Televised Trials: Past and Present

Grant Greer
Utah State University

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Grant Greer

H. Preston Thomas, Advisor
INTRODUCTION

In the early fifties, the television media sought to cover criminal trials with television cameras. A few states allowed some television coverage, but they were a minority. One of these states, Texas, made constitutional history when it allowed the television coverage of the criminal trial of Billie Estes in 1962. The case had been appealed all the way to the Supreme Court, where his conviction had been reversed because of the television coverage of his trial. The Supreme Court's holding in that case had been rather ambiguous because one justice in the five-man majority, while agreeing with the result reached by the other four justices, disagreed with the scope of their decision.

Despite the ambiguity of the Estes decision, the period of time following the 1965 decision to the mid-seventies was characterized by the prohibition of televised trials by most states. Only Colorado and Texas allowed televised trials during this period, and Texas gave in to pressure from TV trial critics and banned televised trials in 1976.

The post-Estes latency period ended in 1975 when several states began allowing televised trials. Unlike the televised trials of the previous era, these new televised trial programs were carefully laid out ahead of time under the auspices of the highest court in each state. By 1980, more states allowed televised trials than didn't. This explosion in televised trials was condoned by the United States Supreme Court in 1981 decision in Chandler v Florida.
Thus, televised trials have been allowed in two periods: an early period during the fifties and early sixties and the present period which began in the mid-seventies. The one exception to this two-period analysis of televised trials is Colorado which adopted its present program of televised trial in 1956. Colorado is unusual in another respect. Although it was one of the first states to allow televised trials, it adopted a program more like the present state programs than the sporadic experimental trials of the fifties and sixties.
CHAPTER I

THE FIRST TELEVISED TRIALS: AN ERA OF
SPORADIC EXPERIMENTATION

A 1955 murder trial in Waco, Texas, was covered by television news-reel cameras in one of the first experiments conducted with televised trials. The local bar association, which had conducted the experiment, prepared and published a report on the trial which indicated that the presence of the television cameras did not have any detrimental effect on the trial. In fact, the bar association said the presence of the cameras had dignified the proceedings somewhat. Ten years later the United States Supreme Court condemned a televised trial from the same state. The ten year period between those two trials was characterized by sporadic experimentation with televised trials by various state courts.

In those states where television coverage of court proceedings was allowed, it was a one-time experiment in the midst of prohibitions. Each televised trial was rather unique, conducted under such regulations (or the lack of them) as determined by individual trial judges. In addition, television coverage of court proceedings was allowed by only a small minority of states. Colorado is the only state which has consistently allowed televised trials since the 1950's. Texas allowed televised trials until the mid 70's. Oklahoma had allowed a trial in 1958 to be televised, but, by 1966, it was one of the forty-eight states which prohibited televised trials.
This rather sporadic pattern of televised trials was the trademark of the time. There was no standard procedure for conducting televised trials. In fact, there was not even any agreement on the issue of whether or not trials should be televised at all. The result was a general confusion over the issue. Few seemed to know exactly what to do when the issue came up. This chaos was well described by Dr. Werner Hartenberger:

The autonomy of an individual court of law to establish a policy, consistent with its own opinion of the role of television and photography in court procedure, resulted in a doctrine that varied from state to state. While the judiciary in Colorado endorsed supervised television coverage of court proceedings, the judiciaries in the majority of states remained in opposition, and while Dr. Sam Sheppard was being tried before a judiciary that was undecided about the effects the media had on his trial, a judge in Portland, Oregon, authorized photographers to take pictures during a murder trial at any time (as long as none were with flash bulbs) from front bench seats in the courtroom.

Dr. Hartenberger went on to say that the "confusion of the judiciary was compounded by the already apparent uncertainty of the bar, press, and lay community."  

### Lyles v State: A Small Success

The situation described by Dr. Hartenberger can better be understood by considering a few of these early TV trials. One such trial occurred in Oklahoma in 1958. Edward Lyles was convicted of second-degree burglary in Oklahoma County. He appealed on the grounds that television cameras which had been permitted in the courtroom had prejudiced his trial and denied his constitutional rights. These cameras had not done any filming during the actual proceedings but only during the recesses. When Mr. Lyles objected to the cameras, the judge ordered the television
crews to stop shooting, although he refused to do anything about the pictures they had taken before the defendant's objection was raised. When the appeal reached Oklahoma Court of Criminal Appeals, the conviction (and the use of television at a trial) was upheld.

The Oklahoma Court upheld the conviction because the "trial court did not abuse its discretion in permitting television cameras in the courtroom and the taking of pictures . . . (was) not prejudicial." The significant factor was not whether TV coverage of trials in and of itself was prejudicial but whether or not the trial judge had allowed the news media in the court to go too far. A standard of reasonableness was applied. Since the appellate court held that the judge was reasonable in allowing the cameras in the courtroom and the restrictions he imposed on the media were reasonable, the trial was a fair one, and no constitutional rights were denied.

The Court of Appeals defined reasonable in both general ideological and specific procedural terms. An ideological question considered by the court was whether there was a compelling reason for admitting cameras into the courtroom. The court felt that freedom of the press included the right of the broadcast media to attend and report on court proceedings and that denying television the same privileges which the printed media enjoyed "would constitute unwarranted discrimination." In finding that the trial was reasonable, the court considered the procedures employed. For instance, one procedure which it considered essential was the existence of a "kill" button on the bench. This is a button within the reach of the judge which, when depressed, would instantly stop the cameras from filming pictures. The Oklahoma Court held
that this was necessary for the trial judge to maintain absolute control of the proceedings.\textsuperscript{10}

While the appellate court later suggested certain standards of conduct for the trial, it also admitted:

\begin{quote}
...the matter of televising or not televising, photographing or not photographing criminal trials and proceedings, subject to the hereinbefore suggested standards, is within the sound discretion of the trial judge.\textsuperscript{11} (emphasis added)
\end{quote}

What were these "hereinbefore suggested standards?" One was the "kill" button requirement. It was also recommended that the press "pool" facilities and that microphones be installed in such a way as to "minimize" distraction." For live telecasts, the cameras were to be concealed behind a wall.

While some standards provided by the Oklahoma Court of Appeals were relatively precise--the pooling requirement, for instance--others were quite vague. For example, the standards regarding microphone placement were rather ambiguous. The trial judge was instructed to see that the microphones were not put in a distracting place, yet he was the one who ultimately determined what would be distracting. Presumably he would take time before the trial to confer with the media and decide on the best possible placement of microphones, but he was not required to. That is, the standard was vague enough to include half-hearted efforts at media control as well as more serious attempts.

The Oklahoma's court's standards were provided in the narrow context of the case before it. Thus, the standards provided were applicable to the Lyles case but not necessarily to another case which had occurred under different circumstances. For example, the Oklahoma
Court provided standards for the placement of cameras which would broadcast live. It said nothing about the placement of film cameras which would record proceedings for later broadcast. This limitation is not unusual. It is, in fact, the normal procedure for an appellate court. Still, it has its drawbacks when a court is trying to provide comprehensive standards for the televising of a trial. Seventeen years after the Lyles decision was rendered state courts realized this and began to formulate procedures in quasi-legislative hearings before a trial was televised. (Colorado, of course, used such a procedure in 1956, twenty years before the other states.)

One might view the Lyles case as characteristic of many of the early televised trials and conclude that the above observations are applicable to most, if not all, of the TV trials of the time. There are problems with this, however. Each of the televised trials was conducted under its own set of rules, and each was a different experience. Nevertheless, one statement can be made about the Lyles case in comparison to the other trials of the time: it was quite well handled. The trial judge had exercised caution when he allowed cameras into his court, and he had constantly monitored them, telling them when they could take pictures and when they could not. Not all of the early TV trials were conducted with such care. In the 1962 trial of Billie Sol Estes, the television coverage was poorly handled. The Estes case, however, was atypical in its own right, for it was the first televised trial to be reviewed by the United States Supreme Court.
This landmark case began in a district court in Tyler, Texas. The defendant, Billie Sol Estes, was convicted of swindling some farmers. On September 24, 1962, the trial was scheduled to begin, but the defense attorney objected to the presence of the television cameras and asked that they be removed. The judge refused. The defense then asked that the trial be delayed, and the judge granted this motion. While the hearing on these two motions was in progress, television and still cameramen took pictures of the scene. Radio and television broadcasted the proceedings live. Justice Clark described this scene in the Supreme Court's decision:

Indeed, at least 12 cameramen were engaged in the courtroom throughout the hearing, taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings.

In short, television cameramen "ran wild" during the proceeding. (For pictures of the scene at the hearing, see Appendix 1, pictures 1 & 2.) Although this hearing was not a trial, it was originally supposed to be one. Only after the defense brought up its motions was the trial postponed and the proceeding turned into a pre-trial hearing. When the actual trial was held, many more restrictions were placed on the press, but, if the trial had been held when scheduled, it would probably have been held in the same atmosphere in which the pre-trial hearing was held: with newsmen and cameras all over the room, with bright "studio" lights and with microphones sticking their snouts into the faces of
trial participants. In short, it seemed that the trial judge had taken very few measures beforehand to assure that the press equipment would be as unobtrusive as possible. By not placing restrictions on the press, the trial judge lacked that control over the proceedings which the Oklahoma Court in the Lyles case felt was so important.

