No. 81-300

STATE OF MINNESOTA

IN SUPREME COURT

In Re

Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct

WCCO Radio Inc.; WCCO Television Inc.; WCCO FM Inc.; WTCN Television, Inc.; United Television, Inc. - KMSP-TV; KTTC Television, Inc.; Hubbard Broadcasting, Inc.; Northwest Publications, Inc.; Minneapolis Star and Tribune Company; Minnesota Public Radio, Inc.; Twin Cities Public Television, Inc.; Minnesota Broadcasters Association; Minnesota Newspaper Association; Radio and Television News Directors Association, Minnesota Chapter; and Sigma Delta Chi/Society of Professional Journalists, Minnesota Chapter,

Petitioners.

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that the undersigned, as attorneys for the Petitioners, will appear at a hearing before this Court on the above-captioned matter on Friday, June 4, 1982 at 9:00 A.M., or as soon thereafter as the parties may be heard.

Dated: May 24, 1982

OPPENHEIMER, WOLFF, FOSTER, SHEPARD AND DONNELLY

By _____
Paul R. Hannah
Catherine A. Cella

1700 First Bank Building
Saint Paul, Minnesota 55101
Telephone: (612) 227 - 7271

ATTORNEYS FOR PETITIONERS

5-24 -- Copy to each Justice and Court Marshall.

PENHEIMER WOLFF
STER SHEPARD
D
NNELLY
FIRST BANK BLDG.
NT PAUL, MN 55101
: (612) 227-7271
EX: 29-7015

LAW OFFICES

MUIR & HEUEL

A PROFESSIONAL ASSOCIATION

404 MARQUETTE BANK BUILDING P.O. BOX 1057 ROCHESTER, MINNESOTA 55903 507-288-4110

ROSS MUIR
DANIEL HEUEL
JAMES CARLSON
ROBERT SPELHAUG
WILLIAM FRENCH

JOHN McCARTHY
Clerk of Minnesota Supreme Court
Minnesota State Capitol
St. Paul, MN 55101

May 24, 1982

81-300

Re: Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct

WCCO Radio, Inc.; WCCO Television, Inc.; WCCO FM, Inc.; WTCN Television, Inc.; United Television, Inc.; KTSP-TV; KTTC Television, Inc.; Hubbard Broadcasting, Inc.; Northwest Publications, Inc.; Minneapolis Star and Tribune Company; Minnesota Public Radio, Inc.; Twin Cities Public Television, Inc.; Minnesota Broadcasters Association; Minnesota Newspaper Association; Radio and Television News Directors Association, Minnesota Chapter; and Sigma Delta Chi/Society of Professional Journalists, Minnesota Chapter.

Dear Mr. McCarthy:

Our firm would like to send a written response to the proposal to modify Canon 3A(7) of the Minnesota Code of Judicial Conduct. We do not ask for an opportunity to present oral comment to the Court. We understand that this letter will be given to the Court for its consideration.

Our firm is engaged exclusively in a trial practice in southeastern Minnesota. The vast majority of our cases involve civil litigation though we do have some current criminal defense matters. It is our unanimous opinion at this firm that the use of broadcast and photographic equipment should not be used in the Courts of the State of Minnesota.

We feel that the use of cameras and photographic equipment would disrupt the Courts of the State of Minnesota and as a result prejudice the rights of litigants. We feel that witnesses, especially witnesses testifying in regard to sensitive matters, would be unduly influenced by the use of broadcast and photographic equipment. We are concerned about the effect of this equipment on jurors also. Witnesses may be hesitant to testify if their testimony will be transmitted to thousands of people in the state. Jurors may be influenced if they knew that the trial in which they served would be broadcast to their friends and neighbors and their verdict questioned by those friends and neighbors

who saw a portion or the entire trial on television. Our objections go to the use of still photographic equipment also in that still photographers would disrupt the orderly and solemn environment of a Courtroom.

In our view, justice is best served in this state under the present system of having open, public trials without the interference and potential disruption caused by cameras in the Courtroom. Interested persons in the judicial process can always attend trials in person or read about trials in newspaper accounts. This sort of public involvement in the trials in this state do not disrupt the Courtroom and do not adversely effect the rights of litigants.

Sincerely,

James R. Carlson

James R. Carlson

JRC/mfs

JUSTICE YETKA

STATE OF MINNESOTA

IN SUPREME COURT

FILE NO. 81-300

- -

In Re:

Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct.

BRIEF IN OPPOSITION TO PETITION

WCCO Radio, Inc., et al,

Petitioners.

- -

"The purpose of a trial is to determine whether or not the accused is guilty -" Justice Benjamin Cardozo.

This Commission was appointed by the Supreme Court to hear testimony and make recommendations on the use of cameras in the courtroom. The selection of such a Commission is unique in Minnesota, since all previous civil or criminal rules have been adopted under the procedures prescribed by Chapter 480 of Minnesota Statutes.

The petitioners seek to have the Supreme Court modify Canon 3A(7) of the Code of Judicial Conduct so as to permit the unlimited use of cameras in the trial courts of this state. Considerable time was spent demonstrating the use and technique of television equipment. We agree that cameras today are relatively quiet and can apparently be used under normal room lighting. All of the paraphernalia, however, is not yet invisible, and the mere presence of television may create untold psychological pressure on anyone put on public display by the all seeing eye.

After years of training and experience, perhaps professional actors and anchormen can act normally, but even the Commission members, in these

comparatively informal proceedings, may have felt the pressure of constantly being "on stage." What will the reaction be of that unknown subpoenaed witness in a future murder trial, as she walks up to the witness stand and sees that "unobtrusive" silent camera pointed in her direction?

Unfortunately I don't have the answer to that question, but neither does the media, this Commission or the Supreme Court. Mr. Hannah argues, nevertheless, that any risk of violating the rights of a defendant or other litigants in a televised trial is "manageable." This viewpoint of petitioners is not shared by the public, and has been rejected by an overwhelming majority of the trial judges and experienced attorneys in Minnesota.

If the members of this Commission, unencumbered by any ties to the petitioners, do in fact "represent the bench, the bar, and the citizens of this state", as petitioners allege in their brief, then the mandate is clear: the votes have already been cast by all three groups against the petition.

In a two year informal poll of hundreds of jurors in Ramsey County, Judge Hyam Segell found almost no support for the presence of cameras in the courtroom. After months of maneuvering at the committee level, the Board of Governors of the Minnesota State Bar Association likewise rejected a proposal to modify Canon 3A(7) of the Code of Judicial Conduct, and the 1980 Bar Convention also voted its opposition to a relaxation of the rule. It is worth noting that the proposals of the media then debated were far less pervasive than those under consideration by this Commission.

As did the trial bar, the trial judges studied the problem of cameras in the courtroom for over three years. A representative committee sought out articles on the experience in other states, read numerous commentators on both sides of the issue, and made its report in June, 1980. With only two or three dissents the State District Judges' Association voted to oppose any

change in Judicial Canon 3A(7). This brief attempts to articulate our opposition to the petition, and the reasons therefor.

We would concede that cameras in the courtroom are technically feasible, but that is not the crux of the controversy. The dangers are eloquently stated in the landmark decision of the U.S. Supreme Court, Estes v. Texas, 381 U.S. 532 (1965). The logic is still compelling:

> "(1) Televising of trials diverts the trial from its proper purpose, because it has an inevitable impact on all the trial participants.
>
> (2) It gives the public the wrong impression about the purpose of trials, thereby detracting from the dignity of court proceedings and lessening the reliability of trials; and
>
> (3) It singles out certain defendants and subjects them to trial under prejudicial conditions not experienced by others." (p. 565)

"Thus the evil of televised trials, as demonstrated by (Estes), lies not in the noise and appearance of the cameras, but in the trial participants' awareness that they are being televised." (p. 569-570)

As stated by Justice Clark in his concurring opinion, "ascertainment of the truth is the chief function of the judicial machinery. The use of television cannot be said to contribute materially to that objective, rather its use amounts to the injection of an irrelevant factor into court proceedings." (p. 544)

We submit that we do not need any 'instant replays' on television to secure the rights of all parties, or to arrive at an impartial judgment of legal issues.

Justice Clark further states in Estes that the impact of courtroom television on the defendant cannot be ignored. "Its presence is a form of mental, if not physical, harassment. 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. A defendant on trial for a specific crime is entitled to his day in court, not in a stadium or a city or a nationwide arena." (p. 549) (Emphasis supplied)

Have those ringing words lost their meaning to us today? Petitioners would have us so believe. They state that the Chandler decision "rejects the arguments found to be persuasive in Estes", and apparently find "a fundamental change of philosophy" of the Supreme Court. (Petitioners' brief, p. 25). Nothing could be further from the truth.

Chandler v. Florida, 101 S. Ct. 802, 66 L.Ed. 2d 740 (1981), holds that Estes does not stand as an absolute ban on state experimentation of television coverage of trials, but the decision falls far short of endorsing the experiment of cameras in the courtroom. It does not change the Estes holding that reporters have only the rights of the general public, namely, to be present, to observe and thereafter if they choose, to report on a trial. We would quote but a few of the statements of Chief Justice Burger in Chandler:

"There was not a court holding of an (unconstitutional) per se rule in Estes ... There is no need to overrule a 'holding' never made by the court." (Footnote 8, p. 809).

"Selection of which trials, or parts of trials, to broadcast will inevitably be made not by judges but by the media, and will be governed

by such factors as the nature of the crime and the status and position of the accused - or the victim; the effect may be to titillate rather than to educate and inform. (Emphasis supplied) The unanswered question is whether electronic coverage will bring public humiliation upon the accused with such randomness that it will evoke due process concerns by being 'unusual in the same way that being struck by lightning is unusual.' Furman v. Georgia, 408 U.S. 238, 309 (1972) Societies and political systems that, from time to time, have put on 'Yankee Stadium show trials' tell more about the power of the State than about its concern for the decent administration of justice - with every citizen receiving the same kind of justice.

"The concurring opinion of Chief Justice Warren joined by Justices Douglas and Goldberg in Estes can fairly be read as viewing the very broadcast of some trials as potentially a form of punishment itself - a punishment before guilt. This concern is far from trivial." (Chandler, p. 812)

Perhaps we could all agree that these statements by Chief Justice Burger in Chandler fall somewhat short of indicating support of petitioners' views in these proceedings, much less constituting a "rejection" of the holding in Estes, or an expression of any changed philosophy. There are no cameras in the U.S. Supreme Court or in any Federal Courts in this land.

The decision in Chandler v. Florida, supra, simply permits Florida to continue its experiment, but gives no support to that effort. Commenting on the results in Florida, petitioners' brief at page 16 alleges that "while Florida's survey (was) not performed as part of a social science experiment, the validity of the data is unquestionable." Neither the U.S. Supreme Court nor the Florida Supreme Court agree with that conclusion. In footnote 11, (p. 810) of Chandler, the Court states:

"The Florida pilot program itself was a type of study ... While the data thus far assembled are cause for some optimism about the abilities

of states to minimize the problems that potentially inhere in electronic coverage of trials, even the Florida Supreme Court conceded the data were limited and non-scientific." (Emphasis supplied)

Petitioners' brief, pages 17-18, regarding Judge Thomas Sholts' views on televised trials is likewise a startling misrepresentation of the truth. Petitioners seem to feel that Judge Sholts could find no adverse effect from the presence of broadcast media in his court, nor any unfairness because of that presence. The Commission has heard his statement, and of course has before it Judge Sholts' report to the Florida Supreme Court following the Herman murder trial. Any fair minded observer could only conclude that Judge Sholts has impartially considered the pros and cons and has voted 'no' on cameras in the courtroom. I would nevertheless quote some highlights of his evaluation:

1. The widow of the deceased murder victim in the Herman trial objected to televising her testimony, but her challenge was rejected by the Florida Supreme Court.

If this is an example of the standard of fairness urged upon us by the petitioners, it must be summarily rejected. Such a rule approaches a barbaric perversion of decent justice, which we thought had been long abandoned.

2. There were no histrionics and no thespians, although the danger of acting for the camera will always exist ... One witness refused to testify from fear of her safety, partially contributed to by the television's presence.

It takes only common sense to realize that such a circumstance is one of the inherent dangers in televised trials. Victims of crimes have

already suffered psychological and even physical harm, and an impartial observer could well ask why petitioners would seek to televise such a reluctant witness. Ms. Burton called particular attention to the emotional problems of sexual assault victims. The media's proposal that a trial judge's finding against televising should be appealable raises the spectre of long trials with interminable TV recesses for appeal purposes, strangely reminiscent of those TV commercial breaks we have come to tolerate in professional football.

3. Subsequent to the Herman verdict, the prosecutor objected on security grounds because of possible retribution against several prison inmate witnesses who testified for the State, and might not have been identified but for exposure on television.

The Commission should know that even today we have some 60 to 70 inmates in protective custody at Stillwater Prison alone, at a considerable extra expense to the State. We all are aware of the retribution and scorn heaped upon "stool pigeons" and "squealers" within penal institutions. If the proposed rules are adopted, we can be assured that a sensational crime within prison walls, or one involving recently paroled felons, will be just that sort of case that TV will select "to educate the public." Mr. Hannah's argument that TV trial risks are "manageable" would probably not get concurrence from Warden Erickson or the inmate-witness.

4. Because of excessive pretrial publicity and the decision to televise the trial, the court sequestered the jury.

Such a step is extremely rare in Minnesota, and has never been ordered in Ramsey County during my twenty years on the bench. At 1978 prices the expense of jury sequestration in the Herman case amounted to $11,500. Ever greater burdens on the strained county budgets can reasonably be anticipated should the Supreme Court permit televised trials.

The obvious inconvenience to citizen jurors from such a long separation from their normal lives is another factor to be considered.

The other problems mentioned by Judge Sholts, i.e. possible change of venue, length of jury selection, bomb threats and security searches were apparently all caused or exacerbated by televising the murder trial. A reasonable person could not argue that such incidents enhanced the deliberative process. Rather the risk of creating a prejudicial atmosphere far outweighs any minor benefit of permitting a cameraman in the courtroom.

As Judge Sholts states in his report, "when a defendant's problems become entertainment for the public, the trial takes on a different form than an orderly search for the truth. The chief function of our judicial trial machinery is to ascertain the truth. The use of television does not materially contribute to this objective." (p. 16)

While Judge Sholts concedes that the experiment of televising the Herman trial worked out better than he believed possible, he nevertheless does not endorse cameras in trial proceedings.

Petitioners' brief at pages 18-20 on related problems, "Fairness to parties, witnesses refusal, witnesses and jurors adversely affected and other objections", i.e. grandstanding lawyers and judges, seems to have a refreshing naivité, but it indicates little knowledge or appreciation of the tough realities of criminal proceedings. The trial judges know, from hundreds of years of collective experience, that witnesses <u>are</u> threatened; that publicity sometimes makes it difficult to draw an impartial jury; that many people are reluctant to serve as jurors, or come into court to testify, because of their shy personalities; and yes, there are possibly some attorneys out there (certainly no judges!)who would love to grandstand

before a television audience, perhaps even furthering a political ambition. Human nature being what it is, we have not really changed much since the days of Estes, or even since the founding of the Republic. We must respectfully resist the temptation to make the jury box and the courtroom a sporting arena for the edification of our almost insatiable interest in the bizarre and violent acts of our fellow man.

