials with considerable public interest have always resulted in courtrooms full of spectators, news reporters, and sketch artists, all of whom add to the intimidation of

106 TH Tongue and RW Lintott, "The Case Against Television in the Courtroom" (1980) 16 *Williamette Law Review* 777 at 791. For arguments disputing the findings of studies showing a lack of psychological effect, see: New York State Defenders Association, *The Intrusion of Cameras In New York's Criminal Courts: A Report by the Public Defense Backup Center* (12 May 1989).

107 See Caplan Report, note 32 *supra* at [4.6].

108 S Walker, note 5 *supra* at 20.

109 *Re Petition of Post-Newsweek Stations, Florida*, note 61 *supra* at 775-6. After conducting an experiment to assess the effect of electronic media coverage on witnesses and jurors, Borgida, DeBono and Buckman concluded that "while people believe that EMC [electronic media coverage] is associated with a host of disruptive effects on judgment, memory, and decision making, the weight of empirical evidence from the present research does not provide support for such concerns": E Borgida, KG DeBono and LA Buckman, "Cameras in the Courtroom. The Effects of Media Coverage on Witness Testimony and Juror Perceptions" (1990) 14 *Law and Human Behaviour* 489 at 506.

110 Caplan Report, note 32 *supra* at [4.7]-[4.11].

the courtroom atmosphere. In our view, the single addition of the camera in the courtroom in these circumstances should not increase tension significantly, given the fact that electronic media will report the proceedings whether or not its camera is actually in our courtroom.¹¹¹

Ramsay points to similar findings in surveys of participants in televised trials in Florida and Wisconsin¹¹² and in interviews with witnesses, lawyers and jurors, undertaken shortly after the televised case of *State v von Bulow*.¹¹³ The Sackville Committee observes that “[s]tudies in the United States have shown that the televising of proceedings of courts has not had a measurable effect upon the participants”.¹¹⁴

D. Participants' Right To Privacy

Public attention and media publicity are crucial aspects of open justice. It is accepted that open justice may involve pain and humiliation for participants.¹¹⁵ The issue therefore is not whether court televising will infringe the privacy of parties but rather whether any infringement will be excessive. The Sackville Report observes that:

It is certainly the case that televising court proceedings will infringe the privacy of parties before the court, at least to the extent that they do not approve of broadcasting... But it must be remembered that the principle of open justice already means, in practice,¹¹⁶ that parties and witnesses in court proceedings do not enjoy a right of privacy.¹¹⁶

Prohibiting broadcasts of court proceedings on the ground that they may infringe the privacy of a party ignores the need to balance such privacy interests against the public interest in the open administration of justice.¹¹⁷ The principle of open justice does not prevent the protection of privacy where such protection is warranted. As discussed above,¹¹⁸ Australian courts protect the privacy of participants, if such protection is deemed necessary.¹¹⁹ These inherent and statutory powers clearly apply to all forms of publication, including television broadcasts. The Sackville Report concludes:

...we recognise that there are concerns about the effect of broadcasting on the privacy of parties and witnesses, but we think that an appropriate balance between

111 *State of Florida v Green* (1981) 395 So 2d 532 at 536, per Overton J.

112 IM Ramsay, “Televising Court Proceedings” (1993) 70 *Current Affairs Bulletin* 16 at 21 citing SG Thompson, “Electronic Media in the Courtroom: Some Observations on Federalism and State Experimentation” (1982) 9 *Ohio Northern University Law Review* 360 (unverified).

113 *Ibid* citing JR Weisberger, “Cameras in the Courtroom: The Rhode Island Experience” (1983) 17 *Suffolk University Law Review* 302 (unverified).

114 Sackville Report, note 7 *supra* at 452, citing JR Weisberger, *ibid* at 302; SG Thompson, note 112 *supra* at 360 (unverified).

115 *Scott v Scott* [1913] AC 417 at 463, per Lord Atkinson. Further discussed *infra* at section II I.

116 Sackville Report, note 7 *supra* at [20.28].

117 Discussed further, *supra* at section I B(ii), and *infra* at section II I(ii).

118 See *supra* at section IB.

119 For example, the identity of a blackmail victim: *Ex parte Attorney General, Re Truth and Sportsman Ltd* (1961) 61 SR (NSW) 484 at 488-9; or a party to an adoption proceedings: *Adoption of Children Act 1984* (Vic), s 121(2). See also, Caplan Report, note 32 *supra* at [4.11], [6.1].

the public interest in open justice and individuals' interests in privacy can be struck by the formulation of guidelines for an experimental program.¹²⁰

The limited Australian experience of the televising of court proceedings reveals how the privacy of participants can be protected. Filming of the television documentary "So help me God",¹²¹ was undertaken with the consent of all participants and the written, informed consent of all defendants.¹²² The producers of the television documentary "Kids at Risk"¹²³ were also determined to respect the privacy of participants. They dealt with these concerns by keeping their presence in court to a minimum,¹²⁴ filming with the permission of all parties, not showing any children involved and not identifying, or 'beeping-out', the names of any children or parents involved in the proceedings.¹²⁵

The balancing of the privacy interests of participants and the public's interest in the open administration of justice, is discussed further below.¹²⁶

E. Fair Trial and the Administration of Justice

In *Green v State*¹²⁷ the Florida Court of Appeal quashed the conviction and ordered the retrial of a defendant who had established that television coverage which followed the trial judge's refusal to exclude electronic media coverage of the judicial proceedings had, "such an adverse psychological impact [on her] as to render her incompetent to stand trial".¹²⁸ Decisions such as this are, however, rare in the United States. Silverstein observes that:

In twenty-one years of trial broadcasting in Colorado, the grave apprehensions postulated by opponents to televised trials have not come to pass. Significantly, in Colorado there has not been one reversal due to television's alleged infringement of one's right to a fair trial.¹²⁹

In *Estes* the Supreme Court of the United States ordered a new trial, holding that the media presence and behaviour had deprived the defendant of due process.¹³⁰ Four of the nine Justices held that the presence of cameras violated due process.¹³¹

120 Sackville Report, note 7 *supra* at [20.32].

121 Note 1 *infra*.

122 Telephone conversation with Mr Tony Moore, Associate Producer, "So Help Me God", 19 October 1993.

123 Note 1 *infra*.

124 Only one camera was used, with only the camera person, sound recordist and producer present in court. The in-court segments were filmed in one-and-a half days: Telephone conversation with Ashley Smith, Producer of "Kids at Risk", 1 November 1993.

125 The Producer spoke to the solicitors involved to ensure that parties consenting to the filming clearly understood what they were consenting to: *ibid*.

126 *Infra* at section II I(ii).

127 Fla App (1979) 377 So 2d 193.

128 *Ibid* at 200, per Hubbart, J.

129 D Silverstein, "TV Comes to the Courts" (1978) 2 *State Court Journal* 15 at 53; see RE Drechsel, "An Alternative View of Media-Judiciary Relations: What The Non-Legal Evidence Suggests About The Fair Trial-Free Press Issue" (1989) 18 *Hofstra Law Review* 1 at 11-19.

130 *Estes v Texas*, note 42 *supra* at 534-51 per Clark J, expressing the opinion of five members of the Court. For details of the disruption at the trial see note 56 *supra*.