When the Estes case finally did come to trial in October of 1962, the trial judge had ordered the media to build a booth in the back of the courtroom and paint it to match the courtroom walls as much as possible. The cameras were to be housed in this booth, with their lenses sticking out of a slit which ran the length of the booth (see Appendix 1, picture 3). Furthermore, the judge allowed live broadcasts only of the attorney's arguments and the delivery of the jury's verdict—not of the testimony and cross-examination of any witnesses. Videotapes were allowed but without sound. For the second day of the trial, the judge ordered that the slit in the camera booth be made narrower so that the cameras would be harder to see (Appendix 1, picture 4). He seemed to be progressing towards a more reasonable televised trial, but on a trial-and-error basis. He was not acting, he was reacting. The Supreme Court noticed this progressive change in the rules of the game when it said that, "Because of continual objection, the rules governing live telecasting, as well as radio and still photos, were changed as the exigencies of the situation seemed to require."\(^{14}\)

Although the Estes case was overturned by the United States Supreme Court and the Lyles case was upheld by Oklahoma's highest court, there were many similarities. In both cases, the trial judge had ultimate discretion in deciding whether or not to televise the trial. In the
Lyles case, however, the trial judge had some limits on his discretion, a few of which were relatively clear procedural requirements. The Estes judge was granted discretion to televise or not to televise as he should desire by Canon 28 or the Integrated State Bar of Texas. Canon 28 left the matter to the "sound discretion" of the trial judge, but also warned that a televised trial may affect the dignity of the trial and distract trial participants. In addition, it instructed that no "flash bulbs or other artificial lighting" be used and that no witnesses be televised without their consent. With the exception of these two recommendations, the judge was left to make all other rules himself.

The fact of the matter is that the judge was not given very much guidance by the Canon. The two explicitly stated guidelines in Canon 28, while undoubtedly helpful to an extent, were also quite limited. The lighting requirement is little more than a statement of common sense. No judge in his right mind would allow flashes in a courtroom. As for the requirement concerning witnesses, it is undoubtedly important, but it doesn't give the judge any guidance on how to televise. It only tells the judge what he cannot allow to be televised. In the Lyles case, however, standards such as the requirement of a camera booth for all live broadcasts do help the judge in a procedural manner, yet it is a recommendation which the judge might not follow otherwise.

In both the Lyles and Estes cases, the judges imposed restrictions on the media to keep the trial as fair as possible. The Lyles judge laid out guidelines from the start by allowing television coverage only during recesses. The Estes judge strove to maintain the balance between the television coverage and the rights of the defendant by
eventually confining the cameras to a booth at the rear of the courtroom and limiting the live telecasts. Yet the progressive manner in which he imposed regulations let the damage be done, at least to a limited extent before the stricter regulations were put in force. Thus, it seems that the Lyles judge had done a better job of preserving the trial by setting his procedures out clearly at the onset of the trial. The final regulations imposed by the Estes judge were probably fair. In fact, one of the justices in the Supreme Court's majority which condemned the Estes trial noted that the television cameras were "relatively unobtrusive." The problem was that these rules were not in force from the start of the trial, but were gradually imposed as it went along.

The Estes and Lyles cases cannot be easily characterized as typical televised trials from the early era. But then, it is wrong to say that they do not fit in with the other trials of this period. It is just difficult to characterize any trial as typical of this period because of the tremendous variety of electronic coverage allowed. The Estes and Lyles cases represent the two ends of the spectrum of televised trials in this period. The Lyles trial was quite well administered by the trial judge and the media was strictly controlled. It shows that, while television coverage could prejudice a trial, it does not have to. On the other hand, the Estes case represents the lower end of the spectrum, where television coverage does seem to interfere with the trial. It is the example of a poorly conducted trial—television showing its "mischeivious potentialities." When the two cases are put together, they show that, while television coverage can harm a trial, it doesn't have to. When the Estes case made it to the United States Supreme Court, however, a different statement about televised trials came about.
CHAPTER I NOTES


2 Susan Martin, "Cameras in the Courtroom: A Denial of Due Process?" Baylor Law Review 30 (Fall 1978): 854. In 1976, Texas adopted Canon 3 A(7), which permits television coverage but only for use in educational institutions after all appeals have been made.


5 Ibid., p. 44.

6 Lyles v State, 330 p. 2d. 734, p. 738.

7 Ibid., p. 734. 8 Ibid., p. 741

10 Ibid., p. 742. 11 Ibid., p. 745.


13 Estes v Texas, 381 U.S. 532, p. 536.

14 Ibid., p. 537.


16 Estes v Texas, p. 603.

It may well be argued that the presence of the bright "studio" lights violated the "artificial lighting" clause of the Canon. On the other hand, it could be said that the Canon only intended to prohibit bright lights on the cameras themselves and that it would be absurd for the Canon to mean that no new lighting could be set up by the media, for this might exclude them just as well as an absolute ban. At any rate, this part of the Canon is ambiguous and therefore all the more useless for the judge. Probably it was intended to prohibit any obtrusive lighting setups while allowing a very limited amount of modification in existing lighting setups to meet the media's needs, but since the trial judge allowed the bright lights he apparently didn't read the Canon this way.

17 Estes v Texas, (J. Harlan, concurring), p. 588.
CHAPTER II

THE ESTES DECISION: AMBIGUOUS CONDEMNATION

In 1965, the United States Supreme Court reversed the conviction of Billie Estes because his trial had been televised without his consent, even though there was no proof that the presence of television cameras had harmed the fair administration of the trial. This result was carried by a bare majority of five justices: a plurality of four and the concurrence of a fifth justice—J. Harlan. The plurality's decision was expressed in the majority opinion written by Justice Clark's majority opinion held that:

The psychological impact of the use of television on all the participants in a trial was inherently prejudicial and of such an incalculable nature that its use was fundamentally inconsistent with the constitutional concept of a fair trial. Thus, even absent a showing of actual prejudice, its use was a violation of due process of law.1

The Chief Justice wrote a separate opinion in which he expressed "additional view on why this is so."2 Justice Harlan concurred in part but refused to say that all televised trials are per se unconstitutional because all televised trials were not before the court. "The Estes trial," Harlan said, "was a heavily publicized and highly sensational affair."3 For this reason, Harlan felt that the televising of the trial had been inherently unfair, even without a showing of harm directly caused by the TV coverage. Routine trials, however, might be televised without harm. Harlan simply refused to condemn all televised trials because television was shown to be inherently unconstitutional in a notorious and highly publicized case.
Four justices dissented because the defense did not prove, or even assert, that the television coverage had a detrimental effect on the trial. The dissenters were unwilling to assume "isolatable prejudice" harm to the trial directly caused by television coverage--"in the absence of any evidence that Estes did not receive a fair trial."4

The holding of the Estes case is ambiguous because the majority itself was split between condemning all televised trials, as the plurality did, and condemning only the televising of a "highly sensational" trial, as Justice Harlan did. Since there could have been no majority without Harlan's concurrence, the Harlan opinion becomes the most important single opinion in the case, and it limits the scope of the holding of the case.5 This lack of consensus in the court undoubtedly paved the way for the reentry or television in courtrooms in the late seventies.6 At any rate, it is clear that the Estes decision did not cause any mass prohibitions of televised trials. The only two states which had allowed televised trials at the time of the Estes decision, Colorado and Texas, continued to allow them for some years after the Supreme Court's decision. A closer look at the decisions which made up the majority will show how this is so.

The Plurality Decision

One of the first things to be established by the plurality was the fact that there did not have to be any showing of "isolatable prejudice" in order for the trial to be adversely affected by the television coverage. This was not necessary because "at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process."7
The televising of the Estes trial was inherently unfair because of the impact it would have on trial participants. The first set of trial participants considered was the trial jurors. The plurality's concern in this area was threefold: that the presence of television would interfere with the jurors in the performance of their duty, that it might prejudice the jury's verdict by exposing them to edited television coverage, and that television broadcasts would prejudice potential jurors, thus making retrial impossible.

The distraction argument hinged on the assumption that jurors would be self-conscious and thus concerned about what the cameras were recording. "We are all self-conscious and uneasy when being televised," the court said, "Human nature being what it is, not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony."8

The plurality also expressed concern that, in certain states where jurors did not have to be sequestered, they might go home and view excerpts of the trial on television. In the process, they would be re-exposed to the events of the trial, with one difference: what they would see on TV would be edited. As a result, certain parts of the trial would be emphasized in the juror's mind. While this particular argument was not applicable to the Estes case because the jurors had to be sequestered under Texas law, it could be applied hypothetically, by pretending the Estes jurors had not been sequestered. Due to the fact that Estes continually objected to being televised, the judge had prohibited the press from filming any of the arguments of the defense. As a result, the trial coverage amounted to "a public presentation of
only the state's side of the case.\textsuperscript{9} If a juror were allowed to go home and view this, it would be the arguments of the prosecution, not the defense, which would be reinforced in his mind. In an extension of this argument, the plurality said that television coverage of a trial would make it difficult to select new jurors if the case had to be retried.

If, as in the Estes case, television coverage tends to favor one side in the trial, potential jurors may be prejudiced before they are called to hear the retrial.

