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NEW RULES FOR OPEN COURTS: PROGRESS OR EMPTY PROMISE?

I. INTRODUCTION

In a system of government whose constitution guarantees both a right to a free press¹ and the right to a fair trial by an impartial jury,² conflicts between the two must be the inevitable and continuing result if both rights are vigorously exercised. Perhaps in no area have those two rights clashed more persistently than over the issue of allowing the press to use mechanical or electronic equipment in the courtroom to gather and disseminate news. Following a 1981 United States Supreme Court decision which opened the door to the search for an equitable resolution of this conflict,³ the Oklahoma Supreme Court made permanent revised Canon 3A(7) of the Code of Judicial Conduct⁴ after a three-year experiment with those rules.⁵ Rejecting the prohibition found in former Canon 3A(7),⁶ the revised Canon permits "broadcasting, televising, recording and taking photographs in the courtroom during sessions of the court, including recesses between sessions"⁷ subject to certain conditions. In addition to a requirement that media personnel not distract participants or impair the dignity of the proceedings,⁸ the Canon also provides for the number and kinds of cameras, media sharing of both video and audio recordings, and utilization of existing light sources.⁹ Telerecording is also conditioned upon the permission of the judge¹⁰ and the individual participants.¹¹ While seeming to open courtrooms to electronic media coverage, experience in the experimental period and in other states indicates that the change in rules will effect little change in practice. This Recent Development will consider

1. U.S. CONST. amend. I.

2. U.S. CONST. amend. VI.

3. *Chandler v. Florida*, 449 U.S. 560 (1981).

4. *In re Revised Canon 3A(7) of Code of Judicial Conduct*, 53 OKLA. B.J. 584 (1982). The revised Canon is codified at OKLA. STAT. tit. 5, ch. 1, app. 4 (1981).

5. New Rule Change For Code of Judicial Conduct Canon 3A(7), 49 OKLA. B.J. 2150 (1978) (Oklahoma Supreme Court order).

6. OKLA. STAT. tit. 5, ch. 1, app. 4 (1978).

7. Code of Judicial Conduct Canon 3A(7), OKLA. STAT. tit. 5, ch. 1, app. 4 (1981).

8. *Id.* Canon 3A(7)(b).

9. *Id.* Canon 3A(7)(f).

10. *Id.* Canon 3A(7)(a).

11. *Id.* Canon 3A(7)(c), (e).

the need for continuing evaluation of the Oklahoma rules found in Canon 3A(7).

II. HISTORY

A. Canon 35

Although the debate over the propriety of cameras in the courtroom had begun some years earlier,¹² the massive media coverage and the "circus atmosphere" of the murder trial of Bruno Hauptman stimulated the American Bar Association to actively enter the debate with the adoption of Judicial Canon 35 in 1937.¹³ The Canon originally read:

Proceedings in court should be conducted with fitting 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.¹⁴

In 1952, the ABA responded to the growing influence of television by inserting a specific ban on that medium.¹⁵ However, an addition to the Canon allowed the televising and broadcasting of certain ceremonial

12. See generally *People v. Munday*, 280 Ill. 32, —, 117 N.E. 286, 300 (1917) (taking photographs of trial improper); *Ex parte Sturm*, 152 Md. 114, 120, 136 A. 312, 315 (1927) (judge's order prohibiting courtroom photography upheld); *In re Seed*, 140 Misc. 681, 684, 251 N.Y.S. 615, 618 (Erie County Sup. Ct. 1931) (court expanded judge's power to prohibit photography "in the vicinity of the court").

13. See *Estes v. Texas*, 381 U.S. 532, 596-97 (1965) (appendix to concurring opinion, summarizing history of Judicial Canon 35).

14. 62 A.B.A. REP. 1134-35 (1937). Canon 35 was presented to the ABA House of Delegates as one of a number of additions and amendments to the Canons of Professional and Judicial Ethics and was adopted unanimously on a blanket motion with no individual discussion or reading. C. CARTER, *MEDIA IN THE COURTS* 5 (1981). By 1938, the ABA was being criticized from within as having acted too hastily in adopting Canon 35. *Blashfield, The Case of the Controversial Canon*, 48 A.B.A. J. 429, 430 (1962).

15. Canon 35 was amended to read:

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court 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.

