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COMMENTARY

WHAT YOU SEE IS NOT ALWAYS WHAT YOU GET: THOUGHTS ON THE O.J. TRIAL AND THE CAMERA

by ROGER COSSACK†

The great American baseball coach and philosopher Yogi Berra once said, "You can observe a lot by watching."[1] I suppose the converse is that if you don't watch, you won't see anything. And then, there are a great many things that many of us simply don't want to see.

The result of the O.J. Simpson case showed us that while we may all watch the same thing, we don't see the same thing. Most people, it seems, saw the result of the trial as a foregone conclusion. Polls tell us that most white Americans had concluded that Simpson was guilty before the trial even began,[2] while black Americans were suspicious about the evidence from the start.[3]

If he wasn't guilty, then why did the cops handcuff him when he returned from Chicago? Why did he try and run away if he didn't do it? And that DNA, isn't it a genetic fingerprint? The odds were five billion to

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1. JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 754 (Justin Kaplan ed., 16th ed. 1992)

2. *See, e.g.*, Sheryl Stolberg, *The Simpson Legacy; Just Under the Skin; Will We Ever Get Along?*, L.A. TIMES, October 10, 1995, at S-3; Joe Urschel, *A Nation More Divided*, USA TODAY, October 9, 1995, at A-5; Cathleen Decker, *Half of Americans Disagree With Verdict Times Poll: Many Cite Race as Key Factor in Trial*, L.A. TIMES, October 4, 1995, at 1(a).

3. Coretta Scott King, *How Can We All Grow Together?*, HOUS. CHRON., November 5, 1995, at 4-C; Scripps Howard News Service, *Depth of Racial Polarization Troubles Clinton*, STAR-TRIBUNE (Minneapolis-St. Paul), October 11, 1995, at 8-A; Jeffrey Abramson, *Stacking O.J. Jury Won't Work*, USA TODAY, September 27, 1994, at 11(a).

one, the blood was O.J.'s, that proves he did it. Besides, he was an admitted wife beater and womanizer. Didn't Marcia Clark tell us on January 20, 1995, just two days after the infamous Bronco freeway chase, that Mr. Simpson was the only suspect in the case and that there were "mountains of evidence" that pointed to O.J. as the only suspect in the killings of his estranged wife, Nicole Brown Simpson and Ronald Goldman? If ever there was a slam dunk case, the prosecutors told us that this was it.

The trial of O.J. Simpson for the murder of Nicole and Ron was an event that captured the attention of Americans from the preliminary hearing to the verdict, which was viewed by 96% of all people who were watching television at the time.[4] Millions of viewers watched Simpson and his friend Al Cowlings as they drove the Los Angeles freeways. It was the ultimate TV cop show. There they were, O.J. and his life long friend Al Cowlings driving aimlessly up and down the San Diego Freeway while sports celebrities took to the radio urging O.J. to give up. Nothing escaped us, we even heard Cowlings pleading with the police to stay away because O.J. had a gun to his head. In a perfect example of life imitating a Fellini movie, hundreds of people stood on the edge of the freeway holding up signs while cheering for O.J. as if he was making one of his patented dashes for the endzone. But, nimble as O.J. is, he could not evade the scores of Los Angeles police cars that fell in quickly behind him, and, unable to go anywhere else, he finally surrendered at his home on Roxbury Drive, where he had lived with Nicole and their children.

There can be only one argument against the televising of trials. That is, that it interferes with the administration of justice by causing jury verdicts that reflect outside influences rather that the evidence presented. Simply stated, the presence of the camera in the courtroom may cause an individual juror to base his decision on something other than the evidence he heard. If that can be demonstrated, then there should be a serious debate concerning whether the camera should ever be allowed inside the courtroom.

By the time the Simpson trial started, Court TV had already televised some 200 trials in its short history—not just criminal cases but civil trials, contract disputes, personal injury cases, and some juicy divorce cases that make daytime television seem tame. Prior to the Simpson verdict, 48 of the 50 states had conducted some form of investigation regarding the influence of the camera in the courtroom, and with the exception of one state, all concluded that the camera had very little, if any, influence.[5] However, since the Simpson case, there has been an ex-

4. Patricia Edmonds, *The Moment*, USA TODAY, Oct. 4, 1995, at News 1.

5. *See* Christo Lassiter, *Put The Lens Cap Back on Cameras in the Courtroom: A Fair Trial is at Stake*, 67 N.Y. ST. B.J. 6 (1995).

tensive and vocal backlash against televising trials. What this represents is not really a new argument against the presence of a camera in the courtroom, but instead, seems to represent the anger of white Americans at a jury verdict that many of them believe was not based on the "mountains of evidence" that the D.A. promised us, but was reached by angry black jurors who entirely disregarded the incredibly compelling testimony of the prosecution.

