Cameras on Trial: The "O. J. Show" Turns the Tide

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A review in the trade paper *Variety* (October 2, 1995, p. 86), said that "the O.J. Simpson trial delivered a lot of entertainment bang for the buck. Though dramatically it suffered from serious pacing problems, the show generated more word-of-mouth than 'Waterworld' and 'Showgirls' combined, and the broadcast of the verdict should be a rating bonanza."

It was. It surpassed, by far, the Super Bowl, Day One of the Gulf War, and the landing on the moon. In fact, between June 17, 1994 and October. 3, 1995, the world has been treated to the most mesmerizing, polarizing, and precedent-shattering television show in history.

An opening-day audience of 95 million in the U.S. alone (I watched in a hotel room in Paris where I had been attending a conference) witnessed, in the words of the *New York Times* headline (June 22, 1994, p. A12), the "Struggle...for the Minds of Potential Jurors." Once the jury selection was completed, the struggle went on for the minds not only of jurors but of the communities into which jurors, judge, witnesses, attorneys, and all other participants must return. That struggle raged in and out of court but in sight of television cameras, through 266 days, 126 witnesses, 20 attorneys, 1105 pieces of evidence, and 45,000 pages of transcript, plus many more episodes kept from the jury as potentially prejudicial, irrelevant, or inflammatory, but all seen by the television audience.

The end of the explosive trial, but by no means of its far-reaching fallout, came at 1 p.m. in the afternoon of the day when 150 million Americans at home and another 50 million outside of home held their collective breath for 10 minutes. New York viewers suddenly turned on 750,000 television sets, boosting Con Edison's load by 93 million watts. Long distance phone calls dropped 58 percent, lightening AT&T's load. Trading on the New York stock exchange plunged by 30 million shares. Airlines delayed departures, legislatures delayed votes, presidents, prime ministers, and cabinet members suspended state business until the verdict was announced. Then, again on television, instant history was frozen into memories of racial division, domestic violence, police bungling, general consternation about what had happened and why, and heated table conversations in 65 million homes.

As the post-mortems replaced the coverage, the toughest decisions the participants faced was whether and how to cash in on the market for their notoriety, how to vindicate their roles, how to reveal what the cameras had concealed or distorted, and how to settle scores. In an article headlined "'Trial of Century,' break of a lifetime," *Advertising Age* (October 9, 1995) projected $1 billion in media and merchandising sales from "Simpson-related marketing." The *New York Times* published "An O.J. Bibliography" on October 1 (p. E7), reporting that "Thirty O.J.-related books have gushed forth so far.... And...there will be more."

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If there ever was a need to demonstrate that cameras can transform, prolong, and make a travesty of a trial, we had it in the O.J. Simpson Show's spectacular run for over a year. It has begun to turn the tide that threatened to make high-profile justice a captive of show business.

Cameras Make The Difference

The combustible mixture that went into the trial — sex, violence, celebrity, and the ostentatious display of all the legal talent that money can buy — would have produced fireworks in any medium. But the O.J. Show exploded more like a nuclear chain reaction. The reason can be found in the difference cameras make in the total cultural environment. The claim that a television trial is not much different from the usual publicity surrounding sensational cases is in the wrong ballpark. It confuses the retail dissemination of news to relatively select readerships with the universal wholesaler discharging massive streams of images and messages into the mainstream of the common cultural environment.

If all daily and weekly newspapers and all general circulation magazines wrote about a case every day, their total exposure (generously figuring an average of two readers per copy reading for an hour a day) amounts to about one-tenth of what television brings to those readers, and also to every hospital, prison, bar, place of work, and home where there are no readers. This is a quantum jump bringing about an environmental transformation and a tidal wave rather than a trickle of public and official reaction.

On September 17, 1995, even before the verdict was announced, the *New York Times* headline observed that "Simpson Case Backlash Keeps Cameras Out of Other Courtrooms" (p. 35). News media lawyers, jurists, and other experts, some of who favored cameras before, were cited as blaming cameras for turning "the search for justice into a spectator sport," for intimidating some and emboldening other participants, and for the interminable length of the trial.

The issue I pose is not one of guilt or innocence, or even just the length of the trial, but the total quantitative and qualitative difference that real-time television saturation makes to the conduct, outcome, and aftermath of a high-profile criminal trial. The chief legal and social policy question is whether that difference is compatible with the mission of the courts, as distinct, for example, from televising legislatures dealing with public policy matters rather than with private lives and the search for convincing evidence.

As any student of communication (or any performer) knows, if you change the audience you change the performance. Televising trials in real time creates media events whose public ramifications feed back into the real-life event. Cameras transport, not just report. They transport the sights and sounds of selected bits and bites and scenes of an ongoing event that they helped shape in the first place, and that they continuously interpret. That additional audiovisual element is the least informative and most prejudicial aspect of televised trials, an aspect that courtrooms should try to neutralize.

