

Winter 1981

## Fourteenth Amendment--Cameras in the Courtroom: Supreme Court Gives the Go-Ahead

Joy D. Fulton

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

Joy D. Fulton, Fourteenth Amendment--Cameras in the Courtroom: Supreme Court Gives the Go-Ahead, 72 J. Crim. L. & Criminology 1393 (1981)

This Supreme Court Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

## FOURTEENTH AMENDMENT—CAMERAS IN THE COURTROOM: SUPREME COURT GIVES THE GO-AHEAD

**Chandler v. Florida, 101 S. Ct. 802 (1981).**

### I. INTRODUCTION

In *Chandler v. Florida*,<sup>1</sup> the Supreme Court resolved the issue left undecided by its plurality opinion in *Estes v. Texas*<sup>2</sup> and concluded that broadcast coverage of criminal trials is not inherently a denial of due process. With this explicit rejection of a per se constitutional rule which would bar broadcast coverage under all circumstances, the Court ruled that an individual appellant must affirmatively demonstrate that broadcast coverage of his trial had sufficiently adverse impact on the trial participants to constitute a denial of due process.

The *Chandler* decision paves the way for additional states to adopt experimental or permanent programs for electronic reporting of judicial proceedings.<sup>3</sup> Provided that such coverage is subject always to the con-

---

<sup>1</sup> 101 S. Ct. 802 (1981).

<sup>2</sup> 381 U.S. 532 (1965).

<sup>3</sup> As of spring of 1981, 25 states allowed some form of broadcast coverage of courtroom proceedings. See Tornquist & Grifall, *Television in the Courtroom: Devil or Saint?*, 17 WILLAMETTE L. REV. 345, 346-47 n.5 (1981):

*Alabama* allows television coverage of all courts with the consent of parties, witnesses and jurors.

*Alaska* allows coverage in trial courts and the state supreme court with consent of witnesses, parties and jurors.

*Arizona* allows coverage of appellate proceedings subject to the judge's discretion. Consent is not required.

*California* allows experimental coverage of trial and appellate proceedings.

*Colorado* has never prohibited electronic coverage of proceedings. It allows coverage in all courts with the judge's consent and in the absence of a participant's objection.

*Florida* allows coverage in all courts without the parties' consent.

*Georgia* allows coverage in appellate proceedings with consent of the parties.

*Idaho* allows coverage of appellate proceedings with the consent of the parties.

*Iowa* allows coverage, but permits the judge to exclude cameras if a witness can show "good cause."

*Louisiana* allows coverage in one district with the consent of the participants.

*Maryland* is currently experimenting with coverage of trial and appellate proceedings.

*Minnesota* allows coverage of appellate proceedings without consent of the parties.

*Montana* allows coverage of all courts, but the presiding judge may deny coverage if the reasons for doing so are stated.

*Nevada* allows coverage in all courts in the absence of objection by a participant.

trol of the presiding judge and that the states provide guidelines which obligate the trial judge to protect the accused's right to a fair trial, the Court's decision will lead to a new era of openness and public awareness regarding the conduct of judicial proceedings.

## II. BACKGROUND: THE BAN ON COURTROOM CAMERAS

The tumult caused by the presence of photographers at the 1935 kidnapping trial of Bruno Richard Hauptmann<sup>4</sup> led the American Bar Association House of Delegates to adopt Canon 35 of the ABA's Canons of Judicial Ethics.<sup>5</sup> Canon 35 was amended in 1952 to prohibit television coverage, and in 1972 was adopted in its present form as Canon 3A(7) of the ABA Code of Judicial Conduct.<sup>6</sup>

---

*New Hampshire* allows coverage of supreme court and some trial proceedings without consent of the participants.

*New Jersey* allows coverage in two counties on an experimental basis.

*North Dakota* allows coverage in the state supreme court without consent of the participants.

*Ohio* allowed experimental coverage from June 1978 to June 1979.

*Oklahoma* allows experimental coverage of trial and appellate courts with the consent of the judge in all cases and the consent of the defendant in criminal cases.

*Pennsylvania* allows the judge to authorize televising of any trial court nonjury civil proceeding except divorce or custody proceedings. No witness or party who objects may be photographed.

*Tennessee* allows televising of trial and appellate proceedings.

*Texas* allows appellate coverage.

*Washington* allows coverage of trial and appellate courts with the consent of all participants.

*West Virginia* allows coverage in one county with the consent of the parties.

*Wisconsin* allows coverage in selected proceedings but denies coverage if a party requests exclusion of the media, unless the media can show that the participant's reason for not desiring coverage is not valid. Alabama, Colorado, Florida, Georgia, Nevada, New Hampshire, Texas and Washington have all adopted permanent rules. *Id. See also In re Post-Newsweek Stations*, 370 So.2d 764, 787-91 (Fla. 1979); Graves, *Cameras in the Courts: The Situation Today*, 63 JUDICATURE 24, 25-27 (1979).