77 A.B.A. REP. 110 (1952) (emphasis in original). In 1963, the House of Delegates softened the Canon by deleting the words "are calculated to" before the word "detract" and deleting the phrase "degrade the court." 88 A.B.A. REP. 117-18 (1963).

proceedings.¹⁶

Despite the ABA's overwhelming and consistent denunciations of camera coverage of trials, several states recognized that the Canon was "merely an ABA sanctioned statutory scheme and did not carry the weight of law" and continued to permit cameras in courtrooms either as a matter of practice or in isolated instances.¹⁷ Apparently, the first television court coverage in the United States took place in Oklahoma City in December, 1953.¹⁸ Two years later, a Waco, Texas court permitted television and newsreel camera coverage of a murder trial¹⁹ in what appears to have been the first trial ever broadcast "live."²⁰ During public hearings to consider revision of Canon 35 in 1956, Colorado addressed the question of whether to allow cameras in courtrooms.²¹ During the six days of public hearings, many of the two hundred exhibits offered were photographs taken during the hearing without the referee's awareness.²² In his recommendation, the referee indicted Canon 35 for its basis in assumptions and conjecture, and stated that the evidence and demonstrations he witnessed "proved conclusively that the assumption of facts as stated in the canon is wholly without support in reality."²³

Two years later, the Oklahoma Criminal Court of Appeals echoed Colorado's refutation of Canon 35 principles, stating, "Our experience is that when properly supervised by the court, there is neither disturbance, distraction, nor lack of dignity or decorum."²⁴ In contradiction,

16. 77 A.B.A. REP. 110-11 (1952).

17. See C. CARTER, *supra* note 14, at 7, (citing F. White, *Cameras in the Courtroom: A Survey of the United States* 3-4 (Aug. 14, 1978) (background paper for Cameras in the Courtroom Plenary Session, Association for Education in Journalism, Seattle, Wash.); Whisenand, *Cameras and Courtrooms: Fair Trial—Free Press Standards*, 52 FLA. B.J. 456, 457 & n.11 (1978)); Lyles v. State, 330 P.2d 734, 738 (Okla. Crim. App. 1958); Goldman & Larson, *News Camera in the Courtroom During State v. Solorzano: End to the Estes Mandate?*, 10 SW. U.L. REV. 2001, 2014-20 (1978).

18. See Geis, *A Lively Public Issue: Canon 35 in the Light of Recent Events*, 43 A.B.A. J. 419, 420 (1957) (citing Pebbles, *Television Makes Progress in Oklahoma Courts* (1956) (unpublished paper, Dept. Soc., U. Okla.); Fields, *News While It's News: It Can Be Done With TV*, BROADCASTING-TELECASTING 76 (Dec. 19, 1955)) (Cameras were housed in an enclosed booth, sound was recorded on a hidden microphone, and additional lighting was provided by photoflood bulbs. The presiding judge could discontinue operation of the cameras at any point by pressing a button.).

19. Note, *The Role of the Electronic Media in the Criminal Justice System*, 47 CIN. L. REV. 417, 419 (1978).

20. Geis, *supra* note 18, at 420; Blashfield, *supra* note 14, at 432.

21. See *In re* Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 296 P.2d 465 (Colo. 1956) (en banc).

22. *Id.* at 466, 468.

23. *Id.* at 468.

24. Lyles v. State, 330 P.2d 734, 742 (Okla. Crim. App. 1958). Supporting the use of televi-

a year later, the Oklahoma Supreme Court adopted a modified version of ABA Canon 35 prohibiting electronic and photographic media coverage of active trial proceedings.²⁵ Nevertheless, two years later, the criminal appellate court indicated that camera coverage was an issue within the proper province of the trial judge's discretion.²⁶ The confusion in Oklahoma ended in 1974 when the state supreme court adopted the ABA prohibition²⁷ in its entirety.²⁸

Acknowledging the departure of a majority of states,²⁹ the ABA on August 11, 1982 withdrew its forty-five year opposition to the use of television, still cameras, and tape recordings in courtrooms. By a vote of 162 to 112, the House of Delegates voted at the annual meeting to support "unobtrusive" courtroom telecoverage under the governance of carefully prescribed rules.³⁰

B. *Supreme Court Treatment of Television Coverage*

The United States Supreme Court's first occasion to rule specifically on the issue of cameras in the courtroom came as a result of the 1962 swindling and embezzlement trial of Texas financier Billy Sol Estes.³¹ The Texas rule left to the trial judge's sound discretion the ques-

sion as a means of educating the public, the court described Canon 35 as a "baseless boogey constructed out of pure conjecture," and stated 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.*

25. Oklahoma Canons of Judicial Ethics, No. 35, OKLA. STAT. tit. 5, ch. 1, app. 4 (1971). Improper publicizing of court proceedings.

