University of Miami Law Review

Volume 32
Number 4 *1977 Developments in Florida Law*

Article 4

9-1-1978

Cameras in Court: *Estes v. Texas* and Florida's One Year Pilot Program

Joseph A. Boyd Jr.

Cameras in Court: *Estes v. Texas* and Florida's One Year Pilot Program*

JOSEPH A. BOYD, JR.**

This article discusses Florida's experiment with cameras in state courtrooms in the context of the decision of the Supreme Court of the United States in Estes v. Texas. *Competing factors of a defendant's right to a fair and public trial, the first amendment rights of the media and the necessity of maintaining an independent judiciary are considered.*

I. INTRODUCTION

The dramatic political and governmental revelations of recent years have inspired a renewed interest in public affairs. Citizens are becoming increasingly conscious of their right to be informed about the activities of their local, state and federal governments.[1] Public institutions are responding to this growing citizen awareness by becoming more open to the public view. In Florida, the Sunshine Law[2] has ensured public access to many governmental proceedings previously conducted in private. The Florida Constitution has been amended[3] to require public officials and candidates for public office to make full disclosure of their financial interests. Citizens' groups are working for the passage of lobbying disclosure laws.[4]

* Thanks to David M. Maloney for his research assistance. Mr. Maloney is a research aide at the Supreme Court of Florida, a member of the Florida Bar and an honors graduate of the Florida State University College of Law.

** Justice of the Supreme Court of Florida. J.D., University of Miami; LL.D., Piedmont College. Justice Boyd expresses no views as to the decision the Supreme Court of Florida will make on full review of the results of the one year experiment.

1. *See* Note, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109 (1977) for a discussion of the constitutional right of access to information which the government may be unwilling to divulge.

2. FLA. STAT. § 286.011 (1977).

3. FLA. CONST. art. II, § 8 (amended 1976).

4. *See* FLA. H.B. 313, 1977 Reg. Sess. & FLA. S.B. 558, 1977 Reg. Sess.

The courts cannot escape the new public scrutiny, and one response of the bench and bar has been to give new consideration to Canon 3A(7)[5] of the Code of Judicial Conduct,[6] which prohibits the broadcasting of most judicial proceedings.[7] Several states[8] are now allowing the television media access to the courtroom. In Florida, the state supreme court has undertaken a bold experiment to see if television and photographic cameras can be present in the courtroom without disturbing the decorum of the proceeding and without depriving a defendant of his right to a fair trial.

On May 21, 1975, the Supreme Court of Florida granted,[9] in part, a petition by the Post-Newsweek stations of Florida. The stations had petitioned the court to adopt a substitute for Canon 3A(7)[10] of the state's Code of Judicial Conduct, which requires that

5. 58 A.B.A.J. 1207, 1208 (1972). *See* note 10 *infra* for the text of Canon 3A(7) as adopted in Florida. The Florida Bar and the American Bar Association have adopted identical versions of the Canon.

Canon 3A(7) was adopted by the House of Delegates, the governing body of the American Bar Association, to replace Canon 35 of the Canons of Judicial Ethics.

In its original form, Canon 35 denounced the taking of photographs and the broadcast of court proceedings as "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 . . . ." 62 A.B.A. REP. 1123, 1134-35 (1937). The Canon was an overreaction to the publicity and broadcast of the trial of Bruno Hauptmann for the kidnapping of the Lindbergh baby. For a good history of the Canon see Estes v. Texas, 381 U.S. 532, 596 (1965)(appendix to opinion of Harlan, J., concurring). Although Canon 3A(7) is written in language much less restrictive than its predecessor, Canon 35, it has been charged that it bars meaningful television coverage of court proceedings just as effectively. Wilson, *Justice in Living Color: The Case for Courtroom Television*, 60 A.B.A.J. 294 (1974).

6. 58 A.B.A.J. 207 (1972), adopted by the ABA House of Delegates to replace the Canons of Judicial Ethics.

7. *See* note 10 *infra* for the limited circumstances under which Canon 3A(7) allows the televising of court proceedings.

8. Alabama, Colorado, Florida, Georgia, Texas and Washington have allowed such access. Associated Press Managing Editors Association Freedom of Information Report, *Cameras in the Courtroom: How to Get 'em There* (available from Hu Blonk, Freedom of Information Committee, Associated Press Managing Editors Association, Wenatchee World, Wenatchee, Washington). *See, e.g., In re* Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 132 Col. 591, 296 P.2d 465 (1956).

9. *See In re* Post-Newsweek Stations, Fla., Inc., for Change in Code of Judicial Conduct, 327 So. 2d 1 (Fla. 1976).

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

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

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

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

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

a judge, in keeping with his adjudicative responsibility, prohibit the broadcasting, televising, recording and photographing of judicial proceedings in courtrooms, except in certain specified circumstances.[11] The court declined to adopt the substitute, but it agreed to reexamine the canon with an eye toward modification.

On January 28, 1976, a second decision was handed down by the court in the Post-Newsweek case.[12] It authorized Judge Ben C. Willis, Chief Judge of the Second Judicial Circuit in Florida, to allow television coverage of one criminal trial and one civil trial, subject to the requirement that the parties, jurors and witnesses consent to the televising of their participation in the trials. The decision was supplemented by a series of decisions which allowed still photography in the courtroom and which increased the number of judges with authority to permit electronic and photographic media in the courtroom for the transmission of judicial proceedings to the public.[13]

When the required consent of the trial participants proved impossible to obtain, the court decided to conduct a one year statewide pilot program.[14] The program allows the media to televise and photograph any state judicial proceeding—criminal, civil or appellate— subject only to standards regulating physical presence in the courtroom and reasonable directions of the presiding judge. The carefully delineated standards promulgated by the supreme court govern the number and location of cameras and personnel, sound and light criteria, movement during the proceedings and alteration of the courtroom.[15] In the interest of the right to counsel[16] and 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.

In re the Florida Bar—Code of Judicial Conduct, 281 So. 2d 21, 25 (1973)(per curiam).

11. *Id.* §§ 7(a)-(c).

12. *In re* Post-Newsweek Stations, Fla., Inc., for Change in Code of Judicial Conduct, 327 So. 2d 1 (Fla. 1976).

13. *In re* Post-Newsweek Stations, Fla., Inc., for Change in Code of Judicial Conduct, 337 So. 2d 804, 805 (Fla. 1976) (per curiam); *In re* Post-Newsweek Stations, Fla., Inc., for Change in Code of Judicial Conduct, 347 So. 2d 402, 403 (Fla. 1977).