Concern was also aired about the effect of television coverage on trial witnesses. Here the justices seemed to be afraid of the unknown. They admitted that there would be no way of knowing what effect television coverage might have on witnesses; however, they did feel that the presence would have some effect. It seemed to the plurality that the witnesses would be so distracted that the accuracy of their testimony might be severely "undermined." Furthermore, the plurality said, witnesses might be approached on the street by hostile television viewers and harassed about their testimony.

It seemed to the plurality that television coverage of a trial might have a significant impact on the trial judge. The court noted that it made the judge's job more difficult by adding to the number of difficult decisions he would have to make. The court seemed even more concerned, however, that television might be used as a political weapon against the judge, particularly where judges were elected. The picture painted by the opinion is one of a trial judge trying his best to do his job with television crews holding a club over his head, ready to swat him if he makes what they consider to be a wrong decision.
Most importantly, the plurality expressed concern for the defendant in a televised trial. They said:

We cannot ignore the impact of courtroom television on the defendant. Its presence is a form of mental—if not physical—harassment, resembling a police line-up or a third degree. 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.10

One look at picture 2 (see Appendix 1) of the Estes hearing seems to support this statement. Billie Estes sits uncomfortably on his chair, with his hand apparently trying to shield his face from the cameras.

The plurality put a great deal of emphasis on the obtrusiveness of the television equipment—especially Justice Warren (who should be considered part of the plurality since his opinion is basically an elaboration of the plurality's ideas.) This concern with the physical appearance of the equipment should not be misunderstood, however. It was considered significant only insofar as it tended to increase psychological distraction of the trial participants.

The Harlan Opinion—One Man Majority

While the rhetoric of the plurality suggested an unconditional condemnation of all televised trials, the actual holding of the case was limited by the reservations in concurring Justice Harlan's separate opinion. Harlan felt that the plurality's decision was too broad.

The precise question is whether the Fourteenth Amendment prohibits a State, over the objections of a defendant, from employing television in the courtroom to be televised contemporaneously, or subsequently by means of videotape, the courtroom proceedings of a criminal trial of widespread interest. The issue is no narrower than
this because petitioner has not asserted any isolatable prejudice resulting from the presence of television apparatus within the courtroom or from the contemporaneous or subsequent broadcasting of the trial proceedings. On the other hand, the issue is no broader, for we are concerned here only with a criminal trial of great notoriety, and not with criminal proceedings of a more or less routine nature.11

This puts Harlan in an interesting position. He clearly considers the facts of the case, if only to determine whether or not the trial is "of great notoriety." Yet, if the trial is notorious, the reasoning of the plurality applies and the televised trial is considered per se unconstitutional. Thus, Harlan's opinion fits between the Clark and Warren opinions, which condemned all televised trials, and the dissenting opinions, which would condemn a televised trial only if the facts showed "isolatable prejudice."

Harlan admitted that there may be no difference between televising a notorious trial and one of a more or less routine nature. He made the distinction because he did not wish to keep the states from pursuing "a novel course of procedural experimentation."12

Harlan also stresses a point briefly conceded by the majority—that their condemnation of televised trials did not mean that TV would always prejudice trials. This was a loophole which would later allow the reentry of television into the courts of many states. Harlan managed to acknowledge this future for televised trials while condemning the Estes case in the same breath,

Finally, we should not be deterred from making the constitutional judgement which this case demands by the prospect that the 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. If and when that day arrives the constitutional judgement called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause.13
CHAPTER II NOTES

1 Dexter Peacock and Don Teague, "CONSTITUTIONAL LAW--Televising parts of a Criminal Trial Over the Objection of the Accused in a Trial of Widespread Public Interest is a Violation of Due Process of Law Even When No Prejudice is Shown," Texas Law Review 43 (July 1965): 992.

2 Estes v Texas, 381 U.S. 532, p. 552.

3 Ibid., p. 590.

4 Dexter Peacock and Don Teague, p. 994.


7 Estes v. Texas, pp. 542-3.

8 Ibid., p. 546.  

9 Ibid., p. 551.  

10 Ibid., p. 549.

11 Ibid., p. 587.  

12 Ibid.  

13 Ibid., pp. 595-6.
CHAPTER III

THE AMERICAN BAR ASSOCIATION'S

CANON 35

While the Estes mandate was an official and somewhat half-hearted criticism of televised trials, the American Bar Association gave a much sharper criticism of TV trials in Canon 35 of the Canon's Judicial Ethics. The Canon does not have any legal forces behind it. The Supreme Court in Estes had noted that: "Canon 35, of course, has of itself no binding effect on the courts but merely expresses the view of the Association in opposition to the broadcasting, televising, and photographing of court proceedings."¹

The Canon was first written in 1937, long before the first trial was televised, as a prohibition of still and newsreel cameras in courtrooms.² It had been inspired by the trial of Bruno Hauptmann, the Lindbergh baby kidnapper, which had been photographed by four still and three newsreel cameras.³ With two minor exceptions, the press had followed the trial judge's restrictions until it was discovered that one of the newsreel cameras had been photographing while the court was in session, instead of during recesses. When the judge heard this, he banned any further camera coverage of the trial. It is interesting to note that the offending newsreel camera "had been so well soundproofed that the judge and public learned of the filming only when some of the footage was released."⁴ Outside the courtroom, however, the scene was
different. Witnesses repeated the highlights of their testimony for newreel cameras outside the courtroom; the jury panel was confronted by a battery of photographers outside the courthouse; newspapers printed "rumors convicting Hauptmann in their columns." Yet, in general, it was the press outside the courtroom which gave the trial its bad name.

At any rate, out of the Hauptmann grew a trend in the American Bar Association for a statement on the control of cameras in the courtroom. In September of 1937, this trend resulted in the adoption of Canon 35.

In 1952, the Canon was amended to include television in its ban on courtroom cameras. Clearly the errors of the press at the Hauptmann trial had played a significant role in the addition of television to the ban, since, at that time of the revision, there had been practically no experimentation with television coverage of trials. A few minor revisions were made in 1963 (deleting some insignificant phrases). As revised, the Canon reads as follows:

Proceedings in the court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or television of court proceedings detract participants and witnesses in the giving testimony, and create misconceptions with respect thereto in the mind of that public and should not be permitted. (emphasis added)
CHAPTER III NOTES


4 Ibid., p. 19.

5 Ibid., pp. 18-9.

6 Ibid., p. 23.


8 Ibid. Canon 35 has been replaced by Canon 3 A(7). In 1972 Canon 3 A(7) was softened to allow limited television coverage, with the consent of participants and only for instructional purposes.
CHAPTER IV

COLORADO—THE EXCEPTION

When Texas adopted Canon 3 A(7) in 1976, that left Colorado as the only state in the present which maintained a televised trial program conceived in the early era. Yet the Colorado program, which was adopted in 1956, is more characteristic of the TV trial programs which exist today than of the sporadic experiments which made up the first televised trials. It was the exception to the rule which prevailed during the first era of televised trials.

That the Colorado program differs from other TV trials of the time is made clear by the manner in which it was adopted. The first televised trials were allowed at the discretion of individual trial judges prior to a particular trial and were approved or rejected by a higher court. In Colorado, televised trials were approved by the Supreme Court (before any trials were televised) in a quasi-legislative hearing. Several television stations had requested that the Supreme Court consider changing Canon 35 to allow television camera coverage of court proceedings. The hearing was not a typical judicial proceeding, but it was in some ways a mini-legislative hearing. This new method of considering whether or not to allow a televised trial was to become the trademark of the televised trial programs of the present.

On the 12th of December, 1955, the Colorado Supreme Court appointed one of its members, Justice Otto Moore, to conduct the hearing to
reconsider Canon 35. The Court felt that, since the Canon had come out, the media had not a chance to prove their side of the issue:

Admittedly, no opportunity has been afforded to those who claim injury or loss of right by enforcement of the Canon in question to make known to this court in an orderly and authorized manner the facts, the law and the argument upon which their claims are grounded.¹

The hearings before Justice Moore began on January 30, 1956, and went on for six days. Many witnesses appeared at the hearing and much equipment was demonstrated by camera coverage of the proceedings. In fact, Justice Moore noted:

At least one hundred photographs were taken at various stages of the hearing which were printed and introduced as exhibits. All of them were taken without the least disturbance or interference with the proceedings, and, with one or two exceptions, without any knowledge on my part that a photograph was being taken. A newsreel operated for half an hour without knowledge on my part that the operation was going on. Radio microphones were not discovered by me until my attention was specifically directed to their location...Cameras used in photo and television demonstrations were of different kinds. In still photography and newsreel activity they were not noticeable and were operated in such a manner that I was unaware that they were functioning.²

The television cameras demonstrated varied from a "large, already outmoded one which is mounted on a moveable tripod, to the small one which is 4" x 5" by 7".³

After the hearing, Justice Moore began a careful analysis of the issues in televising a trial. He saw TV trials as walking a fine line between the constitutional guarantees of free press and fair trial:

In the instant case we must take precautionary measures to guard against two dangers: first, lest under the guise of preserving dignity and decorum in the court cases the civil liberties guaranteed under our Bill of Rights be unnecessarily invaded or nullified; second, lest using the Bill of Rights as a cloak individuals are permitted "to detract from the
essential dignity or the proceedings, distract the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public," by the use of camera, radio or television in the course of a trial.  