The news media caters to that curiosity for its own gain, trying to sell more newspapers than the competition, or striving for higher ratings in order to sell more advertising. We are not overly critical of this manifestation of the American pursuit of material wealth and success, but we do say that the courtrooms of this state should not become part of that process. Petitioners argue that reporters, editors and cameramen have now reached maturity, and that we need not fear such abuses as were present in the Hauptmann, Sheppard or Estes trials. Regrettably the facts are otherwise.

In the Mossler murder trial, "the public went wild, the press went crazy." (St. Paul P.P. 10/11/81) Jean Harris' trial in the early part of this year for the murder of Dr. Tarnower became the center of what reporters called a "media zoo". The reporters themselves didn't enjoy the chase, and one New York Times photographer said she thought it "demeaning for everybody, for the defendant and the press." (St. Paul Disp. 2/24/81) On the local scene I would refer again to the attempt of at least two of the petitioners, WCCO Television (Ch. 4) and Hubbard Broadcasting (Ch. 5), to obtain the Ming Shiue tapes used in Federal Court. Their request was promptly denied by Judge Devitt, but we can legitimately ask if petitioners' purpose therein was to educate the public, and also ask if this is an example of the mature judgment and editorial policy referred to in petitioners' brief.

Other glaring examples of excessive zeal by the media I will leave for the Commissioners to recall from your own observations and experiences.

As Justice Cardozo succinctly stated, "the purpose of a trial is to determine whether or not the accused is guilty", and the role of the judiciary is to secure a steady and impartial administration of the laws. Any infringement of a defendant's right to a fair trial must be respectfully rejected, and the invasion of cameras into the courtroom comes within those parameters.

The Constitution, Article VI, says that "the accused shall enjoy the right to a speedy and public trial," but this guarantee confers no special benefit on the press, the radio industry or television. To satisfy the constitutional requirements of a public trial, it is not necessary to provide facilities large enough for all who might like to attend. To do so would interfere with the integrity of the trial process and make the publicity of trial proceedings an end in itself. The function of a trial is not to provide an education experience. Rather the guarantee of a public trial is a safeguard against any attempt to use our courts as instruments of persecution, and the Sixth Amendment does not require that the trial be broadcast live or on tape to the public. The press may, of course, attend the trial and report on what they have observed. See Estes v. Texas, 381 U.S. 532, 575, 583-584 (1965); Nixon v. Warner Communications, 435 U.S. 589, 610 (1977).

The trial of a lawsuit is a deliberative process, and the entertainment of the public and specific rights of a defendant have never mixed well. Televised trials would be a dangerous experiment in Minnesota and the possible impact on defendants, witnesses and jurors is simply incalcuable.

The quality and integrity of all future trials is at stake. Petitioners concede that they want no rule limiting coverage to civil proceedings, nor do they want any consent provision, since experience in other states tells us that the bench, the bar and the public have consistently refused to give consent to be televised, thereby proving of course the lack of support for petitioners' proposal.

We agree with petitioners (Brief, p. 15) that anything which can increase our knowledge and improve our understanding of how courts work benefits a democratic government. To that end the bench and bar have long had an excellent educational program of speakers, pamphlets and slides available to schools, churches and civic organizations with precious little support, I might add, from any of the media. The State Bar Association has resorted to paid ads in newspapers, radio and television in order to tell its story.

If one of the goals of the media is really to educate the public about the mysteries of the courtroom, we would call their attention to existing Canon 3A(7):

> "A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:
>
> (a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;
>
> (b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;
>
> (c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:
>
> (1) the means of recording will not distract participants or impair the dignity of the proceedings;

(2) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(3) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(4) the reproduction will be exhibited only for instructional purposes in educational institutions."

We know of no request by Channel 2, the public television station, or any commercial enterprise for permission under this present rule to televise a trial. Perhaps we could all agree that the average litigation, civil or criminal, would probably not appeal to a large number of citizens and accordingly would not sell advertising or build ratings. As Mr. Hannah candidly stated in his closing remarks, his clients want to be in on criminal trials, without adding the unneeded explanation - the Caldwells, Piper, Howard, Thompson, Trimble, Ming Shiue type trials are their abiding interest.

In the opinion of the bench, the bar and the public, the tyranny of television is threatening the basic structure of our courts. Trials should reflect the integrity and moderation of the judicial process, although we concede that even under present conditions this is sometimes strained to the breaking point. Considerate men ought nevertheless to prize whatever will fortify that temper in the courts, and to reject whatever would threaten this unique and yet vulnerable institution. No man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundation of public and private confidence in the courts, and to introduce in its stead universal distrust and distress.

Such would be the result of piecemeal televising of only the more sensational trials. In the world today the television camera is a powerful

weapon. Intentionally or inadvertently it can destroy an accused and his case in the eyes of the public. It has helped to bring down a president, it has destroyed political careers, it has jeopardized businesses to the point of bankruptcy. We do not contend that all such actions have been with evil intent or without some public purpose, but such an instrument has no place in the courtroom, where we attempt to insulate the juries and participants from the waves of public sentiment.

The inflexible and uniform adherence to the rights of the Constitution, and of individuals is indispensable in the courts of justice. All citizens support the principles of freedom of the press, reasonable access of the public to open trials, and the right of every defendant to due process of law in every courtroom in this state.

We submit that cameras in the courtroom will not enhance these rights. We respectfully urge this Commission to recommend to the Supreme Court that there be no modification of Canon 3A(7) of the Code of Judicial Conduct.

Respectfully submitted,

Otis H. Godfrey, Jr.

OTIS H. GODFREY, JR.
Judge of District Court
1539 Court House
St. Paul, Minnesota 55102

JUSTICE YETKA

DISTRICT COURT OF MINNESOTA
FIFTH JUDICIAL DISTRICT
NEW ULM, MINNESOTA 56073
TELEPHONE 354-2014

May 28, 1982

NOAH S. ROSENBLOOM
JUDGE

Supreme Court of Minnesota
State Capitol
St. Paul, Minnesota 55155
ATTN: John R. McCarthy - Clerk

Re: Proposed Modification Canon 3A (7),
Minnesota Code of Judicial Conduct

81-300

Dear Mr. McCarthy:

Pursuant to the Chief Justice's Order of March 5, 1982, File Number 81-300, I hereby request opportunity, and if the request is granted, notify the Court by this letter of my intention, to appear before the Court at such time as I may be heard on Friday, June 4, 1982, to offer comment on the Petition to modify the Canons of Judicial Conduct so as to permit electronic and photographic media coverage in the trial courts of Minnesota. This letter will summarize my intended comment.

I would have no objection to electronic media coverage of most presentations to a trial court, other than the evidentiary portion of the trial itself, or other proceedings at which evidence is taken from witnesses. Motion hearings of many types, or final argument of counsel, could be covered without signifigant problem.

I see no objection to natural light still photography of any court proceeding. In either event, the media person should function from a place in the spectator area of the courtroom so positioned as not to distract participants in the proceedings by their coverage activities.

I oppose live electronic media coverage of trials at which testimony is taken with or without a jury present.

If the court is minded to change the existing rules, I assume the proposal of the media petitioners presently before the court, appended as Exhibit B to the petition of March 18, 1981, represents their suggestion for the conditions under which such coverage would be permitted (I know of no other relevant proposed wording to amend the Canon). If the Court grants the media petition, I have the following critical comments concerning the proposed draft.

1) At sub-paragraphs 1 (c), 3 (a) and (b), and sub-paragraph 5, the location of audio pickup or camera equipment within the courtroom and modification of courtroom lighting are made subject to the approval of the Chief Judge of the judicial district in which the proceeding is held. These matters should be left to the control and approval of the presiding judge in all cases. The

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presiding judge, whose conduct of it is subject to review on appeal, should not be left without a voice as to trial arrangements which might, later, be the basis of an appeal. The Chief Judge, necessarily, less trial responsibility in general, and no specific trial responsibility in any case, should not make decisions with the consequences of which the presiding judge must live.

There is no purpose to limit the number of still cameras as per paragraph 1 (b). As many still photographers as the trial judge permits, taking pictures from unobtrusive places in the spectators' seating, could be allowed. Any accredited press representative, subject to room limitations, rights of other members of the public, and the overriding requirements of the proceeding, could and should be accommodated. It is logically necessary to limit electronic coverage to a single "pooled" camera crew; relevant considerations involved for electronic media simply do not apply to still photographers using natural light 35mm camera equipment. Actually, several photographers, each with a single camera suitable to the purpose, would be less obtrusive than a single photographer using the permitted two cameras, with two lenses for each, which is proposed. I suspect the proposed limitation rests on perceived need for symmetry and equal treatment between various types of media representatives, but that has nothing whatever to do with the problem of fair trial. Rather, it relates to competitive conduct between media which is not a legitimate court concern. Under paragraph 7, in context photographic or electronic record of a proceeding covered is made inadmissable,

> ". . . as evidence in the proceeding out of which it arose, any proceeding subsequent or collateral thereto, or upon any re-trial or appeal of such proceedings."

This provision is absurd and unwise. Photographic or videotape record of courtroom proceedings might well be the best possible evidence relevant to a collateral proceeding in contempt arising out of the original trial. Grand-standing for television may very well invite contumacious conduct but the State will then be deprived of any evidence the media might, but for this provision, provide.

Sub-paragraph 8 provides for appellate review of excl sion orders under Rule 21, MRCAP. Could such matters arising in criminal proceedings be properly reviewable under civil appellate rules. Is it sensible, in a new and developing area with novel problems and little relevant experience, to mandate appellate decisions under conditions of unseemly haste likely to exacerbate the problem by improvident decision making. The exigencies of new coverage may very well create need for expedited disposition from the media viewpoint but wise development of applicable standards in this new area make a more deliberate course preferable.

The provisions of paragraph 1 (c) for placement of microphones if "no technically suitable audio system exists in the courtroom, brings us face to face with

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problems inherent in multiple microphone pickup systems for courtroom recording systems. I believe such systems to be unnecessary and unwise. In a courtroom suitable for tape recording of proceedings, single point recording systems are adequate and avoid many problems. Those problems are acutely compounded if electronic media are present and use a multi-microphone system. Confidential information (attorney/client conferences or side bar) or comments, not confidential, but unheard by judge and/or jury, therefore not considered by them during trial, could be picked up by multiple microphones. The result is a misleading record or gross invasion of privacy or both, compounded by media acquisition of it and possible simultaneous live broadcast to the community. If electronic coverage is permitted, something must be done to avoid these evils by appropriate standards concerning courtroom recording equipment which provides for single point recording and will largely avoid the problem.

Additionally, it is observed that courtroom arrangements are in a period of transition. Many new courtrooms are being designed in a different layout than the conventional setup of which those in the new Hennepin County Government Center or the Ramsey County Courthouse are convenient examples. Other arrangements which enable participants to have a better view of exhibits, avoid placing some of counsel with their back to the jury, permit use of projection equipment in the courtroom, and take the judge out of jury view when they look at the witness stand so that his body language does not telegraph unintended reactions to the evidence to them; all of these may dictate a court arrangement different from the conventional. However, the conventional will, quite likely be that preferred by the media because inherently better adapted to their requirements. We ought not adopt any procedure which will inhibit development of better courtrooms to meet the interests of those seated in the public spectator area of the courtroom who are there on behalf of the media. If a more effective courtroom arena for the discovery of truth can be devised than that which has conventionally been used in the past, it ought not be hostage to the commercial interest of media representatives who find it less adapted to their purpose.

The overriding consideration, whether one considers a relaxation of the rules to permit media coverage or the mode by which that relaxation, once made, should be implemented, should be to protect and improve the inherent function of the trial, to discover and communicate the truth so far as it can be known and understood by a factfinder. Any arrangement or alteration in either the physical or the procedural arrangement surrounding the conduct of the trial that impedes the basic objective should not be considered.

If permitted to appear, my remarks will cover the ground summarized in this letter.

Respectfully,

Noah S. Rosenbloom
Judge of District Court

NSR/ml

cc: Hon. Hyam Segell, Judge ofDist. Ct., 1409 Ramsey Cty. Courthouse, St. Paul 55102

JUSTICE YETKA

University of Toronto
TORONTO, CANADA
M5S 1A1

DEPARTMENT OF PSYCHOLOGY

May 27, 1982

TO: Clerk of the Supreme Court
Minnesota Supreme Court
230 State Capitol Building
St. Paul, Minnesota 55155

81-300

FROM: Eugene Borgida, Ph.D.
Department of Psychology
University of Minnesota
Minneapolis, Minnesota 55455
(612) 373-2831

I am an Associate Professor of Psychology at the University of Minnesota, currently on leave at the University of Toronto. I will be returning to the Twin Cities early next week and request the opportunity to testify at the June 4 Supreme Court hearing on the modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct. I am a researcher in the area of Psychology and the Law and a member of the Executive Committee for the Psychology and Law division of the American Psychological Association. I have followed the national debate on cameras in the courtroom, as well as recent developments in Minnesota on this issue, with considerable interest. I previously wrote to the Minnesota Advisory Commission on Cameras in the Courtroom concerning the need for a systematic research evaluation of electronic media coverage (EMC) in Minnesota trial courts. Since that letter (September 14, 1981) my colleagues and I (Kenneth DeBono and Professor Linda Heath) have accumulated information on previous research evaluations conducted in several of the thirty states that now permit some form of televised court proceedings. There are, as you know, numerous legal, psychological and technological issues associated with EMC and I have attached a summary of these research issues from the research evaluation conducted for the state of California (submitted to the Administrative Office for the Courts, The Chief Justice's Special Committee on the Courts and the Media, and the California Judicial Council).

Now that the Minnesota Advisory Commission on Cameras in the Courtroom has recommended EMC on a one year experimental basis, I would like to review for the Court previous research evaluations of EMC in states like Florida, Wisconsin and California, and to urge the Court to consider

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M5S 1A1

DEPARTMENT OF PSYCHOLOGY

similar but refined research efforts in Minnesota. Moreover, my colleagues and I are very interested in conducting such an evaluation and I have already spoken with the Program Director of the National Science Foundation's Law and Social Science Program about the possibility of external funding from NSF.

An experiment involving EMC in the courtroom would provide a unique opportunity to determine exactly what impact cameras in the courts may have. The results of such an experiment could inform the debate over media coverage of the courts and could address the concerns many people have that such coverage will interfere with the defendant's right to a fair trial. To optimize the potential benefits of an experiment on media coverage of the courts, it is critical that a true experiment be conducted and that a careful and systematic evaluation of this experiment be carried out by knowledgeable and independent social scientists. When in 1981 the U.S. Supreme Court rendered its opinion in Chandler v. Florida, Chief Justice Burger pointed to the inability to draw conclusions on the subject of EMC based upon present empirical evidence: "At the moment, however, there is no unimpeachable empirical support for the thesis that the presence of the electronic media, pro facto interferes with trial proceedings...." (see U.S. Law Week, Vol. 49, No. 29). Despite the recent California research evaluation, it is our opinion that Justice Burger's assessment is still valid.

I therefore request the opportunity to discuss these issues at greater length in the scheduled June 4 hearing and to more carefully sketch the type of research evaluation that we believe would be appropriate should the Court decide to approve the Advisory Commission's recommendations.