<sup>4</sup> See *State v. Hauptmann*, 115 N.J.L. 412, 180 A. 809 (1935), cert. denied, 296 U.S. 649 (1935). The ABA's flat prohibition of courtroom cameras arose from one of the most sensational cases of that time. Hauptmann was accused of the kidnapping and murder of Charles A. Lindbergh, Jr.. The trial judge decided to allow still photographers and newsreel cameramen to be present in the courtroom, subject to certain rules. There were some breaches of these rules, such as the photographers' successful effort to snap a picture of Hauptmann as the verdict was being delivered. Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14, 17-18 (1979). Hauptmann's counsel did not object to these violations; thus, the court did not consider their possible constitutional effects.

<sup>5</sup> As adopted on September 30, 1937, Judicial Canon 35 read:

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.

62 A.B.A. REP. 1134-35 (1937).

<sup>6</sup> *Chandler v. Florida*, 101 S. Ct. 802, 804 (1981). Canon 3A(7) as originally adopted in Florida provided:

In 1978, the ABA Committee on Fair Trial-Free Press proposed that Canon 3A(7) be revised to allow unobtrusive electronic coverage under conditions established by the trial judge.<sup>7</sup> Although the ABA's standing committee on Standards for Criminal Justice and the Media endorsed this revision,<sup>8</sup> the House of Delegates rejected the proposal in 1979.<sup>9</sup> Also in 1978, the Conference of State Chief Justices approved a resolution to allow the highest court of each state to promulgate standards and guidelines regulating radio, television, and other photographic coverage of court proceedings.<sup>10</sup>

These developments followed the Florida Supreme Court's program to reconsider its ban on courtroom television. In May of 1975, in response to the urging of the media, the Supreme Court of Florida adopted an experimental program which would have allowed the televising of one civil and one criminal trial, subject to the consent of all parties.<sup>11</sup> When it proved that parties would not agree to broadcast coverage, the Florida Supreme Court substituted a new one-year experimental program during which the media were permitted to broadcast all Florida judicial proceedings without first obtaining the consent of the parties.<sup>12</sup> This program began in July of 1977 and concluded in June of

---

A judge should prohibit broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses, except that a judge may authorize:

- (a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;
- (b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;
- (c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:
  - (i) the means of recording will not distract participants or impair the dignity of the proceedings;
  - (ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;
  - (iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and
  - (iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

*Id.* at 804, n.2.

Camera coverage of federal criminal proceedings is banned by FED. R. CRIM. P. 53 (1946).

<sup>7</sup> ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Proposed Standard 8-3.6(a) (tent. draft, 2d ed. 1978).

<sup>8</sup> Editorial, *Cameras Out of Courtrooms?*, 65 A.B.A. J. 304 (1979).

<sup>9</sup> *Id.*

<sup>10</sup> TELEVISION, RADIO, PHOTOGRAPHIC COVERAGE OF JUDICIAL PROCEEDINGS, RESOLUTION I, adopted at The Thirtieth Annual Meeting of the Conference of Chief Justices, Burlington, Vt. (Aug. 2, 1978), cited in *Chandler v. Florida*, 101 S. Ct. 802, 804 (1981).

<sup>11</sup> *In re* Petition of the Post-Newsweek Stations, Florida, Inc., 327 So. 2d 1 (Fla. 1976).

<sup>12</sup> *In re* Petition of the Post-Newsweek Stations, Florida, Inc., 347 So. 2d 402, 403 (Fla. 1976).

1978.<sup>13</sup>

At the close of the experiment, the Florida Supreme Court evaluated the results and concluded that "on balance there is more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage."<sup>14</sup> Pursuant to this conclusion, the Florida Supreme Court adopted a revised version of Canon 3A(7) which permitted the electronic media access to Florida judicial proceedings, subject to the standards adopted by the Court and subject also to the authority of the presiding judge to control the conduct of the proceedings to ensure a fair trial to the parties.<sup>15</sup>

The Appendices to the Florida Supreme Court's decision set forth specific guidelines which courtroom broadcasters and photographers were to follow.<sup>16</sup> Taken together, these guidelines gave substantial discretion to the trial judge to control broadcasting activities in the courtroom in order to minimize disruption.

Florida's adoption of such a liberal rule on courtroom photography was certainly not without risk. As one federal district judge pointed out in connection with the adoption of the experimental program: "If the Florida Supreme Court has guessed wrong, an entire year's worth of state court convictions—no matter how heinous the crime—may be subject to reversal."<sup>17</sup> With the permanent decision to allow cameras in the courtroom, the Florida court was taking an even greater risk. It was in this context that the appeal of Noel Chandler and Robert Granger arose.

### III. THE CHANDLER DECISION

The appellants in *Chandler* had been charged with conspiracy to commit burglary, grand larceny, and possession of burglar tools, in connection with the breaking and entering of a well-known Miami Beach

---

<sup>13</sup> In re Petition of Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, 766 (Fla. 1979).