Thus, television media and trial judges must try to find a "happy medium" in which neither the rights of the press nor the rights of the defendant will be denied.

The educational value of the televised trial was an important issue for Justice Moore. In response to the argument that TV trials would serve only to satisfy idle curiosity, he made the following oft-quoted statement:

'It is highly inconsistent to complain of the ignorance and apathy of voters and then to "close the windows of information through which they might observe and learn." Generally only idle people, pursuing "idle curiosity" have time to visit court rooms in person.'

Justice Moore also felt that the supporters of Canon 35, while meaning well, had made an incorrect assessment of televised trials. He commented that before the hearing he had been opposed to television coverage of proceedings but that he had changed his mind after his exposure to the television camera. The supporters of Canon 35 disliked televised trials because they lacked any experience with one. Twenty-two years later, a trial judge in Florida made the same statement.

Just because Justice Moore supported televised trials did not mean that he supported them in all cases:

There are doubtless many cases and portions thereof which, in the court's discretion to insure justice, would be withdrawn from reproduction by photo, film, radio or television. The responsible leadership in each of these fields are in agreement that the trial court should have complete discretion to rule out all, or any part of, such activity in those instances where the proper administration of justice requires it.
Moore submitted his report to the rest of the Colorado Supreme Court on February 20th, and on the 27th, the Court unanimously adopted Moore's recommendation for a revised Canon 35, which reads as follows:

Proceedings in court should be conducted with fitting dignity and decorum.

Until further order of this Court, if the trial judge in any court shall believe from the particular circumstances of a given case, or any portion thereof, that the taking of photographs in the court room, or the broadcasting by radio or television of court proceedings would detract from the dignity thereof, distract the witness in giving his testimony, degrade the court, or otherwise materially interfere with the achievement of a fair trial, it should not be permitted; provided, however, that no witness or juror in attendance under subpoena or order of the court shall be photographed or have his testimony broadcast over his expressed objection; and provided further that under no circumstances shall any court proceeding be photographed or broadcast by any person without first having obtained permission from the trial judge to do so, and then only under such regulations as shall be prescribed by him.7

Bar-Press Cooperation in the Colorado Program

One thing which has distinguished the Colorado program from many of its contemporaries is the amount of cooperation between the media and the judges. In the Estes case, the relationship between the media and judge was more a peaceful co-existence (which was occasionally less than peaceful) than cooperation. In Colorado, however, the press came up with its own procedures for the televising of a trial. Justice Moore had recommended pooling of press facilities, but this was not his own idea. It was proposed by Sheldon Peterson of KLZ radio and television. To further facilitate pooling, Mr. Peterson came up with a proposal in which the 14 Denver radio stations and four television stations would go through a permanent organization, the Denver Area Radio and Television Association, in order to televise a trial. The
Association would then work out the "ground rules" for coverage and the trial judge would only have to deal with one person--the Association's secretary--instead of media representatives from a number of stations. In addition, equipment would be set up ahead of time and the Association mandated that "the judge must be fully satisfied with the installation before the trial begins." 8

To assure that media conduct would consistently be reasonable, the association established some rules of conduct for the televising of a trial, (these rules are reproduced in Appendix 2) which would be updated annually. 9 In addition to explaining the detailed process for working with the Denver Area Radio and Television Association, the rules an attorney and former judge in Colorado, noted that these "self-imposed rules and regulations have been adhered to scrupulously in the Denver Metropolitan area, and outside the Denver area where broadcasting has been done in Colorado." 10 Clearly these rules do not have any actual coercive force behind them. However, TV stations do have an advantage in following them in that, if the rules are followed, they may "insure" their being allowed to continue further coverage of televised trials.

The rules do have one limitation in that they do not say anything about editing of material to be broadcast. The potential harm of this is illustrated by the Estes case, where only the prosecution's arguments were televised. But in Colorado, the situation seems to be different. Although there are no specific rules, "In all cases great care has gone into the editing and selection. Experience to date indicates the major use is and will be in news broadcastings, in which time is so limited there is no opportunity for abuses by...parties seeking to capitalize upon the uses of mass communication media." 11
In the 1970's, most if the state programs were to have various regulations imposed upon the media wishing to televise a trial. Colorado resembles these states in that it has standards laid out beforehand to regulate the televising of court proceedings. The only difference is that the standards in Colorado were made and enforced by the media itself. The media's treatment of editing seems to suggest that even when the rules were not written, there were unwritten standards of reasonableness which the media followed voluntarily.
CHAPTER IV NOTES


2 Hearings Concerning Canon 35 or the Canon of Judicial Ethics, 296 p. ad 465, p. 468.

3 Ibid. 4 Ibid., p. 469. 6 Ibid.

7 Ibid., p. 473. 8 Ibid., p. 471.


10 Ibid. 11 Ibid.
CHAPTER V

THE PRESENT ERA OF TELEVISED TRIALS

By the time the Estes decision came out, the prospects for televised trials looked dim. Almost all states had prohibited televised trials, and the Supreme Court had come quite close to declaring all such trials to be unconstitutional. In 1981, the situation reversed. Although the federal courts continue to prohibit television coverage, approximately twenty-seven states permit televising, either on a permanent or experimental basis, of some court proceedings, although only twenty-one allow coverage of criminal trials. This trend was climaxed when on January 26, 1981, the Supreme Court upheld the televising of the trial of two Miami police officers, Noel Chandler and Robert Granger, who had been convicted of burglary.

While there is a great deal of variety in the present TV trial programs, there are also some common factors. First of all, these programs are more appropriately called state programs than the first televised trials. Televising of court proceedings in the 50's and early sixties had not only varied from state to state, but from court to court. If a judge decided to allow television into the trial, he would make the rules covering coverage. Presently, however, matters concerning television coverage are determined on a statewide basis. Trial judges usually have discretion on certain matters, but this discretion is normally limited by state procedures.
There are also some similarities between these state procedural requirements. Most states will allow only one or two television and still cameras in courtrooms. In addition, they usually require the equipment be noiseless and that only existing lighting can be used. Most states also forbid coverage of certain trials. Rape, child custody, divorce, trade secrets, and juvenile proceedings are usually exempted from coverage.

Present state programs differ from the earlier ones in another significant respect—the number of states involved. As noted above, most states now allow televised trials while in the fifties and early sixties TV trials were rare occurrences. Thus, the history of the televised trial has taken a peculiar turn. When it was untried (but also officially uncondemned) only a small minority of the states allowed it; but now, fifteen years after it was criticized by the highest court in the land, it is allowed in more states than it is not.

Perhaps the most easily observable (and popularly emphasized) difference between the TV trials of the present and those of the past is the change in technology which has occurred between the two periods. Ronald Loewen, Executive Producer of News for KAKE-TV, notes that television stations now have "compact electronic cameras that operate in extremely low light levels, are absolutely noiseless, and produce high-quality pictures." He also points out that there are "parabolic" microphones which can be installed on a television camera and pick up a conversation "several yards away," and wireless microphones which are as small as a man's little finger with transmitters "the size of two packs of cigarettes."
The importance of this change in technology should not be overstated, however. After all, Justice Otto Moore in Colorado had noted that during the hearing, many of the cameras were operating without his knowledge and that he did not notice the microphones until they were pointed out to him. That was in 1956. Of course, this does not mean that the improvement in technology since 1956 is not important, merely that it should not be overemphasized to the exclusion of other factors.

State Programs in the "Modern" Era

The above generalizations provide a kind of vague outline of the "modern" televised trial, but a more detailed picture can be obtained by considering a few state programs in depth. The most important program by far is Florida's. There are several reasons for this. First, the Florida program is a permanent one. Only eight states have permanent programs; the rest allow television on a temporary or experimental basis. Second, the Florida program was the one reviewed and approved by the United States Supreme Court in Chandler v Florida. It is therefore likely to serve as a guideline for future televised trial programs. Indeed, it has already done so since it was used as a guide for the Wisconsin program.) Finally, the Florida program is important because it is one of the few states which allows televised trials without the consent of the defendant.

The Leader of the Pack: The Florida Program.

On February 24, 1975, two Florida television stations petitioned the Florida Supreme Court for a proceeding to consider the possible rejection by the Court of Canon 3 A(7). As a result of this petition, the Florida Supreme Court, in June of 1977, initiated a one-year experiment with
televised trials during which it refused to hear constitutional appeals based on the presence of television cameras in the courtrooms. The court had originally tried to limit the experiment to just a few judicial districts and require the consent of all trial participants. When they were unable to conduct any trials with television coverage because they could not receive any consent, they changed the rules to allow coverage without consent.