131 Warren CJ, Douglas, Goldberg and Clark JJ; discussed further in H Nelson and D Teeter, note 43 *supra* at 435 ff.

While no actual prejudice had been established, the Court inferred prejudice from the televising:

...at times a procedure...involves such a probability that prejudice will result that it is deemed lacking in due process...Television in its present state and by its very nature reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced.¹³²

Referring to interference with the jury and witnesses and the impact on the judge and the defendant, as factors which could create unfairness to the accused, the Court held that the televising of the proceedings had infringed the defendant's right to a fair trial.¹³³ In *Chandler*, in a unanimous decision, the Supreme Court of the United States held that the presence of cameras in court during a trial did not in itself necessarily prejudice the outcome of a trial. The Court refused to rule that the mere presence of television cameras, as permitted under Florida guidelines, constituted a sufficient disruption to trials to amount to a violation of the constitutional guarantee of due process¹³⁴ or the right to a fair trial.¹³⁵

The American experience suggests that permitting cameras into courts adds little, if anything, to the burden of defendants and other participants in such cases. It may in fact ease the burden by making it unnecessary for packs of camera crews to haunt the doors of courts, as they do now.¹³⁶ Empirical studies suggest that prejudicial publicity is a minor problem¹³⁷ and that few televised cases have been successfully appealed on the grounds of prejudice caused by the televising of court proceedings.

In any comparative assessment, strategies such as sequestration of the jury and change of venue, which are likely to be employed by American courts, but which are not generally employed in Australia, must be taken into account.¹³⁸ On the other hand, it could be argued that with the deterrent value of Australia's contempt laws,¹³⁹ and to a lesser extent, broadcast regulations,¹⁴⁰ broadcasts of court proceedings are less likely to be detrimental to the administration of justice than shown to be in the American experience. In Australia, strict limits are imposed on potentially prejudicial materials by the law of contempt, while in America the emphasis is on remedies which seek to ensure a fair trial, in spite of prejudicial publicity.¹⁴¹ Chesterman notes that:

132 *Estes v Texas*, note 42 *supra* at 544.

133 *Ibid* at 544-9.

134 Amendments V and XIV, The Constitution of the United States.

135 (1981) 449 US 560 at 581.

136 M Dockray, note 34 *supra* at 601. See further discussion *supra* at section IIC.

137 See RE Drechsel, note 129 *supra* at 11-9.

138 For example, in *Richmond Newspapers v Virginia* (1980) 448 US 555 at 580-1, the Supreme Court ruled that the trial judge, instead of closing the court, should have used measures such as sequestering the witnesses and jurors, to guarantee a fair trial.

139 Discussed *supra* at section IB.

140 Discussed *supra* at section II B(i).

141 For a comparison of English and American contempt laws, see A Ward, "Freedom of the Press and Contempt of Court: A Comparison of the English and US Law" (1982-3) 3-4 *Journal of Media Law and Practice* 175.

By virtue chiefly of the US Constitution, First Amendment, which explicitly guarantees freedom of speech and of the press, contempt law plays a minimal role in deterring the publication of material that might prejudice a fair trial.¹⁴²

To constitute contempt in the United States, the offending material would need to be shown to create a "clear and present danger to the orderly and impartial administration of justice".¹⁴³ In contrast to the American situation where only in extreme cases a broadcast is likely to be held to create such a danger, in Australia, televising of proceedings will amount to *sub judice* contempt if it is done with the intention of interfering with the course of justice, or if "the matter published has, as a matter of practical reality, a tendency to interfere with the due course of justice in a particular case",¹⁴⁴ or "presents a real risk of serious prejudice to a fair trial".¹⁴⁵ While proceedings are *sub judice*¹⁴⁶ television broadcasts would need to avoid disclosing the identity of the accused, if identity is at issue¹⁴⁷ and not convey an impression adverse to a litigant.¹⁴⁸ Any commentary accompanying the broadcast proceedings would also need to avoid words which could be construed as seeking to influence the court's decision or which impair the impartiality of the court, thus evidencing an intention to interfere with the administration of justice or having a tendency to do so.

Pre-judging may also constitute contempt if it has a tendency to interfere with the administration of justice or fair trial of current or pending proceedings:

Publishing material which prejudices the guilt or innocence of an accused person, the merits of the plaintiff's case or the defendant's arguments, the veracity of a witness or the value of evidence or which attempts to resolve any issue of fact or law which is likely to be decided at the trial may constitute contempt on the ground that it is likely to prejudice or bias the jurors or, in an extreme case, the judge.¹⁴⁹

Even where the broadcast of court proceedings is not intended to interfere with the administration of justice or have the tendency to do so in a particular case, it may still constitute contempt on the ground that it interferes with the administration of justice generally. The televising of any matter tending to undermine confidence in the administration of justice may be contempt through 'scandalising the court'. This category of contempt is likely to cover the publication of a suggestion that a judge is not acting impartially, that the judge is acting out of an improper

For a discussion of the remedies available to, and employed by American courts, see: M Chesterman (1985), note 23 *supra* at 51-2.

142 M Chesterman, *ibid* at 51.

143 See, *Bridges v California* (1941) 314 US 252 at 262; *Pennekamp v Florida* (1946) 328 US 331 at 334; *Craig v Harney* (1947) 331 US 367 at 371. For further discussion, see: M Chesterman, *ibid* at 51; A Ward, note 141 *supra* at 180-3; and WE Francois, note 37 *supra* at 339.

144 See *John Fairfax and Sons v McRae* (1955) 93 CLR 351 at 370, per Dixon CJ, Fullagar, Kitto and Taylor JJ; cited with approval in *Hinch v Attorney General for Victoria* (1987) 74 ALR 353 at 363, per Mason CJ.

145 *Hinch v Attorney General for Victoria*, *ibid*.

146 For a review of authorities on the issue of when proceedings are sub-judice, see S Walker, note 5 *supra*, pp 41-3.

147 *Ibid*, pp 63-4.

148 *Hinch v Attorney General for Victoria*, note 145 *supra* at 363 and *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 57.

149 S Walker, note 5 *supra*, pp 56.

motive,¹⁵⁰ or criticism or abuse of a judge “calculated to bring a judge of the Court into contempt or to lower his authority...”¹⁵¹ The essential element in this form of contempt is not the truth of the published material or allegation,¹⁵² or the level of abuse or criticism, but rather whether the broadcast or publication has a tendency to lower the authority of the court.¹⁵³ To broadcast proceedings closed to the public or containing information withheld from those in the court, such as the identity of a blackmail victim or *voir dire* proceedings, would also constitute contempt under this category.¹⁵⁴

F. Effect on the Jury

The Sackville Report has left the question of whether jurors should be permitted to be televised, to be determined by the drafters of court televising guidelines.¹⁵⁵ It is submitted, however, that the televising of juries should be prohibited in all cases, as some American jurisdictions have done, and as the Bar Council of England and Wales has recommended.¹⁵⁶ To permit any televising would be contrary to the policy objectives of existing legislation¹⁵⁷ which seek to ensure that jurors merge back into the community after a trial and that people are not discouraged from acting as jurors because of the possibility of being recognised or even criticised. Appearance on television may, for example, expose jurors to criticism, reprisal and to what Justice Clark in his *Estes* opinion described as “the broadest commentary and criticism and perhaps the well meant advice of friends, relatives and inquiring strangers who recognise them in the street”.¹⁵⁸ The only sure way to overcome this risk would appear to be to ban the filming of a jury in all proceedings.

Even if television cameras do not reveal the identity of jurors, it remains important to consider whether the presence of cameras is likely have a detrimental effect on members of juries. While the presence of television cameras in court may be considered likely to place pressure on, and distract juries, the evidence from American experiments suggests that television fades in psychological importance as a trial progresses¹⁵⁹ and that “anxieties about the potential impact of cameras

150 See *Gallagher v Durack* (1983) 152 CLR 238 and *Ex parte Attorney General, Re Truth and Sportsman Ltd*, note 119 *supra*. See also Sackville Report, note 7 *supra* at [20.7].

151 *R v Gray* [1900] 2 QB 36 at 40, per Lord Russell CJ.

152 While the Federal Court of Australia has held that: “[a] statement made which scandalizes [sic] or otherwise lowers the authority of the court does not cease to constitute a contempt of court if the statement is false. For this purpose, the truth or validity of the statement is immaterial”: *Viner v Builders Labourers' Federation* [1982] 2 IR 177 at 183, per Northrop J; cf the High Court's obiter dicta in *Wills v Nationwide News* [1991-2] 177 CLR 1 at 14-6, per Mason CJ, at 38-9, per Brennan J and at 66-8, per Deane and Toohy JJ.

