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TRIALS AND OTHER ENTERTAINMENT

STUART BANNER*

I'd like to elaborate on one point Lawrence Friedman makes in his paper. "The study of these trials," he says, "is a study not so much of the law, as of the mass media."¹ I think that's right. Much of what Professor Friedman says about trials could also be said about other kinds of things people like to watch. This is especially true about the changes over time in the way the public has experienced trials. We can see a lot of those same changes in the way the public has observed other sorts of events as well. On the other hand, some of the changes in the public's experience of trials are attributable to uniquely legal changes, changes in the nature of trials themselves that don't have any obvious parallels with other kinds of entertainment.

Trials were once popular spectator events, back when the only way to experience them was by going in person.² Spectators still turn up at trials today, especially high profile ones, but not the way they used to.³ People once jammed "into courtrooms so tightly that it could become difficult to move the defendant in and out."⁴ During closing argument in the Cincinnati trial of William Arrison, the famous "infernal machine" case of 1854, "there were so many [spectators] present that they occupied the area normally reserved for the judge, including the judge's own seat."⁵ Big criminal trials were often handled, even for the government, by private lawyers who were "celebrated in their own right for eloquence, so closing arguments attracted big crowds."⁶ The most popular part of the trial may have been the judge's announcement of the sentence, even though this was in the era when a murder conviction

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1. Lawrence M. Friedman, *Front Page: Notes on the Nature and Significance of Headline Trials*, 55 ST. LOUIS U. L.J. 1243, 1246 (2011).

2. Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689, 700 (2004).

3. *See id.* at 700–01.

4. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 164 (2002).

5. *Id.* (citing WILLIAM ARRISON & LEONARD WOODRUFF, *THE INFERNAL MACHINE CASE: TRIAL OF WILLIAM ARRISON* 15, 21 (Cincinnati, HH. Robinson & Co. 1854).

6. *Id.* *See also* Friedman, *supra* note 2, at 700 ("The famous lawyers of the 19th century . . . were great courtroom orators."); Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 46 (1995) ("Privately funded prosecutors most often appeared in murder trials . . .").

virtually always carried the death penalty, leaving little suspense to the sentencing.⁷ Still, the courtroom would be packed with spectators. According to one eyewitness account, “At the 1881 sentencing of Albert and Charles Talbott in Missouri for killing their father, ‘the Judge broke down, covered his face with his hands, and quivered with emotion; strong men wept, women shrieked. The vast multitude present were shaken as if by a tempest.’”⁸ Before television, before radio, before film, all entertainment was live. Trials were simply exciting things to see.

Eventually, though, attendance stopped being necessary to keep up with a trial. Daily newspapers began running accounts of trials in the first half of the nineteenth century.⁹ In the early twentieth century, people could hear about trials on the radio.¹⁰ By the late twentieth century, people could watch some trials on television.¹¹ If trials are not already online, they probably will be soon.¹² By reading or watching at a distance, spectators could skip the boring parts: when lawyers were arguing about the admissibility of evidence, having a private conference with the judge, or taking twenty minutes to establish an exhibit’s chain of custody. Trials once attracted large physical audiences.¹³ With technological change, now they may attract even larger virtual audiences made up of people who may not be physically present, who may be spread across multiple locations, and who may watch or read just the highlights.¹⁴ They’re all watching the trial, but not the way they did before.

We could tell the same kind of story about many other kinds of entertaining events besides trials. As Professor Friedman points out, executions used to be big spectator events too.¹⁵ When the rapist Daniel Wilson was hanged in Providence in 1774, more than 12,000 people showed up to watch at a time when the entire population of Providence was only

7. See BANNER, *supra* note 4, at 164.

8. *Id.* (quoting THE TALBOTT, HISTORY OF THE ASSASSINATION OF DR. P. H. TALBOTT 133 (Maryville, Mo., Republican Steam Job & Book Office, 1871)).