Proceedings in court should be conducted with fitting dignity and decorum. The broadcasting, televising, or the taking of photographs in the court room should be done only during recesses of the court with the consent of and under the supervision of the court, and at such time or times as may be authorized by the court.

The broadcasting, televising, or photographing of active court proceedings, serve to detract from the essential dignity of the proceedings, distract the witnesses and attorneys in the performance of their duties, create misconceptions with respect thereto in the mind of the public, and for these reasons should not be permitted.

.....

Id.

26. The court held that the guarantee of a public trial is fulfilled when the trial is held at a place where the general public can attend and that exclusion of the electronic media is within the proper province of the judge. *Cody v. State*, 361 P.2d 307, 318 (Okla. Crim. App. 1961).

27. When the Code of Judicial Conduct was adopted by the ABA in 1972, Canon 3A(7) superseded Canon 35. 97 A.B.A. REP. 556 (1972).

28. See Oklahoma Canons of Judicial Ethics, No. 3A(7), OKLA. STAT. tit. 5, ch. 1, app. 4 (Supp. 1978).

29. See *infra* text accompanying note 75.

30. *ABA Repeals Its 1937 Canon Against Cameras in the Courtroom*, Wash. Post, Aug. 12, 1982, at A3, col. 1.

31. *Estes v. Texas*, 381 U.S. 532 (1965). Although the Court in 1952 had considered the effects of massive publicity including television and still cameras in the courtroom, in affirming a

tion of whether to allow the televising and photographing of court proceedings.³² Although live broadcasting of the pretrial hearing had created major disruptions,³³ trial coverage was accomplished with little, if any, intrusion into the judicial process.³⁴

In a five to four opinion, the Supreme Court held that Estes had been denied his sixth amendment right to a fair trial before an impartial jury as applied to the states by the due process clause of the fourteenth amendment.³⁵ In his concurring opinion in *Estes*, Chief Justice Warren, joined by Justices Douglas and Goldberg, argued that the record in *Estes* illustrated the "inherent prejudice of televised criminal trials,"³⁶ and advocated an absolute per se ban on the televising of trials.³⁷ However, the limited concurrence of Justice Harlan provided the bare plurality necessary for the reversal of Estes' conviction. Justice Harlan expressly limited his consideration to the facts of *Estes*,³⁸ finding that the defendant's due process rights had been violated.³⁹

In a strong dissent, joined by Justices Black, Brennan, and White, Justice Stewart admitted his personal bias that the introduction of tele-

rape and murder conviction the Court did not specifically address the issue of cameras in the courtroom. *Stoble v. California*, 343 U.S. 181 (1952).

32. *Estes v. Texas*, 381 U.S. at 535.

33. According to the Court:

The videotapes of these hearings clearly illustrate that the picture presented was not one of that judicial serenity and calm to which petitioner was entitled. [citations omitted] Indeed, at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings.

Id. at 536.

34. *Id.* at 537. Television cameras were housed in an inconspicuous booth at the rear of the courtroom. No flashbulbs or floodlights were used, and photographs were not allowed inside the railing. *Id.* at 553 (Warren, C.J., concurring). "Live" broadcast with sound consisted solely of the prosecution's opening and closing remarks and the return of the jury's verdict. All types of audio, video, and photographic coverage of defense counsel were prohibited at the request of Estes. *Id.* at 537. The jury was sequestered. *Id.* at 609 (Stewart, J., dissenting).

35. *Id.* at 552 (Warren, C.J., concurring).

36. *Id.*

37. *Id.* at 580.

38. *Id.* at 590 (Harlan, J., limited concurrence).

39. Justice Harlan wrote:

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.

