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# CASENOTES

## ***In Re Post-Newsweek Stations and Chandler v. Florida: Television on Trial***

*In two cases decided in the mid-sixties, Estes v. Texas and Sheppard v. Maxwell, the Supreme Court of the United States held that extensive media coverage of these criminal trials denied the defendants due process of the law. In 1979, in In re Post-Newsweek Stations, Florida, Inc., the Supreme Court of Florida adopted rules that allowed the televising of trials. This note analyzes both the Post-Newsweek case and the recent decision in Chandler v. Florida, in which the Supreme Court of the United States reviewed an application of Florida's rules on the televising of trials, recognized that such media coverage does not inherently deny due process, and permitted the states freedom to experiment with media coverage programs. Future challengers to programs like Florida's must base their attacks on specific showings of prejudice. As opportunities for media coverage and possibilities for demonstrable prejudice expand in the years to come, television may remain on trial.*

Post-Newsweek Stations, Florida, Inc., an affiliate of the American Broadcasting Company, filed a petition to modify Canon 3A(7) of the Code of Judicial Conduct of the State of Florida to permit the televising of judicial proceedings.<sup>1</sup> The Supreme Court of Florida decided initially to implement an experimental program for the televising of one criminal case and one civil case.<sup>2</sup> The court adopted a series of guidelines to aid the judge in maintaining order at these proceedings,<sup>3</sup> but the trial judge encountered great diffi-

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1. *In re Post-Newsweek Stations, Fla., Inc.*, 327 So. 2d 1 (Fla. 1976). In its original form, Canon 3A(7) of the Florida Code of Judicial Conduct stated: "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 . . . ." reprinted in *In re Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d 764, 765 n.2 (Fla. 1979).

The Canon did, however, allow for three basic exceptions to this prohibition: (1) use of electronic media for judicial administration, including the presentation of evidence; (2) coverage for naturalization and ceremonial proceedings; and (3) use for instructional purposes in educational institutions. *Id.*

2. 327 So. 2d at 2.

3. *Id.* The guidelines enumerated by the court included:

culty in obtaining the consent of parties and counsel for televising the trial. To remedy this situation, the supreme court, in a supplemental interlocutory order, granted authority to an additional judge to conduct the experiment.<sup>4</sup> The court then mandated a pilot program authorizing electronic media coverage<sup>5</sup> in Florida courtrooms from July 5, 1977, to June 30, 1978.<sup>6</sup> At the final stage of the proceedings, the Supreme Court of Florida *held*: Electronic media coverage of a courtroom is not per se a denial of a defendant's right to due process under the fourteenth amendment to the Constitution, nor do the first and sixth amendments require the court to permit electronic media coverage of courtroom proceedings. The court amended Canon 3A(7) of the Florida Code of Judicial Conduct, permitting electronic media coverage of trials under specified guidelines. *In re Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764 (Fla. 1979).<sup>7</sup>

The debate over whether to permit the electronic media into the courtroom began with the Lindbergh kidnapping case in 1935.<sup>8</sup> In the trial, which created a worldwide sensation, still photographers inundated the courtroom with large and noisy cameras and artificial lighting.<sup>9</sup> The court gave the photographers and newsmen

1. The parties to the litigation, jurors and witnesses must consent to the televising of their participation in the trial.

....

3. The trial judge shall have full authority to terminate the televising of all or any part of the proceedings which he deems would be an effective interference in the administration of the justice of the cause.

4. 337 So. 2d 804, 805 (Fla. 1976). Initially, Judge Ben C. Willis, Chief Judge of the Second Judicial Circuit, was the only judge authorized to conduct a trial in the presence of the electronic media. He encountered great difficulty, however, in securing permission from various parties and counsel to conduct the experiment. The Supreme Court of Florida then granted similar authority to Judge Parker McDonald, Circuit Judge of the Ninth Judicial Circuit.

5. This note adopts the supreme court's use of the term "electronic media" to include other media as well. "Unless the context otherwise requires, 'electronic media' shall be used as a generic term that encompasses television film and videotape cameras, still photography cameras, tape recording devices, and radio broadcast equipment." 370 So. 2d at 765 n.1.

6. *In re Post-Newsweek Stations, Fla., Inc.*, 347 So. 2d 404, 404 (Fla. 1978).

7. The Supreme Court of Florida stated:

The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.

370 So. 2d at 779.

8. *State v. Hauptmann*, 115 N.J.L. 412, 180 A. 809, cert. denied, 296 U.S. 649 (1935).