153 *Ex parte Attorney General, Re Truth and Sportsman Ltd*, note 119 *supra* at 488-9.

154 *R v Socialist Worker Printers & Publishers Ltd* [1975] 1 QB 637 at 650, per Lord Widgery. See also *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 450.

155 Sackville Report, note 7 *supra* at [20.33].

156 Caplan Report, note 32 *supra* at [4.9].

157 Discussed *supra* at section IB.

158 Note 42 *supra* at 546. Also see TH Tongue and RW Lintott, note 106 *supra* at 790.

159 H Beisman, note 69 *supra* at 127.

on...jurors... have disappeared with experience".¹⁶⁰ There is even some evidence that the presence of cameras promotes greater diligence in jurors¹⁶¹ and that they are assisted in their task, by their personal experiences of having viewed trials on television.¹⁶²

Concern has been expressed that juries' impartiality could be jeopardised and that they may be prejudiced through watching edited replays of evidence on television at home. When distinguishing the impact of television from other forms of media reporting, it has been suggested that, while a jury can also be influenced by reading headlines, "[e]ven the most carefully edited program can still give a more favourable or worse impression than a newspaper report".¹⁶³ This risk however is not as great as it first appears. It must be borne in mind that telecasts would be subject to the normal rules of contempt which in part are designed to overcome this danger and that jurors would be given the usual warning by the judge to avoid any media reports of the proceedings.

G. Effect on Witnesses

It has been said that witnesses find the process of giving evidence sufficiently frightening without having to endure being filmed by television cameras,¹⁶⁴ and that juries may misconstrue a witness' 'television fright' as nervousness. There is however little evidence to support these views.¹⁶⁵ Borgida, De Bono and Buckman observed that the findings of their empirical study:

...suggest that EMC (electronic media coverage) may not impair witness recall or the ability to present credible testimony. In *Estes v Texas* (1965), for example, Justice Clark stated that the impact of cameras is "simply incalculable....memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined" (p 1635). In the present research, however, EMC witnesses not only recalled as much information as CMC (conventional media coverage) and no-media control witnesses did, but they did so with fewer prompts. Furthermore, jurors evaluated EMC witnesses' ability to communicate as highly as they rated their non-EMC counterparts.¹⁶⁶

Some research findings even suggest that witnesses who are told that they were being recorded, or who see the camera, are more accurate in their responses and remember more specific detail and less incorrect detail than those who are not

160 N Davis, note 87 *supra* at 88.

161 *In re Petition of Post-Newsweek Stations*, note 61 *supra* at 766-9. See discussion in Caplan Report, note 32 *supra* at [4.7].

162 SL Alexander, note 54 *supra* at 311.

163 J Morton, note 34 *supra* at 705.

164 Australian Law Reform Commission, note 26 *supra* at 76.

165 Discussed in New South Wales Law Reform Commission, note 5 *supra* at 40

166 E Borgida et al, note 109 *supra* at 506.

recorded.¹⁶⁷ These findings suggest that televising trials may actually improve the quality of witnesses testimony rather than impair it.¹⁶⁸

It is clear that the evidence of some witnesses will, however, be affected by the mere knowledge that their evidence will be, or is being, recorded by television cameras. Acceptance of this fact should not in itself justify a ban on televising if courts are empowered to exercise their discretionary powers to restrict or prohibit the filming of the testimony or the identification of any witness where such an order is appropriate. The Sackville Report goes so far as to recommend that, "[b]roadcasting of a particular witness' evidence should take place only if the witness consents".¹⁶⁹ This somewhat extreme approach is unwarranted in the light of the findings of the American studies referred to above. It would also make witnesses the only participants whose consent to being televised would be required and impliedly, whose consent could be withheld for any reason. Witnesses not wishing to be televised should be permitted to request that the judge exercise his or her discretion to restrict the televising. The request would be granted only if the witness could establish interference with the rights of a party to a fair trial. American states are divided on this issue, as their broadcast guidelines provide for either discretionary or mandatory prohibition of the coverage of witnesses who object to having their evidence filmed.¹⁷⁰

H. Effect on Judges and Lawyers

Lawyers and judges have tended to resist opening the judicial process to public scrutiny and criticism. The extent of this resistance sometimes appears to go beyond what is required to ensure the effective administration of justice.¹⁷¹

While it is true that the need to supervise and regulate the filming of proceedings can place additional pressure on judges, the American experience has shown that such extra pressure can be minimised by adequate guidelines.¹⁷² It has been pointed out, in a largely overlooked or tactfully avoided argument, that judges might be on somewhat better behaviour if they knew that their sneers and innuendoes were being preserved on camera.¹⁷³ It is likely that courtroom "head

167 See: *In re Petition of Post-Newsweek Stations*, note 61 *supra* at 766-9; MK Platte, note 43 *supra* at 13, H Beisman, note 69 *supra* at 129.

168 The validity of the Courts conclusions have been questioned by Tongue and Lintott who note that: "[i]t is questionable..whether it is realistic to expect that witnesses would admit, in effect, that their testimony might have been different but for the "disruption" or "distraction" of the television cameras or to expect that jurors would admit, in effect, that their verdicts, would have been different but for any such "disruption" or "distraction.": TH Tongue and RW Lintott, note 106 *supra* at 788.

169 Sackville Report, note 7 *supra* at [20.37].

170 New South Wales Law Reform Commission, note 5 *supra* at 30-2. For the most up-to-date summaries of the State rules, see Radio-TV News Directors Association, *News Media Coverage of Judicial Proceedings with Cameras and Microphones: A Survey of the States*, (as of 1 January 1994).

171 See F Rodell, note 104 *supra* at 103; and further, at section IIIK.

172 See LH Abugov, note 96 *supra* at 712, and NT Gardner, note 37 *supra* at 490 ff. TH Tongue and RW Lintott argue that the additional pressures imposed on trial judges are highly undesirable: Tongue and Lintott, note 106 *supra* at 797-9.

173 See J Morton, note 34 *supra* at 705.

kicking” may not be as respectfully tolerated by the viewing public as it traditionally has been by members of the Bar. In the words of Jeremy Bentham: “[p]ublicity...is the keenest spur to exertion... It keeps the judge himself while trying under trial”.¹⁷⁴

While the presence of cameras in court may also increase the pressure on lawyers, evidence suggests that the presence of cameras can act as a spur to excellence for lawyers.¹⁷⁵ In American experiments, lawyers and judges were found to have acted far more diligently with far less inconsequential squabbling under the watchful eye of television.¹⁷⁶ For example, Alabama Judge, Robert Hodnette has said that the filming of a murder trial over which he presided “kept me and all the courtroom personnel on our toes”.¹⁷⁷ Evidence suggesting that televising of court proceedings may enhance the performance of lawyers and judges and provide greater opportunities for first hand observation of their work, is sufficient reason in itself, to warrant the introduction of court televising.

I. Open Justice

Arguments in favour of the televising of court proceedings rely heavily on the principle of open justice. The classic authority for this principle is found in *Scott v Scott*,¹⁷⁸ where Lord Atkinson said:

The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.¹⁷⁹

In the same case Lord Shaw, quoted Jeremy Bentham:

Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.¹⁸⁰

The common law principle of open justice subjects the public administration of justice to public scrutiny by requiring that:

...evidence and argument should be publicly known, so that society may judge for itself the quality of justice administered in its name, and whether the law requires modification.¹⁸¹

Open justice means “a Court to which the public have a right to be admitted”.¹⁸²

174 Cited in *Scott v Scott* [1913] AC 417 at 477, per Lord Shaw. See *infra* at section II I.

175 Caplan Report, note 32 *supra* at [4.9].

176 See: *In re: Hearings Concerning Canon*, note 86 *supra* at 470; and LH Abugov, note 96 *supra* at 716.

177 BH Beach, “Blind Justice Gets a Seeing Eye” *Time*, 9 February 1981, p 35.

178 [1913] AC 417.

