"Television in the Courtroom — Limited Benefits, Vital Risks?"

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HONORABLE EDWARD THOMPSON, Moderator

Speakers: **James Goodale**
Former General Counsel for The New York Times

Herald Price Fahringer
Criminal Defense Attorney

Questions: The Audience

Conclusion: Moderator

MR. BARASCH: The Honorable Edward Thompson, The Honorable Francis T. Murphy, James Goodale, Herald Fahringer, Honorable Stanley Steingut, Honorable Abraham D. Beame, Distinguished Members of the Judiciary, Ladies and Gentlemen: It is my privilege to welcome you all to this timely conference which is another in a series we have projected for your consideration and judgment.

Regardless of the ultimate legal decision, the subject which we are about to discuss, is likely to continue in an area of controversy and is bound to simmer and flare periodically in the years ahead.

The formulation of a sound, balanced policy on televising judicial trials is at once difficult, elusive and beset by some basic contradictions, since it involves not only public education but also deep public passion. There is lit-

tle doubt that the agencies of mass media, which includes television, can exert a positive influence upon the progress of the court, or can be influentially critical and retard judicial procedure. It is a matter of media discretion.

Nothing in the past history of television presentation indicates great restraint in presenting sensational and dramatic views though it may be supported by inaccurate information and border on serious error. No voluntary reformation is likely to emerge in the near future. Experience should teach us to be most on guard when a fundamental change is proposed that involves constitutional protection, no matter how beneficial the proposal. Great danger may be lurking when basic rights are nibbled away slowly, and in part, for a convenient cause.

In evaluating the issue before you, it might be helpful to bear in mind that television newscasters are not accredited members of any bar association, or any related profession, are not licensed by Government, or restricted by a legal code of ethics. They do have the free choice to edit, capsulize, dramatize, sensationalize any issue to satisfy the most basic public appetite in order to generate commercial demand.

Newsworthy quotations may, at times, interject subtle personal views, social and political beliefs of the newscaster; an additional element of complication.

Now, I am particularly delighted to present to you the Moderator of tonight's debate, a man who is dedicated to the preservation of freedom, who believes in the dignity of the human race, who cherishes rights and privileges guaranteed by the Constitution; a man who infects an audience with his charm and wit, the former Administrative Judge of the Civil Court and Supreme Court-Civil Division, the Honorable Edward Thompson.

(Applause.)

JUDGE THOMPSON: Thank you very much, George.

After an introduction like that, I might just as well sit down and say thank you.

Now—

(Laughter.)

JUDGE THOMPSON: I suppose the best way to introduce what we have to say tonight, what we have to argue about tonight, is to read, and I will read a little item in the *New York Law Journal* of yesterday's publication. It reads as follows: "The controversial question of when cameras should be permitted to record criminal trials will be squarely before the Supreme Court of the United States when the Justices begin their 1980 – 1981 term.

"In a case from Florida, which the Justices have agreed to hear and argue, *Chandler vs. Florida*, 76-1290, the High Court will be called upon to define when media coverage of a criminal trial impinges upon a defendant's constitutional right of a fair trial. A decision limiting the right of media

coverage of criminal trials could affect the criminal trials in twenty-three states where camera coverage is already permitted, and other states, like New York, where rules permitting camera access are currently under consideration."

Now, I know that while there are many Justices of the Supreme Court present, and many lawyers, and while we are not exactly in the position of being those who are in conference on weighty matters, may I tell you that the law of Florida, the code of judicial conduct permits — may I accent the word "permits" — electronic and still media coverage of a trial in progress, over a defendant's objection. That is the issue before the court in *Chandler v. Florida,* in the United States Supreme Court.

We are so fortunate tonight to have with us, as the proponent and the adversary of the proposition that trials by television shall be allowed, two really and truly great legal persons.

For the proposition that they should and may be advertised or portrayed by television, we have James C. Goodale, who is a partner in the firm of Debevoise, Plimpton, Lyons & Gates. And now to the average lawyer or to the average judge, it's just another law firm, except that it is a very substantial law firm. And the only reason he's a partner therein is that for many years he was general counsel for *The New York Times.* And when he left that position, he became a general partner in this law firm.