<sup>14</sup> *Id.* at 780. In conjunction with its statement of this conclusion, the Florida Supreme Court stated that "[t]he prime motivating consideration prompting our conclusion is this state's commitment to open government." *Id.*

<sup>15</sup> *Id.* at 781. The Canon as amended provides as follows:

Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, and (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

*Id.*

<sup>16</sup> *Id.* at 783-94.

<sup>17</sup> *Briklod v. Rivkind*, Civil No. 77-2148 (JLK) (S.D. Fla., Order dated July 19, 1977), cited in Block, *Cameras and Courtrooms: The Denial of Due Process*, 52 FLA. B.J. 454, 455 (1978).

restaurant.<sup>18</sup> This case was unique, and attracted the attention of the media, because at the time of their arrest the appellants were Miami Beach policemen.<sup>19</sup> Furthermore, the prosecution's principal witness was an amateur radio operator who had by chance overheard and recorded the appellants' conversations during the burglary, which were carried over their police walkie-talkies.<sup>20</sup>

The appellants challenged the constitutionality of Experimental Canon 3A(7), both on its face and as applied; in a pretrial motion.<sup>21</sup> The trial court certified the question of Canon 3A(7)'s facial validity to the Florida Supreme Court, but that court declined to rule on the issue on the ground that it was not directly relevant to the criminal charges against the appellants.<sup>22</sup>

The appellants made additional efforts to block electronic coverage of the trial, but were unsuccessful.<sup>23</sup> At voir dire, the appellant's counsel asked each prospective juror whether the presence of a television camera during some or all of the trial would affect his or her ability to be "fair and impartial." Each juror chosen for the trial replied that television coverage would not affect his or her consideration in any way.<sup>24</sup>

The appellants then moved to sequester the jury because of the television coverage. The trial judge denied this motion, but he did instruct the jury not to watch or read anything about the case in the media and suggested that the jurors watch only the national news on television.<sup>25</sup> The trial judge also denied a defense request that the witnesses be instructed not to watch any television coverage of testimony presented at the trial, noting that no witness' testimony was being reported or televised.<sup>26</sup>

The actual television recording and broadcasting of the proceedings was minimal. A camera recorded the testimony of the state's chief witness and the closing arguments. There was no camera present during any part of the presentation of the defense. Only two minutes and fifty-five seconds of the trial were actually broadcast, all pertaining to the prosecution's side of the case.<sup>27</sup>

---

<sup>18</sup> Chandler v. Florida, 101 S. Ct. 802, 806 (1981).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> At the time of the appellant's motion, the Florida Supreme Court has not yet adopted its permanent revision of Canon 3A(7).

<sup>22</sup> State v. Granger, 352 So. 2d 175 (Fla. 1977).

<sup>23</sup> Chandler v. Florida, 101 S. Ct. 802, 806 (1981).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

The jury found the appellants guilty on all counts. The defense subsequently moved for a new trial, claiming that because of the television coverage, the trial just concluded had not been fair and impartial. The appellants offered, however, no evidence of specific prejudice.<sup>28</sup>

The Florida District Court of Appeal found that the presence of the television cameras did not deprive the appellants of a fair trial or an impartial jury.<sup>29</sup> That court declined to rule on the facial constitutionality of Canon 3A(7), on the ground that the Florida Supreme Court had, by virtue of its institution of the one-year trial program, implicitly determined that television coverage in and of itself did not violate the federal and state constitutions.<sup>30</sup> Nevertheless, the District Court of Appeal did certify the decision to the Florida Supreme Court "as a question of great public interest."<sup>31</sup> The Florida Supreme Court denied review, holding that the question of the facial validity of Experimental Canon 3A(7) was rendered moot<sup>32</sup> as a result of its decision, rendered shortly after the certification by the District Court of Appeal, to adopt a permanent revised Canon 3A(7).<sup>33</sup>

On further appeal, the Supreme Court affirmed the convictions. Chief Justice Burger, writing for the majority,<sup>34</sup> first noted that the scope of the Supreme Court's review was limited to the question of the Florida Supreme Court's constitutional authority to promulgate its revised Canon 3A(7) for the trial of cases in the Florida courts, and did not involve any issue of a state or federal constitutional right of access to the courtroom on the part of the broadcast media.<sup>35</sup>

The Court then proceeded to analyze its plurality decision in *Estes v. Texas*,<sup>36</sup> the only previous case in which the Supreme Court had

---

<sup>28</sup> *Id.*

<sup>29</sup> *Chandler v. State*, 366 So.2d 64 (Fla. App. 1979).

<sup>30</sup> *Id.* at 69.

<sup>31</sup> *Id.*

<sup>32</sup> *Chandler v. State*, 376 So. 2d 1157 (Fla. 1979) (per curiam).

<sup>33</sup> *In re* Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979).

<sup>34</sup> In addition to the Chief Justice, the majority included Justices Brennan, Marshall, Blackmun, Powell, and Rehnquist. Justices Stewart and White concurred in the result, and Justice Stevens took no part in the decision.

