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CAMERAS IN THE COURTROOM AND DUE PROCESS: A PROPOSAL FOR A QUALITATIVE DIFFERENCE TEST

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In 1965 United States Supreme Court Justice John Harlan said:

> Permitting television in the courtroom undeniably has mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process. Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation.[1]

Fifteen years later, in *Chandler v. Florida*,[2] the Supreme Court reaffirmed Justice Harlan's view by emphasizing the role of federalism in permitting televised trials. Today it is not unusual to see on the local evening news portions of criminal trials conducted only hours earlier. Washington and thirty-four other states permit the electronic media to film and at times even broadcast live coverage of trials.[3] Nevertheless, the concern voiced by Justice Harlan—that a trial may be compromised when cameras intrude into the solemnity of the courtroom—continues to linger.

The issue of cameras in the courtroom is at a crossroads. Many criminal defendants tried in the presence of the electronic media have claimed that they were denied due process, yet neither the Washington courts nor the federal courts have adequately defined the standards under which these claims will be evaluated. This failure to reach a definition has left the courts unable to state why cameras will be permitted at one trial and not at another.

Creating standards to determine when the presence of cameras denies a defendant due process is not an easy task. The most promising judicial approach to emerge is the "qualitative difference test." This test recognizes that the presence of cameras at a trial holds the potential to alter the

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1. Estes v. Texas, 381 U.S. 532, 587 (1965) (concurring opinion).

2. 449 U.S. 560 (1981).

3. As of September, 1981, 23 states allowed broadcast coverage of both trial and appellate proceedings; two states allowed broadcast coverage of trial proceedings only; six states allowed broadcast coverage of appellate proceedings only; five states had programs pending that would allow for some degree of courtroom broadcasting; and 15 states had no existing program of courtroom electronic media coverage. THE NEWS MEDIA & THE LAW, Oct.-Nov. 1981, at 64.

conduct or outcome of a trial.[4] This test originated in the Florida courts,[5] and is still in its infancy. The qualitative difference test does not yet adequately define or provide a substantive standard courts can rely on to make consistent decisions. Further development is needed before a qualitative difference test can offer governing principles.

This comment first reviews the federal law on the role of due process in deciding whether to allow cameras in court. The Washington and Florida experiences with cameras in the courtroom are then examined in an attempt to add substance to the constitutional threshold. By placing the entire issue in the proper context we can chart a course of action that will lead to a useful and workable resolution of lingering problems.

I. THE CONSTITUTIONAL THRESHOLD: *ESTES* AND *CHANDLER*

In analyzing the constitutional effects of electronic media trial coverage, it is important to distinguish between the problems associated with exposing trial participants to extrajudicial evidence and the possibility that a trial will be affected by the presence of cameras in the courtroom.

Courts in the United States long ago showed concern for the possibility that certain actions of the press might interfere with the judicial process. A major concern of the courts has been that media coverage of arrests and trials may create prejudice capable of denying defendants their sixth amendment right to a fair trial.[6] Chief Justice John Marshall noted during

4. *See generally* part IV *infra* (discussing the "qualitative difference" test).

5. *See* notes 42–54 and accompanying text *infra*.

6. There are many sensational cases, marked by abuses of both press and court officials, that have led to prejudicial publicity. *E.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); Pennekamp v. Florida, 328 U.S. 331 (1946). Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), is a landmark case that sets guidelines for excluding the print and broadcast media from trials. Stroble v. California, 343 U.S. 181 (1952), provides a telling example of prejudicial publicity. Stroble was accused of murdering a six-year-old girl with an ice pick. Serious questions of prejudicial publicity arose when the district attorney released a pre-trial confession to the press and news stories described the defendant as a "werewolf," a "fiend," and a "sex-mad killer." *Id.* at 192. The press also quoted the prosecutor as saying that sex offenders should be done away with in the same fashion as mad dogs. *Id.* at 192–93. *Stroble* is an extreme example, but it underscores a point. The problem in the free-press/fair-trial issue is the potential of bias from jurors, witnesses, and other trial participants exposed to extrajudicial evidence in the press. The problem is not the presence of media in the courtroom. The free-press/fair-trial issue continues to plague the media and the courts. *See* Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (the press has a first amendment right to attend trials); Gannett v. DePasquale, 443 U.S. 368 (1979) (the right to a pre-trial hearing open to the public belongs to the defendant, not to the press). The problem has also been recently litigated in Washington. *See* Federated Publications v. Swedberg, 96 Wn. 2d 13, 633 P.2d 74 (1981) (trial court may impose reasonable restrictions upon news media at pre-trial hearing in criminal case, including compelling persons attending to agree to abide by Bench-Bar-Press guidelines).