What role did the camera play in the verdict? I believe that the verdict was influenced by two sets of factors that were, for the most part, independent. One group of these factors I call extra-judicial, and the other I identify as traditional. The extra-judicial is the sequestration of the jury for almost a year. Taking any jury and locking them up for almost a year should now be relegated to the legal hall of fame, to be put on display with other relics of the past such as "separate but equal," and the "exclusionary rule." Certainly, pre-trial publicity convinced Judge Ito to separate these jurors because he believed that for the parties to receive a fair trial, it was necessary to isolate them from their families, friends, television and newspapers. While we may really never know what influence this forced separation had on the jury's four-hour verdict, we do know that several members of the jury were quite angry about the length of time they were locked up and told Judge Ito about their frustration during the famous "jury revolt." I have practiced trial law for more than two decades, and neither I nor any of my colleagues had previously heard of or seen a jury revolt.

If the camera was the sole reason that these jurors were inconvenienced then a compelling argument could be developed that the camera must be excluded in long trials because it creates a tension between the comfort and reliability of jurors, and thus, their reasoned decision, and the right of the public to observe a trial. The scale should always tip in favor of the jurors, who, in the final analysis, are charged with rendering a verdict that is decided solely from the competent evidence heard from the witnesses. It is clear, at least to me, that the Simpson trial should have been tried in a great deal less time than nine months. This is where the camera again showed us a great deal "extrajudicially."

Charles Keating was a mover and a shaker in the Savings and Loan industry, who amassed a fortune by financing junk bonds as well as making rather questionable loans. Apparently, he was also on the receiving end of some inside information from Michael Milkin. When the junk bond and real estate market crashed, so did his savings and loan, leaving hundreds of investors, many of them elderly, out of luck. Keating's crimes affected so many people, that he was tried basically several times for the same crime: in the state court system[6] and in federal court.[7] *Peo-*

6. California v. Keating, 19 Cal. Rptr.2d 899 (Ct. App. 2d Dist. 1993).

ple of California v. Charles Keating,[8] the state court case, was presided over by Judge Lance Ito, and prosecuted by Bill Hodgeman. Although many investors testified against Keating, and the case received much publicity in the newspapers, it was basically a rather dry paper case that was not televised and certainly did not come close to capturing the public's attention as the Simpson case did. Nevertheless, Keating was convicted, and the Los Angeles County District Attorney's office received a great deal of favorable publicity from its effort in garnering the conviction.

Prior to his tenure on the bench, Ito spent his legal career as a Deputy District Attorney with the same L.A.D.A office. His colleagues thought of him as a good deputy, with a fun loving sense of humor. Although defense lawyers viewed him as pro-prosecution, he was generally thought of as fair. During his tenure as a deputy D.A., he met and married Margaret "Peggy" York, an L.A. cop, who had risen to become the highest ranking woman on the force. His reputation as a Judge was as a good guy to try a case before, but clearly not a legal scholar. After the Simpson case, the reverse was true.

Before Judge Ito was assigned the case, a meeting was held between the prosecution and the defense in which the presiding judge indicated that it was his intention to assign the case to Ito. The court wanted both sides to agree before Judge Ito's name was announced, and they did. At that time, I commented that I could understand why the prosecution would be happy with Ito, but I did not understand why the defense would want the husband of a cop to preside over the matter, especially when it was clear that it was the strategy of the defense to put the Los Angeles Police Department on trial. In retrospect the defense could not have made a better decision.

Perhaps because he was so concerned that he would be perceived as not being fair to the defense, Judge Ito allowed the defense counsel to take control of the courtroom from the beginning of the trial. Although most of the time he ruled in favor of the prosecution, he seemed to bend over backwards to allow the defense to present evidence, make motions, and extensively cross-examine witnesses. The key for the defense was to claim that something was not "fair." How many times did we hear Barry Scheck complain about a lack of fairness? Remember the endless "sidebar" meetings where often nothing more than personal complaints were aired?

In every criminal trial, there is a quiet battle fought between the lawyers for control of the courtroom. It is a feeling that experienced trial

7. Keating v. Office of Thrift Supervisor, 45 F.3d 322 (9th Cir. 1995); *see also* Keating v. Nat'l Union Fire Ins. Co. of Pittsburgh, 995 F.2d 154 (9th Cir. 1993).