<sup>35</sup> *Chandler v. Florida*, 101 S. Ct. 802, 807 (1981). The Florida Supreme Court had expressly rejected the media's claim that the first and sixth amendments created a right of access to judicial proceedings for the broadcast media, relying on *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1977). See also *In re* Petition of Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, 774 (Fla. 1979).

<sup>36</sup> 381 U.S. 532 (1965). Justice Clark wrote the opinion of the Court, joined by Chief Justice Warren and Justices Douglas and Goldberg. Chief Justice Warren also wrote a separate concurrence in which he was joined by Justices Douglas and Goldberg. Justice Harlan, whose vote was the fifth necessary for the decision, concurred separately. Justices Stewart, Black, Brennan and White dissented.

squarely faced the issue of the constitutionality of courtroom cameras. In that case, the defendant, Billie Sol Estes, had been indicted for swindling.<sup>37</sup> The trial was highly publicized,<sup>38</sup> and the Court concluded that the televising and broadcasting of the defendant's trial deprived him of his fourteenth amendment right to due process of law.<sup>39</sup> The appellants argued that *Estes* had announced a per se constitutional rule that the televising of criminal trials was inherently a denial of due process. The Chief Justice concluded that the question whether *Estes* had indeed announced such a blanket rule turned upon a careful analysis of Justice Harlan's concurring opinion in that case.

The four justices making up the plurality in *Estes* had clearly espoused a per se constitutional prohibition of televised criminal trials. The plurality opinion, delivered by Justice Clark, noted that "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State [Texas] involves such a probability that prejudice will result that it is deemed inherently lacking in due process."<sup>40</sup> Justice Clark concluded that courtroom televising was such a procedure, reasoning that "[t]elevision in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused."<sup>41</sup> Further, Chief Justice Warren's concurring opinion began:

While I join the Court's opinion and agree that the televising of criminal trials is inherently a denial of due process, I desire to express additional views on why this is so . . . . The record in this case presents a vivid illustration of the inherent prejudice of televised criminal trials and supports our conclusion that this is the appropriate time to make a definitive appraisal of television in the courtroom.<sup>42</sup>

As the Court in *Chandler* observed, however, Justice Harlan, in providing the fifth vote for reversal of *Estes*' conviction, expressly limited

---

<sup>37</sup> "Through false pretenses, Estes induced certain farmers to purchase nonexistent fertilizer tanks and other equipment." Note, *Constitutional Aspects of Television in the Courtroom*, 35 U. CIN. L. REV. 48, 49, n.5 (1966).

<sup>38</sup> The Court's opinion reported that at a pretrial hearing on a defense motion to prevent broadcasting and news photography at the trial:

[A]t least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings.

381 U.S. at 536.

<sup>39</sup> *Id.* at 535.

<sup>40</sup> *Id.* at 542-43.

<sup>41</sup> *Id.* at 544.

<sup>42</sup> *Id.* at 552 (Warren, C.J., concurring).

his concurrence to "the extent indicated in [his] opinion."<sup>43</sup> The Court, upon careful scrutiny of Justice Harlan's opinion, concluded that he had limited his concurrence to the facts of *Estes* and thus did not espouse the per se constitutional ban on courtroom television enunciated by the plurality.<sup>44</sup> Since Justice Harlan's opinion, as the fifth vote for reversal, defined the scope of the holding in *Estes*, the Court concluded that "*Estes* is not to be read as announcing a constitutional rule barring still photographic, radio and television coverage in all cases and under all circumstances."<sup>45</sup>

Having concluded that previous decisions announced no absolute constitutional ban on the broadcasting of judicial proceedings, the Court then proceeded to discuss the policy arguments for and against the promulgation of such a per se rule. First, the Court addressed the argument that the publicity generated about the case by broadcasting the proceedings might impair the defendant's ability to receive a fair trial.<sup>46</sup> The Chief Justice disposed of this argument in a summary fashion, stating:

An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter . . . . The risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly.<sup>47</sup>

The Court then turned to a second argument—much discussed in the concurring opinions in *Estes*<sup>48</sup>—that the presence of broadcasting

---

<sup>43</sup> *Id.* at 587 (Harlan, J., concurring).

<sup>44</sup> *Chandler v. Florida*, 101 S. Ct. at 808.

<sup>45</sup> *Id.* at 809.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 810. The Court cited *Nebraska Free Press Association v. Stewart*, 427 U.S. 539 (1975), for procedures which may be used in lieu of a prior restraint on publication to prevent publicity about a trial from affecting the impartiality of the jury. These include:

1. change of trial venue to a locale less exposed to trial publicity;
2. postponement of trial to allow public attention to subside;
3. careful screening of prospective jurors to eliminate those with preconceived opinions;
4. use of jury instructions to remind the jurors of their duty to decide only on the basis of evidence presented in court; and
5. sequestration of the jury.

