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Televised Trials: Constitutional Constraints, Practical Implications, and State Experimentation

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Televised Trials: Constitutional Constraints, Practical Implications, and State Experimentation

INTRODUCTION

It has been fifty years since a court first addressed the conflict between a defendant's right of fair trial and the presence of the photographic media in the courtroom.\(^1\) This conflict was exacerbated further by the demand that the television camera be used to offer a live presentation of judicial proceedings.\(^2\) Reacting to what it feared would be a disruptive influence on the accused's right to a fair trial, a federal rule was enacted in 1946 banning the camera from federal trials.\(^3\) A similar proscription was drafted by the American Bar Association and adopted in a majority of states.\(^4\) However, decisions from jurisdictions rejecting the ABA proposal,\(^5\) or ignoring

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2. See Yesawich, *Televising and Broadcasting Trials*, 37 CORNELL L.Q. 701 (1952) [hereinafter cited as Yesawich], which discusses the early demands for televised trials arising shortly after the birth of the television industry.
3. Rule 53 provides:
The taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court.

FED. R. CRIM. P. 53.
4. **ABA CANONS OF JUDICIAL ETHICS** No. 35 (1937). Canon 35 was amended in 1952 to specifically include television. Originally, it had banned taking photographs in the courtroom during a trial and the radio broadcasting of any court proceedings. In 1972 the ABA House of Delegates adopted the ABA Code of Judicial Conduct. This Code is merely a revision and renumbering of the original Canons of Judicial Ethics. Canon 35 is now embodied in Canon 3A(7) of the Code of Judicial Conduct. It provides, in pertinent part: "A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions. . . ." ABA Code of Judicial Conduct No. 3A(7)(1972). For a look at some of the arguments pro and con concerning Canon 35 (now No. 3A(7) ) see Blashfield, *The Case of the Controversial Canon*, 48 A.B.A.J. 429 (1962) [hereinafter cited as Blashfield]; Wilkin, *Judicial Canon 35 Should Not Be Changed*, 48 A.B.A.J. 540 (1962); Griswold, *The Standards of the Legal Profession: Canon 35 Should Not be Surrendered*, 48 A.B.A.J. 615 (1962); Warden, *Canon 35: Is There Room for Objectivity?*, 4 WASHBURN L.J. 211 (1965). See also Doubles, *A Camera in the Courtroom*, 22 WASH. & L. REV. 1 (1965) [hereinafter cited as Doubles]; Note, *Canon 35: Cameras, Courts and Confusion*, 51 KY. L.J. 737 (1963). Despite the broad acceptance of Canon 3A(7) by the states, the ABA House of Delegates will meet in August, 1978 to consider changing the Canon to allow trials to be televised. ABA Press Release, April 13, 1978. William Spann Jr., the present President of the ABA, stated in a speech to the West Virginia Bar Association that television should be allowed to cover appellate court proceedings because "they often involve important Constitutional issues about which the American public needs to receive information." *Id.* Spann stated, however, that "definitive action" concerning televised trials should be delayed until an evaluation of ongoing state experiments could be made.
5. Colorado dealt with ABA Canon 35 in *In re Hearings Concerning Canon 35*, 133 Colo. 417, 296 P.2d 465 (1956). In that opinion, the Colorado Supreme Court rejected the ABA's version of Canon 35 and adopted their own version of the rule. *Id.* at 472. In 1966 the rule...
it, have rekindled the debate over courtroom television.

In *Estes v. Texas*, the Supreme Court held that the telecasting of "notorious criminal trials" was a denial of the defendant's right to due process of law. Aside from the obvious physical distractions that the presence of the television camera would cause, the Court was concerned that the psychological impact of being televised would impair the witnesses' ability to give testimony and the jurors' capacity to reach an unpressured verdict. However, the Court indicated that as technology advanced it might be possible to televise trials without disrupting the trial proceedings.

was modified to require the consent of the defendant before any telecasting. See Note, 38 U. Colo. L. Rev. 276, 278 (1966). The present Colorado rule reads as follows:

(9) A judge should prohibit the broadcasting by radio or television of court proceedings, or the taking of photographs in the courtroom, where he believes from the particular circumstances of a given case or any portion thereof, that the broadcasting or taking of photographs would:
(a) detract from the dignity of court proceedings;
(b) distract the witness in giving his testimony;
(c) degrade the court; or
(d) otherwise materially interfere with the achievement of a fair trial.

(10) A judge shall prohibit:
(a) the photographing, or broadcasting by radio or television of testimony, of any witness or juror in attendance under subpoena or order of court who has expressly objected to the photographing or broadcasting by radio or television, of any selection of the jury and continuing until the issues have been submitted to the jury for determination, unless all accused persons who are then on trial shall have affirmatively given their consent to the photographing or broadcasting.

COLORADO CODE OF JUDICIAL CONDUCT No. 3A(9)(iv) (1966).


8. Estes v. Texas, 381 U.S. 532 (1965). The decision was 5 to 4. Four of the five majority justices ruled that televising criminal trials was inherently violative of due process without regard to the circumstances. Mr. Justice Harlan, who cast the fifth majority vote, concurred in the decision with the express reservation that it apply only to the televising of "courtroom proceedings of widespread public interest." Id. at 587. Mr. Justice Harlan's opinion, as restricted, represents the practical holding of the case. Although most of the discussion in this article focuses upon criminal defendants, much of the analysis affects civil trials as well.

9. Id. at 546, 549, 591, 592, 595.

10. Id. at 545, 547, 595.

11. Id. at 551-52. Justice Harlan, in his concurring opinion, noted that televised trials might be acceptable when television became so commonplace in the daily life of the average person that its use would not "impair the judicial process." Id. at 595-96. Thus, while the Court's opinion is directed at physical distractions which would need to be eliminated, Justice
Today, proponents of televised trials assert that the technological advances alluded to in *Estes* are now a reality.¹² In the past three years several states, convinced by these arguments, have begun to televise trials under court supervision.¹³ This article will examine

Harlan’s opinion is aimed at the elimination of psychological distractions. Due to this dichotomy, it is unclear if the *Estes* decision is to be interpreted to mean that both the development of inconspicuous cameras and microphones, as well as human adjustment to the presence of cameras, would have to be established before trials could be televised. It has been argued that the decision did not mean that the development of inconspicuous cameras would be sufficient to allow trials to be televised: only if it was also established that the presence of the cameras would have no significant psychological impact on the witnesses, jurors and other trial participants would televised trials be allowed. Note, *Televising Criminal Trials of Widespread Public Interest Inherently Deprives Defendant of Due Process of Law*, 34 *Fordham L. Rev.* 329, 334 n.39 (1965). Others have argued that even if the Court intended both conditions be met before trials could be televised, the use of unobtrusive cameras, miniature microphones and natural lighting would eliminate any psychological disturbance to the trial participants. Monroe, *Broadcasters In The Courtroom: Two Views—The Case For Courtroom Television*, 21 *Fed. Com. Bar. J.* 48, 51 (1967) [hereinafter cited as Monroe]; Wilson, *Justice In Living Color: The Case For Courtroom Television*, 60 *A.B.A.J.* 294, 295 (1974) [hereinafter cited as Wilson].