179 *Ibid* at 463.

180 *Ibid* at 477.

181 *Harman v Secretary of State for Home Department* [1983] 1 AC 280 at 316, per Lord Scarman.

(i)

Reporting of court proceedings is vital to open justice as it ensures that proceedings are made truly public and subject to wide scrutiny.¹⁸³ While some statutes permit members of the media to be present in otherwise closed courts,¹⁸⁴ as a general rule, members of the media have no greater rights to be present in court than do other members of the public.¹⁸⁵ The value and importance of the reporting of court proceedings by the press appears to be recognised by the courts.¹⁸⁶ However, in order to avoid what they saw as potential abuses of reporting, courts have traditionally erred on the side of caution in dealings with the media. It has been suggested that while some of the restrictions imposed on the reporting of court proceedings may be explained as necessary to the administration of justice, others suggest a fear of the press¹⁸⁷ and of having the judicial process thrown open to public scrutiny and criticism.¹⁸⁸

(ii)

The principles of open justice require courts to be administered openly, unless the interests of justice otherwise require. A court's power to deny public access may arise from statutory provisions,¹⁸⁹ or from the court's discretionary power to deny public access.¹⁹⁰ Such discretionary power is subject to the principle of open justice, which requires that the administration of justice¹⁹¹ be carried out in "a Court to which the public has a right to be admitted".¹⁹² Subject to statutory

182 *R v Hamilton* (1930) 30 SR (NSW) 277, per Street CJ. For summary of history of open justice, see: *Richmond Newspapers Inc v Virginia*, note 138 *supra* at 565-7, per Burger CJ.

183 See *Richmond Newspapers Inc v Virginia*, *ibid* at 572-3, discussed *infra* at section II I(iii).

184 For example, *Children's Protection and Young Offenders Act* 1979 (SA), s 92(2); *Children (Criminal Proceedings) Act* 1987 (NSW), s10(1)(b); and *Children's Services Ordinance* 1986 (ACT), ss 169(1)(h) and 171.

185 "No greater or higher right can be established by representatives of the press than is recognised as existing in members of the general public, who have the right of access to the court subject to regulation and control": *Re Andrew Dunn* [1932] St R Qd 1 at 17, per Henchman J.

186 *Harman v Secretary of State for Home Department* [1983] 1 AC 280 at 316 per Lord Scarman. See discussion by Black CJ, note 9 *supra*.

187 M Chesterman, "Contempt by the Media: How the Courts Define It" (1986) 58 *Australian Quarterly* 388 at 393.

188 Jenny Brockie, the Producer of the documentary "So Help Me God" referred to a "siege mentality" in government bureaucracy and observed how closed our society, and public institutions in particular are. "There is a real sort of "Don't let the media in. Don't show anything that we're doing just in case we get into trouble" mentality. So that when you do get somebody like Kevin Flack (the Presiding Magistrate who permitted the filming in his courtroom: see note 261 *infra*) willing to open it up, it is really refreshing...": M Date, "Through the Eyes of the Law" *Sydney Morning Herald*, 27 September 1993, The Guide, p 8.

189 For example: *Country Court Act* 1958 (Vic), s 81(1); *Children (Criminal Proceedings) Act* 1987 (NSW), s 10(a); and *Magistrates' Court Act* 1989 (Vic), s 126. Also see discussion in S Walker, note 5 *supra*, pp 10-14. See further discussion *supra* at section IB.

190 See also *supra* at section IA, II I(i), *R v Tat and Bartley* (1979) 46 FLR 386.

191 *Home Office v Harman* [1982] 2 WLR 338 at 345, per Lord Diplock.

192 *R v Hamilton* (1930) 30 SR (NSW) 277, per Street CJ. See also, *Scott v Scott* [1913] AC 417; approved by High Court in *Dickason v Dickason* (1913) 17 CLR 50 at 51, and *Russell v Russell* (1976) 134 CLR 495 at 520, 532.

provisions, therefore, the exercise of the discretionary power to deny public access or restrict publication is limited to situations in which justice cannot otherwise be administered:

The only consideration to which the rule as to publicity yields is the paramount duty of the Court to secure that justice should be done. If it is made to appear that justice cannot be done otherwise, then there is power to direct that proceedings be held in private.¹⁹³

Courts are therefore required to reconcile the competing public interest in seeing the public administration of justice, with the interests of those seeking to protect their rights to a fair trial from damaging or prejudicial publicity.¹⁹⁴ The New South Wales Court of Appeal in *John Fairfax Group v The Local Court of NSW*,¹⁹⁵ considered the relevant legal principles to be applied in resolving such a conflict of interests. In a majority judgment Mahoney J¹⁹⁶ made the following observations:

...open conduct of the court can cause great pain and loss to those touched by what is done and what is publicised. It is in my opinion the function of the law - and the obligation of the court administering it - to avoid such pain and loss to the extent that it is possible to do so....the principle that the courts are to be open and the media may publish what is done in them is not an end in itself...it is for these reasons proper to consider whether and in what way the open court principle can be maintained without unacceptable detriment to individuals and the proper administration of justice.¹⁹⁷

In his dissenting judgment Kirby P, held that concerns about invasion of privacy, embarrassment or damaging publicity, unless clearly recognised by the common law or by statute, must give way to the greater public interest of adhering to an open system of justice:

The normal rule of our courts is that justice is administered in a court open to the public where the names of the parties are openly revealed and may be the subject of fair and accurate reports without fear of prosecution for contempt or action for defamation or other civil wrong. It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts or the issue of suppression orders in their alternative forms... A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the greater public interest in adhering to an open system of justice. Otherwise, powerful litigants may come to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported.... It is because the principles of the open administration of justice and the facility of public reporting of the courts are so fundamental to the common law that

193 *R v Hamilton* (1930) 30 SR (NSW) 277 at 278 per Street CJ. See discussion in S Walker, note 5 *supra*, p 7. In *R v Tait and Bartley* (1979) 46 FLR 386, the Full Court of the Federal Court considered the limited nature of a court's discretion to close its proceedings to the public or to restrict the reporting of the proceedings.

194 See *Hinch v Attorney General for Victoria* (1987) 164 CLR 15 at 22, per Mason CJ.

195 *John Fairfax Group v The Local Court of New South Wales* (1991) 26 NSWLR 131.

196 Hope AJA agreed with the reasons put forward by Mahoney JA.

197 *John Fairfax Group Pty Ltd v The Local Court of New South Wales*, note 195 *supra* at 163-4. Also see discussion in G Zdenkowski, "Why Justice Likes a Gag and Blindfold" *Bulletin*, 23 June 1992, p 24.

exceptions must be clearly allowed by the common law itself or by statute, before courts will uphold them.¹⁹⁸

The Sackville Report saw the formulation of guidelines as the means of striking a balance between the public interest in open justice and interests of a party to a court case.¹⁹⁹

We accept that televising court proceedings can be more intrusive than press coverage, but there must be a balance between the privacy of the parties and the legitimate interest of the public in the proceedings of its justice system. We accept that this balance should involve a prohibition on broadcasting cases currently required under Commonwealth or State law to be heard in closed court. We also accept that even in an experimental program, the presiding judge should have a discretion to refuse to permit broadcasting where he or she considers that the broadcasting of proceedings would unduly affect the privacy of one or more parties. However we do not think that privacy considerations justify a blanket prohibition on broadcasting in all circumstances.²⁰⁰

The courts presently order sittings in camera or place restrictions on publication where they are required by statute and where it is deemed necessary to the administration of justice.²⁰¹ There is no reason why the courts would or should be prevented from continuing to exercise such power following any lifting of the blanket prohibition of courtroom televising. The Access to Justice Committee considered s 121 of the *Family Law Act 1975* (Cth). Section 121 makes it an offence to publish an account of Family Law proceedings, which identifies a person in any way concerned in the proceedings.²⁰² After considering the arguments for and against the policy behind this restriction on publication,²⁰³ the Committee concludes, “[i]t is our view that there are special considerations that make family law an unusual case. Therefore, we would not support the extension to the Family Court of the experimental program for broadcasting proceedings”.²⁰⁴ On this basis the Sackville Report recommends that “there should be no change to the policy behind s 121 of the *Family Law Act*”.²⁰⁵

198 Note 195 *supra* at 140, 142-3.

199 Sackville Report, note 7 *supra* at [20.32].

200 *Ibid* at [20.28].

