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FROM ESTES TO CHANDLER: SHIFTING THE CONSTITUTIONAL BURDEN OF COURTROOM CAMERAS TO THE STATES

MARGOT PEQUIGNOT*

On January 26, 1981, the United States Supreme Court chose to neither “endorse” nor “invalidate” Florida’s cameras in the courtroom program.¹ In Chandler v. Florida,² Chief Justice Burger predicated the Court’s de facto affirmance of the decision to permit the televising of state court proceedings on the concept of federalism: “We are not empowered by the Constitution to oversee or harness state procedural experimentation; . . . We must assume state courts will be alert to any factors that impair the fundamental rights of the accused.”³

In reaching its decision, the Court distinguished Estes v. Texas,⁴ which the Appellants and two concurring Justices argued was precedential.⁵ The analysis developed by Chief Justice Burger framed its discussion in terms of procedure not substance. Chandler, in effect, adopted the precise rationale that the Florida Supreme Court had relied upon in In re Petition of Post-Newsweek Stations, Florida, Inc.,⁶ which revised Canon 3A(7) of the Florida Ju-

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2. 101 S. Ct. 802 (1981). The United States Supreme Court agreed to review Chandler on direct appeal from Florida’s Third District Court of Appeal, 366 So. 2d 64 (Fla. 3d Dist. Ct. App. 1978), after the Florida Supreme Court asserted it had no appellate jurisdiction to review the lower court’s decision, and declined to exercise its discretionary jurisdiction, 376 So. 2d 1157 (Fla. 1979).

3. 101 S. Ct. at 813.


5. 101 S. Ct. at 807, 814 (Stewart, J., concurring), 815 (White J., concurring).

6. 370 So. 2d 764 (Fla. 1979). The Florida Supreme Court rendered three similarly styled opinions in this matter. In the first, reported at 327 So. 2d 1 (Fla. 1976), the court agreed to allow televising of one criminal and one civil trial with the consent of all parties. Later, at 358 So. 2d 1360 (Fla. 1978), a one year experiment of televised trials was instituted. Finally, at 370 So. 2d 764 (Fla. 1979), the court permanently revised Canon 3A(7). For purposes of clarity, the term “Post-Newsweek” will be used in this comment only to identify the latter opinion.
dicial Code of Conduct. That revision established the basis for permitting in-court coverage of judicial proceedings by the electronic media.\footnote{370 So. 2d at 781. Prior to the Post-Newsweek opinion, Canon 3A(7) prohibited electronic media from courtroom access:}

This Comment will review the history of electronic media in the courtroom, and analyze an earlier United States Supreme Court decision which held that television cameras had prejudiced a criminal defendant's right to a fair trial. It will examine the Chandler Court's finding that it was unnecessary to overrule that previous decision and will suggest that Chandler represents a substantial deviation from established precedent in analyzing problems arising from the conflict between the first amendment right of a free press and the accused's sixth amendment right to a fair trial. The Chandler decision will be placed in perspective with other recent opinions which appear to dilute both press rights and those of criminal defendants in order to promote the court's goal of reestablishing a strong criminal justice system. Finally, the Comment will discuss State v. Palm Beach Newspapers, Inc.\footnote{6 FLA. L.W. 168 (Fla. S. Ct., Mar. 5, 1981). See notes 169-79 infra, and accompanying} and State v. Green,\footnote{Id. at 765 n.2. The Canon currently reads:}

\begin{quote}
Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida. \\
\textit{Id.} at 781.
\end{quote}

\begin{quote}
sions of the Florida Supreme Court announced after Chandler which interpret the standards of Canon 3A(7). Drawing on these decisions, an attempt will be made to extrapolate workable standards for a trial court to apply in resolving a challenge to media access to the courtroom.

I. CHANDLER v. FLORIDA

A. History of the Case

The case upon which the United States Supreme Court based its "cameras in the courtroom" decision arose from the illegal activities of two Miami Beach policemen. Robert Granger and Noel Chandler were charged on July 1, 1977, with the burglary of a local restaurant.\textsuperscript{10} The prosecution’s case rested primarily upon a tape recording which had been made by John Sion. A ham radio operator, he had inadvertently intercepted a walkie-talkie conversation between the two defendants on the night of the robbery.\textsuperscript{11} This novel aspect of the case understandably engendered considerable interest on the part of the local media.\textsuperscript{12} In accordance with a recent ruling by the Florida Supreme Court, the trial court permitted local television stations to arrange in-court camera coverage of the newsworthy trial.\textsuperscript{13}

Prior to trial, defense counsel moved to exclude television coverage on the ground that the presence of cameras would prejudice the constitutional fair trial rights of Chandler and Granger.\textsuperscript{14} That motion was denied,\textsuperscript{15} as was a subsequent motion to sequester the


\textsuperscript{10} 101 S. Ct. at 806. The defendants were actually charged with four counts: conspiracy to commit a felony, burglary, grand larceny, and possession of burglary tools. 366 So. 2d at 66 n.1. They were apparently convicted on all counts. Id. at 68.

\textsuperscript{11} 366 So. 2d at 66. At trial there was some dispute about the actual date on which Sion had recorded the conversation. Id. at 66-68.

\textsuperscript{12} 101 S. Ct. at 806. Both the Miami Herald and the Miami News published articles about the incident before trial. Brief for Appellee at 84 n.28. The headlines reflected the novel aspects of the case which the Supreme Court conceded engendered public curiosity: "Ham Hears Burglary, Two Officers Arrested." Id. (citing Miami Herald, July 2, 1977, p. 1A); "Beach Policemen Charged with Burglary." Id. (citing Miami News, July 2, 1977, p. 1A); "Trial Date Set for Two Beach Policemen." Id. (citing Miami News, July 20, 1977, p. 1B). Pretrial coverage by local radio and television stations was not documented.

\textsuperscript{13} In re Petition of Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764 (Fla. 1979). See note 7 supra, and notes 31-46 infra, and accompanying text.

\textsuperscript{14} 101 S. Ct. at 806.

\textsuperscript{15} On interlocutory appeal, the Florida Supreme Court declined to invalidate Experi-
jury.\textsuperscript{16}

During the trial, only the testimony of the state's chief witness, Sion, and closing arguments were broadcast. No part of the defendants' case was televised.\textsuperscript{17} The jury returned a verdict of guilty against both Chandler and Granger.\textsuperscript{18}

On appeal, the Third District Court of Appeal rejected the former police officers' claim that the evidence against them had been insufficient to warrant a finding of guilt.\textsuperscript{19} The court also declined to address the per se constitutionality of Canon 3A(7). "The [Florida Supreme] court, therefore, must be presumed to have considered that the adoption of the canon preserves the rights of parties."\textsuperscript{20} Nevertheless, the appeals court certified its decision to the Florida Supreme Court "as a question of great public interest."\textsuperscript{21} The supreme court refused to review Chandler on the ground that its decision in \textit{Post-Newsweek}\textsuperscript{22} had rendered the constitutional issue moot.\textsuperscript{23} The United States Supreme Court noted probable jurisdiction and granted appellate review to the initial appeals court decision.\textsuperscript{24}

\textsuperscript{16} mental Canon 3A(7) on the defendants' assertion that it was unconstitutional on its face and as applied. See State v. Granger, 352 So. 2d 175 (Fla. 1977).
\textsuperscript{17} Id. The Supreme Court noted that only two minutes and fifty-five seconds of the Chandler trial were actually televised.
\textsuperscript{18} Id.
\textsuperscript{19} Chandler v. State, 366 So. 2d 64 (Fla. 3d Dist. Ct. App. 1978), cert. denied, 376 So. 2d 1157 (Fla. 1979), aff'd, 101 S. Ct. 802 (1981). The Third District Court of Appeal held that the evidence presented against Chandler and Granger was sufficient to place them at the scene of the crime and that the recorded walkie-talkie conversation upon which the prosecution primarily relied "tied them firmly to the crime as its perpetrators." 366 So. 2d at 70.
\textsuperscript{20} Id. at 69.
\textsuperscript{21} Under FLA. CONST. art. V, § 3(b)(3) (1968, amended 1980), the Supreme Court’s jurisdiction over appeal court decisions is discretionary as to certified questions of great public importance.
\textsuperscript{22} 370 So. 2d 764 (Fla. 1979).
\textsuperscript{23} 376 So. 2d at 1157. See note 2 supra.
\textsuperscript{24} 100 S. Ct. 1832 (1980). Since the Florida Supreme Court had found that it lacked jurisdiction to review the appeals court decision in Chandler, and declined to review it under its discretionary authority, the case was appealed directly to the United States Supreme Court under 28 U.S.C. § 1257 (2) (1976). Even though the state action to be reviewed was a court rule, the United States Supreme Court apparently accepted the Chandler appeal on the basis that the rule was the equivalent of a statute for jurisdictional purposes. \textit{See} STERN & GRESSMAN, \textit{SUPREME COURT PRACTICE} at 160 n.3 (1978). \textit{See also} 101 S. Ct. at 811 (Chief Justice Burger refers to Canon 3A(7) as a "statute.")
B. History of Cameras in the Courtroom

Instances of misconduct by courtroom photographers led an American Bar Association (ABA) committee to informally oppose still cameras in the courtroom in 1924. Seven years later, the ABA formally recommended that cameras and broadcasting equipment be banned from courtrooms when its House of Delegates adopted Judicial Canon 35. The unrestrained behavior of journalists covering the 1935 trial of Bruno Hauptmann, who was subsequently convicted of the kidnap and murder of the Lindbergh baby, provided the impetus for the ABA resolution. Television equipment was included in the ABA ban when Canon 35 was amended in 1952. Only Colorado and Texas chose not to adopt the recommended prohibition.