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

15. *In re* Post-Newsweek Stations, Fla., Inc., for Change in Code of Judicial Conduct, 347 So. 2d 404 (Fla. 1977) (per curiam).

16. *See* U.S. CONST. amend. VI, note 20 *infra*; FLA. CONST. art. I, § 16: "In all criminal prosecutions the accused shall . . . have the right . . . to be heard in person, by counsel, or both, ..."

confidentiality of the attorney-client relationship, the court prohibits audio pickup or broadcast of courtroom conferences between attorneys and their clients, between co-counsel and between counsel and the judge. The use of media material produced through the program as evidence in a court of law is prohibited, as is media-initiated appellate review of court orders ruling on the standards.[17] At the end of the pilot program year, all media participants in the program and all participating judges are to furnish a report of their experience under the program to the court so that it may make a decision on the proposal to modify Canon 3A(7).

Although the promulgated standards may not have given the media the latitude it deserves,[18] the decisions of the court mark the first significant step in allowing the electronic and photographic media into the courtroom in Florida.[19] At the same time, the court's pilot program calls into question two fundamental constitutional guarantees: the right to a fair trial[20] and freedom of the press.[21] The court's decision to allow television into the courtroom, even temporarily, sets off a complex interaction among three competing factors: the defendant's right to a fair and public trial,[22] the first amendment rights of the media,[23] and the necessity of maintaining an independent judiciary. This article will examine that interaction within the framework of the decision of the Supreme Court of the United States in *Estes v. Texas*,[24] the dominant impediment to television in the courtroom since 1965.

---

17. The prohibition on certain appellate review was for the purpose of ensuring that trials likely to be televised would not be delayed beyond the program year so that there would be enough data for in-depth evaluation. 347 So. 2d at 406. Many have criticized the ban on television in the courtroom because of lack of data on which to intelligently decide the issue. *See* D. GILLMOR, FREE PRESS AND FAIR TRIAL (1966).

18. *See In re* Post-Newsweek Stations, Fla., Inc., for Change in Code of Judicial Conduct, 347 So. 2d 404, 406 (Fla. 1977) (Karl, J., concurring).

19. Even if temporary, the step is a noteworthy one which may result in a case that could have a major effect on the use of television in the courtroom if it reaches the Supreme Court of the United States.

20. *See* U.S. CONST. amend. VI:

> 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.

21. *See* U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom . . . of the press . . . ."

22. *See* note 20 *supra*.

23. *See* note 21 *supra*.

24. 381 U.S. 532 (1965).

II. A DISCUSSION OF *Estes v. Texas*

The Court was confronted in *Estes* with the question of whether Billy Sol Estes, convicted in a Texas court of swindling, was deprived of his fourteenth amendment right to due process[25] by the televising and broadcasting of his trial and the pretrial proceedings.[26] Chief Justice Warren's concurring opinion[27] depicts the spectacle to which the pretrial proceedings were reduced by the presence of the media. Cameramen roamed the courtroom at will, and at one point there were at least twelve of them present.[28] Pictures were snapped of the advocates from behind the judge's bench. The carnival atmosphere[29] which permeated the courtroom and surrounded the courthouse is graphically illustrated in an article which appeared in *The New York Times*,[30] quoted, in part, in Chief Justice Warren's concurring opinion:

> A television motor van, big as an intercontinental bus, was parked outside the courthouse and the second-floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four more marked cameras were aligned just outside the gates. A microphone stuck its 12-inch snout inside the jury box, now occupied by an overflow of reporters from the press table, and three microphones confronted Judge Dunagan on his bench. Cables and wires snaked over the floor.[31]

The opinion of the Court delivered by Mr. Justice Clark announced that, with the electronics technology of 1965,[32] televised trials were unconstitutional in every case.[33] Only three other Justices joined in the Court's opinion, making *Estes* a plurality decision.[34] While the four dissenting Justices were unable to find distinct

25. U.S. CONST. amend. XIV, § 1: "[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . ."

26. Rules of the trial judge markedly altered the manner in which the trial was filmed from the filming of the pretrial proceedings. 381 U.S. at 537. Much of the disagreement between the plurality and the dissenters stems from whether the coverage of the pretrial proceedings was to be subject to review. *See* 381 U.S. at 610 (Stewart, J., concurring).

27. 381 U.S. at 552.

28. *Id.*

29. Ironically, to portray the atmosphere, the Chief Justice makes use of photographs taken at the trial—photographs he would have banned from being taken. *See* 381 U.S. at 586 (Warren, C.J., concurring).

30. N.Y. Times, Sept. 25, 1962, at 46, col. 4.

31. 381 U.S. at 553.

32. *Estes* was decided in 1965. The *Estes* Court noted that "[w]hen the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case." *Id.* at 540.

33. *Id.* at 550-52.

34. The effect of the decision, beyond the immediate consequence to the parties involved, is therefore in some doubt.

instances of prejudice to Estes, the opinions of the Court and of Chief Justice Warren depict a setting in which the potential for prejudice was so great that the Court held it inherently prejudicial to the defendant, thus eliminating the need for a showing of actual prejudice.[35] Mr. Justice Harlan, holding the critical swing vote, joined in the plurality opinion only to the extent indicated in his concurrence.[36] With his typical judicial restraint, Harlan expressed his intention to limit the ban on television in the courtroom to "criminal trial[s] of great notoriety"[37] because the case presented no broader issue. Mr. Justice Brennan, viewing Harlan's limited concurrence in his dissent,[38] brought home the point to be gathered from it by stating that "today's decision is *not* a blanket constitutional prohibition against the televising of state criminal trials."[39]

One of the primary factors motivating the Supreme Court of Florida to initiate its current pilot project was the advancement in electronic and photographic technology made since *Estes*,[40] which minimizes the media's intrusion into the courtroom. Perhaps the four Justices who unqualifiedly joined the opinion of the Court in *Estes* would not have so broadened its holding to every case[41] had they foreseen that technological advances would be achieved so quickly. In any event, the Court recognized that had such advancement occurred at the time of its decision, the result might have been different. In the final paragraph of the opinion Justice Clark wrote:

> It is said that the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today.[42]

---

35. The Court applied a *Rideau*-type rule for finding inherent prejudice, stating that where a procedure employed by the state involves such a probability that prejudice will result that it is deemed inherently lacking in due process, no showing of actual prejudice will be required for reversal. 381 U.S. 542. *See* Rideau v. Louisiana, 373 U.S. 723 (1963) and discussion *infra*, notes 57 and 58 and accompanying text.

