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Chandler v. Florida: Cameras, Courts, and the Constitution

The rising importance of television journalism in the 1960's has resulted in the Supreme Court deciding whether a criminal defendant's due process rights are violated by camera coverage of the courtroom proceeding. The decision of Chandler v. Florida clearly provides the answer; for unless a defendant proves prejudice with specificity, the Constitution does not ban televised criminal trials. The author examines the issues with a revealing historical perspective. He then traces the Court's factual and legal analysis and concludes that the decision will serve to offer the states guidance in deciding whether to implement a program allowing television coverage of its trials.

I. INTRODUCTION

It was Justice Clark who wrote that:

[A] responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for "[w]hat transpires in the court room is public property."¹

While the Court has been most sensitive to the first amendment² rights of the "print media" in the reporting of courtroom proceedings,³ that same sensitivity has not been extended to the

1. Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (quoting Craig v. Harney, 331 U.S. 367, 374 (1947)).

2. The first amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

The first amendment is made applicable to the states by section one of the fourteenth amendment, which reads, in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

3. See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (discussing press access to the courtroom). For a further discussion see Zimmerman, *Overcoming Future Shock: Estes Revisited, or a Modest Proposal for the Constitutional Protection of the News Gathering Process*, 1980 DUKE L.J. 641, 642 (1980). See also note 128 *infra*.

electronic media,⁴ although this disparity is rapidly changing. The recent United States Supreme Court decision of *Chandler v. Florida*⁵ is likely to serve as an impetus to continued experimentation and, perhaps, will lead to implementation of electronic media coverage of courtroom proceedings nationwide. Chief Justice Burger, writing for the *Chandler* Court, held that it is consistent with constitutional guarantees⁶ for a state to allow radio, television and still photographic coverage of criminal trials for public broadcast, notwithstanding the objection of the defendant.

The purpose of this note is to present, first, an historical perspective leading up to *Chandler*. Secondly, the Supreme Court's reasoning and rationale in refusing to accept⁷ or announce a *per se* constitutional rule that all photographic or broadcast coverage of criminal trials is inherently a denial of due process of law will be analyzed. Thirdly, the impact of the case and questions that remain unanswered will be considered.

II. BACKGROUND

A. *The Position of the American Bar Association*

Prior to 1937, a number of cases⁸ received such extensive news media coverage that interference with courtroom proceedings ran rampant, and the setting was totally inappropriate for conducting a trial. This prompted⁹ the American Bar Association (A.B.A.) House of Delegates,¹⁰ in 1937, to adopt Judicial Canon 35, which

4. Unless the context requires otherwise, "electronic media" shall be used as a generic term which encompasses television, film, video tape cameras, still photography cameras, tape recording devices, and radio broadcasting equipment.

5. 101 S. Ct. 802 (1981).

6. The petitioners argued that electronic media coverage of their trial deprived them of their right to due process and a fair trial. Thus, *Chandler* does not represent a first amendment controversy.

7. Appellants argued that *Estes v. Texas*, 381 U.S. 532 (1964), announced a *per se* constitutional rule that televising criminal trials is inherently a denial of due process. However, Chief Justice Burger writes in *Chandler* that the *Estes* decision was only a plurality, with Justice Harlan providing the fifth vote necessary in support of the judgment, and that Justice Harlan limited his holding to the facts in *Estes*. 101 S. Ct. at 808-09.

8. See, e.g., *State v. Hauptmann*, 115 N.J.L. 412, 180 A. 809 (1935), *cert. denied*, 296 U.S. 649 (1935). This case involved the sensationalized trial of Bruno Hauptmann for the kidnapping and murder of the infant son of Charles A. Lindbergh. See note 9 *infra* for sources which expand upon the factors which instigated the A.B.A. prohibition.

9. For a detailed history, see Kieblowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUD. 14 (1979). See also *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539, 548-49 (1976) (discussing the trial of Bruno Hauptmann); S. WHIPPLE, *THE TRIAL OF BRUNO RICHARD HAUPTMANN* 46-49 (1937).

10. The A.B.A. House of Delegates is the policy making body of the American Bar Association.

banned¹¹ all photographic and broadcasting equipment from the courtroom.¹² Almost every state adopted the substance of the Canon at its inception.¹³ In 1952, a special committee of the A.B.A. produced a report that caused the House of Delegates to amend Canon 35 to prohibit the televising of court proceedings as well.¹⁴ The Canon's interdiction was reaffirmed in 1972, when the Code of Judicial Conduct replaced the Canons of Judicial Ethics, and Canon 3A(7) superseded Canon 35.¹⁵ However, as amended, Canon 3A(7) does allow the admission of television cameras into the courtroom for selective and limited purposes, such as use in edu-

11. For the legal effect of such a ban, see note 20 *infra* and accompanying text.

12. American Bar Association, *Canons of Judicial Ethics*, 62 ANN. REP. A.B.A. 1123, 1134-35 (1937). As adopted on September 30, 1937, Judicial Canon 35 reads:

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

A complete summary of the history of Canon 35 is contained in the appendix to Justice Harlan's concurring opinion in *Estes v. Texas*, 381 U.S. at 596 (1964) (Harlan, J., concurring).

13. By the time *Estes v. Texas* was decided in 1964, all but two states, Texas and Colorado, had adopted what was then Canon 35, thereby prohibiting television in the courtroom. 381 U.S. at 544.

14. American Bar Association, *Report of the Special Committee on Televising and Broadcasting Legislative and Judicial Proceedings*, 77 ANN. REP. A.B.A. 607, 607 (1952).

15. E. THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 56-59 (1973). Canon 3A(7) reads as follows:

A judge should prohibit broadcasting, television, recording or taking photographs in the courtroom during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for the purposes of judicial administration;

(b) the broadcasting, televising, recording or photographing of investigative, ceremonial or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

ABA CODE OF JUDICIAL CONDUCT, CANON 3A(7) (1973).

cational settings and for certain experiments.¹⁶

In August, 1977, the A.B.A. Adjunct Committee on Fair Trial-Free Press began a study to reevaluate and assess the standards relating to fair trials and freedom of the press. A proposal of new standards was released by the committee in early 1978. Those standards included a provision allowing courtroom coverage by electronic media, under conditions to be established by local rule or by agreement with representatives of the news media, provided such coverage could be implemented unobtrusively and without affecting the conduct of the trial.¹⁷ The language made certain that no right of access by electronic media was created by the standard; the right of access was left to the sound discretion of the trial court, absent the formulation of a general policy by the highest court of the jurisdiction.¹⁸

On March 22, 1978, the Standing Committee on American Standards for Criminal Justice favorably recommended the adjunct committee's proposed standard. After consideration, the Committee on Criminal Justice and the Media referred the proposal to the Council of Criminal Justice with the suggestion that it endorse the proposed electronic media standard. Despite these two previous favorable recommendations by committee, the Council of the Section of Criminal Justice, by vote, declined to support the proposed measure in April, 1978. The Committee on Association Standards for Criminal Justice accumulated the comments of each reviewing body and presented all of the Fair Trial-Free Press standards to the A.B.A. House of Delegates. At the A.B.A. midwinter meeting, in February, 1979, the House of Delegates reviewed and rejected the proposed standard for electronic media coverage of court proceedings.¹⁹

It must be noted that Canon 3A(7) "has of itself no binding effect on the courts but merely expresses the view of the Association in opposition to the broadcasting, televising, and photographing of court proceedings."²⁰ Since the original adoption of what is now Canon 3A(7) in 1937, and for the three de-

16. See note 15 *supra*.

17. Proposed Standard 8-3.6(a) (tentative draft) of the ABA HOUSE OF DELEGATES, PROCEEDINGS ANNUAL MEETING, Report No. 108 (Aug. 1978) stated in pertinent part: "Television, radio and photographic coverage of judicial proceedings is not *per se* inconsistent with the right to a fair trial." For the full text, see ABA STANDARDS FOR CRIMINAL JUSTICE, CONDUCT OF ATTORNEYS IN CRIMINAL CASES, 8.5 (1980).

18. See note 17 *supra*.

19. A.B.A. HOUSE OF DELEGATES, PROCEEDINGS MIDYEAR MEETINGS, Report No. 109 (Feb. 1979). Apparently, the reasons for declining to support the proposed measure were much the same as those disclosed by the Court in *Estes*. Those reasons will be discussed throughout this note.

20. *Estes v. Texas*, 381 U.S. at 535 (1965).

acades following, major disputes over press recordation of trials were rare.²¹ However, the impact of the Canon should not be understated, for by the time *Estes v. Texas*²² was decided in 1964, all states but Texas and Colorado had adopted what was then A.B.A. Canon 35, thereby prohibiting electronic media coverage in the courtroom.²³

The federal judiciary reacted to the concern for disruptive influence allegedly caused by electronic media in the courtrooms by enacting a federal rule banning still cameras and radio from federal trials.²⁴ In 1962, a resolution of the Federal Judicial Conference expanded the Rule 53 mandate to bar television cameras from all federal courts and from the courtroom surroundings.²⁵ Thus, in essence, the A.B.A. Canon was followed by the federal judiciary, along with most of the sovereign states.