In its 1965 decision, Estes v. Texas, the United States Supreme Court declined to explicitly address the validity of Canon 35. It nevertheless held that the accused had been denied his due process right to a fair trial because television cameras were present in the courtroom.

Unlike Colorado and Texas, Florida incorporated Canon 35 into its own Code of Judicial Conduct as Canon 3A(7). In 1975, Flor-
Florida's electronic media sought to extend their reach into the state's courtrooms by urging the Florida Supreme Court to revise Canon 3A(7). The Post-Newsweek Stations of Florida asserted that broadcasters had the same constitutional right of access to courtrooms as print journalists. The supreme court agreed to initiate an experimental program, but reserved judgment on the constitutional claims to access urged by Post-Newsweek.

The first pilot program was initiated in May, 1975, when the court announced its decision to permit the televising of one civil and one criminal trial, provided that the trial participants consented to the intrusion. The difficulty of obtaining that consent led to the initiating of a second program, which did not require participant consent, beginning in July, 1977. The Chandler trial occurred during this second program.

At the conclusion of the second pilot program, the court permanently revised Canon 3A(7) to permit the televising of courtroom proceedings without the consent of participants, but refused to base its decision on a constitutional right of access. Instead, the court relied upon its supervisory power under the Florida Constitution to prescribe rules for the operation of the state's lower courts.

ject to constitutional restraints mentioned herein.

Id. at 908-09 (footnote omitted).

Florida's commitment to open government extends to both its executive and legislative branches through open records and open meeting laws. See 370 So. 2d at 780; see generally, Comment, Exemptions to the Sunshine Law and the Public Records Law: Have They Impaired Open Government in Florida?, 8 FLA. ST. U.L. REV. 265 (1980).

33. See 370 So. 2d at 774.
34. 327 So. 2d at 2.
35. See 370 So. 2d at 774.
36. 327 So. 2d at 2.
38. 370 So. 2d at 781.
39. Writing for an unanimous court, Justice Sundberg said:

While we have concluded that the due process clause does not prohibit electronic media coverage of judicial proceedings per se, by the same token we reject the argument of the petitioner that the first and sixth amendments to the United States Constitution mandate entry of the electronic media into judicial proceedings.

Id. at 774. The Petitioner's argument that the press had a constitutional right of access under the "public trial" provision of the sixth amendment had not yet been rejected by the United States Supreme Court. See Richmond Newspapers, Inc. v. Virginia, 100 S. Ct. 2814 (1980).

40. 370 So. 2d at 774. FLA. CONST. art. V, § 2(a) provides in pertinent part that "[t]he supreme court shall adopt rules for the practice and procedure in all courts including . . . the administrative supervision of all courts . . . ."
The Post-Newsweek court also rejected the constitutional argument raised by opponents of cameras in the courtroom. The court relied almost exclusively on Estes v. Texas in determining that the presence of cameras would not violate the due process right of a defendant to a fair trial.\textsuperscript{41} The Florida court found that the United States Supreme Court in Estes "expressly limited its opinion to the crude state of the television art existing in 1965\textsuperscript{42} and that the reversal of Estes' conviction was based not on the presence of cameras per se, but on the fact that the Estes trial was "a carnival-like proceeding incessantly interrupted by reporters, cameras, and cameramen."\textsuperscript{43}

Pointing out that the Estes opinion commanded a plurality rather than a majority of the United States Supreme Court,\textsuperscript{44} the Florida court took great pains in Post-Newsweek to demonstrate that the swing vote by Justice Harlan was strictly limited to the particular facts of Estes.\textsuperscript{45} It concentrated on certain aspects of Justice Harlan's concurring opinion which supported that view, but failed to cite other portions of the opinion which appear to qualify such a conclusion.\textsuperscript{46}

The United States Supreme Court in Chandler v. Florida\textsuperscript{47} did not disagree with the Florida Supreme Court's one-sided view of the concurring opinion: "Justice Harlan demonstrates that the Estes decision is limited to its peculiar facts."\textsuperscript{48}

C. The Pivotal Importance of Estes v. Texas as Precedent

In 1965, the United States Supreme Court reversed the Texas conviction of Billie Sol Estes for swindling.\textsuperscript{49} In a split which was

\textsuperscript{41} 370 So. 2d at 774.
\textsuperscript{42} Id. at 773.
\textsuperscript{43} Id. at 772.
\textsuperscript{44} In Estes, Justice Clark delivered the opinion of the Court. Chief Justice Warren wrote a concurrence in which Justices Douglas and Goldberg joined. Justice Harlan concurred with a third opinion, becoming the fifth vote of the plurality. Justices Stewart, Black, Brennan, and White dissented. See 381 U.S. 532.
\textsuperscript{45} 370 So. 2d at 772.
\textsuperscript{46} See note 56 infra, and accompanying text.
\textsuperscript{47} 370 So. 2d at 772. In Chandler the Court noted that "it is fair to say that Justice Harlan viewed the holding as limited to the proposition that 'what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment.'" 101 S. Ct. at 809 (quoting Estes, 381 U.S. at 587) (emphasis added by the Chandler Court).
\textsuperscript{48} 381 U.S. at 534. In a footnote to his opinion for the Court, Justice Clark noted that "[t]he evidence indicated that petitioner, through false pretenses and fraudulent representations, induced certain farmers to purchase fertilizer tanks and accompanying equipment,
unusual for the Warren Court, Justice Clark wrote for himself alone; Justice Warren concurred in a separate opinion joined by two of his brethren; and Justice Harlan, in a third opinion, provided the fifth vote necessary for a plurality.

The *Estes* appeal presented a single issue to the Court: Whether Estes was "deprived of his right under the Fourteenth Amendment to due process by the televising and broadcasting of his trial." Five Justices concluded that he had been so deprived. The critical question faced initially by the Florida Supreme Court in *Post-Newsweek* and more recently by the Burger Court in *Chandler* was how narrow the *Estes* Court intended its holding to be.

The Florida court found that both Justices Clark and Harlan intended their *Estes* opinions to reach no further than the facts of that particular case. Finding that technological advances in the television industry had rendered *Estes* obsolete, the Florida Supreme Court decided that there was no controlling precedent that would prohibit the televising of trials. On that basis, it approved the permanent revision of Canon 3A(7).
The Florida court further noted Justice Harlan's concern that a prohibition by the nation's highest Court "would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation." The court failed to note Justice Harlan's concern for the constitutional fair trial rights of criminal defendants: "Within the courthouse the only relevant constitutional consideration is that the accused be accorded a fair trial. If the presence of television substantially detracts from that goal, due process requires that its use be forbidden." In Chandler, Chief Justice Burger agreed with the Post-Newsweek interpretation of Estes that Justice Harlan never intended his concurrence to apply beyond the actual facts of Estes: "Justice Harlan pointedly limited his conclusion to cases like the one then before the Court, those 'utterly corrupted' by press coverage. There is no need to 'overrule' a 'holding' never made by this Court."

In his Chandler concurrence, Justice Stewart criticized the majority for its "wholly unsuccessful effort to distinguish" Estes when, to Justice Stewart's mind, the earlier case set a controlling precedent which constitutionally prohibited cameras in the courtroom. In his view, only an express overruling of the Texas case would support the Chandler opinion:

The Court in Estes found the admittedly unobtrusive presence of television cameras in a criminal trial to be inherently prejudicial, and thus violative of Due Process of Law. Today the Court reaches precisely the opposite conclusion. I have no great trouble in agreeing with the Court today, but I would acknowledge our square departure from precedent.

Justice White, in a separate concurrence, joined Justice Stewart in

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55. 370 So. 2d at 773 (quoting 381 U.S. at 587).
56. 381 U.S. at 589.
57. 101 S. Ct. at 809 n.8. Chief Justice Burger's reference to the Harlan opinion is unintentionally misleading. The phrase "utterly corrupted" was used not in Estes but in Murphy v. Florida, 421 U.S. 794, 798 (1975), which is cited earlier in the same Chandler footnote.
58. 101 S. Ct. at 814 (Stewart, J., concurring).
59. Id. at 815 (Stewart, J., concurring). As already noted, the Florida Supreme Court characterized the Estes trial as sensational and "carnival-like." 370 So. 2d at 772. While these adjectives properly describe the Estes pre-trial hearings, the trial itself occurred in a well-controlled courtroom, with the presence of radio and television equipment kept as unobtrusive as technically possible. See 381 U.S. at 537; 605-08 (Stewart, J., dissenting). The two-day pretrial proceedings created the sensational aura which surrounded the Estes trial.
the contention that Chandler overruled Estes.\textsuperscript{60}

\textbf{D. The Chandler Analysis}

Although Chief Justice Burger and the majority apparently felt compelled to distinguish rather than overrule Estes, they were arguably not required to do either. If Estes did not establish a per se constitutional ban on cameras, as the Chandler Court maintained, then its impact on an issue resolved not on the basis of due process but on the concept of federalism seems slight. The Chandler approach is clearly distinguishable from the analyses in the Estes plurality opinions.\textsuperscript{61}

Chief Justice Burger considers three major factors in reaching his conclusion that Canon 3A(7) is constitutionally valid. First, Estes did not announce a constitutional rule that the televising of a criminal trial is an inherent denial of due process, and therefore, the Chandler Court was not bound by that decision.\textsuperscript{62} Second, more sophisticated technology, together with safeguards built into the Florida guidelines for courtroom camera coverage, eliminate many of the due process problems perceived by the Estes Court. Other constitutional violations which might occur are properly redressed by appellate review.\textsuperscript{63} Finally, no empirical data exists to support claims that the mere presence of cameras has such a psychological impact on trial participants as to constitute an automatic denial of due process. Consequently, federalism requires that states be permitted to experiment with televised trials unless and until convincing data can be gathered and presented.\textsuperscript{64}

\textsuperscript{60} 101 S. Ct. at 816 (White, J., concurring). See notes 77-79 infra and accompanying text.