Respectfully Submitted,

Eugene Borgida

Eugene Borgida, Ph.D.
Associate Professor of Psychology

EB/ls
Enclosure: Figures I-1A and 1B from California's EMC evaluation

FIGURE I-1A

EXTENDED MEDIA COVERAGE (EMC) NEGATIVE EFFECTS HYPOTHESES

1. The presence and operation of EMC equipment in a courtroom is a significant distraction for trial participants.

2. The presence and operation of EMC equipment in a courtroom disrupts proceedings so as to interfere with the administration of justice.

3. The presence and operation of EMC equipment in a courtroom impairs judicial dignity and decorum.

4. EMC causes witnesses to testify untruthfully.

5. EMC causes witnesses to be more reluctant to testify.

6. EMC causes jurors to be more reluctant to serve.

7. EMC leads to harrassment or physical harm of trial participants (e.g., witnesses, jurors, defendants, etc).

8. EMC distracts jurors so as to make them less attentive to trial proceedings.

9. EMC adversely influences the decision-making of jurors because they perceive a difference between the "right" decision and the "popular" decision.

10. EMC depletes the availability of jurors because of widespread public familiarity with a particular case (especially pertinent to retrials).

11. EMC results in a large increase in sequestered juries.

12. EMC is detrimental to the presentational abilities of attorneys and therefore reduces the quality of their advocacy.

13. EMC causes attorneys to behave contrary to the interests of their client by causing them to avoid unpopular positions (including refusing to represent a client) or by causing them to "grandstand" to seek recognition for personal or political gain.

14. EMC causes judges to behave contrary to the interests of justice by causing them to avoid unpopular positions or by causing them to "grandstand" to seek recognition for personal or political gain.

15. EMC reduces efficiency in the administration of justice causing increased costs, increased case processing time, or administrative difficulties (e.g. scheduling and other matters involved in accommodating EMC requirements).

FIGURE I-1B

TRIAL PARTICIPANT BEHAVIORAL IMPACTS

BASE CATEGORY	DEFINITION/CONTENT	NEGATIVE IMPACT
Juror Effects	Distraction	Reduction in decorum
	Decision-making influence (undesired)	Injustice to litigants
	Difficulty in obtaining due to reluctance or contaminating media exposure	Jury management problem
Witness Effects	Reluctance to testify	Less evidence
	Nervousness/guardedness in testimony	Less evidence, distorted evidence
	Untruthfulness in testimony	Incorrect evidence, damage to litigants
Jury Effects	As decision-maker:	
	Undesired influence	Injustice to litigants due to decision bias
	Distraction, making decision process more difficult	Injustice to litigants due to capability deficiency
	As courtroom manager:	
	Difficulty maintaining control	Reduction in decorum
	Difficulty in conducting an expeditious proceeding	Court delay
Attorney Effects	Presentational ability diminished	Advocacy impairment
	Granstanding to media for personal gain	Advocacy impairment
	Exploitation of media	
*Party Effects	Party as proceeding participant:	
	Exploitation of media: in act of violence or disruption	Potential danger to participants, reduction in decorum, and efficiency loss
Public Effect	As prospective participant:	
	Reluctance to participate	Reduction of effectiveness and usefulness of judicial system

*"Party effects" may also be construed to include impact of EMC on party's constitutional rights, reputation, and well being; however, these impacts are ultimate concerns, not behavioral effects. The role of the party as "receiver" of justice with media exposure is in the mode of a dependent variable while the other effects in this figure are in the mode of independent variables.

JUSTICE YETKA

STATE OF MINNESOTA
DISTRICT COURT, SECOND DISTRICT
SAINT PAUL 55102

HYAM SEGELL
JUDGE
ROOM 1409
COURT HOUSE

STEVE JANICEK, JR.
OFFICIAL COURT REPORTER
TEL. 298-4101

May 25, 1982

John C. McCarthy
Clerk of the Supreme Court
State Capitol
Saint Paul, Minnesota 55155

81-300

Dear Mr. McCarthy:

In accordance with the Order of the Chief Justice dated March 5, 1982, relative to the hearing on cameras in the courts, I am filing herewith an appendix which will supplement the remarks I expect to make on June 4, 1982.

I am not filing a brief in this matter, as the brief heretofore filed by Judge Godfrey before the Commission was adopted as the brief of the Minnesota District Judges Association at one of its meetings, and that brief may serve as the brief before the Supreme Court at this time.

All documents, including this letter, are herewith filed in ten copies in accordance with the Order of March 5, 1982.

Yours very truly,

Hyam Segell

HYAM SEGELL, Judge.

HS/sj

Enc.

STATE OF MINNESOTA

IN SUPREME COURT

In Re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct.

FILE NO. 81-300

WCCO Radio, Inc.; WCCO Television, Inc.; WCCO FM, Inc.; WTCN Television, Inc.; United Television, Inc.-KMSP-TV; KTTC Television, Inc.; Hubbard Broadcasting, Inc.; Northwest Publications, Inc.; Minneapolis Star and Tribune Company; Minnesota Public Radio, Inc.; Twin Cities Public Television, Inc.; Minnesota Broadcasters Association; Minnesota Newspaper Association; Radio and Television News Directors Association, Minnesota Chapter; and Sigma Delta Chi/ Society of Professional Journalists, Minnesota Chapter,

Petitioners.

APPENDIX OF RESPONDENT MINNESOTA DISTRICT JUDGES ASSOCIATION

Hyam Segell

HYAM SEGELL
Chairman, News Media and the Courtroom Committee
Minnesota District Judges Association

IN THE SUPREME COURT OF THE STATE OF DELAWARE

In re: Canon 3A(7) of the	§
Delaware Judges' Code of	§
Judicial Conduct	§

Before HERRMANN, Chief Justice, DUFFY, McNEILLY, QUILLEN and HORSEY, Justices.

ORDER

This 15th day of January, 1982,

Upon the submission of the "Report of the Bar-Bench-Press Conference of Delaware on Television in the Courtroom," dated March 16, 1981, attached hereto as Exhibit A, recommending a one-year experiment of television, radio, tape recording, and still photography news coverage (hereinafter "photographic and electronic news coverage") of trials and appellate judicial proceedings in this State; and

Upon due consideration of (a) the debate upon that Report at the Annual Delaware Joint Bar-Bench Conference between former Chief Justice England of Florida and Dean George Gerbner of The Annenberg School of Communications of the University of Pennsylvania in June, 1981; (b) the public hearing thereupon held by this Court at which Professor Valerie P. Hans, Division of Criminal Justice and Department of Psychology of the University of Delaware, Professor Dan Slater, Department of Communication of the University of Delaware, and Mr. Sidney H. Hurlburt, Executive Editor, The News-Journal Company, appeared and testified in September, 1981; (c) the views and opinions of members of the United States Supreme Court on the subject of television, radio, and still photographic coverage of criminal trials for public broadcast,

in Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1964) and Chandler v. Florida, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981); (d) activity in approximately 30 States, in recent years, relative to varying degrees of relaxation of the ban on photographic and electronic news coverage of judicial proceedings mandated by prevailing Rules such as Canon 3A(7) of the Delaware Judges' Code of Judicial Conduct, copy attached hereto as Exhibit B; (e) the official positions and policies adopted on the issue of such relaxation by the American Bar Association, the American Judicature Society, and the Conference of Chief Justices; and (f) the voluminous recent writings on the subject,

IT APPEARS TO THE COURT:

(1) That as to proceedings before the Delaware Supreme Court, by reason of technological advances, none of the dangers to fair trial that gave rise to nation-wide adoption of Canon 3A(7) and its progenitors, and were visualized in the concurring opinions in Estes and acknowledged by the Court as possible in Chandler, are relevant enough to bar a test of photographic and electronic news coverage of appellate proceedings before the Delaware Supreme Court, subject to specific and detailed guidelines which the Bench-Bar-Press Conference is hereby requested to propose, in consultation with representatives of all news media involved, for approval by the Supreme Court; and that to that end, Canon 3A(7) should be suspended for a period of 1 year as to appellate proceedings before the Delaware Supreme Court;

(2) That as to trials, however, the "mischievous potentialities [of broadcast coverage] for intruding upon the detached atmosphere which should always surround the judicial process" (Estes v. Texas, 381 U. S. at 587, 85 S.Ct. at 1662) may not be lightly disregarded; that still clearly relevant are two possible threats to a defendant's constitutional right to a fair trial recognized in the concurring opinions in Estes, namely: (a) possible adverse psychological impact upon the public and upon participants in the trial, especially jurors and witnesses; and (b) possible prejudicial publicity and violation of rights of privacy of participants in the trial, especially of jurors and witnesses;

(3) That as to these fair-trial dangers, which may reasonably apply to all trials — criminal and civil, jury and non-jury — there is little or no comprehensive empirical data; that "it is clear that the general issue of the psychological impact of broadcast coverage upon the participants in a trial, and particularly upon the defendant, is still a subject of sharp debate": and that even the Florida Supreme Court, a leader in the field, has conceded the data of psychological impact upon trial participants of its experiments in photographic and electronic news coverage, were "limited"and "non-scientific." See Chandler v. Florida, 101 S.Ct. at 810, f.n. 11, and 811;

(4) That as to these dangers to the constitutional right of fair trial, a matter of vital importance in the administration of justice of course, an "experiment" in the subject field should be an "experiment" in the scientifically adequate and acceptable sense of the word — including scientific controls and

scientific evaluation which meet advanced testing techniques and requirements of the social sciences;

(5) That apparently, of the jurisdictions which have conducted, or are now conducting, experiments in the subject field, most include "attitude surveys" — but, insofar as this Court is aware, none constitutes a study employing scientific experimental design techniques necessary to produce an acceptable objective evaluation of the psychological effect of photographic and electronic news media coverage upon the public and the participants in trials;

(6) That the offer of the Bar-Bench-Press Conference, to "make itself available to monitor the experiment and to submit a report at least one month before the end of the experiment as to its recommendation," although generous, is not an acceptable substitution for such a scientific experiment upon which to base an informed policy judgment;

(7) That by Resolution adopted in February, 1981, the Board of Directors of the American Judicature Society declared that the effect of "camera coverage of judicial proceedings" on the "viewing and listening public and on courtroom participants has not been conclusively established"; it urged "those court systems permitting camera coverage of judicial proceedings to undertake scientifically-based research and evaluation to determine its effect on the viewing public and on courtroom participants"; and the Directors resolved that the Society should "continue its role in encouraging and working with other agencies, including various court systems, to capture

and analyze empirical data on the impact of televised judicial proceedings upon which informed policy judgments can be based";

(8) That Dean Gerbner of The Annenberg School of Communications of the University of Pennsylvania, a recognized authority in the field, advises:

> "Neither history nor existing research support the contention that television coverage of courts would enhance fairness, protect freedom, increase public understanding, or promote needed court reform. Only an immediate moratorium on televising trials can give us the time and the opportunity we need for responsible action.
>
> "In the face of demonstrated conflicts and incalculable risks, the burden of proof must shift from the potential victims to the proponents of trials by television. An independent scientific investigation is what we need now, both to analyze a representative sample of televised trials and segments of trials and to assess conceptions of the judicial process that television trials cultivate in the minds of the viewers, as well as the minds of participants. Until we undertake such research and until it disproves reasonable expectations about TV's effects, we should prevent television from remaking our system of justice in its own image."

See American Judicature Society Journal, Vol. 63, No. 9, April, 1980.

(9) That Dean Gerbner has also advised waiting for the outcome of a scientific evaluation of one or more of the experiments now being conducted in other jurisdictions, rather than commencing still another experiment in this State of photographic and electronic news media coverage of trials, concluding:

> "I think it is imprudent; I think it is historically shortsighted; I think it is institutionally reckless to further extend the experiment until the evidence is in, and to use our defendants as guinea pigs."

(10) That Professors Hans and Slater of the University of Delaware have advocated only a scientifically-based experiment if any experiment at all is to be held in this State of photographic and electronic news media coverage of trials;

(11) That, because of inconclusive returns from experiments already undertaken in various States, the Federal Courts and the House of Delegates of the American Bar Association remain opposed to change of the present rules prohibiting camera and radio coverage of trials; that in the summer of 1980, the President of the American Bar Association "stressed the need for a carefully planned collection and analysis of objective data dealing with the impact of camera coverage on trial proceedings" and "lamented the fact that the on-going national debate on the subject did not have the benefit of hard data upon which responsible judgments could be made";

(12) That although the Conference of Chief Justices, by Resolution adopted in 1978, favored amendment of Canon 3A(7) to allow photographic and electronic media coverage of judicial proceedings subject to the discretion of the highest appellate court in each State, that Resolution was not adopted in the light of present circumstances and did little more than state the status quo;

(13) That the estimated cost of an adequate scientifically-based and evaluated experiment in this State has been found by Professors Hans and Slater, after careful and appreciated study, to be in excess of $25,000;

(14) That, in view of the foregoing facts and objective opinions, another experiment of photographic and electronic news coverage of trials in this State at this time, at such an expenditure, is at least inadvisable and at most risky as to potential adverse psychological effects upon the public and participants in trials;

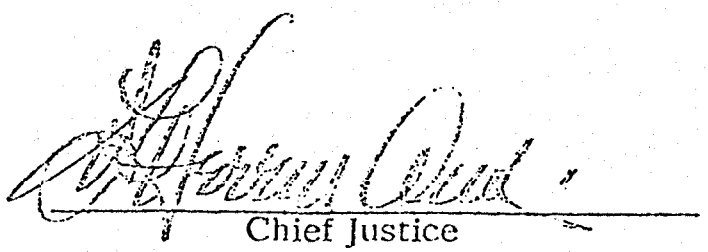
(15) That, accordingly, the recommendation by the Bar-Bench-Press Conference of a one year experiment in photographic and electronic news coverage of trials in Delaware must be found unacceptable at this time;

NOW, THEREFORE, IT IS ORDERED:

(A) That Canon 3A(7) of the Delaware Judges' Code of Judicial Conduct be and it is hereby suspended for a period of one year, commencing May 1, 1982 and ending May 1, 1983, for appellate proceedings in the Delaware Supreme Court, under specific and detailed guidelines (see those adopted in New Jersey, California, and Florida) to be proposed by the Bar-Bench-Press Conference, in consultation with representatives of all types of Delaware news media involved, for approval by this Court; and

(B) That as to all other judicial proceedings in this State, however, Canon 3A(7) shall remain unchanged and in full force and effect until further Order of this Court.

BY THE COURT:



Chief Justice

REPORT

OF THE

BAR-BENCH-PRESS CONFERENCE OF DELAWARE

ON

TELEVISION IN THE COURTROOM

C. Robert Taylor, Chairman
Richard R. Wier, Jr., Vice Chairman

Robert Casey
Arthur F. DiSabatino
Richard S. Gebelein
Thomas J. Miles
Richard E. Poole
Jacqueline Powers
Ronald Stevens
Clarence W. Taylor
Robert D. Thompson
Theodore Townsend

March 16, 1981

- Exhibit A -

I. INTRODUCTION

On November 24, 1978 Chief Justice Daniel L. Herrmann of the Supreme Court of Delaware referred the subject of television in the courtroom to the Bar-Bench-Press Conference of Delaware for study and recommendation. On April 22, 1980 the Chief Justice requested that the report be deferred pending the decision of the United States Supreme Court in Chandler v. Florida, 49 LW 4141 (January 26, 1981). Now that Chandler has been decided, the Bar-Bench-Press Conference hereby submits its report.