The primary reason for the A.B.A. prohibition in 1937 was that the potential prejudice to the accused outweighed the public's right to be informed through the photographic medium.²⁶ Electronic broadcasting and still cameras were loud, conspicuous, and obtrusive. Proponents of the prohibition argued that the potential for disruption of courtroom proceedings would interfere with the dignity and decorum of the trial process and risk prejudice to the defendant.²⁷ Witness testimony and juror attentiveness would suffer from the distractions and the cognizance of being photographed.²⁸ Furthermore, there was the opinion that the edited versions of the trial released to the public would influence jurors to return verdicts to satisfy public sentiments.²⁹ It was thought that electronic media coverage of trial proceedings would create unique problems and time consuming tasks for the trial court ju-

21. See Zimmerman, *supra* note 3, at 679. The reason such disputes were infrequent appears to be due in large part to the adoption of what is now Canon 3A(7) by the A.B.A.

22. 381 U.S. 532 (1965).

23. *Id.* at 544.

24. FED. R. CRIM. P. 53 provides: "The taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court."

25. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORTS OF THE PROCEEDING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 9-10 (1962).

26. American Bar Association, *Special Committee on Cooperation Between the Press, Radio and Bar Report*, 62 ANN. REP. A.B.A. 851, 853 (1937).

27. *Id.* at 864.

28. *Id.*

29. *Id.* at 857-58.

diciary, such as having to conduct an extensive voir dire regarding juror attitude toward television and possibly requiring the court to sequester the jury.³⁰ The A.B.A.'s Special Committee on Televising and Broadcasting Legislative and Judicial Proceedings expressed a concern that electronic media reports of sensational trials might even have an "injurious effect on public morals."³¹ Whether the aforementioned reasons³² are persuasive has triggered much debate³³ and criticism,³⁴ but, to date, the A.B.A. has not displaced or revised Canon 3A(7).³⁵

B. *The Position of the Judiciary*

Largely because of the American Bar Association's long standing electronic media prohibition, litigated disputes over electronic press coverage were rare. However, in the 1960's, television jour-

30. See Whisenand, *Florida's Experience with Cameras in the Courtroom*, 64 A.B.A.J. 1860, 1863 (1978).

31. 77 A.B.A. REP. 607, 610 (1952):

The experience thus far with radio broadcasting and motion pictures of trials has shown that only the most sordid crimes are likely to be televised. In addition, the undue publicity from the telecasting of criminals may pander to the desire of abnormal criminal minds for mock heroics and resulting fame. To sensationalize such trials by television can have but an injurious effect on public morals.

For a further discussion in this area, see generally Zimmerman, *supra* note 3; Tornquist, *Television in the Courtroom: Devil or Saint?*, 17 WILLAMETTE L. REV. 345 (1981).

32. The aforementioned reasons for the electronic media prohibition is by no means complete but is intended merely to serve as an indicator of the issues raised. For a further discussion, see Zimmerman, *supra* note 3 at 672-98; *Estes v. Texas*, 381 U.S. 532; *In re Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d 764 (Fla. 1979).

33. See Zimmerman, *supra* note 3, at 672-79.

34. In Oklahoma, a defendant sought to reverse a conviction because of the psychological impact of television on his trial. *Lyles v. State*, 330 P.2d 734 (Okla. Crim. App. 1958). Affirming the conviction, the appellate court discussed the total absence of evidence of such an impact and therefore criticized the earlier version of A.B.A. Canon 3A(7): "This contention presents itself as a baseless boogey constructed out of pure conjecture. We are of the opinion that the presumption upon which Canon 35 has been constructed is fabricated out of sheer implication and not hammered out on the anvil of experience." *Id.* at 742. See *Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 132 Colo. 591, 595, 296 P.2d 465, 468 (1956) (Justice Moore of the Colorado Supreme Court states his thoughts on and experiences with electronic media in the courtroom); see also Zimmerman, *supra* note 3, at 685-87.

35. The American Bar Association President, William Reece Smith, Jr., was quoted after *Chandler* as saying he still had "grave reservations" about whether television could provide "much useful information in 15-second spots in evening news" coverage of court proceedings. See Winter, *Cameras in the Courtroom*, 67 A.B.A.J. 277 (1981). But Donald Fretz, chairman of the A.B.A. Adjunct Committee on Fair Trial-Free Press in Criminal Law Issues, said that his committee is considering the need to review A.B.A. Standard 8-3.6, relating to "The Rights of Fair Trial and Free Press," to allow televised coverage of trials. *Id.* at 279.

nalism came of age.³⁶ The result was that a number of cases involving an allegation of prejudice to the defendant, because of the broadcast media, came before the United States Supreme Court.³⁷ One such case, the first decided prior to *Estes*, alluded to a suspicion that broadcast publicity held a peerless potential for prejudice. In that case, *Rideau v. Louisiana*,³⁸ a defendant charged with armed robbery, kidnapping, and murder was interrogated, while in jail, by the parish sheriff, and, in front of television cameras, the accused admitted perpetration of the crimes. The filmed "interview" was broadcast several times and widely viewed throughout the parish. The trial judge denied a defense motion for change of venue, and the defendant was accordingly convicted and sentenced to death.³⁹ The Supreme Court held that the televised confession presumptively violated the defendant's due process rights, even though the defendant could not demonstrate precisely how the publicity influenced his conviction.⁴⁰

The debate over electronic media coverage heightened. On the one side, it was argued that to allow the presence of the broadcast media throughout the trial would detract from the dignity of the courtroom, psychologically affect the participants, prejudice the defendant, and create public misconceptions of the legal process.⁴¹ On the other side, it was contended that refusal of the broadcasting privilege was a denial of both the right to a public

36. For a discussion of the rising importance of television news, see HERMAN W. LAND ASSOCIATES, *TELEVISION AND THE WILD CITY: A STUDY OF THE IMPLICATIONS OF A CHANGE IN THE MODE OF TRANSMISSION* (1968); Hardin, *The T.V. News Explosion*, SATURDAY REVIEW, Feb. 11, 1967, at 72.

A recent Gallup Poll estimated that the average American spends 46% of his or her leisure time watching television as compared with 14% of leisure time spent reading. GALLUP OPINION INDEX, REP. NO. 105 (1974).

37. See Zimmerman, *supra* note 3, at 679.

38. 373 U.S. 723 (1963).

39. The conviction was affirmed by the Supreme Court of Louisiana. 242 La. 431, 137 So. 2d 283 (1961).

40. Justice Stewart, in referring to the defendant's trial, stated: "Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963). The Justice continued: "[W]e do not hesitate to hold . . . that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.'" *Id.* at 727.

41. See generally Douglas, *The Public Trial and the Free Press*, 33 ROCKY MT. L. REV. 1 (1960); Griswold, *The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered*, 48 A.B.A.J. 615 (1962); Warden, *Canon 35: Is There Room For Objectivity?*, 4 WASHBURN L.J. 211, 212 (1965).

trial⁴² and freedom of the press.⁴³

This issue was initially faced by the United States Supreme Court in *Estes v. Texas*,⁴⁴ in 1964. However, the Court limited its review to the question of whether requiring petitioner (the defendant at trial), over his continuing objection, to submit to a live telecast and broadcast of his trial⁴⁵ denied him due process of law and equal protection of the law under the fourteenth amendment.⁴⁶ Because the judgment created only a plurality,⁴⁷ it is necessary to give a brief review of each of the six separate opinions.⁴⁸

Justice Clark, speaking for the Court, pronounced that the actions of the media constituted a denial of due process, even in the absence of a showing of specific prejudice.⁴⁹ In other words, the use of television during criminal trials was inherently prejudicial and in itself constituted a violation of the fourteenth amend-

42. The sixth amendment provides in pertinent part: "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.

43. The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

44. 381 U.S. 532 (1965). The defendant was convicted of swindling by the District Court for the Seventh Judicial District of Texas at Tyler. The conviction was affirmed by the Texas Court of Criminal Appeals. Certiorari was granted by the U.S. Supreme Court.

45. The broadcast coverage of *Estes's* trial was limited. Pretrial motions were covered in full by the defense for the exclusion of cameras and recording devices and for a continuance. *Id.* at 535-36. During the trial, the court permitted television personnel to make live broadcasts of the state's opening and closing arguments, even though mechanical difficulties blanked out the visual portion of the coverage of the opening, and of the return of the verdict. The court did not permit coverage of defense summations. During the actual trial, videotapes, but no sound recordings, were permitted. *Id.* at 537, n.2.

A booth, painted to blend with the walls, had been constructed at the back of the courtroom in order to conceal all television and newsreel cameras. An aperture gave the lenses an unrestricted view. *Id.* at 537.

46. *Id.* at 534-35.

47. Justice Clark spoke for the Court and was joined by Justices Warren, Douglas, and Goldberg in a separate concurrence. Justice Harlan provided the fifth vote necessary in support of the judgment by a separate concurrence. Mr. Justice Stewart, with whom Justices Black, Brennan, and White joined, dissented.