9. See, e.g., RONALD L. GOLDFARB, TV OR NOT TV: TELEVISION, JUSTICE, AND THE COURTS 2–5 (1998).

10. MICHAEL KRONENWETTER, FREE PRESS V. FREE TRIAL: TELEVISION AND OTHER MEDIA IN THE COURTROOM 25, 28 (1986).

11. GOLDFARB, *supra* note 9, at xvii.

12. See COURTROOM VIEW NETWORK, <http://www.courtroomview.com> (last visited Mar. 7, 2011) (broadcasting live trials over the internet for a monthly fee).

13. BANNER, *supra* note 4, at 164.

14. See Christo Lassiter, *TV or Not TV—That is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928, 978–79 (1996) (describing the instantaneous nature of televised trial coverage); Kelly L. Cripe, Comment, *Empowering the Audience: Television’s Role in the Diminishing Respect for the American Judicial System*, 6 UCLA ENT. L. REV. 235, 240–42 (1999) (describing the media’s expansion of the non-present judicial audience).

15. Friedman, *supra* note 1, at 1246–47; Friedman, *supra* note 2, at 700.

around 4,000.¹⁶ Over 30,000 spectators were said to have seen Jesse Strang hanged in Albany in 1827, and 50,000 saw the execution of John Johnson in New York in 1824.¹⁷ Even after executions were moved into prison yards over the course of the nineteenth century, they continued to attract huge crowds. Fifteen thousand people streamed into the tiny town of Fonda, New York in 1878 to stand around outside the prison while the murderer Samuel Steenburgh was being hanged inside.¹⁸ Spectators could not see any part of the execution, but that didn't prevent them from showing up and milling around.¹⁹ People would climb trees and find spots on the roofs of nearby houses, hoping to peer over the wall and get a glimpse of what was going on.²⁰ Executions, like trials, were exciting things to see, and people would often go to great lengths to get a view.

The opportunity to see executions in person came to an end when hanging was replaced by the electric chair and gas chamber—execution methods that required small, indoor spaces.²¹ But people could still read about executions, and like trials, they became staples of the daily newspapers.²² Even as the public was excluded, journalists were always given good places to watch, and they wrote lengthy, detailed accounts of what they saw.²³ Ordinary people could usually learn more about an execution from reading an eyewitness account by a journalist who had a good view, than they ever could have from watching one themselves in the old days, because most of them would have been so far away that they could neither have seen much nor heard any of the speeches.²⁴ The physical audience became a much larger virtual audience that never actually gathered in one place.²⁵

Trials are sometimes shown on television, but executions are not.²⁶ Every once in a while, a television station will ask to show one, and occasionally

16. BANNER, *supra* note 4, at 25 (citing DANIEL WILSON, *THE LIFE AND CONFESSION OF DANIEL WILSON* (Providence, 1774)).

17. *Id.* (citing E.M. MURDEN & A. MING, JR., *THE AUTHENTIC CONFESSION OF JESSE STRANG, AS MADE TO THE REV. MR. LACEY* 17 (N.Y., 1832); JAMES G. OGILVE, *TRIAL AND SENTENCE OF JOHN JOHNSON, FOR THE MURDER OF JAMES MURRAY* 36 (N.Y., Joseph Desnoes 1824)).

18. *Id.* at 159.

19. *Id.* at 159–60.

20. *Id.* at 160.

21. BANNER, *supra* note 4, at 203.

22. *Id.* at 161–62.

23. *Id.* at 162.

24. *Id.*

25. *See id.*

26. *See* 28 C.F.R. § 26.4(f) (2010) (prohibiting the visual or audio recording of a federal execution without a court's permission); Robert Perry Barnridge, Jr., Comment, *Death Watch: Why America Was Not Allowed to Watch Timothy McVeigh Die*, 3 N.C. J.L. & TECH. 193 (2001) (discussing the ban on broadcasting executions).

television stations bring lawsuits claiming a constitutional right to broadcast executions, but so far none of these requests or suits has been successful.²⁷ Executions would probably get good ratings. There are plenty of well-known movies featuring simulated executions;²⁸ presumably, real ones would be even more popular. In a world where the social constraints on what the media can show have mostly broken down, this is one of the old Victorian proprieties that is still going strong.