9. See Aspen, *Cameras in the Courtroom: The Florida Experiment*, 67 ILL. B.J. 82, 82 (1978).

virtually free access to any part of the courtroom,<sup>10</sup> creating a "circus-like" atmosphere that totally disrupted the smooth and efficient operation of the trial.<sup>11</sup> As a result of the serious disruptions at the Lindbergh trial, the American Bar Association adopted Canon 35 of the Canons of Judicial Ethics in 1937.<sup>12</sup>

In another highly publicized criminal trial, *Estes v. Texas*,<sup>13</sup> the Supreme Court of the United States confronted this issue. Billie Sol Estes, a well-known financier, had been convicted of swindling in a trial televised over his objection. The Court held that the broadcasting of his notorious and highly sensational criminal trial had deprived Estes of his fourteenth amendment right to due process.<sup>14</sup> The Court could not agree, however, on whether the Constitution required the exclusion of television from criminal trials. Four Justices said yes; four Justices said no; and Justice Harlan, who provided the fifth vote for reversal, was uncertain.<sup>15</sup>

The *Estes* trial was a technological nightmare. Cables and wires stretched across the courtroom floor, and three microphones sat on the judge's bench.<sup>16</sup> The cameras were huge, unwieldy, and noisy, requiring artificial lighting for their operation. The Court could not determine the specific effects of the electronic media and this "circus-like" atmosphere on the trial, but instead condemned the practice of televising a criminal trial as being inherently preju-

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10. See *Cameras in the Courtroom: A Denial of Due Process?* 30 BAYLOR L. REV. 853, 853 (1978).

11. *Id.*

12. *Id.* ABA CANONS OF JUDICIAL ETHICS No. 35 was renumbered as Canon 3A(7) in 1972. 32 FLA. STAT. ANN. Canon 3A(7), Commentary, at 291 (West Supp. 1980). The original Canon 35 stressed three reasons for the prohibition of media activities: 1) The broadcasting or televising of court proceedings detracted from the basic dignity of the proceedings; 2) the broadcasting distracted the participants and witnesses in giving their testimony; and 3) it degraded the court and fostered serious public misconceptions about the function of the court.

13. 381 U.S. 532 (1965).

14. *Id.*

15. *Id.* (Clark, J.; Warren, C.J., concurring, joined by Douglas & Goldberg, JJ.; Harlan, J., concurring separately; Stewart, J., dissenting, joined by Black, Brennan, & White, JJ.); see Aspen, *supra* note 9, at 82-83.

16. 381 U.S. at 536. The *New York Times* described the proceedings more colorfully:

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. Tables [*sic*] and wires snaked over the floor.

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

dicial to the defendant.<sup>17</sup> The *Estes* Court delicately balanced the media's arguments that the right to televise trials inheres in the first amendment and supports an accused's sixth amendment right to a public trial, against the contending argument that such coverage infringed upon *Estes*' fundamental right to due process. Concluding that the due process concerns took precedence, the Court applied the rule of *Rideau v. Louisiana*.<sup>18</sup> any procedure that inherently prejudices the right of a defendant to an unbiased trial (despite its actual effect) denies him due process of law.<sup>19</sup>

The Supreme Court's inherent distrust of the electronic media continued in *Sheppard v. Maxwell*.<sup>20</sup> In an opinion by Justice Clark,<sup>21</sup> the Court dealt with a highly publicized murder trial in which the news media had jammed the courtroom. Cameramen had photographed prospective jurors during the jury selection.<sup>22</sup> After the trial opened, the witnesses, counsel, and jurors were photographed and televised whenever they entered or left the courtroom, and the defendant had to pose for newspaper and television photographers for ten minutes before each court session began.<sup>23</sup> The Supreme Court stressed that the trial court in *Sheppard* had permitted the jurors to go their separate ways outside of the courtroom without adequate directions to avoid reading or listening to anything about the case. Consequently, the jurors were exposed to the massive newspaper, radio, and television coverage of the trial. The Court said that the totality of the circumstances in *Sheppard* mandated the use of the due process test applied in *Estes*—due process is lacking when the defendant can demonstrate a significant probability of prejudice.<sup>24</sup> The defendant need not show identifiable prejudice.<sup>25</sup> Applying this test, the Court reasoned that the extensive prejudicial pretrial publicity and media saturation during the trial had deprived *Sheppard* of the "judicial serenity and calm to which [he] was entitled."<sup>26</sup> The *Sheppard* Court, however,

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17. 381 U.S. at 544. In fact, Justice Clark readily admitted that "[t]elevision in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced." *Id.*

18. 373 U.S. 723 (1963).

19. 381 U.S. at 543, 550.