36. 381 U.S. at 587.

37. *Id.*

38. *Id.* at 617.

39. *Id.*

40. For a review of some of the advancements made up to 1972 see Comment, *Nebraska Faces Videotape: The New Video Technology in Perspective*, 6 CREIGHTON L. REV. 214 (1972).

41. In the minds of many critics, the *Estes* Court went too far in holding that the televising of all trials, using the television technology available in 1965, was inherently prejudicial. For a collection of readings on courtroom access, many of which are critical of *Estes*, see FREE AND FAIR—COURTROOM ACCESS AND THE FAIRNESS DOCTRINE (K. Harwood and J. Kitross eds. 1970).

42. 381 U.S. at 551-52.

Estes, then, is not an unassailable barrier to cameras in courtrooms. The narrow applicability of the plurality opinion, the fractures within the Court, as evidenced by the six written opinions,[43] and the Court's recognition of possible technological advances indicate the possibility of opening the courtroom door to cameras in the future. Today's media technology, the departure from the Court of every member who supported the *Estes* decision that televised trials were unconstitutional and the presence of three of the *Estes* dissenters—Brennan, Stewart and White—on the Court today suggest at least a possibility that, given the opportunity to revisit *Estes,* the present Court would modify if not overrule it.

While *Estes* cannot be read as a total ban on cameras in courtrooms today, an analysis of the case is an aid to understanding the problems which may arise in Florida's experiment with cameras in court. The *Estes* decision points out the disruptive effect cameras in court may have on a judicial proceeding. In addition, the case raises and considers "fair trial" issues created by the presence of cameras in the courtroom. Highlighted in the plurality opinion are four areas in which the use of television in trials could cause subtle, even undetectable, prejudice to the defendant. These four areas are: corruption of juror impartiality; impairment of the quality of testimony; burdensome additions to a judge's responsibilities; and harassment of the defendant beyond interference with his constitutional rights.[44] The critics of *Estes* and the technological advances in the communications media industry challenge the validity of the *Estes* assessment of the impact of cameras in court on these four areas today.

A. *Corruption of Juror Impartiality*[45]

The *Estes* Court found the potential impact of television on jurors to be the most serious problem presented by media presence in the courtroom. Indeed, the prejudice created in the minds of jurors and prospective veniremen by news media reports of pretrial events and judicial proceedings, as well as by the media's actual presence in the courtroom, has been described as the crux of the free press-fair trial controversy.[46]

---

43. Of the nine Justices, only Black, Douglas and Goldberg did not write opinions in the case.

44. 381 U.S. at 545-50.

45. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ." The right is applicable to state criminal proceedings through the due process clause of the fourteenth amendment. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

46. *See* Comment, *Fair Trial v. Free Press: The Psychological Effect of Pre-Trial Public-*

Trial by jury, premised on the concept of impartiality, has been a tradition in the Anglo-Saxon system of justice since the time of the signing of the Magna Carta.[47] In the words of Lord Coke, "every juror ought . . . to be indifferent as he stands unsworn . . . ."[48] The first mention in American jurisprudence of juror impartiality is in the ruling of Chief Justice John C. Marshall, presiding at the trial of Aaron Burr for treason.[49] Marshall recognized a distinction between a juror's "light impressions," those preconceived notions that would yield to the evidence brought forth in court, and his "deep impressions," those that would not yield.[50] If the impression were "light," under Marshall's ruling it would not corrupt impartiality. Marshall left it to the juror to declare whether his impression was so deep that it could not be swayed by the evidence.

The Court in *Reynolds v. United States*[51] was faced for the first time with an appeal of a conviction challenged for lack of juror impartiality. The Court recognized that pretrial publicity made it unlikely that anyone in the community in which the crime had been committed could be found who did not have some preconceived impression as to the guilt of the accused. Carrying Marshall's analysis forward, the Court held that preconceived notions, without more, do not corrupt juror impartiality.[52] Therefore, the defendant was required to make a showing of actual prejudice.

---

ity on the Juror's Ability to be Impartial; A Plea for Reform, 38 S. CAL. L. REV. 672 (1966). The confrontation between first amendment and sixth amendment rights is unlikely to soon abate, given the Court's decision in Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). The Court held that the burden necessary to justify a prior restraint was not met by a judge who had issued a restraining order on the news gathering and dissemination activities of reporters covering a sensational murder case. But the Court did not hold that such prior restraints were constitutionally impermissible in every case. *See id.* at 572 (Brennan, J., concurring). Had the Court adopted the views of Mr. Justice Brennan a significant amount of tension between the two rights would have been relaxed. Justice Brennan would have held that the use of prior restraints on the freedom of the press was an unconstitutional method of enforcing the right to a fair trial.

47. "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." MAGNA CARTA § 39 in A. HOWARD, MAGNA CARTA: TEXT AND COMMENTARY (1964).

48. 1 E. COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND OR, A COMMENTARY UPON LITTLETON, 155 b. (19th ed. London 1853).

49. United States v. Burr, 25 F. Cas. 49 (C.C.D. Va. 1807)(No. 14, 692g).

50. *Id.* at 51. This distinction continues today. *See* Murphy v. Florida, 421 U.S. 794, 801-02 (1975).

51. 98 U.S. 145 (1878).

52. The impracticality of finding prospective jurors who are totally indifferent resulted in the *Reynolds* rule that a finding of impartiality by the trial judge should be set aside only where prejudice is "manifest." *Id.* at 156. For application of the rule, *see* Holt v. United States, 218 U.S. 245 (1910); Spies v. Illinois, 123 U.S. 131 (1887); Hopt v. Utah, 120 U.S. 430 (1887).

The "showing" requirement was reasserted in *Stroble v. California.*[53] In that case the confession of one accused of a sex-connected murder of a six-year-old child was released to the press by the prosecuting attorney and widely broadcast in the trial district. The prejudicial impact of the attorney's misconduct was lessened by the reading of the confession into the public record at a preliminary hearing four days later. The trial was not held until approximately two months after the first report of the confession. The initial spate of reports was offset by infrequent and much milder publicity in the intervening time. The Court affirmed the conviction because Stroble failed to show actual prejudice. Militating against a showing of prejudice were the availability of the confession shortly after its release and the time for public emotion to subside.