48. This article is not intended to present a complete factual scenario and analysis of the *Estes* Court, but merely poses to summarily discuss the case so as to provide the reader with a general understanding of the issue(s) and how each Justice viewed the presence of electronic media in the courtroom at that time. However, *Estes* should not be disregarded as insignificant in the development of the law leading up to *Chandler*, for its impact was far reaching in the media-courtroom debate. For an extensive and precise analysis of *Estes* and a discussion of the case's impact and shortcomings, see Zimmerman, *supra* note 3. See also Recent Cases, *Constitutional Law-Televising of Criminal Trials Held Violative of the Right to a Fair Trial* 18 VAND. L. REV. 20-49 (1965).

49. 381 U.S. 532, 542, 544, 550 (1965). See Zimmerman, *supra* note 3, at 680-82 for a discussion of presumptive prejudicial publicity in the area of the law.

ment.⁵⁰ The Justice expressly recognized the sixth amendment right of the accused to a "public" trial. He also insisted that freedom of the press, as granted by the first amendment, must necessarily be subject to the maintenance of fairness in the judicial process, and that permitting electronic media within the courtroom would inevitably prejudice the trial.⁵¹

In support of this proposition, Justice Clark commented on the potential psychological impact of the electronic media upon the trial participants.⁵² He believed that jurors would be influenced by the publicity and distracted during the proceedings. "[Witnesses] may be demoralized and frightened, some cocky and given to overstatement; memories may falter . . . and accuracy of statement may be severely undermined."⁵³ In addition, Justice Clark felt the trial judge would be burdened with the supervisory task of controlling media crews. Furthermore, for a judge that is elected, the presence of the electronic media could bring the trial into the political arena by affording the judge the maximum possible publicity.⁵⁴ He continued that there would be an unerring

50. Justice Clark specified 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.

381 U.S. at 544-45 (1965). He continued with a host of specific reasons to prohibit electronic media coverage and thus justified what in his mind dictated a presumption of prejudice.

51. *Id.* at 539. In understanding the task of Justice Clark in grappling with the freedom of the press and the right to a fair trial, the words of Justice Black should be considered: "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." *Bridges v. California*, 314 U.S. 252, 260 (1941) (a free speech and fair trial case).

For a discussion of this conflict, see generally Note, *Public Trials and a First Amendment Right of Access: A Presumption of Openness*, 60 NEBRASKA L. REV. 169 (1981).

52. 381 U.S. at 545.

53. *Id.* at 547.

54. Chief Justice Warren cited a clear example of just such an instance in his concurring opinion. In his example, a trial judge made the following speech:

"This case is not being tried under the Federal Constitution. The Defendant has been brought into this Court under the state laws, under the State Constitution. . . .

I took an oath to uphold this Constitution; not the Federal Constitution but the State Constitution; and I am going to do my best to do that as long as I preside in this Court, and if it is distasteful in following my oath and upholding the constitution, it will just have to be distasteful."

Id. at 566 (Warren, C.J., concurring). The Chief Justice commented on the grand-

psychological impact on the accused,⁵⁵ along with the potential for depriving him of effective counsel.⁵⁶

In reaching his conclusion, Justice Clark hesitated to deal with the potential for "future developments in the field of electronics."⁵⁷ He limited his holding to television in its present stage of technological development, clearly appreciating the possibility "that the ever advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials."⁵⁸

It was with this hesitation that the concurring opinion of Chief Justice Warren, joined by Justices Goldberg and Douglas, disagreed. The Chief Justice wrote: "[F]or the Constitution to have vitality, this Court must be able to apply its principles to situations that may not have been foreseen at the time those principles were adopted."⁵⁹ The Justices felt that to permit electronic media coverage of federal and state court trials would invariably violate the sixth and fourteenth amendments.⁶⁰ Basically, three justifications were presented for this posture. The first was the notion that electronic media coverage of trials would detract from the dignity and integrity of the courtroom process with the result being a public misconception of the judicial system.⁶¹ The second was the inescapable psychological impact upon trial partici-

standing as follows: "One is entitled to wonder if such a statement would be made in a court of justice by any state trial judge except as an appeal calculated to gain the favor of his viewing audience." *Id.*

55. In fact the Justice likened the presence of television to "a form of mental—if not physical—harassment, resembling a police line-up or the third degree." *Id.* at 549.

56. "The distractions [and] intrusions into confidential attorney-client relationships, and the temptation offered by television to play to the public audience might often have a direct effect not only upon the lawyers, but the judge, jury and the witnesses." *Id.*

57. *Id.* at 552.

58. *Id.* at 551-52. It can perhaps be inferred that when the Court heard argument on November 12, 1980, on the case of *Chandler v. Florida*, 101 S. Ct. 802 (1981), the future developments in the electronics field that Justice Clark envisioned had come to pass.

59. 381 U.S. at 564 (Warren, C.J., concurring). It was reasoned that regardless of the advancement of the electronic media in future years, it should not be allowed into the courtroom during a criminal trial. *Id.*

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

61. "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." *Id.* at 571 (Warren, C.J., concurring). "There would be a real threat to the integrity of the trial process if the television industry and trial judges were allowed to become partners in the staging of criminal proceedings." *Id.* at 573-74 (Warren, C.J., concurring).

pants.⁶² Third, the television industry would select certain cases because of their sensationalism, and this "singling out" would subject certain defendants to a trial under prejudicial conditions not experienced by others. As an example, the Chief Justice wrote: "[T]he alleged perpetrator of the sensational murder, the fallen idol, or some other person who, like petitioner, has attracted the public interest would find his trial turned into a vehicle for television."⁶³

Because of these aforementioned reasons, the three Justices diagnosed television in the courtroom as inherently unfair and ruled that, both now and in the future, its presence would be necessarily inconsistent with what a trial should be. Stated simply, the Justices required a *per se* rule that criminal trials should never be televised.⁶⁴ In summarizing, Chief Justice Warren categorized television as

one of the great inventions of all time and [able to] perform a large and useful role in society. But the television camera, like other technological innovations, is not entitled to pervade the lives of everyone in disregard of constitutionally protected rights. The television industry, like other institutions, has a proper area of activities and limitations beyond which it cannot go with its cameras. That area does not extend into an American courtroom. On entering that hallowed sanctuary, where the lives, liberty and property of people are in jeopardy, television representatives have only the rights of the general public, namely, to be present, to observe the proceedings, and thereafter, if they choose, to report them.⁶⁵

It was with Justice Harlan's concurrence that the majority split.⁶⁶ Arguably, this split takes on a clearer focus in regard to precedent. While the other four Justices opted for the adoption of a *per se* constitutional prohibition to electronic media coverage of trials, Justice Harlan adopted a less expansive approach, holding only that the presence of television cameras in a "criminal trial of great notoriety" *per se* violated the fundamental right to a fair trial assured by the Due Process Clause of the fourteenth amendment.⁶⁷ Justice Harlan appreciated and essentially agreed with

62. Here, the Justices differed little from the reasoning of Justice Clark. See notes 52-56 *supra* and accompanying text.

63. 381 U.S. at 576-77 (Warren, C.J., concurring). See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (Dr. Sam Sheppard was convicted of murdering his wife after a trial which was described as having a "carnival atmosphere"). *Id.* at 358.

64. 381 U.S. at 540-41.

65. *Id.* at 585-86 (Warren, C.J., concurring).

66. See note 47 *supra*.

67. 381 U.S. at 587 (Harlan, J., concurring). He chose to refrain from deciding the question of the use of television in less sensationalized trials until the appropriate case should arise, by stating the following:

his four brethren concerning the potential evils of the electronic media's presence in the courthouse and felt "the arguments advanced against the constitutional banning of televised trials" to be "peculiarly unpersuasive."⁶⁸ He concluded by saying: "at the present juncture I can only conclude that televised trials, at least in cases like this one,⁶⁹ possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned."⁷⁰

In the sixteen or so years since *Estes* was decided, only two Supreme Court cases⁷¹ have addressed the problems regarding the use of modern electronic news gathering technology.⁷² Neither case involved the use of cameras in court proceedings.⁷³ Notwithstanding the lack of significant Supreme Court guidance as to constitutional permissibility, more than half the states have recently relaxed their rules, either on a permanent or experimental basis.⁷⁴

When the issue of television in a non-notorious trial is presented it may appear that no workable distinction can be drawn based on the type of case involved, or that the possibilities for prejudice, though less severe, are nonetheless of constitutional proportions. [citations omitted] The resolution of those further questions should await an appropriate case; the Court should proceed only step by step in this unplowed field. The opinion of the Court necessarily goes no farther, for only the four members of the majority who unreservedly join the Court's opinion would resolve those questions now.

Id. at 590-91.

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

69. The Justice was referring to notorious trials.

70. *Id.* at 596 (Harlan, J., concurring).

71. That is excluding *Chandler v. Florida*, 101 S. Ct. 802 (1981). However, several lower courts have concluded that televised coverage of a criminal trial is not a *per se* denial of a defendant's right to due process. In none of these cases did the courts interpret *Estes* as imposing a *per se* constitutional ban on the televising of state criminal trials. See *Bradley v. Texas*, 470 F.2d 785 (5th Cir. 1972); *Gonzales v. People*, 165 Colo. 322, 438 P.2d 686 (1968).