¹² Monroe, *supra* note 11, at 50, 51; Blashfield, *supra* note 4, at 432, 433.

¹³ Presently, seven states are televising trials: Alabama, Colorado, Florida, Georgia, Montana, Washington and Wisconsin.

Alabama—On December 15, 1975, the Alabama Supreme Court adopted a canon of judicial ethics. Canon 3A(7A) of that code allows the trial judge to authorize the broadcasting or televising of trial proceedings. *Alabama Canons of Judicial Ethics No. 3A(7A)*, appendix in 37 *Ala. Law.* 10, 16 (1976). For a discussion of this canon, see Comment, *The Televised Trial: A Perspective*, 7 *Cum.-Sam. L. Rev.* 323 (1976).

Florida—On January 28, 1976, the Florida Supreme Court initiated an experimental program in which one civil and one criminal trial would be televised. Petition of Post-Newsweek Stations, Florida, Inc. for Change in the Code of Judicial Conduct, 327 So. 2d 1 (1976). The guidelines for the experiment required that all trial participants consent before the trial could be televised. *Id.* at 2. After being unable to find a trial in which all the trial participants would consent to being televised, the Supreme Court of Florida eliminated this prerequisite. Petition of Post-Newsweek Station, Florida, Inc. for Change in the Code of Judicial Conduct, 347 So. 2d 402, 403 (1977). The court made an additional change in the experimental program. Instead of having only two televised trials, courtroom television would be authorized for a full year. *Id.* at 403. The court later set up various guidelines for the television media pertaining to the type of equipment used, the type of lighting permissible, the number of personnel allowed in the courtroom, and the type of material which could not be broadcast. The material that could not be broadcast was limited to the audio portion of attorney-client conferences and conferences between the attorneys and the judge. Petition of Post-Newsweek Stations, Florida, Inc. for Change in the Code of Judicial Conduct, 347 So. 2d 404 (1977).

Georgia—On May 12, 1977 the Supreme Court of Georgia adopted Canon 3A(8) which expressly authorized televising of trials in two of the states’ judicial circuits.

Montana—Pursuant to order of the Montana Supreme Court, Montana began a two year experiment, which commenced on February 3, 1978.

Washington—On July 23, 1976, the Washington Supreme Court amended Canon 3A(7) of the Washington Code of Judicial Conduct to allow trials to be televised.

Wisconsin—On April 1, 1978, Wisconsin began a one year experiment under supervision of the state supreme court. However, the first courtroom proceeding which was televised under this program was the extradition hearing of Simon Peter Nelson, an Illinois man accused of murdering his six children. The Chicago Tribune, January 10, 1978, Sec. 1, at col. 2.
the constitutional considerations involved when exploring the unique threat posed by the presence of television cameras in the courtroom. In addition, an examination of protective guidelines established by those states which televise trials will be undertaken.

**CONSTITUTIONAL CONSIDERATIONS**

The controversy over televising trials involves four conflicting rights, each of which is grounded in a different constitutional guarantee: (1) the right of privacy of the defendant, witnesses, and jurors;14 (2) the right of public trial;15 (3) the right of freedom of the press;16 and (4) defendant's right to a fair trial.17 Though previously examined and balanced in the traditional trial context,18 each of these rights must be reevaluated when the trial is to be televised.

**Right of Privacy**

The right of privacy, while once of questionable validity,19 has gained substantial constitutional recognition in recent years.20

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15. The right to a public trial is guaranteed by the sixth amendment of the United States Constitution. It reads, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S. CONST. amend. VI.


17. The right to a fair trial is guaranteed by the sixth amendment to the United States Constitution:

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

U.S. CONST. amend. VI.


19. See Yesawich, supra note 2, at 711 & n.36.

20. See note 14 supra.
Numerous definitions of the right of privacy have been offered, but essentially it stands for the right to maintain one's "inviolate personality." This concept has been interpreted to represent an individual's ability to maintain "independence, dignity and integrity." Thus, practices which threaten to strip a person of his human dignity or integrity would be constitutionally impermissible.

Arguably, a person on trial has his privacy violated when widespread reporting of his plight turns his private life into a public spectacle. The traditional position, however, is that a defendant loses his privacy rights when he stands trial. This view has been justified on two distinct grounds: (1) when a person becomes a public figure he impliedly waives his right of privacy; and (2) a person's privacy is not invaded when public information concerning him is published or broadcast.

This latter proposition was recently relied upon by the Supreme Court in two cases involving dissemination of public information. In Cox Broadcasting Corporation v. Cohn, the Court held that the state could not sanction the press for accurately reporting the name of a rape victim. One year later, in Paul v. Davis, the Court found that the publication and subsequent public distribution of plaintiff's picture as a shoplifter did not violate his right of privacy. The Court saw no constitutional distinction from the fact that the records at issue pertained to arrests rather than convictions, and persisted in the view that publication of material in public records did not violate any constitutional rights. Thus, Cox and Paul, along

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22. See Warren & Brandeis, The Right to Privacy, supra note 21, at 204. But see Gerety, supra note 14, at 237 n.18. Gerety argues that this definition is vague and does not sufficiently limit the legal protection which the right of privacy gives to the individual.
23. Blaustein, supra note 21, at 971.
24. Elmhurst v. Pearson, 153 F.2d 467 (D.C. Cir. 1946); Berg v. Minneapolis Star & Tribune, 79 F. Supp. 957 (D. Minn. 1948); Abernathy v. Thornton, 263 Ala. 496, 83 So. 2d 235 (1955); Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491 (1939). It should be noted that each of the cases cited for this proposition involved civil suits, as opposed to criminal actions. It could, therefore, be inferred that this general rule would not apply in criminal cases. See Warren & Brandeis, The Right to Privacy, supra note 21, at 216-17. See also Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 493 (1975).
28. Id. at 494-95.
30. Id. at 712-13. For an extended discussion of the problem of privacy and the distribu-
with traditional notions about privacy rights of those on trial, appear to make the right of privacy "a weak reed to rely upon to prevent a telecast . . . of a trial."31

However, the potential for intimate closeups and widespread exposure of not only the name of the defendant, but of his face and features,32 emotions,33 and possibly even his private thoughts,34 makes the telecasting of a trial unique. There is an obvious difference from mere reporting of cold facts from a public record, regardless of how intimate those facts might be. It also differs from standard news coverage. Thus, the privacy rights of those who stand trial must be re-evaluated in light of the intricacies of this medium.