Id. at 587.

vision into the courtroom is "an extremely unwise policy" but added, "I am unable to escalate this personal view into a *per se* constitutional rule."⁴⁰ Explicitly declining to base his decision on a first amendment argument, Justice Stewart did note his concern for a possible infringement of first amendment rights.⁴¹

Both Justices Stewart and White read the Court's action as placing a flat ban on the use of cameras in courtrooms.⁴² But Justice Brennan wrote a short dissent specifically to call attention to Justice Harlan's limitation, and to point out that *Estes* was "not a blanket constitutional prohibition against the televising of state criminal trials."⁴³

Despite the disagreement of the Justices as to the extent of the *Estes* holding, the practical effect of the ruling was a reaffirmation of Canon 35 and an almost complete⁴⁴ ban on courtroom telecoverage. However, several states began to reconsider and experiment with camera coverage.⁴⁵ A challenge to the Florida experimental scheme resulted in the 1981 United States Supreme Court decision, *Chandler v. Florida*,⁴⁶ which upheld the right of state courts to experiment with electronic courtroom coverage. On appeal to the United States

40. *Id.* at 601-02 (Stewart, J., dissenting).

41. *Id.* Justice Stewart cautioned, "[W]e move in an area touching the realm of free communication, and for that reason, if for no other, I would be wary of imposing any *per se* rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights." *Id.* at 604.

42. *Id.* at 615 (White, J., dissenting).

43. *Id.* at 617 (emphasis in original) (Brennan, J., dissenting).

44. See Hoyt, *Courtroom Coverage: The Effects of Being Televised*, 21 J. BROADCASTING 487 (1977). Colorado has deviated from the trend by allowing courtroom telecoverage consistently since the decision announced in *In re Hearings Concerning Canon 35*. C. Carter, Chart listing states allowing electronic coverage of court proceedings (National Center for State Courts release, Aug. 1981) (copy on file with *Tulsa Law Journal*).

45. See C. CARTER, *supra* note 14, at 25-27; see generally *id.* at 52-123 (state-by-state listing of the histories, as well as current status, of courtroom coverage); Goldman & Larson, *supra* note 17 (analysis of Nevada's experimental program).

46. *Chandler v. Florida*, 449 U.S. 560 (1981). After a one-year experiment from which the Chandler challenge arose, *In re Post-Newsweek Stations, Fla., Inc.*, 347 So. 2d 402, 403 (Fla. 1977), the Florida Supreme Court made permanent an amendment to Canon 3A(7) which permitted electronic media coverage of judicial proceedings. *In re Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d 764, 781 (Fla. 1979). In adopting the amendment, the court relied on the opinions of Justices Harlan and Clark in limiting the application of *Estes* to its particular factual situation. *Id.* at 772-73. However, the court rejected an argument that there is a constitutional right of the broadcast media to electronic coverage of trials. *Id.* at 774. Instead the court based its decision on its supervisory authority over the Florida state courts. In making permanent the standards under which the experimental program had operated, the court reiterated that electronic coverage is "subject also to the authority of the presiding judge at all times to control the conduct of proceedings before him to ensure a fair trial to the litigants." *Id.* at 781. Asserting that "on balance there is more to be gained than lost by permitting electronic media coverage of judicial proceedings," the court cited as its prime motivating consideration Florida's commitment to open government. *Id.* at 780.

Supreme Court,⁴⁷ the defendants argued that the televising of criminal trials is inherently a denial of due process⁴⁸ relying principally on the plurality opinion in *Estes*. In upholding the Florida convictions, the Supreme Court relied on Justice Harlan's limitation in *Estes*, concluding that *Estes* did not announce a constitutional rule barring electronic coverage in all cases.⁴⁹ The Court further refused to hand down such a constitutional ban in *Chandler*.⁵⁰ Finding merit in the Florida Court's contention that it had authority to establish rules of conduct in its state courts, the Supreme Court upheld the right of states to experiment.⁵¹

III. FREE PRESS VS. FAIR TRIAL

Although the seemingly inevitable conflict between the first amendment right to a free press and the sixth amendment right to a fair trial has been acknowledged by the Supreme Court as being "almost as old as the Republic,"⁵² the Court has been consistently reluctant to elevate one above the other.⁵³ Recognizing that a trial is a public event and that what transpires in the courtroom is public property,⁵⁴ the Court has held that the press has no right to information about a trial

47. The Florida District Court of Appeals affirmed the convictions but certified the question of the constitutionality of Canon 3A(7) to the Florida Supreme Court. *Chandler v. State*, 366 So. 2d 64, 71 (Fla. Dist. Ct. App. 1979). Holding that the challenge to Canon 3A(7) was moot by reason of its decision in *In re Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d 764 (Fla. 1979), the Florida Supreme Court denied review. *Chandler v. State*, 376 So. 2d 1157 (Fla. 1979).

