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Televising Court Trials in Canada: We Stand on Guard for a Legal Apocalypse

Lorne H. Abugov

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I. *Introduction*

Four years ago an eminent Canadian jurist denounced the presence of a CBC television crew filming trial participants as they emerged from his courtroom at Osgoode Hall. Chief Justice G. A. Gale of the Ontario Supreme Court found the incident "quite offensive" and bid the crew to leave the hallway and the courthouse "because I was satisfied that their operations constituted an interference with the administration of justice."[1]

Four years later the Canadian position on the presence of news cameras in the courts and within its precincts has remained unaltered, unbending and, worst of all, uncontroverted. A blanket prohibition exists in every Canadian courtroom against the use for publication or otherwise of any news or still camera. Failure to heed the proscription invites the sting of contempt law and, one would assume, from the words of Chief Justice Gale, the eternal damnation of the Canadian judiciary.

But four years hence — perhaps sooner, possibly later — the television news cameras will reappear in the august upper rotunda of Osgoode Hall. And this time, by every indication, the broadcast industry will settle for nothing less than unimpeded access to cover trial proceedings, subject only to court-imposed limitations governing the press. It is frankly naive to believe that the wave of critical reaction to the television ban that has swept across the United States during the past three years will crest and subside without leaving any mark on the Canadian legal community.

In light of recent United States cases like *State* v. *Solorzano*[2] and *State* v. *Zamora,*[3] an examination of which will form an integral part of this paper, it is clear that the television industry is on the

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1. G. Gale, *The Problem of Television in the Courtrooms* (1974), 8 Law Soc'y of U.C. Gaz. 4 at 4.
2. (1976), 92 Nev. 144; 546 P.2d 1295
3. (1977), No. 77-25123-A (Dade County Cir. Ct.)

threshold of gaining entry into that nation's courtrooms on a full-time basis. Once this occurs, and 14 states have already granted their permission,[4] televised civil and criminal trials will become second nature to Americans and, owing to the nature of North American broadcasting, to Canadians as well. That Canadians may soon be able to tune into American network broadcasts of trial and appeals cases may *de facto* settle the issue in this country well before it comes up for judicial determination. Therefore, Canadians concerned about the advent of televised court proceedings and its effect on the pursuit of justice must prepare in advance to ensure maximum harmony between the electronic media and the bench.

This article then will advocate the view that Canadian courts can ill-afford to sit by idly while a legal revolution of sorts rages south of the border. Back in 1974, when Chief Justice Gale addressed the Provincial Judges of Ontario, one could hardly take issue with the smug, slightly reassuring view that television cameras would never be permitted inside the courtroom to darken the fairness, dignity and integrity of the proceedings. Today, that view is being tested empirically in the United States and, almost without exception, is being found to have a hollow ring.[5] This article will urge Canadian jurists to cast a probing eye south to developments in the United States, where daily recognition is being accorded by the American bar and bench to the media's claim that cameras in the courtroom are not inherently perverse to a defendant's right to a fair trail.

It will be necessary first to examine the law of the land in the United States in order to sketch the outlines of the courtroom television controversy. Then, the historical prelude to recent state-level decisions allowing television will be viewed. The traditional ban on televising trials, first enunciated by the American Bar Association in 1952[6] and enshrined in law by the United States Supreme Court in the *Estes* v. *Texas* case,[7] will be discussed along with the maverick response by three states.[8] An in-depth look at the *Estes* judgement will furnish arguments pro and con and

4. The states which either allow televised court trials or are conducting experiments on the subject are: Colorado, Florida, Kentucky, Minnesota, Montana, New Hampshire, Ohio, Wisconsin, Nevada, Washington

5. *Infra,* the discussions of the *Soloryano* case at p. 34, and of the *Zamora* case at p. 38

6. ABA Cannons of Judicial Ethics No. 35; first adopted in 1937 and extended to include television in 1952

7. (1964), 381 U.S. 532

8. Colorado, Oklahoma and Texas

demonstrate how polarized the American legal community has grown over the issue, what with certain states aligning themselves with the media while others line up alongside the U.S. Supreme Court. Several experimental state plans will be assessed to determine the successes and failures of televising court proceedings. And, finally, a proposed set of guidelines will be presented for possible use by Canadian courts when — as opposed to if — the day arrives that cameras in the courtroom are a commonplace occurrence as opposed to their present status of unwelcome interlopers barring the path to justice.

II. *The Law of the Land Says "No" . . .*

If the television news camera is to attain a permanent spot inside the Canadian and American courtroom, two formidable obstacles must be hurdled. First, it must be recognized that any state which permits the filming of a trial does so in flagrant and obvious disregard of the views of the United States Supreme Court.[9] Secondly, allowing telecasts of court proceedings directly challenges Canon 3A(7) of the American Bar Association's Code of Judicial Conduct formerly Canon 35, of the Canons of Judicial Ethics. While the former restraint would seem the more imposing, the ABA's canons in this context have, since the earliest days of radio and then television, been seen as the real backbone in the campaign against the use of news cameras in the courts. In concert the two have effectively stymied any attempt of the television industry to secure a foothold within the courtrooms of the nation until very recently.[10]

The natural starting point for a discussion of the broad outlines of the camera-in-the-courtroom controversy is the 84-page decision of the U.S. Supreme Court in the *Estes* case, wherein the court held by a 5-4 vote that the mere presence of a television camera inside the courtroom during the trial invokes a presumption that the accused is denied his constitutional right to a fair trial under the due process clause of the Fourteenth Amendment.

The court had some difficulty in pinpointing the exact evils of televising court trials, as reflected in its conclusion that television cameras are an unsettling influence in the courtroom even though "one cannot put his finger on its specific mischief."[11] As Mr.

9. (1964), 381 U.S. 532
10. *Supra*, note 5
11. (1964), 381 U.S. 532 at 544 (*per* Mr. Justice Clark delivering the opinion of the Court)

Justice William O. Douglas observed, it is not the novelty or uncertainty surrounding the introduction of cameras in the court that posed the real danger, but rather television's "insidious influences which it puts to work in the administration of justice."[12] Mr. Justice Tom Clark, speaking for the majority, felt that televising trials was a procedure "inherently lacking in due process"[13] and appropriate for the principle in *Rideau* v. *Louisiana,*[14] wherein no indentifiable showing of prejudice to the accused need be shown to warrant contempt. In *Rideau,* the telecast of a 20 minute jailhouse confession by the accused to charges of robbery, kidnap and murder turned his trial into a farce and resulted in a denial of due process when Rideau's request for a change of venue was turned down.

Three specific categories of harm arise in connection with the television broadcast of trials. The court held that barring technological advances in the state of the art, television coverage could not but: a) *physically* disrupt the smooth flow of a trial; b) *psychologically* alter the balance of the proceedings by affecting the various participants in the trial and c) *legally* prejudice the accused by infringing on his right to a fair trial and by discriminatorily subjecting him to television scrutiny. These physical, psychological and legal objections to the camera's presence in the courtroom form the broad, overarching bounds to the controversy, from which all other arguments arise.

