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# This Courtroom Is Not a Television Studio: Why Judge Fujisaki Made the Correct Call in Gagging the Lawyers and Parties, and Banning the Cameras from the O.J. Simpson Civil Case

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**THIS COURTROOM  
IS NOT A TELEVISION STUDIO:  
WHY JUDGE FUJISAKI MADE THE CORRECT  
CALL IN GAGGING THE LAWYERS AND  
PARTIES, AND BANNING THE CAMERAS FROM  
THE O.J. SIMPSON CIVIL CASE**

*Robert A. Pugsley\**

*There is no question that media coverage can and does affect the ultimate outcome of widely publicized cases.<sup>1</sup>*

—Robert Shapiro

*A sense of mortality should make us smarter. . . . Life is short, so you do your work. You don't let your life be eaten by . . . the circuses of the media. The Trial of the Century was a pure waste of time. It was a tar pit, and nobody who went into it came out smarter or kinder or happier or more enlightened. It had no redeeming aspects; it taught nothing. Midwestern farm boys can get 18 years in prison for raising marijuana; rich people can walk away from murder: everyone knew that. Time to get back to work.<sup>2</sup>*

—Garrison Keillor

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1. Robert Shapiro, *Using the Media to Your Advantage*, CHAMPION, Jan./Feb. 1993, at 11-12.

2. Garrison Keillor, *In Autumn We All Get Older Again*, TIME, Nov. 6, 1995, at 90.

## I. INTRODUCTION

On August 13, 1996, Los Angeles Superior Court Judge Hiroshi Fujisaki issued a minute order<sup>3</sup> that thunderstruck both a worldwide public grown dependent on its daily dosage of unfiltered "O.J." and—far more significantly, I shall argue—the legions of electronic media that both fueled and supplied an insatiable appetite for diversion from the quotidian concerns of life on this planet as we knew it before the late evening hours of June 12, 1994.

In his order, this Judge, who at all costs would not be Judge Lance Ito,<sup>4</sup> applied a double-strength tourniquet to staunch the uncontrollable hemorrhaging of leaks, rumors, "spin," and demagogic rhetoric that had drained a sense of fairness and judicial decorum from the moribund body of *People v. Simpson*.<sup>5</sup> During those nine months of legal and media excess, as well as in the preliminary hearing that preceded them, virtually anyone in the world who cared to watch or listen had multiple unfettered avenues of instantaneous access to the proceedings. *People v. Simpson* may or may not have been "The Trial of the Century,"<sup>6</sup> but make no mistake: it was the "Media Mother of All Trials." This was so for several reasons about which others continue to speculate and argue.<sup>7</sup> Indeed, the full cultural, legal, political, journalistic, and racial impact of televising the

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3. *Rufo v. Simpson*, No. SC031947 (Cal. Super. Ct. filed July 20, 1994) (Minute Order issued Aug. 13, 1996); see also B.J. Palermo, *New Judge in Simpson Case Issues Far-Reaching Gag Order*, L.A. DAILY J., Aug. 14, 1996, at A1 (describing the impact of the order).

4. Judge Lance Ito was the presiding judge in the criminal case of *People v. Simpson*, No. BA097211, 1995 WL 704381 (Cal. Super. Ct. Oct. 3, 1995) [hereinafter *Simpson*]. It has frequently been remarked by many *Simpson* trial observers that Judge Fujisaki's judicial demeanor and rulings from the bench differ markedly—both in style and substance—from those of Judge Ito. This is an observation that I believe has been borne out repeatedly in the civil trial. Even though Judge Ito often ruled favorably for the prosecution on contested evidentiary matters, Judge Fujisaki couples that frequency for the plaintiffs with the particularly controversial—and potentially appealable—content of his rulings: allowing, for example, reference to Mr. Simpson's failed polygraph examination, with score, and permitting the hearsay testimony of a domestic abuse hotline counselor. Both rulings were made over strenuous defense objection.

5. *Id.*

6. Professor Gerald Uelmen has valuably identified at least 32 trials since 1900 that have been called a "trial of the century," which exhibited recurrently similar events. GERALD F. UELMEN, *LESSONS FROM THE TRIAL: THE PEOPLE V. O.J. SIMPSON*, 2-8 (1996).

