The object of *Forum* is to encourage thoughtful and intelligent debate on issues relevant to the law. Vigorous argument and analysis of current legal affairs is for the most part impossible in the general media, and it is hoped that the provision of a separate arena such as *Forum*, devoted to discussion of legal matters by the legal community, will promote better awareness and understanding of such issues within academic, professional, judicial, and other circles.

Contributions to *Forum* are intended to stimulate debate rather than canvass issues comprehensively and as such minimal footnoting or referencing is required. The opinions expressed in *Forum* are the personal views of the authors.

FORUM

TELEVISING COURT PROCEEDINGS

THE HONOURABLE JUSTICE MD KIRBY*

In 1983, I delivered my ABC Boyer Lecture on *The Judges*.[1] At the time, my views were sharply criticised in some quarters as dangerously radical. In particular, I was taken to task for various predictions about the future of the judiciary.

Amongst other predictions - such as greater use of alternative dispute resolution, increasing public attention to issues of gender equity, the discarding of wigs and the title "Mr Justice" - I said this about broadcasting and television:

> Another technology with clear implications for the judiciary is the media of communications. In most states of the United States, though not yet in the Federal Courts, television brings the public courts to a wider audience. In Australia royal occasions, church services and now even parliaments themselves are televised. But cameras still normally remain outside the courtroom. People will grow impatient at this adherence to the old technology of information. They will see no logic in the insistence on sketches of little artistic merit of judges and witnesses. Under proper

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1 MD Kirby, *The Judges*, ABC Boyer Lectures 1983, Sydney, p 78.

> conditions, I have no doubt that television and radio will ultimately enter the courtrooms of Australia. The technology has moved on. If the Judges are to remain the great educators of the community they will have, in time, to adapt to it, uncomfortable as that adaptation will be at first. In the 21st century, the camera will be as common in the courtrooms as the law reporter's notebook is today.

Over the decade since those predictions were uttered, we have seen still further expansion of the use of television in the State courtrooms in the United States. By satellite they are regularly brought to Australian audiences. Indeed, in some cases, wherever one goes in the world, it is next to impossible to escape the American fascination with real courtroom dramas. In far-away Lesotho, I saw the trial of a member of the Kennedy clan, on a charge of rape. The trial of Mrs Bobbitt, on a charge of severing her husband's penis, was on the hotel television in Madrid when I was there in January 1994. Now, the trial of the Los Angeles sportsman, OJ Simpson, is receiving saturation television coverage in the United States. CNN, which provides its global audience with material targeted mainly upon American interests, brings intensive daily reports of this trial with extensive commentary. It is probably true to say that no trial since that of Jesus Christ has attracted so much international attention.

The decision of Justice Bernard Teague of the Supreme Court of Victoria to permit the televising of his remarks on sentence of Nathan John Avent for the axe murder of a 10 year-old boy has suddenly propelled the issue of courtroom television into a subject of widespread public debate in Australia. The action of the judge effectively jumped the gun on the proposals of the Federal Access to Justice Advisory Committee which, in May 1995, proposed a pilot programme of telecasts from the Federal Court of Australia. In May 1995, the Prime Minister, Mr Paul Keating, announced in Brisbane the Government's response to the Committee's proposal, including support for the plan for courtroom telecasts. The proclaimed object of the exercise is to demystify the legal system and to help the public to better understand the operation of the courts. Perhaps in anticipation of this, the judges of the Federal Court made a decision to drop the wearing of wigs, except on ceremonial occasions.

I imagine that there will be some cases in the Federal Court which will attract the attention of the news cameras. The case involving the NRMA float springs to mind. The pathos of various immigration appeals, such as that of Mr Teoh might be another fruitful source of news broadcast television clips. Legal combat with Federal Ministers under the *Judicial Review Act* could occasionally provide good television copy. But I do not imagine that even the most news conscious member of the Federal Court would expect that the average run of work in the Federal Court would be likely to seize the imagination of the news editor, sitting at the studio triage, deciding on what to put to air in the evening peak hour news broadcast. Will it be the motion list under the Federal *Bankruptcy Act*? Will it be the interpretation of the rules of a Federal industrial organisation? Perhaps an obscure point in a taxation appeal? I am afraid that these are not the stuff that media dreams are made of.

By and large, the general population tends to consider that the most important area of the law is crime. In the mind of the ordinary citizen, crime and its control are the centrepiece of any legal system. That is why Justice Teague's intervention

was so important. Dressed in his scarlet robes and horsehair wig, he was dealing with the area of the law which is just made for television. This is not the work of the Federal Court, or of the Court of Appeal or of the High Court. Occasionally, they can attract a big interest case. The *Ettinghausen* defamation damages appeal, with Mr TEF Hughes QC and Mr David Jackson QC locked in forensic battle, might be a case in point. An appeal about the Rugby League might be another. But for the most part, in their dull and dreary black robes and endless citations of Lordships and Honours, it is scarcely likely that the lay audience would feel enthralled. In fact, they might see what the judges have to put up with. Leaving Mr Hughes and Mr Jackson aside, it is all too often poor advocacy. Mumbled sentences. No eye contact. Tedium.