the 1807 treason trial of Aaron Burr that the press was capable of contaminating the jury with "strong and deep impressions which will close the mind against the testimony that may be offered."[7]

The introduction in the twentieth century of both photography and broadcasting posed the potential of aggravating the free-press/fair-trial problems referred to by Chief Justice Marshall. But the growth of photography and broadcasting created a different issue from that posed by the printed word. Courtroom photography brought no assertions that potential jurors might be exposed to prejudicial pretrial publicity. Instead, the question arose whether the broadcast media with their sometimes obtrusive equipment might in some way disrupt the trial process itself and alter its outcome. This issue is not the traditional free-press/fair-trial dilemma. The question is whether photographic and recording equipment have some effect on trial participants capable of denying a defendant due process.

Communications reseacher Michael Novak wrote in 1974:

> For twenty-five years we have been immersed in a medium never before experienced on this earth. We can be forgiven if we do not yet understand all the ways in which this medium has altered us, particularly our inner selves: the perceiving, mythic, symbolic—and the judging, critical—parts of ourselves.[8]

Novak's concerns echo the muddled response to the issue of cameras in the courtroom that arose from the Supreme Court in 1965 in *Estes v. Texas*.[9] In that case, salad-oil magnate Billie Sol Estes, a prominent citizen of the Lone Star State, was involved in a scandal that included links to federal government officials. The resulting prosecution received considerable attention from the media. Texas was one of the only states at the time to allow cameras into criminal trials. Twelve television-camera operators crowded into the tiny courtroom where Estes was tried. Estes appealed his fraud conviction, arguing that the presence of cameras at his trial created a denial of due process.[10]

Estes provided the Supreme Court its first opportunity to consider the cameras in the courtroom issue in a context devoid of traditional free-press/fair-trial questions. Implicit in the case was the Court's first chance to set a standard to identify due process limitations on the use of cameras in the courtroom, but the Court's decision left the problem unsettled. The

7. United States v. Burr, 25 F. Cas. 49, 51 (C.C.D. Va. 1807) (No. 14, 692g).

8. Novak, *Television Shapes the Soul*, in TELEVISION AS A SOCIAL FORCE 9, 9 (1975).

9. 381 U.S. 532 (1965).

10. Severe criticism of electronic media in *Estes* centered on purely technical problems that caused distractions, such as cumbersome equipment, distractive lighting, and numerous camera technicians. *Id.* at 568 (Warren, C.J., concurring); *see* Chandler v. Florida, 449 U.S. 560, 576 (1981).

Court was widely split in its reasoning. Five Justices agreed that Estes was denied due process by the presence of cameras at his trial, but Justice Clark's opinion for the Court was joined without reservation by only three Justices.[11]

Chief Justice Warren's concurring opinion in *Estes* called for a complete ban: "The record in this case presents a vivid illustration of the inherent prejudice of televised criminal trials and supports our conclusion that this is the appropriate time to make a definite appraisal of television in the courtroom."[12] Justice Harlan, however, was not ready to go as far as Warren and in supplying the crucial fifth vote stated: "[T]he day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process."[13] Justice Stewart's dissent also left open the door for reconsidering the possibility of televising trials.[14]

The cameras in the courtroom issue appeared before the Court again in 1981 in *Chandler v. Florida*.[15] *Chandler* involved the appeal of two Miami policemen who were convicted of burglary in a Florida court. The case had aroused public attention, and the defendants requested at the outset of their trial that cameras be banned. Based on Canon 3A(7) of the Florida Code of Judicial Conduct[16] the trial court denied the request. The defendants appealed, claiming that the presence of cameras had denied them due process.[17]

Chief Justice Burger formulated the question narrowly: "[W]hether, consistent with constitutional guarantees, a state may provide for radio,

11. *See* 381 U.S. at 591 (Harlan, J., concurring). The three members of the Court who unreservedly joined Justice Clark's opinion did so through a separate concurring opinion authored by Chief Justice Warren.

12. *Id.* at 552.

13. *Id.* at 595 (concurring opinion).

14. Justice Stewart stated: "I would be wary of imposing any *per se* rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights." *Id.* at 604. Despite Stewart's reference to first amendment rights, cases involving cameras in the courtroom have been decided on grounds of federalism rather than press freedom. *E.g.*, Chandler v. Florida, 449 U.S. 560 (1981). *Contra Burger Court Criticized for First Amendment Views*, 7 MEDIA L. REP. (BNA) No. 34, at inside back cover (Dec. 1, 1981) (arguing Court should have used *Chandler* to establish a first amendment right to broadcast trials); *cf.* Cable News Network v. ABC, 518 F. Supp. 1238, 1244 (N.D. Ga. 1981) ("there does exist a limited right of the public and the press, under the First Amendment, to access to information concerning governmental activities").