7. See Steven Brill, *Televising Trials Is the Democratic Way*, *POSTMORTEM: THE O.J. SIMPSON CASE 195-201* (Jeffrey Abramson ed., BASIC BOOKS 1996); see also Lincoln Caplan, *The Failure (and Promise) of Legal Journalism*, *POSTMORTEM: THE O.J. SIMPSON CASE 202-10* (Jeffrey Abramson ed., BASIC BOOKS 1996).

*Simpson* criminal trial has not yet been fully measured.<sup>8</sup> While we still conjecture as to what might have occurred at the murder scene, we vividly retain every memory on videotape libraries of images, sounds, and experiences of the parties, lawyers, witnesses, and the judge during the lengthy and divisive legal combat.

Judge Fujisaki's order concerning the conduct of the civil trial cut off two sources of information that journalists and the public alike had come to depend on. The first part of his order placed a "gag" on the parties themselves, their attorneys, and all witnesses over whom the attorneys had control.<sup>9</sup> This was designed to eliminate the "spin" sessions that the adversaries had used so frequently and effectively outside the courtroom during the criminal trial. Calculated rumors, trial theories and tactics, and most certainly criticism of the other side's evidence, witnesses, and general performance—this was the stuff that added spice to what the television viewers had seen for themselves inside in the courtroom. Although partially regulated by Judge Ito, these forums were never entirely eliminated.

The second part of Judge Fujisaki's order cut out the very heart of the electronic media's ability to transform the *Simpson* civil trial into anything resembling the behemoth of the criminal proceeding. Quite simply, but very controversially, the judge banned TV cameras and audio feed for external transmission from the courtroom.<sup>10</sup> Access to the courtroom was limited to a daily lottery for one of sixteen seats reserved for the general public, with the remaining seats allocated to journalists. To accommodate journalist overflow, there would be a closed-access audio feed to an off-site, makeshift facility containing only folding chairs. Some TV organizations set up temporary trailers, wooden-planked platforms, and

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8. See, e.g., George Lipsitz, *The Greatest Story Ever Sold: Marketing and the O.J. Simpson Trial*, in *BIRTH OF A NATION'HOOD* 3 (Toni Morrison & Claudia Brodsky Lacour eds. 1997); Ishmael Reed, *Bigger and O.J.*, in *BIRTH OF A NATION'HOOD* 169 (Toni Morrison & Claudia Brodsky Lacour eds. 1997); Armond White, *Eye, the Jury*, in *BIRTH OF A NATION'HOOD* 339 (Toni Morrison & Claudia Brodsky Lacour eds. 1997); TOM ELIAS & DENNIS SCHATZMAN, *THE SIMPSON TRIAL IN BLACK AND WHITE* 126, 127 (1996); DONALD FREED & RAYMOND P. BRIGGS, *KILLING TIME* 236–40 (1996); JEWELLE TAYLOR GIBBS, *RACE AND JUSTICE* RODNEY KING AND O.J. SIMPSON IN A HOUSE DIVIDED 154, 219–20, 273–75, 289–90, 298–99 (1996); HANK M. GOLDBERG, *THE PROSECUTION RESPONDS* 360–63 (1996); EARL OFARI HUTCHINSON, *BEYOND O.J.: RACE, SEX, AND CLASS LESSONS FOR AMERICA* 49–53 (1996); WENDY KAMINER, *IT'S ALL THE RAGE: CRIME & CULTURE* 34–35, 40–42 (1996); JEFFREY TOOBIN, *THE RUN OF HIS LIFE: THE PEOPLE V. O.J. SIMPSON* 112–15, 125–28, 139–40, 145, 167, 191–93, 198 (1996); THEO WILSON, *HEADLINE JUSTICE: INSIDE THE COURTROOM: THE COUNTRY'S MOST CONTROVERSIAL TRIALS* 12–19 (1996).

9. *Rufo v. Simpson*, No. SC031947 (Cal. Super. Ct. filed July 20, 1994) (Minute Order issued Aug. 13, 1996).

10. *Id.*

small-scale satellite trucks in the general vicinity of the Santa Monica courthouse. But even at the civil trial's high points (when the plaintiffs called O.J. Simpson to the stand in late November 1996; when the defendants called him in December 1996; and while waiting for the trial's verdict), this media assemblage within view of the Pacific Ocean was but a tiny specter compared to the veritable self-contained village nestled among the concrete canyons of the Criminal Courts Building in downtown Los Angeles, known as "Camp O.J."