\textsuperscript{61} Each of the three concurring opinions in Estes focused on the fundamental right which the criminal accused has to a fair trial. In his opinion for the Court, Justice Clark stated: "Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the \textit{sine qua non} of a fair trial." 381 U.S. at 540.

Chief Justice Warren viewed the guarantee of a fair trial as one which required special protections. "[T]he criminal trial under our Constitution has a clearly defined purpose, to provide a fair and reliable determination of guilt, and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated." \textit{Id.} at 564 (Warren, C.J., concurring).

In his critically important concurrence, Justice Harlan voiced similar concerns. "I am at a loss to understand how the Fourteenth Amendment can be thought not to encompass protection of a state criminal trial from the dangers created by the intrusion of collateral and wholly irrelevant influences into the courtroom." \textit{Id.} at 593 (Harlan, J., concurring).

\textsuperscript{62} 101 S. Ct. at 809.

\textsuperscript{63} \textit{Id.} at 810-11.

\textsuperscript{64} \textit{Id.} at 812. Interestingly, a doctoral candidate in the University of Florida's speech department has undertaken empirical research to determine the effect of courtroom cameras
In the course of his analysis, the Chief Justice makes it clear that the burden of showing prejudice rests squarely on the accused. It also appears that a strict standard will be applied. Justice Burger refers to "prejudice of constitutional dimensions" and a demonstration that the broadcasting of a trial would "invariably and uniformly" impinge upon fundamental fairness.

The Chandler majority concludes that the federal courts have no authority to interfere with the procedural decisions of state courts. The Burger analysis departs substantially from the recurring concerns and analytical schemes incorporated into prior Court decisions which involved fair trial rights and the rights of the press.
In the area of press access, the Chandler Court literally adopted the position taken by the Florida Supreme Court in Post-Newsweek. Both courts rejected the claim that the electronic media have a first amendment right to report on trials from inside the courtroom. Chandler thereby appears to subject broadcasters and defendants alike to potentially arbitrary and inconsistent treatment by various state courts. By disavowing any constitutional right of access, the Court has permitted the electronic media to get one foot inside the courtroom door, but has failed to lay a basis for the states to proceed uniformly in developing procedures and safeguards for the broadcasting of trials. The Court justifies shifting this responsibility to the states by citing sophisticated technology and state-imposed due process safeguards. The latter, at least, was viewed by prior Supreme Court decisions as wholly inadequate to support such a reliance on the states.

The Chief Justice's third contention is that empirical data is insufficient to demonstrate that television cameras impact adversely on trial participants and that, therefore, no per se denial of due process results. Such reasoning appears to be gratuitous. It adds little to the conclusion that federalism requires that the states be given freedom to experiment with television cameras in courtrooms. It does emphasize, however, the greater burden which a criminal defendant must bear in asserting constitutional rights. If

That it chose not to does not affect the practical force of its Chandler opinion.

69. 101 S. Ct. at 807; 370 So. 2d at 774.

70. Currently, fifteen states prohibit the televising of court proceedings. Twenty states permit the electronic media access to both trial and appellate courts, while three states limit such access to trial courts. Twelve other states are studying the issue. 101 S. Ct. at 805 n.6 (citing Joint Brief of Amici Curiae Radio, Television News Directors Ass'n).

Few states permit the televising of a criminal trial over the defendant's objection. See 370 So. 2d at 790-91. See also Cameras in the Courtroom, What Next After Chandler? 67 A.B.A.J. 277 (1981), for an update on the current status of camera access in other states.

71. By its Chandler opinion, however, the Court appears to have placed its imprimatur on the Florida approach to cameras in the courtroom. As noted in note 70 supra, few states have granted the electronic media the latitude which it has been given in Florida.

72. In the area of due process rights, the Court has often refused to accept state guidelines as sufficiently protective of an accused's constitutional rights. See, e.g., Miranda v. Arizona, 384 U.S. 436 (1966) (individual must be informed of right against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent defendant entitled to court-appointed counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule applicable to states). Each of these cases extended the application of a right guaranteed by the Bill of Rights to the states through the fourteenth amendment. Each could well have been decided on the basis that the Court had "no supervisory authority over state courts" and state officials. See 101 S. Ct. at 814.

See also notes 80-155 infra, and accompanying text.

73. 101 S. Ct. at 811-12.
a lack of empirical data permits the conclusion that no rights have been violated, then the converse would seem to require a showing of empirical data to prompt the conclusion that due process rights have been infringed.

Although Justices Stewart and White agree with the Court's holding, they both impliedly take issue with the majority's due process analysis. Justice Stewart convincingly challenges the Chief Justice's analysis of Estes and his conclusion that it need not be overruled. He cites Justice Harlan's dilemma in attempting to distinguish between "notorious" and "run-of-the-mill" cases and the attendant potential dangers to constitutional rights. Justice Stewart also admonishes the Court for its inconsistency in describing the Chandler trial as "notorious" but, at the same time, limiting Estes to its facts as "a notorious criminal trial."

Justice White goes a step further by succinctly focusing on the crux of the Appellants' due process challenge to Canon 3A(7). He notes the necessity for giving a criminal defendant "ample opportunity to convince a judge that televising his trial would be unfair to him." The fact that Florida's Canon 3A(7) has no exception for widely publicized trials creates the potential for bringing cases like Chandler within the narrowest reading of Estes. Consequently, Chandler "effectively eviscerates Estes." The heavier burden which the Chandler majority places on the defendant who objects to courtroom cameras is sharply criticized by Justice White. That view was also rejected by the Estes plurality, when they held that no isolatable prejudice need be shown for the Court to find that the presence of television cameras deprived the defendant of a fair trial.

In an apparent attempt to limit the Chandler holding, or perhaps to instill a sense of responsibility in the states, Justice White concludes:

74. Id. at 814-17.
75. Id. at 814-15 (Stewart, J., concurring). See notes 58-59 supra and accompanying text.
76. 101 S. Ct. at 815.
77. Id. at 815-17 (White, J., concurring): The Florida rule has no exception for the sensational or widely publicized case. Absent a showing of specific prejudice, any kind of case may be televised as long as the rule is otherwise complied with. By affirming the judgment below, the majority indicates that not even the narrower reading of Estes [that inherent prejudice results from televising a sensational trial] will any longer be authoritative.

Id. at 816 (emphasis in original).
78. Id.
By reducing Estes to an admonition to proceed with some caution, the majority does not underestimate or minimize the risks of televising criminal trials over a defendant’s objections . . . . Nor does the decision today, as I understand it, suggest that any state is any less free than it was to avoid this hazard by not permitting a trial to be televised over the objection of the defendant or by forbidding cameras in its court rooms in any criminal case. Accordingly, I concur in the judgment.79

II. THE ANALYTICAL INCONSISTENCY OF Chandler WITH PRIOR CASE LAW

The Chandler Court carefully avoids viewing the controversy in that case as a constitutional clash between the first and sixth amendments. Rather, it examines the alleged danger that juries exposed to television will be prejudiced and therefore unable to render an impartial verdict. The Court concludes that “[t]he risk of juror prejudice . . . does not warrant an absolute constitutional ban on all broadcast coverage.”80 Prior cases would seem to require that the Court balance the rights of the media to cover a trial against the right of a defendant to be judged by an impartial jury. The Chandler Court’s express disavowal of the applicability of the first amendment serves to strengthen the contention that the opinion contravenes established precedent. If two conflicting constitutional rights require a balancing of interests, then it would seem that when one of those rights clashes with a non-constitutional interest, the former should be accorded substantially more weight. Chandler fails to do this and, in fact, assigns considerably more importance to the states’ right to experiment than it does to the fair trial right of the accused.81 The majority’s method and result thus appear to be inconsistent with the free press-fair trial resolution reached in cases such as Nebraska Press Association v. Stuart.82

Nebraska Press differs significantly from Chandler not only in

79. Id. at 817. Justice White’s caveat echoes one voiced by Justice Brennan in his Estes dissent, 381 U.S. at 617.

Justice White’s concurrence has little precedential value compared to the critical concurrence of Justice Harlan in Estes. The five Justices who joined Chief Justice Burger’s opinion for the court in Chandler constituted a solid majority, while Justice Harlan supplied the fifth vote for the Estes plurality.

80. 101 S. Ct. at 810.