15. 449 U.S. 560 (1981).

16. Canon 3A(7), which allows broadcast coverage, was amended by the Florida Supreme Court in *In re* Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764 (Fla. 1979). *See generally* note 39 *infra* (discussing Canon 3A(7)).

17. The Florida District Court of Appeal affirmed the convictions and the Florida Supreme Court denied review, reasoning that it had already spoken on the issue of cameras in the courtroom in *In re* Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764 (Fla. 1979). 449 U.S. at 568–69.

television, and still photographic coverage of a criminal trial for public broadcast, notwithstanding the objection of the accused."[18] The first argument of the defendants was that *Estes* banned cameras in the courtroom as a per se violation of due process rights.[19] The defendants' second argument was that, even if *Estes* did not create a per se rule, in the defendants' case the presence of cameras was a denial of due process.[20]

Chief Justice Burger answered the first argument by pointing out that because Justice Harlan's concurring opinion in *Estes* had been limited to the facts of that case, the *Estes* Court had neither adopted a permanent ban on cameras in the courtroom, nor held that cameras were a per se violation of due process rights.[21] The *Chandler* Court also refused to find that cameras in the courtroom were a per se violation of the defendants' constitutional rights.[22] The Court explained that absent such a constitutional question, the concept of federalism insured the states the right to experiment within the judicial process. Chief Justice Burger stated, "We are not empowered by the Constitution to oversee or harness state procedural experimentation; only when the state action infringes fundamental guarantees are we authorized to intervene."[23] Under *Chandler,* and consistent with the concept of federalism, it is therefore up to the states, not the federal government, to decide whether to allow courtroom photography and broadcasting.[24]

States that allow cameras in the courtroom, however, continue to face the second possibility, raised in both *Estes* and *Chandler,* that in a given case due process rights may be violated. The Court in *Chandler* found that the defendants had made no specific showing of prejudice to their rights.[25] Chief Justice Burger said the defendants had not attempted to show with sufficient "specificity that the presence of cameras impaired the ability of the jurors to decide the case on only the evidence before them or that their trial was affected adversely by the impact on any of the participants of the presence of cameras and the prospect of broadcast."[26]

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18. 449 U.S. at 562.
19. *Id.* at 570.
20. *Id.* at 581.
21. *Id.* at 572–74. Chief Justice Burger felt that, because Justice Harlan provided the fifth vote necessary in support of the *Estes* judgment, "[a] careful analysis of Justice Harlan's opinion is therefore fundamental to an understanding of the ultimate holding of *Estes.*" *Id.* at 571.
22. *Id.* at 582–83.
23. *Id.* at 582.
24. Less than two weeks after the *Chandler* decision, the Maryland House of Delegates voted by a margin of almost three to one to discontinue the state's program of cameras in the courtroom. Wash. Post, Feb. 18, 1981, at C4, col. 1; *see also* Abrahams, *New Efforts in 17 States to Expand Camera Coverage of Courts,* 65 JUDICATURE 116, 118 (1981) (noting the Maryland legislative action).
25. 449 U.S. at 581–82.
26. *Id.* at 581.

The Court did not define the parameters of such necessary "specificity." Undoubtedly, there are constitutional limitations on the presence of cameras in court. For the time being, however, *Chandler* has left it up to each state to devise court procedures that will not violate these limitations. In the words of Chief Justice Burger, "[U]nless we were to conclude that television coverage under all conditions is prohibited by the Constitution, the states must be free to experiment. . . . We must assume state courts will be alert to any factors that impair the fundamental rights of the accused."[27]

II. CAMERAS IN THE COURTROOM IN WASHINGTON

Washington's experience with cameras in the courtroom predates *Chandler* by a number of years. In 1963 a group consisting of lawyers, judges, law-enforcement officers, and representatives of the news media formed the Bench-Bar-Press Committee of Washington.[28] In 1973 the Committee asked the Washington Supreme Court to lift temporarily the ban on cameras in the courtroom.[29] The court found merit in the request and approved a limited program of courtroom photography on an experimental basis.[30] After evaluating the experimental program, Canon 3A(7)