The television industry's challenge and the court's response are traditionally framed in the language of constitutional considerations. Simply stated, in order to determine whether a trial may or may not be televised the rights of the defendant and participants in the trial must be juxtaposed against the rights of the media. Four separate and conflicting constitutional guarantees have been held to govern the television dispute. There are: 1) the right of privacy of the accused, the witnesses and the jurors; 2) the right of freedom of the press; 3) the right of public trial and 4) the right of the accused to a fair trial.[15]

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12. W. Douglas, *The Public Trial and the Free Press* (1960), 33 Rocky Mt. L. Rev. 1 at 1
13. (1964), 381 U.S. 532 at 542-3
14. (1962), 373 U.S. 723
15. For an excellent discussion see: S. Kulwin, *Televised Trials: Constitutional Constraints, Practical Implications, and State Experimentation* (1977-78), 9 Loyola U. of Chi. L. Rev. 910

1. *The right of privacy of the accused, the witnesses and the jurors . . .*

While the United States Constitution makes no express mention of a right of privacy, case law has established that privacy is implicit in several amendments. It has been defined as the right to foster and preserve one's "inviolate personality"[16] which itself has been judicially interpreted as representing a person's ability to maintain "independence, dignity and integrity."[17] The court has also held that when ". . . one becomes identified with an occurence of public or general interest he emerges from his seclusion and it is not an invasion of his 'right of privacy' to publish his photograph or otherwise to give publicity to his connection with that event."[18] A further *caveat* states that the law refuses to "recognize a right of privacy in connection with that which is inherently a public matter."[19] In *Craig* v. *Harney,* the Supreme Court stated:

"A trial is a public event. What transpires in the court room is public property. Those who see and hear what transpired can report it with impunity."[20]

The right of privacy, then, would appear an inadequate constitutional vehicle to bar news cameras from the courts and must therefore be argued in a supportive capacity. Thus, the courts have held that "privacy interests at times must yield to other compelling constitional considerations."[21]

2. *The right of freedom of the press . . .*

The foremost constitutional weapon in a newsman's arsenal is the argument that by forcing him to check the tools of his trade outside the courtroom, the court is depriving him of his freedom to cover newsworthy incidents occurring in a public place.[22] The court has, however, repeatedly affirmed the right of the television newsman to attend a trial and report the goings-on therein. His position is no different than that of a newspaperman, in that neither has an

16. *Id.* at 914
17. *Id.*
18. *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics* (1956), 296 P.2d 465 at 470 (Colo. Sup. Ct. *en banc*)
19. *Id.*
20. (1946), 331 U.S. 367 and 374
21. *Supra,* note 15 at 918
22. U.S. Const. amend. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

unlimited right of access to proceedings as Mr. Justice Clark explained in *Estes:*

> . . . The television reporter has the same privilege. All are entitled to the same rights as the general public. The news reporter is not permitted to bring his typewriter or printing press. When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case.[23]

Restrictive orders of the court, such as that which bars the use of cameras in the courtroom, are said to be constitutionally valid when news coverage of a trial results in "an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."[24] This test emerged from cases which dealt with prejudicial pretrial publicity and not, as here, to television coverage inside the courtroom where the test is held to be less stringent. Televised coverage of a trial can be outlawed when there is potential possibility of a threat to the proceedings, as opposed to an immediate threat that a miscarriage of justice will ensue. For these reasons, the court has not seen fit to find the banishment of news cameras to be a curtailment of a reporter's constitutional right to freedom of the press.

3. *The right of public trial . . .*

Reporters have also alleged that barring their cameras from the court amounts to a contravention of the public's right to know of activities conducted inside the courtroom. This claim, mind you, derives itself from a misapplication of the basic Sixth Amendment guarantee and the rationale behind its enactment. The right, says the court, is one adhering to the individual accused; it is designed for his exclusive benefit and protection.[25] It was implemented to safeguard the accused from Star Court-style judicial proceedings and, by corollary, to guarantee his inviolable right to a fair and open hearing. Where the television reporter's claim enters into this interpretation is not readily apparent. Even adherents to the

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23. (1964), 381 U.S. 532 at 540
24. *U.S.* v. *Dickinson* (1972), 465 F.2d 496 at 507 quoting from *Craig* v. *Harvey* (1946), 331 U.S. 367 at 376
25. *United Press Associations* v. *Volente* (1954), 308 N.Y. 71; 123 N.E. 2d 777 (Ct. App.)

misconstrued stance outlined above would have a difficult time in convincing the Supreme Court that the public's right to know is sufficiently absolute as to warrant infringing on the accused's right to a fair trial. For it is this right, and specifically the due process clause tucked into the Fourteenth Amendment, that ultimately directed the court in *Estes* to a finding in the accused's favour.

4. *The right of the accused to a fair trial . . .*

Whether it be borne of a true concern for the rights of the accused, or, as the late Mr. Justice Jerome Frank suggested cynically,[26] out of a fear of detracting from the dignity of the court and its slightly pompous actors, trial judges traditionally have supported the ban on courtroom television.

Prohibiting courtroom television, as has been shown, can only be justified from a constitutional standpoint if it can be shown that the appearance of cameras would threaten a fair trial. This right of the accused, the court has held, assumes paramountcy over those already discussed in the context of courtroom broadcasting. Thus, the Supreme Court in *Estes* could frame the issue narrowly as "only whether petitioner was tried in a manner which comports with the due process requirement of the Fourteenth Amendment."[27] Due process has been deemed to have been denied in instances where the accused's trial was "shocking to the universal sense of justice."[28] The ultimate question, therefore, is this: Are the physical, psychological and legal effects of courtroom television sufficiently detrimental to the course of a trial as to be shocking to a universal sense of justice? The court in *Estes* said yes.

Although they had never directly confronted the issue before, the court was predisposed by the existence of the ABA's Canon 35, itself the embodiment of almost 40 years of fruitful discussion on the topic by ABA members who foresaw that in-court news cameras could become a hotly-contested free press — fair trial issue.

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26. Rodell, *T.V. or No T.V. in Court?*, N.Y. Times, Apr. 12, 1964, S 6 (magazine), at 103, quoted in Goldman and Larson, *News Camera in the Courtroom During State* v. *Solorzano: End to the Estes Mandate?* (1978), 10 S.W.U.L. Rev. 2001 at 2006 n. 31

27. (1964), 381 U.S. 532 at 535 (*per* Mr. Justice Clark delivering the opinion of the Court)

28. D. Fretz, *Cameras in the Courtroom* (Spring, 1978), 14 Trial at 28-9

III. *Historical Prelude to the Estes Decision . . .*

1. *Canon 35: Its Origin and Its Role*

Since its inception in 1937, the ABA's Canon 35 of its Canons of Judicial Ethics has led a checkered existence. It has at times been extolled mightily as the watchdog of courtroom impartiality, while at others complainants have publicly rued the day it was drafted. Journalists have always seen it as a non-legal smokescreen, a monkey wrench in the otherwise cooperative-working relationship between the media and the courts. What follows then is a brief chronology of the events leading up to and arising out of the adoption of Canon 35:

1927 The Maryland Court of Appeals affirms contempt charges against Baltimore newsmen who violated a court order banning news photography during a murder trial. The judicial restraint order is held not to be an abridgement of freedom of the press.[29]

1932 The ABA is presented with a draft resolution seeking to ban outright the use of radio recording instruments and the practice of radio broadcasting trials.

1935 The Supreme Court refuses to reverse the trial verdict in the Lindbergh baby kidnapping case. Accused Bruno Hauptmann was victimized by the presence of over 800 newsmen whose antics turned the trial into a media fishbowl.[30]

1937 Prodded by the circus atmosphere of the Hauptmann trial, the ABA House of Delegates first adopts Canon 35, which reads:

> Proceedings in court should be conducted with dignity and decorum. The taking of photographs in the court room 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.

1941 A further proscription against use of radio in the courtroom for newsgathering purposes is incorporated into Canon 35.

1952 The ABA bans television cameras from the courts and proscribes televising of court proceedings. Canon 35 is amended to read:

> *Improper Publicizing of Court Proceedings:* Proceedings in court should be conducted with fitting dignity and decorum. The taking

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29. *Ex parte Sturm* (1927), 136 A. 312 (App. Ct.)

30. *Hauptmann* v. *New Jersey* (1935), 296 U.S. 649, *denying cert. to (sub nom.) State* v. *Hauptmann* (1935), 115 N.J.L. 412 (Ct. Err. and App.)

of photographs in the courtroom during sessions of the courts or recesses between sessions, and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.

1954 A special Bar-Media committee on Free Press — Fair Trial reports that television in the courtroom would impose undue policing duties on the trial judge and have an injurious psychological impact on the trial actors.

