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The Prejudicial Effects of Cameras in the Courtroom

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THE PREJUDICIAL EFFECTS OF CAMERAS IN THE COURTROOM

I. INTRODUCTION

The Supreme Court recently held in *Chandler v. Florida*,[1] that absent a showing of actual prejudice, it is not *per se* unconstitutional to televise trials over the objection of the defendant.[2] This decision has a direct bearing on state court procedures, as over one-half of the states currently permit television coverage of trials in one form or another.[3] However, sheer numbers supporting a proposition do not make that proposition "right", nor does a Supreme Court decision upholding its constitutionality imply an unqualified stamp of approval. In fact, previous Supreme Court decisions have overturned convictions because the defendant's right to a fair trial[4] had been violated as a result of media coverage of his case.[5]

In order to protect this right, however, the defendant must prove on appeal that such media coverage "compromised the ability of the particular jury . . . to adjudicate fairly."[6] Accordingly, the defendant must rely on the appellate process to protect his constitutionally guaranteed right to a fair trial. He should not be required to do so. The Court admitted in *Nebraska Press Ass'n v. Stuart*[7] that the appellate process is the least desirable means of redressing fair trial violations: "The costs of failure to afford a fair trial are high . . . [A] reversal means that justice has been delayed for both the defendant and the State . . . . Moreover, in borderline cases in which the conviction is not reversed, there is some possibility of an injustice unredressed."[8]

The "borderline cases" referred to in *Nebraska Press Ass'n* arise most

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1. 449 U.S. 560 (1981).

2. *Id.* at 580-83.

3. Twenty-six states now permit television coverage of trials: Alabama,* Alaska, Arizona, California, Colorado,* Florida,* Georgia,* Idaho, Iowa, Louisiana, Maryland, Minnesota, Montana, Nevada,* New Hampshire,* New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas,* Washington,* West Virginia, and Wisconsin. Those states marked with an asterisk have adopted a permanent rule. *See* Tornquist & Grifall, *Television in the Courtroom: Devil or Saint?*, 17 WILLAMETTE L. REV. 345, 346 n.5 (1981); Graves, *Cameras in the Courts: The Situation Today*, 63 JUD. 24, 25-27 (1979).

4. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI.

5. Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961).

6. 449 U.S. at 575.

7. 427 U.S. 539 (1976).

8. *Id.* at 555. *See also* Comment, *From Estes to Chandler: Shifting the Constitutional Burden of Courtroom Cameras to the States*, 9 FLA. ST. U.L. REV. 315, 330-31 (1981).

frequently when a conviction is challenged on the grounds that the televising of the trial denied the defendant a fair trial. These are borderline cases because the psychological effects on all the trial participants are numerous and intangible.[9] For this reason they are difficult, if not impossible, to prove with any particularity. Yet, the Court in *Chandler* imposed that exact standard of proof. Moreover, the defendant may not be able to afford to appeal a conviction and as a result might be denied a fair trial with no viable recourse. It thus appears that the Court is not adequately protecting the rights of the defendant.

The defendant is not the only person whose rights are affected by the televising of trials. The effects on the trial judge, lawyers, witnesses and jurors must also be considered.[10] It is arguable that televising trials intrudes on their rights as well. Thus, a careful consideration of the effects of televising a trial on all the trial participants is appropriate.

This comment briefly examines what effect the presence of cameras has had on trials in the past, and analyzes the *Chandler* decision and its effect on the televising of trials in the future.[11] Next, the media's alleged right to televise trials is considered and shown to be subordinate to the defendant's right to a fair trial. Finally, this comment looks at the various effects that televising trials has on all of the trial participants in an attempt to illustrate how such television coverage can impede the administration of justice.

II. HISTORY

The roots of the current debate extend back fifty years. Of the trials that involved television or other photographic coverage in the past, three are most illustrative: *State v. Hauptmann*,[12] *Estes v. Texas*,[13] and *Sheppard v. Maxwell*.[14]

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9. The psychological effects include: witnesses feeling nervous and self-conscious, thus impairing their testimony; jurors feeling nervous and self-conscious, thus impairing their ability to determine guilt or innocence; lawyers "playing up" to the cameras, thus not affording their client the best legal assistance possible; and judges having to supervise the cameras, thus distracting their attention from the case at hand. *See generally* Tongue & Lintott, *The Case Against Cameras in the Courtroom*, 16 WILLAMETTE L. REV. 777 (1980).

10. *See* note 9 *supra*.

11. This comment focuses primarily on the problems associated with televising criminal trials due largely to the fact that a criminal defendant has a constitutional right to a fair and impartial trial. U.S. CONST. amend. VI. That right is unique to the criminal defendant and must be considered when determining whether or not to televise a criminal trial. Aside from this aspect of this comment, the discussion is equally applicable to the televising of civil cases.

12. 115 N.J.L. 412, 180 A. 809 (1935), *cert. denied*, 296 U.S. 649 (1935) (trial of the man accused of kidnapping and murdering the two-year-old son of Charles A. Lindbergh).

13. 381 U.S. 532 (1965) (trial of a man accused of swindling).

14. 384 U.S. 333 (1966) (trial of a doctor accused of murdering his pregnant wife).