Extensive publicity concerning a person's identity and the intimate details of his life is a primary concern in privacy analysis.35 Such widespread publicity has the potential to degrade the individual, destroy his human dignity and consequentially violate his privacy.36 This threat of extensive disclosure of the defendant's life is inherent in the concept of a televised trial. Televised trials would reach a far greater audience than ordinary news coverage37 and would capture the attention of those who were previously uninterested.38 Furthermore, since television extensively promotes the programs it airs, promotional messages for upcoming trials would also

31. Yesawich, supra note 2, at 712.
32. In Estes v. Texas, 381 U.S. 532, 577, 578 (1965) (Warren, C.J., concurring), the Court describes the close-up shots of the defendant's face which were taken by the television cameras stationed in various parts of the courtroom.
33. In the recent televising of an extradition hearing in Wisconsin, the cameras focused in on the defendant as he tearfully attempted to answer questions from the bench concerning the mass murder of his six children. See note 13 supra.
34. While a camera cannot read a defendant's mind, it can be used to accomplish basically the same thing, e.g., when the camera zooms in over the defendant's shoulder to read a newspaper article which he is reading. See Estes v. Texas, 381 U.S. 532, 578 (1965) (Warren, C.J., concurring).
35. See Gerety, supra note 14, at 291.
36. Blaustein, supra note 21, at 981.
38. In Estes v. Texas, 381 U.S. 532 (1965), the Supreme Court recognized the new interest which is created in a previously unnoticed trial when it is televised. The Court stated:
From the moment the trial judge announces that a case will be televised it becomes a cause célèbre. The whole community, including prospective jurors, becomes interested in all the morbid details surrounding it. The approaching trial immediately assumes an important status in the public press and the accused is highly publicized along with the offense with which he is charged.
Id. at 545; cf. Bell v. Patterson, 479 F. Supp. 760, 769 (D. Colo. 1968), aff'd on other grounds, 402 F.2d 394 (10th Cir. 1968), cert. denied, 403 U.S. 955 (1971).
enlarge the viewing audience.\textsuperscript{39}

It has been argued, nonetheless, that the extent of publication is unimportant in determining whether the defendant’s right of privacy has been violated.\textsuperscript{40} It is contended that as long as the information made public was never private, no invasion of privacy occurs.\textsuperscript{41} This ignores the fact that much of what goes on in a trial is basically private, receiving little attention in standard news coverage. For example, numerous details about a defendant are normally presented as evidence at a trial. While most of such details about the defendant’s life would go unreported or unnoticed in standard news coverage, television would broadcast this information to millions of people.

This problem was confronted in \textit{United States v. Mitchell},\textsuperscript{42} where the District of Columbia Court of Appeals recently recognized that mass disclosure of evidentiary facts introduced at trial could constitute an invasion of a defendant’s privacy. The \textit{Mitchell} court was presented with an appeal from a district court order prohibiting the National Broadcasting Company and Warner Brothers from distributing the famous “Watergate” tapes to the public. The appellee, former President Nixon, claimed that mass disclosure of these tapes, which had been played into evidence at the Mitchell trial, would be an “intrusion on the sensibilities of those whose voices appear on the tapes.”\textsuperscript{43} Nixon sought to have the district court’s order upheld, asserting mass disclosure of the tapes would constitute an invasion of his privacy.\textsuperscript{44} The court rejected Nixon’s privacy claim, holding that the public’s right to inspect the tapes su-

\textsuperscript{39} Such promotional messages were, in fact, used during the telecasting of the Billie Sol Estes trial to heighten viewer interest. Estes v. Texas, 381 U.S. 532, 571 (1965) (Warren C.J. concurring):

“Tomorrow morning at 9:55 the WFAA T.V. cameras will be in Tyler to telescore live [the trial judge’s] decision whether or not he will permit live coverage of the Billie Sol Estes trial. If so, this will be the first such famous national criminal proceeding to be telescored in its entirety live. [The trial judge] was appointed to the bench here in Tyler in 1942 by [the Governor]. The judge has served every two years since then. The very beautiful Smith County Courthouse was built and dedicated in 1954, but before that [the trial judge] had made a reputation for himself that reached not only throughout Texas, but throughout the United States as well. It is said that [the trial judge], who is now 53 years old, has tried more cases than any other judge during his time in office.”

\textit{Id.} at 571-72.

\textsuperscript{40} See Note, \textit{Constitutional Aspects Of Television In The Courtroom}, 35 U. CIN. L. REV. 48, 54 (1966). \textit{But see note 47 infra.}

\textsuperscript{41} \textit{Id.}


\textsuperscript{43} \textit{Id.} at 1263.

\textsuperscript{44} \textit{Id.}
perseded his privacy interests. However, the court noted that it was the unique nature of these particular tapes which militated against Nixon's claim. These facts did not present the court with "a hypothetical case in which evidence previously accessible to only a few spectators. . . . suddenly become[s] available to the entire public." Thus, the Mitchell court inferred that different standards might be applicable in other, perhaps more traditional, cases.

Aside from the broad scope of disclosure inherent in the televised broadcasting of trials, the potentially offensive nature of the exposure also represents an invasion of privacy. Inevitably, there will be numerous close-up shots of expressions, hand gestures and emotions which will trespass upon the "inviolate personality" which the right of privacy is supposed to protect. The Estes Court characterized the use of such camera shots as a form of "mental harassment" which forced the defendant to stand trial while undergoing "widespread public surveillance." Moreover, the defendant is not the only trial participant whose privacy is endangered by the presence of television in the courtroom. Witnesses and jurors, who in standard proceedings remain relatively unknown, become public figures when a trial is televised. Television exposure will inevitably subject them to a barrage of encounters with "inquisitive strangers and cranks," who may want the testimony explained, or the verdict justified. Since witnesses and jurors are, in a real sense, simply performing a required public duty, to subject them to this type of badgering imposes a particularly invidious form of privacy invasion.

45. Id. at 1263-64.
46. Id. at 1264. The court stated:
   First, the conversations at issue relate to the conduct of the presidency and thus they are both impressed with the "public trust." Second, the fact that the transcripts of the conversations already have received wide circulation make this unlike a hypothetical case in which evidence previously accessible only to a few spectators will suddenly become available to the entire public.
   Id.
47. See Warren & Brandeis, The Right to Privacy, supra note 21. One essential aspect of the "inviolable personality" which Warren and Brandeis described in their seminal article on privacy was the ability to determine "to what extent [a person's] thoughts, sentiments and emotions [should] be communicated to others." Id. at 198. Certainly an individual who must tolerate having millions of television viewers examine his every movement has lost this most essential right. See also Wilkin, Judicial Canon 35 Should Not Be Changed, 48 A.B.A.J. 540, 541 (1962). But see In re Mack, 386 Pa. 251, 126 A.2d 679 (1956) (Musmanno, J., dissenting).
Furthermore, in many trials, a witness is asked questions of a personal nature during examination by counsel. With the advent of television, this personal information, that may only play an insignificant part in the total litigation, will be broadcast to millions of television viewers.