1956 The State of Colorado conducts an investigation into the propriety of Canon 35's television ban. The state Supreme Court holds that criminal and civil trials may be televised at the discretion and under the supervision of the trial judge.[31]

1958 Partially in response to the Colorado challenge, a special ABA investigative committee reports that television is still unfit for in-court use, and suggests a revision of Canon 35 to read, in part:

. . . The taking of photographs in the courtroom during the progress of judicial proceedings or during any recess thereof and the transmitting or sound recording of such proceedings for broadcasting by radio or television introduces extraneous influences which tend to have a detrimental psychological effect on the participants and to divert them from the proper objectives of the trial; they should not be permitted.

1965 The Supreme Court in *Estes* endorses Canon 35 and notes its near-universal adoption by state Supreme Courts.

1972 The ABA adopts by unanimous vote of the House of Delegates a reworking of Canon 35 known as Canon 3A(7). It reads:

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, except that a judge may authorize:

a) the use of electronic or photographic means for 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:

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31. *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics* (1956), 132 Co. 591; 296 P.2d 465 (Sup. Ct. *en banc*)

1) the means of recording will not distract participants or impair the dignity of the proceedings;
2) the parties have consented and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and production;
3) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and
4) the reproduction will be exhibited only for instructional purposes in educational institutions.

Notwithstanding its potent spell on the judges of the nation, Canon 3A(7) and its predecessor Canon 35 do not now carry the weight of law, nor have they ever done so.[32] Rather they have been styled as merely ABA-sanctioned statutory schemes. The court in *Lyles* v. *State,* to be discussed later, entrenched that viewpoint in law by characterizing the canons in the following manner:

> The adoption of the canons of ethics by the courts did not give the canons force of law. They are nothing more than a system of principles of exemplary conduct and good character . . . They are subject to modification to meet the condition of changing times in keeping with the constitutional rights of the people.[33]

As already noted, Colorado, along with Texas and Oklahoma stood alone as holdouts amongst all the remaining states which had, by virtue of legislative enactments or court rules, already adopted Canon 35 prior to the *Estes* case.

2. *The Maverick States: Clash of Perspectives*

Certain state courts in the mid-1950s were not prepared to conceed axiomatic status to Canon 35 without first reappraising its basic premise that photography and broadcasting during a criminal trial was inherently offensive to the accused's right of fair trial and due process. Colorado was at the forefront of the maverick element. In 1956, a Colorado district court and, shortly thereafter, the Colorado Supreme Court, both held that the underlying rationale behind Canon 35 was not merely questionable but wholly incorrect.

First, in *Graham* v. *People,* the district court permitted newsmen to take sound on film of the trial against the stated desires of the defendant, who had allegedly killed 44 people by placing a bomb aboard an airplane in order to collect his mother's life insurance.[34]

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32. *Deupree* v. *Garnett* (1954), 277 P.2d 168 at 175 (Okla. Sup. Ct.)
33. (1958), 330 P.2d 734 at 738 (Okla. Crim. Ct. App.)
34. (1956), 134 Col. 290; 302 P.2d 737 (Sup. Ct. *en banc*)

Friendly and Goldfarb describe the aftermath of the trial proceedings which featured a newscamera booth in the rear of the courtroom and subsequent use of film footage on the nightly news telecasts:

> When the trial was over, the presiding judge, the jury foreman, the attorneys on both sides and the defendant's wife said that, to their knowledge, the broadcast coverage had not distracted anyone and had not interfered with the fairness of the trial. Veteran court reporters did not detect any awareness by witnesses of the broadcast operation. And the jury foreman's comment was: "Frankly, I had forgotten it was there."[35]

Cognizant of the finding in the *Graham* case, the state Supreme Court had occasion to test the waters for itself that same year when it ruled on a petition to amend Canon 35. Speaking for the court in *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics,* Mr. Justice Otto Moore ruled that criminal court proceedings in Colorado would henceforth be governed by an amendment of Canon 35 allowing radio and television broadcasting into the courtroom at the discretion of the trial judge and subject to the consent of all trial principals.[36]

Mr. Justice Moore framed the issue of the validity of Canon 35 as being a simple case of fact or fancy:

> We are concerned with realities and not with conjecture. Canon 35 assumes the fact to be that use of camera, radio and television instruments must in every case interfere with the administration of justice . . . If the assumption of fact is justified the canon should be continued and enforced. If the assumption is not justified the canon cannot be sustained.[37]

Over the course of the hearings all manner of media technology was tested in the courtroom with an eye to gauging the potential and real disruptive effects on the administration of justice. The conclusion, to the chagrin of the ABA, was that "the assumption of facts as stated in the canon is wholly without support in reality."[38]

> There was nothing connected with the telecast which was obtrusive. The dignity or decorum of the court was not in the least disturbed. Many persons entered and retired from the

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35. Friendly and Goldfarb, *Crime and Publicity* (New York: The Twentieth Century Fund, 1967) at 234 quoting W. Monroe, Villanova Law School Symposium, April 16, 1966
36. (1956), 132 Col. 591; 296 P.2d 465 (Sup. Ct. *en banc*)
37. (1956), 296 P.2d 465 (Sup. Ct. *en banc*)
38. *Id.*

courtrooms without being aware that a live telecast was in progress.[39]

The court reasoned that the cooperative efforts of the bench and the electronic media, the former in a scrutineer's capacity and the latter through pooled resources and a heightened sense of social conscience and responsibility, could preserve courtroom decorum without sacrificing an accused to the toughest of all jurors — the television audience. History seems to have borne out that conclusion. In the 22 years since the Colorado reference, not one trial verdict has been toppled owing to the presence of courtroom television.[40]

The Oklahoma Criminal Court of Appeals travelled the same road two years later in *Lyles* v. *State*.[41] There, as in the Colorado reference, the trial judge was vested with full discretion to admit or bar news cameras on a case by case basis. Calling the defendant's claim of television prejudice a "baseless boogey (sic) constructed out of pure conjecture," the court, in no uncertain terms, handed the television industry a mandate they had for so long sought.[42] Or so it must have seemed at the time. Inexplicably, the court retrenched its position the following year, reverting back to a pro-Canon 35 posture in prohibiting statewide the broadcast of all criminal trials.[43] A 1961 criminal trial, *Cody* v. *State*,[44] further muddled the situation when it harkened back to the ruling in *Lyles* and found that the decision for or against television was solely in the hands of the sitting judge. Finally, in 1974, Oklahoma buried the memory of *Lyles* by incorporating into its own canons of judicial ethics the ABA's Canon 3A(7).

Meanwhile, in Texas, the courts had never heeded Canon 35's proscription on television, preferring instead to entrust trial judges with discretionary powers to regulate trial television. The liberal-minded approach boomeranged badly during the ill-fated trial of Billie Sol Estes in 1962, a trial in which every conceiveable nightmare the legal community might conjure up regarding the abuse of television seemingly came to pass.

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39. *Id.*
40. Goldman and Larsen, *News Camera in the Courtroom During State* v. *Soloyano: End to the Estes Mandate?* (1978), 10 S.W.U.L. Rev. 2001 at 2018.
41. (1958), 330 P.2d 734
42. *Id.* at 742
43. Okla. Stat. Am. tit. 5, ch. 1, app. 4 (1966)
44. (1961), 361 P.2d 307 (Okla. Crim. Ct. of App.)

IV. *Estes v. States of Texas* . . .

1. *Trial or Mardi Gras?*

In June, 1965 the United States Supreme Court overturned a conviction for swindling against the appellant Billie Sol Estes on the ground that massive trial publicity, including television cameras inside the courtroom, had severely hampered the accused's right to a fair trial. The ABA's Canon 35 had never before seemed so vital, so tailor-made to any kind of courtroom abuse as to those that transpired in *Estes*. Canon 35, one will recall, did not mince words in declaring that "broadcasting and televising 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."[45] A nonpartisan observer at the trial would not likely have quibbled with the unbending language of the Canon for it must have been drafted with a tawdry courtroom spectacle like *Estes* in mind.