101 S. Ct. at 810, citing 427 U.S. 539, 563-65.

<sup>48</sup> 381 U.S. at 591-92 (Harlan, J., concurring): "To be sure, such distortions may produce no tell-tale signs, but in a highly publicized trial the danger of their presence is substantial, and their effects may be far more pervasive and deleterious than the physical disruptions which all concede would vitiate a conviction."

381 U.S. at 569-70 (Warren, C.J., concurring):

equipment at a trial gives rise to a general psychological impact on the trial participants which impairs the defendant's ability to receive a fair trial. To counter this argument, the Court first noted that there had been substantial changes in television technology since the *Estes* trial in 1962.<sup>49</sup> The distracting aspects of the media's presence discussed in that case, including bulky equipment, cables, special lighting, and numerous technical personnel are, the Court noted, no longer part of media technology and thus not objectionable. The Court noted further that state guidelines for the broadcasting process, such as those promulgated by the Florida Supreme Court, also helped to avoid some of the problems anticipated by the various Justices in *Estes*. As an example, the Court listed the rule of the Florida Supreme Court which may protect certain witnesses, such as children, sexual battery victims, witnesses under protection of anonymity, etc. from being televised.<sup>50</sup>

Another aspect of the Florida broadcasting rules was cited approvingly by the Court as an effort to prevent a general, adverse psychological impact on the trial participants. The Court stated that Florida's requirement that the defendant be given a pretrial hearing in which to express his objections to broadcast coverage allowed the trial court to take steps to minimize or eliminate the risk of prejudice to the accused.<sup>51</sup>

The Court then went on to note that "at present no one has been able to present empirical data sufficient to establish that the mere pres-

---

It is common knowledge that "television . . . can . . . work profound changes in the behavior of the people it focuses on." (citations omitted). The present record provides ample support for scholars who have claimed that awareness that a trial is being televised to a vast, but unseen audience, is bound to increase nervousness and tension, cause an increased concern about appearances, and bring to the surface latent opportunism that the traditional dignity of the courtroom would discourage. Whether they do so consciously or subconsciously, all trial participants act differently in the presence of television cameras.

<sup>49</sup> 101 S. Ct. at 810-11.

<sup>50</sup> *Id.* Televising of witnesses in the Florida courts is left to the discretion of the trial judge, subject to the following standard:

The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.

*In re* Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764, 779 (Fla. 1979). The Chief Justice stated that, in addition to the categories of witnesses listed above, the rule will protect "even the very timid witness or party." 101 S. Ct. at 811. The Florida Supreme Court never referred to the especially timid witness in its discussion of the above standard, although it did explicitly mention children, sex crime victims, and informants. In light of this omission, and the fact that the standard requires a *qualitatively* different effect on the witness rather than merely a *quantitative* one to exclude him from coverage, it would appear that the Chief Justice's confidence in the rule's ability to protect the excessively timid witness is misplaced.

<sup>51</sup> *Id.*

ence of the broadcast media inherently has an adverse effect on [the judicial] process.”<sup>52</sup> The Chief Justice stated that the appellants had not offered any evidence to show that the trial was “tainted” by broadcast coverage in their particular case, much less that broadcast coverage would taint all televised trials.<sup>53</sup>

Finally, the Court set out a federalism argument in support of the Florida program. It stated that “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>54</sup> Since the Court did not find that Florida’s experiment was an automatic denial of due process, it concluded that Florida should be allowed to carry on.

The Court did not take a position on the argument, articulated by Chief Justice Warren in *Estes*, that displaying particular defendants on television was in itself a denial of due process because the media’s selective coverage of cases would subject some defendants to trials under prejudicial conditions which others would not experience.<sup>55</sup> Rather, Chief Justice Burger reserved judgment on the issue pending continuing experimentation by the states, so as to be better able to determine whether selective trial coverage would in practice turn those proceedings into “show trials” and thus evoke due process concerns.

Having thus concluded that a per se constitutional rule against courtroom broadcasting was unwarranted, both by its previous decisions and by an independent examination of the competing policies, the Court went on to inquire whether the appellants had been accorded due process of law in their particular case. The Court held that they had.<sup>56</sup> First, the Court reiterated that the appellants had not presented any specific evidence that the presence of the television cameras had impaired the jury’s ability to judge them only on the basis of information presented at the trial, or that the cameras had caused a general adverse impact on any of the trial participants sufficient to constitute a denial of due process.<sup>57</sup>

Second, the Court noted that each juror had indicated at voir dire that the television camera would not impair his or her ability to judge the case solely on its merits. Moreover, the trial judge had instructed the jurors not to watch accounts of the trial on television, and there was

---

<sup>52</sup> *Id.* at 812.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (quoting *New State Ice Co. v. Liebman*, 385 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

<sup>55</sup> 381 U.S. at 565 (Warren, C.J., concurring).

<sup>56</sup> 101 S. Ct. at 813.

<sup>57</sup> *Id.*

no contention that this instruction was violated.<sup>58</sup> Thus, the Court held that no constitutional violation had occurred as a result of the televising of the defendants' trial, and affirmed their convictions.