81. Id. at 809-10, 12.

82. 427 U.S. 539 (1976).
its constitutional analysis but on its facts. The trial of Erwin Charles Simants was unquestionably notorious. Charged with the sex slayings of a family of six in their own home, Simants was to be tried in a community of 850 people, which was located in the same county where the killings had taken place. The massive local and national publicity which preceded the trial prompted a motion by both the defense and the state to restrict the disclosure of certain information relating to the proceedings. On writ for mandamus by press interests, the Nebraska Supreme Court upheld the trial court's restrictive order.

In reversing the state court, Chief Justice Burger characterized the gravamen of the issue to be resolved as "a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged." The plurality opinion noted that Nebraska Press was a case of first impression in its presentation of a two-sided constitutional issue arising from a prior restraint on speech.

Noting that the Constitution assigns no priorities as between first and sixth amendment rights, Chief Justice Burger made a strong case for protecting the integrity of each. The plurality's discussion of the first amendment was narrowly and appropriately focused on the constitutionality of prior restraints on the press. It concluded that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amend-

83. Both opinions were written by Chief Justice Burger. Nebraska Press, however, involved the question of prior restraint, which the Court had addressed in a number of other contexts. See Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (leafleting in suburban neighborhood protected by first amendment); Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968) (white supremacist group could not be restrained from holding public rally); Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931) (scandalous publication not restrainable as public nuisance). Thus, the first amendment analysis necessary to resolve a prior restraint question was well developed and freely referenced in Nebraska Press. See 427 U.S. at 556-61.

84. Id. at 542.

85. Id. The trial court's order prohibited the release "in any form or manner" of any evidence or testimony adduced at trial.

86. Id. at 544. The Nebraska Supreme Court limited the scope of the trial court's restrictive order to confessions and admissions by the defendant; and "other facts 'strongly implicative' of the accused." Id. at 545. See State v. Simants, 236 N.W.2d 794 (Neb. 1975).

87. 427 U.S. at 570.

88. Id. at 556.

89. Id. at 561.

90. Id. at 556-63.
ment rights." Interestingly, the plurality imposed "something in the nature of a fiduciary duty [on the press] to exercise the protected rights responsibly."

The analysis accorded sixth amendment rights in Nebraska Press was more broadly based than its analysis of first amendment guarantees. The Court relied on cases in which prejudicial publicity arising from various sources had cast doubt on the impartiality of jury verdicts. The Court approvingly cited those cases' uniform concern for the rights of the accused.

Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.

The "strong measures" set out in Nebraska Press, and later cited in Chandler as "curative devices," include change of venue; continuance; voir dire; jury instructions; and jury sequestration. The Nebraska Press plurality indicated that a less desirable alternative...

91. Id. at 559. Other members of the Court agreed to varying extents in their concurrences. "[T]here is grave doubt in my mind whether orders with respect to the press such as were entered in this case would ever be justifiable." Id. at 570-71 (White, J., concurring).

"[D]iscussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors." Id. at 573 (Brennan, J., concurring).

Justice Powell, however, suggested that a balance must be struck between the sixth amendment fair trial right and the first amendment prohibition against prior restraint. He implied that, under certain circumstances, a restrictive order could be properly issued by the trial court. Id. at 571-72 (Powell, J., concurring).

92. Id. at 560. The Court went on to note that "It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors." Id.

Cf. Chandler v. Florida, 101 S. Ct. 802 (in which the Court places the burden of protecting the rights of the accused not on the press but on the state, the court, and, to an even greater extent on the accused himself).


94. Id. at 553 (citing Sheppard, 384 U.S. at 362) (emphasis added by Nebraska Press Court).

95. 101 S. Ct. at 809.

96. 427 U.S. at 563-64. See also Sheppard, 384 U.S. at 362-63.

Significantly, it would seem that none of the less restrictive alternatives discussed in Nebraska Press could alleviate the alleged prejudice resulting from cameras in the courtroom save jury sequestration. That "curative device" was rejected by the trial court in Chandler. See Chandler, 101 S. Ct. at 815 n.1 (Stewart, J., concurring).
to restricting first amendment press rights is reliance on appellate review as a means of redressing fair trial violations resulting from prejudicial publicity. "The costs of failure to afford a fair trial are high. . . . [A] reversal means that justice has been delayed for both the defendant and the State; . . . ." 97

The *Nebraska Press* analysis differs substantially from that of *Chandler*. The rights of the press are predicated on the constitutional guarantees of the first amendment. In *Chandler*, the rights of the electronic press are expressly subject to the supervisory powers of a state's highest court. 98 While this deference to state's rights could well be denominated constitutional under the tenth amendment, 99 the *Chandler* Court chooses not to do so. Had the majority analyzed the issue in terms of that amendment, it appears unlikely that the same equal balancing could have been applied as was done in *Nebraska Press*. 100 The Court has simply not accorded the same degree of near-absolutism to the tenth amendment that it has consistently applied to the first. 101

More striking than the disparity between the two cases in their respective and distinct analyses of the rights of the press is the disparate treatment accorded the sixth amendment and the rights it guarantees to the criminal defendant. *Chandler* recedes from the protective tone of *Nebraska Press*. Rather than begin its analysis with the right to a fair trial itself, the Court jumps to an examination of the various types of prejudice which constitute a possible violation of that right. 102 Its analysis is incomplete because, unlike *Nebraska Press*, no constitutional basis is 'laid for such an examination. 103

97. 427 U.S. at 555. See note 107 *supra*.
98. 101 S. Ct. at 813-14.
99. The tenth amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.
100. The Court notes that, since the authors of the Bill of Rights assigned no priorities as between the first and sixth amendments, it was not within the Court's power to "rewrite the Constitution." 427 U.S. at 561.
103. In *Nebraska Press*, the Court discussed at length the constitutional importance of
In *Chandler*, the Court notes that any criminal trial which engenders publicity will necessarily present the possibility that the jury may be influenced by exposure to that publicity. Trial courts are obligated to take steps which insulate jurors from such extraneous influences. Chief Justice Burger cites *Nebraska Press* for the proposition that "[o]ver the years, courts have developed a range of curative devices to prevent publicity about a trial from infecting jury deliberations." Therefore, the Court seems to reason, since "publicity" which might prejudice jurors cannot be absolutely banned, neither can electronic media coverage, which might prejudice jurors, be absolutely banned. The "appropriate safeguard" to foreclose such prejudice—be it from publicity or from cameras in the courtroom—is the defendant’s right to demonstrate that the alleged prejudice actually compromised the jury’s ability to reach a verdict based solely on the evidence.

This explicit reliance on appellate review is contrary to the concern expressed in *Nebraska Press* that justice delayed may result in justice denied. The *Chandler* Court nevertheless offers the appeals process as the ultimate protection for fair trial rights. It notes, too, that the Florida canon incorporates additional safeguards in its guidelines. The Court places "positive obligations" on the trial judge to ensure that a defendant is not deprived of due process.

Providing the criminal defendant with an impartial jury untainted by outside influences. *427 U.S.* at 551-56. In *Chandler*, the Court appears to place the burden on the defendant to prove that the jury is not impartial. See notes 111-13 *infra* and accompanying text.

104. 101 S. Ct. at 809. The "curative devices" were actually less restrictive alternatives to issuing gag orders to the press. See *427 U.S.* at 563-65.

105. See 101 S. Ct. at 809.

106. *Id.* The Chief Justice’s actual words were "the defendant’s right to a verdict based solely upon the evidence and the relevant law."

107. *427 U.S.* at 551-53. Chief Justice Burger wrote for the Court: "Due process requires that the accused receive a trial by an impartial jury free from outside influences . . . [R]eversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception." *Id.* at 553 (quoting Sheppard v. Maxwell, 384 *U.S.* at 362-63).

108. The *Nebraska Press* Court is more emphatic in the responsibility it places on the trial court than is the *Chandler* Court. In the former case, the Court states, "The trial judge has a major responsibility . . . [T]he measures . . . [he] . . . takes or fails to take to mitigate the effects of pretrial publicity . . . may well determine whether the defendant receives a trial consistent with the requirements of due process." *427 U.S.* at 555.

In *Chandler*, the Court says, "Trial courts must be especially vigilant to guard against any impairment of the defendant’s right to a verdict based solely upon the evidence and the relevant law." 101 S. Ct. at 809.
forum to state his reasons for excluding the media.\textsuperscript{109}

In addition, the Florida safeguards appear on the surface to be preventive measures, but they are more properly viewed as remedial, given the mandatory language of Canon 3A(7): "electronic media . . . coverage of public judicial proceedings . . . shall be allowed."\textsuperscript{110}

Chandler's deference to the Florida presumption in favor of electronic media access to trials precludes the Court from following the precedent set by Nebraska Press. No new guidelines for resolving the constitutional stand-off between the free press guarantee of the first amendment and the fair trial guarantee of the sixth amendment are offered.

To the contrary, Chandler modifies the constitutional analysis which the Court has applied in the past to due process rights and prejudicial publicity. Rather than focus on constitutional considerations, the Court resolves the issue on procedural grounds. While this approach has not been utilized in past free press-fair trial cases,\textsuperscript{111} it has found frequent expression in recent opinions involving the constitutional rights of criminal defendants.