Because of the notoriety of the victim in the *Hauptmann* case, media coverage was intense and at times outrageous.[15] The inappropriate conduct of the photographers, which manifested itself both inside[16] and outside the courtroom,[17] prompted the American Bar Association to draft Canon 35, a proposed ban on all courtroom photography.[18] However, since the Canons are merely suggested guidelines and are not binding on State Bar Associations, some states continued to televise trials. Regrettably, Canon 35 was of no help to Hauptmann as he was convicted, his appeal denied and his life taken.[19]

In 1965, the Supreme Court entered the arena when it decided *Estes v. Texas*.[20] Under the circumstances presented by this case the Court ruled that the televising of a trial was an unconstitutional infringement on a defendant's sixth amendment rights.[21] The Court, in overturning Estes' conviction, took into consideration the facts and circumstances of the pretrial hearings.[22] It recognized that there had been a "bombardment of

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15. For an excellent discussion of the *Hauptmann* trial and its ramifications see Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUD. 14 (1979).

16. The conduct of the press included the filming of Hauptmann's interrogation at the police station shortly after his arrest; the photographing of witnesses and jurors during recesses (contrary to the judge's orders); the photographing of Lindbergh and his wife while they were testifying (contrary to the judge's orders); and the filming of several days of the trial, with sound, which was subsequently shown in movie theatres across the country. *Id.* at 17-19.

17. The entire city capitalized on the publicity. One writer observed that the "stores were having a run on cameras, that local bars had fixed up a drink of apple-jack known as The Hauptmann . . . and that the sale of 'kidnap ladders' and miniature sleeping suits was progressing nicely." Benchley, *Apres la Guerre Finie*, NEW YORKER, Feb. 23, 1935, at 44.

18. Kielbowicz, *supra* note 15, at 21-23. As subsequently amended in 1972 and embodied in the Code of Judicial Conduct, the ban now reads (in pertinent part): "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. . . ." ABA CODE OF JUDICIAL CONDUCT Canon 3 (1972).

19. Hauptmann v. New Jersey, 296 U.S. 649 (1935).

20. 381 U.S. 532 (1965). Amid incredible publicity and intense coverage of the two-day preliminary hearing and of the actual trial, Estes was convicted. He subsequently appealed to the Supreme Court, alleging he had been denied a fair trial.

21. So much publicity had been generated that eleven volumes of press clippings were filed with the clerk in support of a motion for a change of venue. The motion was granted and the case was tried in a county five hundred miles away. Despite this move, all the courtroom seats were filled, and people stood in the aisles to watch the trial. Although all cameramen were confined to a booth in the back of the courtroom, their activities continued. The opening and closing arguments of the state were broadcast live, the entire trial (except for the arguments of the defense counsel to the jury) was filmed, and daily clips were shown on the evening news. On at least one occasion the film of the day's proceedings was shown in place of the late movie. *Id.* at 536-38.

22. *Id.* at 536. The Court said that broadcast of "[p]retrial [hearings] can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence." Another

the community with the sights and sounds" of the hearing and, to a more limited extent, of the trial.[23] The actions of the defendant,[24] the lawyers and the judge were highly publicized, and the intense coverage was said to have set the trial apart in the public's mind as an extraordinary case.[25] The Court explained that

> the chief function of our judicial machinery is to ascertain the truth. The use of television, however, cannot be said to contribute materially to this objective. Rather its use amounts to the injection of an irrelevant factor into court proceedings. In addition, experience teaches that there are numerous situations in which it might cause actual unfairness - some so subtle as to defy detection by the accused or control by the judge.[26]

In conclusion, the Court stated that "[a] defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nationwide arena. The heightened public clamor resulting from radio and television coverage will *inevitably* result in prejudice. Trial by television is, therefore, foreign to our system."[27] Accordingly, there was no need for the defendant to show actual prejudice in order to have his conviction reversed.

Chief Justice Warren concurred with the majority opinion and explained that televising a trial is unconstitutional in

> (1) that the televising of trials diverts the trial from its proper purpose in that it has an inevitable impact on all the trial participants; (2) that it gives the public the wrong impression about the purpose of trials, thereby detracting from the dignity of court proceedings and lessening the reliability of trials; and (3) that it singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others.[28]

He also agreed that a defendant should not be required on appeal to prove actual prejudice. "The prejudice of television may be so subtle that it escapes the ordinary methods of proof, but it would gradually erode our fundamental conception of trial. A defendant may be unable to prove that he was actually prejudiced by a televised trial. . . ."[29]

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important fact was that four of the jurors empaneled had seen all or most of the broadcasts of the pretrial hearings. *Id.* at 538.

23. *Id.* at 538.

24. As he arrived each day the defendant was badgered outside the courthouse by reporters trying to get a statement. Inside, apart from the constant coverage of the trial, on one occasion a photographer was caught "zooming in" over the defendant's shoulder trying to determine what he was reading. *Id.* at 577-78 (Warren, C.J., concurring).

25. *Id.* at 538.

26. *Id.* at 544-45. The Court enumerated some of the psychological effects of televising trials: distraction of jurors, intimidation of witnesses, additional pressure and responsibility on judges, and adverse shaping of public opinion against a defendant. *Id.* at 545-50.