72. *Hochins v. KQED, Inc.*, 438 U.S. 1 (1978) (refused to allow broadcaster access to a jail); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (holding that there is no constitutional right to have either live or taped testimony recorded and broadcast). For a discussion of these cases with the first amendment arguments presented, see Zimmerman, *supra* note 3, at 651-53.

73. Nor did either case clarify or elaborate on the post-*Estes* uncertainty about a potential first amendment right of technological access. *Id.* at 651.

74. An accurate list of those states that permit television and other electronic media coverage either permanently or experimentally is difficult to compile because many states are currently in a phase of transition in this regard. As compiled in a recent article, Comment, *Television in the Courtroom: Devil or Saint?*, 17 WILLAMETTE L. REV. 345, 347 (1981), the following states permit television coverage:

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

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

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

One such state is Florida. In 1975, the Florida Supreme Court instituted an experimental program of courtroom television cover-

California has recently opened trial and appellate courts to experimental coverage. A special committee on courts and the media commenced an intensive study in June 1980, to determine the effects of television coverage on trial participants' behavior.

*Colorado** never adopted the A.B.A. Canon. It adopted its own rule which allows coverage in all courts with the judge's consent and in the absence of a participant's objection.

*Florida** allows television in all courts without the parties' objection.

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

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

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

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

Maryland on November 10, 1980, authorized an 18-month experiment with broadcast coverage on both trial and appellate court proceedings.

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

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

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

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

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

*New York** recently adopted a rule permitting coverage of appellate court proceedings.

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

Ohio allowed experimental coverage from June 1978 to June 1979.

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

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

Tennessee allows televising of trial and appellate proceedings.

*Texas** allows appellate coverage.

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

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

Wisconsin allows coverage in selected proceedings but denies coverage if a party requests exclusion of the media unless the media can show that the participant's reason for not desiring coverage is not valid.

States marked with an asterick (*) have adopted a permanent rule. See NATIONAL CENTER FOR STATE COURTS, RULES CONCERNING TELEVISION, RADIO AND PHOTOGRAPHIC COVERAGE OF JUDICIAL PROCEEDINGS, SUMMARY TABLE (rev. March 24, 1980). See also *In re Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d 764, 782-91 (Fla. 1979); Graves, *Cameras in the Courts: The Situation Today*, 63 JUD. 24, 25-27 (1979); Zimmerman, *supra* note 3, at 645 n.21 (for a more detailed compilation).

age⁷⁵ under the mandate of specific guidelines.⁷⁶ These initial guidelines, among other things, required the consent of all parties to the action. It developed, in practice, however, that the parties usually refused to agree to such electronic coverage. Nevertheless, it was the view of the court that an experimental period during which trials would be conducted with electronic media coverage was essential to a reasoned decision on the petition⁷⁷ for modification of Canon 3A(7). Consequently, the court then supplemented its rule and established a new one year experimental program, which permitted the electronic media to cover all judicial proceedings without reference to the consent of the parties, but still retained certain implementation guidelines.⁷⁸ When the experimental period concluded, the Florida Supreme Court reviewed briefs, reports, letters of comment and studies and surveyed witnesses, jurors, attorneys, and court personnel. The court also conducted a separate survey of judges and reviewed the experiences of other states that had adopted, either experimentally or permanently, electronic media programs.

The Florida Supreme Court concluded "that on balance there was more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage."⁷⁹ The court was of the opinion that, because of the judiciary's significant role in the day-to-day lives of the citizenry, it was imperative that the populace have confidence in the process.⁸⁰ It thought that broadcast coverage of trials would aid the public in accepting and understanding court decisions.⁸¹ The Florida court then amended Canon 3A(7) to allow television in the courtroom.⁸²

75. This was the result of the Post-Newsweek Stations of Florida petitioning the Supreme Court of Florida urging a change in Florida's Canon 3A(7) electronic media prohibition. Petition of the Post-Newsweek Stations, Florida, Inc., 327 So. 2d 1 (Fla. 1976).

76. Those guidelines can be found in Petition of the Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, 792 (1979). See note 78 *infra*.

77. See note 22 *supra*.

78. Petition of the Post-Newsweek Stations, Florida, Inc., 347 So. 2d 402 (Fla. 1976). A copy of the pilot-program standards can be found as an Appendix to Petition of Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, 783 (Fla. 1979).

79. *Id.* at 780.

80. *Id.*

81. In writing for the Court, Justice Sandberg reasoned:

In reaching our conclusion we are not unmindful of the perceived risks articulated by the opponents of change. However, there are risks in any system of free and open government. A democratic system of government is not the safest form of government, it is just the best man has devised to date, and it works best when its citizens are informed about its workings.

Id. at 781.

82. *Id.* The canon now provides:

Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and pre-

It was this revision that prompted two criminal defendants to challenge the constitutional validity of television coverage of their trial and ultimately gave the United States Supreme Court an opportunity to clarify and review its position in *Estes*.

III. FACTS OF THE CASE

In 1977, Noel Chandler and Robert Granger, appellants, were charged with conspiracy to commit burglary, grand larceny and possession of burglary tools.⁸³ What made this case more than a conventional burglary was that, at the time of their arrest, appellants were Miami Beach policemen. The state's leading witness⁸⁴ was an amateur radio operator, who unintentionally overheard and recorded incriminating conversation between appellants over their police field radios during the burglary. Predictably, the unique attributes of the case attracted the attention of the media.

Appellants sought, by pretrial motion, to have Experimental Canon 3A(7)⁸⁵ declared unconstitutional on its face and as applied.⁸⁶ Although the trial court denied relief,⁸⁷ it certified the issue to the Florida Supreme Court.⁸⁸ The Florida Supreme Court, nevertheless, declined to rule on the matter based on the fact that it was not directly relevant to the criminal charges against the appellants.⁸⁹ Although appellants persisted with several other attempts to prevent electronic media coverage of the trial, none were successful.

At voir dire, counsel for appellants questioned each prospective juror as to whether he or she could be impartial and fair, notwithstanding the presence of a television camera during the trial.

vent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

Id.

83. Appellants had attempted to burglarize a well known Miami Beach restaurant. *Id.* at 806.

84. The witness's name was John Sion.

85. See note 78 *supra* and accompanying text.

86. Appellants alleged that television coverage of this proceeding denied them a fair and impartial trial.

87. 101 S. Ct. 802, 806 (1981).

88. See note 82 *supra*, which states that the Florida Supreme Court retains supervisory power over the trial court's implementation of electronic media coverage of its proceedings.

89. *State v. Granger*, 352 So. 2d 175 (Fla. 1977).

Each juror actually selected for the case responded that such coverage would not affect his or her consideration in any way.⁹⁰

The trial judge denied a defense motion to sequester the jury.⁹¹ The court did, however, instruct the jury not to watch or read any sort of media coverage of the case and suggested that jurors limit their television news exposure to only that of national scope. Appellants' counsel then requested that the witnesses be instructed not to watch any television coverage of testimony presented at trial. The court refused this instruction, reasoning that no witness testimony was being reported on the evening news.⁹²

During the trial, a television camera covered the state's presentation of the radio operator's testimony and the closing arguments. There was no television coverage of any part of the case for the defense.⁹³ With the exception of one minor incident,⁹⁴ there was no evidence of any disruption or confusion caused by the television camera's presence.

The jury found appellants guilty on all counts. As a consequence, appellants moved for a new trial, asserting that they had been denied a fair and impartial trial as a result of the television coverage. Appellants made no showing or allegation of specific prejudice.

Upon affirming the convictions,⁹⁵ the Florida District Court of Appeal declined to address the facial validity of Canon 3A(7). The court reasoned that the Florida Supreme Court, having determined to allow an experimental program for television coverage, had implicitly decided that such coverage did not violate the federal or state constitutions. The district court of appeal did, however, agree to certify the question of the facial constitutionality of Canon 3A(7) to the Florida Supreme Court.⁹⁶

The Florida Supreme Court denied review⁹⁷ because of its hold-

90. 101 S. Ct. 802, 806 (1981). Interestingly, a television camera recorded the voir dire.

91. *Id.* Cf. *Estes*, wherein the Texas jurors were sequestered. See TEX. CODE CRIM. PROC. art. 35.23 (1966); *Estes v. Texas*, 381 U.S. 532, 609 (1965) (Stewart, J., dissenting).

92. 101 S. Ct. at 806.

93. *Id.* In total, only two minutes and fifty-five seconds of trial were broadcast, and, of that, only the prosecution's side of the case was shown.

94. *Id.* at 806 n.7. During a part of the testimony of the state's key witness, John Sion, the judge interrupted the questioning to instruct a cameraman to stop a certain movement that the judge apparently found distracting.

95. *Chandler v. State*, 366 So. 2d 64 (Fla. Dist. Ct. App. 1978).