In Stone v. Powell, for example, the Court held that federal habeas corpus is unavailable to a state criminal defendant who has had "a full and fair opportunity" to litigate the issue in a state court proceeding.\textsuperscript{112} Wainwright v. Sykes found that Florida's contemporaneous objection rule does not violate a defendant's due process rights.\textsuperscript{113} In Rose v. Mitchell, the Court held that the alleged discriminatory selection of a grand jury foreman must be sufficiently proven to constitute grounds for reversal of a criminal conviction.\textsuperscript{114}

Most recently, in Allen v. McCurry, the Court determined that an accused may not bring a civil suit under 42 U.S.C. § 1983 if the defendant has already been given an opportunity to litigate the alleged civil rights violation in a state criminal proceeding.\textsuperscript{115} The McCurry Court utilized the procedural doctrine of collateral estoppel to withhold from the accused the substantive right to seek a

\textsuperscript{109} See notes 182-85 infra.
\textsuperscript{110} See note 7 supra, for complete text. 370 So. 2d at 781.
\textsuperscript{111} See notes 80-107 supra and accompanying text.
\textsuperscript{112} 428 U.S. 465, 482 (1976).
\textsuperscript{113} 433 U.S. 72 (1977).
\textsuperscript{114} 443 U.S. 545 (1979).
\textsuperscript{115} 101 S. Ct. 411 (1980).
federal forum as guaranteed by § 1983.116

Arguably, procedure over substance is the common denominator of each of these defendants' rights cases.117 Unquestionably, procedural considerations are the bases of the Court's decision in Chandler.118

Both the McCurry reasoning and conclusion bear striking similarity to those in Chandler. Chief Justice Burger's examination of Canon 35 and its history parallels Justice Stewart's discussion of § 1983.119 Justice Burger's treatment of Estes v. Texas120 as supporting rather than precluding the Chandler conclusion is reflected in the McCurry treatment of Monroe v. Pape121 and Mitchum v. Foster,122 two precedential cases construing the reach of § 1983.123 Most importantly, the explicit determination in Chandler that

116. Id. at 420.
117. This trend is not a recent one. One constitutional scholar has observed that "the Supreme Court now defends rather than attacks state procedures." Tribe, supra note 101, at 129. Another commentator suggests that the Burger Court's disregard of the rights of criminal defendants appears to have peaked during the Court's 1976 term and that "the pendulum" has begun to swing the other way. Seidman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 COLUM. L. REV. 426, 448 (1980) (hereinafter cited as Seidman) (citing, e.g., Delaware v. Prouse, 440 U.S. 648 (1979) (spot checks of motorists' licenses prohibited intrusion under fourth amendment)). McCurry appears to cast doubt on that theory.

While the right to utilize a federal forum is not explicitly guaranteed by the Constitution, the fourteenth amendment right to equal protection and due process of law was the impetus for the enactment of § 1983. See Herzer, Federal Jurisdiction Over Statutorily Based Welfare Claims, 6 HARV. C.R.-C.L.L. REV. 1, 5 (1970); See also Lynch v. Household Fin. Corp., 405 U.S. 538 (1972). In the past, the Court has recognized the constitutional implications of the civil rights statute, Mitchum v. Foster, 407 U.S. 225 (1972); Monroe v. Pape, 365 U.S. 167 (1961).

118. 101 S. Ct. at 807.
119. Id. at 803-04; Id. at 417-18.
120. Id. at 807-09.
123. In Monroe, the Court recounted the legislative history of § 1983 and, in Justice Blackmun's view, concluded that "this remedy was to be available no matter what the circumstances of state law." 101 S. Ct. at 423 (Blackmun, J., dissenting). Justice Stewart, writing for the majority construed Monroe as limiting the availability of a § 1983 action to three specific situations: "where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice." 101 S. Ct. at 418.

In Mitchum, the Court said, "The very purpose of § 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights." 407 U.S. at 242. Justice Stewart cites Mitchum and Monroe together for the proposition that Congress realized that it was changing the balance of power between state and federal courts by enacting § 1983, but intended only to add to federal jurisdiction, not detract from state jurisdiction. 101 S. Ct. at 417.
“many of the negative factors found in Estes . . . are less substantial factors today”124 is clearly echoed in McCurry’s implicit conclusion that state courts are no longer “deficient in protecting federal rights.”125

The decisions in Chandler and McCurry are only incidentally a victory for states’ rights. Both cases fit the pattern established by the Burger Court of de-federalizing criminal procedure as a step toward correcting “a dangerous imbalance” which accords too much constitutional protection to criminals and too little to their victims and to society at large.126 By limiting the rights of defendants to seek a federal forum, it would seem that the Court is primarily concerned with “the deterrent effect of swift and certain consequences: swift arrest, prompt trial, certain penalty, and—at some point—finality of judgment.”127

III. THE EFFECT OF Chandler ON PRESS RIGHTS

These decisions appear to be changing the analytical framework for resolving not only defendants’ rights cases but also press access cases. In its rejection of a first amendment basis for its decision in Chandler, the Court has handed the press no great constitutional victory. In fact, the media rights aspect of Chandler appears to erode advances made in cases like Nebraska Press. Nevertheless, Chandler is arguably consistent with the Court’s recent approach to the rights of the press as they interact with the criminal justice system.128

One commentator has noted that the Burger Court has continued the practice of its predecessor of “treating criminal defendants as bit players in a larger social struggle.”129 It appears that the

124. 101 S. Ct. at 810-11.
125. See Id. at 417.
127. Id. at 292.
128. See notes 129-50 infra, and accompanying text. In his discussion of the Burger Court’s recent treatment of first amendment cases, Archibald Cox notes that:

The first amendment decisions of the 1970's seem to me to bear . . . marks of an exceedingly pragmatic and particularistic jurisprudence, even though doctrinal development is not always neglected . . . [T]he opinions often lack the full exposition necessary to fit the decisions into a coherent body of law.

Cox, supra note 49, at 72.

The scanty analysis the Chandler plurality affords press access and federalism would thus appear to preclude that opinion from enhancing the coherent body of law which has arisen in those two areas.

129. Seidman, supra note 117, at 437.
press, too, has been relegated to such a role by the Court. Two recent and controversial cases illustrate this observation: Richmond Newspapers, Inc. v. Virginia\textsuperscript{130} and Gannett Co. v. DePasquale.\textsuperscript{131} Other cases, including Zurcher v. Stanford Daily\textsuperscript{132} and Houchins v. KQED, Inc.,\textsuperscript{133} similarly demonstrate the Court's apparent lack of concern for the first amendment rights of the press when the countervailing consideration is the withdrawal of federal courts from their protective role in the area of criminal justice.

In a fragmented plurality opinion,\textsuperscript{134} the Court in Richmond Newspapers held that the first amendment implicitly guarantees the public—and thus representatives of the media—a right of access to criminal trials.\textsuperscript{135} Chief Justice Burger predicated his opinion for the Court on “the presumptive openness of the trial” which historically pervades Anglo-American jurisprudence.\textsuperscript{136} He extended the constitutional umbrella of the first amendment to this presumption on the penumbra theory utilized by the Court in the past to establish a right of decisional privacy,\textsuperscript{137} the right to interstate travel,\textsuperscript{138} and the right of association.\textsuperscript{139} Richmond Newspapers, however, does not grant the public an absolute right of access to courtrooms. The plurality opinion noted that the constitutional basis is actually an amalgam of the guarantees of speech, press, and assembly. Consequently, the right of access to courtrooms is “[s]ubject to the traditional time, place, and manner restrictions” which attend the right of assembly.\textsuperscript{140}

A second implicit restriction which the Court placed on this new first amendment right was its apparent reluctance to label it. “It is not crucial whether we describe this right . . . as a ‘right of access’
... or a 'right to gather information...'."141 This reluctance could be construed as calculated to withhold from the press a basis for asserting an absolute right of access to trials, much as the Court withheld a constitutional predicate for electronic media coverage in Chandler by shifting the responsibility to the state courts.142 This interpretation is supported by the in-depth discussion which Chief Justice Burger accorded the "right of visitation" the public historically has enjoyed, and the little emphasis his opinion placed on the right of the press to act as surrogate for the people in covering judicial proceedings.143

Richmond Newspapers has generally been hailed as a victory for the press and "a break from the Court's repeated decisions denying access."144 That characterization seems debatable, however, in light of the above mentioned observations and in the wake of the Court's confusing opinion in Gannett, which preceded Richmond Newspapers by exactly one year. The apparent holding in Gannett is that the press and public have no right of access to pretrial hearings.145 At the time it was released, however, and until the Court's decision in Richmond Newspapers, Gannett was viewed by some as rejecting a constitutional guarantee of access to criminal trials.146 Writing for the plurality, Justice Stewart said, "we hold that

141. Id. at 2827 (citing Gannett, 443 U.S. at 317, and Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).
142. 101 S. Ct. at 807. See notes 69-73 supra and accompanying text.
143. The Richmond Newspapers plurality opinion notes that "we have recognized that 'without some protection for seeking out the news, freedom of the press could be eviscerated,'" 100 S. Ct. at 2827 (citing Branzburg, 408 U.S. at 681). In a footnote it observes that "the media... are entitled to the same rights [to attend trials] as the general public." Id. at 2827 n.12 (citations omitted) (citing Estes, 381 U.S. at 540).

The extensive discussion accorded first amendment press rights in Nebraska Press is noticeably missing from Richmond Newspapers. See 427 U.S. at 556-61.