Transporting the trial scene into a public arena, as political tribunals and long-discredited show trials tended to do, makes hundreds of millions of viewers feel that they are actually witnessing real history in the making. Their reaction affects trial participants,

influences the outcome, and alters the subsequent course of the now irreversibly modified sequence of events far beyond any previous feats of publicity.

Looking Back — and Forward

In 1980, I wrote that "the sudden rush seems to fly in the face of known risks of prejudice, the certainty of endless litigation, a decision of the Supreme Court, [and] resistance on the Federal level." I concluded that "as a system of mutual accommodations and pay-offs develops, controls and inhibitions are likely to fall by the wayside."

Media pressure and the siren song of public visibility persuaded 47 states (but not the less vulnerable Federal judiciary) to admit cameras into their courts. But if the hazards of that temptation ever needed clear and dramatic demonstration, we had it in the O.J. Simpson Show. It will be useful, therefore, to take a brief look at the rise and fall and probably renewal of the ban on cameras in the courtroom.

Relationships between powerful social institutions are seldom in a state of equilibrium. The media are the cultural arms of the social order, taking the place of religion in the medieval power-nexus of church and state, and replacing it with telling stories for sale. The courts adjudicate specific conflicts according to law in an environment as free from commercial or political pressure and popular prejudice as possible. The constitutionally mandated independence of the judiciary is designed to shield defendants from arbitrary government power, angry mobs, and vengeful or fearful jurors.

Despite their different functions, the courts and the media are in some ways dependent on each other. The courts rely on the media to legitimate their functions and to keep the public informed about their decisions. Public assumptions about justice are shaped by crime stories, both factual and fictional. Good relationships with the press can enhance the courts' image and political standing. And the media rely on the courts as an important source of stories.

In general, the phrase "cameras in the courts" has been used to refer to all technological devices. The ban on technology reflected the judiciary's assumption that electronic coverage is essentially different from personal observation and reporting. One of the strongest arguments for banning electronic equipment in its early years was that its use disrupted the trial process. While the scribbling of notes on a pad was relatively quiet, the operation of cameras and recording devices was initially obtrusive and disruptive.

The courts, however, were never solely concerned with the obtrusiveness of electronic equipment. They had for many years assumed that the broadcasting media, particularly television, have characteristics that distinguish them from other modes of communication. Former Chief Justice Earl Warren echoed this concern when he stated that "the televising of trials would cause the public to equate the trial process with the forms of entertainment regularly seen on television and with the commercial objectives of the television industry."

Such pointed charges were new. In early frontier America, attending criminal trials was a popular activity in rural communities. People would travel many miles to the county seat to be entertained by court proceedings. Criminal trials became the theater of the countryside.

Throughout the 19th century, court reporting was the mainstay and a prime circulation booster of newspapers. When radio was introduced in the 1920s, broadcasters began to look to the courts as a source of programming. In 1925, Chicago station WGN set up a microphone to broadcast the proceedings of the famous Scopes "monkey trial" to a large and attentive audience.

The success of this venture convinced broadcasters to continue courtroom coverage, and for the next 10 years radio aired trial proceedings without incident. In the 1930s, however, critics of the media's often sensationalized coverage of judicial proceedings began to speak out against the abuses of the media in the courts. The 1935 trial of Bruno Hauptmann, accused and convicted of kidnapping aviator Charles Lindbergh's infant son, provided the occasion for a change in policy.

A large number of newspaper and radio reporters covered the story from inside the courtroom, jostling each other for position and taking countless pictures. Descriptions of the trial indicate the press corps' behavior created a carnival-like atmosphere that seriously interfered with the proceedings.

The American Bar Association (ABA) addressed the problem by banning camera coverage altogether. Although it had no authority to enforce the ban, most state courts followed the rule and barred cameras from judicial proceedings. The federal courts followed suit.

The legal objections were articulated in 1965 by the U.S. Supreme Court's decision in *Estes v. Texas*. Billy Sol Estes, an associate of Lyndon Johnson, was convicted on swindling charges. Texas was one of the few states that had not adopted a ban on cameras in the courts, and Estes' highly publicized trial received extensive television coverage. Estes appealed the conviction to the U.S. Supreme Court, arguing that the televising of his trial had deprived him of his 14th Amendment right to due process of law. A 5-4 majority of the Supreme Court held that the broadcast coverage had indeed deprived Estes of due process and voted to reverse his conviction.

Despite Estes, media organizations applied pressure and persuaded several states to admit cameras at least on an experimental basis. By 1979, eighteen states permitted televising courtroom proceedings on either a permanent or an experimental basis. This prompted a judicial reexamination of the constitutionality of televised trials.

Legal Issues

In general, the courts have focused on three issues: (a) whether a ban on cameras in the courtroom violated the broadcast media's First Amendment right of free speech; (b) whether such a ban undermines the defendant's Sixth Amendment right to a public trial; and (c) whether camera coverage deprives the defendant in a criminal trial of his 14th Amendment right of due process.