96. It's worthy to note that the district court of appeal found no evidence in the trial transcript to indicate that the presence of a television camera had hindered appellants in presenting their case or had deprived them of an impartial jury. *Id.* at 69.

97. *Chandler v. State*, 376 So. 2d 1157 (Fla. 1979) (actually finding the issue moot).

ing, in *In re Post-Newsweek Stations, Florida, Inc.*,⁹⁸ that television coverage of courtroom proceedings was not *per se* a denial of due process. The *Chandler* case was then appealed to the United States Supreme Court,⁹⁹ which subsequently affirmed the judgment of the Florida Court¹⁰⁰ and signaled to other states that a program permitting radio, television and photographic coverage of criminal proceedings, over the accused's objection, is constitutional, absent a showing of specific prejudice.

IV. SUPREME COURT ANALYSIS

The *Chandler* Court¹⁰¹ initiated its analysis with a discussion of the Florida Supreme Court's explicit rejection of any state or federal constitutional right of access by the electronic media to cover a trial and, thereafter, broadcast the proceedings.¹⁰² In making its rejection, the Florida court relied on *Nixon v. Warner Communications, Inc.*,¹⁰³ where the Court held:

In the first place, . . . there is no constitutional right to have [live witness] testimony recorded and broadcast. [citation omitted]. Second, while the guarantee of a public trial, in the words of Justice Black, is "a safeguard against any attempt to employ our courts as instruments of persecution," [citation omitted] it confers no special benefit on the press. [citation omitted]. Nor does the Sixth Amendment require that the trial—or any part of it—be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and report what they have observed.¹⁰⁴

The Court tacitly affirmed this earlier holding in *Nixon*¹⁰⁵ without discussion and utilized the Florida court's interpretation of and reliance on *Nixon* to narrow the issue before them. The

98. 370 So. 2d at 782.

99. 100 S. Ct. 1832 (1980) (probable jurisdiction noted).

100. 101 S. Ct. 802 (1981).

101. Chief Justice Burger delivered the opinion of the Court, in which Associate Justices Brennan, Marshall, Blackmun, Powell and Rehnquist joined. Justices Stewart and White wrote separate concurrences. Justice Stevens did not participate.

102. 101 S. Ct. at 807. The Florida Supreme Court made this judgment while promulgating the revised Canon 3A(7), and it framed its holding as follows:

While we have concluded that the due process clause does not prohibit electronic media coverage of judicial proceedings *per se*, by the same token we reject the argument of the [Post-Newsweek Stations] that the first and sixth amendments to the United States Constitution mandate entry of the electronic media into judicial proceedings.

Petition of Post-Newsweek Stations, Florida, Inc., 370 So. 2d at 774.

103. 435 U.S. 589 (1978).

104. *Id.* at 610.

105. *Id.*

Court stated that "the Florida Supreme Court predicated the revised Canon 3A(7) upon its supervisory authority over the Florida courts, and not upon any constitutional imperative . . . [therefore] only the limited question of the Florida Supreme Court's authority to promulgate the canon for the trial of cases in Florida courts"¹⁰⁶ is to be decided. The Court continued: "this Court has no supervisory jurisdiction over state courts, and, in reviewing a state court judgment, we are confined to evaluating it in relation to the Federal Constitution."¹⁰⁷ Thus, the *Chandler* Court, by recognizing a state court's utilization of Supreme Court precedent,¹⁰⁸ side-stepped any confrontation with the first amendment rights of the electronic media.¹⁰⁹

A. *The Meaning of Estes*

The Court directed its attention to the opinion¹¹⁰ in *Estes* which appellants argued announced a *per se* constitutional rule that televising criminal trials is inherently a denial of due process. The Court acknowledged that Chief Justice Warren's concurrence, which was joined by Justices Douglas and Goldberg, lent some support to the appellants' position.¹¹¹ However, the Court empha-

106. 101 S. Ct. at 807.

107. *Id.*

108. Interestingly, the *Nixon* majority relied on *Estes* to support the conclusion that "there is no constitutional right to have testimony recorded and broadcast." 435 U.S. at 610. However, the reliance on *Estes* was unjustified since *Estes* did not decide that there was no first amendment right to record trials. Instead, that case held merely that recording would not be permitted when it threatened a defendant's right to due process of law. Thus, the questionable use of precedent can arguably be viewed as permeating at least the framing of the issue in *Chandler*.

109. This author acknowledges the fact that the petitioner's herein only allege the media's coverage deprived them of a fair trial; at the same time, the first amendment issue has, in the mind of many scholars, been so intertwined with the right to a fair trial that more attention by the Court to the free press issue would have been expected.

For example, recently, an author, discussing the many state courts allowing electronic media coverage of trials, wrote that ultimately the issue will confront the United States Supreme Court, "giving the Court the opportunity to review both the validity of its position in *Estes* and the first amendment issues it failed to address in that case." Zimmerman, *supra* note 3 at 646. Unfortunately, the author's prediction was correct only as to the former.

For an excellent discussion of the first amendment issues regarding technological access to the courtroom, case history, and a proposed analysis for the Court, see Zimmerman, *supra* note 3.

The Court has in the past made assumptions for the sake of argument when it felt discussion was necessary to clarify confusion. See, e.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. at 610.

110. Appellants relied chiefly on Justice Clark's opinion for the majority and Chief Justice Warren's separate concurring opinion. See notes 49-65 *supra* and accompanying text.

111. 101 S. Ct. at 807. "If appellants' reading of *Estes* were correct, we would be obliged to apply that holding and reverse the judgment under review." *Id.*

sized that *Estes* was a plurality decision with Justice Harlan providing the fifth vote necessary in support of the judgment. This prompted the Court to examine and dissect Justice Harlan's opinion, so as to make a determination of the ultimate holding in *Estes*, thereby deciding whether a *per se* rule was in fact established by the *Estes* Court.

Chief Justice Burger opened this analysis with an observation made by Justice Harlan in *Estes*.

Permitting television in the courtroom undeniably has mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process. Forbidding this innovation [referring to television in courtrooms], however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the states from pursuing a novel course of procedural experimentation. My conclusion is that there is no constitutional requirement that television be allowed in the courtroom, and, at least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment.¹¹²

The Court then took notice of Justice Harlan's synthesis of what he conceived to be the inherent dangers of televised trials.¹¹³ The Chief Justice doubted "how much of Justice Clark's opinion was joined in, and supported by Justice Harlan."¹¹⁴ However, Chief Justice Burger expressed understanding in the apparent indecisiveness of the *Estes* Court by stating: "In an area charged with constitutional nuances, perhaps more should not be expected."¹¹⁵

The Court, in reaching its conclusion as to the meaning of the *Estes* decision, pronounced that "Justice Harlan's opinion . . . must be read as defining the scope of that holding [referring to *Estes*]; we conclude that *Estes* is not to be read as announcing a constitutional rule barring still photographic, radio and television coverage in all cases and under all circumstances."¹¹⁶ The Court

112. *Id.* at 807-08 (citing *Estes v. Texas*, 381 U.S. at 587 (Harlan J., concurring)).

113. 101 S. Ct. at 808. See 381 U.S. at 591 (Harlan, J., concurring). The list that Justice Harlan presented was much the same as this article revealed in the background discussion. See notes 52-69 *supra* and accompanying text.

114. 101 S. Ct. at 808.

115. *Id.* at 808-09.

116. *Id.* at 809. To support this proposition, the Court cited its subsequent cases which have so read *Estes*. Those cases were: *Sheppard v. Maxwell*, 384 U.S. 333, 352 (1966), where *Estes* was cited as an instance where "the totality of the circumstances" led to a denial of due process; *Murphy v. Florida*, 421 U.S. 794, 798 (1975), in which the Court described *Estes* as "a state court conviction obtained in the trial atmosphere that had been utterly corrupted by press coverage;" *Nebraska*

determined that *Estes* "does not stand as an absolute ban on state experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964, and is, even now, in a state of continuing change."¹¹⁷

Notwithstanding this rather strong language, the Court recognized in a footnote that Justice Harlan's opinion "sounded a note" that broadcast coverage inherently violates the Due Process Clause.¹¹⁸ However, this was quickly countered by other language in the Harlan opinion that supported the *Chandler* Court's view.¹¹⁹ Thus, the Chief Justice wrote: "There is no need to 'overrule' a 'holding' never made by the Court."¹²⁰

Although the Court refrained from using any incisive analysis in reaching this conclusion, it did select those portions of the Harlan opinion which best supported its proposition to distinguish *Estes* from this case. However, a careful reading of Justice Harlan's opinion leaves the reader with no definitive answer.¹²¹ It is readily apparent that whether a narrow or broad reading of *Estes* (more particularly the Harlan opinion) is adopted, the holdings will vary. This Court opted for a narrow reading, thereby avoiding a disavowal of the *Estes* decision.

B. Formulating a Rule

When the Court became satisfied that *Estes* did not proclaim a constitutional rule prohibiting all electronic media coverage of criminal trials, the Court directed itself, as a matter of first impression,¹²² to the appellants' recommendation that it formulate

Free Press Ass'n v. Stuart, 427 U.S. 539, 552 (1975), in which the *Estes* trial was depicted as lacking due process where "the volume of trial publicity, the judge's failure to control the proceeding, and the telecast of a hearing and of the the trial itself" prevented a sober search for the truth. *Id.* at 809 n.8.