The petition of the television stations had emphasized the technological developments in media equipment which would enable trial coverage without any distraction of trial participants. Since the majority in the Estes case had ambiguously agreed that new technology might create a situation to which their ruling would be inapplicable, the Florida experiment was not necessarily in contradiction with the Estes ruling. After accepting the petition, the court set up some rather rigorous standards for the conduct of trials with television coverage:

1) The court allowed only one audio pickup system, and existing audio facilities were to be used for this purpose whenever possible. Only one television camera (either film or videotape) and one still camera photographer, who could operate at most two cameras, would be allowed to cover proceedings. In addition, the court limited the types of cameras which could be used, specifying them by name of the manufacturer and model number of the camera. The still cameras to be used could emit clicks no louder than those made by a 35 mm Leica "M" Series Rangefinder camera. The court was even more restrictive when it came to television cameras, as it listed the specific cameras which could be used and prohibited all others.
2) When more than one station wished to cover a trial, they would be forced to "pool" equipment and personnel. This was the responsibility of the media, and they were not, under any circumstances, to call in the trial judge to resolve their disputes. If the media could not agree on which of the several television stations present should run the camera, the court mandated that the right should go to whoever set up first and that the "presiding judge shall exclude all contesting media personnel from a proceeding."

3) Media personnel were prohibited from using any flashes or bright lights on either the television or still cameras. Existing lighting was to be the only source of light, and if this proved insufficient, it would have to be modified at the expense of the media.

4) The exact location of the cameras in the courtroom was to be determined by the Chief Judge of the circuit in which the trial was to be held. The only restrictions imposed by the Supreme Court was that the location provide "reasonable access to coverage." Once the cameras had been placed, however, the court forbade the cameramen to move about the courtroom and take pictures. In fact, their movement was so restricted that they couldn't even replace film in their cameras except during a recess.

5) All equipment which was not a "competent part of a television camera," (such as a videotape recorder), were required by the court to be contained outside of the courtroom in a separate room, when such a room was available.

6) Audio pickup of conferences between the defendant and his attorney or bench conferences between attorneys and the judge was prohibited.
These standards thus had an advantage over the standards of the court in the Lyles case because they were even more precise. Under the Lyles standards, a trial judge could have felt that he was conforming to the vague guidelines without really providing any adequate protection for the defendant. In Chandler v Florida, however, the United States Supreme Court noted that the Florida standards "placed on trial judges positive obligations to protect the fundamental right of the accused to a fair trial." These standards were indeed explicit enough to force a "positive obligation" on the trial judge. They were, in fact, quite strict. One of the Florida Supreme Court judges, while concurring with the rest of the court in adopting the standards, felt that "the standards promulgated by the majority go further than necessary... I would establish far less restrictive standards." During this one year experimental period, several notorious trials were televised. The first of these was State v Zamora. In this case, Ronny Zamora, a 14-year old boy, was convicted of murdering an elderly woman and stealing her car and 415 dollars. The facts of the crime alone were enough to make it highly publicized, but this trial was also newsworthy. Ronny Zamora was tried as an adult in a televised trial, and he claimed as a defense that violent police shows like Kojak had created a "mental condition of insanity...diseasing his mind and impairing his behavioral controls." The Zamora trial thus clearly fit into the "heavily publicized and highly sensational" category condemned by Justice Harlan in Estes. The Zamora trial bore another similarity to the Estes case in that televising was allowed without the consent of the accused.
In general, the reaction to the Zamora trial was favorable. Trial Judge Paul Baker, who had before the trial said that he was horrified at the thought of a televised trial,\(^{15}\) said that the trial "must be viewed as a success."\(^{16}\) Judith Kreeger, a Miami lawyer, commented "There were no theatrics. The cameras didn't intrude. The public got to see what goes on. That's the way it should be."\(^{17}\)

The Zamora trial was not without its problems, however. When the media originally set up their lighting, Judge Baker noted that the cables snaked across the floor and the heat-producing lights mounted on the walls made the courtroom look like a "Hollywood sound stage" and ordered them removed. At this time, technology came to the rescue of the media in the form of several high intensity bulbs which the media technicians were able to insert into the existing light fixtures and which were, in Judge Baker's words, "neither distracting nor uncomfortable."\(^{18}\)

Another problem occurred when the media personnel blocked the corridors of the courthouse as they tried to get pictures of trial participants entering and leaving the courtroom. The corridors were cleared after Judge Baker requested it. In explaining his reasons for making such a request, Judge Baker said:

The Court took the position that access to the actual trial proceedings in the pilot program was a major step in the media's favor. In exchange therefore the media should refrain from having cameras and lights in the corridors for the purpose of photographing trial participants and eliciting interviews. In the Court's opinion what transpired in the courtroom is a factual account of the trial which is news, but what is elicited in the corridors takes on the color of editorial comment."\(^{19}\)

Judge Baker had also felt the need to tell announcers to "admonish the public not to 'set their minds upon a determination of any issue
for the reason they were not seeing the trial in its entirety'...

1) In any televised trial where there is a jury, the jurors should be sequestered.

2) There should be a pre-trial conference between the judge and the media, and the media liaison person should be appointed. Judge Baker had done this in the Zamora trial, appointing Steve Tello, news manager of one of the local stations, as this liaison.

Any matters that required clarification were communicated to the court through Mr. Tello and in turn he conveyed instructions to the media from the court.

In no instance did any member of the media attempt to bypass the court-appointed liaison and in no instance did any member of the media fail to cooperate with instructions of the court relayed through Mr. Tello.

It is interesting to note the similarities between this procedure and the voluntary use of a liaison by the Denver Area Radio and Television Association (see Appendix 2).

3) Witnesses should be advised by the judge not to watch any part of the trial on television.

4) Any attorney or judge who "solicits media coverage of a trial for personal or political motives" should be severely punished.

In this report, Judge Baker refuted the objections to televised trials posed by the plurality in the Estes case, pointing out that no such problems had occurred in Zamora. In reference to Justice Harlan's statement that the time for televised trials might come in the future, Judge Baker said:

The day has indeed arrived when television is commonplace in our daily lives. Technical advances over the last ten years have made equipment less obtrusive, and the majority of media personnel have come to view their role as the conscience of the community with greater responsibility.
Upon the conclusion of the one-year experiment, the Florida Supreme considered whether or not the program would be made permanent. In making this decision they had the advantage of two surveys: one of trial participants conducted by the Office of the State Courts Administrator, and one of judges which was conducted by the Florida Conference of Circuit Judges. (Both these surveys are discussed in this chapter.)

With all of its available data in front of it, the Florida Supreme Court considered the arguments for and against the coverage of televised trials. The court considered six different arguments against the televising of courtroom proceedings: physical disruptions, psychological effects of coverage, exploitation of court coverage by the media for entertainment purposes, prejudicial publicity, the effects of coverage on particular kinds of witnesses, and the privacy rights of trial participants. After considering all of these reasons, the court dismissed them as insignificant. It is interesting that the court admitted that there might be psychological impact, exploitation by the media, and prejudicial publicity in television coverage, but it dismissed these arguments on the ground that these problems might well occur even in a trial covered exclusively by the print media.

The court considered many arguments of the media as to why television cameras should be admitted into trials, but the only valid reason they considered for allowing coverage was that it would be consistent with open democratic government. The court said, "Ventilating the judicial process... will enhance the image of the Florida bench and bar and thereby elevate public confidence in the system." With this in mind,
the court made the Florida program permanent, saying "We are persuaded that on balance there is more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage." The Court then changed Canon 3 A(7) of its Code of Judicial Conduct to read as follows:

Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards or conduct and technology promulgated by the Supreme Court of Florida.

With this change in Canon 3 A(7), Florida made permanent what was, from the media's perspective, the most liberal program of televised trials in the country.

Other State Programs

While the Florida experiment is the most prominent program of televised trials in the "modern" era, it is by no means the only one. In addition to Florida, there are seven states with permanent programs: Georgia, New Hampshire, Nevada, Washington, Wisconsin, and, of course, Colorado. Several other states, including California, Idaho, Louisiana, Minnesota, Montana, New Jersey, North Dakota, Ohio, Oklahoma, West Virginia, Alaska, and Arizona are experimenting with television coverage of some court proceedings (either trial or appellate). Despite the great variety and number of programs several state programs are surprisingly similar, while others tend to be quite original. An analysis of a few state programs will show how this is so.
Wisconsin: In Florida's Image

In April of 1978, the Wisconsin Supreme Court began a one-year experiment with television coverage of trials, which was later extended to fifteen months. During this period, trials were covered without the consent of the trial participants, as is the case in Florida. Participants could, however, request that the judge prohibit cameras if there was sufficient cause to do so. By "cause," the Supreme Court meant more than "the desire not to be photographed..." it was "a reasonable fear of undue embarrassment, or the like."26 Outside of this rather vague guideline, the Wisconsin rule resembled that of Florida.