Technological change produced similar effects on other kinds of entertaining events. Political speeches and debates used to be big spectator sports. The Lincoln-Douglas debates in 1858 drew audiences estimated between 12,000 and 15,000.²⁹ Daniel Webster gave a famous speech at Bunker Hill in 1840, and eyewitnesses swore there were more than 25,000 people watching.³⁰ People must have loved this sort of thing, as this was an era long before the invention of microphones, so most spectators probably couldn't hear what the speakers were saying. With sound amplification, the numbers have on occasion grown much larger; more than 1 million people were said to be on hand for the inaugural addresses of Lyndon Johnson in 1965 and Barack Obama in 2009,³¹ although once crowds get this big it is very hard to count them.

Of course, it has been a long time since most people experienced political speeches in person. Once newspapers began to print them verbatim, the number of people who read speeches in the paper far exceeded the number who heard them live.³² Then, with radio, television, and now the internet, this disparity has increased even more. On C-Span today, you can watch politicians giving speeches before what look like completely empty chambers.³³ The entire audience is watching on television. Audiences are greater than they used to be, but they are not physically together. Everyone is watching separately.

27. See, e.g., *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977); WENDY LESSER, PICTURES AT AN EXECUTION: AN INQUIRY INTO THE SUBJECT OF MURDER 24 (1993) (discussing *KQED, Inc. v. Vasquez*, No. C-90-1383 RHS, 1991 U.S. Dist. LEXIS 21163 (N.D. Cal. Feb. 12, 1992) (decided June 7, 1991)).

28. See, e.g., *BRAVEHEART* (Paramount Pictures 1995); *THE CRUCIBLE* (Twentieth Century Fox 1996); *DEAD MAN WALKING* (Polygram Filmed Entertainment 1995); *THE GREEN MILE* (Warner Bros. 1999).

29. WALTER J. ONG, *ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD* 137 (Routledge reprinted 1990) (1982).

30. MERRILL D. PETERSON, *THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN* 294-95 (1987).

31. Michael E. Ruane et al., *From Across the Country, A Jubilant Crowd Emerges*, WASH. POST, Jan. 21, 2009, at A13.

32. *ENCYCLOPEDIA OF AMERICAN JOURNALISM* 260 (Stephen L. Vaughn ed., 2008).

33. See *C-SPAN NETWORKS LIVE*, <http://www.cspan.org/Live-Video/C-SPAN> (last visited Jan. 9, 2011) (ability to view politician speeches will vary depending on channel programming).

The same goes for sermons. The minister George Whitefield was a celebrity in the mid-eighteenth century.³⁴ He regularly delivered sermons before crowds of several thousand, sometimes as high as 20,000 or more.³⁵ We still have famous ministers today, and they still draw big crowds, but most people today likely get their celebrity sermons from either television or the internet.³⁶ Or think about music. Jenny Lind's tour of the United States in the early 1850s was probably the most publicized American entertainment event of the nineteenth century, but the largest theaters in which she sang could hold only around 5,000 or 6,000 people.³⁷ The biggest singers today may get that many listeners every minute, if you add up radio, CDs, and all the various ways music can be heard on the Internet. George Whitefield's audience and Jenny Lind's audience were physical assemblages of people, but Lady Gaga's audience usually is not.³⁸ Instead, it's a lot of people by themselves wearing earphones.