The Bar-Bench-Press Conference is a voluntary group of lawyers (3), judges (3) and news representatives (6) interested in the conduct of open, fair and impartial court proceedings. In its study of the issue of television in the courtroom, the Conference reviewed the law (Section II), conducted a technical feasibility study (Section III), and undertook a survey of the opinions of all Delaware lawyers, judges and news representatives who chose to participate (Section IV). The Conference's unanimous recommendation (Section V) is that on a strictly-controlled basis the Delaware courts should permit television, radio and tape recording, and still photography for a test or trial period of one year from September 1, 1981 through August 31, 1982. A proposed court rule for the trial period is set forth in Section VI.

II. THE LAW ON ELECTRONIC COURTROOM COVERAGE

In Chandler, supra, the United States Supreme Court held unanimously that each state may decide for itself whether to experiment with electronic coverage of court proceedings, free of the risk that such coverage constitutes a per se violation of the due process clause of the Fourteenth Amendment.

Some thirty states now permit electronic courtroom coverage in some form, but Chandler neither endorses nor invalidates it. Eventually the United States Supreme Court may hold that the First and Sixth Amendments mandate the entry of the electronic media into judicial proceedings, inasmuch as in Richmond Newspapers, Inc. v. Virginia, 100 S. Ct. 2814 (1980), the Court established a constitutional right of access generally. However, Nixon v. Warner Communications, Inc., 435 U. S. 589 (1977), and footnote 12 of Justice Powell's dissent in Bates v. State Bar of Arizona, 433 U. S. 350 (1977), produce uncertainty as to whether the constitutional right of access applies to any but the print media. What remains clear after Chandler is that the courts must see to it that any coverage by the electronic media is consistent with a defendant's right to a fair trial in each particular case.

III. TECHNICAL FEASIBILITY

In early 1979 Keith D. Humphry, then News Director, WHYY-TV (Channel 12), undertook a study of light, acoustics and space features of Delaware courtrooms. He concluded that "there are no insurmountable logistical problems in television coverage in Delaware's court rooms."

New Castle County Superior Court rooms 5, 6, and 7 are ideal for electronic coverage, but the other Superior Court rooms would need upgrading, particularly as to lighting, for judicial proceedings to be covered by the electronic media. Kent County Superior Court room 2 is ideal for television coverage. The Chancery Court rooms have adequate lighting, but the audio system might need some work, and space limitations there would have to be given attention. New Castle County Common Pleas Court room # 1 has lighting problems, but New Castle County Common Pleas Court room # 2 is fine for electronic coverage. The Kent County Common Pleas Court room could provide adequate illumination if the blinds were adjusted properly. Wilmington Municipal Court has a good audio system, and it also has a TV monitoring system which works well, at least as to the public seating area.

The Supreme Court of Delaware has an existing audio system that is more than adequate. There is also sufficient room in the courtroom to accomodate a television camera and its

operator. Present lighting is insufficient, but the wall fixtures could be altered to throw more light on critical areas.

It is the recommendation of the Conference that the news media be solely responsible for any expenses necessary to accommodate electronic courtroom coverage.

IV. OPINION SURVEY

A survey was conducted during the summer of 1980 by means of a mail questionnaire sent to all members of the Delaware State Bar Association, to members of the state judiciary and to news media organizations that cover Delaware. The number of questionnaires sent and returned, and the response rates, were as follows:

	SENT	RETURNED	RESPONSE RATE
Lawyers	1,100	444	40.4%
Judges	42	28	65.5%
Media Orgs.	43	21	48.8%

The survey asked the three groups for their opinions on the question of television coverage of the courts. Specifically, it asked respondents whether they would favor a change in court rules to allow television coverage, voice recording or still photography in the courts. It also asked whether they would favor an experiment here to test the effects of such coverage.

The survey included a number of questions designed to explore the basis of respondents' attitudes toward television in the courts. Other questions asked how the groups would react to experimental television coverage if it were allowed. Finally, a number of demogaphic questions were included to help determine if there were differences in attitudes among sub-classes of the three groups.

Here are some of the major findings of the survey:

Among all the respondents, 60 percent opposed an outright change in the rules, 26 percent favored a change and the rest were undecided or had no answer. Among lawyers, 64 percent opposed a change and only 23 percent favored such a change. For judges, 25 percent favored and 46 percent were opposed. For the media, 81 percent favored a rules change and 10 percent opposed it.

Attitudes toward an experiment were more favorable. While opposition was two to one against a rules change, the survey found opinion evenly divided among all respondents toward an experiment. Forty-five percent favored it and 46 percent were opposed. Among the lawyers, 49 percent were opposed and 43 percent favored it. For judges, 58 percent favored an experiment and 36 percent were opposed, and for the media 81 percent favored an experiment and 20 percent were opposed.

Attitudes among all three groups seemed to be strongly held on this subject. Those lawyers and judges opposed to the introduction of television coverage were against a rules change and also opposed any experiment. The more favorable sentiment toward an experiment resulted from lawyers undecided on the rules change switching over to favor an experiment.

There was little difference between the attitudes toward television coverage in the courts and the attitudes toward voice recording and still photography. In fact there was less support for the latter two than for television.

Differences were observed among lawyer groups in their attitudes toward television, although the majority of each group was opposed to both a change and an experiment. Younger lawyers tended to favor television, as did those from smaller firms. Older lawyers and those from large firms were more likely to oppose it.

The majority of Superior Court and Family Court judges favor an experiment to test television in the courts.

Defense lawyers tended to be more favorable toward a change in rules to allow TV, while prosecutors were more likely to oppose it, although the majority of both groups opposed any change.

Respondents did not know the extent of experimentation and rules changes in other states. When asked how many states had made changes, only 3 percent correctly answered more than 20.

The survey found strong sentiment in favor of requiring the consent of all parties to a case before television coverage is allowed, in the event of a rules change or experiment. Seventy-six percent favored such consent.

Attitudes of lawyers and judges toward a rules change or an experiment tended to correlate with their attitudes toward the performance of the news media. Those critical of the media's performance tended to be more strongly opposed.

No information is available on the attitudes or characteristics of the non-respondents to this survey.

V. RECOMMENDATIONS

As noted at the outset in the Introduction, the Bar-Bench-Press Conference recommends that the courts of Delaware, during a trial period of one year beginning September 1, 1981, permit electronic coverage of judicial proceedings.

Actual television coverage is likely to be spotty, particularly after the novelty wears off. Delaware has just one public television channel, and no commercial channels apart from cable. Channel 12 maintains a rather low profile in Delaware, and the Philadelphia commercial stations cover Delaware news rather infrequently. Accordingly, the burden on the judicial system of accommodating television is likely to be modest in Delaware.

Still photography, if permitted, is likely to be taken advantage of to a considerable extent by the print journalists. Newspapers, as well as radio stations, are also interested in audio equipment to make the task of quick and accurate reporting easier.

It is the unanimous judgment of the Conference that the Court rules for the one-year trial period should provide that arrangements for electronic coverage in each particular case be in the exclusive control of the presiding judge, after hearing from the litigants and the interested news representatives. To require the consent of all parties would mean that in practice

here in Delaware there would be little or no coverage, given the extent of the opposition reflected in the survey. (Florida experienced an inability to obtain such consent, before the Florida Courts dropped that requirement. See Chandler, supra.)

VI. PROPOSED COURT RULE

Canon 3A.(7) of the Delaware Judges' Code of Judicial Conduct currently prohibits "broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions." Modeled after the Florida rule, the Bar-Bench-Press Conference recommends that the Delaware Judges' Code be amended for the period of September 1, 1981 through August 31, 1982, by suspending Canon 3A.(7) in its entirety and temporarily adopting a new Court rule as follows:

(1) A judge may permit broadcasting, televising, recording, and taking photographs in the courtroom and areas immediately adjacent thereto with the same limitations in the interest of the fair administration of justice as are applicable to the press and public generally, subject to the following standards:

(a) Interested news representatives shall petition the presiding judge for permission to cover the judicial proceeding electronically;

(b) The presiding judge shall give all interested parties and participants an opportunity to be heard on the petition(s) for electronic coverage, but the final decision as to coverage rests with the presiding judge alone, and such decisions are not subject to appeal or extraordinary writ by news representatives during the period of the experiment;

(c) Not more than one television camera, operated by not more than one television camera person, shall be permitted in any court proceeding. The arrangements for still cameras and audio equipment shall be within the sole discretion of the presiding judge. Any "pooling" arrangements among news representatives required by these limitations on equipment and personnel shall be the sole responsibility of the news media without intervention by the presiding judge;

(d) No supplemental lighting devices and no distracting sounds shall be permitted in connection with electronic courtroom coverage;

(e) Photographic, audio and other equipment shall be positioned in such location as shall be designated by the presiding judge;

(f) There shall be no audio pickup of conferences between counsel and client, between co-counsel of the client, between counsel and the presiding judge held at the bench, of members of the jury, and of any other person (including witnesses) whom the presiding judge in his sole discretion in any particular case orders protected from electronic coverage;

(2) Every presiding judge shall keep accurate records on forms provided by the Administrative Office of the Courts of all applications made pursuant to these rules, and pertinent data of all instances when broadcasting, televising, recording, and photography is permitted pursuant to these rules. Such reports, including any written comments received by the

presiding judge from any of the participants or observers, shall be submitted to the Administrative Office of the Courts on a monthly basis.

(3) The Bar-Bench-Press Conference shall make itself available to monitor the experiment and to submit a report at least one month before the end of the experiment as to its recommendations.

DELAWARE JUDGES' CODE OF JUDICIAL CONDUCT

Canon 3 A(7):

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

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

(b) The broadcasting, televising, recording, or photographing of investigative or ceremonial proceedings;

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

(i) The means of recording will not distract participants or impair the dignity of the proceedings;

(ii) The parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) The reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) The reproduction will be exhibited only for instructional purposes in educational institutions."

Remarks Of

Dr. George Gerbner, Dean

of the Annenberg School of Communications

of the University of Pennsylvania

at the Annual Delaware

Joint Bar-Bench Conference

on June 3, 1981

Chief Justice Herrmann, Chief Justice England, members of the Bar and Bench, Mrs. England, Mrs. Gerbner:

If you ever needed a demonstration that the media take over and dominate the proceedings, this is it. You may recall that we started at ten past four, and I understand that it is now ten past five. I understand that you wish to adjourn at five twenty-five. So I have to be very short.

You have just witnessed - actually I am taking what I consider to be the cautious and fair approach, but I am forced into looking at the other side of the coin in a number of important respects. You have just witnessed a television demonstration brought to you by the American Broadcasting Company - that well-known charitable organization and impartial bystander in this case that has nothing but the administration of justice as its primary mission. You have seen a number of scenes that I think can be considered only as a red herring non issues.

I am very pleased to be sharing this platform with Chief Justice England because I think that his moderate approach in Florida, and particularly his efforts to provide a standard for what he considers to be a qualitative difference between television cameras in the courtroom and other forms of trial publicity, is a significant if not the key issue in the case. My contention is that those qualitative standards, those qualitative differences on one hand, are very obvious and I will mention them, and on the other hand, are non-measurable and not to be judged by personal impression, by vague and hazy recollection, or by affidavits based on other peoples' personal impressions. But they have to be judged on the basis of appropriate scientific evidence which we do not have

and which it is my interpretation of the Chandler decision of the Supreme Court are desired and urged upon the States — in order to experiment, in order to provide the kind of basis on which we can judge. Now if you don't mind, although I understand that the modern television cameras do not need the big lights of former years, it is very hot here. And if you don't mind, I'm going to remove my coat, and let me invite you - those of you in the audience who are also warm - to do the same.

The great historical transformations of all time are usually invisible, not perceived by those who take part in them, judged on the basis of the immediately apparent and usually obsolete short run considerations. I believe that that is the case today. What is at issue, and I am a communications researcher been studying not the courtroom but television the past ten or eleven years — the kind of system that television is and what happens when you plug another institution into that system. My contention and my reason for urging caution and the kind of experimentation that can produce credible social scientific evidence on the basis of which prudent and controlled judgments can be made is that the issue is not simply a kind of minor public-spirited improvement in the openness of the courts or of our government. The issue is an irreversible, you cannot go back, major transformation of an institution which is what we call the administration of justice. By being plugged into another institution whose system is one of entertainment and sales, whose mission, while worthy on its own, is incompatible by and large, which eventually takes over and takes control of the matter unless the cautions and the guidelines are carefully designed and strictly implemented.

We all agree that this is not a First Amendment issue, and I don't have to dwell on that. Let us also agree that this is not an issue anymore of the intrusiveness of television cameras, of their creating what is sometimes called a circus atmosphere of trials. Although I must say that at least in the Estes decision the circus atmosphere was not the primary basis. The primary basis for Estes, if you read the majority and concurrent opinions carefully, are- have to do with the psychological import and implications and indeed the political implications of the difference between speaking to millions with all the ramifications of that and addressing yourself to the people and the issues at hand in the court. So we're not dealing with the obtrusiveness of the old technology. We're not even dealing with video recording. Few people seem to be aware of the fact that Canon 3A (7) of the Code of Judicial Conduct already permits of the video recording of trials and their broadcast for informational and educational purposes after the trial is over and all appeals have been exhausted and yet we never see these. So we are really not even dealing with the possibility of video recording of the trial because that can already be arranged. We're certainly not dealing with a possibility of setting up a media room in which media personnel can relax by closed circuit. That can be done now and I see no objection to that. We're not dealing with open government either. Legislative hearings, Congressional Committee hearings, the broadcasting of legislatures is an entirely different issue and it only obscures and obfuscates what we're actually dealing with. Because in a legislative matter the ultimate authority is the voting public and the voting public is therefore entitled to arguments as they come from the mouths of legislators

and persons involved in those hearings. But in a trial, particularly in a criminal trial, it's not designed for education. It is not designed for information. It is certainly not designed for entertainment. It is designed not to provide the public a final vote and voice or we would still be having show trials in a stadium. It is designed for one very simple purpose. It is the ascertainment of whether an individual indeed violated a specific law at a specific time in a specific place as charged - not whether that person is a good or bad person - not whether that person is perspiring and therefore is fit to be seen as guilty - not whether that person is a popular or an unpopular person and the act that he has committed is a popular or an unpopular act, all of which are the dramatic considerations which become if not the only but certainly the major reasons why television is even interested in broadcasting trials. If you remove and kind of peel off these non-issues there's only one single issue that remains or one single area and perhaps two issues connected with it. The single area that remains and the most critical is the instantaneous televising of criminal trials while the trials are on. That is typically what television cameras and television broadcasters want to do. Their primary interest is in rating, is in sales, is in entertainment. More and more even the journalists are not in control of many of the local broadcasts. More and more not only the courts, but the people of the press, become camera crews and soundmen who are hired, trained, employed, and permitted to continue as long as they help the ratings of the particular station. So more and more the question is who is going to select the trials, who is going to edit the trials, what