Upon completion of the experiment, the Wisconsin Supreme Court followed in the footsteps of Florida by, on July 1, 1979, changing its Canon 3 A(7) to allow television coverage of trial and appellate proceedings. The final rule adopted by the Wisconsin Court, however, differed from Florida's in one important respect. Florida had chosen not to specify certain classes of trials which might be exempt from television coverage, and instead left the matter up to the trial judge. Wisconsin went beyond this by listing certain cases which shouldn't be televised:

In cases involving the victims of crimes, including sex crimes, police informants, undercover agents, relocated witnesses, and juveniles, and in evidentiary suppression hearings, divorce proceedings, and cases involving trade secrets, a presumption of validity attends the requests [to prohibit television coverage]; the trial judge shall exercise a broad discretion in deciding whether there is cause for prohibition. This list of requests which enjoy the resumption is not exclusive; the judge may in his or her discretion find cause in comparable situations.27

The Wisconsin program bore another resemblance to the Florida program in using research on televised trials to help it make its decision to make the program permanent. A committee appointed by
the Supreme Court had surveyed 55 judges in Wisconsin and found that 44 approved of televised trials while only eight "clearly opposed the practice." 28

Alabama: The Colorado Resemblance

The Supreme Court of Alabama changed Canons 3 A(7A) and (7B) to allow television coverage of trial and appellate courts if all trial participants consented. 29 The standards adopted are basically the same as those in Colorado, leaving the ultimate decision of whether or not television coverage will be allowed up to the trial judge. 30

There is a striking difference between the Colorado and Alabama programs, however. In Alabama, before any particular courtroom can be used as a site of a televised trial a detailed plan describing camera placement, lighting and wiring procedures, "with the objective of safeguarding the dignity of the courtroom," 31 must be submitted to and approved by the Supreme Court. This plan must be submitted "jointly by the judge, district attorney, president of the local bar association, and the chairman of the county commissioners." Thus, each and every courtroom has its own detailed guidelines for the placement of media equipment.

Tennessee: An Innovative Idea

The Tennessee Supreme Court changed its Code of Judicial Conduct temporarily in February of 1979. The rule change will remain in effect "as long as the media behave." 32 This sort of permanent temporary rule represents an unusual procedure for a state allowing television coverage of court proceedings. The trend is for a state to experiment with television coverage and then, if the media has shown that it can handle itself, the experiment is made permanent.
Under the Tennessee rule, written consent is required of the accused if a trial is to be televised. In addition, the parties or their attorneys may have television coverage discontinued at any time during the trial, and any juror or witness who objects to any coverage of himself may prohibit his picture being taken, although other segments of the trial may still be televised.\(^33\)

It is interesting to note that, despite the tremendous variety of programs in the "modern" era, there are some important similarities. First of all, all the states have adopted their televised trial programs either through the highest court in the state or through a judicial committee appointed by the highest court in the state (the case in California, Wisconsin, and Colorado). In fact, Nevada's Supreme Court initiated its permanent program in direct contradiction with an existing state statute.\(^34\) Thus, the "modern" programs of televised trials are judicially created, but, since this is done in advance, through the highest court in the state, the programs are statewide and premeditated, like a legislative mandate.

Research in the "Modern" Era

When the Estes decision came out in 1965, there was no evidence which would indicate exactly what effects television coverage of trials would have. The Court had contended that television coverage might adversely affect a trial by distracting or inhibiting trial participants, yet even the Court admitted that these arguments were based on "conjecture and hypothesis." Justice Clark, speaking for the plurality, had noted, "It is true that our empirical knowledge of [television's] full effect on the public, the jury or the participants in a trial, including
the judge, witnesses and lawyers, is limited." Since then, the situation has changed somewhat. Although to date there has been only one "scientific" study concerning the effects of television coverage--it was a study on the impact of television on witnesses which was performed by Professor James Hoyt--there have been many surveys which, while not as useful as a controlled experiment, do provide some useful answers to the questions posed by the Estes court.

Surveys

There have been a large number of surveys conducted about televised trials (although only a few will be discussed here) but, by and large, only certain types of surveys are useful. A general survey of lawyers asking them what they think of televised trials does not shed much light on the subject of the effect of televised trials. A survey of participants in a televised trial, however, can give a general idea of the impact of the television camera.

This type of survey is plagued with a special problem, however. Sometimes it may concern itself with television coverage to the exclusion of other factors. This a survey which shows that 30% of the trial participants thought the presence of television harmed a trial is useless if 25% felt that the mere presence of reporters harmed it.

To prove this point, TV station WPLG of Miami conducted an "admittedly imperfect" telephone survey in which randomly selected respondents in two Florida counties were asked if "the presence of newspaper reporters and sketch artists affects the testimony of witnesses in a negative way?" About 30% of the 262 people surveyed said yes.
The surveys on televised trials roughly addressed the very issues stated in the Estes; that is, they are concerned with the effect of television on the public, on trial participants, and on judges.

Television Trials and the Public

In 1979, a research team at the University of Wisconsin conducted a survey of the residents of two Wisconsin cities. Interviewers telephoned 258 people and asked them some questions about the trial of Jennifer Patri, who had been convicted of murder but acquitted of arson in a televised trial. The actual trial had been conducted in a third city, miles away from the two cities in which the poll was conducted. Table 1 shows the results of this survey. It is significant to note that, although the trial had been televised, 36% of the people surveyed never heard how it came out (Question 4, Table 1).

<table>
<thead>
<tr>
<th>Questions</th>
<th>Correct Response</th>
<th>Incorrect Response</th>
<th>No Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) Unaided recall of Patri's name</td>
<td>16%</td>
<td>7%</td>
<td>77%</td>
</tr>
<tr>
<td>2) Aided recall of Patri's name</td>
<td>75%</td>
<td>2%</td>
<td>23%</td>
</tr>
<tr>
<td>3) Recall of murder motive</td>
<td>61%</td>
<td>10%</td>
<td>29%</td>
</tr>
<tr>
<td>4) Recall of trial outcome</td>
<td>5%</td>
<td>59%</td>
<td>36%</td>
</tr>
<tr>
<td>5) Recall of judge's name</td>
<td>14%</td>
<td>11%</td>
<td>75%</td>
</tr>
<tr>
<td>6) Recall of prosecutor's name</td>
<td>7%</td>
<td>4%</td>
<td>89%</td>
</tr>
<tr>
<td>7) Recall of defense attorney's name</td>
<td>15%</td>
<td>3%</td>
<td>82%</td>
</tr>
</tbody>
</table>


Surveys of Lawyers and Trial Participants

As the Florida experiment came to close, a research team from the University of Central Florida surveyed 540 Florida lawyers (of which 247 responded) and asked them several questions about televised trials.
The surveyors made the interesting discovery that "attorneys with camera experience were in general not quite as negative about TV coverage as those who did not have live camera experience." The remarks of Justice Moore of Colorado made over twenty years before were thus born out in statistics.

The Florida Supreme Court had commissioned its own survey on televised trials. A research team from Florida State University was supposed to conduct the survey but they chose a method which proved to be impractical. The Florida Court then requested that the Office of the State Courts Administrator (OSCA) perform the survey, which was of all trial participants except judges. The respondents were divided into four groups: witnesses, attorneys, court personnel (bailiffs, clerks and court reporters), and jurors. A separate questionnaire was made up for each of these groups, although several of the questions were similar. The survey was by no means empirical; it merely reflected "the respondents' attitudes and perceptions."

In general, the OSCA survey found that, while electronic coverage did tend to influence the trial participants in some cases, the effect it had was slight. See Table 2 for answers provided to specific questions. In the very least, the OSCA survey seems to indicate that while television coverage does seem to affect a trial, it is not as disruptive as the Estes court postulated.

Surveys of Judges

Although the OSCA survey did not pertain to judges, the Florida Supreme Court did have the advantage of a survey conducted by the Florida Conference of Circuit Judges. About two thirds of the judges polled in this survey previously had some experience with television coverage of
**TABLE 2**
SURVEY OF TRIAL PARTICIPANTS IN THE FLORIDA EXPERIMENT:
EFFECT OF TELEVISION AND STILL CAMERA COVERAGE ON TRIAL

<table>
<thead>
<tr>
<th>Questions Asked</th>
<th>Respondents Questions Were Directed At</th>
<th>Response*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disrupt trial?</td>
<td>All</td>
<td>(x) (x)**</td>
</tr>
<tr>
<td>Awareness of media presence</td>
<td>All</td>
<td>(x)</td>
</tr>
<tr>
<td>Effect on ability to judge truthfulness of witnesses</td>
<td>Attorneys &amp; Jurors</td>
<td>(x)</td>
</tr>
<tr>
<td>Made self-conscious</td>
<td>All</td>
<td>(x)</td>
</tr>
<tr>
<td>Effect on ability to concentrate on testimony</td>
<td>Jurors</td>
<td>(x)</td>
</tr>
<tr>
<td>More responsible for actions</td>
<td>Jurors &amp; Witnesses</td>
<td>(x)</td>
</tr>
<tr>
<td>More attentive or nervous</td>
<td>All</td>
<td>(x)</td>
</tr>
<tr>
<td>Cause any distraction</td>
<td>Jurors</td>
<td>(x)</td>
</tr>
<tr>
<td>Cause any distraction</td>
<td>Attorneys &amp; Witnesses</td>
<td>(x)</td>
</tr>
<tr>
<td>Urge to see self on media</td>
<td>Attorneys &amp; Witnesses</td>
<td>(x)</td>
</tr>
<tr>
<td>Did media presence make witness testimony seem more important?</td>
<td>Jurors</td>
<td>(x)</td>
</tr>
<tr>
<td>Concern over harm as a result of electronic coverage as opposed to print coverage</td>
<td>All</td>
<td>(x)</td>
</tr>
<tr>
<td>Made attorneys more flamboyant</td>
<td>Attorneys &amp; Court Personnel</td>
<td>(x)</td>
</tr>
<tr>
<td>Made witnesses more flamboyant</td>
<td>Attorneys &amp; Court Personnel</td>
<td>(x)</td>
</tr>
<tr>
<td>Witnesses inhibited &amp; jurors nervous, self-conscious or distracted</td>
<td>Attorneys &amp; Court Personnel</td>
<td>(x)</td>
</tr>
<tr>
<td>Jurors more attentive</td>
<td>Attorneys &amp; Court Personnel</td>
<td>(x)</td>
</tr>
</tbody>
</table>

**SOURCE:** *In re Petition of Post-Newsweek Stations, 370 Southern Reporter, 2d series, 766-9.*

*Original response scale was a 5-point spectrum but since all responses were in the lower half of the scale that is all that is shown here.