One more example: sports. Boxing was one of the first commercially successful spectator sports in the United States.³⁹ John L. Sullivan, the most famous American athlete of the nineteenth century, earned well over \$100,000 per year in the 1880s⁴⁰ (more than \$2 million when adjusted for inflation),⁴¹ which was about a hundred times what the highest-paid baseball players made.⁴² Boxing attracted huge crowds. The 1926 fight between Jack Dempsey and Gene Tunney drew over 120,000 spectators; their rematch the following year filled all 105,000 seats of Chicago's Soldier Field.⁴³ When college football became popular in the early twentieth century, it drew

34. HARRY S. STOUT, *THE DIVINE DRAMATIST: GEORGE WHITEFIELD AND THE RISE OF MODERN EVANGELICALISM* xiii (1991).

35. *Id.* at 90, 92, 104, 109, 118, 119, 121.

36. See Kevin Howley, *Prey TV: Televangelism and Interpellation*, J. FILM & VIDEO, Summer/Fall 2001, at 23, 25 (2001); see, e.g., CHRISTIAN FORECASTERS, <http://www.christianforecasters.com/online-sermons.html> (last visited Mar. 8, 2011) (providing access to online sermons).

37. W. PORTER WARE & THADDEUS C. LOCKARD, JR., *P.T. BARNUM PRESENTS JENNY LIND: THE AMERICAN TOUR OF THE SWEDISH NIGHTINGALE* 20, 39, 45 (1980).

38. See IFPI, *IFPI DIGITAL MUSIC REPORT 2010: MUSIC HOW, WHEN, WHERE YOU WANT IT* 10 (2010), available at <http://ifpi.org/content/library/DMR2010.pdf> (demonstrating the huge digital listening audience of Lady Gaga through an estimated 9.8 million digital sales of her single "Poker Face" in 2009 alone).

39. See ELLIOTT J. GORN, *THE MANLY ART: BARE-KNUCKLE PRIZE FIGHTING IN AMERICA* 98 (1986); JEFFREY T. SAMMONS, *BEYOND THE RING: THE ROLE OF BOXING IN AMERICAN SOCIETY* 6–10 (1988).

40. GORN, *supra* note 39, at 220–21.

41. As verified at <http://www.westegg.com/inflation>.

42. JOHN LOWELL PRATT & JIM BENAGH, *THE OFFICIAL ENCYCLOPEDIA OF SPORTS* 18 (1964).

43. SAMMONS, *supra* note 39, at 71, 78.

comparable crowds,⁴⁴ and when professional baseball became popular, it attracted audiences a bit smaller.⁴⁵ Virtually all of the money in sports in the early twentieth century came from ticket sales.⁴⁶ In fact, when radio and television came along, at first promoters tried to keep their events off the air for fear that no one would buy tickets if they could sit at home and watch for free.⁴⁷ Eventually, promoters realized they could make more money from television revenue than from ticket sales. Today sporting events still attract big crowds, but most of the people watching are not at the stadium with other spectators. They are at home, watching by themselves.⁴⁸

Trials are just like these other forms of entertainment, in that technology has converted a physical audience into a much larger virtual audience that never actually assembles in one place. Similarly, trials are like other events in that the same technological changes that allow for wider audiences also allow spectators to watch only the best parts. It used to be that if you wanted to see a trial you had to go to the courtroom and watch whatever happened to be going on that day. Then, with newspapers and television spectators could catch the highlights. With the internet, it would be possible to slice trials even more finely to fulfill a market for people who only want to watch, say, closing arguments in arson cases from Arizona, or cross-examinations by prosecutors with moustaches. The same is true of other forms of entertainment. Concerts used to last a couple of hours and gave listeners little choice over what would be played. Then sound recording allowed audiences to hear music in smaller chunks tailored more to their liking. Similarly, if you don't want to sit through a whole baseball game you can watch highlights on television. If you only want to see home runs or strikeouts, you can do that online.

44. See, e.g., LIAM T.A. FORD, *SOLDIER FIELD: A STADIUM AND ITS CITY* 89–90 (2009) (describing a record crowd of 120,000 for the 1927 Notre Dame vs. University of Southern California game played at Soldier Field).

