

## *Cameras in court: justice's loss or gain?*

In October 1995, one hundred million people tuned in to what *TIME* called 'The single most suspenseful moment in television history'. For thirty minutes, America stood still. Trading on the New York Stock Exchange plummeted 41%. The O. J. Simpson trial had reached its climax.

Sixteen years on, the government plans to bring cameras into English and Welsh courtrooms for the first time, and most barristers are supportive.<sup>1</sup> So too, on balance, is this essay.

Yet the reform faces significant objections, not least that injustices might result. First, it is argued that broadcasting could make vulnerable witnesses too 'inhibited' to give reliable evidence<sup>2</sup> and may incentivise grandstanding amongst counsel and judges. Other less direct effects seem unavoidable: American evidence suggests that merely applying for televised coverage encourages opponents to settle.<sup>3</sup> Cameras, it might be said, represent the judicial counterpart to the Heisenberg Uncertainty Principle in physics: one cannot observe a phenomenon without also changing it.

Another misgiving is that cameras could harm the entire justice system, encouraging a sort of plebiscitary justice in which prosecution and litigation take place 'both in the court of law and the court of public opinion'.<sup>4</sup> A final concern is that coverage might trivialize or commercialize the courts. Would judges really want their judgements voted into the next round of 'Strictly Come Chancery' or 'X Factortame'? Should a Serious Fraud trial be

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<sup>1</sup> *Times*, 5/11/2011

<sup>2</sup> Lord Hope, *Times*, 7/9/2011

<sup>3</sup> Goldfarb, *TV* (1998) p139

<sup>4</sup> Dershowitz, *Reasonable Doubts* (1997) p142

sandwiched between an advertisement for *Pedigree Chum* and a promotion for sausage rolls at Tesco?

These various objections are formidable but not fatal. As an immediate reassurance, the reform should include the iron rule, borrowed from the US, that vulnerable parties are never filmed without their informed consent. As for courtroom behaviour, we may actually see an improvement: in Auckland, coverage led to an *increase* in the formality of proceedings.<sup>5</sup> By analogy, when cameras were introduced to the UK Parliament, attendance and punctuality rose dramatically.

Concerns about ‘trial by media’ are important but misguided: important, because the fair trial is a prince among rights and a guarantor of others,<sup>6</sup> trumping even rights of free speech (*Montgomery v. HM Advocate*); misguided because bias and lynch-mobbery are, like trivialization and commercialization, functions of reporting, not recording. In reality, people are more likely to understand a verdict if they watch it themselves, not by reading a front-page splash or terse courtroom Tweet. Moreover, the public’s right to ‘receive’ information should not be impaired by the media’s abuse of their corresponding right to ‘impart’ it.<sup>7</sup> Like American *Court TV*, British broadcasters must navigate the path between sensation and tedium.

There is a powerful positive case for broadcasting, rooted in tradition as well as principle: publicity is both practically *conducive to* justice and *inherent in* the concept of justice. First, it is desirable that unelected judges’ conduct can be scrutinised publicly and critiqued informally. This argument is not new: as Lord Atkinson affirmed in *Scott v. Scott* [1913]: the ‘public trial’ offers ‘the best security for the pure, impartial, and efficient administration

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<sup>5</sup> Stepniak, *Audio-Visual Coverage* (2008) p364

<sup>6</sup> HRA 6

<sup>7</sup> Both ECHR 10

of justice'. For Professor Dershowitz, cameras 'keep the system honest by keeping it open.'<sup>8</sup> Second, and relatedly, research indicates that people generally *trust* crime-fighting institutions more when they see them first-hand – in this case, straight from their living room.<sup>9</sup> Feelings of confidence and ownership are hallmarks of a healthy legal system. Cameras could strengthen both.

Advocates of broadcasting recognize, third, that the Judiciary is built upon 'impartiality' and 'authority',<sup>10</sup> but argue that impartiality is not the same as aloofness; and unlike mere power, authority must be earned. Cameras enable the courts to show that they are at peace with the broader culture they serve, and simultaneously to draw on what scholars call the 'iconography of Justice': a symbolic gravitas that lay individuals instinctively recognize and respect.<sup>11</sup>

There is a fourth, principled, argument too, captured pithily by Bentham: 'publicity is the very soul of justice'. Since nobody escapes the law's writ, justice demands that all should see how rules are made and applied. We might ask - if a trial is held in the forest, with no one there to hear it, can it be claimed to be just? Lord Shaw made clear in *Scott* that English jurisprudence answers 'no'. In 2011, broadcasting represents the natural extension of a belief in physical access to courts that is ancient and uncontroversial. Cameras merely affect *who* is able to see justice in action, and *when*: not in a courtroom during inconvenient working hours, but at home and in comfort.

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<sup>8</sup> Dershowitz p203

<sup>9</sup> *Confidence* (MoJ, 2007) 2:8

<sup>10</sup> HRA 10(2)

<sup>11</sup> Resnik & Curtis, *Representing Justice* (2011)

Cameras are therefore in the public interest; and the public is certainly interested. The UK Supreme Court live feed already attracts 90,000 observers daily.<sup>12</sup> 3.3million saw *The Trial*, filmed in Scottish courts, and 500,000 watched footage from The Hague in the 1990s.<sup>13</sup>

In all, cameras should be welcomed, but with one contemporary note of caution. In *Harman v. Home Secretary*, Lord Scarman remarked that ‘Justice is done in public so that it may be discussed and criticised in public’. That case was heard in 1982, when television involved a unidirectional (and slightly grainy) transmission of information from broadcasters to viewers. Today, video recordings may be seen online, and endlessly analysed on various social media, blogs, and forums. The twenty-first century viewer expects to have her opinions heard, particularly in respect of ‘reality’ content. So feedback will be inevitable: some positive, some negative. Are the courts prepared for this, either technologically or temperamentally? To ignore it completely would betray the notion of ‘open justice’. Yet embracing it headlong could bring difficulties: few want ‘public debate’ to attain the persuasive status given to parliamentary debate in *Pepper v. Hart*. Wherever the balance is struck, cameras must be part of a wider endeavour: to combine ‘open justice’ with an open-minded justice system.

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<sup>12</sup> *Economist*, 20/08/2011

<sup>13</sup> Stepniak pp26-30