145. 443 U.S. at 394. In Gannett, a pretrial suppression hearing was closed to the public after the accused, on trial for murder, the prosecutor, and the trial judge agreed.

The Court was again badly splintered. Justice Stewart wrote for the Court, and Justices Powell, Burger, and Rehnquist concurred in separate opinions. Justice Blackmun, joined by Justices Brennan, White and Marshall, concurred in part and dissented in part. See notes 146-50 infra and accompanying text.

See also Cox, supra note 49, at 19-20; Comment, Fair Trial — Constitution Does Not Grant an Affirmative Right of Access to a Pretrial Proceeding When All Participants Agree It Should Be Closed to Protect Defendant's Fair Trial Rights, 7 FLA. ST. U.L. REV. 719 (1979).

members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." He de-

clined to address the asserted first amendment basis for such ac-

cess. 147 Justice Powell, however, in a concurring opinion, "would

hold explicitly that petitioner's reporter had an interest protected

by the First and Fourteenth Amendments in being present at the

pretrial suppression hearing." 148 Justice Rehnquist, in his own con-
currence, stated a contrary position. "Despite the Court's seeming

reservation of the question whether the First Amendment guaran-
tees the public a right of access to pretrial proceedings, it is clear

that . . . there is no First Amendment right of access in the public

or the press to judicial or other governmental proceedings." 149

Since Richmond Newspapers, Gannett appears to be limited to

the single proposition that public access to pretrial hearings is not

guaranteed by the sixth amendment. 150

Viewing Gannett, Richmond Newspapers and Chandler to-

gether, it can be seen that the Court has established certain consis-
tent guidelines for the exercise of constitutional rights by the crim-

inal defendant and the press, even though the rights are not

consistently denominated as such.

Apparently no right exists with either the press or the accused to

demand that pretrial hearings be opened or closed. Similarly, no

right seems to lie with an accused to require the exclusion of tele-

vision cameras from his actual trial, nor with the press to demand

access. The only constitutional right of access recognized by the

Court in the context of these three cases is the first amendment

right of the public—not the press per se—to attend criminal trials.

Any other "rights" are subject to the control of the states.

Arguably, by defining only one constitutional guarantee and as-

signing it to the people at large, the Court is approaching the fair

trial—free press conflict with studied consistency. The controlling

considerations may well be to advance "open processes of justice

[and] provid[e] an outlet for community concern, hostility, and

emotion" 151 by shifting the responsibility for protecting constitu-
tional rights to the public itself and to the states which represent

147. 443 U.S. at 391.
148. Id. at 397 (Powell, J., concurring).
149. Id. at 404 (Rehnquist, J., concurring) (citations omitted).
150. In Richmond Newspapers, Chief Justice Burger noted that "the precise issue

presented here has not previously been before this Court for decision." He characterized

Gannett as limited to precluding access to hearings on pretrial motions. 100 S. Ct. at 2821.
151. 100 S. Ct. at 2824.
the people. Both Chandler and Richmond Newspapers can be read as supporting this view. Gannett, too, fits into this pattern because the control of access to pretrial hearings is essentially left to the trial judge, representing the state.

In addition, the Court could well be seeking to impose a measure of accountability on the press by granting such broad discretion to the states and their courts in the area of pretrial and trial access. In the final analysis, it is the public with which the Court appears to be concerned, to the possible diminution of the rights of the press and criminal defendant.152

In the wake of Richmond Newspapers and Chandler, and their apparent promises of press access, Houchins v. KQED and Zurcher v. Stanford Daily seem oddly anomalous. Both, however, indicate the same concerns for deferring to the authority of the states. In Houchins, the Court held that the press had no right of access to prisons.153 Zurcher permitted the searching of a newsroom for incriminating photographs taken at a political rally.154 Both holdings infringed upon perceived rights of the press.155 Neither decision can be viewed as beneficially affecting the rights of defendants—those already convicted or those being pursued. Rather, the cases serve to protect the law enforcement and penal functions of the state, and presumably the rights of the public. A pattern can thus be discerned in a first amendment context. Whether consciously or not, the Burger Court appears to be consistently relegating the rights of the criminal defendant—and when they coincide, the rights of the press—to a level of concern which is noticeably subordinate to the rights of the state.

152. See notes 129-33 supra and accompanying text.
153. 438 U.S. at 9. Writing for a plurality, Chief Justice Burger held that the press has no constitutional "right of access to government information or sources of information within the government's control." Id. at 15.
154. 436 U.S. at 547. The Court held that probable cause to believe evidence of a crime might be found was a sufficient constitutional basis to undertake a search of the newspaper office. The press argued that a subpoena should be required to provide it with the opportunity to supply law enforcement officials with the particular documents or photographs sought. Id. at 547-48.
155. Houchins appears to withdraw the promise of Branzburg which indicated that the press should be accorded "some protection for seeking out the news." 408 U.S. at 681.

One journalist has expressed concern that Zurcher may provide the justification for "[o]fficials who find themselves the targets of newspaper or media investigations...[to] conduct...searches aimed at finding out precisely what various journalists have discovered, to retaliate against those individuals who have unearthed and reported official wrongdoing." Tribe, supra note 101, at 74-75 (1979 Supp.) (citing Statement of Paul Davis, Vice President, Radio Television News Directors Ass'n, June 22, 1978, before the Subcommittee on the Constitution of the Senate Committee on the Judiciary.)
Rights, of course, carry burdens. The question then is how readily and how adequately are the individual states prepared to accept the burden of protecting the constitutional rights of the defendant and the press? The Chandler decision has given the State of Florida an opportunity to demonstrate its capacity for assuming this burden.

IV. FLORIDA DEFINES AND REFINES CANON 3A(7)

In its Post-Newsweek decision to permit the televising of trials, the Florida Supreme Court examined six specific considerations against allowing electronic media coverage of judicial proceedings: 1) physical disruption; 2) psychological effect on participants; 3) exploitation of the courts for commercial purposes; 4) prejudicial publicity; 5) effect on particular categories of witnesses; and 6) privacy rights of participants. The most controversial consideration proved to be the fifth, the effect of camera coverage on certain witnesses. The court noted that Florida trial courts had encountered difficulties during the one-year pilot program because "no standard for exercise of the judge's discretion" had been articulated by the supreme court when it approved the experimental program. Consequently, at least three criminal trials occurred in which witnesses moved to exclude camera coverage for various reasons.

In State v. Jacobson, the trial court granted the motion by witnesses, who were under federal protection and whose identities those authorities sought to protect, to exclude cameras. In two other cases, however, witnesses' objections to camera coverage were overruled. A prison inmate was held in contempt for refusing to testify 'on the air,' and in the other case, a sixteen-year-old rape victim failed to convince a trial judge that the media should be

156. 370 So. 2d at 764. See notes 38-46 supra and accompanying text.
157. Id. at 774-79.
158. Id. at 778-79. See notes 36-37 supra and accompanying text.
159. 370 So. 2d at 778.
160. No. 75-8791 (Fla. 11th Cir.).
161. Id. In State v. Herman, No. 77-1236 (Fla. 15th Cir.), the prisoner witness feared reprisals from fellow inmates if she testified, and thus, refused to do so with the camera present.

In the same trial, the widow of the victim appealed the trial court's denial of a ban on cameras. Neither the Florida Supreme Court nor the United States District Court for the Southern District of Florida would reverse the trial court's ruling. 370 So. 2d at 778. See Kreusler v. Sholts, 355 So. 2d 515 (Fla. 1978).
prohibited from televising her testimony.\textsuperscript{162}

The Florida Supreme Court, obviously disturbed by such occurrences, found that “an articulated standard” should be established to guide trial courts in the exercise of their discretion to exclude electronic media coverage.\textsuperscript{163} Making it clear that the trial judge retains the ultimate discretion to control the presence of cameras, the court determined that the judge may exclude such coverage upon finding that “coverage of a particular participant . . . will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.”\textsuperscript{164}

The supreme court has given a measure of substance to that standard by holding that the “finding” required need not be based on an evidentiary hearing.\textsuperscript{165} Further, it held in another case that the “qualitatively different” test requires two showings by the trial participant seeking exclusion: that camera coverage will result in a “special and identifiable injury” and that the effect will be sufficiently more injurious than coverage by other types of media.\textsuperscript{166}