The television camera's unique ubiquitousness dictates a reconsideration of conventional notions of privacy when evaluating that medium's impact on a judicial proceeding. However, since the right of privacy is not absolute, even adherence to the view that courtroom cameras infringe on this interest will not necessarily remove the cameras from the courtroom. Privacy interests at times must yield to other compelling constitutional considerations. The right of a public trial and the right to a free press are most often cited as being victimized by a ban on in-court television cameras. If these objections are valid, it is arguable that the trial participants' rights of privacy may be subordinated, and the telecasts allowed.

51. Impugning a witness' character is a method often used by attorneys to attack a witness' credibility. McCormick, Evidence §§ 81-82 (2d ed. 1972). Such attacks can be broad based, including a witness' prior convictions, his prior bad conduct and his reputation in the community. Id. at §§ 82-92. The practice of assailing a witness' character to damage his credibility, while necessary to our system of legal advocacy, would result in severe infringement upon the privacy rights of witnesses participating in televised trials as they would now be forced to discuss skeletons in the closet in front of millions of television viewers.

52. An example of a witness suffering this sort of invasion of privacy came during the famous Watergate hearings. This political imbroglio included Congressional hearings on an alleged break-in of Democratic National Headquarters that purportedly reached the inner circle of the Republican presidency. John Dean, a key figure in the Watergate affair, was being questioned by the Senate Watergate Committee about his role in that scandal. In an attack upon Dean's credibility, Senator Herman Talmadge questioned Dean about unethical business dealings in which Dean had allegedly been involved several years before joining the White House staff. J. DEAN, BLIND AMBITION 313 (1975). In answering these charges, Dean was forced to reveal to millions of television viewers a personal and private incident that was completely unrelated to the subject of the hearings. Of course, in the case of the Watergate hearings public interest justified televising the proceedings, despite the serious invasion of privacy which this caused to witnesses such as Dean. However, forcing witnesses in murder trials, for example, to bare the details of their personal life to a television audience cannot be similarly justified. This problem would assume even greater proportion in criminal trials involving rape and other sex crimes.


54. See Comment, The New Star Chamber—TV In The Courtroom, 32 So. Cal. L. Rev. 281 (1959); contra, Doubles, supra note 4; Douglas, surpa note 43.

55. That is not to say that if it is shown that the ban on televised trials represents a slight infringement on either the right to a public trial or the right of free press that the trial participants' right to privacy must be automatically set aside. Clearly, the Constitution sets up no such inflexible system of priority among the various Bill of Rights. Dennis v. United States, 341 U.S. 494, 517 (1951)(Frankfurter, J., concurring). The decision whether to allow television into the courtroom must ultimately be determined by an application of Frankfurter's "constitutional balancing" standard, i.e., an "informed weighing of the competing interests." Id. at 525. Of course, an informed determination as to whether to allow television in the courtroom cannot be made without also considering the threat to fair trial, posed by
fore, it is necessary to examine the extent that a television ban infringes upon these two guarantees.

Right of Public Trial

The sixth amendment guarantees the right to a public trial. The purpose of this guarantee is to protect against secret proceedings and to assure the defendant a fair and open trial. The right to a public trial is considered to be a personal one, vested solely in the accused and created exclusively for his protection. It follows, therefore, that a rule prohibiting television in the courtroom does not infringe on the sixth amendment since it in no way denies a defendant a public proceeding. Some have argued, however, that there is a "second major purpose" embodied in that guarantee—the public's right to be kept informed of what occurs in the courts. Several courts have recognized this societal right and have held that, absent proper justification, the public may not be excluded from trial proceedings. Since the Supreme Court has yet to hand down a defini-

such a practice. Consideration of the fair trial aspect of this constitutional conflict is presented in a subsequent section of this article. See text accompanying notes 97 through 140 infra.

56. See note 15 supra.
60. E.W. Scripps v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896 (1955); State v. Hensley, 75 Ohio St. 255, 79 N.E. 462 (1906); see United States v. American Radiator & Standard Sanitary Corp., 274 F. Supp. 790 (W.D. Pa. 1967); cf. Lyles v. State, 390 P.2d 734 (Okla. Crim. App. 1958) and In re Hearings Concerning Canon 35, 133 Colo. 417, 296 P.2d 465 (1956) (both discussing the importance of educating the public as to what occurs in the courtroom). The educational value of televising trials has also been asserted as a major reason for allowing television into the courtroom. Wilson, supra note 12, at 296; Warden, Canon 35: Is There Room For Objectivity, 4 WASHBURN L.J. 211, 217-19 (1965); contra, Douglas, supra note 43, at 4-5; Doubles, supra note 4, at 9. On the other hand, those who oppose televised trials assert that television will come to the courtroom to entertain, not to educate, and that the public will receive an erroneous impression of courtroom proceedings. See, e.g., Chief Justice Warren's concurrence in Estes v. Texas, 381 U.S. 532, 552 (1965) (Warren, C.J., concurring):

The televising of trials would cause the public to equate the trial process with the forms of entertainment regularly seen on television and with the commercial objectives of the television industry. . . . [I]f trials were televised there would be a natural tendency on the part of broadcasters to develop the personalities of the trial participants, so as to give the proceedings more of an element of drama.

The television industry might also decide that the bareboned trial itself does not contain sufficient drama to sustain an audience. It might provide expert commentary on the proceedings and hire persons with legal backgrounds to anticipate possible trial strategy, as the football expert anticipates plays for his audience.

ld. at 571 72.
tive interpretation of the scope of the right to a public trial, the "public right" interpretation of the sixth amendment, although a minority position, cannot be perfunctorily dismissed. Yet, even those courts which acknowledge this purpose agree that the right is not absolute. The public may be excluded in cases involving moral turpitude, or where their presence would interfere with the ability to conduct a fair trial. In addition, it is generally accepted that a court need not move a trial to a larger enclosure to accommodate the public when there is insufficient space.

The press has similar rights as those of the general public and may not be excluded from the courtroom without justification. It is argued that since the television industry, as members of the press, also enjoys the right to freely attend trials, an unjustified ban on their presence in the courtroom violates their sixth amendment right to a public trial. This argument, of course, points up a distinction between banishment of the press per se and banishment of the accoutrements of their profession. The Estes Court addressed

61. The Court discussed the right of public trial in In re Oliver, 333 U.S. 257 (1948) but failed to precisely define the various interests protected by that right. But see Estes v. Texas, 381 U.S. 532, 588 (1965) (Harlan, J., concurring). However, the Supreme Court has found a societal right in the "speedy trial" aspect of the sixth amendment. Barker v. Wingo, 407 U.S. 514 (1972).

62. Doubles, supra note 4, at 6.


65. See Craig v. Harney, 331 U.S. 367, 377 (1947); Pennekamp v. Florida, 328 U.S. 331, 336 (1946); Bridges v. California, 314 U.S. 252, 266 (1941); Moore v. Dempsey, 261 U.S. 86 (1923). It should also be noted that in some jurisdictions the public is excluded from juvenile proceedings, see, e.g., ILL. REV. STAT. ch. 37, § 701-20(b) (1975). The Illinois statute authorizes exclusion of the media as well as the general public. Id.