The media's attorneys, *not* the parties' attorneys, appealed Judge Fujisaki's order,<sup>11</sup> but succeeded only in gaining reinstatement of a courtroom sketch artist and retaining closed circuit audio transmission. The media did not succeed in its prime objective: installing the all-seeing camera, the very umbilical cord of instantaneous, unrehearsed legal proceedings as daytime television drama. This ruling was, indeed, a big loss for the media,<sup>12</sup> though not, I will argue, for the public it presumes to serve.<sup>13</sup> Far more importantly, it was a major step in facilitating a fair and orderly proceeding for the litigants.

In Section II, this Article will briefly outline the constitutional principles underlying Judge Fujisaki's gag order. Section III will identify some of the dangers to a fair proceeding that aggressive media coverage of high-profile cases present, particularly the Simpson criminal case. Many of these problems would have simply repeated themselves in the subsequent Simpson civil case, but for the proper and necessary imposition of the gag order fashioned by Judge Fujisaki.

Section IV will briefly trace the relevant law governing the televising and/or radio broadcasting of trials in California. Section V will detail the reasons why Judge Fujisaki's exercise of discretion to ban cameras from the civil trial was both legally and prudentially correct. Section VI will review the impact that televising the Simpson criminal trial has already had on the decisions of other courts in high-profile cases in California and the nation, with regard to electronic broadcast of their proceedings. Included in this Section are some provisional thoughts on judicial practice in this area for both the present and the future.

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11. See Palermo, *supra* note 3, at A1.

12. See generally WILSON, *supra* note 8, at 18.

13. See GOLDBERG, *supra* note 8, at 360-63 (quoting Robert Lind, *Book Review: Defender of the Faith in the Midst of the Simpson Circus*, SW. U. L. REV. 1215, 1215-16 (1995)).

## II. THE GAG ORDER

Since the issue of denying actual media access to the courtroom proceedings is not contemplated by Judge Fujisaki's order, I will sidestep that body of constitutional law that has consistently reaffirmed the presumptive openness of criminal trials, and by extension civil trials, to the public and the press.<sup>14</sup> Despite some of the more alarmist reactions to his order by the media's representatives, this is not an edict the judge laid down.

Federal constitutional tension between a defendant's Sixth Amendment right to a fair trial and the media's First Amendment right—exercised as surrogate on behalf of the people to report on that trial—dates back at least to the 1807 trial of Aaron Burr.<sup>15</sup> In the foundational case of the modern era, *Sheppard v. Maxwell*,<sup>16</sup> attorney F. Lee Bailey persuaded the Warren Court that irreparable damage to a fair trial had occurred due to unrestrained pretrial publicity concerning prejudicial matters. The Court recognized that imposing restrictive “gag orders” on trial participants constituted a prior restraint. However, the Court drew an important distinction whose constitutional vitality extends to the present moment: gag orders restrict what participants can say to the press, but do not restrict or prevent the press from reporting the trial and speaking to other sources. This type of gag order, then, is not considered a prior restraint on the press itself, but only on some sources of information. Imposing restraint on those with the most at stake in the proceeding—the parties and their attorneys—is the most direct and least intrusive of the seven possible remedies the Court outlined for securing as fair a trial as possible in the face of aggressive, extensive, and sustained media activity.<sup>17</sup> *Sheppard* marked the Court's willingness to deal with the facts of trial life in an age of mass, and sometimes crass, media.

A decade later, the Court revisited the issue of prior restraint in the media's coverage of yet another murder trial. In *Nebraska Press Ass'n v. Stuart*,<sup>18</sup> the Court invalidated a trial court order that had imposed a blanket gag order *on the press* from reporting “any testimony given or

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14. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

15. *United States v. Burr*, 25 Fed. Cas. 49 (1807).

16. 384 U.S. 333 (1966).