27. *Id.* at 582. For a detailed discussion of the history of the cameras-in-the-courtroom issue, see Kelso & Pawluc, *Focus on Cameras in the Courtroom: The Florida Experience, The California Experiment, and the Pending Decision in* Chandler v. Florida, 12 PAC. L.J. 1 (1980); Stephen, *Cameras in Courtrooms in Florida*, 1979 JOURNALISM Q. 703; Zimmerman, *Overcoming Future Shock:* Estes *Revisited, or a Modest Proposal for the Constitutional Protection of the News-gathering Process*, 1980 DUKE L.J. 641. Recent discussions of *Chandler v. Florida* include: Beisman, *In the Wake of* Chandler v. Florida: *A Comprehensive Approach to the Implementation of Cameras in the Courtroom*, 33 FED. COM. L.J. 117 (1981); Pequignot, *From* Estes *to* Chandler: *Shifting the Constitutional Burden of Courtroom Cameras to the States*, 9 FLA. ST. U.L. REV. 315 (1981).

28. The purpose of the committee is to "foster better understanding . . . and to seek accommodations between the constitutional rights of free trial and free press." Principles and Guidelines of the Bench-Bar-Press Committee of Washington 1 (on file with the *Washington Law Review*) [hereinafter cited as Bench-Bar-Press Principles and Guidelines]. The Committee explores concerns and suggests non-binding solutions to issues of concern to the bar, the judiciary and the media of Washington. *See* notes 32, 34 & 39 *infra*. Membership in the original committee included representatives from the Washington State Supreme Court, Washington State Court of Appeals, Federal Judiciary in Washington, Superior Court Judges' Association, Washington State Magistrates' Association, Washington State Bar Association, Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association, Washington State Association of Broadcasters, Associated Press, United Press International, University of Washington School of Communications, Washington State Prosecuting Attorneys' Association, Washington Association of Sheriffs and Chiefs of Police, and Washington State Board of Prison Terms and Paroles. Bench-Bar-Press Principles and Guidelines, *supra*, at 1–2.

29. Memorandum to Bench-Bar-Press Committee of Washington on Cameras in the Courtroom (Oct. 28, 1981) (on file with the *Washington Law Review*).

30. The Washington Supreme Court adopted the Committee's recommendation and a test case, State v. Fetter, Crim. No. 69–484 (King County Super. Ct. Dec. 2, 1974), was selected. Under prearranged ground rules, the court allowed Seattle television stations to test various film and record-

of the Washington Code of Judicial Conduct was revised to permit cameras in the courtroom at the discretion of the trial judge.[31] Under the modified canon the media are required to secure the permission of the trial judge prior to photographing or broadcasting trials. The permission of witnesses, defendants, jurors and other parties to a trial is not necessary, although individuals may prevent their own pictures from being taken if they object in advance.[32]

In 1981 the Washington Court of Appeals decided *State v. Wixon*,[33] the first review of the cameras-in-the-courtroom issue by a Washington appellate court since the United States Supreme Court decided *Chandler*. Todd James Wixon and Steven Earl Brown were tried for murder. The victim was a prominent Seattle citizen whose body was found in the locked trunk of a car. When the trial began, the judge granted permission to the media, over the objections of the defendants, to bring their cameras into the courtroom.[34] Despite all the trappings of a Raymond Chandler

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ing equipment during the course of the trial as long as there was no interference with the proceedings. The University of Washington supplied the only stationary video camera at the trial. Neither live coverage nor film or videotape of the *Fetter* proceedings was ever broadcast to the public. At the trial's conclusion, representatives of the court and the Bench-Bar-Press Committee conducted interviews with various participants and observers and prepared a final report.

31. WASH. CODE OF JUDICIAL CONDUCT Canon 3A(7) now states:

A judge may permit broadcasting, televising, recording, and taking photographs in the courtroom during sessions of the court, including recesses between sessions, under the following conditions:

(a) Permission shall have first been expressly granted by the judge and under such conditions as the judge may prescribe;

(b) The media personnel will not distract participants or impair the dignity of the proceedings; and

(c) No witness, juror or party who expresses any prior objection to the judge shall be photographed nor shall the testimony of such a witness, juror or party be broadcast or telecast.

32. The language of Canon 3A(7)(c) holds the potential for misinterpretation. A November 10, 1981 report of the Bench-Bar-Press Committee of Washington states: "Unfortunately, some trial judges have construed the permissive nature of Canon 3A(7) to mean that consent of the parties is necessary [before broadcasting may be allowed at trials], which it is not." Recent Actions By Bench-Bar-Press Committee Concerning Coverage of Judicial Proceedings 2 (Nov. 10, 1981) (on file with the *Washington Law Review*) [hereinafter cited as Bench-Bar-Press Recent Actions]. The language of Canon 3A(7)(c) could appear on its face to mean that parties to a trial, including the defendant, can veto the judge's decision to allow broadcasting from the courtroom. However, a member of the Bench-Bar-Press Committee recently stated that the intent of Canon 3A(7) was only to afford "parties, witnesses and jurors the option of objecting to the training of cameras on them personally." Minutes of Bench-Bar-Press Committee of Washington 2 (Nov. 7, 1981) (on file with the *Washington Law Review*) [hereinafter cited as Bench-Bar-Press Minutes]. *See* note 34 *infra*.