20. 384 U.S. 333 (1966).

21. Justice Clark also authored the majority opinion in *Estes*.

22. 384 U.S. at 343.

23. *Id.* at 344.

24. *Id.* at 352.

25. *Id.*

26. *Id.* at 355 (quoting *Estes v. Texas*, 381 U.S. at 536) (brackets in original).

could not describe the specific negative effect of the electronic media on the courtroom proceedings, and therefore based its conclusion on the vague notion that the courtroom procedure "involve[d] such a *probability* that prejudice will result that it [was] inherently lacking in due process."<sup>27</sup>

The Court's rigid stand against the presence of electronic media in the courtroom began to erode in the mid-1970's. During this period the Court began to modify its *Estes-Sheppard* approach—that cameras and microphones in the courtroom inherently prejudice a defendant's right to a fair trial, whatever their apparent effect—and began granting greater leeway for media operations in and around the courtroom.

In *Murphy v. Florida*,<sup>28</sup> the extensive newspaper and television publicity surrounding the trial included information about the defendant and his past criminal record. During voir dire, the jurors had revealed no predisposed hostility toward the defendant despite the publicity. By distinguishing the facts in *Rideau*, *Estes*, and *Sheppard* from those before it, the Court began its restriction of the *Estes-Sheppard* approach by requiring the defendant to show that the extensive media coverage had prejudiced his trial.<sup>29</sup> Examining the totality of the circumstances,<sup>30</sup> the Court affirmed the conviction because the defendant had failed to show that the setting of the trial was "inherently prejudicial."<sup>31</sup>

In *Nebraska Press Association v. Stuart*,<sup>32</sup> the Court signaled that it would continue its retreat from the *Estes-Sheppard* stand that restricted electronic media in the courtroom. Chief Justice Burger emphasized that pervasive pretrial publicity does not inevitably lead to an unfair trial.<sup>33</sup> The trial judge has the power and the responsibility to take measures designed to mitigate the negative effects of pretrial publicity.<sup>34</sup> The Court noted the trial judge's conclusion that massive pretrial publicity would jeopardize the de-

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27. *Id.* at 352 (quoting 381 U.S. at 542-43) (emphasis added by *Sheppard* Court).

28. 421 U.S. 794 (1975).

29. See notes 23-24 and accompanying text *supra*.

30. 421 U.S. at 799.

31. *Id.* at 803.

32. 427 U.S. 539 (1976).

33. *Id.* at 554.

34. The trial judge has a major responsibility. What the judge says about a case, in or out of the courtroom, is likely to appear in newspapers and broadcasts. More important, the measures a judge takes or fails to take to mitigate the effects of pretrial publicity . . . may well determine whether the defendant receives a trial consistent with the requirements of due process.

*Id.* at 555.

fendant's right to a fair trial, but found that prior restraints on the publication of judicial proceedings held in public violated the first amendment rights of the press.<sup>35</sup>

In the *Post-Newsweek* case<sup>36</sup> the Supreme Court of Florida took the next significant step in the coverage of trials by the electronic media. Although this decision dealt primarily with the televising of trials in Florida, the supreme court based its reasoning on the rationale developed by the Supreme Court of the United States since the mid-1960's.<sup>37</sup> The *Post-Newsweek* decision, however, reflected a more modern sociological emphasis and acknowledged significant advances in media technology.<sup>38</sup>

In *Post-Newsweek*, the Florida court armed itself with a modern arsenal of sociological data to facilitate an analysis of the effects of televising trials.<sup>39</sup> In addition, the court noted the crude state of television cameras and equipment at the time of the *Estes* decision<sup>40</sup> and focused on Justice Clark's proviso in that opinion: "When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case."<sup>41</sup> The court was also quick to recognize Justice Harlan's foresight: "[T]he day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process."<sup>42</sup>

The modern innovations in electronic media technology support the shift that Justice Harlan predicted. Today, a spectator at a televised trial would not notice any television cables or artificial lighting,<sup>43</sup> and technology has drastically reduced the noise level of the cameras.<sup>44</sup>

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35. *Id.* at 570. See generally *Near v. Minnesota*, 283 U.S. 697 (1931).

36. 370 So. 2d 764 (Fla. 1979).

37. See notes 13-35 and accompanying text *supra*.

38. 370 So. 2d at 775-76, 780.

39. *Id.* at 767-70, 785.

40. *Id.* at 772.

41. *Id.* at 773 (quoting 381 U.S. at 540).