Justice Stewart concurred in the result, taking issue only with the Court's failure to overrule *Estes*.<sup>59</sup> He argued that *Estes* had announced a per se rule that, at least as to "notorious" criminal trials such as *Estes* itself, the presence of cameras in the courtroom was a denial of due process of law.<sup>60</sup>

Justice White concurred in the judgment, but interpreted *Estes* to establish a per se constitutional rule against televising any criminal trial if the defendant objects.<sup>61</sup> Alternatively, he argued that *Estes* could be read more narrowly as imposing such a rule only in the case of "widely publicized" and "sensational" criminal trials.<sup>62</sup> Under either reading, Justice White agreed with Justice Stewart that *Estes* should be overruled in order to affirm the result below.<sup>63</sup>

---

<sup>58</sup> The Court expressly stated that these factors were not essential to its holding. *Id.*

<sup>59</sup> 101 S. Ct. at 814. (Stewart, J., concurring).

<sup>60</sup> *Id.* at 814 (Stewart, J., concurring).

<sup>61</sup> *Id.* at 816. (White, J., concurring).

<sup>62</sup> *Id.*

<sup>63</sup> The position taken by Justices White and Stewart regarding the overruling of *Estes* is arguably correct. Although the *Chandler* majority ruled that Justice Harlan's opinion extended only to the facts of *Estes* and thus did not establish any sort of per se ban on courtroom broadcasting, there is actually a substantial amount of language in Justice Harlan's concurring opinion which indicates that he did espouse a per se ban on the broadcast coverage of "notorious" or "sensational" trials. For example, he framed the issue as "whether the Fourteenth Amendment prohibits a State, over the objection of a defendant, from employing television in the courtroom to televise . . . the courtroom proceedings of a criminal trial of *widespread public interest*." 381 U.S. at 587 (Harlan, J., concurring) (emphasis added). He then expressly stated that the issue was no broader than this, since "we are concerned here only with a criminal trial of great notoriety, and not with criminal proceedings of a more or less routine nature." *Id.*

Justice Harlan's conclusion was that:

[A]t least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment.

*Id.*

Finally, Justice Harlan noted that the *Estes* trial was a heavily publicized, sensational proceeding. He then stated:

. . . I wish to make it perfectly clear that I am by no means prepared to say that the constitutional issue should ultimately turn upon the nature of the particular case involved. When the issue of television in a non-notorious trial is presented it may appear that no workable distinction can be drawn based on the type of case involved, or that the possibilities for prejudice, though less severe, are nonetheless of constitutional proportions.

*Id.* at 590.

This language can be read, not as disclaiming a per se ban on the broadcasting of sensational trials, but as an acknowledgement that such a per se ban *might* need to be extended to

## IV. ANALYSIS

Critics regularly raise several objections to the use of television in the courtroom. As the Court recognized in *Chandler*, these include physical disruption and psychological pressures on the trial participants, among others.<sup>64</sup> Balanced against these claimed disadvantages is the benefit of the greater public knowledge and understanding of the judicial system as a result of the televised proceedings. An analysis of the traditional grounds for the ban on courtroom cameras reveals, as the Supreme Court concluded, that they certainly do not justify an absolute prohibition.

The claim that the presence of the media in the courtroom will cause disruption is no longer a basis for the ban, if indeed it ever was. The fear of such disruption and its effects on the administration of justice was central to the decision in *Estes*. The Justices' concern was that the bulky equipment and noisy cameramen such as were present at *Estes*' pretrial hearing would so affect judicial proceedings that the jurors, lawyers and judges could not function properly, and the defendant would thus be denied his sixth amendment right to a fair trial.<sup>65</sup> Even at the time of *Estes*, however, the Court acknowledged that technological improvements in television broadcasting and public familiarity with television as a medium of communication might change the result. Even Justice Clark, writing for the plurality in *Estes*, recognized this possibility when he stated: "It is said that the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials."<sup>66</sup> Thus, the *Estes* opinion implied that equipment which was small, quiet, and did not require special lighting or numerous personnel might be acceptable in courtrooms of the future.

These technical qualifications are amply met by modern broadcasting equipment. Television equipment manufacturers are now capable of producing compact, noiseless color cameras that can operate without

---

non-notorious trials also. Justice Harlan simply did not need to go so far under the facts of *Estes*.

At any rate, whether the *Chandler* majority or those concurring were correct in interpreting Justice Harlan's opinion, it is clear after *Chandler* that the Supreme Court does not recognize a per se ban on trial broadcasting, regardless of the level of public interest in the case.

<sup>64</sup> See *Estes v. Texas*, 381 U.S. 532 (1965); Doubles, *A Camera in the Courtroom*, 22 WASH. & LEE L. REV. 1 (1965); Loewen, *Cameras in the Courtroom: A Reconsideration*, 17 WASHBURN L.J. 504 (1978); Tornquist & Grifall, *supra* note 2; Comment, *Cameras in the Courtroom: A Denial of Due Process?*, 30 BAYLOR L. REV. 853 (1978); Note, *Televised Trials: Constitutional Constraints, Practical Implications and State Experimentation*, 9 LOY. CHI. L.J. 910 (1978).