17. *Id.* at 358–63. The seven remedies include: limiting the number of reporters allowed in the courtroom; insulating the witnesses; controlling the release of information and gossip to the press by parties and witnesses involved; and proscribing extrajudicial statements. *Id.*

18. 427 U.S. 539 (1976).

evidence adduced”<sup>19</sup> at trial, holding that any court-imposed prior restraint on the media violated the First Amendment.<sup>20</sup> The Court further articulated a “heavy burden” test requiring less legally Draconian methods of avoiding unfair prejudice to the accused.<sup>21</sup> This test rendered closing the courtroom door to the press an unconstitutional form of prior restraint. The majority opinion, however, repeatedly suggested (though did not precisely hold) that gag orders on the participants, if necessary, were a less intrusive and constitutionally permissible method of insuring a defendant’s right to a fair trial.<sup>22</sup> In the absence of a clear holding on this issue by the U.S. Supreme Court, the circuit courts of appeals have divided. The Ninth Circuit has upheld gag orders on trial participants requiring the trial court to determine whether it is reasonably likely that the pretrial publicity will jeopardize the accused’s right to a fair trial.<sup>23</sup> California law is in accord.<sup>24</sup>

A related but separate weapon in the quest to keep a trial within the courtroom and off the courthouse steps lies in the realm of rules governing lawyers’ professional conduct. Indeed, catalyzed by the excesses of lawyers’ extrajudicial speech during the entire Simpson criminal trial, the California legislature mandated the State Bar to develop and submit for the state supreme court’s adoption a rule of professional conduct on this very subject.<sup>25</sup> The result was California Rule of Professional Conduct (CRPC) Rule 5-120,<sup>26</sup> which became effective on October 1, 1995.

Disagreement exists as to whether a disciplinary action for professional misconduct or the trial court’s traditional remedies of venue change, voir dire to detect media exposure and/or gag orders on the parties and lawyers remain better suited to achieve the goal of curtailing prejudicial speech and publicity outside the courtroom before and during a trial. Interestingly, as noted in *Levine v. United States District Court*, the standard for participant gag orders is one of “reasonable likelihood” that publicity will endanger an accused’s right to a fair trial.<sup>27</sup> The standard of CRPC Rule 5-120, taken from ABA Model Rule 3.6,<sup>28</sup> is violated when a

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19. *Id.* at 542.

20. *Id.* at 569–70.

21. *Id.*

22. *Id.* at 569.

23. *Levine v. United States Dist. Court*, 764 F.2d 590, 601 (9th Cir. 1985).

24. *People v. Watson*, 15 Cal. App. 3d 28, 41 (1971).

25. *See* 254, Reg. Sess. (Ca. 1993–94).

26. CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 5-120 (1995).

27. *Levine*, 764 F. 2d at 596.

28. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1995).

lawyer's extrajudicial speech would create a "substantial likelihood of materially prejudicing" an adjudicative proceeding.<sup>29</sup> In California, then, either remedial avenue rests on a constitutionally firm standard of "sufficient probability" rather than the more demanding scale of "clear and present danger."<sup>30</sup>

In view of this standard, Judge Fujisaki's choice of the gag order seems the wiser course. It is immediate, based on specific determinations of relevant facts appealable, and—depending on an appeal's outcome—establishes a clear rule for the case. In that sense, such an order provides greater prophylaxis than the uncertain, after-the-fact evaluation through the State Bar disciplinary process. Of course, neither remedy is redundant nor mutually exclusive. The significant point for this Article is that *both* the California Rule *and* Judge Fujisaki's prospective gag order for the Simpson civil trial were the direct result of the out-of-control "media circus" into which the Simpson criminal case grew.

### III. DANGERS OF MEDIA COVERAGE IN HIGH PROFILE CASES

Trial publicity guidelines may be insufficiently precise, and court gag orders may be endlessly arguable—and that is as it should be in a society covetous of its robust tradition and philosophy of press freedom. But, as with every other exercise of cherished freedoms within the limits of social constraint, there inevitably comes the case that at once defies and demands a boundary on those freedoms, lest the fragile system that attempts to protect them is itself overwhelmed. Simpson was, and is, one such case.

Simpson criminal defense lawyer Robert L. Shapiro addressed the central role media relations have assumed in modern high-profile cases in a 1993 article directed to the pragmatic concerns of litigators.<sup>31</sup> In retrospect, Shapiro's article proved both prescient and yet barely suggestive of the efforts needed and developed by the defense and the prosecution to keep their respective rafts afloat in the midst of the media tidal wave that engulfed the Simpson criminal trial. In that event, not only did the media become an observer and recorder of proceedings in the courtroom, but also of events outside it. More than once, the media, unwittingly or otherwise, became a big-stakes player in the phenomenon of *People v. Simpson*. This reality included providing leaked details of the initial police investigation well in advance of the preliminary hearing, some of which were erroneous, and covering live and endlessly

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29. *Id.* at 3.6(a).