201 See *supra* at section IB. In *R v Leicester City Justices* [1991] 2 QB 260 at 284, Lord Donaldson MR observed, “[i]here are many basic rules covering the administration of justice by the courts, but they can be summed up by saying that it must be administered fairly and, unless the interests of justice otherwise require, it must be administered openly and its administration must not only be fair but be seen to be fair...” For an application of this principle see: *Trung Dong Nguyen v The Magistrates' Court of Victoria*, note 31 *supra*.

202 Also discussed, *supra* at section IB.

203 Sackville Report, note 7 *supra* at [20.44] and [20.45].

204 *Ibid* at [20.47].

205 *Ibid* at [20.47].

(iii)

The principle of open justice was formulated in days preceding significant technological advances, such as television. Not surprisingly therefore the traditional principle has difficulties in dealing with the issues of electronic media regulation.²⁰⁶ As spelt out in *Scott v Scott*,²⁰⁷ the principle emphasises the need for cases to be heard in public and to receive publicity. In the present day, a hearing in a court open to the public does not in itself truly ensure a public hearing, or publicity. There are two reasons: first, very few people ever enter a courtroom to watch the administration of justice,²⁰⁸ and second, the major source of information and publicity in our society, the television, is effectively barred from the courts. The Caplan Report noted that:

In practice, therefore, the concept of open justice means that those members of the public who have the time, the resources and the will to travel to a particular court may succeed on arrival in gaining access to the proceedings they wish to observe if space in the public gallery permits. For those who do not or cannot go to court [which is clearly the vast majority of the population], or who cannot gain access even if they do go, their understanding and knowledge of what transpires in court depends exclusively on the reports in the printed media and, if a television reporter is present, on that reporter's account to camera outside the court building of what he observed.²⁰⁹

It is a fact of modern society that very little information is gathered by personal observation, or even through reading. As the United States Supreme Court observed:

...instead of acquiring information about trials by first hand observation or by word of mouth from those who attended, people now acquire it chiefly through print and electronic media. In a sense this validates the media claim of functioning as surrogates for the public.²¹⁰

Television is by far the most relied on source for our day to day information, knowledge and understanding of the world around us.²¹¹ Arguably therefore:

...given the fact that television is the main source of information about public affairs for most people, broadcasting should be viewed as more important than a press presence.²¹²

Although television journalists have the same access rights to courts as other journalists, while television cameras are prohibited, the television medium faces great difficulties in making reports interesting and of an acceptable standard. The absence of courtroom footage has resulted in stories not being reported in

206 S Walker, note 5 *supra*, p 7.

207 [1913] AC 417.

208 Court hours preclude the employed from attendance. In the writer's experience, it is not unknown for those who do attend to be treated with suspicion, and sometimes with contempt. Phillip Adams has observed that 'it's a pity that more people don't drop in [to see] scenes of compelling drama [and] justice being meted out in local courts...': P Adams, note 4 *supra*.

209 Caplan Report, note 32 *supra* at [1.6].

210 *Richmond Newspapers Inc v Virginia*, note 138 *supra* at 572-3.

211 See AC Laing, note 54 *supra*; J Morton, note 34 *supra* at 705; and EE Slotnick, "Media Coverage of Supreme Court Decision Making: Problems and Prospects" (1991) 75(3) *Judicature* 128 at 129-30.

212 C Walker and D Brogarth, note 48 *supra* at 638.

appropriate depth, reliance being placed largely on superficial visuals, the inclusion of harassing footage filmed in the vicinity of the court, as well as reliance on sketches with extracts of transcript; all of which severely restrict the quality of such reports.²¹³

(iv)

It is widely recognised that open justice, by ensuring that justice is not only done but seen to be done, maintains public confidence in the legal system.²¹⁴ The Caplan Report noted that:

Public confidence is essential in the judicial resolution of disputes between individual and state or between individual and individual. That confidence can only be achieved and maintained by giving public access to the court so that the public or their representatives can witness for themselves what occurs.²¹⁵

Television is uniquely placed to enhance public confidence in and gain support for the judicial system. It can achieve this by educating and informing, and by providing an opportunity for first-hand observation of court proceedings to a larger number and wider cross section of the population, than any other form of publicity.

The Australian experience of the televising of court proceedings reveals that by providing viewers with an opportunity for first-hand observation, public scrutiny of the law and its institutions, can be made more informed and effective. Confirming that a picture is worth a thousand words, the presentation of the work of the Courts of Petty Sessions, by the ABC program Four Corners in June 1981, was commended for bringing to the public's attention a situation which could only be fully appreciated by being seen.²¹⁶ The producers of the television documentary "So Help Me God"²¹⁷ also endeavoured to provide viewers with an opportunity to assess, through first hand observation, the adequacy and appropriateness of the

213 As Carl Stern of NBC News has observed: "a single courtroom sketch stays on screen for only six or seven seconds during a piece, while sound and visual 'bites' last between 15 and 30 seconds or even longer". On this basis Paul Davis, news director of Chicago's WGN-TV concludes that "[t]here's simply less temptation to invest in covering a trial when visuals are absent": T Mauro, note 78 *supra* at 44.

214 See: *John Fairfax Group Pty Ltd v The Local Court of New South Wales*, note 195 *supra* at 142-3, per Kirby P, cited *supra* at section II I(ii); discussion in G Zdenkowski, note 198 *supra* at 205.

215 Caplan Report, note 32 *supra* at [1.1]. Chief Justice Black of the Federal Court of Australia has argued that the televising of courts might better inform the public about our system of justice, replace stereotype images of judges with more realistic and accurate ones, and in so doing instil confidence in our legal system (see Black CJ, note 9 *supra*; A Messina, note 9 *supra*).

216 In June 1981, the Australian Broadcasting Corporation televised a Four Corners program which aimed to give the public a general view of what it is like to appear in a Court of Petty Sessions. The Australian Law Journal commended the Australian Broadcasting Corporation for "enabling a nation-wide audience to form an impression of what is currently going on in the busiest Court of Petty Sessions in Australia...Few people not familiar with the proceedings, in the Central Court of Petty Sessions in Sydney, had any idea of the extent to which stipendiary magistrates and police are overworked in disposing of long lists of cases and the inherent delays which are endemic in the existing system": "Current Topics" (1981) 55 *Australian Law Journal* 511.