In *Irvin v. Dowd,*[54] the requirement that actual prejudice be demonstrated was weakened. The Court reiterated that to hold that the existence of a preconceived notion, without more, rebuts the presumption of impartiality would set an impossible standard, adding that this was especially so "in these days of swift, widespread and diverse communication."[55] However, Irvin had been tried in an atmosphere permeated with hostility, and eight of the twelve jurors believed him to be guilty before the start of the trial. The Court held this to be a sufficient showing of prejudice to reverse his conviction for lack of juror impartiality:

> With his life at stake it is not asking too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of its members admit, before hearing any testimony, to possessing a belief in his guilt.[56]

Inherent prejudice was again sufficient to reverse a conviction in *Rideau v. Louisiana,*[57] where a change of venue was denied after a film of the jailed defendant's confession to a sheriff was broadcast three times over a television station in the community. The Court recognized that "[f]or anyone who has ever watched television the

53. 343 U.S. 181 (1952).

54. 366 U.S. 717 (1961).

55. *Id.* at 722.

56. *Id.* at 728.

57. 373 U.S. 723 (1963). The absolute rule of *Rideau* served as precedent for the *Estes* Court to free the petitioner from showing actual prejudice. 381 U.S. at 544. *See also* Sheppard v. Maxwell, 384 U.S. 333 (1966), where petitioner's conviction was reversed without a showing of actual prejudice because prejudice was inherent in the trial judge's failure to insulate the jurors from the effects of massive publicity and from his failure to minimize the disruption caused by the press in the courtroom.

conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense *was* Rideau's trial, at which he pleaded guilty to murder."[58]

Two years after deciding *Rideau* the Court, considering the problem of juror prejudice in *Estes,* noted that once a judge announces that a criminal trial will be televised undue community interest focuses on the trial. The entire community "becomes interested in all the morbid details surrounding it."[59] This increases the chance that jurors will unfairly carry into the jury box impressions prejudicial to the defendant.[60] Underlying this conclusion was the assumption that commercial interests would allow only the most notorious cases to be televised.[61] The Court also believed that, with the eyes of a community hostile to the defendant upon them, the jurors would feel community pressure to find the defendant guilty. In analyzing the problems posed by cameras in court, the Court assumed that jurors would be distracted from the evidence by their knowledge of the cameras' presence.[62] It was also feared that in states that did not have sequestration rules, the jurors would see on television at home selected parts of the trial likely to be the most damaging to the defendant and would subconsciously be influenced by those parts.[63] Finally, it was felt that new trials would be jeopardized since it would be difficult to impanel a jury whose members had not seen the previous trial.[64]

Today, much of the concern with juror impartiality expressed by the *Estes* Court appears to be unjustified. The idea that undue community interest focuses on a televised trial may no longer be valid. More television is watched today than ever before.[65] Perhaps the continued exposure of our society to television and the part television plays in daily life have made people less susceptible to the media's influence, thereby lessening its prejudicial effects. In any case, even the most popular television programs rarely capture more than forty percent of the television audience.[66] It is highly likely,

58. *Id.* at 726.

59. 381 U.S. at 545.

60. Most pretrial publicity is prejudicial to the accused. *See* Note, 14 SYRACUSE L. REV. 450 (1963).

61. 381 U.S. at 549-50. *See* Note, 43 TEX. L. REV. 992, 995 (1965).

62. 381 U.S. at 546.

63. *Id.*

64. *Id.* at 546-47.

65. The average American home watches six hours, eight minutes of television per day. More than 71.5 million (97%) U.S. homes have television sets. Forty-five percent of these have more than one set. *A Short Course in Broadcasting,* 1977 BROADCASTING Y.B. A-2.

66. For example, the show which gained the largest audience for the week of Sept. 29 to Oct. 5, 1977, "Heavyweight Boxing," was watched by 37.3% of the viewing audience. BROADCASTING, Oct. 10, 1977.

then, that prospective jurors can be found who have not seen broadcasts of pretrial events. The argument that financial requirements of commercial interest would allow only the most sensational trials to be televised was made before the steady gains of public television in the last decade.[67]

Distraction of the jurors is lessened by the advanced technology of present-day cameras. One judge, familiar with the courtroom and believing the distraction of witnesses to be a relative matter, has written that distractions caused by the camera may be minor in comparison to the normal distractions inherent in a trial: restriction of evidentiary rules, judicial reprimands, lively cross-examination and scrutiny of the proceedings by those present in the courtroom.[68] The same reasoning is applicable to jurors, and, in addition, jurors must suffer the frequent distraction of having to leave the courtroom for proffers of evidence objected to on grounds of inadmissibility.

While the *Estes* Court recognized the potential problems posed by states without provisions for sequestration, such concern with pressure exerted by a hostile community on a jury is unjustified when the tool of sequestering the jury during trial is available.[69] Certainly the lack of a sequestration rule in one state should not bar the televising of proceedings in states which do have such rules. Finally, the argument that new trials would be jeopardized is counter balanced by the statistics which indicate that a large percentage of the television audience will not be viewing a particular television offering.[70] The argument also ignores the potential of judicial control to relax the tension of the free press-fair trial controversy.[71]

67. The number of public television stations in 1965, 88, increased to 252 in 1976. *ABC's of Radio and Television*, 1977 BROADCASTING Y.B. A-1, A-7.

68. Miller, *The Broadcaster's Stand: A Question of Fair Trial and Free Information*, 1 J. BROADCASTING 3, (1956-57).

69. Sequestration is allowed in Florida. State *ex rel.* Miami Herald Publishing Co. v. McIntosh, 340 So. 2d 904 (Fla. 1977). *See also* State *ex rel.* Miami Herald Publishing Co. v. Rose, 271 So. 2d 483 (Fla. 2d Dist. 1972).

70. *See* text accompanying note 66 *supra*.