45. See, e.g., RON SMITH, *THE BALLPARK BOOK* 30–32, 42, 265 (2000) (describing the 14,000-seat capacity of Wrigley Park when built in 1914, the crowd of over 30,000 at the 1909 opening game in the 20,000-seat capacity Shibe Park, and the official but admittedly inflated crowd of 74,000 at Yankee Stadium in 1923).

46. MICHAEL LEEDS & PETER VON ALLMEN, *THE ECONOMICS OF SPORTS* 69–105 (2002), reprinted in *THE BUSINESS OF SPORTS* 361, 362 (Scott R. Rosner & Kenneth L. Shropshire eds., 2004).

47. See ALLEN GUTTMANN, *Mediated Spectatorship*, in *SPORTS SPECTATORS* 127–46 (1986), reprinted in *THE NEW AMERICAN SPORTS HISTORY* 366, 374 (S.W. Pope ed., Sports & Soc. Ser. 1997).

48. E.g., in 2010, there were 106.5 million United States viewers watching Super Bowl XLIV on television, as opposed to the proportionally minuscule 74,059 in attendance at Miami's sold out Sun Life Stadium. Martin Hendricks, *Huge Performances Rock Super Bowl Stage*, *JOURNAL SENTINEL ONLINE* (Mar. 17, 2010), <http://www.jsonline.com/sports/packers/87813667.html>.

I don't want to overstate the extent of this change. In my office, I have a book from 1925 called *Famous American Jury Speeches*, which is kind of like a highlight reel of opening and closing arguments from the previous forty years.⁴⁹ It has Clarence Darrow's closing argument in the Leopold-Loeb case,⁵⁰ a couple of arguments by Joseph Choate, as well as a whole bunch by people I have never heard of.⁵¹ It has always been *possible* to edit the spectator's experience down to the most exciting bits. It has just never been so easy as it is today, whether with trials or with any other kind of entertainment.

On the other hand, trials themselves were changing in ways that affected the spectator's experience. Mostly, they grew less exciting. Trials gradually became more legalistic over the course of the nineteenth and twentieth centuries.⁵² In 1800 a trial consisted almost entirely of witnesses telling what they knew.⁵³ They were interrupted only to be asked questions, and not just by the lawyers—sometimes the judge would ask questions, and sometimes even the jurors would ask questions.⁵⁴ Today, trials still involve witnesses telling stories, but only in patches between voir dire and objections and long stretches of legal argument and the laying of foundations for the introduction of exhibits and so on.⁵⁵ Trials aren't nearly as interesting as they used to be. It is an ordeal to sit through a whole trial today, in a way that wasn't true a couple of centuries ago. Even if there had been no technological change—no newspapers, no radio, and so on—there would have been increasing pressure to find some way of watching only the highlights, without all the boring things in between.

In some respects, then, the changes in the way the public has experienced trials have nothing to do with trials themselves. Those changes are emblematic of a broader change in the nature of entertainment, a change that can be traced to technological developments like television and the internet. In other respects, though, trials themselves have changed, and those uniquely legal

49. FAMOUS AMERICAN JURY SPEECHES (Frederick C. Hicks ed., 1925).

50. *Id.* at 992–1089.

51. *Id.* at 183–213.

52. LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 251–52 (2002).

53. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 237 (1993).

54. See MIKE MCCONVILLE & CHESTER L. MIRSKY, JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY 139 (2005) (“The [judge] would directly involve themselves in the questioning of witnesses where issues raised required further clarification or to avoid duplication and unnecessary argument.”); Lisa M. Harms, Note, *The Questioning of Witnesses by Jurors*, 27 AM. U. L. REV. 127, 134 (1997–1998) (“They [jurors] actively marshalled [sic] facts and asked questions of witnesses who could help piece together a complete story.”).

55. See generally FED R. CIV. P.

changes would presumably have caused spectators to experience trials differently, even without any technological developments.