

The Fake Trial of Michael Jackson

An argument for permitting cameras
in the courtroom.

By Gary Gumpert and Susan J. Drucker

No doubt the Michael Jackson molestation trial has caught the imagination of a world-wide public, but presiding Judge Rodney S. Melville has banned cameras from his courtroom. The interested public is limited to watching Michael Jackson and his familial and legal entourage navigate the maze of fans and press corps, the ritual of entering the courthouse itself and the familiar passage through the security guards and machines. In response to an apparent demand the television audience now has an option – it can watch *The Michael Jackson Trial, An E! News Presentation* each evening. E! Entertainment Television is a 24-hour cable television network that features celebrity gossip and entertainment news. Along with E!Online the service is available to more than 78 million cable and direct-satellite subscribers in the United States and is also broadcast on the E! International Network.

There is something about a trial that appeals to most of us – as long as we are not part of it. Perhaps it is the inherent built-in drama and the dire consequence of the decision that is so attracting.

There is something about a trial of a celebrity that is even more enticing as we sit back and enjoy the potentially lurid testimony and anticipate the judgment. The press has traditionally served as the public's proxy, acting as its mediating agent, presenting the factual details to those unable to witness the trial at first-hand. The tales of famous trials are countless, but beyond the accounts of the printed page, the camera (still, film and television) and the microphone, have generally been barred from the courtroom. There have been notable exceptions – the trials of O.J. Simpson, Scott Peterson and Robert Blake to name a few—but for the most part the American Bar Association, through its Canons and Standards, have supported barring the electronic press. Shortly after the Lindbergh kidnapping trial in 1935, the ABA passed Canon 35 of the Association's Canons of Professional and Judicial Ethics recommending that cameras be banned from trials. Although Canon 35 did not have the weight of law, such ABA recommendations are often consulted by state legislatures, state bar associations and judges writing case opinions. Radio was similarly barred



Michael Jackson (above) outside of the courtroom, while Edward Moss (right) portrays Michael Jackson in the courtroom re-enactments for “The Michael Jackson Trial, An E! News Presentation”



by the ABA in 1941, and television cameras were added to the list in 1963. As television became a part of life in the United States in the 1950s and early 1960s, most states continued to prohibit any form of camera coverage in their courts. Judges, lawyers, and others soon became concerned, and in 1937, the ABA's House of Delegates adopted Judicial Canon 35, declaring that all photographic and broadcast coverage of courtroom proceedings should be prohibited. In 1952, the House of Delegates amended Canon 35 to proscribe television coverage as well. The Canon's proscription was reaffirmed in 1972 when the Code of Judicial Conduct replaced the Canons of Judicial Ethics and Canon 3A (7) superseded Canon 35. It read:

A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions.

By 1981 the tide against television

coverage in courtrooms began to shift as a result of the U.S. Supreme Court's decision in *Chandler v. Florida*, in which Chief Justice Warren Burger wrote “. . .the Constitution does not prohibit a state from experimenting with the program authorized by revised Canon 3A(7).”

Canon 3A(7) of the Code of Judicial Conduct was amended to allow radio, television and photographic coverage at the *discretion* of the presiding judge. Today the ABA press standards serve as guidelines suggested or as a model for state bar associations. ABA Standard 8-3.8 no longer calls for a ban on cameras in courtrooms if consistent with the right to a fair trial and “subject to express conditions, limitations, and guidelines which allow such coverage in a manner that will be unobtrusive, will not distract or otherwise adversely affect witnesses or other trial participants, and will not otherwise interfere with the administration of justice.”

With 47 states permitting some form of camera access to courtrooms, including at least 35 permitting cameras

in criminal trials—although most states place some limits on access—the consent of the trial judge is generally required. No constitutional right of access has been found to include the right to photograph or televise trials. Today, broadcast journalists have technically gained entry to most state courts, but judicial discretion remains a barrier and broadcast journalists still face closed doors to the Federal court system. In an age of media convergence, several state supreme courts regularly not only broadcast hearings but webcast via the Internet as well (e.g. Alaska, Florida, Indiana, Missouri, Vermont, Washington and Ohio).

In banning news cameras from the courtroom the judge relinquished more control than if he had permitted them in...

According to Court TV anchor Fred Graham, “On a case-by-case basis, there is a trend of judges in important cases, cases of great public interest, to say that for that very reason that they are not going to allow coverage.” With an increasing number of trials televised, it is strange that those televised from within the courtroom are not necessarily those of greatest interest and notoriety. There is a further paradox that as venues for televised trials have grown, fewer judges see fit to grant permission, thereby excluding cameras in their courtrooms.