<sup>65</sup> 381 U.S. at 611-12 (Stewart, J., dissenting).

<sup>66</sup> *Id.* at 551-52.

the necessity of any additional room lighting.<sup>67</sup> In addition, sound equipment no longer consists of intrusive microphones and transmitters. As one commentator noted:

[m]icrophones no longer than the end of a man's small finger can operate with a wireless transmitter the size of two packs of cigarettes. Parabolic microphones can be mounted on the camera itself and pick up conversations several yards away. There simply is no longer any need for snaking cables, bright lights, and intrusive microphones. Television has "grown up."<sup>68</sup>

These technological improvements have allowed television to become commonplace at many types of public proceedings, such as legislative sessions, city council meetings, and even solemn religious ceremonies. If the presence of cameras at these proceedings has not been found to be disruptive, it is reasonable to conclude that cameras will not disrupt the courtroom. Disruption of the courtroom is no longer a valid reason for an absolute ban on television cameras.

A more difficult question concerns the psychological impact of courtroom television cameras on trial participants. The *Estes* court was concerned with the effect of television on jurors' impartiality and attentiveness, effects on witnesses, effects on judges, and on the defendant as well.<sup>69</sup> The *Estes* Court believed that televising that case would draw attention to it and create intense public feeling about the case. This public feeling ostensibly would be aggravated by trial telecasting, so that "the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them."<sup>70</sup> Consequently, the Court concluded, jurors would find it difficult to maintain an impartial stance in the face of community hostility toward the accused.

It is not clear why the *Estes* Court concluded that the presence of television would add to the feeling of juror pressure which it describes. In any trial, televised or not, which has generated intense public sentiment, the jury must inevitably feel a similar pressure. The jurors' friends and neighbors will know of the jurors' role in the trial, and if these friends and neighbors are inclined to make their viewpoints known to the individual juror, or otherwise to exert pressure on him, they will do so without regard to the presence of television. In extreme cases, the

---

<sup>67</sup> A list of 9 film cameras and 12 videotape electronic cameras which met with judicial approval was attached to the opinion of the Florida Supreme Court which adopted its revised Canon 3A(7). *In re* Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764, 794 (Fla. 1979).

<sup>68</sup> See Loewen, *supra* note 64.

<sup>69</sup> 381 U.S. at 545-50.

<sup>70</sup> *Id.* at 545.

jury could be sequestered to insulate it from these kinds of outside influences.

The *Estes* Court also reasoned that the jurors' awareness of the fact that they were being televised would distract them, thus preventing them from devoting full concentration to the trial proceedings.<sup>71</sup> The only basis that the Court articulated to support this conclusion, however, was "human nature."<sup>72</sup> In light of the public's great familiarity with the medium of television, and the unobtrusive fashion in which broadcasting can be accomplished, it seems unlikely that jurors would be so intensely preoccupied by the filming. Moreover, when the Court decided *Estes*, it really had nothing more than its perception of "human nature" to rely upon—there had been no actual experimentation with courtroom broadcasting such as was carried on in Florida. Since the Florida court concluded that juror distraction was not a basis for the application of a per se ban on the use of courtroom cameras, it is fair to conclude that this rationale does not justify the ban.

Similar arguments apply to the effects of televising witnesses' testimony. The *Estes* Court suggested that some witnesses might suffer memory lapses and thus give inaccurate statements.<sup>73</sup> The *Estes* plurality acknowledged that the defendant could not prove the existence of these factors, but stated that "we all know from experience that they exist."<sup>74</sup> Again, the Florida Supreme Court's survey on the results of its experiment indicated that the presence of electronic media "made all respondents feel only slightly nervous or more attentive,"<sup>75</sup> and "[b]oth jurors and witnesses perceived that the presence of electronic media made them feel just slightly more responsible for their actions."<sup>76</sup> In addition, if witnesses' testimony differed from pretrial statements, the defendant could demonstrate the fact and vitiate any actual prejudice which might occur as a result.

The *Estes* Court was also concerned with television's effect on the trial judge himself, noting that "telecasting is particularly bad where the judge is elected."<sup>77</sup> Apparently, the fear was that the judge's attention would be directed to his performance and not to his task of doing justice in the particular case at hand. This is a somewhat cynical view of the trial judge and the gravity with which he views his judicial tasks. After all, a "good performance" by a judge consists precisely of "doing jus-

---

<sup>71</sup> *Id.* at 546.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 547.

<sup>74</sup> *Id.*

<sup>75</sup> 370 So.2d at 768.

<sup>76</sup> *Id.*

<sup>77</sup> 381 U.S. at 548.

tice." In addition, judicial "showboating" to the frustration of justice would be readily observable, and the defendant could demonstrate such behavior as evidence of unfairness in his particular case.