117. *Id.* at 809. See notes 57-58 *supra* and accompanying text.

118. *Id.* at 809 n.8.

119. The Court was particularly convinced when Justice Harlan concluded his opinion by stating, "the day may come when television will have become so commonplace an affair in the daily life of the average person . . . that its use in courtrooms may disparage the judicial process." 381 U.S. at 595 (Harlan, J., concurring). Such language made it clear that no *per se* rule existed.

120. 101 S. Ct. at 809 n.8.

121. As Justice Stewart aptly points out, Justice Harlan "limited his opinion" to . . . notorious criminal trial[s] such as the one in [*Estes*] . . .," but at the same time admitted that there may be no practical distinctions that can be drawn based on the type of case. 101 S. Ct. at 815 (Stewart, J., concurring). The *Chandler* Court, notwithstanding the arguable conflicts in the Harlan opinion, treated its conclusion as apparent, that is, as pointed out by Justices Stewart and White in each concurrence, fought with difficulty.

122. Although the Court stated that deciding whether a *per se* rule should be adopted was one of first impression for this Court, the question is hardly a new one. The *Estes* Court fully discussed the propriety of a constitutional rule throughout its six opinions, notwithstanding the lack of a specific request by the

such a *per se* rule.¹²³ In so doing, the Court prefaced its discussion with the notion that a great deal of publicity in a criminal case may impair the defendant's right to a fair trial.¹²⁴ Notwithstanding this fact, the Court took notice of the various curative devices the courts have adopted to secure unprejudiced jury deliberations.¹²⁵ The Chief Justice then established a precept which served as a directive for the Court to expand upon. He stated: "[A]n 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."¹²⁶ This risk, the Court felt, is safeguarded by the fact that a defendant has the right to demonstrate on appeal that the media's coverage of his case compromised the ability of the jurors to adjudicate fairly.¹²⁷ In other words, the defendant is placed with the burden of showing that his case was prejudiced.¹²⁸ Acknowledging that the

appellant. See 381 U.S. at 552 (Warren, C.J., concurring), where Chief Justice Warren wrote "I join the Court's opinion and agree that the televising of criminal trials is inherently a denial of due process. . . ." See also *id.* at 601, 615 (Stewart J., dissenting); *id.* at 615 (White, J., dissenting).

123. 101 S. Ct. at 809.

124. *Id.* See, e.g., *Nebraska Free Press Ass'n v. Stuart*, 427 U.S. 539 (1975).

125. The Court cited *Nebraska Free Press Ass'n v. Stuart*, 427 U.S. at 563-65 (1975), wherein the opinion catalogued a variety of protective precautions to avoid biased jury deliberations. Some of those were a change of venue, postponement of trial to allow public attention to subside, extensive voir dire, clear instructions to jurors and sequestration.

126. 101 S. Ct. at 810.

127. *Id.* at 813.

128. *Id.* at 810. In dicta, the Court noted that: "[T]he risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage." *Id.* at 810. However, it is argued that there has existed and continues to exist a definite judicially viewed disparity between the first amendment rights of the print media and that of the broadcast media. "Legislators and government administrators have, with Court approval, exerted control over the content and operations of the broadcast media that would be unthinkable if applied to the print media." Zimmerman, *supra* note 3, at 642.

For a discussion of the treatment of print versus broadcast media, see, e.g., B. SCHMIDT, *FREEDOM OF THE PRESS AND PUBLIC ACCESS* (1976); Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976); Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW. & ECON. 15 (1967).

For cases arguably enforcing a double standard, see *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978), *reh. den.*, 439 U.S. 883 (1978) (holding 18 U.S.C. 1464 (1976), which prohibits the broadcasting of "obscene, indecent, or profane language", constitutional as applied to the particular facts of the case); *Red Lion Broadcasting*

number of appeals may likely increase because of the creation of a new ground for reversal, without expansion, the Court said this is a risk Florida has opted to bear.¹²⁹

In confronting the concern that the presence of media cameras and recording devices at trial would inevitably give rise to adverse psychological impact on the participants in the trial, the Court said that, at this time "there is no unimpeachable empirical support for the thesis that the presence of the electronic media, ipso facto, interferes with trial proceedings."¹³⁰ The Court did, however, mention that if data were to demonstrate that electronic media coverage of trials "invariably and uniformly"¹³¹ had an adverse impact on the conduct of participants, so as to impair fundamental fairness, the decision would be easy: "prohibition of broadcast coverage of trials would be required."¹³²

The *Chandler* Court also emphasized that the Florida rule harbors safeguards to protect against the potential for prejudice by requiring that objections to coverage by the accused be heard and considered on the record by the trial judge.¹³³ Consequently, there would be a transcript for appellate review.¹³⁴ But it appeared more important to the Court that a pretrial hearing would allow a defendant to demonstrate factually the basis of this objection to broadcast coverage, thereby enabling the trial court to take measures necessary to reduce or eradicate the risks of prejudice to the accused.¹³⁵

Content that unfavorable ramifications to trial participants were not inherently attached to electronic coverage of trials, so as to deny an accused due process, and that formulated safeguards served to protect against any adverse impacts, the majority pro-

Co. v. F.C.C., 395 U.S. 367 (1969) (where the Supreme Court allowed major governmental intrusions into editorial control of the content of radio and television programming). *But cf.* *Miller v. California*, 413 U.S. 15 (1973), *reh den.*, 414 U.S. 881 (1973); *Memoris v. Massachusetts*, 383 U.S. 413 (1966); *Roth v. United States*, 354 U.S. 476 (1957), which exemplify the print media's enjoyment of a broader freedom to be indecent.

129. 101 S. Ct. at 811.

130. *Id.* at 810 n.11.

131. *Id.* at 810.

132. *Id.* See note 178 *infra* and accompanying text.

133. *Id.* at 811. The petitioners herein made no request for an evidentiary hearing to show adverse impact or injury.

Although the Court made no mention, it could be argued that pretrial hearing allowing the accused an opportunity to demonstrate that broadcast coverage adversely impacts his trial would be but a hallow formality. For if, as acknowledged by the Court, *id.* at 810 n.11, there is to date no empirical data which demonstrates electronic media coverage taints a trial, how shall a defendant make proof of such prejudice? See *Green v. State*, 377 So. 2d 193 (Fla. Dist. Ct. App. 1979).

134. 101 S. Ct. at 811.

135. *Id.*

ceeded to formulate a directive to foster state experimentation in this area. Serving as an analytical platform, the *Chandler* Court quoted the following admonition of Justice Brandeis.

"To 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. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, and unreasonable But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."¹³⁶

Even though aware of all the alleged "mischievous potentialities"¹³⁷ of broadcast coverage that could deny the accused due process of law, the Court was still convinced that the appellants had to prove specific injury because of the cameras' presence.¹³⁸ No injuries were proved, and this was lethal to the particular appellant's (*Chandler*) claim herein.¹³⁹

In reaching its conclusion, the Court felt uncompelled to ignore or minimize "the potential danger to the fairness of a trial in a particular case in order to conclude that Florida may permit the electronic media to cover trials in its state courts."¹⁴⁰ Simply put, the Court found no equivalently constitutional prohibition and decided "the states must be free to experiment,"¹⁴¹ as Florida had done with the program authorized by Canon 3A(7). The majority

136. 101 S. Ct. at 812 (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

137. 381 U.S. at 587. See notes 52-56, 61-63 *supra* and accompanying text.

138. 101 S. Ct. at 813. The Court said: "appellants have offered no evidence that any participant in this case was affected by the presence of cameras. In short, there is no showing that the trial was compromised by television coverage, as was the case in *Estes*." 381 U.S. at 587.

However, a look at *Estes* reveals that Justice Clark explicitly said "this Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. This is such a case." 381 U.S. at 542.

The *Chandler* majority should have been more precise in its discussion of presumptive prejudice, for it was subsequent to the *Estes* decision that the Court employed a stricter standard for measuring press prejudice. In *Murphy v. Florida*, 421 U.S. 794 (1975), the Court held juror awareness of the trial's notoriety was not enough to trigger a finding of presumptive prejudice, for cases after *Murphy*, see *United States v. Haldeman*, 559 F.2d 31, 59-71 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *People v. Manson*, 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (1976), *cert. denied*, 430 U.S. 986 (1977).

139. 101 S. Ct. at 813.