At trial, Estes had moved to bar live telecasts of the proceedings, but the bid was rejected on the basis that the state did not subscribe to Canon 35 and permitted courtroom broadcasting at the trial judge's discretion. Upon his subsequent conviction Estes appealed on grounds that his constitutional right to a fair trial according to due process was violated by television coverage. The New York Times described the carnival atmosphere of the trial in its September 25, 1962 edition in the following manner:

> A television motor van, big as an intercontinental bus was parked outside the courthouse and the second floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four marked cameras were aligned just outside the gates. A microphone stuck its 12-inch snout inside the jury box, now occupied by an overflow of reporters from the press table, and three microphones confronted Judge Dunagan on his bench. Cables and wires snaked all over the floor.

For all the apparent mayhem that prevailed in the *Estes* courtroom during the October, 1962 deliberations of the Texas Circuit Court, two things must be kept in mind for the sake of fairness. First off, all the manoeuvring of the newsmen was done under the watchful supervision of the trial judge who maintained a firm rein over the proceedings, relatively speaking. Second, the Supreme Court, in overturning Estes' sentence, could find no nexus whatsoever

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45. *Supra*, p. 11 for Canon 35 as it read in 1952.

between the activities of the newsmen and any direct prejudice to the accused's right to a fair trial.[46] But this notwithstanding, even dissenters on the Supreme Court in *Estes* conceeded that television coverage had done the defendant a disservice.[47] It is essential, then, to assess the judgements in *Estes,* to enumerate the multifarious complaints lodged against television therein and to sift out the most noteworthy. Those that remain as *bona fide* can then be weighed against the positive factors accruing out of the broadcasting of trials. Thus, no mention will be made of Chief Justice Earl Warren's complaint, for example, that taped coverage of the trial preempted "The Tonight Show" on the Texas NBC affiliate.[48] This "degradation by association" argument is trifling and is subsumed under the larger species of complaint which argues that trial telecasts will lend judicial proceedings the flavour of basic entertainment. The framework for discussion will be the same as that suggested by the case itself, namely a breakdown of the objections into three categories: physical, psychological and legal.

2. *Analysis of Estes: The Case Against Television*

It was contended by the majority in *Estes* that the use of television in the trial process injected "an irrelevant factor into the court proceedings."[49] This would seem to indicate that the Court's holding against television was at least partly based on the medium's nuisance potential and not wholly on the nefarious and prejudicial impact it had on the particular defendant's right of fair trial. Goldman and Larson observed this when they commented that the bottom line "in all of the Court's criticisms was that the presence of television could not materially contribute to the ascertainment of truth, and arguably could vitiate the finding altogether."[50] Nowhere is this attitude of the Court more apparent than in its criticisms of television for physically disrupting the "sober search for the truth."[51]

(a) *Physical disruption of trial proceedings . . .*

At the root of this particular problem is the basic observation that no

46. (1964), 381 U.S. 532 at 544 (*per* Mr. Justice Clark delivering the opinion of the Court)
47. See the decisions of Brennon, J. and White, J.
48. (1964), 381 U.S. 532 at 571 (*per* Warren, C.J.)
49. *Id.* at 544 (*per* Mr. Justice Clark delivering the opinion of the Court)
50. *Supra,* note 40 at 2024-5
51. (1964), 381 U.S. 532 at 551 (opinion of the Court)

one, not even a trial judge, can do two things at once and do them well. Is the presence of television cameras in the courtroom a guarantee of shoddily administered justice since a trial judge must also assume the guise of television producer? In *Estes,* Chief Justice Warren observed that the judge's attention was distracted from trial since he was compelled on seven occasions to make rulings on television coverage and the conduct of newsmen. Chief Justice Warren commented that it was impossible for any trial participant not to have observed the presence of the media since the "snouts of the four television cameras protruded through the opening in the booth."[52] Specifically, the Court has always been chary of having to pander in any way to the television industry since this is outright evidence of diverting one's energies from the appointed task of administering justice. Thus, any evidence that extra lighting was required or abnormal modification to the courtroom was necessary will predispose the Court to a finding of media culpability. The standard contention of the bench is that the physical disruptions caused by television shatter the decorum of the trial process.

But most of the arguments raised with regard to physical disruption of the trial were prefaced with the observation that advancing technology could solve the problem at a later date. Mr. Justice White for example dissented on the basis that the sheer paucity of information on the impact of television precluded him from barring courtroom television on a permanent basis. Even Chief Justice Warren concluded that ". . . the evil of televised trials, as demonstrated by this case, lies not in the noise and appearance of the cameras, but in the trial participant's awareness that they are being televised."[53] A study of the more recent experimental cases will provide answers to the questions regarding current TV technology. What is far more difficult to ascertain is the psychological impact on the trial participants to which Warren, C. J. alludes.

(b) *Psychological distraction of trial participants . . .*

To fully understand the complexities of this aspect of the problem it is helpful to leave *Estes* for the moment and compare two recent statements by American judges on this topic. Colorado Chief Justice Edward Pringle has presided over televised trials in that state since

52. *Id.* at 568
53. *Id.* at 570

1956. He recently observed that: "I've never seen jurors become upset . . . I've never seen witnesses show off . . . If the judge is going to showboat, he's going to showboat anyways."[54] In contrast, the Honourable Donald R. Fretz, an American trial judge and a leading exponent of a cautious approach to courtroom television reported that:

> Eastern Airlines is said to be appealing a $1.6 million judgement against it on the ground that jurors were so thrilled with being on a TV news show that they were "improperly motivated to return a sufficiently spectacular and newsworthy verdict in the hopes and expectation that they would receive further television coverage."[55]

The potential psychological effects of stationing news cameras in the courtroom has always been the most contentious and the least understood of all the detriments imputed to courtroom TV. This is as true today, as the conflicting quotes illustrate, as it was during the *Estes* trial. Perhaps the attorneys for the State of Texas were more realistic than the Supreme Court when they argued that the psychological ramifications of courtroom broadcasting were for the psychologists to fret over, and not the courts.[56]

In response, the court contended that it didn't take a psychologist to appreciate the self-evident range of potential harm that the mere presence of newscameras could trigger.[57] Mr. Justice Clark's most memorable argument in *Estes* was his enumeration of the detrimental psychological impact of TV on each of the trial actors — jurors, witnesses, judge and defendant. To this list one might also add the viewing audience which, according to the court, would suffer from television's inaccurate portrayal of the trial process.

Capsulized, the majority's arguments went as follows:

(i) Jurors:

. . . potential impact of television on the jurors is perhaps of the greatest significance.

1) From the moment the trial judge announces that a case will be televised it becomes a cause célebre. The whole community including prospective jurors, becomes interested in all the morbid details surrounding it . . . Every juror carries with him into the

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54. Stone and Edlin, *T.V. or Not T.V.: Televised and Photographic Coverage of Trials* (1977-78), 29 Mercer L. Rev. 1119 at 1132

55. F. Graham and D. Fretz, *Cameras in the Courtroom: A Dialogue* (1978), 64 A.B.A.J. 545 at 550

56. (1964), 381 U.S. 532 at 541

57. *Id.* at 550

> jury box these solemn facts and thus increases the chance of prejudice that is possible in every criminal case.
>
> 2) The televised jurors cannot help but feel the pressures of knowing that friends and neighbours have their eyes upon them. If the community be hostile to an accused a televised juror, realizing that he must return to neighbours who saw the trial themselves, may well be led 'not to hold the balance nice, clear and true between the State and the accused . . .
>
> 3) . . . those of us who know juries realize the problem of 'jury distraction' . . . It is the awareness of the fact of telecasting that is felt by the juror throughout the trial . . . not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony.
>
> 4) . . . Jurors would return home and turn on the TV if only to see how they appeared upon it . . . Moreover, they would be subjected to the broadcast commentary and criticism and perhaps the well-meant advice of friends, relatives and inquiring strangers who recognized them on the streets.
>
> 5) Finally, new trials plainly would be jeopardized in that potential jurors will often have seen and heard the original trial when it was telecast.[58]

Implicit in the court's first three arguments are the twin notions that television will never become a commonplace feature inside the courtroom and that television technology will never advance significantly beyond the level attained during the *Estes* trial. For example, morbid curiousity could pose a difficulty in empanelling a jury during the early days of courtroom broadcasting. However, Colorado's experience has shown that once televising trials has become an accustomed part of the public's mindset, rabid interest quickly levels off and eliminates the problem. Likewise, Mr. Justice Clark's second argument may apply to the most heinous of crimes which, by their very nature, tend to incite the public's passion, but can it be so for the more numerous cases which can safely be called plodding and dull? Special arrangements, to be discussed later, can be effected to ensure that jurors are insulated from caustic comments of the community in the more notorious cases. The third view presupposes that television hardware will never be sufficiently sophisticated to ensure its unobtrusiveness. One need only appreciate that courtrooms can be built with cameras constructed right into the walls in order to discount the court's premise.