The fact that some judges are elected should not be a reason why they should not be televised. On the contrary, it would be to the public's advantage to see and hear judicial candidates in action. As the situation currently stands, the vast majority of the voting public has little conception of the qualifications of the candidates for judgeships.

Overall, the amorphously adverse "psychological impact" feared by the *Estes* Court does not seem to be borne out in fact, as demonstrated by the experience of the Florida courts. These adverse effects, if they exist at all, are not sufficiently severe to require a per se rule against courtroom cameras, as evidenced by the growing trend of states which now allow some form of courtroom broadcasting.<sup>78</sup>

In addition to physical disruption and psychological impact, the *Estes* Court relied on the fact that at the time that case was decided, the vast majority of states prohibited the televising and photographing of criminal trials<sup>79</sup> to reach its conclusion that such practices should be prohibited. The majority stated that "[f]orty-eight of our States and the Federal Rules have deemed the use of television improper in the courtroom. This fact is most telling in buttressing our conclusion that any change in procedure which would permit its use would be inconsistent with our concepts of due process in this field."<sup>80</sup> If the fact that forty-eight states prohibited courtroom cameras in 1965 bore so heavily on the Court's conclusion that its per se ban on courtroom cameras was justified, then the modern trend should provide equally "telling" evidence that it is not.

Balanced against the perceived negative effects of courtroom broadcasting is the benefit of greater public awareness of our judicial system. The electronic media could play an important role in dispelling the view, held even by an educated public, that courts are remote and incomprehensible institutions.<sup>81</sup> One survey has revealed some disturbing but widely-held erroneous beliefs about our legal system. For example, 37 percent of those surveyed believed that a person accused of a crime is guilty until proven innocent; 72 percent thought that the Supreme Court can review and reverse any state court decision; and 30 percent

---

<sup>78</sup> See note 3 *supra*.

<sup>79</sup> 381 U.S. at 540. At that time, only Texas and Colorado permitted courtroom television, under specified conditions.

<sup>80</sup> *Id.* at 544.

<sup>81</sup> See Weinstein & Zimmerman, *Let the People Observe Their Courts*, 61 JUDICATURE 156 (1977).

believed that a district attorney's job is to defend an accused criminal who cannot afford a lawyer.<sup>82</sup>

Courtroom television could do much toward relieving this appalling ignorance of the workings of our legal system. Nielsen studies indicate that 70,100,000 households, or 97.5 percent of total homes in the country, contained televisions in 1975, and that the average American now devotes six hours and nineteen minutes per day to television viewing.<sup>83</sup> In contrast, only 23 percent of Americans buy morning newspapers, and only 31 percent purchase an evening newspaper.<sup>84</sup> Further, a 1977 Roper poll indicated that the American public regards television as the number one source of news, by a wide margin.<sup>85</sup> Thus, courtroom broadcasting would bring a much greater proportion of the public into some degree of contact with the legal system.

In addition to the informational value of courtroom television, the Supreme Court itself has suggested that public trials have significant community therapeutic value, since the means used to achieve justice must have the support of public acceptance of the process and its results.<sup>86</sup> Thus, the open administration of justice provides an outlet for community concern, hostility and emotion.<sup>87</sup>

If the open processes of justice indeed have this kind of therapeutic value, then the more widespread the outlet for public sentiment, the better. Television broadcasting would greatly expand the number of people who can observe the judicial system.

## V. CONCLUSION

The traditional objections to the use of courtroom television do not justify a per se constitutional ban. As the Court concluded in *Chandler*, disruption of the judicial process will be minimal because of modern television technology. In addition, the conjectural psychological effects on trial participants which the Court discussed in *Estes* are precisely that—conjectural—and also do not call for a blanket exclusion of cameras from the courtroom.

Balanced against these questionable assertions of disadvantage are the significant advantages to be gained from the use of courtroom television broadcasting. The balance of the advantages of increased public awareness of the judicial process against outmoded fears of the dubious

---

<sup>82</sup> Tate, *Cameras in the Courtroom: Here to Stay*, 10 U. TOL. L. REV. 925, 927 (1979).

<sup>83</sup> D'Alemberte & Hirschhorn, *Cameras in the Courtroom? Yes and No*, 7 BARRISTER 6, 8 (1980).

<sup>84</sup> Tornquist & Grifall, *supra* note 64, at 366.

<sup>85</sup> D'Alemberte & Hirschhorn, *supra* note 83, at 8.

<sup>86</sup> *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814, 2824 (1980).

<sup>87</sup> *Id.*

negative effects which alarmed the Supreme Court in *Estes* now tips in favor of broadcasting. This is certainly the trend among the states, and it now has been given constitutional approval by the Supreme Court in *Chandler*. The *Chandler* decision should encourage the states which have not yet done so to adopt procedures for courtroom broadcasting, thus enhancing public awareness and acceptance of our legal system.

JOY D. FULTON