**Responses were split between slight and none.
trials, and of these judges over a third were in favor of television coverage while another third were neutral, although making favorable comments about television coverage. Only 29 of the 96 judges who had experience with televised trials were opposed to television coverage. 39

In addition, 90-95% of the judges surveyed felt that jurors, witnesses, and lawyers "were not affected in the performance of their sworn duty by the presence of electronic media." There were, however, some strong reservations voiced by most judges surveyed. They were greatly concerned about maintaining control of proceedings in the courtroom and in preventing undercover agents, crime victims, and juvenile proceedings from being photographed. Aside from these reservations, the response was favorable. Judge Arthur Franza, who had conducted the survey, felt that, in general, judges "do not object to the use of cameras in the courtroom now that they have had some experience."

The Hoyt Study

While there have been countless surveys about televised trials conducted, there has to date been only one controlled study on the effects of television coverage of trial proceedings. This was done by the University of Wisconsin Professor James Hoyt, whose study explored the effects of television coverage on witnesses. Hoyt did not use any actual trial witnesses but "created" witnesses by having some randomly selected students view a film and answer some questions about what they saw. Hoyt said that the "study simulated some of the pressure placed on witnesses in a courtroom setting while at the same time maintaining experimental control so the results could be meaningfully analyzed." 40
Professor Hoyt divided the participants into three groups: those who would be questioned in the presence of a television camera which was out in the open; those questioned with a television camera concealed behind a two-way mirror; and those questioned with no camera present. When the cameras were present (even when concealed) the subjects were shown where the cameras were and were told that the cameras would record their testimony on videotapes which would at a later time be seen by "...a large number of people." When the cameras were not present, the interviewer told the subjects that notes of their answers would be taken and later be shown to a large number of people. The point of this was that the choice between television coverage and a facsimile of traditional newspaper coverage instead of TV coverage and no other coverage at all.41

The results of the study were somewhat surprising. First of all, it was noted that there was no substantial difference between the answers provided by those covered by a hidden camera and those without any camera at all. "It was as if when the camera was out of sight it was also out of their [the subjects] thoughts and concerns."42

Even more surprising results came out concerning the difference between obtrusive camera coverage and both hidden camera and no camera. In general, Hoyt found that when the camera was easy to see, the subjects provided longer answers (an average of 14 more words) than when no camera was used. In addition, there was about 15% increase in the correct amount of information when the cameras were obtrusive while there was no significant difference in the number of incorrect responses. Thus, it seems, the opposite of what the Supreme Court in Estes said would happen seems to be true. The Hoyt study suggests that, television coverage, instead of harming witness testimony as was contended in Estes, might
actually help it by somehow getting the witnesses to provide more correct information. Hoyt said that, "...in this context television cameras can, in fact, lead to a fairer trial." It is interesting to compare these results to the above-mentioned OSCA survey which found that, while television coverage did make participants self-conscious to a degree, it also made them slightly more attentive (see Table 2, above).

There is one limitation to the Hoyt study, however. While it attempted to resemble a "courtroom setting" as much as possible, it could not duplicate all of the factors of a trial. For instance, the subjects were not in an adversary environment. Nor would their answers send a man to jail or set him free. This does not mean that the study is inaccurate, merely that it is imperfect. It was "an experimental approximation of some of the key aspects of the courtroom environment. It was not, quite obviously, a trial itself." In general, it seems that two things can safely be inferred from the Hoyt study. First, if the camera is hidden from sight, it tends to be forgotten and thus has no significant impact on witness testimony. Second, if the camera is out in the open, it has a favorable effect on witness testimony.
CHAPTER V NOTES


2 Ibid., p. 1; Chandler v State, 366 So. 2d 64, p. 66.


4 Ibid.


6 Ibid.


10 Petition of Post-Newsweek Stations, 783-4. All references to the standards of the Florida program are to these pages.


14 Ibid.

15 Loewen, p. 506.


22 Ibid., p. 27.

23 Petition of Post-Newsweek Stations, p. 780.

24 Ibid.

25 Graves, pp. 25-27. New Hampshire does not allow television coverage of all trial proceedings.


27 Ibid., p. 295

28 Ibid.

29 Ibid., p. 291; Graves, p. 25.


32 Graves, p. 27.


36 Norman Davis, "Television in Our Courts: the Proven Advantages, the Unproven Dangers," Judicature 64 (August 1980): p. 90. (This survey was submitted to the Florida Supreme Court to help it in its evaluation of the one-year experiment.)


38 Petition of Post-Newsweek Stations, p. 768.

39 Ibid., pp. 769-70. (All references to this survey are from these pages.)

41 Ibid., pp. 491-2.

42 Ibid., p. 494.

43 Ibid., 494-5.

44 Ibid.
The first era of televised trials had concluded with a decision of the United States Supreme Court. In the same manner, the present era has been climaxed by the Supreme Court's ruling in Chandler v Florida. There was a significant difference between the two rulings, however, because the court in the Chandler decision upheld the televising of a criminal trial, so long as no actual prejudice of the proceedings caused by the television coverage was shown.

The Chandler case began with the 1977 robbery of a Miami restaurant by two police officers, Noel Chandler and Robert Granger. Since their trial took place in 1978, it had been televised as a part of Florida's one-year experiment. The case was unusual in that some of the evidence against them consisted of a tape recording of a radio conversation the two officers had made while planning the robbery. The conversation, which had been held at 2:30 a.m., was received and recorded by a ham radio operator, who by sheer chance, had been listening to his radio at the time.¹

The two police officers had appealed their convictions, on the grounds that the television coverage of their trial had violated their constitutional rights to a fair trial. They did not show that television coverage actually hurt their trial but instead relied on Estes as a rule that TV trials were per se unconstitutional. Since the Florida Supreme Court refused to hear constitutional appeals based on television

¹
coverage during the experimental period, the appeal went straight to the Supreme Court of the United States.

In his opinion for the unanimous majority in Chandler, Chief Justice Burger carefully limited the scope of the Court's review to a determination of whether or not there was a constitutional violation. "In this setting," he said, "because this Court has no supervisory authority over state courts, our review is confined to whether there is a constitutional violation." This statement by Burger was more than just an expression of procedure; Burger wished to make it perfectly clear that, although the Court was affirming Chandler's conviction, it was not approving TV trials. Burger had further noted that, while there "mischevious potentialities" in allowing television coverage of court proceedings, "the states must be free to experiment." The Court said that, since there was no showing of a constitutional violation, it could neither endorse or invalidate the Florida program. In short, Chandler v Florida was a permission slip for the states.

The Court's permission was not unconditional, however. It noted that "a defendant has the right on review to show that the media's coverage of his case--printed or broadcast--compromised the ability of the jury to judge him fairly." It must be shown that some harm resulted from the presence of television cameras since the Court was unwilling to assume harm as it had in the Estes case. Furthermore, this harm must constitute more than juror awareness of broadcast media. To show prejudice, a defendant must prove either that "the presence of cameras impaired the ability of the jurors to decide the case on only the evidence before them" or that the trial participants were so distracted or disturbed by "the presence of
cameras and the prospect of broadcast" that the trial was "affected adversely." In short, the decendant has the burden of proof on appeal to prove that the presence of television cameras harmed his trial. The Chandler Court thus requires that an appeal based on television coverage of a trial meet the same burden as an appeal or any other grounds.

The Chandler decision does not go any further than allowing state experimentation with televised trials, however. In July of 1980, the Supreme Court had, in Richmond Newspapers v Virginia, stated that the press has a right of access to trials. This decision does not, however, apply to televised trials. The Chandler Court noted that since the Florida program had denied that there was any right of access on the part of the television media, it was not an issue in the case. (748) No mention is made in the Chandler decision of the earlier Richmond case. Clearly, the Supreme Court is stating that there is no right of access for television cameras, but neither does it deny that such a right might exist in the future. It simply remains mute on the issue. At any rate, because the Chandler decision merely allows and does not approve televised trials, a constitutional right of access will not likely come about for some time.

Does Chandler Contradict Estes?

A great deal of time in the Chandler case was devoted to proving whether or not Estes was an absolute ban on television coverage of court proceedings. The court acknowledged that, if Estes was such a ban, they would "be obliged to apply that holding and reverse the judgement under review." After an analysis of the Estes opinions, the Court held that "Estes is not to be read as announcing a constitutional
rule barring still photographic, radio and television coverage in all cases and under all circumstances.\textsuperscript{8} It was on this point that the two concurring justices disagreed with the majority. Justice Stewart, who had dissented in Estes, agreed with the majority that the Chandler judgement should be affirmed but also felt that Estes announced a rule that television coverage was a per se denial of a defendant's rights and should therefore be overruled.\textsuperscript{9} Justice White, who also concurred, agreed that Estes should be overruled whether the Estes decision is read "broadly or narrowly."\textsuperscript{10} In other words, Estes should be overruled regardless of what it is interpreted to mean.