140. *Id.*

141. *Id.*

continued: "We are not empowered by the Constitution to oversee or harness state procedural experimentation; only when the state action infringes fundamental guarantees are we authorized to intervene."¹⁴² However, the Court remained clearly uncommitted to state its position on the issue when it said, "there is no reason for this Court either to endorse or to invalidate Florida's experiment," unless there is a showing of actual prejudice of constitutional dimensions to these defendants.¹⁴³

Notwithstanding this reticence, Chief Justice Burger has said he would not allow a television camera in his courtroom.¹⁴⁴ As to the meaning of *Chandler*, the Chief Justice was quoted as saying that the decision was in the area of states rights. "The central point of that decision is the recognition that the United States Supreme Court is not a supervisor of state courts. Our jurisdiction begins only when some action transgresses the Constitution."¹⁴⁵ Thus, it was the concept of federalism that actually guided the majority in reaching its decision.¹⁴⁶

V. THE CONCURRENCES

A. Justice Stewart: Concurring in the Result

Justice Stewart refused to join the opinion of the majority because he felt the convictions in the case could not be affirmed without overruling *Estes v. Texas*.¹⁴⁷ He believed *Estes* established a *per se* rule prohibiting all electronic media from state courtrooms whenever a criminal trial was in progress. In fact, the Justice dissented in *Estes* for that very reason.¹⁴⁸ Justice Stewart pointedly criticized the *Chandler* opinion by stating: "rather than join what seems to me a wholly unsuccessful effort to distinguish that decision, I would now flatly overrule it."¹⁴⁹

Justice Stewart reasoned that the factual scenerio in *Estes* was not much unlike that in *Chandler*. In *Estes*, all television and newsreel photographers were restricted to a booth, specially constructed in the back of the courtroom. Only a limited portion of the trial was permitted to be telecast.¹⁵⁰ Thus, Justice Stewart could not perceive the lack of physical disruption as the distin-

142. *Id.*

143. *Id.*

144. Winter, *Cameras in the Courtroom*, 67 A.B.A.J. 277, (1981).

145. *Id.*

146. 101 S. Ct. at 812.

147. 381 U.S. 532 (1964). See 101 S. Ct. at 814 (Stewart, J., concurring).

148. 381 U.S. at 601 (Stewart, J., dissenting).

149. 101 S. Ct. at 814 (Stewart, J., concurring).

150. 381 U.S. at 537. In fact, only the opening and closing arguments of the State and the return and receipt of the jury's verdict were carried live with sound.

guishing factor in *Chandler*.¹⁵¹

Rather, in *Estes*, Justice Stewart felt that "The violation inhered . . . in the hypothesis that the mere presence of cameras and recording devices might have an effect on the trial participants prejudicial to the accused."¹⁵² This he closely scrutinized by noting that the *Estes* jurors "were sequestered day and night, from the first day of the trial until it ended."¹⁵³ In *Chandler*, Justice Stewart noted that the jurors were not sequestered at all. This aspect alone, he said, made the *Estes* decision an even easier one than *Chandler* to find no substantial threat to a fair trial.¹⁵⁴

In further dissecting the *Chandler* majority's use of precedent, he questioned the majority's reliance upon Justice Harlan's concurrence in *Estes* because he recognized that the majority began its opinion by noting that Justice Harlan limited his opinion "to a notorious criminal trial such as the one in [*Estes*]."¹⁵⁵ Justice Stewart aptly pointed out that the majority in *Chandler* labeled the *Chandler* trial as notorious by use of the following language: "several aspects of the case distinguish it from a routine burglary Not surprisingly, these novel factors attracted the attention of the media."¹⁵⁶ Thus, Justice Stewart believed the majority's attempt to factually distinguish *Estes* from *Chandler* was tenuous at best.

In concluding, Justice Stewart said that the *Estes* Court "found the admittedly unobtrusive presence of television cameras in a criminal trial to be inherently prejudicial, and thus violative of Due Process of Law."¹⁵⁷ He then explicitly stated that the *Chandler* majority reached "precisely the opposite conclusion"¹⁵⁸ and disapproved "the square departure from precedent."¹⁵⁹

The trial judge, at the defendant's request, prohibited coverage of defense counsel during their summation to the jury. *Id.*

Even Justice Harlan, upon whose opinion the majority relied heavily, called the *Estes* coverage "relatively unobtrusive, with the cameras contained in a booth at the back of the courtroom." *Id.* at 588 (Harlan, J., concurring).

151. 101 S. Ct. at 814 (Stewart, J., concurring).

152. *Id.* at 814-15.

153. *Id.* at 815 n.1 (Stewart, J., concurring).

154. *Id.*

155. *Id.* at 815 (Stewart, J., concurring) (quoting majority opinion, 101 S. Ct. at 808).

156. *Id.* at 806.

157. *Id.* at 815 (Stewart, J., concurring).

158. *Id.*

159. *Id.*

B. Justice White: Concurring in the Judgment

Agreeing with the reasons advanced in Justice Stewart's concurrence, Justice White was of the opinion that "*Estes* is fairly read as establishing a *per se* constitutional rule against televising any criminal trial if the defendant objects."¹⁶⁰ As a result, he pronounced that *Estes* must be overruled to affirm the *Chandler* judgment below.¹⁶¹

Justice White acknowledged, however, that *Estes* could arguably be read more narrowly because of Justice Harlan's concurring opinion, which called for the prohibition of electronic media coverage of only widely publicized, notorious criminal trials. Notwithstanding this possibility, Justice White believed that whatever the reading of *Estes*, broad or narrow, the decision should have been overruled by the *Chandler* Court.¹⁶²

Justice White, like Justice Stewart, was in the dissent in *Estes* and wrote that he remained "unwilling to assume or conclude without more proof than has been marshalled to date that televising criminal trials is inherently prejudicial even when carried out under properly controlled conditions."¹⁶³ Thus, as to this portion of the Chief Justice's opinion in *Chandler*, Justice White agrees.¹⁶⁴

However, Justice White disapproved of the *Chandler* Court's reliance on and interpretation of Justice Harlan's opinion in *Estes*.¹⁶⁵ For example, Justice White proficiently pointed out that the Florida rule has no exception for the sensational or widely publicized case on which Justice Harlan explicitly limited his concurrence.¹⁶⁶ This he argued is such a departure from *Estes* that it "effectively eviscerates"¹⁶⁷ that case. Thus, he concluded not even the narrower reading of *Estes*, which the *Chandler* majority adopted, would have precedential value.¹⁶⁸

Furthermore, Justice White believed that a defendant should be required to show some specific prejudice to his or her defense, and, without so doing, a state court decision to allow television

160. 101 S. Ct. at 816 (White, J., concurring).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* See 381 U.S. at 587 (Harlan, J., concurring). The Florida program provides that any kind of case may be televised, absent a showing of specific prejudice, as long as the rule is otherwise complied with. *Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d at 774 (Fla. 1979).

167. 101 S. Ct. at 816 (White, J., concurring).

168. *Id.*

coverage should not be overturned.¹⁶⁹ It was with this issue that Justice White had further difficulty in reconciling the *Chandler* majority with that of *Estes*. He reiterated that the *Chandler* opinion construed *Estes* as merely announcing that, on the facts of that case, there had been an unfair trial, and no *per se* rule was established at all. Justice White articulated that this was directly in conflict with the various *Estes* opinions. As an example, he cited Justice Clark's majority opinion, which said "that no 'isolatable' or 'actual' prejudice had been or need be shown"¹⁷⁰ In addition, Justice White noted that Justice Harlan explicitly rejected the requirement of showing "specific prejudice" in cases 'like this one.'¹⁷¹ Justice White then focused on the *Chandler* rule which stated that "absent a showing of prejudice of constitutional dimensions to these defendants, there is no reason to overturn the Florida rule"¹⁷²

Justice White viewed these inconsistencies as reducing "*Estes* to an admonition to proceed with some caution."¹⁷³ He aptly concluded that the *Chandler* decision does nothing that the *Estes* Court did not already do.¹⁷⁴ In other words, since the majority had decided *Estes* never in fact established a constitutional prohibition to electronic coverage of trials, it followed that it had been just as permissible pre-*Chandler*, as it is currently, for a state to permit television coverage of its trials over the defendant's objection.

VI. IMPACT OF THE CASE

The unanimous *Chandler* decision clearly shows that the federal constitution does not mandate a prohibition of electronic media coverage of state courtroom proceedings. This decision is, beyond doubt, an important one, for it uncontestably establishes strong precedent which will serve to offer the states guidance in deciding whether to implement a program allowing television coverage of its trials.¹⁷⁵ It is not the result of the *Chandler* decision

169. *Id.*

170. *Id.*

171. *Id.* at 817 (White, J., concurring) (quoting *Estes v. Texas*, 381 U.S. at 593 (Harlan, J., concurring)).

172. *Id.* (quoting 101 S. Ct. at 813).

173. *Id.*

174. *Id.*

175. Certainly many states which currently permit television coverage of trials on an experimental basis, *see* note 74 *supra*, will consider the *Chandler* opinion

that disturbs this author; rather, it is the way the decision was reached. Before discussing the Court's method of reaching its decision, it is necessary to disclose exactly what the *Chandler* case does denote and what the probable practical ramifications will be.