27. *Id.* at 549 (emphasis added).

28. *Id.* at 565 (Warren, C.J., concurring).

29. *Id.* at 578 (Warren, C.J., concurring).

One year later in *Sheppard v. Maxwell*,[30] the Court again held that the widespread publicity resulting from televising a criminal trial, inherently could deprive a defendant of a fair trial.[31] After some outlandish reporting by the media of the investigation,[32] inquest[33] and trial,[34] Sheppard was convicted. He subsequently appealed to the Supreme Court.[35]

After reviewing the facts of the case, the Court was prompted to label the trial as having been conducted in a "carnival atmosphere."[36] It reversed the conviction without requiring the defendant to show actual prejudice,[37] and stated that

> [d]ue process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.[38]

Thus, the Court continued to recognize the inherent dangers in broadcast

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30. 384 U.S. 333 (1966).

31. *Id.* at 352-55. The Court's description of the facts should be read in full to appreciate the full impact of what transpired.

32. Attention and suspicion focused on Sheppard immediately after the killing. One local newspaper declared that somebody is "getting away with murder" and demanded an inquest. The coroner called one that same day. *Id.* at 338.

33. The inquest was held in a school gymnasium. Reporters and photographers were reserved a place in the front of the room, and the inquest was broadcast live. Sheppard was questioned for more than five hours in the three-day inquest about the night of the murder, his married life with his wife, and an alleged extramarital affair. His attorneys were present during the inquest, but were not allowed to participate. When one of his attorneys attempted to introduce some documents into the record, "he was forcibly ejected from the room by the Coroner, who received cheers, hugs, and kisses from ladies in the audience." *Id.* at 340. Three weeks after the killing, the papers demanded Sheppard's arrest. One newspaper, hungry for a conviction, ran an article entitled *Quit Stalling—Bring Him In!* Later that night Sheppard was arrested. *Id.* at 341.

34. Sheppard was brought to trial just two weeks before the general election in which the trial judge was a candidate to succeed himself and the chief prosecutor was a candidate for a different judgeship. When the jurors were empaneled, their names and addresses were published in the paper. All of them subsequently received letters and phone calls about the ensuing prosecution. At the trial, a table was set up a few feet from the jury box and defense table to accommodate about twenty reporters. Although picture-taking was prohibited while court was in session, still and newsreel pictures were taken of the judge, jurors, witnesses, and defendant as they entered and left the courthouse each day. One television station even staged an interview with the judge as he entered the courthouse. *Id.* at 342-44.

35. Sheppard was convicted in 1954 and spent 10 years in jail after the Supreme Court originally denied certiorari. Sheppard v. Ohio, 352 U.S. 910 (1956). In 1964, the United States District Court granted his petition for a writ of habeas corpus on the grounds that he was denied a fair trial. Sheppard v. Maxwell, 231 F. Supp. 37 (S.D. Ohio 1964), *rev'd*, 346 F.2d 707 (6th Cir. 1965), *cert. granted*, 382 U.S. 916 (1965).

36. 384 U.S. at 358.

37. *Id.* at 352-55.

38. *Id.* at 362.

coverage of trials and did not require the defendant, on appeal, to prove how he actually was prejudiced. That approach, however, ended with the *Chandler* decision.

III. Analysis of *Chandler v. Florida*

Chandler v. Florida[39] involved a constitutional challenge to Florida's revised Canon 3A(7),[40] which permitted the televising of trials. The defendants were convicted as charged and appealed their convictions, without success, through the Florida courts up to the Supreme Court of the United States.[41] At no time did they present any evidence of specific prejudice.[42] On appeal, the Supreme Court affirmed, requiring that actual evidence of prejudice be presented before a conviction could be overturned. Chief Justice Burger wrote: "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."[43] He noted, however, that the defendant's rights are protected by his showing on appeal that "the media's coverage of his case . . . compromised the ability of the particular jury that heard the case to adjudicate fairly."[44]

Thus, the defendant is forced to rely on the appellate process to protect his right to a fair trial. However, the Supreme Court itself has recognized the inadequacy of the appellate process in this regard. In *Sheppard,* the Court said: "[W]e must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that

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39. 449 U.S. 560 (1981). The case involved the trial of two Miami policemen for conspiracy to commit burglary and grand larceny. The case attracted wide-spread media coverage in the Miami area, and, over the objection of the defendants, the trial was televised.

40. *In re* Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764 (Fla. 1979). As revised by that case, Canon 3A(7) reads in part: "Subject at all times to the authority of the presiding judge . . . electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed. . . ." *Id.* at 781.

41. The defendants first appealed to the Florida District Court of Appeals on the grounds that the television coverage denied them their right to a fair and impartial trial. However, since they did not present any evidence of specific prejudice, the Court of Appeals affirmed the conviction. Chandler v. State, 366 So. 2d 64 (Fla. Dist. Ct. App. 1978). The Supreme Court of Florida denied review. Chandler v. State, 376 So. 2d 1157 (Fla. 1979), citing its holding in *In re* Post-Newsweek Stations, Florida, Inc., 370 So. 2d at 771-74, that absent an actual showing of prejudice, it is not unconstitutional to televise a trial.