30. *See id.*; *see also* *Levine*, 764 F. 2d at 595.

31. *See* Shapiro, *supra* note 1.



rebroadcasting Kardashian's reading of the "suicide note," and press conferences by police, prosecutors, and defense attorneys. Also, potential witnesses damaged their credibility and lost their trial value by selling their information to TV and print tabloids. All of this was only to be topped off by the most massively watched segment of freeway driving in California history. Throughout this event, all parties played spin and spin-control to a frenzied media that was predictably feeding an insatiable public. And this was only the first week! But it set the oversized, uncontrollable tone of lawyers in and on the media that lasted for the next sixteen months.

#### IV. CALIFORNIA LAW GOVERNING CAMERAS IN THE COURTROOM

There are no television cameras permitted in federal courtrooms, despite experiments with their use.<sup>32</sup> In contrast, there is no constitutional impediment to TV cameras in state courts, provided they do not distract the jurors and witnesses, or unduly burden the judge, thereby depriving the defendant of a fair trial. The Supreme Court's views on this issue have kept pace with TV technology. As cameras became smaller and less obtrusive, the Court's concerns about their violating a defendant's fair trial rights have diminished. In *Chandler v. Florida*,<sup>33</sup> the Court held that the Constitution does not prohibit a state from experimenting with televised trials.<sup>34</sup> Cameras would be barred only if the defendant could make a showing that the media's coverage of his case compromised the ability of his jury to judge the case fairly.<sup>35</sup>

On the other hand, there is no right of any party or the public to have a trial televised or radio broadcast. Consequently, California, like several other states, leaves the matter to the discretion of the trial court. California Rules of Court 980 permits, but does not require, the judge to allow a camera in the courtroom.<sup>36</sup> Additionally, as occurred in the Simpson case, when an alternative juror is inadvertently and identifiably shown on camera, the judge has authority to terminate coverage. Indeed, Rule 980 focuses on protecting the defendant's right to a fair trial, rather than a different and potentially competing interest of whether restricting TV

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32. Michael Kirkland, *No Cameras in Federal Courtrooms*, UPI, Sept. 21, 1994, available in LEXIS, News Library, UPI File; see also Charles Whitebread & Darrell W. Contreras, *Free Press v. Fair Trial: Protecting the Criminal Defendant's Rights in a Highly Publicized Trial by Applying the Sheppard-Mu'min Remedy*, 69 S. CAL. L. REV. 1587, 1595-96 (1996).

33. 449 U.S. 560 (1981).

34. *Id.* at 583.

35. *Id.* at 582.

36. CAL. R. CT. 980 (West 1996).

coverage is an unconstitutional form of prior restraint upon the media.<sup>37</sup> Even in the age of television, the public's access to a trial is *not* limited to that medium alone. In the Simpson civil trial, journalists from both electronic and print media had access to the courtroom, but were required to go outside to file their reports on camera, the radio airwaves, or the printed page.

#### V. JUDGE FUJISAKI'S RULING

Within the Simpson criminal trial, most of the media's participant-observer glitches were attributable to the real-time electronic broadcast of the proceedings on a gavel-to-gavel basis, especially by television camera. As Ellis Cose opined, "Many journalists and others idealistically believed that televised trials would enhance the quality of justice and increase general knowledge about the courts by providing public oversight not previously available. Unfortunately, this was not the case."<sup>38</sup> Television did not deter lying witnesses; instead, it rendered many truthful ones nervous and inarticulate.

Television provided the temptation, and the opportunity, for media-savvy lawyers and a media-conscious judge to sell their respective cases not merely to the jury, but literally to the world. The camera in *this case* and in *this courtroom* proved to be a world class platform for the rhetorician, a snare for the unwary, a seducer and mirror to the vain, an indiscriminate and often harsh recorder of humor, wit, guile, trickery, and lies, and the transmitter to the world of both excellent and poor lawyering on both sides.<sup>39</sup>

The initial joinder in a marriage of convenience between television and Simpson eventually became more than either the criminal justice system or electronic journalism could reasonably sustain or contain. It is fair to say that only a prophet could have foreseen what was to be, and none of us may rightfully claim that title. Quite the opposite.

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37. Whitebread & Contreras, *supra* note 2, at 1596; *see also* revised amendments to CAL. R. CT. 980, effective January 1, 1997, reiterating and expanding a trial court's discretionary authority over electronic coverage, including and especially TV cameras, in the courtroom.