48. 449 U.S. at 570. At the time of their arrest for burglary, Chandler and Granger were Miami Beach policemen. The principal prosecution witness was an amateur radio operator who happened to hear and record conversations of the defendants over their police walkie-talkie radios during the course of the burglary. The defendants sought unsuccessfully to prevent electronic coverage of the trial and to have the jury sequestered. However, the court did instruct the jury not to read or watch anything about the case. *Id.* at 567. A television camera was in place only for the novel testimony of the chief prosecution witness and for closing arguments. Less than three minutes of the trial proceedings were broadcast. *Id.* at 568.

49. *Id.* at 571-73.

50. *Id.* at 574-75.

51. *Id.* at 582-83.

52. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976) (involving the media's constitutional challenge to a state trial judge's pre-trial gag order).

53. See, e.g., *Bridges v. California*, 314 U.S. 252, 260 (1941) ("For 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."). The Court in *Nebraska Press* reasoned,

The authors of the Bill of Rights did not undertake to assign priorities as between First and Sixth Amendment rights, ranking one as superior to the other But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issues by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do.

427 U.S. at 561.

54. *Craig v. Harney*, 331 U.S. 367 (1947).

superior to that of the general public⁵⁵ and that the rights of the press are relative, to be exercised freely only so long as they do not infringe upon or injure the rights of others.⁵⁶ The press has occasionally argued that the sixth amendment right to a "speedy and public trial"⁵⁷ guarantees them a right of access to trials.⁵⁸ But the Court has rejected this argument, holding that the right to a public trial is a right of the accused, not of the public.⁵⁹

Opponents of television coverage of judicial proceedings argue that the admission of electronic media coverage jeopardizes the defendant's right of confrontation and cross-examination as well as the defendant's sixth amendment right to have his case heard by an impartial jury.⁶⁰ The plurality in *Estes*, finding televising of trial as per se denial of defendants' due process rights, seems to have been most concerned with problems of physical disturbance of the proceedings, psychological impact on trial participants, and possibilities for prejudice.⁶¹ How-

55. In holding that broadcasters had no constitutional right to copy White House tapes played during a Watergate conspiracy trial, the Court cited Justice Harlan's concurring opinion in *Estes* as authority that a reporter's constitutional rights are no greater than those of the public. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1977).

56. *Lyles v. State*, 330 P.2d 734, 739 (Okla. Crim. App. 1958).

57. The sixth amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

58. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 562; see also *Nixon v. Warner Communications, Inc.*, 435 U.S. at 597-98 (discussion of common law right of access to judicial records).

59. *Estes v. Texas*, 381 U.S. 532, 588 (1965). See also *In re Oliver*, 333 U.S. 257 (1948). The Court described the right to a public trial as an institutional safeguard:

Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.

Id. at 270.

60. A detailed discussion of the relative merits and potential problems of courtroom coverage is beyond the scope of this Recent Development. For valuable discussions of the pro and con arguments, see *Blashfield*, *supra* note 14; *Whisenand*, *supra* note 17; *Goldman & Larson*, *supra* note 17; *Geis*, *supra* note 18; *Note*, *supra* note 19; *Beaver*, *supra* note 58; *Note*, *supra*, note 58; *Nevas*, *The Case for Cameras in the Courtroom*, 20 *JUDGES J.* 22 (1981); *Tongue & Lintott*, *The Case Against Television in the Courtroom*, 16 *WILLIAMETTE L.J.* 777 (1980); *Wilson*, *Justice in Living Color: The Case for Courtroom Television*, 60 *A.B.A. J.* 294 (1974); *Day*, *The Case against Cameras in the Courtroom*, 20 *JUDGES J.* 18 (1981).