42. They instead were arguing for a ruling that it is *per se* unconstitutional to televise a trial over the objection of the defendant. 376 So. 2d 1157 (Fla. 1979); 366 So. 2d 64 (Fla. Dist. Ct. App. 1978).

43. 449 U.S. at 574-75.

44. *Id.*

will protect their processes from prejudicial outside interferences."[45] The appellate process cannot afford an appropriate remedy, because in many instances, the damage has already been done. And in those cases where the defendant cannot afford to appeal, whatever remedy might have been available to him is meaningless.

The inherent unfairness of the *Chandler* decision is the burden of proof it places on the defendant. On appeal he must produce evidence of specific prejudice in support of his contention that he was denied a fair trial.[46] Yet, because of the psychological nature of the factors affected, specific proof is difficult if not impossible to produce.[47] The Court in *Estes* recognized the potential prejudicial problems television could create. "Television . . . by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced."[48] With this in mind, the majority in *Estes* chose not to require that the defendant show actual prejudice.[49]

The Court in *Chandler,* however, also realized that the psychological problems associated with televising trials might be difficult to prove with particularity.

> Inherent in electronic coverage of a trial is a risk that the *very awareness* by the accused of the coverage and the contemplated broadcast may adversely affect the conduct of the participants and the fairness of the trial, *yet leave no evidence* of how the conduct or the trial's fairness was affected.[50]

Cognizant of the possibility that the defendant may be prejudiced and not be able to prove it, the Court nevertheless required on appeal that the defendant present evidence of specific prejudice.[51] In *Estes,* Chief Justice Warren mentioned some of the problems associated with the televising of trials and noted that a defendant may be unable to prove actual prejudice in many cases.

> How is the defendant to prove that the prosecutor acted differently than he ordinarily would have, that defense counsel was more concerned with impressing prospective clients than with the interests of the defendant, that a juror was so concerned with how he appeared on television that his mind continually wandered from the proceedings, that an important defense witness made a bad impression on the jury because he was "playing" to the television audience, or that the judge was a little more lenient or a little more strict than he usually might be? And then, how is petitioner to show

45. 384 U.S. at 363.
46. 449 U.S. at 575-82.
47. *See* notes 9 and 26 *supra* and accompanying text.
48. 381 U.S. at 544.
49. *Id.* at 550-52.
50. 449 U.S. at 577 (emphasis added).
51. *Id.* at 582.

> [on appeal] that this combination of changed attitudes diverted the trial sufficiently from its purpose to deprive him of a fair trial?[52]

The decision in *Chandler* appears to be concerned more with the State's right to experiment than the rights of the criminal defendant. Chief Justice Burger wrote: "[t]o stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation."[53] It appears the Court did not want to decide the issue, and instead, shifted the responsibility of ensuring the defendant a fair trial to the states. In this respect, *Chandler* is at odds with previous Supreme Court decisions that prohibit the states from setting guide lines to protect a defendant's constitutional rights in order to promulgate a more uniform federal requirement.[54] In light of the above considerations, the *Chandler* decision appears to be an aberration or perhaps a sign of things to come.

IV. The Media's Right to Cover Trials

A. *Competing First and Sixth Amendment Rights*

The question of whether or not to televise trials balances the media's first amendment right to report on trials against the defendant's sixth amendment right to a fair trial.[55] This balance should tip in favor of the accused. Although the Constitution accords equal weight to each amendment, the Supreme Court when faced with this dilemma has indicated that the right to a fair trial must always be protected.[56] In *Sheppard,* the Court said the balance between first and sixth amendment rights must "never [be] weighed against the accused."[57] In *Estes,* the Court referred to the guarantees of the sixth amendment as "the most fundamental of all freedoms."[58] Even in *Nebraska Press Ass'n,* where the Court found the balance to be tipped in favor of the protection of first amendment rights, it was recognized that first amendment rights are not absolute,

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52. 381 U.S. at 579 (Warren, C.J., concurring).

53. 449 U.S. at 579 (quoting New State Ice Co. v. Hiebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

54. *See, e.g.,* Miranda v. Arizona, 384 U.S. 436 (1966) (individual must be informed of his right against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent defendant entitled to court-appointed attorney). *See also* Comment, *supra* note 8, at 326.

55. A detailed analysis of these competing rights is beyond the scope of this comment. For a good discussion on this topic, see generally Erickson, *Fair Trial and Free Press: The Practical Dilemma,* 29 Stan. L. Rev. 485 (1977); Isaacson, *Fair Trial and Free Press: An Opportunity for Co-existence,* 29 Stan. L. Rev. 561 (1977); Comment, *Balancing Right to Fair Trial Against Statutory Right of Public Access to Court Proceedings After Gannett,* 14 Suffolk U.L. Rev. 1403 (1980).

56. *See, e.g.,* Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961).

57. 384 U.S. at 362.