71. In addition to sequestration to prevent jurors from seeing the day's trial events again on television, there is the trial judge's inherent ability to stop the flow to the press of information damaging to the defendant by controlling court personnel and officers of the court. Much of the fair trial-free press controversy stems from statements which prosecuting attorneys have made to the press. *See, e.g.*, Stroble v. California, 343 U.S. 181 (1952). Indeed, lack of judicial control has been cited as a primary cause of the fair trial-free press conflict. *See* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON RADIO, TELEVISION AND THE ADMINISTRATION OF JUSTICE: A DOCUMENTED SURVEY OF MATERIALS 33-42 (1965). The court should be able to control the behavior of court officers and media representatives during trial proceedings to avoid any danger to the defendant. As for the dangers of televised pretrial proceedings being viewed by prospective jurors, brief continuances or changes in venue can reduce the effect of prejudicial publicity.

B. *Impairment of the Quality of Testimony*

The *Estes* Court acknowledged the difficulty a defendant would have in proving the existence of factors which could impair the quality of a witness' testimony. Several factors which might lead to inaccuracy were listed: nervousness, demoralization and fright, cockiness and embarassment. The Court also feared that witnesses either before or after their testimony would be harassed on the street by those who recognized them. Furthermore, the Court foresaw frustration of the rule which excludes witnesses from the courtroom while another is on the stand so that they do not hear and observe each other's testimony. Witnesses could observe other witnesses at home on television, even if admonished against it, and thus be subject to subconscious shaping of their own testimony.[72]

Many of the foregoing objections may be cured by new electronic equipment which is much less obtrusive in the courtroom,[73] and as discussed in the previous section, the distraction to witnesses may be slight when measured against the usual disruptions in the courtroom.[74] Witnesses will forget that cameras are present just as they forget about the presence of stenographers and other recording equipment frequently employed today in the courtroom.[75] In addition, there is evidence to show that trial participants are less likely to be given to personal quirks when they know they are being televised.[76]

As to frustration of the sequestration rule, even when it is invoked the possibility always exists that an excluded witness will learn about another's testimony.[77] Subconscious effects cannot be predicted with accuracy. If a trial is routine, it is unlikely that one witness will bother to view others on television, and, even if one sees another witness in a case in which he has a personal interest, there is no guarantee of deliberate alteration of testimony.[78]

The *Estes* Court also suggested that fear of being televised will make some witnesses reluctant to appear.[79] This argument ignores the subpoena power,[80] and it disregards one of the primary purposes

72. 381 U.S. at 547.

73. *See* note 40 *supra.*

74. *See* text accompanying note 59 *supra.*

75. *Cf.* Quiat, *The Freedom of Pressure and the Explosive Canon 35,* 33 ROCKY MTN. L. REV. 11, 17 (1960) ("Newsmen feel that personnel in the court room [sic] soon forget the presence of recording equipment in concentrating on the case.")

76. Note, *Television in the Courtroom: The Florida Supreme Court Reopens the Door,* at 17 (Fall Quarter, 1976)(unpublished student note, University of Florida College of Law).

77. *Id.* at 18.

78. *Id.*

79. 381 U.S. at 547.

80. *See, e.g.,* FLA. STAT. § 914.001 (1977) which reads in pertinent part: "Subpoenas for

of a public trial: that key witnesses unknown to the parties may come forward and give important testimony.[81]

The *Estes* decision recognized that many of the dangers television coverage presents to witnesses are invoked by newspaper coverage as well. But the Court concluded that "the circumstances and extraneous influences intruding upon the *solemn decorum* of court procedure in the televised trial are far more serious than in cases involving only newspaper coverage."[82] To the Court, then, it is the actual invasion of the courtroom which presents the greatest problem. Again, the problem diminishes with new equipment. In addition, the argument has been made that television may enhance the dignity of the judiciary.[83] Perhaps the placing of such stress on decorum within the courtroom reveals a preoccupation with judicial ceremony and raises form over substance.[84] Certainly, the televising of solemn and portentous occasions, such as presidential inaugurations, church services and coronation ceremonies does not detract from the dignity of these events.[85]

C. *Burdens on the Judge*

In a criminal proceeding it is the responsibility of the judge to ensure that the trial is fair. The *Estes* Court felt that the burden of surpervising television in the courtroom added too much to that responsibility[86] by requiring the judge to rule on numerous addi-

witnesses in criminal cases shall run throughout the state . . . ."

81. Miller, *supra* note 68, at 10.

82. 381 U.S. at 548 (emphasis added).

83. Wilson, *supra* note 5, at 295. "[F]ar from detracting from the dignity of the proceedings, television could help ensure it. It would serve as a restraint to breaches in dignity, be they judicial bullying, antics of counsel, or unfair treatment of the accused and witnesses. Even the possibility that there might be television coverage would serve as a restraint." *Id.*

84. One does not have to entirely agree with the following to admit that pretense, at times, may surround a judicial proceeding.

> Much of the respect, even awe, in which law and lawyers are generally held by laymen has its source in the aura of solemnity which surrounds the craft—from the ponderous language to the musty lawbooks that line lawyers' offices, to, especially, the almost religious ritual of the courtroom itself. The late Judge Jerome Frank used to ridicule this ceremonial solemnity—of architecture, of judges' uniforms, of standardized and stiffly formal court procedure—with a symbolic phrase, "the cult of the robe." But he knew that judges and lawyers loved it because it made them and their work, however trivial on occasion, look important and impressive. The idea of opening a courtroom, like a ballpark or convention hall, to television offends much of the profession less because of a fear of unfair trials than because of a fear of detracting from the dignity of the court—and of themselves.

Rodell, *TV or No TV in Court?* N.Y. Times, Apr. 12, 1964, § 6 (Magazine), at 103.

85. *See* Miller, *supra* note 68, at 5-6.

86. 381 U.S. at 548. *Compare Estes with* Bridges v. California, 314 U.S. 252 (1941).

tional questions.[87] Furthermore, judges are subject to the same human reactions to television as laymen and would be just as likely to be distracted from their task.When judges are elected, telecasting could be used as a political weapon,[88] especially if the judge were faced with the initial decision of whether to permit a telecast at all. In deciding whether to allow proceedings to be televised, it would be difficult for a judge to ignore the pressures the media could bring on him, both directly and indirectly through the shaping of public opinion.[89]

The concern of the *Estes* Court that judges would not be able to ensure a fair trial if they also had to supervise the televising of the proceeding is probably the least defensible of all the arguments.[90] The first objection of the Court, that television in the courtroom places too great a burden on the judge, can largely be cured by an order, similar to the one issued by the Supreme Court of Florida, promulgating the standards governing courtroom television.[91] Carefully delineated standards should serve to minimize any conflict between the media and the defendant over the physical presence of cameras. With all the parties aware of what the court guidelines allow, the necessity of rulings by the trial judge will be reduced. The distractions caused by the media, as mentioned above, are probably overstated by the *Estes* opinion.[92] Certainly, as more trials are televised, the judge, who is the one trial participant repeatedly before the cameras, will become accustomed to the camera's presence and the distractions it may cause. Dangers from political use of the camera may exist to a certain extent but such dangers are probably exaggerated in *Estes*. In Florida, the pilot program has eliminated the danger of a press attack against a judge for refusal to allow televising of a trial since all trials are open to the media at its discretion.[93]

In any event, in the context of a fair trial analysis, in the rare instances when a defendant is prejudiced by a judge's inability to

87. *See* 381 U.S. at 536-37 (numerous pretrial rulings in *Estes* detailed).