217 Note 1 *supra*.

adversarial system's and criminal law's handling of pressing social problems, such as alcohol, drug related crime, mental illness and domestic violence.²¹⁸

Precisely because it permitted first-hand observation, televising of court proceedings has been used in Australia to counter unfounded rumours.²¹⁹ Similarly, in the United States, ethnic community leaders are reported to have requested television coverage of certain trials in the hope of averting outbreaks of racial violence. One such community leader noted, "[a] basic philosophy we have is that when people are informed, they are able to assess judicial proceedings and develop a respect for the judicial process".²²⁰

It may be instructive to note that the televising of the proceedings of another Australian public institution, the Federal Parliament, has been shown to be beneficial to a public understanding of its function. The parliamentary Select Committee appointed to inquire into the televising of the Federal House of Representatives,²²¹ concluded that:

...there is sufficient evidence to indicate that the trial period of televising of proceedings has been successful in that it has increased an awareness of the Parliament and its people and its procedures. The Committee considers that the continuation of televised proceedings will assist the public to develop an even better knowledge and awareness of the work of the House of Representatives and the issues discussed here... The Committee recommends continuing the live broadcast and rebroadcast of excerpts of House of Representatives proceedings...²²²

The view that televising permits first-hand observation has however, been questioned:

It may be misleading to suggest that [a] camera in court can give an accurate portrayal of a trial ...it does not permit personal observation, it feeds a selected and edited account which reflects the subjective opinion of the camera operator and producer on what is salient and relevant..²²³

218 Telephone conversation with Tony Moore, Associate Producer, "So Help Me God", 19 October 1993. In the expressed hope that the program would "trigger a long overdue debate on the functioning of local courts", Phillip Adams observed that: "[a]t the end of "So Help Me God", your admiration for [Senior Magistrate] Flack and his colleagues in the courtroom have [sic] grown considerably, as has your disquiet with the process. There has to be a better way of dealing with the rising tide of human detritus, with the flotsam and jetsam of a society in crisis. The adversarial system, though half-heartedly pursued by police prosecutors, who clearly sense its irrelevance, is wholly inappropriate to most of the cases brought before Magistrate Flack and his colleagues around the State and the country": P Adams, note 4 *supra*.

219 Mr Barrett SM, the Coroner in the First Coronial Inquiry into the Death of Azaria Chamberlain, invited cameras to record and televise his findings because of "the prevalence of 'unfounded' rumours that had circulated in relation to the inquest": New South Wales Law Reform Commission, note 5 *supra* at 34.

220 Rabbi Solomon Klein, "Miami State Airs Trial to Defuse Racial Tensions" *Electronic Media*, 4 December 1989, p 2. (Unverified - as cited in SL Alexander, note 54 *supra* at 313).

221 Televising on a trial basis from 12 February 1991.

222 Report of the House of Representatives Select Committee on Televising, *The Eyes Have It!, Inquiry Into the Televising of the House of Representatives and its Committees*, August 1991. See (1991) 41 *Parliamentary Papers*, Paper No 464 at [1.9.1]-[1.9.3].

223 E Katsh, "The Supreme Court Beat: How Television Covers the US Supreme Court" (1983) 67 *Judicature* 6 at 9.

While it is true that a risk exists that editing may distort the trial process and misrepresent the judicial system to the public,²²⁴ the same danger may be said to apply to other sectors of the media.²²⁵ The Sackville Report notes that:

The concern about possible distortion cannot be dismissed lightly. However, it suggests that caution should be exercised about the *manner* in which broadcasting of court proceedings should be permitted, rather than about whether it should take place at all.²²⁶

In its proposed guidelines therefore, the Sackville Committee recommends that "it may be appropriate for the [Federal] Court to consider a condition requiring the broadcast of a segment without editorial comment".²²⁷

J. The Informative and Educative Value of Televising

Public knowledge and understanding of our judicial system is low.²²⁸ What public knowledge there is, is often gained from fictional programs which tend to present a distorted, inaccurate or misleading picture.²²⁹ There is a strong case for suggesting that the televising of court proceedings would be of great assistance in acquainting the public with the judicial process.²³⁰ It is reported that in America the lack of public knowledge about the workings of the judicial system has motivated lawyers, judges and the media to support televised coverage of trials.²³¹ It has been urged that media coverage is crucial to the public's understanding of the judicial system and that television has a unique role to play.²³² The stated

224 Mrs Holborow, the presiding Magistrate of the Children's Care Court filmed in the documentary "Kids at Risk" was initially concerned about ensuring fairness in editing, but is said to have indicated that she was pleased with the program as broadcast: Telephone conversation with Mr Ashley Smith, the Producer of "Kids at Risk", 1 November 1993.

225 RP Lindsey, note 47 *supra* at 416. On the reformatting effect of televised trials see SJ Drucker, "The Televised Mediated Trial: Formal and Substantive Characteristics" (1989) 37 *Communication Quarterly* 305. On the point of accurate portrayal, it is worth noting that videotaped records of proceedings have been shown to be more accurate than certified transcripts of proceedings: *Hyslop v Australian Paper Manufacturers Ltd (No 2)* [1987] VR 309. See discussion in: JG Starke, "Practice Note" (1988) 62 *Australian Law Journal* 727; and Caplan Report, note 32 *supra* at [7.7].

226 Sackville Report, note 7 *supra* at [20.25].

227 *Ibid* at [20.37].

228 P Raymond, note 55 *supra* at 205. See also IM Ramsay, note 112 *supra* at 20; CJ Black, note 9 *supra* at 2-3.

229 See LH Abugov, note 96 *supra* at 721. It has been said that viewing the court documentary "So Help Me God" was "probably the closest that many people will get to seeing what actually happens inside a court. And it is nothing like 'LA Law' or 'Rumpole': M Date, note 4 *supra*.

230 In arguing that through greater media access courts could improve the community's level of understanding of our legal system, Black CJ has suggested that, "[t]he present unprecedented level of critical interest in the system in this country should, in my view, be seen as providing an excellent opportunity to promote a much better understanding of the system": Black CJ, note 9 *supra* at 3. See also LH Abugov, *ibid* at 718, and H Beisman, note 69 *supra* at 133. For argument dismissing the educational value of televising see, TH Tongue and RW Lintott, note 106 *supra* at 785.

231 P Raymond, note 55 *supra* at 205.

232 See Caplan Report, note 32 *supra* at [4.2]; On Court TV's educational Value, see E Libby, "Court TV: Are we Being Fed a Steady Diet of Tabloid Television? No: Tacky or Not, it Helps Bring the Law to Life" (May, 1994) *American Bar Association Journal* 47. Also see EE Slotnick, note 211 *supra*; the 1989 report of the New York State Defenders Association, note 106 *supra* at 27-9.

object of the New York State Rules Regulating Audio-Visual Coverage of Judicial Proceedings, acknowledges the educational value of courtroom televising:

These rules are promulgated to comport with the legislative finding that an enhanced public understanding of the judicial system is important in maintaining a high level of public confidence in the judiciary...²³³

As the then Master of the Rolls observed:

...[it is] crucially important that the judiciary should explain to the public what they are seeking to achieve, how they are seeking to achieve it, what problems they are encountering, and what success is attending their efforts...²³⁴

In this respect, after taking into account that the televising of much of what happens in court would not guarantee high television ratings, it may well be the case that the courts need television more than television needs the courts.²³⁵

One of the prime objects of Australian experiments with courtroom televising has been to educate. For example, one of the aims of the program, "So help me God" was to bring to the public's attention the reality of the operation of Local Courts.²³⁶ Similarly the aims of the "Kids at Risk" program were to present the confrontation between the Department of Community Services and others seeking to take care of the children, to educate the public about the legal and social issues of child care, to reveal the powerlessness of persons involved and to highlight the cyclical nature of events and proceedings.²³⁷

K. Sensationalism

To counter arguments concerning the educative role, opponents of televising suggest that the nature of competition for ratings will tend to ensure that the more sensational proceedings and more sensational parts of proceedings will be televised, perhaps at the expense of the actual substance of the trial.²³⁸ In this respect, many argue that recent developments in the electronic media's coverage of court proceedings in America confirm predictions that televising would commercialise and trivialise the judicial process.²³⁹

233 Section 131(1)(a); reproduced in the Caplan Report, note 32 *supra*, Appendix C, and discussed *supra* at section II H.

234 MR Donaldson, Sir John Francis, 1987 Court of Appeal (Civil Division) Annual Review, as cited in M Dockray, note 34 *supra* at 598.