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58. *Id.* at 545-7

Regarding the court's fourth and fifth argument, especially in the large majority of cases where the jury is not sequestered, there seems little doubt that the problems are real and the potential harm to the administration of justice is immeasurable. What the juror does outside the courtroom in these instances is not a fitting area for the court's concern.

(ii) *Witnesses:*
The quality of the testimony in criminal trials will often be impaired.

1) Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publically, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization.

2) Indeed, the mere fact that the trial is to be televised might render witnesses reluctant to appear and thereby impede the trial as well as the discovery of the truth.

3) Furthermore, inquisitive strangers and 'cranks' might approach witnesses on the street with jibes, advice or demands for explanation of testimony.[59]

The majority's thinking in all of the arguments above is that, while each applies equally to standard press coverage, the ability of newscameras to capture every action, every word and nuance, gives television a much more psychologically demoralizing effect on the jittery witness. The handy argument against these claims of the court is that in most states no televising is allowed without the consent of all parties involved. But this prior consent doesn't speak to the real concern, namely the witness' state of mind once the cameras start rolling. More empirical evidence is necessary before the first two arguments can be properly assessed. The questions will be raised again during discussion of the *Solorzano* and *Zamora* cases. The third claim of the court can be discounted since the same fate awaits any witness whose name and photograph, along with quotes, appears in a newspaper. While this poses obvious dangers to the juror who may incorporate out-of-courtroom advice or criticism into his later verdict, it seems to have no appreciable impact on the witness' testimony since: a) he may already have concluded testimony by the time the television coverage is broadcast; b) he has already likely given a pre-trial deposition which can be used to track

59. *Id.* at 547-8

down any divergencies caused by public comment; and c) the threat of perjury hangs over the witness and not the juror.

(iii) *Judges:*

A major aspect of the problem is the additional responsibilities the presence of television places on the trial judge.

1) . . . laying physical interruptions aside, there is the ever-present distraction that the mere awareness of television's presence prompts. Judges are human beings also . . .

2) Telecasting is particularly bad where the judge is elected . . . telecasting of a trial becomes a political weapon, which . . . diverts his attention from the task at hand — the fair trial of the accused.

3) . . . it is difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly and through the shaping of public opinion.

4) . . . where one judge in a district or even a State permits telecasting, the requirement that the others do the same is almost mandatory.[60]

An additional worry of the court was the potential "showboating" of a trial judge which differs from the second argument since it derives not out of any quest for political gain but rather through the natural "ham" in us all. In Canada, we need not worry about the political aspect of the problem since our judges are appointed and not selected by the viewing audience. However, the tendency toward overdramatizing the proceedings must be a constant concern of the bench. The first problem can be rectified quite simply through cooperation between the media and the individual judge, usually through the device of a pre-trial conference to map out the limitations on television coverage. Perhaps the most difficult issue is the added burden placed on the judge by televisions's capacity to fan the fires of public opinion. This, however, cannot be a decisive factor against television because it doesn't lend itself to empirical testing and no measurements can effectively gauge the mettle of any given judge. It must be written off as an occupational hazard. Likewise the final point, albeit for a different reason. The practice since *Estes* has been for a state Supreme Court to give a rule of state-wide applicability on the topic of courtroom TV. Thus, when a state grants discretion to its trial judges to permit telecasts, the case-by-case decisions of one judge will have no bearing on similar

60. *Id.* at 548-9

determinations by one or all of his colleagues. In conclusion, the judge is possibly least affected by television in the courtroom when full cooperation is extended his way by the television industry.

(iv) *Defendants*

> . . . Its presence is a form of mental . . . harassment, resembling a police line-up or the third degree
>
> 1) The inevitable close-ups of his gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before him — sometimes the difference between life and death — dispassionately, freely and without the distraction of wide public surveillance.
>
> 2) A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nation-wide arena.
>
> 3) Furthermore, telecasting may also deprive an accused of effective counsel. The distractions, intrusions into confidential attorney-client relationships and the temptation offered by television to play to the audience might often have a direct effect not only upon the lawyers, but the judge, the jury and the witnesses.[61]

While all of the court's arguments could be assailed for their heavyhandedness, they nevertheless reflect the concern for the accused which overrides that of all others at trial. Only the second argument seems to be indisputable, however, it seems more amenable to a discussion of legal prejudice than psychological distraction. The defendant's real concern is that a trial judge may indiscriminately select his trial for telecast as opposed to any number of others for reasons not always geared to the furtherance of the pursuit of justice.

(v) *The Television Audience:*

The *Estes* court alluded on several occasions to the potential distorting effect of televised court trials on the viewing audience. Weaned on Perry Mason, home viewers are generally ignorant of the workings of the court and, it is argued, television may not be ideally suited to clearing up the problem. The potential to reach a wide market places television at the top of the media list so far as its use as an educational tool is concerned. However, the court recognized several factors inherent in the broadcasting industry that

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61. *Id.* at 549-50

would militate against the "educational" use of network television. Among them are the following: a) in *Estes,* the notoriety of the trial led viewers to tune in more for macabre reasons than out of concern for learning the court process;[62] b) the commercial nature of television would force industry executives to hone in on the most titillating of cases so as to ensure sponsorship and high ratings;[63] c) the editing process can have dire effects on the final product as seen by the public. Much of what the court would deem of educational value would likely wind up on the cutting-room floor[64] and d) the natural tendency of the public is to forget the life-and-death aspect of a trial and view it instead as entertainment.[65] The Court has held that since the public obtains wrong impressions as to the purpose of the trials, the dignity and decorum of the proceedings is eroded and any educational value pales alongside the overall detriment to the judicial system.

Psychologists and sociologists have devoted untold hours of research to the impact of television in general upon its legions of viewers. Still, there remain far more questions than answers; the issue of courtroom television has become yet another unanswered question. One thing is certain, however. A generation raised on trial television cannot help but have a significantly different view of the administration of justice than, say, our own generation. As to what precise shape the differing attitudes would take, it is impossible to say and dangerous to speculate upon. Again, the situation begs for more empirical evidence.