88. Perhaps televised judicial proceedings are more justified where judges are elected, since voters would be given the opportunity to observe and evaluate their performances. Note, *supra* note 76, at 19.

89. 381 U.S. at 548-49.

90. In Bridges v. California, 314 U.S. 252 (1941), the Supreme Court came near to holding that a judge is expected to be a person of fortitude and never seriously affected by any outside influence. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 457 (1971).

91. *See In re* Post-Newsweek Stations, Fla., Inc., for Change in Code of Judicial Conduct, 347 So. 2d 404 (Fla. 1977) (per curiam).

92. *See* Miller, *supra* note 68 and accompanying text.

93. *In re* Post-Newsweek Stations, Fla., Inc., for Change in Code of Judicial Conduct, 347 So. 2d 404 (Fla. 1977)(per curiam).

control media coverage, the defendant's conviction may, on appeal, be reversed for lack of a fair trial. The conviction of Dr. Sam Sheppard was reversed in *Sheppard v. Maxwell*[94] largely on the basis of the trial judge's failure to minimize disruptive actions of the press and his failure to insulate the jurors from the pressures of the communications media.

D. *Harassment of the Defendant*

The *Estes* Court felt that the presence of television in the courtroom would constitute a form of mental harassment of the defendant resembling a police line-up or the third degree.[95] The Court implied that the defendant's right to privacy would be threatened and his concentration broken.[96] Even further, the Court feared that television broadcasts would intrude upon the defendant's confidential relationship with his attorney. Finally, the Court speculated that the pressures of paid sponsorship would result in the selective telecasting of only the more sensational trials, which would heighten the possibility of prejudice against an unpopular accused.

Certainly the Court's analogy to the third degree is exaggerated. The focusing of the lens on a defendant cannot begin to compare with such an affront to human dignity as the "third degree" has been described to be.[97] With the new equipment available for televising or videotaping trials, the defendant will probably not be aware of the camera focused on him so that whatever concentration he can muster during the ordeal of a trial may continue unbroken. A claim of abridgment of privacy rights would be difficult to sustain,[98] particularly since defendants accused of notorious crimes cannot expect to remain out of the public eye.[99] As for the argument that the necessity of paid sponsorship will result in broadcasts of

94. 384 U.S. 333 (1966).

95. 381 U.S. at 549.

96. The inevitable close-ups of his gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before him—sometimes the difference between life and death—dispassionately, freely and without the distraction of wide public surveillance.

Id.

97. *See* Miranda v. Arizona, 384 U.S. 436, 445-58 (1966).

98. Generally, the right has been limited to matters relating to marriage, procreation, contraception, family relationships, child rearing and education. Paul v. Davis, 424 U.S. 693, 713 (1976); *accord,* Laird v. State, 342 So. 2d 962 (Fla. 1977).

99. *See* Dobbert v. Florida, 432 U.S. 282 (1977). Justice Rehnquist, writing for the majority in a notorious case which involved the murder-torture by the defendant of his minor children, said, "[o]ne who is reasonably suspected of murdering his children cannot expect to remain anonymous." *Id.* at 303.

only the most sensational cases, the decision ignores the potential of public television, which may well televise routine trials. The decision also overlooks standards which might be enforced to protect the attorney-client relationship.[100]

The simple fact is that the *Estes* decision is too broad to stand unmodified. It ignores the potential of public television, the televising of civil trials[101] and the use of television in routine trials. The least defensible of its fears is that interference with the independence of the judiciary will result. The fear of the inability of a witness to testify accurately fails to account for the present technological sophistication of videotape equipment which will minimize the witness' perception that the camera lens is focused upon him. For many witnesses the experience of testifying in a court of law is a foreign one and, if the presence of the television is not given undue attention by the officers of the court,[102] it will not even be noticed by most witnesses, attentive as they must be to everything else that occurs in a trial. Furthermore, *Estes* ignores the tools that the trial judge has at his disposal to control the media's presence. Much of the bother to which a defendant will be subjected is probably overstated. Finally, the Court's unwillingness to find inherent prejudice in two recent decisions[103] involving possible juror impartiality indicates that much of the *Estes* Court's objections to television and its effects on juror impartiality may no longer be valid.

III. THE RIGHT TO A PUBLIC TRIAL

The constitutional right to a public trial protects an accused from the use of the courts as an instrument of persecution.[104] The

100. *See In re* Post-Newsweek Stations, Fla., Inc., for Change in Code of Judicial Conduct, 347 So. 2d 404, 406 (Fla. 1977)(per curiam).

101. *See* Ripley, *An Argument for Television in the Civil Courtroom*, 12 J. BROADCASTING 23 (1968).

102. *See* note 71 *supra*. For an insider's view of manipulation of the press by an attorney see Gertz, *A Lawyer "Uses" the Press* in MASS MEDIA AND THE LAW, FREEDOM AND RESTRAINT 161 (D. Clark and E. Hutchinson eds. 1970).

103. In Murphy v. Florida, 421 U.S. 794 (1975), members of the jury had learned from news accounts about the defendant's prior felony convictions and facts about the crime with which he was charged. The Court reiterated that jury exposure to information damaging to a defendant does not presumptively deprive him of due process. Since Murphy had failed to show actual prejudice from the voir dire or inherent prejudice from the totality of the circumstances, his conviction was upheld. Prior cases in which inherent prejudice had been found were characterized as involving "a trial atmosphere that had been utterly corrupted by press coverage." *Id.* at 798. The same standard was applied in Dobbert v. State, 328 So. 2d 433, 440 (Fla. 1976), *aff'd*, 432 U.S. 282 (1977), where it was held that a great amount of publicity given to a crime or an accused is not enough to raise a presumption of juror impartiality.