42. *Id.* (quoting 381 U.S. at 595) (Harlan, J., concurring). Television has in fact become a commonplace occurrence in everyday life. Banks use closed circuit television cameras as security devices. Cameras are also common in hotel lobbies, bookstores, and apartment complexes. In Florida, one finds cameras in all levels of government. The court considered comments about the positive effect of television coverage of the Florida Legislature. *Id.* at 780. The Supreme Court of Florida also noted Justice Harlan's recognition of the benefits to be derived from state experimentation with electronic media coverage. *Id.* at 773.

43. See Aspen, *supra* note 9, at 85.

44. 370 So. 2d at 775.

To overcome the problem of a lack of empirical data on the effects of televising trials, the Supreme Court of Florida relied on a survey of individuals previously associated with televised trials.<sup>45</sup> The results of the survey indicated that the negative effects of the electronic media were generally insignificant,<sup>46</sup> although the court

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45. JUDICIAL PLANNING COORDINATION UNIT, OFFICE OF THE STATE COURTS ADMINISTRATOR, A SAMPLE SURVEY INVOLVING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE IN FLORIDA COURTS (1978); 370 So. 2d at 767-70.

46. (1) Presence of the electronic media in the courtroom had little effect upon the respondents' perception of the judiciary or of the dignity of the proceedings.

(2) It was felt that the presence of electronic media disrupted the trial either not at all or only slightly.

(3) Respondents' awareness of the presence of electronic media averaged between slightly and moderately.

(4) The ability of the attorney and juror respondents to judge the truthfulness of witnesses was perceived to be affected not at all. The ability of jurors to concentrate on the testimony was similarly unaffected.

(5) All respondents were made to feel slightly self-conscious by the presence of electronic media.

(6) Both jurors and witnesses perceived that the presence of electronic media made them feel just slightly more responsible for their actions.

(7) Presence of electronic media made all respondents feel only slightly nervous or more attentive.

(8) The distracting effect of electronic media was deemed to range from almost not at all for jurors, to slightly for witnesses and attorneys.

(9) The degree to which jurors and witnesses felt the urge to see or hear themselves on the media fell between not at all and slightly.

(10) Presence of electronic media affected the different participants' sense of the importance of the case in varying degrees. Jurors felt that it made the case more important to a slight degree; witnesses to a degree between slightly and moderately; court personnel slightly; and attorneys moderately.

(11) To a degree between not at all and slightly, jurors perceived that the presence of electronic media in the courtroom during the testimony of a witness made that witness's testimony more important.

(12) There was no significant difference in the participants' concern over being harmed as a result of their appearance on electronic media broadcast (including still photography) as opposed to their names appearing in the print media. In each instance the concern ranged on the scale between not at all and slightly.

(13) Jurors and witnesses manifested the same attitude concerning the possibility that persons would attempt to influence their decision or testimony. There was no discernible difference in the height of their concern as between electronic and print media; the average response was slightly on the lower end of the spectrum between not at all and slightly.

(14) Court personnel and attorneys perceived that the presence of electronic media made the participating attorneys' actions more flamboyant only to a slight extent.

(15) Court personnel and attorneys were of the attitude that the presence of electronic media affected the flamboyancy of witnesses to a degree between not at all and slightly.

(16) They also felt that the witnesses were slightly inhibited by the presence of electronic media and that jurors were made slightly self-conscious, nervous,



admitted "that the survey results are nonscientific and reflect only the respondents' attitudes and perceptions about the presence of electronic media in the courtroom."<sup>47</sup> The court, citing the Florida survey data and the technological advances in electronic media, asserted that the inherent prejudice found in *Estes*<sup>48</sup> was no longer a serious problem.

Justice Sundberg then considered and rejected the contention that the first and sixth amendments mandate the coverage of courtroom proceedings.<sup>49</sup> The court cited *Nixon v. Warner Communications, Inc.*<sup>50</sup> and declared:

the Sixth Amendment [does not] require that the trial—or any part of it—be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.<sup>51</sup>

Having disposed of the constitutional issues, the *Post-Newsweek* court then analyzed specific problems noted by the opponents of electronic media coverage of judicial proceedings.<sup>52</sup> The court recognized the potential problems inherent in media coverage of child custody proceedings, and in circumstances involving prisoners, confidential informants, victims of sexual battery, and witnesses requiring anonymity.<sup>53</sup> The court, however, was justifiably reluctant to compile a specific list of inappropriate parties for media coverage or to formulate an absolute rule to deal with all the potential problems.<sup>54</sup> Instead, the court gave the presiding judge the responsibility for evaluating the case-by-case effects of elec-

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and distracted, but also slightly more attentive.