33. 30 Wn. App. 63, 631 P.2d 1033 (1981).

34. No photographs were taken of the defendants, but cameras were allowed to focus on other participants at the trial. The *Wixon* court did not address directly the contention that the defendants' permission was required before any photographs of the trial could be taken, but the conclusion is unavoidable that a defendant's permission is not required before other portions of a trial may be filmed. The court held that the defendants were not denied due process by the presence of cameras photographing others at the trial. By implicitly approving of the mere presence of cameras despite the

mystery novel, the trial judge found the reporting by the Seattle media of both the arrests and the trial to be "factual and neither sensational nor inflammatory."[35] Nevertheless, the defendants claimed that because the trial judge had allowed cameras in the courtroom over their objection, they had been denied due process.[36]

The court of appeals disagreed. The court applied *Chandler* and held that absent a specific showing of a denial of due process to the defendants, the state may allow broadcast coverage of criminal trials. The defendants in *Wixon*, like the defendants in *Chandler*, had failed to show a specific denial of their due process rights.[37]

III. ANALYSIS

Wixon is Washington's affirmation of the *Chandler* holding and makes it clear that broadcast coverage of criminal trials in Washington will not in and of itself be seen as a threat to a fair trial. *Chandler* could not establish that holding for Washington because *Chandler* does not require a state to permit broadcasting of criminal trials.[38] Washington's decision to allow cameras in the courtroom is Washington's alone, and is consistent with a reading of *Chandler* as a case dealing primarily with federalism. But

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defendants' objections, the court of appeals' interpretation of Canon 3A(7) is consistent with the original intent of the Canon as recently stated by a member of the Bench-Bar-Press Committee. *See* note 32 *supra*. Nevertheless, some members of the Committee continue to fear future misinterpretations, and at the Committee's November 7, 1981 meeting a motion was adopted to add the following language to Canon 3A(7)(c): "Notwithstanding such objection, the judge may allow the broadcasting, televising, recording or photographing of any other portion of the proceedings." Bench-Bar-Press Recent Actions, *supra* note 32, at 2.

35. 30 Wn. App. at 68, 631 P.2d at 1038.

36. A free-press/fair-trial issue was also raised by defendant Wixon's contention that the trial judge erred when he did not grant a change of venue due to prejudicial publicity. The court rejected this argument noting that "[f]ollowing individual voir dire, the trial judge denied the motion based upon his evaluation of the nature of the publicity, the selection of an apparently unbiased jury, and the benefits and burdens to the parties of granting a change of venue." *Id.* at 66-67, 631 P.2d at 1037.

37. The *Wixon* court stated:

> Here, neither Wixon nor Brown has offered any evidence that the televising of their trials impaired the ability of the jurors to decide the case on the basis of the evidence presented or that the trial was affected adversely by the impact of the broadcasters' presence on any of the participants.

Id. at 73, 631 P.2d at 1040.

38. Justice White's concurring opinion in *Chandler* stresses this point:

> I agree that those risks [associated with cameras in the courtroom] are real and should not be permitted to develop into the reality of an unfair trial. 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 courtrooms in any criminal case.

Chandler v. Florida, 449 U.S. 560, 589 (1981).

Wixon is more than a simple reaffirmation of federalism. *Wixon* also demonstrates the need for standards that identify conditions under which cameras in the courtroom do violate due process. Neither *Chandler* nor *Wixon* provides those standards.

The need for standards is particularly acute in Washington because the decision whether to permit courtroom broadcasting is left entirely to the trial judge's discretion. Canon 3A(7) of the Washington Code of Judicial Conduct states: "A judge *may* permit broadcasting, televising, recording, and taking photographs in the courtroom . . . ."[39] Only with advance permission of the trial judge, secured with each new case, may the media bring broadcast and photographic equipment into Washington courts. It is, therefore, more accurate in Washington to speak of a privilege to broadcast and photograph trials than of a right to do so.