Yet the very case which Justice Teague chose for his experiment demonstrates the risks of presenting such material to the community at large. Why was that case chosen? The answer is because it was so newsworthy, even sensational. Why was it newsworthy? Because it involved such a cruel and bloody crime by an unlikely perpetrator from a religious family with horrible suffering both for the families of the victim and of the accused. If the object were to give a window into the operations of the courts, this was scarcely a typical day in the life of the Australian courts. But it was a notable criminal trial in which there was a great deal of public interest. The lawyers' plea to the media for a heightened interest in the *Trade Practices Act* or the *Appropriation Act [No 4]* is, I am afraid, likely to fall on deaf public ears.

Yet this brings me back to my prediction in 1983. Every sensible person can see that, the technology of information having moved along, courts and judges can scarcely expect to keep the cameras out of Australian courts forever. What is the reason for our strong principle of open courts? It is the fundamental belief that the courts belong to the people who have a right at virtually all times to be there. Their presence, or even their right to be present, puts a brake on the potential arrogance of power. It is another means of ensuring accountability so that those who judge are themselves constantly subject to judgment. If this is so, then it is difficult to justify limiting the open court principle to straggling groups of partly-interested schoolchildren or to the new brigade of pensioners and foreign visitors who are increasingly brought to sit in the back row to watch our courts until boredom or the incessant demands of the tour guides send them on their way. Nor is it easy to see how the technology can forever be limited to the ball-point pen of the observant news reporter when modern means of recording can do the job so much more accurately. The Supreme Court of New South Wales has recently agreed to permit reporters to use sound recording in its courtrooms, as an aid to their work, so long as they obtain the permission of the presiding judge and do not occasion any disturbance of the proceedings. It is a small step indeed from this to allow cameras. And if television is the way that most people in Australia nowadays get their news information, it is difficult to see why it should be forbidden.

Of course there must be controls:

- Free movement in the courtrooms by television crews would potentially distract attention from the serious business of the courts and could not be allowed;
- The control of the judge of all court proceedings is essential because that will remind those who are present of the intensely serious matters in which courts are typically engaged;
- Non-obtrusive introduction of cameras should be possible as the technology of electronic recording becomes simpler;
- The fears of witnesses being intimidated or playing up to the cameras (as has happened in the OJ Simpson trial) can be dealt with by the resolute control of proceedings by judges of our tradition; and
- The concern of unrepresentative samples and embarrassing highlights of inappropriate questioning can be controlled, in part at least, by the law of defamation by public regulation of the electronic media and by effective control exerted by, and statements of, the trial judge.

It is probably true that cameras in courtrooms will change things somewhat. But it is equally likely that the intensive experience of conducting a trial or an appeal will continue to be so mind absorbing for those immediately involved that they will soon forget the presence of the cameras. Like the stenographers who take the official transcript, such electronic recording will become simply an incident of the life of the courtroom.

If the courtrooms of Australia are brought to the people by television it may be hoped, with some interpretation, that their work will be better understood and appreciated. The sight of judicial officers struggling to decide cases in a lawful and just way is, or should be, a wonderful sight to most citizens. It is by no means universal in our world. It is, or should be, a cherished feature of our constitutional system. It is the very machinery of the rule of law. For the most part, I believe that the presence of the eye of the community, through television, could bring a better understanding and appreciation of the courts and their work. It might also bring demands for reform where court procedures or the substantive law applied are seen to be out of tune with community expectations. It could bring academic, professional, judicial and other experts out of their closets into a public dialogue with the community - explaining this decision, examining that ruling, criticising that law and even the judge where this is warranted.

A community which knows its law, and its judiciary, will sometimes insist upon reform. But it will also perhaps, appreciate the strengths of our system - particularly the existence of independent decision-makers with the *will* to do justice according to law.

In short, cameras in the courts are inevitable. We will do well to resolve the conditions on their use. I disagree with Dean David Weisbrot[2] that crime must be excluded. By what right do we, the lawyers, purport to exclude the people's eyes from a part of the court process of the greatest concern to them? Nor do I agree

2 D Weisbrot, Cameras in Court: Yes, But Not for Crimes (1995) 27 *University of Sydney News* 1.

with Sir Anthony Mason[3] that we should await the experiment in the Federal Court (and in the Supreme Court of Western Australia). The genius of our federation has been its capacity to afford the possibility of experiment. It should not be beyond our capacities to avoid the pitfalls of saturation coverage of the OJ Simpson kind whilst at the same time renouncing the do-nothing professional view that legal nannies always know best.

A word in closing derived from long experience in public life. Ten years after all the hubbub, no one will remember what the fuss was all about.

3 AF Mason, *The Australian*, 12 June 1995, p 29.