370 So. 2d at 768-69 (footnotes omitted).

47. *Id.* at 768. Some surveys do, however, yield disturbing results. In Wisconsin, where trials were also televised for a one-year experiment, a random survey of 300 Wisconsin citizens indicated that in the trial of a Mrs. Patri, who had been convicted of murder and acquitted of arson, 59% of the respondents incorrectly remembered Mrs. Patri as having been convicted of both murder and arson. Only 5% correctly remembered the verdict. Thirty-nine percent could not remember the reason for the killing, and 25% of the respondents could not identify her name. See Netteberg, *Does Research Support the Estes Ban on Cameras in the Courtroom?*, 63 JUDICATURE 467, 474 (1980).

48. "Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused." 381 U.S. at 544. See also *Turner v. Louisiana*, 379 U.S. 466 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963).

49. 370 So. 2d at 774.

50. 435 U.S. 589, 610 (1978).

51. 370 So. 2d at 774.

52. *Id.* at 774-79.

53. *Id.* at 779.

54. *Id.*

tronic media in the courtroom.<sup>55</sup> The court also placed strict limitations on the number of cameras permitted in the courtroom, on their location, and on the number of personnel authorized to operate the equipment.<sup>56</sup> In setting these standards, the *Post-News-*

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55. The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.

*Id.* The wording of this passage may be vague and troublesome to some judges. See *Palm Beach Newspapers, Inc. v. State*, 378 So. 2d 862 (Fla. 4th DCA 1979), in which the court reversed the trial court's acceptance of a motion and affidavits setting forth subjective fears of two prospective witnesses that the televising of their testimony would jeopardize their personal safety. The Fourth District rejected the State's contention "that the trial judge need not support his decision to limit electronic or still photography coverage with a finding of necessity." 378 So. 2d at 864.

In his dissent, Judge Letts questioned the majority's use of the word "necessity," which the Florida Supreme Court had not used in its guidelines. He advocated the use of affidavits to aid in the "findings" of the court, in lieu of the "full evidentiary hearing" he construed the majority to require. *Id.* at 865.

56. 1. *Equipment and personnel.*

(a) Not more than one portable television camera [film camera—16 mm sound on film (self blimped) or video tape electronic camera], operated by not more than one camera person, shall be permitted in any trial court proceeding. Not more than two television cameras, operated by not more than one camera person each, shall be permitted in any appellate court proceeding.

(b) Not more than one still photographer, utilizing not more than two lenses for each camera and related equipment for print purposes shall be permitted in any proceeding in a trial or appellate court.

(c) Not more than one audio system for radio broadcast purposes shall be permitted in any proceeding in a trial or appellate court. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the chief judge of the judicial circuit or district in which the court facility is located.

(d) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge shall exclude all contesting media personnel from a proceeding.

2. *Sound and light criteria.*

(a) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, such photographic and audio equipment shall produce no greater sound or light than the equipment designated in Appendix A annexed hereto, when the same is in good working order. No artificial lighting device of any kind shall be employed in connection with the television camera.

(b) Only still camera equipment which does not produce distracting sound

*week court thus charted a new direction for the use of the elec-*

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or light shall be employed to cover judicial proceedings. Specifically, such still camera equipment shall produce no greater sound or light than a 35 mm Leica "M" Series Rangefinder camera, and no artificial lighting device of any kind shall be employed in connection with a still camera.

(c) It shall be the affirmative duty of media personnel to demonstrate to the presiding judge adequately in advance of any proceeding that the equipment sought to be utilized meets the sound and light criteria enunciated herein. A failure to obtain advance judicial approval for equipment shall preclude its use in any proceeding.

*3. Location of equipment and personnel.*

(a) Television camera equipment shall be positioned in such location in the court facility as shall be designated by the chief judge of the judicial circuit or district in which such facility is situated. The area designated shall provide reasonable access to coverage. If and when areas remote from the court facility which permit reasonable access to coverage are provided all television camera and audio equipment shall be positioned only in such area. Video tape recording equipment which is not a component part of a television camera shall be located in an area remote from the court facility.

(b) A still camera photographer shall position himself or herself in such location in the court facility as shall be designated by the chief judge of the judicial circuit or district in which such facility is situated. The area designated shall provide reasonable access to coverage. Still camera photographers shall assume a fixed position within the designated area and, once a photographer has established himself or herself in a shooting position, he or she shall act so as not to call attention to himself or herself through further movement. Still camera photographers shall not be permitted to move about in order to obtain photographs of court proceedings.

(c) Broadcast media representatives shall not move about the court facility while proceedings are in session, and microphones or taping equipment once positioned as required by 1(c) above shall not be moved during the pendency of the proceeding.