61. 381 U.S. at 533 (syllabus by the Court). The plurality opinion stated,

(f) There are numerous respects in which televising court proceedings may alone, and in combination almost certainly will, cause unfairness, such as: (1) improperly influen-

ever, the Florida Supreme Court, after considering results of surveys of judges and non-judicial participants,⁶² determined that there is no logical basis to distinguish between the print and electronic media; the concept of a public trial is promoted by electronic media coverage; there is educational value in telecoverage; judicially controlled in-courtroom electronic coverage is less likely to interfere with a fair trial than "courthouse-lawn" electronic summary coverage; and that the public confidence in the judiciary will be enhanced by electronic media coverage. The court also concluded that the pilot program had proven that electronic media technology had evolved to a level at which the telecoverage could be accomplished with no disturbance of judicial proceedings.⁶³

IV. EMPIRICAL DATA

Both the *Estes* Court in 1965⁶⁴ and the *Chandler* Court in 1981⁶⁵ pointed out the dearth of empirical data on the effects of telecasting on trial participants. As predicted by Justice Stewart,⁶⁶ the effect of *Estes* was to discourage further meaningful study.⁶⁷ The information that has been gathered has come mostly in the form of case studies ranging from opinion surveys of local bar associations⁶⁸ to judicial assessment of the success of a particular televised trial.⁶⁹ Although helpful indicia

cing jurors by emphasizing the notoriety of the trial and affecting their impartial judgment, distracting their attention, facilitating (in States which do not sequester jurors) their viewing of selected parts of the proceedings, and improperly influencing potential jurors and thus jeopardizing the fairness of new trials; (2) impairing the testimony of witnesses, as by causing some to be frightened and others to overstate their testimony, and generally influencing the testimony of witnesses, thus frustrating invocation of the "rule" against witnesses; (3) distracting judges generally and exercising an adverse psychological effect particularly upon those who are elected; and (4) imposing pressures upon the defendant and intruding into the confidential attorney-client relationship.

62. Summaries of the results of both surveys are reported at *In re Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d 764, 769 (Fla. 1979).

63. *Id.* (Of the judges responding to the survey who had experience with electronic media coverage in the pilot program, 36 indicated positive reaction, 29 negative reaction, and 37 neutral.)

64. 381 U.S. at 552.

65. 449 U.S. at 576 n.11.

66. Justice Stewart believed that,

The opinion of the Court in effect precludes further opportunity for intelligent assessment of the probable hazards imposed by the use of cameras at criminal trials. . . . [A]lthough our experience is inadequate and our judgment correspondingly infirm, the Court discourages further meaningful study of the use of television at criminal trials.

381 U.S. at 616 (Stewart, J., dissenting).

67. See *supra* note 44 and accompanying text.

68. See, e.g., Geis, *supra* note 18, at 421.

69. See generally Goldman & Larson, *supra* note 17 (judicial critique of Nevada experimental program).

of the effects of television on trial participants, case studies cannot be generalized and are local in nature.⁷⁰ The state-wide studies conducted in Florida and Wisconsin may be more readily generalized and replicated than strict case studies, but they also contain flaws.⁷¹ Currently, only one study appears in the available literature which has conformed to standardized, empirical methodology capable of replication.⁷² The study was not conducted in conjunction with an actual trial, since trials are incapable of being repeated under controlled circumstances and are less capable of generalization. Instead it simulated pressures placed on witnesses in a courtroom setting. This format enabled the tester to maintain experimental controls.⁷³ The results of the study showed that where there was knowledge of filming but the camera was not obtrusive, its presence had no significant effect on participants' responses. Where the camera was obtrusive, participants responded to questions more quickly and talked longer, but their answers also contained "significantly more *correct* information directly relevant to the questions."⁷⁴

Currently, sixteen states are experimenting by allowing at least some electronic coverage, and fourteen states now permanently allow television cameras in courtrooms.⁷⁵ Now that the door to experimentation has been opened, it is imperative that teachers and students of law, journalism, and the behavioral sciences work with the courts in examining the effects of television on trial participants through empirical methods of study.

V. CONSENT REQUIREMENTS

In formulating a rule allowing television coverage, Oklahoma fol-

70. "[A]ll these case studies suffer from lack of generalizability inherent in case study methodology. Simply because one trial can be conducted fairly under the camera's scrutiny does not mean that others can." Netteburg, *The results from studies conducted so far*, 63 JUDICATURE 470, 471 (1980).