trials will be broadcast and what becomes-and I suggest that both in terms of the past and the future-in other states but with Florida you think of Zamora, Bundy, McDuffie - the sensational trials of violence, of sex, of the kinds that fit the mythology of television about what crime reporting and courtrooms are all about. Now the qualitative difference between broadcasting criminal trials by television and reporting criminal trials by journalists including television journalists /which, of course, they are now fair to do - free to do - only do much too infrequently. The critical difference is clearly not in narration that they can do now. The critical difference is the sights and the only qualitative difference is the sights, the sounds, and the spectacle transporting an actual scene to the viewers and sights, sounds, and spectacle. I submit that qualitative critical difference has little or nothing to add to the understanding of what is going on because that understanding is based on certain propositions that are typically behind the scenes. They are not there. They are invisible and they - the addition to the substance of the issues in a trial particularly in a criminal trial - the addition of the sights, the sounds, what the defendant looks like, what the witnesses look like and how they act are the most prejudicial parts. They are the very parts that if a Court could, would be excluded. However, the addition of the sights, sounds, and spectacle transform the events from the reporting of a trial into a television program. Once it becomes a television program it becomes selected and treated as a television program unless careful guidelines are implemented; and if it is selected, edited and treated as a television program, it will be like all other television programs. It will have to fit

the image the mythology of the courts with which most of us have grown up - the Perry Mason mythology of the courts.Otherwise it will not suit the purpose of ratings and of sales. And this is what our studies have shown. The television public is not only informed about courtrooms. It's only too well informed but in the wrong way. This is what television has done and when - and it is entirely free to do what it wishes to do. Let me tell you that the average viewer of television sees 30 policemen, 6 lawyers and 3 judges every week, week in and week out in highly illuminating detail and it is that fantasy - it is that fantasy by and large that is acceptable to the large viewing public as a television program as credible as real as unbias and/producing of ratings. So once television is established - once television acquires the right if not legally at least a squatter's right to make courtrooms into program originating locations. The courtrooms become part of another system - an appendage of another system. And the great question is not whether being an appendage of that other system they provoke riots. Clearly I think that is an extreme change. They may provide the spark but alone no single medium provokes a riot. The question and the major question is do they add to the fairness to the defendant. In what way do they enhance the primary and only reason for a criminal trial, namely to produce evidence and to consider evidence as free from pressure, as free from popular clamor, as free from the fear of returning to communities in an unpopular case, of being molested on the streets because everyone recognizes you if you defend an unpopular client, of your children being stopped, as has happened in many states, in the schools if you happened to be a lawyer defending an unpopular client, as free from these

extraneous influences no matter how much public curiosity they satisfy as possible. Do they enhance fairness and secondly do they correct rectify or confirm-the way in which they are selected and edited-the mythology of trials that the public holds very strongly. These are then the principal issues on which I would claim the evidence is not available. The verdict is not in and I think Chief Justice England is quite understandable from my point of view in recalling those incidents from the many thousands of broadcasts in Florida that after all defend a position over which he has presided in which he has such a strong vested interest. I think that it may be entirely correct — it may not, if the Florida experiment was not an experiment in the proper sense, in the scientifically adequate and acceptable sense in the word. Twenty eight states or perhaps by now twenty-nine have launched so-called experiments and none of them had any controls, none of them had independent evaluation not paid for by the proponents, none of them had focused on the difference between television reporting a trial by the television journalists witnessing and then going on camera to report it and the additional sights and sounds. None of them had tested the actual effects of - not of the cameras - but of the knowledge that they are speaking to millions of people-on the judges, and the juries and the witnesses and the defendants. All of the surveys including the Florida survey asked people what did you think, did it prejudice you, did it inhibit you, did it make you bias. One of the first rules of social science is

that when it comes to psychological effect, when it comes to the recognition of the political stakes involved for judges, attorneys, states' attorneys, and so on that the least conclusive evidence is one's own impression of the effect on one's self of what one is undergoing that this cannot be taken at face value. None of the states have done this kind of experiment. The kind of experimentation that has been going on I can only liken to a pharmaceutical company manufacturing a new drug, to a food company including a new chemical that is very - tastes very good and seems to be very popular and then just watching effect on participants - of clearly speaking to a huge public to which they have to return, which will have to vote for them, with which you'll have to live. Imperceptible except on a basis of controlled experiments which can be done and I think will be done. If nobody else will do it, we will do it. And secondly without the kind of testing that will ascertain whether indeed the additional sights and sounds to the normal procedures of reporting on trials by broadcasters as well as everyone else. With the addition of sight and sound and spectacle and the transformation of a journalistic report into a dramatic program genre, corrects and rectifies or confirms by what appears to be real but is highly selective analysis the mythology of the courtrooms. Until that evidence is in and it may take two or three years but it's not a long time for the kind of institutional transformation that is at risk. Until that evidence is in, I think it's impudent to extend any further — there are enough states that are engaging in this that provide a good basis for the scientific experiment, that need to take place. I think it is impudent. I think

it is historically short-sighted. I think it is institutionally reckless to further extend the experiment until the evidence is in and to use our defendants as guinea pigs. Thank you.

FOR THE NATIONAL SCIENCE FOUNDATION,
LAW & SOCIAL SCIENCE PROGRAM

Proposed Starting Date: September 1, 1982

CAMERAS IN THE COURTROOM:

A Proposal for Research

A collaborative research project of the American Judicature Society and The Annenberg School of Communications at the University of Pennsylvania.

Co-Project Directors

George Gerbner, Dean & Professor of Communications, Annenberg School of Communications, University of Pennsylvania

and John Paul Ryan, Director of Research, American Judicature Society

STATEMENT OF PROPOSED RESEARCH

We propose a basic social scientific study of the consequences of televising trials for public understanding of courtroom procedure and the legal system. This study is not limited to the immediate and short-run effects of cameras upon participants in the courtroom. That problem has been studied but not resolved and we believe cannot be resolved in such a limited context. Our research encompasses that question within a new and more far-reaching context by investigating the consequences of television coverage for the long-range cultivation of ideas about courts and the administration of justice and hence for the attitudes and behaviors of future participants in all courtrooms.

The immediate context and urgency of the issue was noted when, on January 16, 1981, the Supreme Court of the United States ruled that the Constitution does not prohibit states from allowing television cameras to record and broadcast courtroom proceedings (Chandler v. Florida). The majority's opinion noted that no empirical data of sufficient validity have been offered to suggest that the televising of trials per se affects the judicial process.

The Supreme Court pointed out that the appellants mustered nothing except generalized allegations of prejudice deriving from the mere presence of cameras. But in terms of the larger question of the effects of the broadcast media on the judicial process, and the absence of persuasive empirical evidence, the Court repeatedly stressed that "further research may change the picture," that a Constitutional ban on media coverage of trials could not be justified "without more proof than has been marshalled to date," and that the full assessment of television's impact on courts must "await the continuing experimentation" (1).

We propose to address the need for evidence noted by the Court and to contribute to the understanding of the nature and impact of televising courtroom proceedings. The main purpose of the proposed research is to subject to social scientific testing the theories advanced and at least implicitly accepted or assumed by the states that admit cameras but held unproven by the U.S. Supreme Court, and never before systematically investigated.

Proponents claim that television coverage from within the courtroom is qualitatively different from other forms of publicity in that by conveying real courtroom procedure to millions of homes it has the capacity to enhance public understanding and reduce public misconceptions about the administration of justice while not necessarily interfering with what goes on within the courtroom.

Others concede that cameras in the courtroom do not necessarily interfere with the proceedings at the time, but question whether they improve public understanding and long-range fairness or justice. Depending on the selection and editing of trials and scenes to be televised, cameras may even confirm or heighten misconceptions now cultivated, at least in part, by courtroom drama on television.

Thus we propose to conduct research testing theories about the public impact and long-range consequences of originating television broadcasts from inside courtrooms. The goal of the research would be reached in three steps:

(1) Analysis of the actual content of courtroom coverage;

(2) Investigation of the policies and decision-making processes that determine selection, treatment, and editing of broadcast coverage; and

(3) Research on the consequences of television coverage for the understanding of courtroom procedure and the legal system.

Background

Trials holding a special interest for the public have historically received extensive coverage by the news media. Radio, newspapers, and most recently, television, have covered the trials of political dissidents, public officials, and criminals charged with heinous offenses. But this coverage has usually been limited by the absence of cameras or other broadcasting equipment inside the courtroom itself.

In the wake of photographic coverage of the controversial Hauptmann trial in the 1930's, the American Bar Association in 1937 adopted a Canon (No. 35) prohibiting all photographic and broadcast coverage of courtroom proceedings. The canon stated that the taking of photographs was "calculated to detract from the essential dignity of the proceedings... and create misconceptions in the mind of the public" (2). In 1952, the American Bar Association amended the Canon to prohibit television coverage as well (3). Though the ABA Canon has no force of law, it heavily influenced the state and federal judicial systems in their development and modifications of procedural rules.

By the 1970's, however, cameras slowly began to appear in the courtrooms of many states. Pressures from the television media for direct coverage intensified, as access was gained to the proceedings of other governmental institutions, including legislative bodies. The Conference of Chief Justices in 1978 voted overwhelmingly to encourage state supreme courts to develop guidelines permitting camera coverage of courtroom proceedings. And in the same year, the American Bar Association debated, but ultimately rejected, an amendment to Canon 35 to permit photographic and electronic coverage under some circumstances.

In the past three years, television coverage of courtroom proceedings has greatly expanded. Currently, about 35 states permit coverage of trial and/or appellate proceedings, under varying conditions and rules (4). Three committees of the American Bar Association are presently considering changes in Canon 35 or other codes of judicial conduct, so as to reflect the widespread presence of cameras in America's courtrooms in 1982 (5).

The Issues

A broad range of concerns have been raised in discussions of the impact of television technology on courtroom procedures and judicial processes. The central issues represent a continuum from a "micro" focus on the internal workings and decorum of the courtroom to a "macro" focus on broad social and cultural consequences. Distinctions among levels in this hierarchy are at best heuristic; the larger social and cultural climate may influence what transpires in courtrooms, and vice-versa. Thus, while the two foci are related, most of the research and debate has been directed -- inappropriately, we believe -- at the effects of television cameras within the courtroom. This has led to research which emphasizes individual cases, the self-reports of courtroom participants, and artificial experiments -- all of which produce little in the way of firm or generalizable findings (6).

At the micro level, one early argument against permitting broadcast coverage of trials was that television equipment is bulky, distracting, and cumbersome (7). But today, the advances in broadcast technology are such that the required equipment is light, compact, and nonobtrusive.

A related concern of critics is that the mere presence of television cameras is psychologically distracting to witnesses, jurors, attorneys, or even the presiding trial judge (8). Evidence derived from artificial experimental situations suggests that an obtrusively present camera may cause people to speak longer than they do when the camera is hidden or when there is no camera at all (9).

In any case, the Court in Chandler reviewed the relevant legal and empirical arguments and concluded that, whatever the potential dangers in this regard, no sufficiently compelling data exist to support these contentions (10).

Another concern is whether the presence of cameras impinges upon courtroom participants in undesirable ways. Judges and chief prosecutors are often elected (and may aspire to other offices), and defense attorneys may utilize the exposure to enhance their private practice. In short, television may offer these courtoom participants a powerful medium for exposure and possible political or personal gain. These considerations do not always coincide with the demands of justice or fairness. Such concerns have yet to be raised seriously in the legal literature, but have been voiced in testimony before the American Bar Association's recent hearings on cameras in the courtroom (11).

At the next level of concern is the possibility that extensive publicity may damage a defendant's ability to attain a fair trial (12). Of course, this is potentially true of any form of publicity, whether printed or broadcast, and whether emanating from within the courtroom or without (see, e.g., Sheppard v. Maxwell). The critical issue is not the amount of courtoom coverage, but whether coverage from within the courtroom might be qualitatively different from coverage without cameras present. Empirical information on these issues is totally lacking and will be collected in the proposed study.

Finally, we reach the broadest level of concern. Trial broadcasts may be selected and edited in such a way as to be more congruent with familiar dramatic representations of trials rather than actual trials in real courtrooms. Instead of clarifying myths and imprecise or false images about courts (13), such broadcasts could confirm and even increase those misconceptions, spread them more widely, and entrench them more deeply.

What is needed is a rigorous, systematic investigation of the processes underlying the broadcasting of trial proceedings, the content of those broadcasts, and how the lessons contained in them counteract or reinforce the lessons cultivated by exposure to fictional trials. The assumptions, images and expectations that may be cultivated by fictional courtroom dramas -- such as preconceived notions of innocence and guilt, the generation of boredom and restlessness when real trials are not fast-paced and dramatic, the nature of evidence, and the tendency for witnesses to expect to be tricked or ridiculed (14) -- need to be examined in light of the production, content, and consequences of exposure to actual trials on television.

Learning from Television

Television is our nation's most common and constant learning environment, as well as the mainstream of the culture. In the typical American home, the set is on for more than six hours each day, engaging its audience in a ritual most people perform with little selectivity or deviation.

Presidents, policemen, judges, spies, and celebrities are familiar parts of a selective, synthetic, symbolic environment of entertainment and news in which we grow up and learn most of what we know in common. The classifications of the print era -- the relatively sharp differentiations between news and drama, for example -- do not apply to television. Heavy viewers watch more of everything. Different programs complement and reinforce each other as they entertain the same audiences and repeat similar propositions about life and society.

Though television is only one source of citizens' information about courts and law (15), it may well be the single most common and pervasive source of shared cultural myths and imagery. Typical viewers of dramatic network programs will see 30 police officers, seven lawyers, and three judges every week. Two-thirds of these lawyers work on criminal cases, mostly murder.

Over the past twelve years, Cultural Indicators research at The Annenberg School of Communications has found that the amount of time people spend "living" in the world of television makes an independent contribution to their conceptions of social reality (16). Heavy viewers of television, even when other factors are held constant, report images and assumptions about crime and violence, interpersonal mistrust, occupations, age and sex-roles, health, science, and other issues which parallel television portrayals (17). Television viewing, in short, absorbs a range of otherwise diverse perspectives into its patterned, standardized, homogeneous mainstream.

The implications of these findings about television assume added importance when juxtaposed with the controversies over cameras in the courtrooms. What will broadcasters show of courtrooms on the evening news? How will viewers assimilate those images?

Research Questions

The question of the content of televised materials is a particularly controversial one, giving rise to debates about how the media will, in fact, portray courtrooms. The Supreme Court in Chandler remarked:

> Selection of which trials, or parts of trials, to broadcast will inevitably be made not by judges but by the media, and will be governed by such factors as the status and position of the accused--or of the victim; the effect may be to titillate rather than to educate and inform (18).

In light of the policy issues and relevant prior research, we shall address three broad empirical questions: (1) what is the content of television broadcasts of courtroom coverage; (2) what are the institutional processes through which the television media select and edit courtroom materials for broadcast; and (3) what is the impact of these materials on the viewing audience's understanding of the judicial system.

RESEARCH METHODOLOGY

We propose to conduct empirical research into these three broad areas in two states -- one state that permits cameras inside the courtroom (for example, Florida or Rhode Island) and one state that does not (e.g., Illinois) (19).

Institutional Processes

Extended, open-ended interviews will be conducted with members of the news media, including local television station managers, and the reporters and camerapersons regularly assigned to courthouses. We will conduct these interviews at each of the three television network stations in both of the research sites. We anticipate interviewing roughly ten or more persons at each station, with the actual number depending upon the size and internal structure of the stations. Some of these informants whom we determine, in the course of our interviewing, to be especially critical to the shaping of news about courts and the legal system will be interviewed more than once.