*4. Movement during proceedings.*

News media photographic or audio equipment shall not be placed in or removed from the court facility except prior to commencement or after adjournment of proceedings each day, or during a recess. Neither television film magazines nor still camera film or lenses shall be changed within a court facility except during a recess in the proceeding.

*5. Courtroom light sources.*

With the concurrence of the chief judge of a judicial circuit or district in which a court facility is situated, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions are installed and maintained without public expense.

*6. Conferences of counsel.*

To protect the attorney-client privilege and the effective right to counsel, there shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judge held at the bench.

*7. Impermissible use of media material.*

None of the film, video tape, still photographs or audio reproductions developed during or by virtue of the pilot program shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent or collateral thereto, or upon any retrial or appeal of such proceedings.

tronic media in Florida courtrooms.

In an age of unobtrusive media technology, the *Post-Newsweek* decision represents an important step in the process of balancing the public's right to information with the due process rights of defendants. Although the guidelines seem thorough and straightforward, some disquieting problems may arise. What constitutes a proper "finding" of specific prejudice?<sup>57</sup> How can a judge determine whether electronic media coverage will have a sufficiently substantial effect upon an individual to warrant the exclusion of the electronic media from the courtroom?<sup>58</sup> The *Post-Newsweek* decision contained several examples of the serious dilemmas facing judges, as well as some of the serious errors made in their evaluation of problems faced by certain witnesses required to testify at a trial.<sup>59</sup>

Opponents of permitting the electronic media in the courtroom have raised other objections: that televised jurors would feel intense peer pressure to vote according to the wishes of friends,<sup>60</sup> that camera coverage would give the public the wrong impression about the purpose of trials,<sup>61</sup> and that jurors would sense the notoriety of a case from the camera's presence.<sup>62</sup> Opponents also argue that cameras will distract jurors and other trial participants, and

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370 So. 2d at 783-84 (adopting the standards governing the one-year pilot program originally set forth in 347 So. 2d 404, 405-06).

57. See *Palm Beach Newspapers, Inc. v. State*, 378 So. 2d 862 (Fla. 4th DCA 1979); note 55 *supra*.

58. 370 So. 2d at 779.

59. *Id.* at 778. One glaring example concerned an inmate of a Florida prison whom the state called as a witness. She requested that the court withdraw the electronic media coverage from the courtroom for fear of reprisals from other inmates if she testified. The trial judge denied her request and, when she refused to testify, held her in contempt. See *Netteburg*, *supra* note 47, at 471 (prisoner held under contempt sentence for five months and twenty-nine days).

60. See *Cameras in the Courtroom*, *supra* note 10, at 858.

61. 370 So. 2d at 776. Chief Justice Edward E. Pringle of the Colorado Supreme Court once stated:

It [photography] certainly is better than the distorted pictures of the people involved which come from the artists who sit in the courtroom drawing and it does away . . . with the unseemly and completely undignified situation of eight or nine microphones being thrust in peoples' faces as they leave the courthouse and being asked asinine questions which they don't answer anyway just to accompany the photographic representations which the cameras are making.

Letter from Chief Justice Pringle to Dick Leonard (Feb. 25, 1977).

62. 370 So. 2d 775. Proponents of electronic media coverage argue that the presence of a camera does not make a case seem any more notorious than does the presence of a sketch artist, newspaper reporters, or a full courtroom of people. The factual circumstances of the specific case, and not the presence of a cameraman, determine whether the case is of great public interest.

that the lawyers will tend to grandstand.<sup>63</sup> Despite many of these reservations, the Supreme Court of Florida apparently believes—and rightly so—that it must accumulate a sufficient amount of data from many types of trials to evaluate any possible psychological effects on witnesses, jurors, and judges. The court has taken an admirably pragmatic approach to the televising of trials, a course apparently followed by the Supreme Court of the United States.

In *Richmond Newspapers, Inc. v. Virginia*,<sup>64</sup> the Court continued to retreat from its rigid *Estes-Sheppard* stand against electronic media in the courtroom. The case involved a defendant's fourth trial on the same murder charge before the same court. The third mistrial may have resulted from a prospective juror's having discussed with other prospective jurors a newspaper account of the defendant's previous trials. Two reporters for the appellant, Richmond Newspapers, attended the fourth trial. Defense counsel moved to close the trial to the public; the prosecution did not object, and the trial continued without spectators. Later that day, the court granted appellant's request for a hearing on its motion to vacate the court's closure order. Appellant contended that the court should not order closure without first determining that there was no other way to protect the defendant's rights. After the court denied the motion, the trial continued with the press and public excluded. The next day, the court found the defendant not guilty after granting the defendant's motion to strike the prosecution's evidence and excusing the jury.<sup>65</sup>

In an opinion joined by Justices White and Stevens, Chief Justice Burger announced the Court's judgment, reversing the decision of the Supreme Court of Virginia that had denied review. Approving of the inherent openness of a criminal trial under the American justice system,<sup>66</sup> and recognizing that first amendment protection extends beyond freedom of the press and the right of self-expression, the Court held that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."<sup>67</sup> Although the first amendment prohibits govern-

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63. See *Cameras in the Courtroom*, *supra* note 10, at 859.