One need not favor trial broadcasting to appreciate the need for a consistent approach to balancing the desirability of electronic media coverage against the possibility of an unfair trial. Without a consistent approach, trial judges must base their decisions on little more than visceral feelings about cameras in the courtroom. If they decide to close their courtrooms the goal of increasing public awareness of the judicial process is frustrated. But when judges decide to open their courtrooms to broadcasting, the absence of a well-defined standard increases the likelihood that defendants will appeal those decisions.[40]

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39. (Emphasis added). The Washington Canon is different from the Florida Canon approved by the United States Supreme Court in *Chandler*. Florida Canon 3A(7) states, in part:

> 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.

FLA. CODE OF JUDICIAL CONDUCT Canon 3A(7) (emphasis added). If a Florida judge wishes to exclude the electronic media, the normal procedure is to first grant an evidentiary hearing to the press. *See* State v. Palm Beach Newspapers, Inc., 395 So. 2d 544, 548 (Fla. 1981). Under Washington Canon 3A(7) a judge is not required to grant a hearing before electronic media are excluded from a trial. *See* note 31 *supra*.

The Subcommittee on Canon 3A(7) to the Bench-Bar-Press Committee of Washington has recognized the differences between the Washington and Florida canons. The Subcommittee considered "[w]hether Washington CJC 3A(7) should be modified along the lines of the Florida Canon as approved by the U.S. Supreme Court in *Chandler v. Florida*," but "recommended against modification of Washington's canon to align it with Florida's." Report of Subcommittee on Canon 3A(7) to Bench-Bar-Press Committee (Nov. 7, 1981) (on file with the *Washington Law Review*). The full Committee adopted the Subcommittee's recommendation. Bench-Bar-Press Minutes, *supra* note 32, at 2–3.

40. State v. Hansen, Crim. No. 176 (Wahkiakum County Super. Ct. Aug. 27, 1981), illustrates the problems the vague language of Canon 3A(7) present for the judiciary and the media. The Wahkiakum County Superior Court granted prior permission to the *Longview Daily News* and the *Wahkiakum Eagle* to take still photographs at a 1981 first-degree murder trial. In addition, however, the court

Chandler and *Wixon* held that a defendant's right to due process is violated if the defendant can show "some specific evidence that televising the trial adversely affected the conduct of his trial."[41] But the Washington courts have yet to speak on what such a specific showing must include.

IV. THE QUALITATIVE DIFFERENCE TEST

The experience of the Florida courts in the wake of *Chandler* provides useful guidance in developing a qualitative difference test. In March 1981, shortly after *Chandler*, the Florida Supreme Court announced two decisions involving cameras in the courtroom. In *State v. Palm Beach Newspapers, Inc.*,[42] the media sought review of a trial court order prohibiting still photographs, sketches, and television coverage during testimony at a murder trial.[43] The defendant was accused of killing a fellow inmate at Glades Correctional Institute and was on trial for first-degree murder. Because the inmates at the prison were allowed to watch television and because the defendant feared that his testimony about prison violence might place him in jeopardy if the prisoners saw televised proceedings of his testimony, the trial court agreed that the defendant's testimony should not be broadcast.[44]

The Florida Supreme Court focused on the standard a court should use to exclude electronic media from a trial.[45] The court said:

> The presiding judge may exclude electronic media coverage of a particular

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stipulated that before any photographs of the trial could be published in the newspaper, the film would have to be submitted to the court for review and approval. At its November 7, 1981 meeting the Bench-Bar-Press Committee was presented with a report of the Liaison Committee discussing the Wahkiakum County trial. Bench-Bar-Press Minutes, *supra* note 32, at 3. The full Committee adopted this report and accepted the Liaison Committee's recommendation that:

> the Bench-Bar-Press Committee recommend to the state's judiciary, media, and the bar that once the presiding judge has approved cameras (or recording) in the courtroom pursuant to the court's discretion under Canon 3A(7), the court should not request approval of the materials recorded or photographed. The reference in subparagraph (c) of Canon 3A(7) to "*prior* objection to the judge" was intended to indicate that no one should have the right of screening recorded or photographed materials.

Report of Liaison Committee Concerning Trial Judge Review of Photographs 2 (Nov. 7, 1981) (on file with the *Washington Law Review*). There was no suggestion from the Liaison Committee that the problem was anything more than a misunderstanding and the Committee commended the judge, counsel, and the involved newspapers for their efforts to communicate and cooperate.

41. *Wixon*, 30 Wn. App. at 73, 631 P.2d at 1040; *see Chandler*, 449 U.S. at 575.

42. 395 So. 2d 544 (Fla. 1981).

43. Reporters themselves were not barred from the courtroom or prohibited from writing about the trial. *See id.* at 546.