Clearly, the Estes decision was not a constitutional ban on television coverage of court proceedings in all instances. Harlan's separate opinion prevented this. It said that only notorious TV trials are per se unconstitutional; routine trials might be fairly televised. In showing that Estes was not a per se rule against TV trials, the Chandler court had emphasized certain phrases in Harlan's opinion—phrases such as "cases like this one"—to prove their point. But by those phrases Harlan had meant "notorious cases." That Harlan felt notorious trials are per se unconstitutional is made clear by his admission in the Estes that there had been no showing of any "isolate prejudice resulting from the presence of television apparatus within the courtroom."\textsuperscript{11} Yet despite the fact that there was no showing of harm resulting from television coverage of the Estes case, Harlan had been perfectly willing to reverse the conviction.

Of course, certain cases which had been televised could be upheld under the Estes ruling, if they were notorious (or perhaps if the defendant had consented to coverage.) Yet the Chandler case is clearly notorious.
Justice Burger had noted that, due to the rather unusual facts of the case, Chandler had from the start "attracted the attention of the media."\(^{12}\)

Admittedly, there was quite a difference between the Estes and Chandler cases. The Florida program had very precise standards which had been laid out and used before the Chandler trial was held. The standards in the Estes case, however, had been gradually put together by the trial judge before and during the trial. Yet, logically, this difference does not fit into the Harlan opinion, which had determined constitutionality on the basis of the notoriety of the trial. The dissenters in Estes, however, did have a constitutional rule which was based on the manner in which the trial was handled; they said that a trial was unconstitutional only if "isolatable prejudice" could be shown. This is the very rule asserted by the majority in the Chandler case.

If there is a contradiction between the Estes and Chandler cases, then why does Justice Burger say there is none? Perhaps this can be understood by pretending that the decision in the Estes case had reached the same result but for different reasons. More precisely, what if the Harlan opinion had stated that the reason for overruling the Estes case was the actual, "isolatable prejudice" which had come about because the trial was televised. In Chandler, Burger had said, "In short, there is no showing that the trial was compromised by television coverage, as was the case in Estes."\(^{13}\) (emphasis added) If Estes had reached the same decision because of actual harm caused by television coverage, then Burger would have a club over the heads of the television media. That is, the Chandler ruling upheld televised trials as long as the media behaved, but this concept is rather ambiguous. To compensate, Burger reinterprets Estes to mean "this is what will happen if the media is
not kept under control." Logically, this is inconsistent, but it does have merit for public policy reasons. It may also be an indication of what is meant by "isolatable prejudice," although there is no way to know until another case comes before the Court.
CHAPTER VI NOTES


3. Ibid., p. 756.  
4. Ibid., pp. 755-6.  
5. Ibid., 756.


8. Ibid., p. 751.  
9. Ibid., p. 757.  
10. Ibid., p. 760.


13. Ibid., p. 756.
CHAPTER VII

CONCLUSION

The evolution of televised trials from the first TV trials to the present state programs is by no means complete, as the Chandler decision indicates. In fact, in some ways there has been no evolution. Colorado had adopted a "modern" program in 1956. Furthermore, the Lyles case indicates that, even when the state does not lay out procedures ahead of time, a trial can be televised with no ill effect. In this sense, the distinction between the two eras of televised trials fades. The present era of televised trials is still one of experimentation, as the statements in Chandler and the small number of states with permanent programs indicate. It is simply wrong to say that we now live in the time Justice Harlan spoke of when he said that the day may come when television may be so "commonplace" as to "dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process."

But this does not mean that this day will never come. Undoubtedly when it does come, the Supreme Court will apply the right of access created in the Richmond case to the television camera.

Over the years, there has been some progress in the area of televised trials. Clearly, there has been a change in technology. This may not have utterly changed the nature of televised trials, but it certainly has helped. The media's substitution of high intensity bulbs for bright studio lights in the Zamora case clearly indicates that, while the media may have been able to fairly conduct the trial without technological advances,
increased technology made the job easier.

The most significant difference between the first TV trials and the present state programs is the fact that the recent programs are carefully conceived by state supreme courts and precise guidelines for the conduct of the television media are laid out ahead of time. Again, the Lyles case shows that this could happen to an extent in the early trials but only if the trial judge took the trouble to lay them out ahead of time. Even then, the Lyles standards lacked the precision of present guidelines.

Colorado stands as a rather unusual case. It conceived its program in the State Supreme Court, like the present programs, yet it did this in 1956. The Colorado program differs from the newer programs, however, in that the Court did not carefully lay out precise standards ahead of time—the media did it themselves. One look at these standards (appendix 2) shows that they are about as precise as any court-proposed standard. The longevity of the Colorado program indicates that these standards have no problem in practice. Thus, the Colorado stands as glaring proof that the standards for televising a trial need not be established by the courts. The important thing is that they exist.

Perhaps the difference between the two periods of television coverage of trials may be best understood in terms of an analogy. The court's experimentation with televised trials may be compared with a tightrope walker. When television first requested admittance to a courtroom, the courts were not quite sure what to do. They had had some experience with still camera coverage of proceedings, but these had long been condemned by Canon 35. They seemed to be walking the tightrope for the
first time, some, like Colorado, made it across but many fell to the ground. By the seventies, however, the states had learned from their experiences. They more carefully approached the wire, cautiously testing it with their feet. In addition, they have a sort of balancing pole in their knowledge of mistakes, in improved technology, and—in some cases—in the use of modern research. They have procedures which act as a net to catch them if they fall. The possibility for failure still exists, but it is greatly reduced. Perhaps someday televised trials will have become so advanced that the tightrope will be lowered to the ground. Until then, states will, and probably should, continue to experiment and gradually adopt permanent programs.
APPENDIX I
PHOTOGRAPHS OF THE ESTES TRIAL
This photograph shows the concentration and variety of television, newsreel and still picture cameras at the September pre-trial hearing.
Photograph 2. This photograph shows various cameras focused on Billie Sol Estes at the September pre-trial hearing. Note the imposing television camera at the left and the harassed look of the defendant (foreground).
Photograph 3. This photograph shows the television booth as it appeared on the first day of the Estes trial. Note how easily the cameras and media personnel can be seen through the slot in the booth.
Photograph 4. This photograph shows the television booth as it appeared after the trial judge ordered that the camera slot be narrowed.
APPENDIX 2
DENVER AREA RADIO AND TELEVISION ASSOCIATION
RULES OF CONDUCT FOR TELEVISED TRIALS
DENVER AREA RADIO AND TELEVISION ASSOCIATION
RULES OF CONDUCT FOR TELEVISED TRIALS

1. All TV and radio coverage trials must be pooled.* Arrangements to broadcast or photograph a trial, arraignment, argument on motion, or any other preliminary hearing must be made through the coordinator of the Denver Area Radio and Television Association. Initial contact must be made only through the coordinator.

2. When the coordinator has obtained permission, make certain that the personnel who cover the proceedings contact the judge and introduce themselves and arrange to have the equipment set up prior to the opening of court. Explain to the judge what coverage is planned and, if the judge raises objections, modify plans to meet his objections. Also find out from the judge whether arrangements are to be made with the judge personally or with his clerk or bailiff.

3. Always address the judge as "Your Honor," or "Judge."

4. Always ask permission of the clerk of bailiff to see the judge in his chambers.

5. Dress properly for court. A coat and necktie are a must.

6. Regardless of how others may act in court, all radio and TV personnel should conduct themselves with dignity and do everything possible to preserve the decorum of the courtroom.

7. Always stand when the judge leaves or enters the courtroom and remain standing until the judge has assumed his position upon the bench or has left the courtroom.

8. Formal proceedings in courtrooms, other than trials or matters preliminary thereto, such as swearing-in ceremonies or new judges, lawyers, etc., may be covered by radio and TV without contacting the Association's coordinator. Prior permission should be obtained from the presiding judge and all other rules of conduct as set out herein must be observed. If more than one station appears to cover the proceedings, ask the court if he desires pool coverage. If he does—pool.

9. Individual appearances of judges, attorneys, defendants, witnesses, jurors, or any parties in chambers or outside the courtroom should be handled with extreme care and discretion but need not be pooled. Always obtain prior permission from the judge for such coverage.

*Any request for a pooling arrangement must be filed with the coordinator or with the station operating in court prior to the start of any trial session.

In the event or a request to pool a radio tape to be copied from a film sound track, the delivery of such a tape shall be contingent upon the convenience of the TV station or stations holding the film.
10. Do everything possible at all times to make the coverage as unobtrusive as possible and make sure that microphones, cameras, and other equipment are as inconspicuous as possible. Care should be taken to make any wiring needed as unobtrusive as possible.

11. Do not use microphones or other equipment with visible station call letters in the courtroom.

Your observance of these rules and the maintaining of proper dignity and decorum in the court will insure our being allowed access to the courts.

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