58. 381 U.S. at 540. *See also* Erickson, *supra* note 55, at 486.

and may necessarily yield to the defendant's right to a fair trial in certain instances.[59]

Richmond Newspapers, Inc. v. Virginia[60] held that the first amendment not only protects speech and press, but also gives the public and the media the right to attend trials. However, as stated by Justice Stewart:

> [T]his does not mean that the first amendment right of members of the public and representatives of the press to attend civil and criminal trials is absolute. Just as a legislature may impose reasonable time, place and manner restrictions upon the exercise of first amendment freedoms, so may a trial judge impose reasonable limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public.[61]

Thus, in those cases where first and sixth amendment guarantees conflict, the sixth amendment right to a fair trial should weigh heavier in the balance.

B. *The "Right" To Educate the Public*

It is asserted by the media that televising a case would better educate the public as to what actually transpires during a trial. Since recent public opinion polls reflect the public's low opinion of lawyers, judges and the court system in general, it is arguable that the public's opinion and confidence in the system can be improved by educating the people as to what goes on behind the courtroom doors.[62] *Richmond Newspapers, Inc.* lends some support to this argument.

> People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case.[63]

Television reporters also point to recent surveys indicating television to be the number one news source for most of the American public,[64] and claim that trials should be televised in order to accomodate the majority.

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59. 427 U.S. at 562-70. The Court stated that restrictions could be put on the press' exercise of its first amendment rights if no other alternative was available to protect the sixth amendment right of a defendant.

60. 448 U.S. 555 (1980).

61. *Id.* at 600 (Stewart, J., concurring).

62. *See* Tornquist & Grifall, *supra* note 3, at 365-66. *See also* K. DEVOL, MASS MEDIA AND THE SUPREME COURT: THE LEGACY OF THE WARREN YEARS 313 (1976); Loewen, *Cameras in the Courtroom: A Reconsideration,* 17 WASHBURN L.J. 504, 512-13 (1978).

63. 448 U.S. at 572.

64. D'Alemberte, *Cameras in the Courtroom? Yes,* 7 BARRISTER 6, 8 (Spring 1980) (citing tests conducted by A.C. Nielson, the Federal Communications Commission, and the Roper Organization, Inc.).

The counterargument maintains that television broadcasters are not interested in educating the people but rather seek primarily to provide entertainment.[65] Rarely, if ever, will an entire trial be broadcast on television. Instead, one or two minute "spots" on the evening news will be devoted to a trial. Such random selections from a trial will not serve to educate, but rather may misinform the public.[66] Justice Warren in *Estes* also realized that the televising of trials might become a form of entertainment.

> The televising of trials would cause the public to equate the trial process with the forms of entertainment regularly seen on television and with the commercial objectives of the television industry. . . . In addition, if trials were televised there would be a natural tendency on the part of broadcasters to develop the personalities of the trial participants so as to give the proceedings more of an element of drama.[67]

The few cases that are broadcast in their entirety will, because of the necessity of sponsorship, be those that best attract the public's interest because of the personalities involved or the unique facts of the case. Accordingly, the "educational" benefits of broadcasting such cases will be minimal. As Justice Harlan said in *Estes:*

> [T]he public's interest in viewing the trial is likely to be engendered more by curiosity about the personality of the well-known figure who is the defendant . . . or about the details of the particular crime involved, than by [an] innate curiosity to learn about the workings of the judicial process itself.[68]

V. The Effect of Televising on the Trial Participants

A. *Trial Judge and Attorneys*

The trial judge would be affected by the televising of a trial as he must assume the additional responsibility of supervising all aspects of the broadcast, in order to ensure that it does not interfere with the trial. The *Estes* Court recognized that "[t]he telecasting of a trial . . . diverts [the judge's] attention from the task at hand—the fair trial of the accused."[69]

The physical distractions associated with the mechanics of broadcasting, however, are but one category of the additional problems that confront the judge. The initial decision of whether or not to allow televising,

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65. *See* Day, *The Case Against Cameras in the Courtroom,* 20 Judges J. 18, 19-20 (1981).

66. *Id.* at 20. Judge Day does not support the proposition that educating the public (even if accomplished) is a valid reason to televise trials. "The judicial process is not designed or intended to educate, inform, or entertain the public. It is a search for truth." *Id.* at 19. *See also* Sutro, *TV Cameras in the Courtroom,* U.S. News and World Report, April 17, 1978, at 51.

67. 381 U.S. at 571 (Warren, C.J., concurring).

68. *Id.* at 594 (Harlan, J., concurring).

69. *Id.* at 548.

in those states which permit it, is within the judge's discretion.[70] This decision, by its nature, will be subject to pressure from the television stations. This is especially true in the large number of states where judges are elected. Justice Douglas, in a law review article, discussed this problem:

> There is pressure these days on courts all over the land to put trials and hearings on radio and television. In one state the radio and TV industry leveled their guns at a court which had banned these broadcasts. At fifteen minute intervals there were spot announcements over the air reminding the people that 'the courts do not belong to the lawyers' and urging the listeners to get busy and write the members of the court to change the rule.[71]

Judges should not be subject to this kind of political pressure.