8. 19 Cal. Rptr.2d at 899.

lawyers get and they believe that if either the prosecution or defense takes control, then the jury will sense their mastery of the situation and be subconsciously swayed to their side.

It is up to the judge to never relinquish control of the courtroom to either side. In our democratic society, the courtroom is one of the few autocratic institutions left, and for a good reason. While the prosecution may seek justice, the defense is in the courtroom for no other reason than to win the case. A trial is not an opportunity for men and women of good will to reason together, but rather, is an exercise in salesmanship, with the jury being the ultimate buyer.

Most federal judges seem to understand this concept. While there are too many stories told about rude and sometimes cruel federal judges, those who practice in the federal courts know all too well how to conduct themselves while in the courtroom. When a federal judge tells the lawyer that he has 15 minutes left, there is no confusion. In federal court, the jury is never left waiting while the court and the lawyers argue over minutiae as in the Simpson case.

However, whatever criticism Judge Ito should receive for his inability to control the lawyers, he should be praised for his legal scholarship. Although it is definitely not the practice of California state judges to issue written opinions, Judge Ito, more often than not, wrote and explained his decisions with citations and authorities. He was not afraid to put into writing the reasons for his decisions, even though he knew it might make him an easier target on appeal. Although his decisions generally favored the prosecution, he made some very tough calls against them. Remember, Ito ruled that the prosecution could not use the fibers found at the crime scene that the prosecution claimed came from Simpson's Bronco and were unique to that year and style of Ford. The jury therefore never heard from expert witnesses who were prepared to, at the very least, state that there were only a few Ford Broncos that the fibers could have come from, and one of them was Simpson's. Why did he keep out this evidence? Because after multiple warnings to the prosecution that he was tired of their discovery game playing, as well as multiple warnings that he would eventually sanction them, he did. He simply had enough, and the prosecution paid the price.

The camera, like a giant x-ray, gave us a picture of the inner soul of our society, and exposed the disease of racism which infects us like a malignant tumor that sends its seeds of destruction throughout our bodies. Each of us became the thirteenth juror, each of us made up our mind and each of us had a vote. But, what we saw and heard depended upon our life experiences. Early on we made our decisions about his guilt or innocence. During the trial, I had the opportunity to read both the mainstream white press as well as the smaller "black press." They reported two different trials. The bias of the mainstream press was anti-Simpson

and the reporting usually trumpeted the successes of the prosecution with a heavy emphasis on DNA.

From the very beginning, blacks were suspicious that Simpson may have been targeted, framed or both, while whites quickly took the jump from wife beater to wife killer. As each bit of evidence was admitted, each side became more sure of their position. And when the verdict was announced, in less than a few hours, white America cried foul while black America cheered.

The L.A.D.A's office played right into their fears. One week after the murder, Marcia Clark held a press conference announcing that Simpson was the only suspect in a crime that many believed had to be committed by two or at least one with help. The defense claimed a "rush to judgment" and many blacks, feeling that this would not be the first time, nodded their heads in agreement. The *coup de gras* came with the shameful revelation of Mark Furman's racism and lies.

Many observers have written and opined that the Simpson verdict can only be explained by jury nullification.[9] They claim that the Los Angeles jury had made up its mind even before the trial began, they did not listen or care what evidence was presented, and that the black jurors had obviously lied during *voir dire* when they said they would be fair to both sides. I don't think that is true.

As trial lawyers, my colleague Greta Van Susteren[10] and I have discussed at length what happened in this trial and what the prosecution did wrong. While we are all equal under the law, some of us are more equal than others. The prosecution was attempting to convince the jury to convict O.J. Simpson for a brutal double murder on purely circumstantial evidence. There were no eyewitnesses, no murder weapon, and no confession. Convincing the jury would be a difficult job at best. Before O.J. was a defendant, he was a handsome, well-known celebrity, who had won the Heisman Trophy, became an all-star professional football player, a pitchman who ran through airports for Hertz, and a sometime actor in goofy movies.[11]

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9. *See, e.g.*, D. H. Kaye, *Was the Verdict Wrong?*, Jan. 3, 1996, *available in* WESTLAW, O.J. Comm. Database at 1996 WL 1218; Norman M. Garland, *The Cat's Out of the Bag: Prospective Jurors May Now Know About Their Power to Nullify*, Nov. 1, 1995, *available in* WESTLAW, O.J. Comm. Database at 1995 WL 637915 (first delivered as Address, MCLE Program at Southwestern Univ. Law School (Oct. 29, 1995)).

10. Van Susteren, a partner in the Washington D.C. firm of Coale & Van Susteren, provided expert legal analysis of the O.J. Simpson trial as co-host to the author on CNN's highly acclaimed program *Burden of Proof*.