64. 100 S. Ct. 2814 (1980).

65. *Id.* at 2818-20. The trial court later granted the newspaper's motion to intervene *nunc pro tunc*. The Supreme Court of Virginia denied review, but the United States Supreme Court accepted the appeal. 444 U.S. 896 (1979).

66. 100 S. Ct. at 2825.

67. *Id.* at 2830 (footnote omitted).

mental restriction of channels for public information,<sup>68</sup> the Court noted that the first amendment rights of the public and the press are not absolute.

Just as a government may impose reasonable time, place, and manner restrictions upon the use of the streets in the interest of such objectives as the free flow of traffic, . . . so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial.<sup>69</sup>

In *Richmond* the trial judge made no findings to support closure, and absent any overriding interest indicated by the findings, the Court held that the trial "must be left open to the public."<sup>70</sup>

The *Richmond* Court took a totality-of-the-circumstances approach<sup>71</sup> remarkably similar to the reasoning of the Supreme Court of Florida in *Post-Newsweek*.<sup>72</sup> Both the Florida court and the Supreme Court weighed all of the variables and made appropriate discretionary rulings on an ad hoc basis. Neither the Supreme Court nor the Florida court adhered to any firm constitutional restrictions or mandate; each recognized the necessity of a case-by-case review.

The Court's emphasis on a totality-of-the-circumstances approach, coupled with its continued erosion of the *Estes-Sheppard* anti-electronic media position, culminated in its decision in *Chandler v. Florida*.<sup>73</sup> In *Chandler*, two police officers were tried for conspiracy to commit the burglary of a Miami Beach restaurant. At voir dire, all the selected jurors asserted that they could remain impartial despite the presence of a television camera in the courtroom. The trial judge denied a defense motion to sequester the jury because of the television coverage, but instructed the jurors not to watch or read anything about the case. The trial judge suggested that the jurors "avoid the local news and watch only the

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68. *Id.* at 2827. But see *Gannett Co. v. De Pasquale*, 443 U.S. 368 (1979), which held that the sixth amendment guarantee of a public trial for the accused gave neither the public nor the press an enforceable right of access to a pretrial suppression hearing.

The *Richmond* Court did not overrule *Gannett* but distinguished it on the basis of the absence in *Richmond* of any articulated justification for the closure order and the trial court's apparent indifference towards alternatives to closure. *Id.* at 2829-30. For a thorough analysis of the effect of *Richmond* on *Gannett*, see Note 34 U. MIAMI L. REV. 936 (1980).

69. 100 S. Ct. at 2830 n.18.

70. *Id.* at 2829-30.

71. *Id.* at 2830.

72. 370 So. 2d at 779.

73. 366 So. 2d 64 (Fla. 3d DCA 1978), cert. denied, 376 So. 2d 1157 (Fla. 1979), aff'd 101 S. Ct. 802 (1981).

national news on television,"<sup>74</sup> but he declined to issue a binding rule that the jurors avoid any accounts of the testimony presented at trial.<sup>75</sup> The television camera was in place for one afternoon when the state presented the testimony of its chief witness. No camera, however, recorded any part of the case for the defense. In total, the media broadcast only two minutes and fifty-five seconds of the trial.<sup>76</sup> The jury subsequently found the defendants guilty on all counts.<sup>77</sup> The defendants moved for a new trial, claiming that the electronic media coverage had inherently denied their right to a fair trial. The Florida District Court of Appeal, Third District, affirmed the conviction, and the Supreme Court of Florida denied review, reasoning that the *Post-Newsweek* decision had rendered moot any challenge to Canon 3A(7).<sup>78</sup>