68. The Supreme Court has implicitly recognized that the television industry has equal rights as those of the press and general public under the first amendment. See Superior Films, Inc. v. Dept. of Education, 346 U.S. 587, 589 (1954); Joseph Burstyn Inc. v. Wilson, 343 U.S. 495 (1952).

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the latter issue when it stated that since "[t]he news reporter was not allowed to bring his typewriter or printing press" into the court, forcing the television reporter to leave his camera at the door did not infringe on his constitutional right to attend and report on the trial proceedings. 70

Freedom of the Press

A second constitutional impediment to banning the camera from the courtroom is the first amendment's freedom of the press guarantee. Arguably, the ban on televised trials can be classified as an invalid prior restraint on the broadcast of information. Prior restraint, in the context of a trial, is a judicial order that prohibits publication of material which might at some later time prejudice a defendant's right to a fair and impartial proceeding. 71 Characterizing these orders as "the most serious and least tolerable infringement[s] on First Amendment rights," 72 the Supreme Court has established a strong presumption against their constitutional validity. 73 But such restrictive orders will be allowed when news coverage of a trial results in an "imminent threat to the administration of justice," which is neither remote nor improbable, but which immediately imperils the administering of a fair trial. 74

This "imminent threat" test was most recently refined by the Supreme Court in Nebraska Press Association v. Stuart, 75 where the Court invalidated a restrictive order that prohibited the publication or broadcasting of confessions and admissions made by the defendant to police. The Court found that although pre-trial news accounts of the defendant's statements might adversely affect the attitudes of some prospective jurors, selection of an impartial jury would still be possible, and thus the "heavy burden" needed to justify such drastic prior restraint on publication was not met. 76 Nebraska indicates that greater deference must be given to the right of freedom of the press, even when the exercise of that right might endanger a fair trial. Proponents of in-court cameras can therefore

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73. Id. at 558. See also New York Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931).
75. 427 U.S. 539 (1976).
76. Id. at 568-70.
rely on *Nebraska* to argue that television's threat is too speculative to justify an absolute ban of televised trials.

*Nebraska*, however, involved a prior restraint on news reporting taking place outside of the courtroom. The prohibition of televised trials differs since it restraints only media activities within the courtroom. A less stringent test is applied in determining the constitutionality of this type of prior restraint. The evolving test in this situation is not whether the activities of the press represent an "imminent danger" to the administering of a fair trial, but whether there is a "potential possibility" that it will do so. The Supreme Court's reasoning in *Estes* exemplifies the application of this more moderate test. The Court refrained from applying a prior restraint analysis to the prohibition of in-court telecasting. Instead, it held that the probability of such a procedure prejudicing the accused made a ban on such activity constitutionally permissible.

Two recent federal cases indicate a trend towards adopting a stricter test with respect to restraints upon in-court press activities. In *Dorfman v. Meiszner* the Seventh Circuit reviewed a district court order which prohibited all photography and broadcasting within the building that housed both the federal courts and various federal offices. The court found that the district court could properly "exclude photography and broadcasting which would lead to disruption or distraction of judicial proceedings." However, this order was overly broad in that it banned media activities which presented no significant threat to the administration of justice. Therefore, the scope of the order went beyond what is permissible

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77. Doubles, supra note 4, at 12.
79. *Estes v. Texas*, 381 U.S. 532, 542-43 (1965). A similar approach was used by Justice Harlan in his concurring opinion:

> Once beyond the confines of the courthouse, a newsgathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public. Within the courthouse the only relevant constitutional consideration is that the accused be afforded a fair trial.

Id. at 589.
80. 430 F.2d 558 (7th Cir. 1970).
81. Id. at 561. The prohibition of photography and televising did not apply to all 27 floors of the building. Certain floors fell outside the scope of the order. But the order did encompass floors where no judicial proceedings were being held.
82. Id.
83. *Id. But cf. Seymour v. United States*, 373 F.2d 629 (5th Cir. 1967).
under the first amendment. Although Dorfman did not involve press activities within the courtroom, it is one of the first decisions giving serious consideration to the press' first amendment right concerning an area so near the courtroom itself.

United States v. Columbia Broadcasting System, went even further than Dorfman. The case involved the validity of a federal district court order during the trial of the "Gainsville Eight." The order prohibited all in-court sketching as well as the publication of any drawings of courtroom scenes. An artist for the television network drew four sketches from memory which were subsequently televised. The Columbia Broadcasting System was convicted of criminal contempt for disobeying the court order.

On appeal, the Fifth Circuit applied traditional prior restraint analysis, and concluded that the prohibition of publication of all sketches of courtroom scenes was constitutionally invalid. Of greater importance to the television issue was the court's tacit application of an "imminent danger" test to the in-court ban of sketching. Absent a showing that the sketching was actually obtrusive or disruptive, its prohibition constituted an unconstitutional restraint on first amendment rights. The Fifth Circuit thus became the first court to hold that restraints on media activities within a courtroom must be justified by demonstrating actual prejudice, as opposed to a potential threat to the administration of justice.

It is widely recognized that television poses at least a potential danger to a fair trial. But under traditional prior restraint analysis, a potential danger is not sufficient to justify the blanket prohibition

84. Id.
86. The Gainsville Eight were on trial for allegedly disrupting the 1972 Republican National Convention.
87. 497 F.2d 102, 103 (5th Cir. 1974).
88. The appeal from the criminal conviction of contempt was dealt with in a separate opinion. United States v. Columbia Broadcasting Company, 497 F.2d 107 (5th Cir. 1974).
89. See text accompanying notes 71-76 supra.
90. 497 F.2d 102, 106 (5th Cir. 1974).
91. Id. at 106. The court distinguished Estes v. Texas, 381 U.S. 532 (1965), on the grounds that sketching individuals, as opposed to televising them, could be done in the courtroom without distracting the trial participants. Id. at 105-06. This raises the possibility that the Fifth Circuit might allow television in the courtroom if it could be demonstrated that televising could be done in an unobtrusive manner. See The Televised Trial: A Perspective, 7 CUM.-SAM. L. REV. 323, 336, 337 n.124 (1978); Comment, United States v. C.B.S.: When Sketch Artists Are Allowed In The Courtroom, Can Photographers Be Far Behind?, 1975 DEUKE L.J. 188, 201 n.90.
92. See generally articles cited in note 4 supra.
of televised trials. To justify this type of restraint, an "imminent danger" to a fair trial must be demonstrated. Although it is still an open question whether traditional prior restraint analysis will ever be applied to the ban on televised trials, the trend shown by Dorfman and United States v. Columbia Broadcasting System indicates that such an application is not entirely inconceivable. A movement by the courts in that direction would render unconstitutional almost any prohibition on televised trials. However, under the present constitutional analysis for evaluating in-court restraints, so long as the camera is deemed to impose a potential danger, its banishment should not be considered unconstitutional.