The political power of television can be used by a judge as well as against him. At election time, he may want the people to see how well he handles a trial, and for this reason might permit the televising of a trial of great notoriety.[72] This would create a pressure upon other judges to do the same.[73]

If a trial is televised, the judge may succumb to the public's demands for a conviction. He might allow the admission of evidence warranting constitutional exclusion.[74] This may be an especially strong temptation in a contested election year, the presiding judge realizing that the public neither understands constitutional law nor approves of defendants being acquitted on technicalities.[75]

Nor are attorneys immune from the temptation of using a televised trial as a forum. They may "play up" to the viewing audience or choose to cross-examine a witness, knowing that neither is in the best interest of his client, simply to "show-off."[76] The public prosecutor (elected in many states) may choose to prosecute a case simply to impress his electorate watching on television.[77] Televising trials inherently presents these dangers.

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70. *See, e.g., In re* Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, 781 (Fla. 1979). Florida Canon 3A(7) was revised to read, in part: "Subject at all times to the authority of the presiding judge . . . electronic media and still photography coverage . . . shall be allowed." *Id.*

71. Douglas, *The Public Trial and the Free Press*, 33 ROCKY MTN. L. REV. 1, 1 (1960).

72. Because of the problems evidenced in the *Sheppard* and *Estes* trials, this type of case should not be televised.

73. 381 U.S. at 549.

74. Although this may be grounds for reversal on appeal, the defendant should not be required to rely on the appellate process to protect a right that should be guarded at the trial level. *See* notes 43-49 *supra* and accompanying text.

75. *See* Hirschhorn, *Cameras in the Courtroom? No*, 7 BARRISTER 7, 56 (Spring 1980).

76. Janus, *Fair Trial - Free Press: What Price Justice?*, 5 VA. BAR ASS'N J. 8, 12 (1979). *See also* 381 U.S. at 549.

77. *See* Janus, *supra* note 76, at 12.

B. *Witnesses*

Televising a trial may effect a witness in several ways. First, the witness may be distracted while testifying. It is argued that such distractions are minimal today with the technological advances in the television equipment that is used;[78] however, the physical distractions caused by the equipment are not the sole problem. A serious concern arises from the mere presence of the cameras. As the Court in *Estes* noted, "distractions are not caused solely by the physical presence of the camera and its telltale red lights. . . . It is the awareness of the fact of telecasting" that the witness feels throughout the trial.[79] In his concurrence, Chief Justice Warren went further to say:

> Whether they do so consciously or subconsciously, all trial participants act differently in the presence of television cameras. And, even if all participants make a conscientious and studied effort to be unaffected by the presence of television, this effort in itself prevents them from giving their full attention to their proper function at trial. Thus, the evil of televised trials . . . lies *not in the noise and appearance of the cameras, but in the trial participants' awareness that they are being televised.*[80]

Recent surveys support Chief Justice Warren's view. One such survey of trial participants, conducted by the Cleveland Bar Association, found that a significant number of witnesses admitted not only to being aware of the presence of the television cameras during their testimony, but also to being distracted, nervous, and self-conscious.[81]

The natural result of such witness response is a decline in the quality of their testimony. Even "seasoned" actors experience a form of stage fright when appearing before television cameras.[82] A witness who has never appeared before a television camera may very well be too frightened to testify. The *Estes* Court recognized this danger when it stated:

> The quality of the testimony . . . will often be impaired. The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency to-

78. *See* 370 So. 2d at 775. *See also* Loewen, *supra* note 62, at 509-12.

79. 381 U.S. at 546.

80. *Id.* at 569-70 (Warren, C.J., concurring) (emphasis added).

81. Results of survey of trial participants conducted by Cleveland Bar Association in 1980, *reprinted in* Day, *supra* note 65, at 21, 51.

82. Lyman & Scott, *Stage Fright and the Problem of Identity*, in DRAMA IN LIFE: THE USES OF COMMUNICATION IN SOCIETY 136-37 (J. Combs & M. Mansfield ed. 1976). "Stage fright" was defined as "a consciousness of one's own limitations, at a moment when limitations of any sort place a barrier between what one wants to do and what one can do." *Id.* at 136 (quoting Heylbut, *How to Abolish Fear Before Audiences*, ETUDE, Jan., 1939, at 12).

ward overdramatization.[83]

Another way in which the witness may be affected by the televising of trials is that he may consciously alter his testimony in response to watching other witnesses testify on television,[84] so as to make his testimony more persuasive[85] or simply to conform with previous testimony in order to avoid appearing foolish on television.[86] A witness may also change his testimony in response to pressure from friends and neighbors, watching the trial on television, that he testify in a certain way so as to influence the jury to reach the "proper" decision.[87]

Another important, yet little-considered, concern is the witness's right to privacy. Although not addressed in *Chandler,* this right has been recognized by other authorities who note that forcing witnesses to testify before television cameras may constitute an invasion of this right.[88] They may be approached on the street by strangers, who saw them on television, demanding an explanation for their testimony.[89] Justice Douglas wrote that if witnesses are forced to appear on television against their will, "then their essential dignity as human beings is being violated."[90] Justice Stewart, dissenting in *Estes,* admitted that "[c]onstitutional problems of another kind might arise if a witness . . . were subjected to being televised over his objection."[91]

An additional problem is that witnesses may refuse to testify because of the television camera. Even without the camera this is not an uncommon problem. Many potential witnesses fear testifying because of possible em-

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83. 381 U.S. at 547. *See also* Janus, *supra* note 76, at 11; Tongue & Lintott, *supra* note 9, at 790-92.