11. *See, e.g.*, THE NAKED GUN (Paramount 1988); THE NAKED GUN 2½: THE SMELL OF FEAR (Paramount 1991) (the *Journal*'s favorite); THE NAKED GUN 33⅓: THE FINAL INSULT (Paramount 1994).

The best evidence the prosecution had was presented in an almost unintelligible recitation of genetic percentages by expert DNA witnesses who could not make their testimony understood by the jury. Why the prosecution believed that it had to present day after day of this long, tedious DNA evidence is a mystery. If it wasn't bad enough that most of the testimony sounded as if it was in a foreign language, the prosecution's statistics expert, Dr. Bruce Weir, grudgingly admitted after 15 minutes of cross examination that he had erred in favor of the prosecution and against Simpson. Mark Twain once said "there are lies, damned lies, and statistics."[12]

The prosecution also incorrectly believed that female jurors would understand that Simpson indeed had a motive to kill his ex-wife because she rejected him and refused to reconcile or even spend time with him. The prosecution recognized that they had to do something to convince the jury that O.J. was not the man of his public image, but instead was a violent wife beater. Women, they thought, would understand Nicole's inability to escape from him.

While at first blush this seems to make sense, it turned out to be a rather simplistic notion that eliminates many other factors that are present in relationships. One day on my CNN show, *Burden of Proof*, a black female sociologist told us that one reason that the women on the jury put less emphasis on spousal abuse than the prosecution anticipated is that they simply did not want to believe a man like Simpson could be a wife-beater. Whatever the reasoning of the jury, the prosecution clearly was mistaken to put as much reliance as they did on Simpson's prior spousal abuse.

Finally, the camera showed us both good and bad lawyers. Every law student wishing to be a trial lawyer should watch a video of Barry Scheck examining Dennis Fung several times. Scheck's complete mastery of the facts as well as his knowledge of the process of collecting DNA proved devastating to poor Mr. Fung. Scheck's use of videos as well as other demonstrative evidence was a masterful example of what a skilled cross examination can accomplish. Unlike the prosecution, which never seemed to be able to reduce the case to a simple theory, Scheck time and again would repeat "Garbage in, Garbage out," a simple, but brilliant phrase that made it easy for the jury to disregard the DNA evidence if it wanted to.

On the other hand, Marcia Clark's cross examination seemed scattered and nasty. Witnesses were either with the prosecution or against them. Her examination of the witnesses who were on the plane to Chicago with Simpson and claimed that he looked calm and relaxed, as well

12. MARK TWAIN, THE AUTOBIOGRAPHY OF MARK TWAIN 149 (Neider ed., Harper and Row 1959).

as her examination of the two youngsters who were on a date and walked by the murder scene without noticing anything unusual, was more of an example of nastiness than cross-examination. All lawyers know that there are times when witnesses who in complete good faith and honesty do not see things the way you do. Every trial lawyer knows the best way to handle this type of witness is to suggest they simply are mistaken and to move on. The passengers on the plane had never before seen Simpson in person and they would have readily admitted that they had no basis with which to compare Simpson's demeanor. Certainly, it should have been suggested that the young lovers had other things on their minds when they strolled down that poorly lit street on which the murders were committed.

Finally, although he became a secondary member of the defense team when Johnny Cochrane was added, Bob Shapiro played a very important part in gaining the eventual acquittal. It was Shapiro who, early on in the case, had Simpson examined for bruises, cuts, as well as having him drug tested. He also hired Dr. Henry Lee, the pre-eminent criminologist from Connecticut, as well as Drs. Baaden and Wolfe, both eminent coroners. He had them come immediately to the scene to examine and prepare reports. Not only was their testimony compelling and important, but perhaps equally important, their services were lost to the prosecution when they came to work for Shapiro.

The trial of O.J. Simpson told us more about ourselves than we wanted to know. It picked up the rug and exposed the dirt that we had swept away. The irony is that O.J. Simpson, a black man who had never seemed interested or involved in the struggles of other black Americans, became a rallying cry for black Americans against what they believe has been years of oppression and mistreatment by various inner city police departments. In the final analysis, I believe that the televising of the Simpson trial, more than any other recent event, exposed the depth of the racial conflict that divides our country. It showed us the enemy, and, if I may paraphrase, the enemy is us.[13]

13. Ephraim Buchwald, a prominent Jewish spokesman is often attributed with the phrase, "I have seen the enemy, and he is us." *See* Sanford Goodkin, *The Holocaust and U.S. Jews*, L.A. TIMES, May 21, 1992, at B-4.