44. *Id.*

45. The court also dealt with a number of technical aspects concerning the Florida requirement that, barring special circumstances, the media must receive a hearing before cameras may be excluded from the courtroom. *Id.* Washington does not require such hearings. *See* note 39 *supra*.

> participant only upon a *finding* that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.[46]

The key phrase is the reference to an effect caused by the electronic media that is "qualitatively different from coverage by other types of media." The court did not, however, explain how to determine when coverage is "qualitatively different."

The Florida Supreme Court also considered how to shape substantive standards to identify conditions under which the electronic media may be excluded from a trial in *State v. Green.*[47] In *Green,* the electronic media were allowed to cover a trial over the objections of the defendant. Green, an attorney, was standing trial for allegedly misappropriating client funds. Her trial had been postponed for several months after court-appointed psychiatrists testified at an evidentiary hearing that Green was incompetent to stand trial because of a nervous condition. When the trial actually began, her counsel moved to exclude the electronic media and included a psychiatrist's report that stated "the presence of electronic media in the courtroom would adversely impact respondent's competency to stand trial."[48] Nevertheless, the trial judge allowed the electronic media to remain.

The Florida district court of appeal overturned Green's conviction and remanded for a new trial.[49] The Florida Supreme Court affirmed. It found the "qualitative difference" standard to be the controlling issue in *Green* and went to some length to explain that test. The court noted that the test "emphasizes that any general effect resulting from public notoriety of the case will not suffice to trigger electronic media exclusion."[50] The court pointed out that trials have always been intimidating and that "the single addition of the camera in the courtroom . . . should not increase tension significantly, given the fact that electronic media will report the proceedings whether or not its camera is actually in the courtroom."[51] The court held that it would not accept "[g]eneral assertions or allegations"[52] as proof of harm, and that "[i]n all instances, a showing must be made that the prejudice or the special injury resulted solely from the presence of

46. 395 So. 2d at 546–47 (quoting *In re* Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, 779 (Fla. 1979)).
47. 395 So. 2d 532 (Fla. 1981).
48. *Id.* at 536.
49. Green v. State, 377 So. 2d 193 (Fla. Dist. Ct. App. 1979).
50. 395 So. 2d at 536.
51. *Id.*
52. *Id.* at 538.

electronic media in the courtroom in a manner which is qualitatively different from that caused by traditional media coverage."[53]

The Florida qualitative difference test provides useful guidance for Washington courts in developing standards on which to base the exclusion of electronic media from trials. But the question of what makes a provable qualitative difference remains unresolved in both Washington and Florida. Even in Florida the test exists in name only. The Florida courts used a qualitative difference test in *Palm Beach Newspapers* as grounds for allowing cameras into a courtroom, and in *Green* as grounds for finding a denial of due process when cameras were allowed. In these decisions, however, the Florida courts have gone no further than to make vague references to "specific showings of evidence" that due process was violated. The Florida courts have set no criteria that would define such a specific showing.

The Washington judiciary must develop its own version of a qualitative difference test. There are at least three criteria that this test should meet. First, the test must be in keeping with the Washington constitutional mandate for the open administration of justice[54] by allowing electronic media in the courtroom while at the same time providing adequate protection for a defendant's fundamental right to a fair trial. At present, individual judges in Washington have little to turn to when questions are raised about either the potential effects of broadcasting trials or, in the case of an appeal, the actual effects caused by the presence of electronic media. In either case there is little incentive to risk due process violations in order to provide for better public access to trials without some consistent means to actually weigh those risks.

Second, the qualitative difference test must be practical. A court cannot be expected to spend the time necessary in every new case to conduct psychological testing of trial participants to determine whether they will be affected by the presence of cameras. The test must define the type of evidence that may be used to show that the presence of cameras will deny a defendant due process. This evidence should be available and applicable in each case within a reasonable amount of time to prevent disruptions in the judicial process.

Third, the qualitative difference test must be understandable both to the judiciary and to the media. If it is too explicit its application will be too limited, and if it is too vague it will only continue the existing confusion and inconsistency.[55] Journalists and jurists may not always understand or

53. *Id.*

54. WASH. CONST. art I, § 10 ("Justice in all cases shall be administered openly, and without unnecessary delay.").

55. *See* note 40 *supra*.

be sensitive to each other's problems. Yet both have a role in ensuring that the judicial branch of government operates effectively and constitutionally.[56] Therefore it is vital that rules affecting both the press and the judiciary take into consideration the needs of both institutions.