84. 381 U.S. at 547.

85. *See* Tongue & Lintott, *supra* note 9, at 791-92.

86. *See* Janus, *supra* note 76, at 11. Psychological tests conducted show that a person may change his belief or conduct when he is the only one in a group with that belief or conduct. Test results also indicate that the more "public" that belief or conduct becomes, the more he is likely to be influenced or pressured to change. *See* B. KOLASA, INTRODUCTION TO BEHAVIORAL SCIENCES FOR BUSINESS 458-60 (1969). Thus, if a witness were to testify opposite of what everyone else had or would, he may change his testimony, knowing that he might look foolish on television as the odd person in the group.

87. *See* Note, *Televised Trials: Constitution Constraints, Practical Implications, and State Experimentation,* 9 LOY. U. CHI. L.J. 910, 928 (1978).

88. For a discussion of the background of this asserted right, see generally Gerety, *Redefining Privacy,* 12 HARV. C.R.-C.L.L. REV. 233 (1977); Prosser, *Privacy,* 48 CALIF. L. REV. 383 (1960); Warren and Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890); Note, *Privacy in the First Amendment,* 82 YALE L.J. 1462 (1973). The Supreme Court itself recognized that a penumbra of rights does exist with respect to privacy. *See, e.g.,* Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

89. 381 U.S. at 547.

90. Douglas, *supra* note 71, at 7.

91. 381 U.S. at 613 (Stewart, J., dissenting).

barrassment. Others simply do not want to "get involved."[92] Often witnesses must be subpoenaed to testify. The addition of television cameras into the courtroom can only serve to magnify the problem.[93] Competent witnesses are needed for just adjudication. Anything that might prevent a witness from testifying ought to be avoided.

It is contended that the problem of witnesses refusing to testify because of objection to being televised can be alleviated because, in most states, the judge has the discretionary power to prohibit the televising of certain witnesses.[94] However, if trial judges fail to prohibit the televising of witnesses in appropriate situations, this could serve as a deterrent to future witnesses in similar situations.[95]

C. *Jurors*

The effect of televising a trial on the jurors is of critical importance as it will be these men and women who decide the guilt or innocence of the accused in a criminal trial. Along with feeling nervous or self-conscious, many jurors (as many as fifty percent in one survey) fear physical harm as a result of the decision they make.[96] It is hard to imagine that the juror, arguably the most important element in the search for truth, can give his undivided attention to the case at hand when he is in fear for his personal safety, a fear magnified when one's face is being transmitted throughout the entire community, state, or nation.

Besides distracting the jurors' attention, televising a trial creates another problem in that it brings public opinion into the decision-making process.[97] Chief Justice Warren in *Estes* recognized this potential danger:

> Broadcasting in the courtroom would give the television industry an awesome power to condition the public mind either for or against an accused.

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92. *See Scaring Off Witnesses*, TIME, Sept. 11, 1978, at 41. *See also* Tongue & Lintott, *supra* note 9, at 790.

93. *See* Sutro, *supra* note 66, at 51.

94. *See, e.g., In re* Post-Newsweek Stations, Florida, Inc., 370 So. 2d at 779. The revised Florida Canon 3A(7) reads in part:

> 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 of other types of media.

Id.

95. 370 So. 2d at 778. The Florida Supreme Court made specific mention of three cases where the trial judge refused requests by witnesses and victims not to have their testimonies televised. The refusal was upheld in each case. One case involved the widow of a murder victim; another involved a prison inmate who feared retaliation; and the third involved a sixteen year-old rape victim. *Id.*

96. Day, *supra* note 65, at 21, 51.

97. Note, *supra* note 87, at 928.

> By showing only those parts of its films or tapes which depict the defendant or his witnesses in an awkward or unattractive position, television directors could give the community, state, or country a false and unfavorable impression of the man on trial.[98]

Another legal writer observed that "not only would television bring with it to the courtroom the specter of public opinion, but it could at the same time shape that opinion."[99] The danger is that the jurors, subject to pressure from that public opinion, may tailor their verdicts in accordance with it. Psychological studies reveal that people will succumb to such pressure and conform their opinions to that of the perceived group belief.[100] This danger is magnified when the decision to be made is widely publicized.[101] In essence, televising a trial that the public believes ought to result in a conviction creates external pressure to convict.

D. *The Defendant*

The defendant in a criminal trial has a sixth amendment, constitutional right to a fair trial before an impartial jury. From the preceding discussion, it should be apparent that the televising of a trial may adversely affect the judge, attorneys, witnesses, or jurors. If this occurs, then the defendant has been denied a fair trial.[102] Since the Court in *Chandler*[103] refused to ban the broadcasting of trials in all cases, if the defendant believes that his sixth amendment right has been violated by the televising of his trial, he will be required to prove on appeal exactly how the media coverage "compromised the ability of the jury to judge him fairly."[104] When the factors that can adversely affect the fairness of a trial are psychological, the defendant will have a difficult time proving their existence and their effect on the trial participants with any particularity.[105] He may thus be deprived of a fair trial without the means of proving it.