71. Because these studies were based upon samples of participants (Florida) and trials (Wisconsin) rather than one specific trial, they are more readily generalized than a case study. However, they contain methodological flaws, such as extreme simplicity in instrumentation. Netteburg, *supra* note 70, at 472-73. See *A Sample Survey of the Attitudes of Individuals Associated with Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts between July 5, 1977 and June 30, 1978* (available from the Florida Supreme Court); *Report of the Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom* (Apr. 1, 1979) (available from the Wisconsin Supreme Court).

72. See Hoyt, *supra* note 44.

73. *Id.* at 490.

74. *Id.* at 494 (emphasis in original).

75. C. Carter, *supra* note 44.

lowed the majority of states by requiring consent of the individual parties.⁷⁶ Consent rules reflect the uncertainty of the states in allowing electronic coverage. While established as a compromise, consent requirements have the effect of turning media access rules into empty promises.⁷⁷ Consent rules also remove some of the judge's authority to control the proceedings of his court and make distortion of coverage inevitable.⁷⁸ In states that have consent rules, the judge may exclude the media at his discretion, but he can only allow the media at the discretion of himself and any number of other participants such as parties, jurors, and witnesses. Since a trial is often an emotion-packed proceeding, these important decisions should properly be left to the sound discretion of the trial judge, who is in the best position to balance and safeguard the rights of all parties—the individual participants, broadcasters, the press, and the public.⁷⁹

In contrast to consent rule states, Florida has wisely adopted a presumption of openness. Participants who object to being telecast are afforded a pre-trial opportunity to move for exclusion, and the presiding judge is required to hear evidence on the motion.⁸⁰ A defendant's due process rights are further protected by his ability on review to show that media coverage prejudiced the jury.⁸¹ The Wisconsin courts adopted a permanent rule with no consent requirements, but which provides that in certain instances, a request not to be photographed or recorded carries a presumption of validity.⁸² In these cases, the burden of proof moves to the media. If the media disagree with the ruling, they have the difficult task of proving that the reason given by the victim was not valid.⁸³ Wisconsin also prohibits photographing of individual jurors without specific and individual consent.⁸⁴ The recurring theme in these states' rules is that media access is subject to the sound discretion of the

76. See Hoyt, *Prohibiting courtroom photography: it's up to the judge in Florida and Wisconsin*, 63 JUDICATURE 290, 292 (1980).

77. Nevas, *supra* note 60, at 49.

78. *Id.* at 50; Hoyt, *supra* note 76, at 292.

79. Lyles v. State, 330 P.2d 734, 745 (Okla. Crim. App. 1958).

80. *In re Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d 764, 778-79 (Fla. 1979).

81. Chandler v. Florida, 560 U.S. at 581.

82. As a result of compromises with special interest groups, the classes of individuals whose requests to be excluded from electronic coverage are presumed valid include victims of sex crimes, police informants, undercover agents, relocated witnesses, and juveniles. Types of proceedings to which the presumption of validity applies include evidentiary hearings, divorce proceedings, and cases involving trade secrets. Hoyt, *supra* note 76, at 294-95.

83. *Id.* at 295.

84. WISCONSIN COURT RULES AND PROCEDURES SCR 61.11(2) (West Supp. 1980). See C. Carter, *supra* note 44, at 3.

presiding judge.⁸⁵

VI. CONCLUSION

Today, television is the nation's primary means of news communication.⁸⁶ As one commentator has observed, "[I]t's doing just fine" without courtroom coverage.⁸⁷ However, television, if properly supervised, has much to offer the judicial system, especially in terms of legitimizing the system by acquainting people with it. Realistically, the vast majority of the populace will be prohibited by time and other considerations from ever observing courtroom proceedings first-hand.⁸⁸ If these people are to glimpse the workings of this branch of government, it will be by means of the electronic media. In this sense, the media can operate as a surrogate for the public⁸⁹ and should be afforded as great a degree of access to courtrooms as is consistent with the rights of the defendant. While Oklahoma's adoption of revised Canon 3A(7) is a step toward judicial openness, the rules should continue to be scrutinized and, as experience shows the value of courtroom telecoverage, Canon 3A(7) should again be revised to eliminate consent requirements.

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85. See generally C. CARTER, *supra* note 14 (summary of state court rules).

86. A. ROPER, PUBLIC PERCEPTIONS OF TELEVISION AND OTHER MASS MEDIA (1979).

87. Wilson, *supra* note 60, at 294.

88. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975).

89. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). "Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public." *Id.* at 572-73.