Thus, the paramount consideration is the impact actually imposed by television on an accused's trial rights. Until that question can be answered with certainty, the other constitutional issues will remain unresolved.

The Right to a Fair Trial

Courtroom television poses at least three distinct threats to a defendant's right to a fair trial. First, the physical presence of television in the courtroom disrupts the proceedings and prevents the trial from acting as the "quiet search for truth" it was designed to be. Second, the presence of television has an adverse psychological impact on some trial participants. Finally, televising a trial results in widespread, prejudicial publicity about the defendant's case and hampers his ability to obtain an impartial proceeding. Whether these threats are sufficient to justify the televised ban is a crucial consideration that requires examination.

1. Physical Distractions

The idea of televised trials was first suggested when the television industry was in its infancy. Early commentators envisioned a
courtroom cluttered with cables, microphones, and noisy television cameras. The impact of physical distractions had previously been demonstrated in the trial of Bruno Hauptmann, the accused murderer of the Lindbergh baby. The Hauptmann trial was turned into a spectacle by a proliferation of photographers and reporters, accompanied by a mass of radio and newsreel equipment. The adverse effect of such distractions was later recognized in the Estes case where the accused was a well-known financier who had been convicted of fraud. Both the pre-trial hearing and the trial were televised in part. The Supreme Court reversed the defendant’s convictions, partially resting its decision on the physical distractions caused by the television equipment, which the Court perceived as interfering with defendant’s right to a fair trial. It was this perception that precipitated the Court’s allusion that technological advances in television equipment could eventually eliminate distractions inherent in televising trials.

The technological advances envisioned by the Estes Court are now a reality. Modern television cameras can be operated noiselessly, without the need for additional lighting, and no longer pose a source of distraction to those present. In addition, equally unobtrusive microphones have also been developed. In light of these advances, the physical distraction argument loses most of its force. However, modern technology has not cured one potential physical distraction which could be caused by courtroom television—commercial interruption of the trial proceedings. Television stations operate on the basis of commercial sponsorship and programs must frequently be interrupted for advertisements. A televised trial may not prove immune from such interruption. It is also possible that television stations would attempt to adjust the trial

101. See Doubles, supra note 4, at 2, 3.
103. Doubles, supra note 4, at 2.
105. Id. at 536-37.
106. Id. at 550-51.
107. Id. at 551-52.
109. See Blashfield, supra note 3, at 429.
110. See Estes v. Texas, 381 U.S. 532, 571, 573 (1965) (Warren, C.J., concurring); Rachelle, Broadcasters In The Courtroom: Two Views—If there is to be an Abridgement of Pretrial Communication, Should it be Coupled with an Expansion of Trial Coverage by Radio and Television, 21 FED. COM. BAR J. 42, 46, 47 (1967). See also Griswold, The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered, supra note 4, at 616.
111. The notable exception to this general rule is the Public Broadcasting system (PBS), which operates without advertising revenue.
schedule (e.g., court recesses) to coincide with the schedule of commercial interruptions.\textsuperscript{112} The problem of commercial interruption adds new vitality to the physical distraction argument.\textsuperscript{113}

2. Psychological Effects

The main concern of those who oppose televised trials is that television will have an adverse psychological effect on trial participants.\textsuperscript{114} In Estes v. Texas,\textsuperscript{115} the Supreme Court noted that jury attentiveness would be diminished by the presence of television cameras.\textsuperscript{116} The Court felt that “not only will the juror’s eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony.”\textsuperscript{117} The Court was also concerned about television’s impact upon the witnesses, fearing the camera’s presence would undermine the accuracy of the testimony being given and that the cameras would frighten timid witnesses, while coaxing “cocky” witnesses into overstatement.\textsuperscript{118} Additionally, neither the trial judge nor the lawyers were found to be immune from the effects caused by the presence of the television cameras.\textsuperscript{119} Both would have a tendency to “play” to the cameras.\textsuperscript{120} In light of these factors, the Court concluded that allowing television into the courtroom would be highly prejudicial to the defendant and would violate his right to a fair trial.\textsuperscript{121}

\textsuperscript{112} Estes v. Texas, 381 U.S. 532, 573 (1965) (Warren, C.J. concurring). As one legal commentator noted, this could have a peculiarly distracting effect on the trial, “I ask, and not facetiously, will a judge be importuned to pause and consider his ruling at a given juncture of a case before giving it, so a commercial can serve the . . . purpose of advertising the sponsor’s product. . . .?” Raichile, Broadcasters In The Courtroom: Two Views, supra note 110, at 47. It should be noted that if PBS was the sole network covering trials, the problem of commercial interruption would be avoided.

\textsuperscript{113} Another effect courtroom television could have on trials is that trial participants, in an effort to conform to the expectations of their audience, might begin to act in a manner most familiar to the television audience, i.e., in a manner similar to trial participants in lawyer-television shows. As one political commentator noted:

Almost half of the things detectives do in the course of an investigation are done for “public relations” reasons. In other words, most of the fingerprinting, showing the victim mug shots, lineup, and other details that American television audiences expect are done by real police only because the television audience—which presumably include the victim of the real crime they are investigating—have come to expect it.


\textsuperscript{114} See, e.g., Doubles, supra note 4, at 4, 5; Griswold, The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered, supra note 4, at 617.

\textsuperscript{115} 381 U.S. 532 (1965).

\textsuperscript{116} Id. at 546.

\textsuperscript{117} Id.

\textsuperscript{118} Id. at 547.

\textsuperscript{119} Id. at 548, 579.

\textsuperscript{120} Id.

\textsuperscript{121} Id. at 545-50; see note 8 supra. It should be noted that Justice Harlan’s concurrence
The Supreme Court's reasoning in *Estes* has been sharply challenged. It has been argued that television's psychological effects are a matter of speculation, and that there is no basis for such conjecture in the records of any of the trials that have thus far been televised. The experiences of states which have allowed televised trials appear to substantiate this contention. In Colorado, where televised trials have been allowed since 1956, there have been no complaints of adverse psychological effects on trial participants. Similarly, in experiments in Texas, no evidence of "grandstanding" by the attorneys or witnesses, or any other adverse effects were found. In addition, defendants who have sought to have their convictions overturned because the trial judge allowed television cameras into the courtroom, have met with little success. However, prejudice resulting from courtroom use of television is extremely difficult to discern. As Chief Justice Warren noted in his concurring opinion in *Estes*:

How is the defendant to prove that the prosecutor acted differently than he ordinarily would have, that defense counsel was more concerned with impressing prospective clients than with the interests of the defendant, that a juror was so concerned with how he appeared on television that his mind continually wandered from the proceedings, that an important defense witness made a bad impression on the jury because he was "playing" to the television audience, or that the judge was a little more lenient or a little more strict than he might be? And then, how is petitioner to show that this combination of changed attitudes diverted the trial sufficiently from its purpose to deprive him of a fair trial?