These interviews will focus on how judgments about "newsworthiness" are operationalized in the studio and in the field. We will probe for the influences of external forces on definitions of newsworthiness, such as limited budgetary resources and technical constraints. We will also examine how the constraints of available time segments and scheduling influence definitions of news. Finally, we will examine how the commercial character of television and its concomitant quest for ratings affect standards of newsworthiness. We will probe these issues for the news arena in general, and for court/legal system news in particular (20). In the state permitting cameras inside the courtroom, we will particularly seek to determine the media's view of how this innovation has impacted upon each station's coverage of courts. And by comparing the responses and viewpoints of media personnel in the two states, we can further suggest how the availability of cameras inside the courtroom may influence the nature of television news coverage of courts and the legal system.

Finally, we will also interview a small sample of judges, prosecutors and defense attorneys in each of the two research sites. Our purpose here is to examine the relationships between media professionals and courtroom workgroup members who either have participated in televised trials (in the camera state) or who have been the subject of extensive television reporting of trials (in the non-camera state). We seek to understand--in both states--the process by which courtrooms and cases are selected for various types of television coverage. Is it the nature of the case, or the visibility of the victim or defendant or the personality of the trial judge, or the prominence of the attorneys, or some other mix of criteria that lead television stations to or away from particular court events? Thus, our interviews with courtroom participants will partially provide a much-needed check against the perceptions of television station managers, reporters and camerapersons (21).

Message System Analysis

The content of three kinds of news program messages will be analyzed and compared. From a site in the state that permits television coverage of trials we will analyze (1) a sample of routine court news items on television that do not include direct broadcasts from the courtroom and (2) news items from telecasts made directly from the courtrooms. The third kind will be a sample of routine court news items from the site in the state that does not permit cameras in the courtroom. We thus will be able to conduct a comparative analysis to isolate key characteristics of televised trials and compare them with trials reported but not televised. This analysis will permit us to ascertain what aspects of courtroom procedures (e.g.,motions, hearings, trials, etc.) are selected for television coverage, the demographic characteristics of televised participants and the "action structure" of the trial, including patterns of innocence or guilt. We shall also compare the results of this analysis with empirical research findings on courts (22), and with images from television entertainment programs (see below).

We will conduct message system analysis on a sample of programs selected from existing archives of prime-time network dramatic programs. Using the archive of 15 week-long samples of dramatic television programs aried between 1969 and 1981 available at The Annenberg School of Communications, we will analyze the portrayal of the courts and legal proceedings in a large sample of prime-time programs in which courts and trials appear. We will also examine the characters who populate these programs, in particular the characteristics of those who are cast in legal -- or court-related -- roles, such as judges, lawyers, defendants, and witnesses. Message System Analysis methodology (sampling, training, etc.) is presented in detail in Appendix A.

Analysis of Effects on the Viewing Audience

Surveys will be conducted on random probability samples of citizens in the site in the state that permits television in the courts and in the one that does not permit televised trials. Approximately 500 to 750 interviews will be conducted in each site. In order to collect a substantial amount of information from a large number of people in the most efficient manner, interviews will be conducted by telephone. We will design the questionaire and execute all phases of the analysis; a professional survey firm will draw the

samples and do the actual interviewing.

The findings from our two previous stages will be transformed into testable hypotheses about the effects of trial broadcasts. The dependent variables will be developed from the findings of the message system analysis. Based on the patterns observed in fictional television trials, and the ways in which they match or contradict the patterns presented in broadcasts of actual trials, we will administer to respondents items that measure selected assumptions, expectations, and experience with courtroom proceedings. Specifically, we will examine people's knowledge of court procedures, presumptions about innocence and guilt, attitudes towards attorneys, and understanding of the purpose(s) of criminal, civil, and specialized (e.g., small claims or housing) courts.

The analytical strategy is based on a comparison of viewers who frequently watch televised trials with viewers who infrequently watch televised trials, controlling for demographic characteristics of viewers, overall levels of viewing, and direct experience with courtrooms. In other words, we shall isolate patterns of responses to questions about courtroom procedure given by specific groups who watch televised trials and compare them to patterns of responses given by similar groups of heavy and light viewers who cannot watch real courtroom broadcasts. If televised trials improve understanding, the first group should reflect that in comparison to the others. For example, highly educated light viewers of television may exhibit a more correct understanding of courtroom procedure than both highly educated heavy viewers and all less educated viewers. Where will highly educated frequent viewers of televised trials fit into that pattern? Will their understanding be superior to either light viewers or heavy viewers of television drama? Or will they tend to reflect the same (or greater) misconceptions as those who do not have televised trials available, on various levels of viewing and courtoom experience?

This approach will permit us to assess the basic educational claim advanced by supporters of cameras inside the courtroom. We can determine whether exposure to actual trials on television counteracts, or otherwise mediates the cultivation of conceptions about courts and the legal process, taking a citizen's direct experience with courtrooms and his or her personal background into account.

Benefits of Proposed Research

The proposed research will have both policy and theoretical value. It will contribute to the scientific understanding of how television reports and shapes legal information and symbols in

prime-time entertainment as well as news programs. By doing so, the research can facilitate a better understanding between local courts and the local media. The research can inform judges, court administrators, and local television stations of informational or ideological biases in television coverage, thereby providing a basis for corrective action. The research can also inform the work of increasingly prevalent bench-bar-media committees that struggle with the difficult issues of camera coverage in local communities. Such committees look for guidance as to how to balance the rights of defendants, media requests for access, and the potential educational value to the local citizenry in individual instances. This research may also inform the decisions of future appellate courts that are asked to weigh, in individual cases, the general educational benefits of camera coverage against the specific harm alleged by a particular defendant.

Dissemination

We anticipate the broadest dissemination of the findings and policy implications from the study, to reach the audiences of scholars, trial judges, court administrators, news producers, and appellate courts noted above. This would include the publication of a monograph by the American Judicature Society, designed to inform and assist bench-bar-media committees. We would also publish articles in the scholarly journals of communications, law, and the social sciences, and present papers at conferences where media and legal representataives normally attend.

Collaboration

The collaboration of the American Judicature Society and The Annenberg School of Communications at the University of Pennsylvania unites two well-known institutions from the fields of socio-legal research and communications research, respectively. Both institutions and their professional staffs have broad experience in empirical research. The Annenberg researchers have published extensively in quantitative resesarch, whereas AJS has particularly emphasized qualitative research.

In the proposed study, AJS would bear the responsibility for the interviews of media and court participants in the television trial research sites. The Annenberg School researchers would bear primary responsibility for the content analysis of television broadcasts and the viewer survey, with supportive assistance in the analytic and reporting phases from AJS.

FOOTNOTES

(1) Chandler v. Florida, 49 LW 4146

(2) The full text of Canon 35 is as follows:

> "Proceedings in 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 of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted." 62 A.B.A. Rep. 1134-1135 (1937).

(3) 77 A.B.A. Rep. 610-611 (1952).

(4) Some states permit cameras on an experimental basis, whereas other states allow them on a permanent basis. In some states, only appellate proceedings may be covered; in other states, both trial and appellate proceedings may be covered. And in some states, most or all parties (e.g., the defendant, attorney, witnesses, and jurors) must agree to the cameras, whereas in other states the trial judge holds sole discretion. Thus, the range of conditions under which cameras are permitted is highly variable across the states.

(5) The three committees are: Standing Committee on Association Standards for Criminal Justice; Standing Committee on Association Communications; and Standing Committee on Ethics and Professional Responsibility. Each of these committees was represented at the American Bar Association's "Open Meeting on Cameras in the Courtroom," January 24, 1982 in Chicago.

(6) See, for example, Report of the Wisconsin Supreme Court Committee to Monitor and Evalute the Use of Audio and Visual Equipment in the Courtroom, April 1, 1979; also, A Sample Survey of the Attitudes of Individuals Associated with Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts Between July 5, 1977 and June 30, 1978, prepared by the Judicial Planning Coordination Unit, Office of the Florida State Court Administrator, November 1, 1978.

(7) See, for example, the concerns expressed in Estes v. Texas, 381 US 532 (1965).

(8) See, for example, Note, "Televised Trials: Constitutional Constraints, Practical Implications and State Experimentation," 9 Loyola (Chi) Law Journal 910 (1978). See also, Estes v. Texas.

(9) James L. Hoyt, "Courtroom Coverage: The Effects of Being Televised," 21 Journal of Broadcasting (1977), p.493.

(10) Chandler v. Florida, 49 LW 4147.

(11) "Open Meeting on Cameras in the Courtroom," see note 5 above.

(12) This has been the primary concern, of course, in the legal literature. See, for example, L. Tornquist and K. Griffall, "Television in the Courtroom: Devil or Saint," 17 Willamette Law Review 345 (1981); W. Stone and S. Edlin, "T.V. or not T.V.: Televised and Photograhic Coverage of Trials," 29 Mercer Law Review 1119 (1978).

(13) According to a recent national survey, "The general public's knowledge of and direct experience with courts is low." See Yankelovich, Skelly and White, Inc., Highlights of a Natinal Survey of the General Public, Judges, Lawyers, and Community Leaders (Williamsburg, Va.: National Center for State Courts), p.5.

(14) George Gerbner, "Trial by Television: Are We at the Point of No Return?" Judicature, April 1980, 63:9, 416-426.

(15) Yankelovich, Skelly and White, Inc. report that

> "formal education and the media are the public's principal sources of information about courts" (p.9), see note 13 above.

(16) George Gerbner and Larry Gross, "Living with Television The Violence Profile." Journal of Communication Spring 1976, pp.173-199.

(17) George Gerbner, Larry Gross, Michael Morgan and Nancy Signorielli, "The 'Mainstreaming' of America: Violence Profile No. 11." Journal of Communication, Fall 1980, pp. 10-29; George Gerbner, Larry Gross, Nancy Signorielli, and Michael Morgan, "Aging with Television: Images on Television Drama and Conceptions of Social Reality." Journal of Communication Winter 1980, pp. 37-47; George Gerbner, Larry Gross, Nancy Signorielli, Michael Morgan, and Marilyn Jackson-Beeck. "The Demonstration of Power: Violence Profile No. 10." Journal of Communication, Summer 1979, pp.177-196.

(18) Chandler v. Florida, 49 LW 4146-4147.

(19) The choice of Florida is suggested by the large amount of broadcast coverage of courtrooms there, facilitated by state court rules that do not require consent of the defendant. Illinois is suggested by its comparability with Florida along

relevant demograhic factors such as population, urban-rural mix, racial mix, educational level, etc.

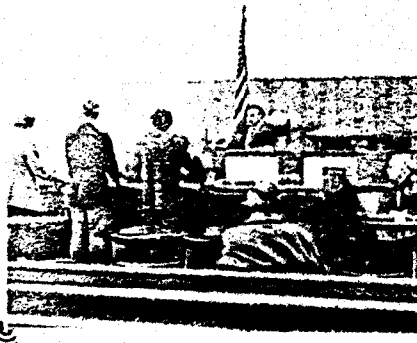
(20) There is a slowly-growing literature analyzing how news is reported, interpreted, and modified by the media. See, for example, G. Tuchman, Making_News (New York: Free Press, 1978); Herbert Gans, Deciding_What's_News (New York: Vintage, 1980); and D. Altheide, Creating_Reality, (Beverly Hills and London: Sage Publications, 1976).

(21) The interviews will proceed from a flexible, loosely-structured interview guide. All interviews will be tape-reporded and transcribed verbatim for subsequent analysis. For a recent discussion of issues related to interview methodology, see Michael Q. Patton, Qualitative_Evaluation_Methods (Beverly Hills and London: Sage Publications, 1980).

(22) We will draw upon reference literature that provides data on the proportion of criminal and civil case filings and trials, the proportion of pleas, dismissals and trials, conviction ratios, the race, sex, and age of criminal defendants, etc. for the states and locales under study, or nationally if localized data are not available.

Trial by television: Are we at the point of no return?

by George Gerbner



Television reshapes the way we perceive reality. Before we allow TV in even one more courtroom, we must know more about its effects on trials and on our image of justice.

Television is moving into the American courtroom. The sudden rush seems to fly in the face of the known risks of prejudice, the certainty of endless litigation, a decision of the Supreme Court, resistance on the federal level, and a vote last year by the American Bar Association to uphold its advisory ban on cameras in the courtroom.

Some speakers called the ABA stand "a rear guard action long after the dawn of the electronic age."[1] Since television made its claims on behalf of the public's right to know, resistant delegates appeared to be in a last-ditch defense against the inevitable march of freedom. In the most widely reported comment, former FCC Commissioner and Washington attorney Lee Loevinger told the ABA delegates: "You're fooling yourselves. I don't think we have any choice. We'll continue to get television coverage whether we like it or not."[2]

Events may prove Loevinger right. Television has already entered courtrooms in the majority of states or is about to do so for "experiments" whose long-range effects no one is prepared to evaluate seriously. No meaningful research has yet demonstrated the validity of arguments for television trials or the benefits from trials already televised. No one has yet investigated the potentially far-reaching social impact and institutional consequences of plugging the administration of criminal justice into a system geared to entertainment and sales.

Our organs of public discussion, the mass media, are hardly disinterested parties in the debate. They are not motivated, to say the least, to expose their own blindspots and limitations. As a result, the public debate has been conducted on narrow, obsolete, and at times misleading grounds.

- Freedom to report is not the issue. Journalists—both broadcast and print—are free to cover most trials. The fact that they choose to report only a few of the most dramatic ones already warps public understanding of the judicial process. Television trials would not help that. They would only add audiovisual spectacle and further dramatic diversion to the reporting.
- Obtrusive equipment and courtroom decorum are no longer issues. Video technology can be unobtrusive and can even reduce the movement of reporters during the trial by providing monitors for them outside the courtroom.
- Even video recording is not the issue. Canon 3A(7) of the Code of Judicial Conduct already permits recording of trials for educational purposes, so long as the tapes are shown after the trial and all appeals have been exhausted.

The only remaining issue is whether the addition of video spectacle to the already existing press and broadcast coverage would reduce or increase the risk of prejudice and whether it would correct or further extend the viewers' already distorted image of the court. That issue has been addressed—and then ignored. The Supreme Court has said that the sudden notoriety of judges, jurors, attorneys, and defendants and "heightened public clamor" would "inevitably result in prejudice."[3] And prejudice could extend far beyond the courtroom since television profoundly affects the social and political climate and the institutional setting in which courts work.

Altering the historic relationship

Trials by television are likely to alter the historic relationship between two institutions that have largely divergent and partially conflicting functions. Popular entertainment and news via mass media represent the conventional cultural pressures of the social order. The judicial process, however, represents an effort to adjudicate individual cases according to law. That distinction is crucial to this whole discussion.

In criminal cases, the most likely to be televised, a fair trial means determination of guilt of the specific offense charged, and not, as in general entertainment and news, whether a person has done something bad for which he or she should be punished. In fact, a trial must proceed as independently as possible from conventional moral pressures and the popular clamor of the moment. Televising trials may

The author wishes to thank those who read earlier drafts of this article and provided helpful criticism: Janice Bellace, Jo Brandry, Paul Bender, Cathy Boggs, Michael Botein, Stephen Burbank, Paul J. Fink, Larry Gross, Joel Hirschhorn, Robert Lewis Shayon, Daniel Schiller, and Louis B. Schwartz.

1. *Bar Association Votes to Continue Its Ban on TV and Radio in Courts*, N. Y. TIMES, February 13, 1979, p. A16.
2. *Id.*
3. Estes v. Texas, 381 U.S. 532, 538-49 (1965).