On January 26, 1981, the Court held in *Chandler v. Florida*, that a ban on television coverage of trials did not violate the broadcast media's First Amendment right of free speech. It held that camera coverage (as distinct from reporting) is not protected by the First Amendment.

In *Estes* the concurring justices had concluded that the Sixth Amendment does not confer upon the defendant a right to televised trials. In the words of Justice Harlan:

> The "public trial" guarantee of the Sixth Amendment...certainly does not require that television be admitted to the courtroom.... Its guarantee will be met as long as the court is open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process. It does not give anyone a concomitant right to photograph, record, broadcast or otherwise transmit the trial proceedings to those members of the public not present.

Likewise, Chief Justice Warren Burger observed in *Chandler* that "the requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed."

On the other hand, *Chandler* also held that television coverage is not a per se denial of defendants' constitutional right to a fair trial. The reason is the lack of scientifically acceptable evidence bearing on the issue. Thus *Chandler* posed the key challenge: States are free to experiment in order to demonstrate whether or not the addition of cameras makes a difference that affects the ability of the courts to conduct a fair trial.

But as a 1983 decision, *United States v. Hastings* observed in upholding the federal court ban, it is very difficult to detect the adverse impact of television coverage. In an unpublished 1989 review of experiments undertaken by the court, my students and I at the Annenberg School for Communication at the University of Pennsylvania found that they were conducted by interested parties, employed no controls, had specified no criteria for "success," and did not test effects on participants in scientifically acceptable ways. Predictably, they came to the foregone conclusion that television coverage did not disturb the proceedings, a rationale that had become irrelevant to the issues that had emerged since the Hauptmann trial.

In contrast, a 1986 survey of participants and observers by a New Orleans researcher, William M. Henican, asked about a broader range of impacts, and concluded that "the risks of allowing cameras into the trial courts of this country are very high" and that "when prejudice does occur it will be very difficult to demonstrate." Paul Thaler's 1994 book offers mixed but equally troubling evidence. The key question posed in *Chandler* remained unanswered — until now.

Now We Know

Now we know that judges cannot ignore the fact that they are playing to a global audience. One of the baffling decisions of Judge Lance Ito was the permission to air "in the public interest," a videotaped diatribe more vicious, vulgar, and inflammatory than has ever been heard on television. Another was permitting the defendant well-rehearsed "spontaneous" mini-soliloquy proclaiming innocence without risking challenge or cross-examination. Piping such sensational provocations into every home escalated the risk of community uproar and its seeping back into the jury room despite sequestration, and assured the contamination of any future jury pool, should there be further legal action.

When lead defense attorney Johnny Cochran was asked on national television if he would favor cameras in the future, he hesitated a bit and said, "Well, in this case, it turned out to help us. I believe that because of the presence of the cameras, Judge Ito made some decisions that were favorable to our side. Without cameras he might have been much tougher."

Now we know that prosecutors and defense attorneys cannot ignore the fact that television coverage presents career-making or breaking opportunities and potentially lucrative markets for their words, writings, and appearances that far exceed those of other forms of publicity. Their fate and fortune may depend on how they look, sound, and perform on camera, as well as, or perhaps even more than, on how faithfully they perform their legal responsibilities.

Jurors become instant celebrities, equally sought after, even if they were never seen on camera. They return to communities aroused as only television images can arouse, facing either approbation or hostility and even harassment, depending on how popular their verdict. Witnesses, like jurors, are catapulted into notoriety and can either shrink from testifying freely or exult in it, or sell their stories to talk shows and tabloids, damaging their usefulness in court but trading "trash for cash."

Most defendants in criminal trials are not as handsome, rich, and popular as O. J. Simpson. But for all of them, television is the new pillory. The camera close-ups expose their every facial expression and gesture to a public that will form judgments on that basis. For an unsavory or unpopular defendant, especially one who looks and acts strange, stigmatization by imagery may well tip the scales of justice the other way.

On September 30, 1993, the Federal Judicial Center released a little-publicized study by an independent research organization, designed to assess the Federal courts' experiment with admitting cameras into civil trials. They:

> found little or no evidence that the use of courtroom footage provides additional information to viewers about either the facts of the case being covered or the legal process involved.... The pictures frequently seemed to dramatize and personalize the story, rather than adding any factual material to it.... Within the confines of our investigative procedures, we could not confirm that the use of cameras in the courtroom served any educative function (Amundson & Lichter, 1993, pp. 50-51).

Shortly thereafter, the Federal Courts terminated the experiment. The study provides at least a partial answer to the questions posed in *Chandler* about the legal, informational, or educational value of the addition of cameras to the reporting of trials. It is now only a question of time until the reversal of another major verdict on grounds of television contamination, as in *Estes*, leads to the renewal of the long-standing safeguards protecting the integrity of the judicial process. In the meantime, the state courts are expected to review their policies and Courts of Appeal to take a careful and critical view before dismissing appeals on grounds of prejudicial camera coverage.

It is high time to join other democratic countries in refusing to deliver our courts, juries, and defendants to television exploitation and experimentation whose consequences for lives and justice we may never know.

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