235 H Beisman, note 69 *supra* at 134.

236 Telephone conversation with Tony Moore, Associate Producer, "So Help Me God", 19 October 1993.

237 The original title of the program was, "Damned if you do, and damned if you don't": Telephone conversation with Ashley Smith, Producer of "Kids at Risk", 1 November 1993.

238 See R Phillips, note 79 *supra* at 7, and MP Quinn, "Courts Should Take Strong Action to Stop Trials by Media" (1991) 13 *Australian Journalism Review* 45. For a rebuttal of this argument see comments by S Brill, the Chairman of Court TV, note 250 *infra*. The United States experience appears to suggest that while some viewers may tune in for voyeuristic reasons, they stay tuned and become involved in community debates over significant legal and social issues arising from cases: See E Kolbert, "Our New Participatory Tabloid Videocracy" *New York Times*, 17 July 1994, p 93.

239 See P Marcotte, "Courts on Cable" (1990) 76 *American Bar Association Journal* 19; K Legge, "Sensationalism Dominates Justice Via Cable Network" *Australian*, 2 August 1991, p 6; T Walker, "Kennedy Rape Trial Takes TV To Its Intrusive Worst" *Age*, 14 December 1991, p 14; J Lyons, "Justice as

The concern with sensationalist coverage of courtroom proceedings is not new. Moves to prohibit courtroom photography and consequently television cameras in the United States and the United Kingdom may in large measure be attributed to a widespread alarm at the sensationalist coverage of trials²⁴⁰ and to a reaction by lawyers and judges against the generation, through such publication, of popular interest in judicial proceedings.²⁴¹ In examining the validity of those arguments against the televising of court proceedings which are based on fears of sensationalism, it is important to ask whether the concerns are for perceived adverse effects on the administration of justice, or whether they reflect a desire to retain the mystique and exclusiveness of the law and to minimise public scrutiny and accountability.²⁴²

In dealing with concerns regarding the potential for media excesses and sensationalism, one must assess whether the much publicised American excesses are likely to be repeated here. It is submitted that the excesses of American media sensationalism will be avoided in Australia because of, tougher Australian contempt²⁴³ and defamation laws,²⁴⁴ the absence of an Australian equivalent to the

Entertainment: America's New Show Trials" *The Australian Magazine*, 21-22 May 1994, p 12; A Dershowitz, "Court TV: Are We Being Fed a Steady Diet of Tabloid Television? Yes: Its Commercialism Hides Its Potential" (1994) 80 (May) *American Bar Association Journal* 46.

240 AC Laing, note 54 *supra* at 46. Moves to prohibit photography and sketching in courtrooms appear to have been in reaction to the introduction of the previously unknown, regular newspaper publication of courtroom photographs and sketches. Particularly notable were: first, a photograph published by the *Mirror* on 15 March 1912, of Bucknell J in the Old Bailey, passing sentence of death on Frederick Seddon, a murderer; and secondly, the sensationalist reporting of several notorious cases in the early 1920s. For the history of the ban see, M Dockray, note 34 *supra* at 595-7, and Caplan Report, note 32 *supra* at [2.2].

241 Dockray, in referring to British parliamentary debates of the 1920s observed that: "[i]t was precisely because photographs attracted interest in such unwholesome matters as proceedings in court that they were suppressed in 1925": note 34 *supra* at 597. In the United States, the American Bar Association opposed the broadcast of court proceedings because they believed that it changed "what should be the most serious of human institutions ... into an enterprise for the entertainment of the public...Using such a trial for the entertainment of the public or for satisfying its curiosity shocks our sensibilities": American Bar Association Committee on Professional Ethics and Grievances, Formal Opinion 67 (March 21, 1932) (1932) 18 *American Bar Association Journal* 550. See also, appendix to opinion of Mr Justice Harlan in *Estes v Texas* note 42 *supra* at 597, footnote 2; and discussion in RP Lindsey, note 47 *supra*.

242 See comments of Franck J, *supra* at section IIB (ii).

243 Disobeying court orders or breaching undertakings constitutes a category of contempt of court law. Thus, disobeying court orders restricting the filming of court proceedings or breaching an undertaking not to do so, as occurred in the Hauptmann case, (see *supra* at section IIA) would clearly constitute contempt in Australia. The sub judge category of contempt of court also prevents Australian lawyers from using the mass media to further their clients' in pending. See further discussion, *supra* at sections IA, IIE.

244 American defamation laws permit the broadcast of material regarding public figures or people involved in matters of public concern with far greater immunity than do Australian laws. The 'public figure' test was developed by the United States Supreme Court in *Times Co v Sullivan* (1964) 376 US 254, where the Court held that due to the First Amendment guarantee of freedom of speech and of the press the ability of public officials to sue for libel relating to their official duties was restricted to situations where such public officials could establish that the statements were made with the knowledge that they were false, or with reckless disregard of the truth. The principle has been extended to mean that even a private individual may be prevented from seeking compensation for a libel regarding matters of public concern. See *Gertz v Welch* (1974) 418 US 323. For further discussion see N Strossen, "A Defence of the Aspirations - But Not The Achievements - Of The US Rules Limiting Defamation Actions By Public Officials Or Public Figures" (1986) 15 *MULR* 419; JG

First Amendment to the American Constitution;²⁴⁵ and due to the existing laws prohibiting the identification of jurors²⁴⁶ and in some matters, other parties.²⁴⁷ Implicit in the assessment and criticism of American media excesses in the reporting of court proceedings appears to be the assumption that it is the televising of proceedings which is primarily responsible for the sensationalism and excesses. It is suggested that a closer analysis may well reveal that it is the 'cheque-book journalism' employed by publishers and the use of the media by lawyers to further their clients' cases, which are at the core of the most objectionable aspects of legal proceedings' publicity in America.²⁴⁸

Critics of those who broadcast court proceedings tend, also, to be very selective in their presentation of the facts. For example, while Court Television, the cable network responsible for the 'gavel to gavel' coverage of the Menendez and Bobbitt trials has been criticised for allegedly selecting cases purely on the basis of popular appeal,²⁴⁹ such criticism appears to overlook the wide range of cases, both criminal and civil, which have been transmitted by the network,²⁵⁰ as well as the endeavours of the network to balance the sensationalism which attracts viewers and subscribers with educational and informative commentary and analysis, which the transmission of judicial proceedings calls for.²⁵¹

Fleming, "Retraction and Reply: Alternative Remedies for Defamation" (1978) 12 *University of British Columbia Law Review* 15; and Australian Law Reform Commission Report No 11, *Unfair Publication: Defamation and Privacy*, 1979.

245 Discussed *supra* at section IIE.

246 See *supra* at sections IB and IIF.

247 See *supra* at sections IB and IIG.

248 This article does not attempt to analyse this point. It has been suggested that much of the criticism of the media coverage of judicial proceedings such as OJ Simpson's preliminary hearing, concerns the electronic media coverage outside the courtroom. The in-court camera coverage in contrast continues to lessen the 'circus atmosphere' and may even be seen as an 'antidote' to other media abuses, leaks and re-enactments etc: S Brill, "The Eye that Educates" *New York Times*, 15 July 1994, p 2.

249 For example, "In Camera With Court TV" *The New Yorker*, 24 January 1994, pp 27-8. See also A Dershowitz, note 239 *supra*.