38. Ellis Cose, *Finding Balance in the OJ Trials*, USA TODAY, Jan. 15, 1997, at 11A.

39. *See id.* Cose described the camera's presence as turning "the judge into an idiot and the lawyers into second-rate actors and served the audience a diet of rambling, self-indulgent lawyerly soliloquies." *Id.* According to prominent defense attorney, Leslie Abramson, Judge Lance Ito told her that one of his two mistakes during the criminal trial was allowing cameras in the courtroom. Scott Kaufer, *The Trials of Leslie Abramson*, BUZZ, Feb. 1997, at 56. The other mistake Judge Ito was alleged to have acknowledged was admitting the dream evidence, which was "incredibly prejudicial and foolish . . ." *Id.*

At the outset, Judge Lance Ito's exercise of discretion to permit a camera in the courtroom and to allow simultaneous radio broadcast was welcomed as enlightened; a window opened onto a world for which the public pays but rarely experiences. Besides all the obvious elements of courtroom drama inherent in a first-degree, double murder case, Simpson had a lot of extras: a defendant of icon status in the worlds of sport and celebrity; teams of highly-trained attorneys; and specialists in the developing science of forensic DNA. The major national and international television networks, as well as local networks, dedicated significant blocks of time, top-level reporters, and interpretive legal analysts to inform and enlighten the public about what an American criminal trial can be when both sides pour very substantial financial and personnel resources into it.

No one could have foreseen what I have just barely begun to describe. I personally was a legal commentator on the case, a role that many embraced and, I am sure, so many more disdained.<sup>40</sup> This phenomenon grew bigger and faster than ever could have been anticipated. It assumed a life of its own, and took over the lives—in one way or another—of thousands or millions of people. So, let me be very clear: this Article is born of hindsight, most certainly not prescience. There is no judgment intended or implied here of the key players and the decisions they made regarding lawyers' and clients' speech, or concerning the unobtrusive but all-seeing eye in the back corner of Judge Ito's courtroom.

But one reward of experience is, occasionally, the opportunity to avoid repeating a mistake. In addition to all that the Simpson criminal trial was and will remain—a social, political, cultural, racial, legal, and moral event of mammoth proportions—it is a yardstick against which to evaluate how encompassing and intense the relationship among the courts, the public, and the media that link them should be. Sometimes a full gazing embrace will leave all enlightened and ennobled. At other times, the continued vitality of the relationship calls for a slightly-studied distance, a more filtered form of ongoing communication. In either case, the judge must face the question and choose. Judge Fujisaki did, and I honor the decision he made.

## VI. THE IMPACT OF THE SIMPSON CRIMINAL CASE

Many critics of the Simpson criminal trial's media coverage have dubbed the event a "media circus" that should never have been allowed

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40. See e.g., Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator*, 69 S. CAL. L. REV. 1303 (1996); Erwin Chemerinsky, *Is It the Siren's Call?: Judges and Free Speech While Cases Are Pending*, 28 LOY. L.A. L. REV. 831 (1995).

and most certainly should never be repeated. Other parties, whose own broadcasting corporations and financial interests were intimately involved in transmitting the trial, made a more circumscribed complaint. They felt live gavel-to-gavel TV coverage was fine so long as it was “serious minded” (their coverage), as distinguished from “entertainment oriented” (several other entities providing live coverage or edited daily reports). Finally, some disinterested critics suggested that a gag order on the parties and the attorneys would have retained the requisite decorum of the criminal proceedings, and that TV transmission was not inimical to an orderly and fair trial. Presumably, the latter two groups of critics would have merged support for the televising of the Simpson civil trial.

I wish to state a different position. First, let me distance myself totally from certain politicians’ proposals made in the immediate aftermath of the Simpson criminal trial that cameras be banned from all California courtrooms. Such a Draconian and inflexible reaction to the perceived excesses of the Simpson criminal trial coverage would be an unwarranted and unnecessary interference with the informative access to public governmental proceedings that the technology of TV and radio can afford the public. The experiments with televised trial coverage blessed by *Chandler v. Florida*<sup>41</sup> and carried out so successfully in California and many other states should most definitely not be aborted in response to one aberrational event.