Accepting these criteria as a place to begin, the next step is to identify and define the concepts that underlie the notion of qualitative difference. What shall the test be and how shall it be applied? First, the courts developing the test must identify the "difference" brought about by the presence of electronic media; in other words, the courts must identify the kind of psychological effect the media will have at a trial.[57] Does the presence of cameras cause people to change their behavior? Do cameras cause trial participants to pay attention to something other than the trial, perhaps because they are thinking about coverage on the evening news that will be seen by family, friends or business associates? These are questions about human behavior that can be tested empirically, and this testing should help to reveal under what circumstances the presence of cameras at a trial causes changes in behavior.

Once courts have identified when the presence of cameras will cause a change in behavior, they must turn to the notion of "qualitative." Cameras may indeed have some effect upon behavior in a courtroom, but is that effect of such a quality that it interferes with the judicial process? Even assuming that cameras can and do interfere with the judicial process, we need to know at what point that interference becomes a denial of due process. In essence, there is some threshold of interference caused by cameras in the courtroom beyond which there is a qualitative difference in the judicial process. Until this threshold can be identified, judges will continue to apply visceral standards that may give unnecessary weight to due process considerations when they are balanced against the need to expand public awareness of the judicial process.

Both of these factors—identifying changes in behavior and identifying a threshold of interference—involve phenomena that are essentially behavioral in nature. The context is certainly that of the law, but the courts should not overlook the necessity of basing a jurisprudential qualitative difference test at least in part on information more likely to come from social scientists than from lawyers.[58]

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56. It has long been accepted that the press has a watchdog role in guarding against abuses by the judicial branch of government. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980).

57. *See* State v. Green, 395 So. 2d 532, 536–37 (Fla. 1981).

58. This should not be cause for alarm. Both law and social science have made quantum advances since Sir Henry Maine commented three-quarters of a century ago: "The inquiries of the jurist are in truth prosecuted much as inquiry in physics and physiology was prosecuted before observation

Using an interdisciplinary approach to develop a qualitative difference test would not be the first pairing of the behavioral and legal professions to find answers to questions of joint concern. Similar work has been done in the areas of free-press/fair-trial,[59] juries,[60] and, most recently, the two professions have joined forces to explore the use of videotape in trials.[61] The point is that by working in conjunction, the legal profession and social scientists have the opportunity to bring order to a perplexing set of problems.

V. CONCLUSION

We are only now at the point where the need for standards to resolve the question of cameras in the courtroom has been identified. Lawyers, like scientists, operate best when they work with a well-formulated question. But a great deal of work remains before a satisfactory solution can be reached. Cameras are already in courtrooms and temporary solutions are required when due process issues meet head-on with the desire to open up the courts by permitting televised and photographic coverage of trials. But the temporary solutions should not be allowed to become permanent.

The case law and the judicial rules that now surround the televising of Washington trials are inconsistent and insufficient to meet either the needs of the judicial process and its participants or the needs of the media and the public. Some courts have begun to rely on the concept of qualitative difference and while that concept may be a good one, the qualitative difference test does not yet provide a substantive standard. The test merely alludes to a standard. In its current form the qualitative difference test can provide the judiciary with little more than a quasi-rationale upon which to defend visceral decisions.

A well-formulated test would serve the judiciary, the press, and the public by accomplishing two tasks. First, the test would give judges substantive criteria by which to weigh media requests to televise trials. Second, the test would provide clear standards for judges deciding appeals by defendants who claim their due process rights were violated by the presence of cameras in the courtroom.

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had taken the place of assumption." H. MAINE, ANCIENT LAW 3 (10th ed. 1906), *quoted in* Kaplan, *Behavioral Science and the Law*, 19 CASE W. RES. L. REV. 57, 57 (1967).

59. *E.g.*, F. SIEBERT, W. WILCOX, G. HOUGH III & C. BUSH, FREE PRESS AND FAIR TRIAL (1970).

60. *E.g.*, H. KALVEN, JR. & H. ZEISEL, THE AMERICAN JURY (1966).

61. *See* Bermant, Chappell, Crockett, Jacoubovitch & McGuire, *Juror Responses to Prerecorded Videotape Trial Presentations in California and Ohio*, 26 HASTINGS L.J. 975 (1975).

An interdisciplinary approach could produce a well-formulated qualitative difference test. Both the law and social science are powerless to operate effectively without specification; yet neither the law nor social science has identified with sufficient specificity the conditions under which televised trials create a denial of due process. References to "specific showings of evidence" will not suffice. This does not insinuate that either the press or the judiciary have abused the qualitative difference test. The point is simply that no such standard actually exists.

The qualitative difference test holds the potential to become a useful standard when dealing with cameras in the courtroom. But the test is incomplete. It remains to establish usable criteria for determining what effects are caused by the presence of cameras in the courtroom and which of those effects may cause a denial of due process.