The court released its opinions in \textit{State v. Green} and \textit{State v. Palm Beach Newspapers, Inc.}, on the same day.\textsuperscript{167} The decisions,

\begin{footnotesize}
\begin{enumerate}
  \item \textsuperscript{162} State v. Bannister, No. 77-521-CF-A-01 (Fla. 12th Cir.). On interlocutory appeal, the Second District Court of Appeal “request[ed] the trial judge to hold a hearing . . . after notice to the media” before prohibiting such coverage. 370 So. 2d at 778. \textit{See} Times Publishing Co. v. Hall, 357 So. 2d 736 (Fla. 2d Dist. Ct. App. 1978). The trial judge nevertheless refused to prohibit media coverage. 370 So. 2d at 779.
  \item \textsuperscript{163} 370 So. 2d at 778-79. Although this standard has since been held applicable to the consideration of objections by certain defendants, \textit{see} State v. Green, 6 FLA. L.W. 172 (Fla. S. Ct., Mar. 5, 1981); notes 165-98 \textit{infra} and accompanying text, the \textit{Post-Newsweek} decision limits its concern to “particular categories of witnesses.”
  \item \textsuperscript{164} Interestingly, \textit{Post-Newsweek} does not discuss the blanket right of appeal accorded the press by the “standards of conduct and technology” which accompanied its revision of Canon 3A(7). The standards provide that appellate review of a trial court order excluding camera coverage must be in accordance with FLA. R. APP. P. 9.100(d), which states in pertinent part:
    \begin{enumerate}
      \item A petition to review an order excluding the press or public from access to any proceeding . . . if the proceedings or records are not required by law to be confidential, shall be filed in the court as soon as practicable . . . .
      \item The court shall immediately consider the petition to determine whether a stay of proceedings in the lower tribunal is appropriate . . . .
    \end{enumerate}
  \item \textsuperscript{165} 370 So. 2d at 779 (emphasis added).
  \item \textsuperscript{167} State v. Green, 6 FLA. L.W. 172, 173 (Fla. S. Ct., Mar. 5, 1981). \textit{See} notes 189-97 \textit{infra} and accompanying text.
  \item \textsuperscript{168} In \textit{Green}, 6 FLA. L.W. 172 (Fla. S. Ct., Mar. 5, 1981), Justice England wrote for the court. The \textit{Palm Beach Newspapers} opinion, 6 FLA. L.W. 168 (Fla. S. Ct., Mar. 5 1981), was
\end{enumerate}
\end{footnotesize}
in fact, complement one another in establishing more precise guidelines for trial judges faced with Canon 3A(7) challenges.\textsuperscript{168} Since the cases are distinguishable on their facts, the supreme court rulings taken together are applicable to many courtroom camera situations which may arise in the future.

\section*{A. The Procedural Requirements of Excluding Cameras from the Courtroom}

\textit{Palm Beach Newspapers} presented the court with a fact situation which it had already explored in \textit{Post-Newsweek}\.\textsuperscript{169} Two prison inmates, scheduled to testify against a third prisoner charged with murder, sought to have cameras excluded from the trial. The witnesses indicated to the trial court via affidavits that they feared reprisals by other inmates from the live televising of their testimony.\textsuperscript{170} After a nonevidentiary hearing, the trial court granted the state's motion, on behalf of the prisoner witnesses, to exclude cameras.\textsuperscript{171}

On appeal, the Fourth District Court of Appeal reversed the trial court on the basis that the "finding" required by \textit{Post-Newsweek} is a valid basis for exclusion only if the trial court conducts an evidentiary hearing.\textsuperscript{172} The Florida Supreme Court declined to adopt that precise holding.\textsuperscript{173} While it acknowledged that a full blown hearing "should be" permitted in all cases, the court appears to have stopped short of actually requiring an adversary hearing in all such situations. "An evidentiary hearing should be allowed in all cases to elicit relevant facts if these points are made an issue, provided demands for time or proof do not unreasonably disrupt the main trial proceeding."\textsuperscript{174} In some cases, the court notes, affidavits alone—or even judicial knowledge—could be a sufficient basis for a finding that cameras must be excluded.\textsuperscript{175} These grounds must be

\begin{itemize}
\item authored by Justice Overton. Both decisions were unanimous.
\item \textsuperscript{168} See notes 189-95 infra and accompanying text.
\item \textsuperscript{169} See 370 So. 2d at 778-79.\textsuperscript{170} Palm Beach Newspapers, Inc. v. State, 378 So. 2d 862 (Fla. 4th Dist. Ct. App. 1979).
\item \textsuperscript{171} \textit{Id.} at 863.
\item \textsuperscript{172} \textit{Id.} at 864-65.
\item \textsuperscript{173} 6 FLA. L.W. at 169.
\item \textsuperscript{174} \textit{Id.} (Emphasis added).
\item In a footnote, the court notes that "improved communication between counsel" before trial could eliminate the potentially disruptive effect which a pretrial exclusion hearing could have on the main trial. The court's observation is adopted from and credited to the suggestion of counsel for the media in \textit{Palm Beach Newspapers}. \textit{Id.} at 170 n.6.
\item \textsuperscript{175} \textit{Id.} at 168.
\end{itemize}
identified on the record, however, and counsel must be given the chance to refute or challenge them.\(^{176}\) Although the court does not identify "counsel," it appears that the only counsel ever in a position to challenge such "evidence" would be counsel for the media organization seeking access to the trial. Canon 3A(7) has established the presumption of media access to all trials.\(^{177}\) Thus, only the trial participant seeking to exclude coverage would be in the proper posture to request a hearing and to present evidence.\(^{178}\)

For all practical purposes, then, an evidentiary hearing is required. While the supreme court refused to so hold, it nevertheless found that the hearing conducted by the trial court in *Palm Beach Newspapers* was "defective." The court reasoned that media representatives were denied access to the affidavits upon which the trial court based its exclusionary finding and that no testimony was taken on the issue of "less restrictive means" to excluding cameras, even though a prison official was present at the hearing and could have testified.\(^{179}\)

In *State v. Green*, the defendant herself challenged the presence of cameras in the courtroom.\(^{180}\) The special circumstances of *Green* required the court to resolve the substantive issue of exclusion quite differently than it had in *Palm Beach Newspapers*.\(^{181}\) Its treatment of procedural considerations, however, substantially complements the *Palm Beach Newspapers* approach to hearing requirements. In *Green*, the defendant, who had a history of mental illness, sought to exclude the electronic media, alleging that the presence of a camera would render her incompetent to stand trial.\(^{182}\) Without holding an evidentiary hearing, the trial court denied the motion.\(^{183}\) The Third District Court of Appeal reversed and remanded the case because no evidentiary hearing had been

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176. *Id.*
177. See note 7 supra.
178. The press itself has been accorded the right of staying the trial to pursue an interlocutory appeal if the trial court grants an exclusionary motion or excludes the media *sua sponte*. See note 163 supra.
179. 6 FLA. L.W. at 169. The court theorized that the official could have addressed means by which inmate access to radio and television could be restricted, thus eliminating the basis of the fears of reprisal expressed by the prisoner witnesses in the case.
180. *Id.* at 172. It is noteworthy, perhaps, that Green was not the usual criminal defendant, but an attorney charged with grand larceny for the misappropriation of client funds.
181. See notes 182-85 infra and accompanying text.
183. The trial judge was presented with affidavits by psychiatrists and heard oral argument by counsel, but refused to take testimony. The cameras were therefore not excluded. Green was convicted and appealed. 6 FLA. L.W. at 172.
Appearing to defer to its companion case, Green only briefly addresses the necessity for an evidentiary hearing in the context of Canon 3A(7). That question was rendered moot by the supreme court's holding that the trial judge was constitutionally required to have an evidentiary hearing on the competency issue. The supreme court does, however, add to the Palm Beach Newspapers discussion of the nature of the required hearing by delineating collateral standards: 1) that the hearing be expeditious in all cases, and 2) that the motion be proper. A "proper" motion requires more than general assertions or allegations. It must "set forth facts that, if proven, would justify the entry of a restrictive order."\(^{185}\)

Together, Palm Beach Newspapers and Green establish a definite procedure which trial judges must follow when Canon 3A(7) is challenged. The challenging party must present a proper motion alleging specific facts which sufficiently demonstrate that: 1) the trial participant will suffer an effect which is qualitatively different from the effect a member of the general public would suffer and 2) the effect will be qualitatively different from one caused by coverage by media other than radio and television.\(^{186}\) Given the Green requirement of setting forth specific facts, and assuming that those facts would be "made an issue," the trial court is required to hold an evidentiary hearing, so long as it would not "unreasonably disrupt" the main trial.\(^{187}\) After conducting the hearing, the trial judge must issue a finding. It need not be a written order, but it must be clear from the record.\(^{188}\)

Thus, while the Palm Beach Newspapers court specifically notes that "no additional formalities are necessary," the guidelines established by both that case and Green indicate that certain procedures must be followed to challenge and to rule upon the presence

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184. 377 So. 2d 193 (Fla. 3d Dist. Ct. App. 1979). The appeal was based upon the defendant's constitutional right to due process which was allegedly violated by the presence of cameras. Id. at 200. See Chandler v. Florida, 101 S. Ct. at 811: "Experiments such as the one presented here may well increase the number of appeals by adding a new basis for claims to reverse, but this is a risk Florida has chosen to take after preliminary experimentation."

185. 6 FLA. L.W. at 173.

186. See id., notes 189-97 infra, and accompanying text.

187. 6 FLA. L.W. at 169. The supreme court does not set forth an alternative procedure for instances when an evidentiary hearing on exclusion of the media would unduly disrupt the actual trial proceeding.

188. Id. at 168. The court compares the procedural requirements attendant on such a finding to those required in a voluntary confession hearing, i.e., it is sufficient that the trial judge recite his conclusory finding into the record.
COURTROOM CAMERAS

of the electronic media in the courtroom.

B. The Substantive Requirements of Excluding Cameras from the Courtroom

As already noted, any challenge to the presence of cameras must meet the "qualitatively different" test in two respects. It must be shown that "a special and identifiable injury" will be suffered, and that the injury is solely traceable to coverage by the electronic media, as distinguished from press coverage in general.