Second, let me emphasize my increased respect for the great majority of the journalistic community—electronic and print—that developed and grew over the many grueling months of the Simpson criminal trial coverage. I accord the same respect for my fellow members of the “Simpson commentocracy,” including those whose views on various issues differed sharply from mine. For my argument in this Article, I choose not to rely on purported aesthetic distinctions—ultimately subjective if not arbitrary—between “good/responsible” coverage and “trash/tabloid” coverage. Let the viewer/listener beware.

In this connection, let me express a personal concern regarding “infotainment,” misleading “docudramas,” and “reality-based” dramatizations on all variety of news events, not just criminal trials. The blur between reality and fiction, news and entertainment, is a significant and growing problem for news media generally, and television news in particular. Some—not most—coverage of the Simpson criminal trial may have capitalized on and even accelerated this disturbing trend. But this has been an ongoing issue within the broadcast industry, one that did not start

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41. 449 U.S. 560 (1981).

with TV coverage of Simpson. Also, it is a question that will not somehow be answered by a media ban of future trials.

Further in this vein, “tabloid TV” and the long-established print tabloid “newspapers” are a genre unto themselves. Their tactics and “standards” speak for themselves, yet the First Amendment protects their access to a marketplace that consistently demonstrates their enduring popularity. All that might be usefully said here about the “tabs,” notably the print *National Enquirer*, is that frequently they got the day’s story correct and first.

Third, for reasons stated earlier in this Article, I believe—with wisdom born only of hindsight—that a gag rule on the parties and lawyers alone would have proven insufficient to allow Judge Ito to have retained control of the unwieldy monstrosity that the Simpson criminal trial eventually became. While some of the most poignant and provocative statements were uttered on the courthouse steps, a far greater number of TV-oriented moments were played out in the courtroom to a watching world. Besides the verbal clashes in excess of what would probably otherwise have occurred, remember fondly, if you will, both sides’ inevitable efforts to dominate the “cliffhanger moment” that would leave the world in suspense from Friday afternoon until Monday morning. Now, that’s television.

What was intended, and often realized, as an educational insight for the public into the workings of their criminal justice system often devolved—because of the camera’s presence—into an unedifying, cynicism-producing spectacle that left many in the audience wondering angrily what any of this had to do with the “truth” or “justice” or a “system,” and for what exactly their taxes were being used for.

Fourth, the ultimate and only legal basis on which to argue in support of Judge Fujisaki’s order to both gag the parties and their attorneys, and ban the camera from the Simpson civil trial is that, in my opinion, it has facilitated the fairest possible trial for the litigants. The absence of a camera enabled their attorneys to focus all their professional energies in the courtroom, maximized the decorum and efficiency of the trial proceedings, and eliminated any possible anxiety the witnesses, jurors and alternates might have felt because of the camera’s presence. At the same time, it allowed for full and robust media coverage of the trial in a way that has served our nation well for the first 200 years of its existence.

Individual trial court judges in California and other states where cameras are permitted have exercised their discretion to exclude cameras in the interests of a fair trial for all parties. Most of these have been “high-profile” cases: an infamous defendant, a celebrity participant, or a

particularly heinous crime—especially if the victim was a child. In short, cases whose real-time televising could easily engender community prejudice, taint the potential juror pool, and unnecessarily expose the parties to prejudicial publicity. In each of the cases of which I am aware, I believe the trial court made the correct decisions.

That does not mean, however, the end of televising/broadcasting controversial trials on difficult subjects. Such trials, I am certain, will—and rightly so—be televised and provide both education—and probably diversion for the viewing audience. As the public learns more of the realities of the “ordinary” trials, both criminal and civil, it will also learn to discriminate between the ordinary and the sensational. It should and must retain the right to view both. And as trial judges become more comfortable and confident in their assessment of the impact of televising a given trial on the fairness to the parties in that trial, I think we will see a healthy percentage of controversial, “high-profile” cases televised. Besides the arguments for the parties and the judges’ own growing experience in these matters, criteria for guiding judges’ decisions do exist.<sup>42</sup> The ultimate concern is to subordinate the media coverage to the essential fairness of the proceedings for the parties.

## VII. CONCLUSION

Judge Fujisaki’s orders to ban the camera from the courtroom, and gag the parties, lawyers and witnesses produced a businesslike, legally focused trial. His action has deservedly drawn praise from many. It is, after all, the law and legal process that people want to know about. When, in a particular case, the electronic media present an impediment to fair legal process—and the media become the message—then it’s time to pull the plug.

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42. CAL. R. CT. 980 (West 1996).