(c) *Legal prejudice to the accused's right to fair trial . . .*

Chief Justice Warren, in opening his judgement in *Estes,* stated:

> I believe it violates the Sixth Amendment for federal courts and the Fourteenth Amendment for state courts to allow criminal trials to be televised to the public at large. I base this conclusion on three grounds:. . . 3) that it singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others.[66]

This comment indicates that to Chief Justice Warren's mind both the selection of a trial for telecast and the ensuing telecast itself are

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62. *Id.* at 592 (*per* Harlan, J.)
63. *Id.* at 571-4 (*per* Warren, C. J.)
64. *Id.* at 574 (*per* Warren, C. J.)
65. *Id.* at 575 (*per* Warren, C. J.)
66. *Id.* at 565

latently prejudicial to the accused's right of fair trial. Much of what has already been discussed in the previoius two subsections goes toward answering — or, in this case, supporting — his finding on the second matter of prejudice in the ensuing trial coverage. As to the selection itself being prejudicial, there is no doubt that it is, especially in a case like *Estes* where the complaints of the accused fell upon deaf ears. A judge may, in effect, hand-pick a certain trial for coverage on the basis of, say, its educational value. This should never override the accused's right, however, to withhold his consent, thereby banning the televised broadcast. It is interesting to note that the *Zamora* case in Florida was chosen for television after a year of fruitless search by jurists who consistently ran into the defendant's veto power.[67]

(d) *Summary: Arguments Against Televised Trials*

1) Physical disruption to the trial proceedings was a factor in *Estes*, but even there the justices held the door open for the advent of improved technology. An accused would likely have little success today if he based his argument in support of television prejudice on the physical disruption of the proceedings, unless matters grew badly out of hand.

2) Psychological distraction of the participants of a trial is a complex area still in its research infancy. It has been shown that jurors are the most susceptible to in-court prejudice of a psychological nature, though, interestingly enough, the influencing takes place outside the courtroom by way of family and friends or even the nightly viewing of their own performance that day. With respect to witnesses and the quality of their testimony, many of the problems regarding television are markedly similar to those already posed by the presence of the press. The difference here is one of degree and not kind, and television, arguably, may push certain witnesses past the breaking point. Judges, with ample cooperation from the TV industry, can likely fend for themselves despite having to assume certain new supervisory roles during trial. This is not to imply however that judges as a class are anymore steely-minded than the rest of the trial actors. The defendant, since in many cases he is not required to testify, will not be unduly affected directly by the cameras presence. He will be indirectly affected psychologically

67. See *In re Petition of Post-Newsweek Stations, Florida, Inc. for Change in Code of Judicial Conduct* (1977), 347 So. 2d 402

by the camera's effects on other participants and the general atmosphere within the courtroom. The viewing public will almost certainly be affected in one way or another, but this area must be left to the social scientists for determination, and not to the courts.

3) Legal prejudice to the accused is a twofold evil. His right to a fair trial can be violated by abuses for any of the above reasons. Furthermore, the mere selection of his trial for television coverage can be prejudicial to him unless he is guaranteed the right to veto the court's decision by withholding his consent.

3. *Rebuttal: The Case For Television*

Proponents of courtroom television have always been disadvantaged by the two-step process they require to argue their case. First off, they must neutralize the welter of arguments raised by the *Estes* decision. Once done, they must drive home their own arguments, namely that televised trials would serve a valuable educational function, would enhance the public's right to know, and would remove from television its unwarranted status as media "second-class citizen."

Mr. Justice Otto Moore in the Colorado reference concerning Canon 35 was, in effect, the first crusader in support of television's presence inside the courtroom.[68] Like others who would follow him, Justice Moore canvassed most of the arguments raised in support of Canon 35, then systematically shot them down.

Regarding the contention that television would "amount to entering the field of entertainment", the justice referred to the Supreme Court's ruling in *Winters* v. *New York* which held that what "is one man's amusement, teaches another's doctrine."[69]

He then challenged the notion that some trial participants would seize the opportunity to "play to the galleries", including publicity-hungry lawyers and judges. In his experience, Mr. Justice Moore found that the exact opposite actually came to pass. Lawyers and judges acted far more diligently with far less inconsequential squabbling under the watchful eye of television. Furthermore, he reasoned that a loutish individual on camera was likely no different under normal circumstances:

> . . . A constitutional right of all citizens cannot be denied because a very few persons may conceivably make fools of

68. *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics* (1956), 296 P.2d 465 (Colo. Sup. Ct. *en banc*)
69. (1947), 333 U.S. 507 at 510

> themselves before a larger audience than that which might otherwise be subjected to their offensive conduct.[70]

He then disposed of two other possible problems, the accused's right of privacy and the threat of media overkill and its pernicious effect on the decorum of the proceedings. The trial, he maintained was a public event and the law recognized no privacy right attaching thereto. Pooling resources, he concluded, was the court's guarantee against the dangers of a journalistic mob. He further suggested the establishment of a full-time Media-Bar organization charged with full responsibility for in-court broadcasts.

Jerome Wilson takes the interesting approach that it is the courts that need television and not the reverse as goes the conventional argument. He says that court coverage would generally speaking be far down the list of a station manager's priorities:

> . . . At best, from a pure television standpoint, courtroom stories are static visually; they tie up film crews for an inordinate amount of time; and sometimes the proceedings are difficult for the average person to understand.[71]

He adds:

> . . . Without . . . television coverage, the nation's primary means of news communication, the judicial system is sinking slowly into obscurity. As for television, it's doing just fine . . .[72]

But this notwithstanding, he still argues strongly for the presence of cameras-in-the-courtroom. Wilson notes that the use of a single camera shooting noiselessly with natural light would effectively solve the problem of physical disruptions. He discounts the importance of this complaint in any case, since Canon 3A(7) allows for television cameras for educational purposes. The cameras are just as likely or unlikely to disrupt trials singled out for their educational value as any others, and yet they are allowed. Nor do his own experiences support the view that cameras psychologically distract trial participants. They are, he suggests, quickly forgotten once the proceedings begin.

Wilson also suggests that far from impairing the dignity and decorum of the trial, television can actually safeguard it by preventing breaches in dignity by judges who might bully, lawyers

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70. *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics* (1956), 296 P.2d 465 at 470

71. J. Wilson, *Justice in Living Color: The Case for Courtroom Television* (1974), 60 A.B.A.J. 294 at 294.

72. *Id.*

who might grandstand or both, should they act in concert to intimidate the accused or the witnesses. He also agrees with the author that the effects registered upon a viewing audience of a televised trial are not properly judicial concerns.

Regarding the educational value argument, Wilson recognizes that many of the Justices in *Estes* supported the notion. Mr. Justice Harlan, for example, said that television would serve an educational purpose by "acquainting the public with the judicial process in action," though he felt these were "not arguments of constitutional proportions."[73] He also takes the approach that no other medium is more suited to engendering public interest in the court's proceedings. He quotes former CBS President Frank Stanton as commenting that:

> . . . Misconstructions, misinterpretations, and distortions of court decisions are inevitable if the only voices in government to whom the people are denied direct access are the voices of the judges.[74]

One of the more concise and informative statements on the beneficial aspects of courtroom television was written recently by Stone and Edlin. They conclude that:

> . . . televising of trials can be both an effective teaching tool and socialization device. It could disseminate not only an academic understanding of judicial processes and their relationship to individuals, but also could raise in the consciousness of viewers ideals of individual rights and responsibilities in relation to the system. This would make the viewers more aware of their own rights and responsibilities in our society, which our judicial system is entrusted with enforcing.[75]

By now it should be quite apparent that there is no clear-cut path to a solution to the questions involved in the challenge of courtroom broadcasting. In terms of sheer volume, the arguments opposing the expansion of news coverage inside the courtroom seem to hold sway. Viewed from the perspective of the swinging pendulum, the mood of the United States seems more strongly in favour of expanding the courtroom walls to encompass home viewers than ever before. Back in 1956, the Colorado reference attempted to see for itself what positive and negative forces came into play when television cameras were permitted entry into the court. Today, a

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73. (1964), 381 U.S. 532 at 589
74. *Supra*, note 71 at 296
75. *Supra*, note 54 at 1132

whole wave of states are picking up on Colorado's initiative in a move to sort out the matter for themselves. All of the experiments have proved illuminating, but two in particular are worthy of note.