The audience attraction to trial atmosphere has long been recognized. The development of Court TV in 1999 was a response the public’s fascination with the courtroom. Today’s daytime programming includes *Judge Judy*,

Judge Joe Brown, *Divorce Court*, *Judge Hatchett*, *Judge Greg Mathis*, *Curtis Court*, *Judge Mills Lane* and *Moral Court*—shows in which the misguided tribulations of the common folk are celebrated and attract a large mass audience, particularly through syndication. The distinction between the courtroom and the living room has been fairly clear – until recently. We recognize the difference between the actual public trial, the report trial (via the press), the televised trial, and the made for television courtroom show. One recognizes the difference, particularly, the increasing entertainment value in this progression of judicial attractions.

And now a newcomer has joined the group perhaps best characterized and described as a “*made for television trial show based upon the actual trial.*”

The variation of a theme on a trial is operationally unique. At the end of each day a court reporter at the Jackson trial e-mails the transcript of that day’s proceedings to the E! headquarters. A portion of that material is then developed into a script and produced and prepared for broadcast next day. *The Michael Jackson Trial*, *An E! News Presentation* (the wording of the title has obviously been chosen with great care) is aired at 7:30 p.m. EST and repeated at 9:00 p.m. The format is relatively simple—enactment and cross-fire-like commentary. The host of the program is James Curtis, a former district attorney. The commentators include Shawn Chapman Holley of the late Johnny Cochran’s law firm in Los Angeles; Rikki Klieman, a *Court TV/Today Show* analyst; and Howard Weitzman, a trial attorney. Additional

expert commentators are used when needed. The primary focus of the *E! News Presentation* is the trial itself. The opening of the program is preceded with the following persuasive disclaimer: “The re-enactment and commentary in this program may contain frank talk of a sexual nature... Viewer discretion advised.”

The program is produced in Studio A of the Wilshire Boulevard headquarters of E! The trial analysis frames the enactment in a carefully constructed courtroom set. The primary actors are the created doppelgangers of the real-life participants. Rigg Kennedy plays the role of defense attorney Thomas Mesereau, easily distinguished by a mane of white hair. Edward Moss (age 27), a long time professional Jackson impersonator plays the role of the defendant.

“It takes a mere 45 minutes for Edward Moss to morph from a little-known, Los Angeles-based actor into one of the world’s most infamous performers,” the *New York Times* reported recently. “He starts with a close shave. ‘I grow a lot of facial hair,’ Mr. Moss said with a sheepish, high-pitched giggle. He then moves on to his olive-colored complexion, which, with the help of MAC and La Femme makeup, is quickly made several shades lighter. Skin sufficiently whitened, he heads for his eyes. ‘I make them lower and a little more almond-shaped,’ he explained. ‘I have to draw in the eyebrows a little arched, contour the nose and cheeks to make them thinner, add a cleft to my chin, then you add the wig and the costume and ...’”

There is always something offsetting by impersonators; even the inanimate Madame Tussaud wax figures are

somewhat disturbing. They are almost real, but not real. We look both for exactness of reproduction and for the flaw as well in the cloned figure. In the case of the enactment, the viewer is caught in that constant comparison of real and unreal, between the hard edged reality of the courtroom and its strange studio duplicate.

E! extends or pushes the envelope and recognizes that all trials have an entertainment function. Maybe E! is more honest in its approach than the others. From cable networks like CNN, MSNBC and Fox to network newscasts and magazine programs, broadcasters play to our shared prurient interests with coverage of trials, whether media coverage comes through a lens in the courtroom itself or through images assembled from outside the courtroom and given meaning through the play-by-play commentary of the newly celebrated class of legal commentators. These “news” and “talk” shows are media constructed trials, reconstructions of a sort that are not so apparent, they are not labeled as entertainment but appear in the guise of news.

The re-enacted trial, the fake trial, is framed as entertainment. The re-enactment is a reconstruction of the trial that the panelists then deconstruct with their legal expertise. The panel of commentators don’t refer to actors, don’t call attention to them as representations of the actual trial participants, but speak of the transcript which serves to legitimize the fake trial. The use of transcripts and the panel of legal experts support the perception that the medium of this re-enactment via actors is transparent – that is to say that the constructed event serves as a proxy for the actual courtroom event.

It fosters the illusion of transparency; the audience is watching the trial. Theoretically, the enactment is in the background. The real trial is in the foreground.

As E! News presents its trial each night one can almost hear the exclamation "Its show time!" Although the judge's ban on cameras was meant to avoid the media circus and the potential trivialization of the trial, the opposite effect has been achieved. In banning news cameras from the courtroom, the

judge relinquished more control than if he had permitted them in, where his rules of coverage would have been binding. Media re-enactments need not adhere to judicially defined rules of coverage.

Lesson for judges: You can keep the television camera out of the courtroom, but you cannot keep it out of the trial. In the name of justice, and under controlled circumstances, perhaps it is time for a change.

Gary Gumpert is professor emeritus of communication arts and sciences at Queens College, City University of New York. Susan J. Drucker is an attorney and a professor in the department of Journalism/Mass Media Studies at Hofstra University's School of Communication.