250 For example, *Becker v Unisys* - age discrimination case from Philadelphia, *Citizens to End Animal Suffering and Animal Legal Defense Fund v Metropolitan District Commission* - federal case seeking to restrict deer hunting, from Boston, and *Deskiewicz v Philip Morris* - tobacco company liability for addictiveness of its products: "Court TV Trials Aired to Date" (as of January 10, 1994) Court TV: Courtroom Television Network. See also J Hall, "And the Verdict Is..." *Los Angeles Times*, 27 December 1993, F1. S Brill, the founder and Chairman of Court TV has responded to charges of focusing on sensationalist cases in the following manner: "[w]e have now covered more than 300 cases; two of them have been rape cases, while at least 113, by any objective definition, have been "no tabloid" civil cases: torts, civil rights, anti-trust (the MIT financial aid price-fixing case), international law (at the World Court and in Serbia), and the like. And this does not include the six hours a week of CLE programming that Court TV televises for lawyers; or the hourly prime-time program we do in which Dershowitz's colleague, Arthur Miller, attempts to put Court TV cases in context; or the hourly-prime-time program we do in which Fred Graham talks with policy makers in Washington; or the hourly prime-time program we do called "The System" in which we examine the criminal justice system by taking individual cases from 911 call to parole. And one of the exhilarating things about Court TV's success is that our ratings have been just as high when we have televised these types of trials and programs": S Brill, "Personal Grudge" (1994) (July) *American Bar Association Journal* 10.

251 The writer observed part of the live transmission of the Lorena Bobbitt trial, in the New York control room of Court TV on 10 January 1994, and noted the extensive efforts being made by the network to provide informative and unsensational commentary to a case commanding immense public interest and debate.

III. CONCLUSION

It is submitted that in view of its benefits, the televising of courtroom proceedings is not only defensible but highly desirable. This article has shown that the televising of courtroom proceedings can have many benefits. It has the capacity to reduce the physical disruption which currently exists in courtrooms and court precincts, in part due to current restraints on court reporting. It may also enhance the dignity and decorum through its positive effect on courtroom participants. It also has a unique potential to educate and inform many who are not reached by existing forms of legal and courtroom publicity.²⁵² It makes the judicial process truly open, by providing opportunity for personal observation to virtually all members of our society, the vast majority of whom would never otherwise have been able to observe and scrutinise the judicial process. In this way, courtroom televising, by ensuring that justice is not only done but seen to be done, has shown itself capable of maintaining and even enhancing public confidence in our legal system.

On the basis of the findings of their extensive research, the Working Party of the English and Welsh Bar stated that:

...objections to televising are based largely on fears which, in practice, are revealed to be unfounded, and in part upon an emotive reaction to television...²⁵³ Actual experience, however, has shown that the anticipated risks were almost invariably without foundation and, in so far as elements of risks remained, capable of being controlled.²⁵⁴

Ramsay also cites evidence from the findings of United States surveys of judges which suggest that opposition to court televising tends to weaken as those opposed to court televising, personally experience it.²⁵⁵ Yet, some of the perceived dangers are still responsible for the de-facto prohibition which exists in Australia.

In 1987 the Australian Law Reform Commission recommended that the matter of courtroom televising should be placed squarely within the discretion of the presiding judge, with televising only permitted when the judge has granted permission to film and to broadcast.²⁵⁶ The preferred approach and one which would be more consistent with the principle of open justice as presently applied to non electronic media reporting of court proceedings, would be to open to television

252 While many may have watched the live telecasts of the Bobbitt trial out of sheer curiosity and fascination with the bizarre facts involved, they did so aided by informative commentary and explanations from eminently qualified legal experts. Definitions, explanations of legal terms and concepts, and the appearance of legal experts on screen to explain various facets of the proceedings and to answer questions from viewers during breaks in the proceedings were unreported parts of the Court TV package, which subscribers received in the United States. Such reporting needs to be contrasted with, the generally speaking, selective and largely uninformative nature of reporting given by other sectors of the media.

253 Caplan Report, note 32 *supra* at [6.1].

254 *Ibid* at [4.1].

255 IA Ramsay, note 112 *supra* at 21, citing JL Hoyt, "Courtroom Coverage: The Effects of Being Televised" (1977) 21 *Journal of Broadcasting* at 494-5; and S Barber, "News Cameras in the Court-room: A Free Press-Fair Trial Debate", 1987 at 87 (unverified).

256 Australian Law Reform Commission, note 26 *supra* at [126].

cameras, all court proceedings presently open to other forms of media.²⁵⁷ This appears to be the view of the Sackville Report.²⁵⁸

This article observed that any televising of Australian court proceedings would be subject to existing restrictions on access to courts and publication. In recognition of the existence of dangers which are peculiar to the medium of television, a clear and firmly enforced set of guidelines will be required. Such guidelines would ensure *inter alia*, that media activity does not distract participants, unduly infringe on the privacy of participants, impair the dignity of proceedings or interfere with a fair and impartial trial.²⁵⁹ Any proposed guidelines would, however, need to be flexible in order to be able to deal with a variety of cases and to protect the independence of the judiciary.

In certain cases further restriction, regulation or even prohibition on televising may be warranted in the interests of the administration of justice. As with the discretionary exercise of their statutory powers and their inherent powers to control proceedings, the basis of the exercise by judges of their discretion to restrict or prohibit televising should be the detrimental effect on the administration of justice and the ability of defendants to obtain fair trials. The Sackville Report proposes that:

The presiding judge should have a discretion to allow broadcasting and, in particular, should be able to limit, temporarily suspend, or disallow broadcasting, if, in the judge's opinion, such coverage has interfered or will interfere with the rights of the parties to a fair trial and the proper administration of justice.²⁶⁰

Under such guidelines magistrates or judges would be able to restrict or prohibit televising whenever a problem, caused or likely to be caused by the presence of television cameras or by the televising, is identified. To avoid the making of such orders on the basis of merely perceived but unsubstantiated concerns, judges and

257 Judges and Magistrates who have permitted television cameras into their courtrooms have tended to emphasise that what they were doing was merely allowing television to report what was open to the public or already being reported by other forms of media. For example, The presiding magistrate in Campbelltown Local Court, Senior Magistrate Kevin Flack in explaining why he agreed to permit television cameras into his court to film the documentary "So Help Me God" noted that: "[g]enerally all the processes in the courts are able to be published word for word, name for name...All we were doing differently was showing on film what would be reported anyway". See M Date, "Through the Eyes of the Law" *Sydney Morning Herald*, 27 September 1993, The Guide, p 1. Similarly, Millhouse J of the South Australian Supreme Court in permitting television cameras into his court observed that as his courtroom was a public place, he did not see any reason why cameras should not be admitted: see R Duncan, note 5 *supra*.

258 See Sackville Report, note 7 *supra* at [20.1] ff.

259 All American States that permit televised proceedings, do so subject to a range of restrictions: Radio-TV News Directors Association, see News Media Coverage of Judicial Proceedings with Cameras and Microphones: A Survey of the States, (as of January 1, 1994); New South Wales Law Reform Commission, note 5 *supra* at 3; and Caplan Report, note 32 *supra* at [5.6]. For examples of procedural rules regulating television coverage of court proceedings, see: New South Wales Law Reform Commission, *ibid* at 57-67: NT Gardner, note 37 *supra* at 495; and SL Alexander, note 54 *supra* at 310.

260 Sackville Report, note 7 *supra* at [20.37].

magistrates should, it is submitted, be required to state reasons for making such orders. Such orders should also be subject to legal challenge by the media.²⁶¹

The onus for establishing the existence of grounds sufficient to warrant an order restricting or prohibiting televising should rest on those seeking such orders. They after all, are the ones seeking to restrict the open administration of justice.

In dealing with the concerns surrounding the issue of whether to permit television cameras into Australian courtrooms, it is important to emphasise one of the most compelling aspects of the American experience, that of the many and varied experiments conducted in the United States, no American State that has permitted televising in its courts has later gone on to prohibit it.²⁶²

261 For the currently accepted position on media standing to challenge orders restricting access to courts and the publication of proceedings, see: *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1; cf *John Fairfax Group v Local Court of NSW*, note 195 *supra* at 167-9.

262 Caplan Report, note 32 *supra* at [4.7].