"For heaven's sake, man, look ashamed. We're being televised."

Drawing by Levin; © 1979 The New Yorker Magazine, Inc.

erode independence of judges to do justice in each case; it would do nothing to ensure greater fairness that existing media scrutiny could not do.

The erosion of independence will be hard to track and difficult to measure. It will occur as television trials, despite any safeguards within the court,[4] are selected and edited to fit the existing patterns of televison. We may be on the verge of drifting into a major institutional transformation while assuming that we are only making a few public-spirited adjustments.

A review of research on the impact of television on American institutions shows that it has reshaped politics, changed the nature of sports and business, transformed family life and the socialization of children, and affected public security and the enforcement of laws.[5] The debate over cameras in the courts may be our last opportunity to consider the evidence already available on the influence of television on public images of law and the courts, and to halt the rush toward televised trials until we can take a fresh look at the problem.

4. Even safeguards require vigorous enforcement, which is impractical. An analysis of the effectiveness of ABA and state press-bar guidelines covering the release of pre-trial information, and reported in bar and press polls to work "reasonably well," found that 67.7 per cent of the stories violated the agreement. Tankard, Middleton and Rimmer, *Compliance with American Bar Association Fair Trial-Free Press Guidelines*, 56 JOURNALISM Q. 464, 468 (Autumn 1979).

5. Comstock, *The Impact of Television on American Institutions*, 28 J. OF COM. 12 (Spring 1978).

Television as a system

Television is our common and constant learning environment. Our children are born into it. In the typical home, the family watches more than six hours of TV a day in a ritual most people perform with little selectivity or deviation.

Television demands no mobility, literacy, or concentrated attention. Its repetitive patterns come into the home and show as well as tell about people and society. Presidents, policemen, judges, spies and celebrities are familiar parts of a selective, synthetic, symbolic environment of entertainment and news in which we grow up and learn most of what we know in common.

Different kinds of programs serve the same basic formula: they assemble viewers and sell them at the least cost. The classifications of the print era—the relatively sharp differentiation between news, drama, documentary, etc.—do not apply to television. Heavy viewers watch more of everything. Different programs complement and reinforce each other as they entertain the same audiences and repeat the same propositions about life and society. Most program formulas present different aspects of the same symbolic world made to the same specifications of television and its sponsors.

The process of socialization via entertainment is an exercise in social typing. It sets the norms of society by showing their frequent violations. Offenders and their victims cast for most dramatic attention (or selected as "newsworthy") tend to be those who fit established preconceptions.[6]

Lessons in justice and power

Most action on television revolves around some demonstration of justice and power. Violence, the stock dramatic device of that demonstration, gives us the cheapest and quickest lesson on who should get away with what against whom. Two-thirds of all major dramatic characters are involved in some violence. When women and minorities are involved,

6. *See*, e.g., Jones, *The Press as Metropolitan Monitor*, 40 PUB. OPINION Q. 239 (Summer 1976); Smith, *Mythic Elements in Television News*, 29 J. OF COM. 75 (Winter 1979); Graber, *Is Crime News Coverage Excessive?* 29 J. OF COM. 81 (Summer 1979); Mishra, *How Commerical Television Networks Cover News of Law Enforcement*, 56 JOURNALISM Q. 611 (Autumn 1979).

they are more likely to be victims than victimizers, and they are generally underrepresented and devalued in many other ways.[7] Casting and fate on television combine to present—and to cultivate—a social structure typically ruled by force and dominated by stereotypes.

According to a study of television drama and the law by Albert S. Tedesco, crime on televison is not only much more rampant than in real life but also very different.[8] Television characters are the targets of crime about 10 times as often as people in the real world. Nearly 41 per cent of all television crimes are murders; the next leading crime amounts to only 5 per cent of all TV crimes. A disproportionate number of victims are whites. (In the real world, property crimes are most common and a disproportionate number of victims are blacks.)

Half of all television police make arrests each week, and nine out of 10 times they solve crime by making successful arrests. In real life the clearance rate is about 11 per cent. Arrest sends the suspect into a legal limbo. Tedesco, confirming other investigators, found that the police observe suspect's rights in fewer than two in every 10 cases.

Law in the world of television

Typical viewers of prime time and weekend daytime network shows alone receive the lessons inherent in vivid images of an average of 30 police officers, seven lawyers, and three judges every week.[9] But what do they learn?

A study of 15 prime time police programs telecast in one week found that in all but three the enforcers of the law routinely committed clear violations of constitutional rights.[10] The authors, an attorney and a law professor, conclude:

> The overall image that shows project is clearly one that is alien to the Constitution. Hardly a single viewing hour passes without an illegal search, or a confession obtained by coercion, or the failure to provide counsel. Warrants are not sought or issued, and hardly any mention is made of notifying suspects of their right against self-incrimination.
>
> Scores of citizens uninvolved in the crime under investigation are roughed up, shaken down, or harrassed—by police. Homes, offices, and cars are broken into regularly—by police.... Every such invasion of personal privacy turns up the real, and usually demented, criminal, or is justified because the victim was probably guilty of some crime anyway. Honest, law-abiding citizens are miraculously never hurt by these methods.[11]

The authors wonder if the daily obliteration of rights on TV may not be responsible for their casual violations in real life and for the growing pressure on the courts to conform to the tough omniscience and omnipotence of television justice.[12]

On television, police are the law, virtually isolated from lawyers and the criminal justice system. In 157 crime programs studied by Tedesco a lawyer only once interceded in a police action against a citizen.[13]

Television lawyers are equally removed from real life. Consider these findings by Tedesco:

- Two-thirds work on criminal cases, mostly murder, performing selfless service defending needy clients.
- Nine in 10 television lawyers are wealthier than their clients. Few work for the corporations that in real life employ most lawyers.
- Six out of 10 lawyers defend clients wrong-

7. Gerbner and Signorielli, WOMEN AND MINORITIES IN TELEVISION DRAMA 1969-1978. Philadelphia: The Annenberg School of Communications, University of Pennsylvania, 1969.

8. Tedesco, "Images of the State in Characterizations of Police and Legal Professionals," doctoral dissertation in progress, The Annenberg School of Communications, University of Pennsylvania, Philadelphia.

9. These figures come from our data bank based on the annual monitoring of network television drama since 1967. For a general description, see Gerbner, Gross, Jackson-Beeck, Jeffries-Fox, and Signorielli, *Cultural Indicators: Violence Profile No. 9*, 28 J. OF COM. 176 (Summer 1978).

10. Arons and Katsh, *How TV Cops Flout the Law*, SATURDAY REVIEW, March 19, 1977.

11. *Id.*, at 14.

12. Broadcasting codes requiring that crime must not go unpunished provide a standard of justice seen every day on television that no real system of law enforcement can meet. (For the text of those codes, *see* Cassata and Asante, MASS COMMUNICATIONS: PRINCIPLES AND PRACTICES, Appendix A, "The Codes." New York: Macmillan, 1979.)

This idealized standard sets up courts as a disappointing experience. See THE PUBLIC IMAGE OF THE COURTS: HIGHLIGHTS OF A NATIONAL SURVEY OF THE GENERAL PUBLIC, JUDGES, LAWYERS, AND COMMUNITY LEADERS 17. Williamsburg, Va.: The National Center for State Courts, 1978.

Televised trials selected to contrast legal complexities with the swift justice of Perry Mason would exploit that dissatisfaction. The suggestion that such exposure might hasten necessary reform does not jibe with past performance. A comprehensive review concludes that "With few honorable exceptions, journalists and broadcasters defaulted on their obligation to educate the public on the issues of penal reform." Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics and Prospects*, 1977 DUKE L. J. 224 (1977).

13. Tedesco, *supra* n. 8.

fully accused and eventually acquitted.

- One-third of all television lawyers serve as prosecutors.
- TV lawyers rarely defend professional criminals (who always lose); when they do, the lawyers are likely to be corrupt or criminal themselves.

The scenario of social typing and the confirmation of conventional presumptions—rather than the judicial avoidance of all that—is the substance of the law on television.

The mind of the beholder

Television is also a primary source of our information about occupations. On a test of occupational knowledge children score significantly higher in their knowledge of rare vocations they see frequently on television than their knowledge of more common occupations they seldom see on TV.[14] Children who give television as the source also have more to say about the professions. When we consider all sources of information other than television (but including conversation), we learn that less than half the children named other sources for information about lawyers and less than one third named other sources for information about judges.[15]

The majority could not cite any difference between lawyers on television and in real life; 73 per cent could not cite any differences between judges on television and in real life. As the researcher noted, "...viewing of television was found to cultivate an understanding of the world of law enforcement consistent with television's somewhat inaccurate portrayals."[16]

Is there any way to calculate the effects upon adults? Research conducted so far can show the background of television-cultivated conceptions of social reality into which televised trials will have to fit. The research found that exposure to television cultivates a heightened sense of living in a mean and violent world. Again, consider these findings.[17]

- Heavy viewers (compared to light viewer in the same age, sex, and socio-economi groups) exhibit a consistently higher degree o insecurity, mistrust, and quest for protection.
- They give higher estimates than light viewers of their chances of encountering violence, the proportion of violent crimes, the number of people involved in law enforcement, the danger of walking a city street at night, and the number of times policemen use their guns.
- They are more likely than light viewers to agree that people just look out for themselves, try to take advantage of others, and cannot be trusted.
- And they are more likely than their light viewing neighbors to seek protection and take protective measures themselves. All in all, television viewing appears to cultivate relatively anxious hard-line attitudes among viewers of most types, particularly the young.

Are trials made-for-TV?

But if television begins broadcasting trials, won't it give a more accurate portrayal than fiction? Probably not. Selected courtrooms will become program originating locations, transporting the sights and sounds of real courtrooms into millions of homes conditioned to a weekly ritual of courtroom and crime drama. Trials will be picked and edited to fit that dramatic ritual.

The problem is that the opaque reality of the courtroom is less illuminating of the judicial process than is translucent fiction. One must go behind the scenes to see how things really work. Surface appearances are more likely to conceal than to reveal how the judicial system operates. Television will create popular spectacles of great appeal but deceptive authenticity as it selects and interprets trials to fit the existing pattern of law in the world of television.

Indeed, the media have already recognized that the public, so woefully misinformed about the courts, is not very interested in the issues that really occupy the judicial system. The exceptions are a few highly visible and politically charged controversies such as desegregation,

14. DeFleur and DeFleur, *The Relative Contribution of Television as a Learning Source for Children's Occupational Knowledge*, 32 Am. Soc. Rev. 777 (October 1964).

15. Jeffries-Fox, "Television's Contribution to Young People's Conceptions about Occupations," unpublished doctoral dissertation, The Annenberg School of Communications, University of Pennsylvania, Philadelphia (1978).

16. *Id.*, at 208-9

17. For the most recent reports, and references to previous studies, *see* Gerbner, Gross, Signorielli, Morgan, and Jackson-Beeck, *The Demonstration of Power: Violence Profile No. 10*, 29 J. of Com. 177 (Summer 1979).

The purpose of open trials is to help protect the accused, not to entertain or even to educate.

prayer in the public schools, capital punishment, abortion, and "coddling" defendants in criminal cases.[18] Public interest too often results from publicity the media give to claims of judicial excess and leniency, and from organized groups objecting to the enforcement of laws they dislike in the first place.

Television thus represents a process that sets cultural norms and generates anxieties and insecurities that can find release in dependence on strong authority and in harsh or repressive measures. These social functions of media compete and conflict with those of the courts. The history of troubled relations between the two institutions shows a precarious balance reached at great cost over the centuries.

Institutions at cross-purposes

Entertainment is the cultivation of conventional morality. It "entertains" the basic values and norms of the community and cultivates conformity to those norms. An important part of that process is the exploitation of popular prejudices and the cultivation of public support for the suppression of threats and challenges to the social order.

From the arenas of the Roman empire to this very day, show trials, highly publicized confessions, public tribunals and executions have helped to reaffirm the legitimacy of contemporary values. The most widely frequented shows in London just emerging from the Middle Ages were public executions, and

> even after these were abolished, attendance at murder trials remained as a more socially restricted but nevertheless much sought-after entertainment. A visit to a hanging might well, one presumes, have followed a gentle prodding with a stick of some madman at Bedlam.[19]

The great show trials and public confessions of the twentieth century occurred under dictatorships and during periods of witchhunt in democracies. They were a part of the entertainment mainstream, now joined by much of what we call news, compelling attention, exposing deviation, spreading fear, and cultivating conformity.[20]

The struggle to remove trials from the public arena parallelled the fight against secret proceedings, the Star Chamber. In fact, the two are sides of the same coin. Arbitrary power wants no public witness to its private deliberations but needs all the hoopla it can get to legitimize its actions.

The integrity and independence of judicial proceedings serve to protect the accused from both arbitrary power and public prejudice. The purpose of open trials is to help assure observance of these protections, not to entertain or even to educate.

Why Canon 35 was adopted

General entertainment and specific rights have never mixed well. Chief Justice Earl Warren pointed out in *Estes v. Texas* that "In the early days of our country's development, the entertainment a trial might provide often tended to obfuscate its proper role."[21] And he continued, citing other accounts:

> The people thought holding court one of the greatest performances...the country folk would crowd in for ten miles to hear these 'great lawyers' plead; and it was a secondary matter with them whether he won or lost his case, so long as the 'pleading' was loud and long.
>
> In early frontier America, when no motion pic-

18. Schwartz, *supra* n. 12.

19. Haskell, *Yesterday's Today Show*, N. Y. Rev. of Books, October 12, 1978, p. 55.

20. The most recent state to use television trials in a systematic way is the new Islamic government of Iran which broadcast them and aired "full confessions" nightly on television. "2 Convicted of Torture Face Iran Firing Squad," N. Y. Times, June 25, 1979, p. A1.

21. Estes v. Texas, 381 U.S. 532, 570-71 (Warren, C.J., concurring) (1965).

tures, no television, and no radio provided entertainment, trial day in the country was like fair day, and from near and far citizens young and old converged on the county seat. The criminal trial was the theater and spectaculum of old rural America...All too easily lawyers and judges became part-time actors at the bar....[22]

When functions of public entertainment and civic responsibility shifted to the press, new problems emerged. Crime and court reporting were the big guns in the circulation wars of the 19th century. They were also weapons of the press on the way to establishing itself as the organ of business community rather than of local governments and parties upon whose patronage it had once depended.

In that process the press shook up some bloated and venal local administrations, police and court systems. But it also assumed the responsibility for conducting trials by newspaper for what James Gordon Bennett of the New York *Herald* called the "living Jury of the Nation," ignoring the essential contrast between jury box and arena.

Things became so bad that the American Bar Association appointed a special committee in 1924 to curb "unwholesome tendencies" in news reporting. In 1927, the committee reported that "There can be no more opportune time than the present for the press to cease making vulgar amusement of our law en-

22. *Id.*

Do the media defend the rights of others?

With the prospect of TV rather than the courts calling the shots, it may be instructive to consider the record of the press in using its rights to defend the rights of others—especially those with no money, clout, or popular appeal.