104. *In re* Oliver, 333 U.S. 257, 270 (1948). The guarantee was undoubtedly provided to prevent excesses similar to those of the English Star Chamber, the French monarchy's abuse of the lettre de cachet and the Spanish Inquisition. *Id.* at 268-69.

public, however, also has an interest in trials.

> A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we supposed none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.[105]

Distinguished legal scholars have hailed the openness of judicial proceedings as bestowing a number of benefits on society.[106] Openness allows the public to observe proceedings firsthand and judge the performance of the court and its officers. It is likely to improve the quality of the testimony, and the attendant publicity may serve to notify unknown witnesses who may step forward with relevant evidence. Surely it inspires the trial participants to perform their duties conscientiously.

The *Estes* decision is criticized[107] for ignoring these benefits to the public's interest in a public trial. Television certainly will enable the public to better understand what goes on in the court. The right to a public trial in a state proceeding is derived from the due process clause of the fourteenth amendment.[108] In determining the scope of the right, the Supreme Court has looked to the common law and the widely followed practices in the United States,[109] which include the public's right to attend trials. Considering the limitations (e.g. size, geographic accessibility) of the courtroom, should not the public have a right to televised proceedings as a means to turn trials into truly public events? The increased public awareness of what goes on inside the courtroom resulting from the televising of trials should ultimately serve to protect the defendant from arbitrary abuse at the hands of the judicial system.

IV. First Amendment Implications of *Estes*

The most critical remark to be made about the *Estes* decision

105. Craig v. Harney, 331 U.S. 367, 374 (1947).

106. 3 W. Blackstone, Commentaries on the Laws of England 372-73 (10th ed. London 1787)(1st ed. London 1765); 6 J. Wigmore, Evidence § 1834 (Chadbourn rev. 1976).

107. Ripley, *supra* note 101, at 27-31; *see* Miller, *supra* note 68, at 52.

108. *In re* Oliver, 333 U.S. 257, 272-73 (1948).

109. *In re* Oliver, 333 U.S. 257 (1948).

is that it may have served to abridge first amendment rights.[110] In fact, there was no clear first amendment claim raised in *Estes*. As Justice Stewart pointed out, the problem in *Estes* was solely one of due process,[111] and the approach of the Court shows that the issue was limited to due process considerations.[112] Justice Stewart, however, was disturbed by the suggestion in the plurality opinion that there are limitations upon the public's right to know what goes on in the courts. He felt that "the proposition that non participants in a trial might get the 'wrong impression' from unfettered reporting" smacked of censorship,[113] the protection against which lies at the heart of the first amendment.[114]

The plurality opinion and the two concurring opinions in *Estes* were at pains to explain how the decision was not inconsistent with the freedoms of speech and press.[115] They argued that so long as representatives of the media are allowed to attend courtroom proceedings, with the same right accorded to the general public, and then allowed to report their observations, no interference with first

---

110. *But see* Emerson, *supra* note 90, at 450, where the author argues that restrictions on the communications media in the interest of effective management of a judicial proceeding have never been thought to constitute an abridgment of first amendment freedom of expression.

111. It is a problem rooted in the Due Process Clause of the Fourteenth Amendment. We deal here with matters subject to continuous and unforeseeable change—the techniques of public communication. In an area where all the variables may be modified tomorrow, I cannot at this time rest my determination on hypothetical possibilities not present in the record of this case. There is no claim here based upon any right guaranteed by the First Amendment. But it is important to remember that we 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.

381 U.S. at 603-04 (Stewart, J., dissenting).

112. "In short, the question here is not the validity of either Canon 35 of the American Bar Association or Canon 28 of the State Bar of Texas, but only whether petitioner was tried in a manner which comports with the due process requirement of the Fourteenth Amendment." 381 U.S. at 535.

113. 381 U.S. at 615 (Stewart, J., dissenting).

114. Prior restraints are "the essence of censorship." Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931). Emerson said this about censorship and prior restraints:

A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows.

Emerson, *supra* note 90, at 506.

115. 381 U.S. at 538-40 (plurality opinion), 583-86 (Warren, C.J., concurring), 588-90 (Harlan, J., concurring).

amendment freedoms occurs. This theory does not take into account the limitations of most courtrooms. It is not inconceivable that someone with an interest in preventing the report of a trial could pack a small courtroom and thereby keep the press outside. Also not taken into account is the fact that any medium of communication is entitled to first amendment protections and its presence should be presumed to be justified.[116]

The first amendment is designed to protect the free flow of information and ideas.[117] It has been consistently held that the presumption in favor of preserving first amendment freedoms is necessary to ensure that the public be presented with every side of an issue fully exposed. The need for full exposure of information and ideas is especially important in a democratic society, where it is critical that the electorate be kept informed.[118] Where first amendment freedoms and the administration of justice have conflicted in other settings, the first amendment freedom has been given the fullest measure of protection.[119] For example, the Supreme Court of the United States has never upheld a contempt citation for expression critical of a court. The issue has been faced in a number of cases,[120] but each time the Court has allowed freedom of discussion to prevail and reversed the contempt citation. Thus, the Court has been determined to extend a high degree of protection to the discussion of administration of justice.[121] In keeping with the necessity of an informed electorate, it would seem that an even higher premium would be placed on open discussion of court proceedings in a system where circuit court judges are popularly elected.

If every medium of communication is entitled to first amendment protection, provided it conveys worthwhile information, why should television in the courtroom not be afforded the same protection? The first amendment argument for allowing electronic media in the courtroom should prevail if, as the new technology has

116. *See* Speiser v. Randall, 357 U.S. 513, 526 (1958).

117. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

118. "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (August 4, 1822), *reprinted in* THE COMPLETE MADISON 337 (S. Padover ed. 1953).

119. *See generally* AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (1968); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON RADIO, TELEVISION, AND THE ADMINISTRATION OF JUSTICE, FREEDOM OF THE PRESS AND FAIR TRIAL: FINAL REPORT WITH RECOMMENDATIONS (1967).

120. *See, e.g.*, Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

121. Emerson, *supra* note 90, at 456.

shown, disruption of the orderly processes of the court can be kept to a minimum. If the Court is presented with a case for television in the courtroom set in first amendment claims, perhaps it will rethink *Estes*.