Concisely stated, *Chandler v. Florida* held that television cameras in state courtrooms is not inherently unconstitutional with regard to the defendant.¹⁷⁶ Electronic media coverage of a criminal trial does not *per se* violate a defendant's due process right to a fair trial. The result of such a holding directly places the burden on the defendant of proving that actual prejudice resulted (in the case of an appeal) or will result (in the case of a pretrial challenge to electronic coverage) because of the electronic media's presence in the courtroom.¹⁷⁷ The Court further required that this showing be with specificity. For example, Chief Justice Burger wrote in *Chandler*: "To demonstrate prejudice in a specific case a defendant must show something more than juror awareness that the trial is such as to attract the attention of broadcasters."¹⁷⁸ By negative implication, *Chandler* sets a high standard by requiring a near scientific showing by a defendant that the presence of cameras will prejudice his case.¹⁷⁹ "Yet the bottom line to date remains, as the U.S. Supreme Court said in *Chandler*, 'at present no one has presented empirical data sufficient to establish that the mere presence of broadcast media in the courtroom inherently has an adverse effect on the process under all circumstances.'"¹⁸⁰ Therefore, it is doubtful that a defendant will have success in attaining an equal showing of prejudice, unless the circumstances are extremely unique.¹⁸¹

when deciding whether to adopt permanently a program such as Florida's. It is also likely that those states which have refrained from experimenting with electronic media covered trials will reconsider that posture. It was said that "*Chandler* does not require states to admit cameras into their courts, but . . . state laws prohibiting televised coverage 'would invite a very strong constitutional challenge.'" Winter, *supra* note 144 at 278 (quoting Stephan Nevas, First Amendment counsel for the National Association of Broadcasters).

Curiously, after the *Chandler* decision, the Maryland House of Delegates voted to prohibit cameras and tape recorders from criminal trials, notwithstanding a state court of appeal's ruling which allowed an 18 month experiment with the television coverage that began prior to the *Chandler* opinion. Winter, *supra* note 144 at 278.

176. 101 S. Ct. at 813-14.

177. *Id.* at 810-14.

178. *Id.* at 813.

179. Winter, *supra* note 144, at 278.

180. *Id.* (quoting from *Chandler v. Florida*, 101 S. Ct. at 812).

181. As an example of an adequate showing, see *Green v. State*, 377 So. 2d 193 (Fla. Dist. Ct. App. 1979), where it was held that upon showing that electronic media coverage of a trial would render an otherwise competent defendant incompetent to stand trial, the trial court is constitutionally required to prohibit electronic media coverage of such court proceedings.

Undoubtedly, there will be a considerable increase in pretrial challenges because of television coverage. If at all possible, it would seem logical that defense attorneys will attempt to protect their clients from increased public exposure. Objections to coverage will need to be made at the trial level so as to preserve the right to raise the issue on appeal. Further, as noted by the *Chandler* Court, such coverage "may well increase the number of appeals by adding a new basis for claims to reverse"¹⁸² In any event, the Court has provided the legal community with a decision on the electronic media issue, and only actual implementation and time will fully reveal the practical repercussions.

As noted earlier, the approach the *Chandler* Court utilized in attaining the basis for its decision is questionable. For as Justice White enunciated in his concurring opinion,¹⁸³ the *Chandler* decision really did not change the law because the Court found its opinion to be consistent with *Estes v. Texas*. The question is, consistent with what?

In *Estes*, Justice Clark opted for a *per se* rule which required prohibiting television from the courtroom¹⁸⁴ but limited that ruling to "television in its present stage of development."¹⁸⁵ This qualification prompted Chief Justice Warren, joined by Justices Goldberg and Douglas, to separately concur and flatly mandate a *per se* prohibition.¹⁸⁶ Justice Harlan's concurrence stated that "cases like this one [referring to trials of notoriety], possess such capabilities for interfering with the even course of judicial process that they are constitutionally banned."¹⁸⁷ Further, Justice Stewart, with whom Justices Black, Brennan, and White joined, dissented because they believed that *Estes* announced a *per se* rule that the fourteenth amendment "prohibits all television cameras from a state courtroom whenever a criminal trial is in progress."¹⁸⁸

Nevertheless, the *Chandler* majority chose to gather from the

182. 101 S. Ct. at 811.

183. *Id.* at 817 (White, J., concurring).

184. *Estes v. Texas*, 381 U.S. at 542, 544, 550 (1965).

185. *Id.* at 551. See notes 49-58 *supra* and accompanying text.

186. *Id.* at 540-41 (Warren, C.J., concurring). See notes 59-65 *supra* and accompanying text.

187. *Id.* at 596 (Harlan, J., concurring). See notes 66-70 *supra* and accompanying text.

188. *Id.* at 614 (Stewart, J., dissenting). See generally the concurrences of Justices Stewart and White in *Chandler*. 101 S. Ct. at 814-17.

Harlan concurrence in *Estes* every excerpt possible to support the attempted proposition that *Estes* did not in fact establish a *per se* rule prohibiting televised coverage of trials.¹⁸⁹ By so doing, the Court found it unnecessary to overrule *Estes*.¹⁹⁰ Because of these inconsistencies, there is little difficulty for one finding the separate concurrences of Justices Stewart and White to be particularly more persuasive and the *Chandler* majority's attempt to reconcile analytically the *Estes* and *Chandler* decision tenuous at most.¹⁹¹

Setting this aside, it is inescapable that *Chandler v. Florida* raised a series of questions that will certainly return to the Court for answers. Most inevitable will be the broadcasters' assertion of their first amendment right of courtroom access.¹⁹² This will be most likely in those states which have, to date, refused to allow electronic media into their courts. Further, it must be remembered that if empirical data is gathered that shows the television camera to have a peculiar, adverse psychological impact on trial participants, the *Chandler* majority has already announced that it will bar the cameras' presence.¹⁹³

It remains to be seen whether the American Bar Association will reverse its current position, in light of this decision, and ac-

189. See, e.g., 101 S. Ct. at 814-15 (Stewart, J., concurring); *id.* at 815-17 (White, J., concurring), where both Justices dissected the *Chandler* majority's interpretation of Justice Harlan's concurrence in *Estes* and pointedly referenced the blatant inconsistencies in the *Chandler* Court's analysis.

190. Interestingly, since Justice Harlan limited his concurrence in *Estes* to trials of great notoriety, 381 U.S. at 808 (Harlan, J., concurring), and the *Chandler* majority tacitly labeled the *Chandler* case notorious, e.g., "not surprisingly the novel factors [referring to the *Chandler* facts] attracted the attention of the media," 101 S. Ct. at 806, what could be the distinguishing factors? Justice Stewart also pointed to this analytical shortcoming of the majority. *Id.* at 815 n.3 (Stewart, J., concurring).

Further, as indicated by Justice White, "Justice Clark's majority opinion [in *Estes*] . . . expressly recognized that no 'isolatable' or 'actual' prejudice had been or need be shown [381 U.S. at 542-43] and Justice Harlan expressly rejected the necessity of showing 'specific' prejudice in cases 'like this one [381 U.S. at 593 (Harlan, J., concurring)].'" 101 S. Ct. at 816-17 (White, J., concurring). Yet the *Chandler* majority ruled that "[absent a showing of prejudice of constitutional dimension to those] . . . defendants" there is no reason to overturn the convictions of the appellants. 101 S. Ct. at 813.

191. See generally notes 147-74 *supra* and accompanying text.

192. For a full discussion of this subject, see Zimmerman, *supra* note 3.

193. "If it could be demonstrated that the mere presence of photographic and recording equipment . . . 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." 101 S. Ct. at 810.

There is presently a study being conducted by a private research firm in California which is compiling data to measure the television camera's psychological impact on trial proceedings and its participants. When completed, the findings will be submitted to the California Judicial Council for review. See Winter, *supra* note 144.

cept the cameras' courtroom presence. In addition to the A.B.A., the practicing trial attorney will need to readjust his attitude toward the invisible courtroom audience, for it is unlikely the Court will regress from the *Chandler* decision.¹⁹⁴

VII. CONCLUSION

The *Chandler* Court will be remembered for bringing television into the courthouse, even though the decision was not founded upon anything other than ambiguous precedent. This is substantiated because a considerable portion of the majority opinion, and all of the two separate concurrences, were directed toward searching for the current interpretation of *Estes*.

However, the *Chandler* case was much simpler than its eventual counterpart, which was alluded to by both the *Estes* and *Chandler* Courts. That will be the continuing saga of the "fair trial-free press issue." For it is destined that a trial judge, while acting within his or her discretionary powers, will refuse the electronic media access to a sensational trial. The denial will arguably not stem from the potential prejudice to a defendant, but rather because of the judge's concern for eventual reversal in the event electronic coverage disrupts or prejudices the trial. This case will be closely akin to the *Post-Newsweek* case that was before the Florida Supreme Court.¹⁹⁵ At that point, the highest court in the land may reassess the television issue in light of the first amendment and be forced to produce a relatively firm and understandable result. But for the present, the Court has let it be known that the camera's eye is not constitutionally prohibited from the criminal courtroom, unless the defendant can specifically show that it will prejudice his or her trial so as to constitute a denial of due process of law.

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194. This author has concluded that the Court will not change this decision later because there are currently so many states either permanently or experimentally implementing a program permitting electronic media coverage of trials. See note 74 *supra*. Further, it should be remembered that *Chandler* was an 8-0 decision.

195. See *Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764 (1979).