A study of metropolitan newspapers' coverage of First Amendment cases before the Supreme Court shows considerably greater concern with press rights than with the other basic freedoms. The study suggests that press advocacy of freedom is largely self-serving and could not be expected to help uphold rights inimical or irrelevant to its own.[1]

The press also has a poor record of using information made available by the courts. Of the 139 most significant decisions announced by the California Supreme Court in 1972, a sample of 10 state daily newspapers showed that they published reports on only one-fifth of the cases. Only conflict on the court helped draw press attention to a case.[2] The first time the media ever paid sustained and compelling attention to the U.S. Supreme Court, even going to the extent of serializing the story, was the appearance of the personalized account of a thousand leaks, *The Brethren* by Bob Woodward and Scott Armstrong.[3]

In the most sensitive area of citizens' rights, the area of crime reporting, the media work closely with the police and generally follow what one survey of research calls "the police version of crime."[4] Most studies agree that crime news generally gives a misleading and prejudicial account of the frequency and nature of crime in a community[5] and that such coverage provides the media "with a vehicle for communication to readers of the necessity for strong social controls."[6]

Broadcast coverage is, if anything, the most slanted toward the police view of due process, especially since the minicam gave crews the ability to follow police tips to the field and to concentrate on the violent and the spectacular. A 14-week survey of community coverage found the programming "often arbitrary, superficial, or both," a casualty of "the so-called 'realities' of the TV industry...."[7]

—*George Gerbner*

1. Hale, *A Comparison of Coverage of Speech and Press Verdicts of Supreme Court*, 56 JOURNALISM Q. 43 (Spring 1979).

2. Hale, *Press Releases vs. Newspaper Coverage of California Supreme Court Decisions*, 55 JOURNALISM Q. 696 (Winter 1978).

3. Armstrong and Woodward, THE BRETHREN. New York: Simon and Schuster, 1979.

4. Sherizen, *Social Creation of Crime News: All the News Fitted to Print*, in Winick, ed., DEVIANCE AND MASS MEDIA 222. Beverly Hills, California: Sage, 1978.

5. *See, e.g.*, Jones, *The Press as Metropolitan Monitor*, 40 PUB. OPINION Q. 239-44 (1976).

6. Lippman, *The Law of Contempt: Fair Jury Trials and Free Press in Australia*, 5 AUSTRALIAN SCAN: JOURNAL OF HUMAN COMMUNICATION 20 (December 1978-May 1979).

7. *Public affairs weak in New York, says New School report* (a survey by the Lab for Public Affairs Television at the New School's Center for New York City Affairs), BROADCASTING, February 20, 1978, p. 60.

forcement institutions...." Instead, however, crime photographers entered the courtroom and disrupted proceedings and even sneaked pictures of convicted murderers dying in the electric chair.[23]

The 1935 trial of Bruno Richard Hauptmann, accused of kidnapping the 20-month old son of Anne and Charles Lindbergh, attracted an army of reporters and photographers.[24] The ABA called the Hauptmann trial "the most spectacular and depressing example of improper publicity and professional misconduct ever presented to the people of the United States in a criminal trial."[25] As a result, the ABA passed Canon 35 in its Canons of Judicial Ethics, a ban on cameras and microphones in the courtroom.[26]

But it took two more landmark cases to educate the public—at least for a while—about the threat that television poses to justice. One was the 1954 murder trial and conviction of Dr. Sam Sheppard; the other, the 1965 swindle trial and conviction of Billie Sol Estes.[27] Both convictions were eventually reversed because of massive, pervasive and prejudicial publicity.

TV as an 'irrelevant factor'

A "circus atmosphere" prevailing at the Estes trial is often considered the cause of the reversal of the conviction. Actually, however, other considerations, as valid today as they were then, weighed heavily in the decision of the Court.

Indeed, Mr. Justice Harlan was of the view that "a circus atmosphere" was *not* the problem in *Estes*:

> Cables, kleig lights, interviews with principal participants, commentary on their performances, "commercials" at frequent intervals, special wearing apparel and makeup for the trial participants—certainly such things would not conduce to the sound administration of justice by an acceptable standard. But that is not the case before us. We must judge television as we find it in this trial—relatively unobtrusive, with the cameras contained in a booth at the back of the courtroom.[28]

23. Floren, *The Camera Comes to Court*. FREEDOM OF INFORMATION CENTER REPORT No. 3960. University of Missouri (October 1978).
24. *Id.*
25. Francois, MASS MEDIA LAW AND REGULATION 272 (second edition). Columbus, Ohio: Grid, Inc., 1978.
26. *Id.*, at 307.
27. *Id.*, at 273-4.
28. Estes v. Texas, 381 U.S. 532, 588 (Harlan, J., concurring) (1965).

'It is only the notorious trial which will be broadcast,' Justice Clark warned in Estes v. Texas.

Mr. Justice Clark's opinion for the Court also noted features whose relevance only increased in time.[29] He acknowledged that the Sixth Amendment guarantees a "public trial" to the "accused."

> It is said, however, that the freedoms granted in the First Amendment extend the right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between newspapers and television. This is a misconception of the right of the press... The television and radio reporter has the same privilege. All are entitled to the same rights as the general public.[30]

Television does not contribute materially to the courts objective of ascertaining the truth, Justice Clark argued. In fact, he said, the introduction of TV represents "the injection of an irrelevant factor into court proceedings...."[31]

It is the sensational trial that most people will actually see, Justice Clark warned.

> ...From the moment the trial judge announces that a case will be televised it becomes a cause celebre... The whole community, including prospective jurors, becomes interested in all the morbid details surrounding it... And we must remember that realistically it is only the notorious trial which will be broadcast because of the necessity for paid sponsorship.[32]

29. *Id.*, at 538-549.
30. *Id.*
31. *Id.*
32. *Id.*

And the effect upon justice is almost inevitable.

> ...If a community be hostile to an accused, a televised juror, realizing that he must return to neighbors who saw the trial themselves, may well be led 'not to hold the balance nice, clear, and true between the State and accused....'
>
> ...But we know that distractions are not caused solely by the physical presence of the cameras and its telltale red lights. It is the awareness of the fact of telecasting that is felt...throughout the trial.
>
> ....
>
> ...The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable....[33]

Justice Clark acknowledged that newspaper coverage results in some of these same problems, but he said that "the circumstances and extraneous influences...in the televised trial are far more serious."

Television would put new responsibilities on the trial judge, too. "[I]t is difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly and through the shaping of public opinion," Justice Clark wrote.[34] As soon as one judge permits telecasting, other judges—especially elected ones—could hardly resist the pressures to do the same.

Finally, Justice Clark said, the defendant would suffer if television were introduced.

> A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or city or nationwide arena. The heightened public clamor resulting from radio and television coverage will inevitably result in prejudice. Trial by television is, therefore, foreign to our system...[35]

The trend today

The drawing power of the Watergate impeachment hearings and the lure of sensational trials has lately led to mounting media pressures to open the courts to cameras. But look at what has happened so far.

- In an Ohio case, the defendant, charged with the rape and murder of a nine-year-old girl, was allowed to be hypnotized during the examination, creating high viewer interest in the trial.[36]

As soon as one judge permits telecasting, others can hardly resist the pressures to do the same.

- *Hustler* magazine owner Larry Flynt was shot during a recess of the televised trial in which he was charged with distributing obscene material.[37]
- The murder-robbery trial of 17-year-old Ronny Zamora, televised during a one-year "experiment" in the state of Florida, became a national media sensation because television was "on trial": in a novel defense, Zamora's attorney charged that TV had induced his insanity through "involuntary subliminal intoxication." Ratings reportedly exceeded those of the Johnny Carson Show.[38]

In an effort to limit some of the adverse effects of broadcasting, several states—including Florida, Wisconsin and now Iowa—give their judges the power to decide whether to turn off the cameras for a particular witness or a particular case. Florida, for example, allows a judge to exclude electronic media if he finds that such coverage will affect a particular person much differently than it affects other people—and differently from the ways in which print media affect him or her.[39] Iowa allows the judge to refuse media coverage if a

33. *Id.*
34. *Id.*
35. *Id.*
36. White, *Cameras in the Courtroom: A U.S. Survey*, 60 JOURNALISM MONOGRAPHS 30 (April 1979).
37. *Id.*, at 16.
38. *Id.*, at 26.
39. Hoyt, *Prohibiting courtroom photography: it's up to the judge in Florida and Wisconsin*, 63 JUDICATURE 290 (December-January 1980).

witness can show "good cause."[40] But how can a witness or defendant posibly know, let alone show, such a thing?

Already the Florida District Court of Appeals has overturned a conviction because the judge allowed the trial to be covered despite an objection and without "a full evidentiary hearing on the possible effects of coverage."[41] In another Miami case, a defendant has appealed a $1.6 million judgment on grounds that the jury returned a "newsworthy verdict in hope and expectation that they would receive further television coverage."[42] And now a case from the Florida "experiment" is headed for the U.S. Supreme Court, which will soon decide whether the presence of television denied the defendants a fair and impartial trial.[43]

The current offensive

Camera crews are not journalists; they are union technicians hauling and handling costly equipment whose every move and minute must be carefully budgeted. Soon after the Florida "experiment" was declared a success, television prepared for the big push. ABC's Steve Tello, who had run the broadcast pool for the groundbreaking *Zamora* affair, was assigned to the biggest show yet in the line of legal spectaculars, the multiple college-girl sex murder trial of Theodore Bundy.

With its lurid and intimate details and type casting fitting the dramatic media pattern, Bundy became the first nationally televised, courtroom-originated, real-life horror show of the new era. It cost ABC an estimated $2 million to field the crew and carry the event, a good investment by program cost and ratings standards. The judge, Edward Cowart, pronouncing his third death sentence, called the coverage "the most accurate reporting of a trial."[44] Bundy denounced the coverage and claimed that he had been victimized by media "sharks." *Broadcasting* magazine declared "Verdict Is In Favor Of TV In Bundy Trial."[45]

Emboldened by their success and impatient with legal inhibitions, the media have launched a new offensive. An example was the careful staging of a demonstration of "cameras in the courtroom" at the August 1979 Dallas meeting of the American Bar Association. Invited by the ABA, featuring a debate and a mock TV trial, the demonstration was designed to show, in the words of National Association of Broadcasters President Vincent T. Wasilevsky, "how effectively the electronic media can operate without any interference with the dignity and decorum of the proceedings."[46]

Steve Tello of *Zamora* and *Bundy* fame was again pressed into service. Learning a lesson from Atlanta, camera crews donned pin stripes and were reported "almost indistinguishable from conservatively dressed ABA members."[47] Cables were tucked down air conditioning ducts. The formal briefs used in the mock appellate proceedings were included in a booklet entitled "Cameras in the Courtroom: A Presidential Showcase Program" and distributed at the convention. In an article headlined "TV in its Sunday Best for ABA demonstration," *Broadcasting* concluded: "No muss, no fuss: It was an example of what television technology and professionalism can do in 1979."[48]

The next show was the February 1980 conference of Chief Justices in Chicago. This time, Steve Tello starred in front of, as well as behind, the cameras, showing assembled chief justices the silent working of the Bundy trial cameras. Judge Cowart himself explained the need for letting the television industry participate in the courtroom rule-making process. Tello then turned on the videotape recorder and played the tape of the meeting just ending "emphatically making the point that the presence of the TV cameras—although announced at the start—had had no appreciable effect on the meeting."[49]

And so the bandwagon rolls on its road of non-sequiturs, misplaced demonstrations, self-serving tests and generally flawed "experi-

40. Supreme Court of Iowa, Order No. 63674, "In the Matter of Media Coverage of the Courts" (November 21, 1979), which revises Canon 3A (7) of the Iowa Code of Judicial Conduct, effective January 1, 1980.

41. FREEDOM OF INFORMATION DIG. 1, University of Missouri (September-October 1979).

42. BROADCASTING, October 17, 1977, p. 25.

43. Chandler v. State, 366 So.2d 64 (Florida District Court of Appeals 1978), *appeal dismissed and cert. denied*, 376 So.2d 1157 (Florida 1979), *stay of mandate granted*, (January 11, 1980) (Powell, J., in chambers).

44. VARIETY, October 31, 1979, p. 73.

45. BROADCASTING, August 6, 1979, p. 29.

46. BROADCASTING, July 30, 1979, p. 69.

47. BROADCASTING, August 20, 1979, p. 36.

48. *Id.*

49. VARIETY 1 (February 6, 1980).

ments" that permit no controls, disproof, or evaluation.

At the point of no return

Television presents a coherent world of images and messages serving its own institutional interests. The question is whether the judiciary should be enlisted to add further credibility to media mythology. Plugging courtrooms into the television system can make them appendages of that system. Once televised trials attract a large national following, the process will be irresistible, cumulative, and probably irreversible.

The scenario unfolding now is what Chief Justice Warren warned against when, agreeing with the majority in *Estes v. Texas* that "the televising of criminal trials is inherently a denial of due process," expressed the additional view that the case at hand was only "a vivid illustration of the inherent prejudice of televised criminal trials."[50] Therefore, Warren wished to "make a definitive appraisal of television in the courtroom."[51]

In doing so, he predicted with uncanny foresight the entertainment pressures upon the selection and treatment of trials; the impact of notoriety upon participants, including jurors returning to their communities; the problem of impartially re-trying a case after wide national exposure; and the likelihood that defendants who have attracted public interest and find their "trial turned into a vehicle for television ... are the very persons who encounter the greatest difficulty in securing an impartial trial even without the presence of television."[52]

In his conclusion, Chief Justice Warren repeated the important point that the purposes of the media and the courts are very different.

> [t]he television industry, like other institutions, has a proper area of activities and limitations beyond which it cannot go with its cameras. That area does not extend into an American courtroom... Where the lives, liberty, and property of people are in jeopardy, television representatives have only the rights of the general public, namely to be present, to observe the proceedings, and thereafter, if they choose, to report them.[53]

Without a doubt television has enriched the horizons of many who have been out of the cultural mainstream since the coming of print-oriented culture. It sometimes offers superb insight and enlightenment. Indeed, it has even provided dramatic reenactments of great moments in judicial history, going behind the scenes to illuminate the invisible but all-important principles of justice in a calmer historical perspective. But telecasting of live trials—television at its spontaneous best—would not encourage that kind of dispassionate analysis.

The political opportunities inherent in the shifting balance of powers will become more and more compelling. About 10 per cent of the electorate can now identify any judicial candidate during an election. A television trial can easily multiply that recognition factor for a candidate. (Will others ask for equal television trial time?) As a system of mutual accommodations and pay-offs develops, controls and inhibitions are likely to fall by the wayside.

Neither history nor existing research support the contention that television coverage of courts would enhance fairness, protect freedom, increase public understanding, or promote needed court reform. Only an immediate moratorium on televising trials can give us the time and the opportunity we need for responsible action.

In the face of demonstrated conflicts and incalculable risks, the burden of proof must shift from the potential victims to the proponents of trials by television. An independent scientific investigation is what we need now, both to analyze a representative sample of televised trials and segments of trials and to assess conceptions of the judicial process that television trials cultivate in the minds of the viewers, as well as the minds of participants. Until we undertake such research and until it disproves reasonable expectations about TV's effects, we should prevent television from remaking our system of justice in its own image. □

50. Estes v. Texas, 381 U.S. 532 (1965) (Warren, C.J., concurring).
51. *Id.*
52. *Id.*, at 576-77.
53. *Id.*, at 585-86.

GEORGE GERBNER is a professor of communications and dean of The Annenberg School of Communications at the University of Pennsylvania.