By granting review in *Chandler*, the Supreme Court of the United States acknowledged the need to reconsider its *Estes-Sheppard* rationale in light of advances in media technology and the emergence of empirical data evaluating the effects of media coverage on trial participants. The Court established the framework for its evaluation by recognizing that it had no power to oversee state court procedural experimentation; it thus limited its review to ensuring that the state's action did not infringe upon the fundamental rights guaranteed to the defendants by the Federal Constitution. The central question, therefore, was whether the Supreme Court of Florida had the authority to promulgate Canon 3A(7) for the trial of cases in Florida courts. The Court concluded that the Constitution did not prohibit Florida from experimenting with the program authorized by the Canon. A defendant is entitled, however, to show that media coverage compromised his right to a fair trial. Because the Florida experiment was not per se unconstitutional, and because the police officers made no specific showing of prejudice, the Court affirmed their conviction.<sup>79</sup> The *Chandler* decision, however, reveals an acceptance of the electronic media tempered by recognition of the need for further study of their effects in the courtroom.

The Court, in an opinion by Chief Justice Burger, noted that *Estes v. Texas* had not announced that the presence of electronic

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74. 101 S. Ct. at 806.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 813.

media in the courtroom inherently denied due process.<sup>80</sup> The Court based this interpretation on the opinion of Justice Harlan, whose concurrence had been the swing vote in reversing *Estes*' conviction. The Court focused on Justice Harlan's reasoning that even though the presence of the media had "mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process,"<sup>81</sup> its presence was not necessarily prejudicial.<sup>82</sup>

Focusing on Justice Harlan's concurring opinion in *Estes*, the Court applied the totality-of-the-circumstances approach found in *Richmond Newspapers*.<sup>83</sup> Relying on this approach, the Court found in *Chandler* neither the "Roman circus" nor the "Yankee Stadium" atmosphere that had existed in the *Estes* courtroom.<sup>84</sup> Moreover, the Court found that the *Chandler* defendants had made no showing of prejudice of constitutional dimensions.<sup>85</sup> The Court noted that a defendant has the right to show that the media's coverage compromised his right to a fair trial, but "[t]o demonstrate prejudice in a specific case a defendant must show something more than juror awareness that the trial is such as to attract the attention of broadcasters."<sup>86</sup> Thus, the Court recognized that the presence of the media in the courtroom in some cases might cause sufficient prejudice to constitute a denial of due process.

But in separate concurring opinions, Justices Stewart and White construed *Estes* as having announced a per se rule that the fourteenth amendment prohibits televising criminal trials over a defendant's objection.<sup>87</sup> Justice Stewart read both Justice Clark's opinion for the Court in *Estes* and Justice Harlan's concurrence as providing that the mere presence of cameras and similar media recording devices during a criminal trial have an inherently prejudi-

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80. *Id.* at 809.

81. *Id.* at 808 (quoting *Estes v. Texas*, 381 U.S. 532, 587 (Harlan, J., concurring)).

82. [T]here 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 808 (quoting 381 U.S. at 591) (emphasis added by *Chandler* Court.)

83. See Note, *supra* note 68.

84. 101 S. Ct. at 813.

85. *Id.*

86. *Id.* (citing *Murphy v. Florida*, 421 U.S. 794, 800 (1975)).

87. *Id.* at 814-17 (Stewart & White, JJ., concurring).



cial effect on the rights of an accused to a fair trial.<sup>88</sup> Thus, Justices Stewart and White argued that the Court should overrule *Estes* in order to affirm the judgments against the *Chandler* defendants.

Whether it has overruled *Estes* or not, however, the Court has reduced that decision to an admonition to proceed with due care, regardless of Justice Clark's statement in *Estes* that no isolatable or actual prejudice had been or need be shown. Despite allowing the state to continue its experimental televising of criminal trials, the Court expressed caution. The Court was aware of the possibility of identifiable prejudice caused by the presence of the electronic media in the courtroom, and of the need for more detailed "scientific" surveys of the potential effects on jurors, judges, and witnesses.<sup>89</sup>

The *Post-Newsweek* and *Chandler* decisions show the present trend: expanded opportunities for state experimentation with electronic media coverage in the courtroom, tempered by a cautious eye toward the very real possibility of demonstrable prejudice. In that sense, television may remain on trial in the years to come.

PETER J. RUBENSTEIN

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88. *Id.* at 814-15.

89. Although it recognized that comprehensive empirical data on certain aspects of the problem was not yet available, the Court stated:

[I]t is noteworthy that the data now available do not support the proposition that, in every case and in all circumstances, electronic coverage creates a significant adverse effect upon the participants in trials—at least not one uniquely associated with electronic coverage as opposed to more traditional forms of coverage. Further research may change the picture. At the moment, however, there is no unimpeachable empirical support for the thesis that the presence of the electronic media, *ipso facto*, interferes with trial proceedings.

*Id.* at 810 n.11.