After Green and Palm Beach Newspapers, doubt remains as to the showing of injury required to exclude cameras from the courtroom. Neither Green nor Palm Beach Newspapers sufficiently defines "injury" as applied to those cases to formulate a standard upon which others can rely. The thrust of the latter opinion is that, even though the hearing was defective, no remand was necessary, since that particular trial had been concluded. Thus, it is not clear what quantum of proof must be presented to the trial court by an inmate witness who fears reprisals from testimony that is televised. The Green opinion fails to reach the issue of what constitutes "substantial effect." Its decision that an evidentiary hearing should have been held in that case is predicated on the competency issue. "In the instant case... the competency issue mandated an evidentiary hearing. The trial judge erred in not allowing one."

Nor is the second prong of the "qualitatively different" test adequately defined by Green and Palm Beach Newspapers. The latter court, in fact, declines to "adopt a precise standard of proof." It does assert, however, that the focus of the hearing must be only on the difference between the effect of electronic media and the effect of other types of media. The Green court also requires that the claimed injury be "a product of electronic media's presence." In both cases the court justifies this lack of specificity by deferring to

189. Id. at 173.
190. Id. at 169.
191. The court does suggest that a more desirable alternative to excluding the media is to restrict inmates within the prison from access to television while such a trial is in progress. Id.
192. Id. at 173. The Green court relies upon Drope v. Missouri, 420 U.S. 162 (1975) and Lane v. State, 388 So. 2d 1022 (Fla. 1980), which require the trial court to conduct an evidentiary hearing on the competency issue regardless of counsel's request for such a hearing.
193. Id. at 169.
194. Id.
195. Id. at 173.
the discretion of the trial judge, which must be exercised "on the basis of what is available at the time and under the circumstances."\(^{196}\)

Without standards to determine what constitutes an effect which is qualitatively different, trial courts and trial participants who challenge the presence of electronic media appear to be in no different posture than before. The burden is unquestionably on the movant to establish facts sufficient to convince the judge that a substantial injury would result and further, that the injury would not result but for the presence of cameras. It remains to be seen from future cases whether this burden can ever be met. It would appear, at this point, that it cannot be met, absent unusual circumstances such as those which attended *Green*. Thus, *Green* and *Palm Beach Newspapers* seem to extend, without limitation, the position stated in *Post-Newsweek*: "[T]here is more to be gained than lost by permitting electronic media coverage of judicial proceedings."\(^{197}\)

It is, of course, arguable that the Florida Supreme Court had no choice but to discuss its "qualitatively different" test in general terms. Cases which arise in the future may involve fact situations to which the circumstances of *Green* and *Palm Beach Newspapers* will simply not apply. *Post-Newsweek* foresaw this when it determined the necessity for "an articulated standard for the exercise of the presiding judge's discretion in determining whether it is appropriate to prohibit electronic media coverage of a particular participant."\(^{198}\)

In the final analysis, only the trial judge is in the proper posture to evaluate the possible adverse effects which the presence of a camera might have on an individual. No matter how strict the standards might be, a judge will be required to use his or her discretion in applying them.

Nevertheless, it is arguable that *Green* and *Palm Beach Newspapers* further complicate rather than resolve the dilemma faced by a trial judge when Canon 3A(7) is challenged. The Florida Supreme Court could well have mandated that an evidentiary hearing be held in every case. Such a requirement certainly would not infringe upon a trial court's discretion. To the contrary, an absolute standard would relieve the added burden placed upon the trial

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196. *Id.* at 169 (footnote omitted). The court also declines to prescribe "witness requirements" for exclusionary hearings.
197. 370 So. 2d at 780.
198. *Id.* at 778-79 (emphasis added).
court to determine, for example, whether an affidavit alone is ever a sufficient basis for excluding cameras from a trial.\textsuperscript{199}

Furthermore, the court failed to adequately set perimeters for its "qualitatively different" standard. Trial courts can arguably establish an average person standard analogous to the reasonable person standard in tort law to determine whether the effect of courtroom cameras is qualitatively different on one individual than on the average person.\textsuperscript{200} In other words, if the trial court determines that the participant seeking exclusion of the media could be "injured" by its presence, but the "average" person would not be injured, then the cameras are excluded. If, on the other hand, the challenger would be injured only to the same extent that an average person would be injured, the cameras cannot be excluded. Thus, the trial judge has a basis in experience for making such a determination. The question left unanswered by the supreme court is whether a prisoner-witness, for example, must be compared to the "average" prisoner or to the "average" member of the general population.

The facts set forth in the challenger's motion presumably would inform the court whether the exclusion is being sought for physical or psychological reasons. If, using the prisoner-witness example, a witness asserts that the televising of his testimony would place him in physical danger, the court could pose the following questions:

1. Can the movant offer affidavits or witnesses to support his assertions?
2. What are the qualifications of his affiants or witnesses?
3. How crucial is the movant's testimony to trying the case?
4. Is the witness fearful of reprisals for specific testimony which he might be required to give on the stand?
5. Can the press present a viable alternative to excluding cameras which would protect the witness from reprisals?
6. Would the alternative be unduly disruptive of the trial or of the witness' daily routine after trial?
7. Would the alternative be unduly disruptive of the routine of the prison in which those whom the witness fears are incarcerated?

The second prong of the supreme court's qualitatively different test will be more difficult to apply. Trial courts have been given no guidance—and have dealt with nothing comparable in the past—for determining how electronic media will be qualitatively

\textsuperscript{199} 6 Fla. L.W. at 168-69.

\textsuperscript{200} See 370 So. 2d at 779; 6 Fla. L.W. at 169, 173.
different in their effect than will the print media. Furthermore, it is questionable whether the movant can present any "facts" to support such a contention given the acknowledged lack of empirical data on the effect of radio and television as opposed to the effect of print media. 201

Nevertheless, the trial judge could attempt to ascertain the actual impact of different types of press coverage on a prisoner-witness by asking the following questions:

1. Would a newspaper photograph of the witness leaving the courthouse place him in substantially less danger from physical reprisals than the broadcasting of his actual testimony on the evening television news?

2. Would printed excerpts of his testimony reach those he fears and move them to act against him as readily as a radio broadcast of his in-court testimony played on local stations several times throughout the day?

3. Do the persons whom he fears have more, less, or equal access to radio and television as they do to newspapers?

4. Will more immediate access to radio and television reports of the trial than to printed accounts by those persons feared present a greater chance of danger to the witness?

5. Will viewing the witness as a "talking head" incite those whom he fears more than an artist's sketch in the following day's newspaper?

The judge should consider both immediate and delayed impact. For instance, the televising of a teen-age rape victim's testimony may not only humiliate her at trial but also subject her to ridicule or unwanted sympathy for months or years after the case is closed. 202

Trial courts ought to recognize the complexities of making such decisions. Yet the supreme court has an obligation to offer guidelines on how to make these determinations. Its failure to do so has placed yet another burden upon trial courts to ensure that the judicial process is administered fairly.

201. See 370 So. 2d at 767-68; 101 S. Ct. at 812.

202. A recent example of delayed impact is the harassment which Mrs. Doris Jones, the state's key eyewitness in a Miami murder trial, received from her neighbors after her testimony was televised. See St. Petersburg Times, May 4, 1981, at 2B, col. 1.
C. Constitutional Considerations in Excluding Cameras from the Courtroom

Green and Palm Beach Newspapers do appear to extend Post-Newsweek in one important respect. Both opinions emphasize the constitutional fair trial aspects of permitting televised trials. They caution against delaying the trial and label the exclusionary hearing "collateral." In Palm Beach Newspapers Justice England states:

[I]t remains essential for trial judges to err on the side of fair trial rights for both the state and the defense. The electronic media's presence in Florida's courtrooms is desirable, but it is not indispensable. The presence of witnesses is indispensable. That difference should always affect but never control a trial judge in his approach to the exercise of his discretion in excluding electronic media coverage of a prisoner-witness, or for that matter, any witness.

Justice Overton expresses a similar caveat in Green. "[T]he qualitatively different test has constitutional dimensions when applied to a criminal defendant because the constitutional right to fair trial is at issue." Notwithstanding such concern, Green and Palm Beach Newspapers appear to carry forward the basic thesis of Post-Newsweek. Without a specific showing of prejudice, a trial court cannot exclude electronic media from the courtroom.

V. Conclusion

Chandler v. Florida is a departure from earlier opinions which resolved conflicts between a fair trial and a free press. Yet it appears to advance the Burger Court's recent approach to the constitutional rights of both the criminal defendant and the press when they have arisen in other contexts. Choosing to forego substantive constitutional analysis in these cases, the Court instead relies on procedural grounds. The result has been that the burden of protecting the rights of criminal defendants and the press has fallen to the states.

The Florida Supreme Court has accepted that challenge by enlarging upon the guidelines it enunciated in Post-Newsweek. Green

203. 6 FLA. L.W. at 169, 173.
204. Id. at 169.
205. Id. at 173.
and *Palm Beach Newspapers* do not resolve every question which has arisen or which will arise when the electronic media seek access to the trial of a camera-shy defendant. Nor do the cases provide sufficient guidelines for trial courts to protect witnesses fearful of reprisals or community stigmas. The process is necessarily ongoing, however. Particular situations will have to be resolved on a case-by-case basis. Whether individuals who challenge Canon 3A(7) will have the resources or the stamina to seek such resolutions is a dilemma which pervades the judicial system. The Florida Supreme Court at least has begun the process of establishing a body of law to meet the needs of a society increasingly subject to the camera's eye and to set a respectable example for other states to follow.