It is conceivable that this type of prejudice has been overlooked by the courts since it manifests itself in a subtle form which is difficult for either the trial or appellate bench to perceive. Merely because the psychological effects are subtle does not justify chara-
terizing them as speculative. Certainly if proven, they represent a serious threat to the administering of a fair trial.\textsuperscript{129} The Constitution's commitment to the concept of a fair trial should place the burden on proponents to show that the psychological effects are indeed minimal.

3. Prejudicial Publicity

The problem of prejudicial publicity is twofold. First, it is feared that if a trial is televised public opinion will become an unwanted and powerful thirteenth juror.\textsuperscript{130} Second, there is concern that if the trial court's determination is reversed, the publicity the case received would make it impossible for the accused to receive an impartial new trial.\textsuperscript{131}

While public opinion is often a decisive factor in the resolution of issues in this country, its impact on the adjudicative branch of government is perilous.\textsuperscript{132} The adverse impact which mass opinion can have on the administration of justice has often been demonstrated.\textsuperscript{133} This problem is exacerbated by local newspapers and the media which exhort juries and judges to particular verdicts based on that opinion.\textsuperscript{134} Television's presence in the courtroom would bring the pressures of public opinion even closer to the decision making process.\textsuperscript{135} In addition, if the trial were not televised in its entirety, the public would base its impressions on segments of the proceedings and attain a misimpression of the merits of a case.\textsuperscript{136} Witnesses could face pressure from neighbors who have been watching the trial on television to withhold or change their testimony so that a "correct" verdict would be reached.\textsuperscript{137} Thus, not only would television bring with it to the courtroom the specter of public opinion, but it could at the same time shape that opinion. The anomalous effect would be to place the sanctity of the trial one step closer to the taint from external forces.

Opponents of televised trials argue that prejudicial publicity will be more pronounced when a televised trial must be retried.\textsuperscript{138} A large

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\begin{footnotes}
\footnotetext{130. See Douglas, supra note 37, at 6, 8, 10.}
\footnotetext{131. Estes v. Texas, 381 U.S. 532, 546, 547 (1965); Yesawich, supra note 2, at 710.}
\footnotetext{132. Douglas, supra note 37, at 9-10.}
\footnotetext{134. See, e.g., Sheppard v. Maxwell, 384 U.S. 333 (1966); Stroble v. California, 343 U.S. 181 (1952).}
\footnotetext{135. See Douglas, supra note 37, at 8-10.}
\footnotetext{136. Id. at 9. Estes v. Texas, 381 U.S. 532, 574 (1965); Yesawich, supra note 2, at 710.}
\footnotetext{137. See Estes v. Texas, 381 U.S. 532, 547 (1965).}
\footnotetext{138. Yesawich, supra note 2, at 710.}
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television audience would increase the difficulty in finding twelve uninfluenced jurors. Although this is a valid concern, it is doubtful that "... the risk of causing possible prejudice at a hypothetical second trial ..." is alone sufficient to justify a prohibition of televised trials.

The Constitutional Rights in the Balance

Courtroom television violates the constitutional rights of privacy of the defendant and other trial participants. In contrast, the ban on televised trials does not infringe upon the sixth amendment right of public trial. Thus, if the balancing process were to end here, televised trials would be deemed constitutionally impermissible. However, other rights must be considered.

The ban on televised trials has been attacked as an unconstitutional prior restraint of the press. The prohibition of courtroom television represents an in-court restraint upon the media's activities. To justify such restraints it must be established that the activities of the media constitute a possible threat to a fair trial. Courtroom television does, in fact, endanger the administering of a fair trial. The advance of technology eliminated some adverse effects which television's physical presence had upon trial proceedings, other more serious effects remain. Thus, it cannot be said that television could be allowed in the courtroom without jeopardizing the defendant's right to a fair trial. It is submitted, therefore, that the ban on televised trials is not an unconstitutional prior restraint of the press and that such a prohibition is necessary to assure fair and impartial proceedings. When the various competing constitutional interests are concurrently weighed, the balance tips in favor of the ban on televised trials.

State Guidelines

Despite indications of unconstitutionality, certain states now allow television in the courtroom. Presently, seven states permit

140. United States v. Mitchell, 551 F.2d 1252 (D.C. Cir. 1976), cert. granted, 97 S. Ct. 1578 (1977). But cf. Rideau v. Louisiana, 373 U.S. 723 (1963), in which the Supreme Court held that televising a defendant's confession in the small community where his trial was to take place made it impossible for him to obtain a fair trial.
141. See text accompanying notes 32-52 supra.
142. See text accompanying notes 56-70 supra.
143. See text accompanying notes 77-79 & 96 supra.
144. See text accompanying notes 108-09 supra.
145. See text accompanying notes 110-21, 133-37 supra.
trials to be televised. At least three of these states, Alabama, Colorado and Florida, impose conditions and guidelines limiting televised trials. These jurisdictions believe that such conditions and guidelines prevent the constitutional rights of the various trial participants from being infringed upon by televising trials. These guidelines and their ability to convert courtroom television into a constitutionally permissible practice, will now be examined.

**Colorado & Alabama**

Both the Supreme Court of Colorado and the Supreme Court of Alabama have promulgated guidelines for the televising of trials. The Colorado rules, which sought to prevent the physical presence of television from "degrading the court" or "materially interfering with the achievement of a fair trial," were amended in response to the Estes decision to require the consent of witnesses, jurors and defendant prior to broadcasting. The rules also vest final discretion with the trial judge, absent objections from any of the trial participants.

The Alabama rules are similar to those of Colorado, except the Alabama Supreme Court must approve telecasting prior to trial. A plan must be submitted to the court which specifies location of equipment and media personnel within the courtroom. These plans ensure that the broadcasting of the proceedings will not detract from the dignity of the court proceedings, distract any witness from giving testimony, degrade the court, or otherwise interfere with the achievement of a fair trial. Once this plan is approved, the final decision whether to televise a trial, as under the Colorado guidelines, rests in the discretion of the trial judge.

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146. See notes 5 & 13 supra and accompanying text.
147. See notes 5 & 13 supra.
149. See notes 5 & 13 supra.
150. COLORADO CODE OF JUDICIAL CONDUCT No. 3A(9)(10)(1977).
151. Id.
152. See note 5 supra.
154. Compare ALABAMA CANONS OF JUDICIAL ETHICS No. 8A(7A) with COLORADO CODE OF JUDICIAL CONDUCT No. 3A(9)(10)(1966).
155. ALABAMA CANONS OF JUDICIAL ETHICS No. 3A(7A)(a)(1977). For further discussion see note 13 supra.
156. Id.
157. Id.
158. Id.
Florida

The Florida Supreme Court rule differs from those adopted in Colorado and Alabama in three major respects. First, the rule in Florida is experimental. Televising of trials is permitted in Florida for only one year, and the program is scheduled to terminate in June of 1978. At that time, the Florida Supreme Court will make a final decision as to the feasibility of televised trials. Second, the Florida rule does not require the consent of the trial participants as a prerequisite to televising a trial. Third, the Florida guidelines impose far greater restrictions upon the television industry's behavior within the courtroom during the trial. The type of equipment which must be used by the television stations is closely regulated, as are the number of cameras which may be employed. Furthermore, the guidelines completely prohibit movement of media personnel or broadcast equipment during the trial proceedings. Finally, the audio pick-up or broadcast of conferences between attorneys and their clients, or between co-counsel, or between the attorney's and the presiding judge, are expressly prohibited.