IV. *State v. Solorzano . . .*[76]

At 8:00 p.m. on the evening of June 28, 1976, residents of Las Vegas, Nevada who happened to be tuned to station KLAS-TV, a CBS affiliate, had the unique opportunity of sitting in on local history in the making. For the first time ever in Nevada, the public was afforded direct contact with a criminal trial through the medium of television. Telecast in the form of a four-part documentary entitled, "Justice: The State of Nevada v. Xavier P. Solorzano", five hours worth of edited videotape of the actual trial of an illegal alien charged with the attempted murder of his wife was broadcast to any or all of the 132,000 television households in the area.

A year earlier, almost to the day, trial judge Carl J. Christensen began the proceedings against Solorzano in a courtroom outfitted with two videotape TV cameras. The consent of all parties involved had been secured and three conditions had been imposed on the television station: a) no physical obstruction of the proceedings would be tolerated; b) no portion of the trial could be broadcast until all avenues of appeal had been exhausted and c) the above mentioned consent requirement.

Nevada court rules and state regulations conformed closely with the wording of Canon 3A(7). In order to follow through with the Solorzano project the court had to bend the rules somewhat. It was felt that the proposed delayed broadcast eminating videotaped from the network studio and not the courtroom excepted *Solorzano* from the regulations and, furthermore, the educational nature of the broadcast brought it within the ambit of Canon 3A(7).

Goldman and Larson agree that *Solorzano* was selected as a trial balloon for two reasons. 1) The fact situation and predicted length of the trial brought it well within the budgetary constraints of the station,[77] as opposed to a different type of trial involving more witnesses and longer proceedings; 2) It was felt that the viewing public could readily identify with a crime such as this, i.e. the attempted murder of a wife following a marital argument in a barroom.

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76. *Supra,* note 40 for a complete discussion of this case.
77. *Id.* at 2035 n.251

Every moment of courtroom proceedings was videotaped, totalling some 35 hours. The jury deliberations went unfilmed. Jurors were sequestered throughout the trial. The coverage was done by two videotape cameras directed by technicians outside the courtroom and operated by two in-court cameramen. The cameras were positioned to the left of the jury box and behind the spectator gallery respectively. On the final day of trial one camera was brought forward opposite the bench to better record the judgment.

The end-product was five hours worth of documentary film, with scant interludes of narration and commercial breaks timed so as not to leave viewers hanging. At the start and finish of each telecast, a brief reenactment of the crime and taped interviews with some of the principals of the trial were aired to flesh out the program. Yet, there was no mistake as to the intention of the TV producers, as Goldman and Larson note:

> Foremost in the mind of the director was 'how to maintain fidelity to the actual events in the courtroom presenting them in an accurate and truthful context, without sacrificing all dramatic and aesthetic standards'
>
> . . .
>
> The director intended to present the trial in much the same way as an ordinary courtroom spectator would have observed the process, with all the feelings of interest, drama and boredom.[78]

Despite conditions that one might call "laboratory" or experimental and levels of cooperation heretofore unheard of, it is important to realize that *Solorzano* remained a *bona fide* legal trial with no guarantees that a ruling of the court would not at a later date be overturned due to the telecast. With the fate of the accused on the line, the media's performance took on exceptional importance. Solorzano was found guilty of battery with intent to kill and was sentenced to five years imprisonment. There was no appeal based on courtroom television. That, in itself, was a major achievement for the rule in *Estes* remained a tenacious precedent up until that time. As there was no in-court debate about the propriety of televising the proceedings, it was left to the participants following the trial to comment on their impressions of the trial. *Solorzano* stands in total opposition to the findings in *Estes*. Two similarly-styled fact situations, both with the same narrow issue, had yielded two conflicting decisions. The following comments

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78. *Id.* at 2038 as quoted from the statements of Stuart Murtland

from participants in the *Solorzano* trial will be useful in establishing that none of the prophecies of doom in *Estes* are inherent in a televised trial:

Judge Christensen:

> During the trial the lawyers, the witnesses and I as the judge tried just a little bit harder to carry out our roles to perfection . . . .
> Our adversary system is often not fully understood by our citizenry and I feel that this televised production has helped the general public to better understand our system of justice . . . .
> This awareness (of the cameras) by everyone appeared to me to result in a conscientious desire on the part of everyone to do his best. The proceedings in the courtroom were marked by seriousness, attitude, dress, demeanour, and other characteristics of concern and attention that both judges and lawyers strive for in a jury trial . . . .

Defense Counsel Phil Pro:

> . . . in my opinion, the fact that the trial was being video-taped had no visible adverse effect on the jurors, judge, witnesses, attorneys, or most important, Xavier Solorzano . . . .
> The cameras, sound equipment, and T.V. personnel were remarkably unnoticeable during the trial and provided no source of distraction for the participants in my opinion. . . .

Prosecutor Robert E. Wolf:

> To be quite candid, I would have to say that I was periodically conscious of the cameras and realized that we could not cut and reshoot. At the time I felt the television aspect was one more problem or pressure that had to be overcome along with the marshalling of the facts, presentation of evidence, and winning the case before the jury. I would have to conclude, therefore, that the presence of television or motion picture cameras during a jury trial has somewhat of a negative effect on an attorney's performance . . .
> Regardless of any entertainment factors, I feel that the public reaps a benefit in viewing realities versus the imagery of television law programs. Because of our form of government I feel that such an educational input to the public is essential.

Jury Foreman John G. Carter:

> It is my personal belief the television cameras neither distracted nor influenced the jury, prosecution, defense, or witnesses in this case.[79]

In summarizing the importance of this case in relation to those that had gone before, Goldman and Larson state unequivocally:

> . . . unlike the forecast in *Estes*, the participants in *Solorzano*

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79. *Id.* at 2062-7 (Appendix)

> reacted to the camera in a positive manner consonant with the requirements of justice. Even the one attorney who felt the camera may have "somewhat of a negative effect on an attorney's performance," did not proffer any specific instance of prejudice that would render the proceedings suspect. The remaining data indicate the 'awareness' of the camera simply acted as a catalyst to heighten individual performances. Thus, unlike the Supreme Court's hypothesis in *Estes* that the camera would obstruct justice, the *Soloranzo* experience provides an actual empirical basis, and leads the reasonable man to conclude that the presence of the television news camera during trial is a benign — if not beneficial — influence.[80]

V. *State v. Zamora* . . .

On a petition to the Florida Supreme Court by the Florida Post-Newsweek TV stations, the court held that any modifications to the state's Canon 3A(7) would hinge on the results of a one-year experimental program of televised courtroom coverage. A well-defined set of operational guidelines laid out by the court in *Petition of Post-Newsweek Stations Florida, Inc. for Change in the Code of Judicial Conduct* were to serve as the ground rules for the program.[81] No final report on the success or failure of the overall program has yet been proffered for public consumption. What is known is that no single case up to and including those in progress on the July 5, 1978 closing date offered the courts more difficulty than the inaugural case of *State* v. *Zamora*.[82]

As fate would have it, in *Zamora* the defendant relied on the excesses of television in general to plead his case. If the television experiment failed, he would be in the unique position of pleading a second type of television excess on appeal, namely in-court telecasting to the detriment of his constitutional right of a fair trial. If this sounds slightly confusing, take heart — it was.