If the defendant does manage to have his conviction overturned on appeal, he may have a difficult time finding uninformed impartial jurors for a retrial.[106] A recent experiment reveals that many prospective jurors

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98. 381 U.S. at 574 (Warren, C.J., concurring).

99. Note, *supra* note 87, at 928.

100. KOLASA, *supra* note 86, at 458-60. *See also* Katzer, *Cameras in the Courtroom: The Kansas Opposition*, 18 WASHBURN L.J. 230, 238 (1979).

101. Katzer, *supra* note 100, at 238.

102. *See generally* Note, *Televising Criminal Trial of Widespread Public Interest Inherently Deprives Defendant of Due Process*, 34 FORDHAM L. REV. 329 (1965).

103. 449 U.S. 560 (1981).

104. *Id.* at 580.

105. *See* notes 50-52 *supra* and accompanying text. *See also* Douglas, *supra* note 71, at 10. Writing on the subject, he said when "the trial is opened up to broadcasting and television, the damage done may be too subtle to measure accurately." *Id.*

106. *See* Note, *supra* note 87, at 928-29.

enter a second trial remembering facts from the first trial that are both incorrect and prejudicial.[107] A change of venue would be mandatory, but with cases drawing widespread media coverage, such a change in venue would fail to eliminate the prejudice.

Televising a trial does nothing more than turn public opinion against a defendant. Such adverse public opinion spawns pressure to convict.[108] This is not conducive to the notion of a fair trial. Justice Douglas once wrote: "A man on trial for his life or liberty needs protection from the mob. Mobs are not interested in the administration of justice. They have base appetites to satisfy."[109] He concluded that "[s]ince the defendant's rights are the interests protected by the public trial, the end is best served by banning all photography, broadcasting, and television."[110]

VI. The Future of Cameras in the Courtroom

Despite all the potential problems and dangers associated with televising trials, many states like Florida continue to permit such coverage. This is due, at least in part, to the lack of definitive data regarding the psychological effects of televising trials on the trial participants.[111] The Court in *Chandler* recognized this fact and made clear that if empirical data should become available proving the adverse effects of televising trials, a different result would be warranted.

> If it could be demonstrated that the mere presence of photographic and recording equipment and the knowledge that the event would be broadcast invariably and uniformly affected the conduct of participants so as to impair fundamental fairness, our task would be simple; prohibition of broadcast coverage of trials would be required.[112]

This language should prompt a study of the psychological effects of televising trials. More surveys need to be made and more data collected. Until such definitive data is available, criminal trials should not be broadcast over the objection of the defendant. The defendant's right to a fair trial ought to be protected against any risk of prejudice.[113] A survey of

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107. *See* Netteburg, *Does Research Support the Estes Ban on Cameras in the Courtroom?*, 63 Judicature 467, 472-75 (1980). That statistic was the result of a survey taken after the Wisconsin trial of Jennifer Patri. She was tried for murder and arson but was convicted of murder only. People who had seen the trial on television responded to questions on various aspects of it. Fifty-nine percent of the people surveyed incorrectly thought that Patri had been convicted on both charges. *Id.* at 474. Recall of such "facts" by jurors at a second trial would be highly prejudicial.

108. *See* notes 96-101 *supra* and accompanying text.

109. Douglas, *supra* note 71, at 6.

110. *Id.* at 10.

111. *See In re* Post-Newsweek Stations, Florida, Inc., 370 So. 2d at 775-76.

112. 449 U.S. at 575.

113. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. at 551-56. In attempting to protect that right, the Court cited a type of "balancing" test promulgated by Justice Learned Hand.

attorneys taken by the Cleveland Bar Association indicated that a majority of them believe that the consent of all the parties should be secured before televising a trial. A smaller majority also believed that the consent of the witnesses and victims should likewise be secured.[114] Acquiring such consent, though admittedly difficult, would ensure judicial efficiency and would create less grounds for appeal, thus encouraging finality.

VII. CONCLUSION

There are many problems associated with the televising of trials, especially criminal trials. Of paramount importance is the possibility of denying the defendant a fair and impartial trial. The possible adverse effects of such televising on the judge, attorneys, witnesses, jurors, and public opinion in general put the ability to conduct a fair trial in jeopardy. These psychological effects can do much to change the complexion of a case and yet leave no observable evidence of their existence. According to the decision in *Chandler*, the defendant on appeal must prove the existence of such psychological factors with particularity. This is clearly an unfair and unreasonable burden.

Admittedly, there is insufficient empirical data concerning the psychological effects, on the trial participants, of televising a trial. Although proponents view this as reason enough for continuing to televise trials,[115] it is, to the contrary, justification for prohibiting the televising of a trial over the objection of the defendant. He may very well be denied a fair trial without the ability to prove it. For this reason and until more data is collected and analyzed and the effects of televising actually known, televising a trial, over the objection of the defendant, should be prohibited.

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According to that test, the balance would tip in favor of the defendant in a particular case if "[t]he gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 554. Thus, the Court was concerned with the possibility of harm to the defendant and sought to guard against it.

114. Day, *supra* note 65, at 51.

115. Chandler v. Florida, 449 U.S. at 575-80.