Evaluation of the Guidelines

The television guidelines in these states were promulgated to prevent infringement of the constitutional rights of trial participants. A brief review of these rules demonstrates that they do not accomplish this goal.

All of the above states place restrictions upon the physical presence of television within the courtroom. These rules are effective to

160. Id. at 406.
163. Id. at 405.
164. Id. at 406.
165. Id. It should be noted that the constitutionality of the Florida television experiment was challenged upon its inception. Briklo v. Rivkind, 2 Med. L. Rev. 2258 (1977). The plaintiff asked the federal district court to issue an injunctive order preventing his criminal trial from being televised. Id. The court, relying on Estes v. Texas, 381 U.S. 532 (1965), held that televising this non-notorious criminal trial was not so "patently and flagrantly unconstitutional for the purposes of granting injunctive relief." Id. at 2260. However, the court specifically reserved ruling on the "ultimate merits of the plaintiff's constitutional claims," and noted that it could only "speculate privately on the tragic possibility that an entire year's worth of state court convictions—no matter how heinous the crime—may be subject to reversal through state and federal habeas corpus proceedings." Id. at 2260 & n.3.
166. See note 148 supra and accompanying text.
prevent the physical distractions, created by the presence of television, from interfering with a trial. However, as noted above, the physical distraction caused by television is the least significant problem associated with televised trials. Presently, the only arguable potential for courtroom disruption concerns commercial delays incident to televising trials. None of the state guidelines refer to this problem specifically, although Colorado and Alabama do have a requirement that the televising of the trial should neither "degrade the court" nor "detract from the dignity of the proceedings." This language could be interpreted, in part, as a guard against the problem of commercial interruption.

The main problem associated with televised trials is the harmful psychological effect on trial participants caused by the presence of television in the courtroom. All of the state guidelines are of minimal utility in resolving this problem. In Colorado and Alabama, this difficulty was believed to be largely eliminated by the requirement that all trial participants consent to being televised. The rationale behind this consent rule is that trial participants, who believe they will be adversely affected by the presence of the television cameras, can simply object to being televised. This logic is fallacious for three reasons. First, it is only natural for witnesses and jurors to "accept the conditions of the courtroom as the trial judge establishes them." Even if the cameras were unsettling to them, it is doubtful that a witness or juror would have the courage to object to being televised. Second, participants may not object for fear of being labeled as a "weakling of some sort." Finally, there is the problem of the witness or juror who fails to object because they want to be on television. Such individuals represent the greatest threat to the administering of a fair trial since their attention will be focused on the camera, rather than the trial proceedings.

Prejudicial publicity is another hazard to a fair trial connected with courtroom television. However, none of the state guidelines

167. See notes 100-09 supra and accompanying text.
168. See notes 110-13 supra and accompanying text.
169. COLORADO CODE OF JUDICIAL CONDUCT No. 3A(9)(10)(1977); ALABAMA CANONS OF JUDICIAL ETHICS No. 3A(7A), in 37 ALA. LAW 10, 16 (1977).
170. See notes 114-21 supra and accompanying text.
173. Doubles, supra note 4, at 14. Of course, this problem is even greater in Florida, which has no consent requirement.
174. Id.
175. Id.
176. Id.
177. See notes 130-40 supra and accompanying text.
effectively deal with this problem. Each jurisdiction leaves the decision of whether to televise a trial to the discretion of the trial judge. It is believed that the trial judge will prohibit such televising if it would create a prejudicial atmosphere. Such reasoning does not account for the problem presented by the politically ambitious judge, who recognizes the danger in televising a particular trial, but who wishes to exploit the sensational nature of a case for political purposes. Another hazard is the trial judge who simply surrenders to public pressure to televise a particular trial.

Finally, the state guidelines do little to protect the privacy rights of the trial participants. In Colorado and Alabama, privacy rights are supposed to be protected by the consent requirement. As previously noted, such a requirement offers little to the trial participant who does not wish to be televised. Furthermore, in Florida, the privacy rights of trial participants do not even receive this limited protection, since the state's guidelines fail to include a consent requirement. Additionally, none of the guidelines impose restrictions on the type of camera shots which are allowed. Thus, cameras are free to shoot close-ups of the defendant at any time during the trial. As noted earlier, this type of television coverage is a particularly offensive form of invasion of privacy.

Thus, the regulatory guidelines adopted by Alabama, Colorado and Florida actually provide few constitutional safeguards for trial participants. It is uncertain whether modification of these guidelines could offer greater protection. However, it is clear that televising trials under the existing state guidelines is no more constitutionally permissible than if there were no guidelines at all.

CONCLUSION

Courtroom television presents a unique threat to the constitutional rights of trial participants. The accused, as well as the witnesses and jurors, are forced to endure a serious assault on their privacy when trials are televised. In addition, the adverse impact which television's presence has on the behavior of all of the trial

181. Id.
182. See note 171 supra.
183. See notes 172-74 supra and accompanying text.
184. See note 161 supra and accompanying text.
185. See notes 47-48 supra and accompanying text.
participants, from the jurors to the trial judge, impairs the defendant's ability to obtain a fair trial.

Proponents of courtroom television have attempted to justify the idea on other constitutional grounds. However, this cannot be done. Neither the constitutional guarantee of public trial, nor the freedom of the press, are endangered by the ban on televised trials. As long as television stations are free to send representatives to trials, the rights of public trial and free press are secure.

Yet, certain states continue to televise trials and others are beginning to experiment with the idea. In some of these jurisdictions it is believed that the constitutional rights of the defendant and other trial participants are protected by guidelines which regulate the practice of televising trials. These guidelines are inadequate since they offer insignificant safeguards to protect the defendant's right to a fair trial. In addition, these guidelines afford little or no protection to the privacy interests of any of the trial participants. Thus, those states which now televise trials have failed to effectively curb the dangers which this activity poses to the constitutional rights of privacy and fair trial.

In *Estes v. Texas*, the Supreme Court ruled that televising certain criminal trials is unconstitutional. In this decision, the Court recognized the serious dangers which courtroom television presents to the administration of justice. The Supreme Court should reaffirm its mandate in *Estes* in the modern day context. Until that time, other courts should recognize the dangers inherent in televised trials and resist the growing pressure to allow television into the courtroom.

**Shelly Byron Kulwin**

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186. 381 U.S. 532 (1965).