The defendant Ronnie Zamora, 15, was charged with first degree murder in the death of his 82-year-old neighbour. The woman was killed while Zamora and a friend were in the act of burglarizing her home. Zamora's ingenious defense counsel argued that the lad was suffering "involuntary subliminal television intoxication" at the time he commited the act. Judge H. Paul Baker rejected the defense in the state's first ever televised trial. The uniqueness of the

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80. *Id.* at 2040-1
81. (1977), 347 So. 2d 404 at 405-6
82. (1977), No. 77-25123-A (Dade County Cir. Ct.)

defense, i.e. that Zamora's incessant diet of police and detective shows such as Kojak had left him "intoxicated" and unable to distinguish between truth and televised fiction, had stirred worldwide publicity and easily surpassed the public interest that a case like *Estes* had generated. In all, several million people viewed one stage or another of the trial, broadcast live and, under terms of the guidelines, without the consent of the defendant. Despite the potential for abuse of due process and infringement of Zamora's fair trial rights, there was no suggestion of any prejudice to the accused. Trial Judge Baker said the television aspect of the trial "must be viewed as a success."[83]

Zamora is likely even more consequential a case than *Solorzano*, which in its own right went a long way toward sounding the death knell of the *Estes* ruling. *Zamora* has already been hailed as the case that broke Canon 3A(7)'s back, a sentiment shared by many authors and by trial Judge Baker:

> The television and audio equipment used during the course of the Zamora trial produced no distracting sound or light in the opinion of the court. In speaking privately with the jurors at the conclusion of the trial, the Court ascertained that the presence of cameras (both still and televisoin) was slightly distracting but not to the extent that it interfered with the jurors considering the testimony and being able to concentrate on the argument of counsel and the court's instructions.
>
> . . .
>
> Justice Clark made reference to the "telltale red lights" on the television cameras which would distract the jury. No such lights were present on the cameras used throughout the *Zamora* trial. Justice Clark felt the jurors' eyes would be fixed on the cameras rather than the witnesses. This court took particular note of the jurors throughout the trial and such was not the case. Concern was expressed in *Estes* that jurors would be subject to seeing portions of the trial on television or hearing broadcast commentary. This was avoided in the instant trial as previously discussed.[84]

In his report, Judge Baker further refuted the *Estes* rationale by finding no detrimental effect on the quality of witness testimony, no physical disruptions to the trial proceedings despite extra lighting, and no noteable prejudice to the defendant, either legal or

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83. See H. Baker, Private Report to the Supreme Court of Florida re: *Conduct of Audio-Visual Trial Coverage*, at 17
84. *Id.* at 4

psychological.

It is clear from both the *Solorzano* and *Zamora* trials that television coverage of criminal trials is not, as the U.S. Supreme Court maintained in *Estes*, inherently prejudicial to the defendant's right to a fair trial under the due process clause. The time is indeed ripe for a reconsideration by the highest court in America of its holding in that pivotal case.

VI. *Recommendations: Proposed Guidelines for the Future*

Of the 14 or more American states now employing television cameras in their courtrooms on a full-time or experimental basis, Alabama arguably has devised the most practicable code of procedure. The Alabama Canons of Judicial Ethics No. 3A(7A)[85] reworked in certain areas so as to dovetail with the Canadian court system, would provide an excellent starting point for the regulation of news cameras in the courtroom in Canada. Of course, the Alabama plan is not ideally-suited to Canadian courtroom conditions or television operations; however, it does represent a comprehensive scheme not far removed from what the author would envisage as a viable Canadian framework for televising court trials. As reworked, the plan provides:

> A trial judge, in the exercise of sound discretion, may authorize the broadcasting, televising, recording or taking of photographs in a courtroom during a trial or other judicial hearing;
>
> a) provided the Supreme Court of that province has authorized a plan for the courtroom in which the photographing, recording or broadcasting by radio or television will occur. The authorized plan shall set forth the safeguards to ensure that such photographing, recording or broadcasting by radio or television of such proceedings will not detract from the dignity of the court proceedings, distract any witness from giving testimony, degrade the court, or otherwise interfere with the achievement of a fair trial and shall further set forth where cameras, lights, wires and transmitting devices may be located and other details, including, but not limited to, the area of movement of media personnel. Prior to the Supreme Court's approval of such a plan, a petition shall have been filed with the Supreme Court signed by the presiding judge of the trial, the Crown Prosecutor, President of the local Barrister's Society and the appointed officer of the media group seeking to televise the trial.
>
> b) provided further, if the case is a criminal proceeding, all

85. (1976), 37 Ala. Law. 11 at 16-7

accused persons who will be before the court during any such photographing recording or broadcasting by television or radio, as well as the Crown Prosecutor representing the Attorney-General, shall have affirmatively given their written consent to the photographing, recording or broadcasting by television or radio.

However, the judge shall immediately suspend or stop any photographing, recording or broadcasting by television or radio at any time that a witness who is testifying, a parent or guardian of any testifying witness who is a minor, or a juror, party or counsel expressly objects to the photographing, recording or broadcasting by television or radio.

An example of a detailed plan that gained acceptance of the Alabama Supreme Court and, it is submitted, would likewise be accepted by a Canadian court contained the following extract on the subject of news coverage:

"The trial judge may authorize the broadcasting, televising, recording or taking of photographs for news purposes (hereinafter referred to as media coverage) in a courtroom during trial of other judicial hearings, provided that:

A) the appropriate media representative shall make timely request for the same prior to the trial or the event desired to be broadcast, televised, recorded or photographed out of the presence of the jury and the request shall specify the particular event or events to be broadcast, televised, recorded or photographed;

B) in the event the trial judge is agreeable to the request, he shall make the request known to counsel for all parties with the additional request that they contact their respective clients. The consent of all attorneys and parties to the media coverage requested shall be in writing, signed by each one on forms prepared for that purpose. If it is desired that the testimony of a witness be covered by the media, the consent of that witness in writing must also be obtained. The consent of the jury must be obtained which shall be made part of the record;

C) in the event a party or witness is a minor, the consent of the party or witness and that of his parent or guardian must be obtained in writing. As used herein "party" or "witness" shall include parents or guardian if the party or witness is under 18 years of age, provided that if the disability of non-age of a minor has been removed, the minor may give his own consent;

D) any juror, party, criminal defendant, or witness may request coverage to cease or withdraw his consent by notifying the judge, in

which event the judge shall require the media photo and recording coverage to cease:

E) consent, once given, or refusal of the same, or withdrawal of the same shall apply equally to all the news media: that is, consent may not be given, refused or withdrawn as to one type of media and given, refused or withdrawn as to another type;

F) the trial judge may stop such media coverage when, in his discretion, the same interferes with the orderly conduct of the trial or becomes distracting;

G) nothing contained in this plan shall be construed to preclude the coverage of a trial by a *news reporter* who is not using a camera or electronic equipment in connection therewith, but is taking notes, making sketches, etc.; such a reporter will be considered as a member of the public;

H) no interviews of jurors, witnesses or parties shall be permitted during the course of the media coverage, until the jury returns its verdict.

I) no juvenile proceedings or youthful offender requests, hearings, pleas or trials may be covered by the news media;

J) members of the media covering the event subject to media coverage will avoid all distractions and will remain in the area designated by the court during the time they are covering the event;

K) not more than two still cameramen and two television cameras will be permitted to cover the event while the court is in session. They are to remain seated to the extent that it is practicable. The court may limit the media coverage if the size of the courtroom, security or crowded conditions require, and shall consider the priority of media coverage requests. In the event this becomes necessary, media may pool its coverage.

VII. *Conclusions*

There is no doubt that many questions remain to be resolved in this controversial area of procedural law. Even the more recent American decisions analysed above point out glaring deficiencies in television coverage of trial proceedings, not the least of which is what will transpire when the so-called laboratory-like conditions no longer exist? Will the broadcast industry backslide? Will they make excessive new demands on the judicial system that will render justice a sham and relegate it to a backseat position behind entertainment. And what of the special anomalous cases that

unquestionably fall outside the scope of possible television cases, i.e. those involving rape, child custody, undercover agents, etc.? This list of possible inquiries is seemingly endless.

Yet, this article has shown that to artificially stem the tide of support for televising trials, as *Estes* and Canon 3A(7) arguably have done, is akin to placing a finger in the dike. Through cooperative effort of bench and bar and the media, plans for the coverage of court proceedings that are fair to all concerned can be established as in Florida, Colorado and Nevada. Guided by the just supervision of the trial judge and the pooled resources of the TV industry, no spectacles such as *Estes* need ever darken the legal horizon again. In conclusion, then, a televised court trial has been proven to be well within the reach of mortal men and well within their capacity to act fairly, reasonably and responsibly. There is no apparent reason at this time why the practice of courtroom television should not go forth and multiply — even into Canada!

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