V. THE RESPONSIBILITY OF THE MEDIA

Much of the success of the pilot project implemented by the Supreme Court of Florida depends upon the media and its conduct in televising trials. During the one year that the television industry is allowed into the courtroom, it must prove that it can and will conduct itself in a manner that will neither disrupt judicial proceedings nor deny a defendant his fair trial rights.

With greater freedom goes greater responsibility, and there is no doubt that the press has been given great freedom in many respects. For example, it is virtually free to publish whatever it likes.[122] Prior restraints on speech and publication are "the most serious and the least tolerable infringement on First Amendment rights."[123] In fact, the Supreme Court has refused to uphold every prior restraint on the press that it has considered.[124] A good argument can even be made for invalidating prior restraints in cases where they are ordered for the protection of a defendant's fair trial rights, even though these have been described as the greatest rights of our judicial system.[125] The press is also given wide protection in many instances from post-publication sanctions to prevent the future exercise of first amendment rights from being chilled.[126]

---

122. It appears that only the publication, during wartime, of secrets relating to national security may be restrained. Relying on Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963), the Supreme Court in a per curiam opinion stated: "Any system of prior restraints of expression comes to this Court bearing heavy presumption against its constitutional validity." New York Times Co. v. United States, 403 U.S. 713, 714 (1971). *But see* Schenck v. United States, 249 U.S. 47, 52 (1919) where the Court states: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."

123. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

124. *See id.;* New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931). Florida courts have also invalidated the prior restraints that have come before them. State *ex rel.* Miami Herald Publishing Co. v. McIntosh, 340 So. 2d 904 (Fla. 1977); State *ex rel.* Miami Herald Publishing Co. v. Rose, 271 So. 2d 483 (Fla. 2d Dist. 1972).

125. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 572 (1976) (Brennan, J., concurring).

126. For example, a public official cannot recover damages for defamatory falsehoods relating to his official conduct unless he can prove that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). This conditional privilege to publish defamatory criticism has been extended to include public figures. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). In cases of defamation of private citizens, the states are forbidden by first amend-

Perhaps the most realistic concern about media use of televised courtroom proceedings is that selective portions of the proceedings, usually the most sensationalized, will be presented on evening news reports.[127] Whether these excerpts would have greater impact on the public than the artist sketches currently used by news commentators is questionable.[128] Nevertheless, because of the Federal Communications Commission's role as overseer[129] of the television industry and the "public trustee" function of the licensed broadcaster, the obligation of news broadcasters to maintain high journalistic standards may be even greater than that of newspaper editors.[130] As Chief Justice Burger said in *Columbia Broadcasting System, Inc. v. Democratic National Committee:*

> The regulatory scheme evolved slowly, but very early the licensee's role developed in terms of a "public trustee" charged with the duty of fairly and impartially informing the public audience. In this structure the Commission acts in essence as an "overseer," but the initial and primary responsibility for fairness, balance, and objectivity rests with the licensee. This role of the government as an "overseer" and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic "free agent" call for a delicate balancing of competing interests.
>
> . . . .
>
> . . . [S]o long as a licensee meets its "public trustee" obligation to provide balanced coverage of issues and events, it has broad discretion to decide how that obligation will be met.[131]

It is evident, then, that we place great trust in the media. The framers of the Constitution by including the first amendment rights assured that "debate on public issues should be uninhibited, robust, and wide-open."[132] Our interest in maintaining an unrestricted flow of ideas and information outweighs the occasional abuse which we allow to occur under the umbrella of the first amendment.[133] The Supreme Court of Florida has opened up a whole new avenue for the communication of information about its state court system. The

---

ment principles to impose liability without fault. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

127. *See* Note *supra* note 76, at 16.

128. *Id.* at 17.

129. 47 U.S.C. §§ 151-55 (1970).

130. Wilson, *supra* note 5, at 295.

131. 412 U.S. 94, 117-19 (1973).

132. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

133. James Madison said: "Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press." 4 J. ELLIOTT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 571 (2d ed. 1836).

media must minimize any disruptive influence it might have in the courtroom and live up to its professional responsibility.

VI. CONCLUSION

A complex reaction of constitutional principles has been set in motion by the allowance of television into Florida's courtrooms. For the pilot project to be extended and given permanent status the components of the system must each do their part. The press must be responsible, the judges must be strong, jurors must be impartial and officers of the court must resist the temptation to use the media to their own benefit. The final question of whether televised trials will meet constitutional muster will remain unresolved until it is put before the Supreme Court of the United States. If a defendant is convicted during a televised trial[134] and the conviction is affirmed in the state courts, the case is likely to be accepted for review by the Supreme Court. Only then will we know whether television will be able to slip, for good, through the crack in the courtroom door left open by *Estes*.

POSTSCRIPT

As this article goes to press, the present status of photographic and electronic recording equipment in Florida's courtrooms is uncertain. The one year pilot program permitting coverage of judicial proceedings by electronic media and still photographers terminated at 11:59 p.m. on June 30, 1978. On March 3, 1978 attorneys representing Post-Newsweek Stations, Florida, Inc., requested a continuation of full media coverage beyond the June 30th deadline. Responding to that request, on May 11, 1978, the Supreme Court of Florida, in a four to three per curiam decision, refused to extend the terminaton date. *In Re Petition of Post-Newsweek Stations, Florida, Inc.*† In denying Post-Newsweek's petition for an extention of the pilot program, the court promulgated a procedure whereby interested parties, both in favor and opposed to media presence in the courtroom, could submit written arguments and supporting materials.

The court will evaluate the desirability of electronic media coverage of courtroom procedures beginning July 1, 1978, the deadline for submitting arguments. Whether the Code of Judicial Conduct will be modified to permit television cameras in court facilities on

134. Fifteen year old Ronald Zamora has been convicted of first degree murder during a televised trial in Dade County Circuit Court. Circuit Court Case No. 77-25123A. On February 27, 1978, an appeal was filed with the Third District Court of Appeal, No. 77-2566.

† 358 So. 2d 1361 (Fla. 1978).

a permanent basis hinges on the results of these deliberations. While the ultimate resolution remains open, the favorable language used by the dissenting justices who advocated a continuation of the program until a final decision could be reached, perhaps portends in which direction the court will move. Justice Boyd, in his dissent, discussed the probable renewal of permitting cameras in court and argued that any temporary termination would have a disruptive and frustrating effect on a program "which at this time appears to be generally accepted in the State."†† **—Editors—**

†† *Id.* at 1362.