Now, James Goodale is a man about whom you have read possibly without recognition. In 1970 and '71, when the Pentagon Papers were in issue, he was General Counsel for *The New York Times,* the newspaper. And it was he and he alone, a graduate of Yale and the University of Chicago Law School — and I don't really take umbrage to them because I'm from Brooklyn Law School, — you can understand that —

(Laughter.)

JUDGE THOMPSON: He said to the counsel for the paper — and that is a tough thing to say — you judges who are here know it is — "I have a duty, you have a duty, my client has a duty to publish the Pentagon Papers." And you know that they were published.

You know what happened as a result thereof. You know, and I can show you (exhibiting a photograph): look at how handsome he was in those days. He has suffered as a result thereof.

(Laughter.)

JUDGE THOMPSON: You can see! Here he is, being escorted into the Federal — I was going to say penitentiary, but it almost was the penitentiary — court. He had to defy the President of the United States, even though the counsel for the paper — and you know they were well known, I wouldn't indicate their names, it's not important — but he had to say, we have a duty to publish to the public under the First Amendment.

I don't know whether he was right or wrong, but the Supreme Court, in

a couple of days assembled all of their members. And it was assured that he would lose five to four. But he argued, and he won six to three.

(Laughter.)

JUDGE THOMPSON: It's not easy, you know, it's a little in between, if you know what I mean.

But here he is, a graduate of those colleges I mentioned to you. He is a Trustee of St. Bernard's School; of Salzberg Seminar Center; the Boys Club of New York; a lecturer on communications and law at the Yale Law School; a member of the Visiting Committee, the University of Chicago Law School; and the Board of Editors of the *Media Law Reporter;* Chairman of the PLI Communications Law Seminar, a columnist in the *National Law Journal,* and he's listed in *Who's Who.*

MRS. GOODALE: I'm in *Who's Who,* also.

JUDGE THOMPSON: You hear that?

I want to give you both a little credit. But here he is. I had to search a little bit, if you know what I mean. It isn't easy as the Moderator to gather, for your benefit, you, judges, lawyers, engineers, educators, labor leaders, in an audience such as this, under the sponsorship of the great association, and George Barasch, it isn't easy to secure someone whose opinions you will appreciate and have you stand up and say, I disagree, or I would like to know why you took this position.

Well, the United States statute states that if you publish classified material, you commit a felony. Well, he committed — can I say that, affectionately? — he committed these felonies. He said, yes, publish, —publish them word for word, all the Pentagon Papers. You read them, you've probably not read them in total. I didn't read them either, they were boring.

(Laughter.)

JUDGE THOMPSON: Of course they were boring, you know that. They were boring to him. But he had the courage to say, do it, because the public, under the First Amendment, is entitled to be informed.

And I give you at this time, James C. Goodale, former General Counsel to *The New York Times.*

(Applause.)

MR. GOODALE: Thank you, Judge Thompson.

I think anyone who can follow that act is crazy. Judge Kupferman told me that all remarks were going to be reprinted in *Communications and the Law,* subject to the right of editing. And am I ever going to exercise that blue and red pencil! I'll rewrite the whole introduction.*

* Editor's Note: Mr. Goodale made no changes. However, he did add a post-script to cover the decision in *Chandler v. Florida* handed down by the United States Supreme Court after this discussion took place. The Editors believe the discussion still valid despite the decision. The postscript appears at the conclusion of this discussion.

(Applause)

MR. FAHRINGER: Judge Thompson, honored Judges, honored guests and ladies and gentlemen. Since I occupy the office of General Counsel to the First Amendment Lawyers Association you can easily understand my discomfort with being placed on this side of a most controversial issue.

The complex problem of balancing the interests of a free press against an accused's right to a fair trial has created a constitutional confrontation of heroic proportions. This pervasive issue has raged through the last four terms of the Supreme Court. Recently it has been further inflamed by the media's insistence that television cameras be permitted in courtrooms. Already, twenty-seven states are allowing cameras in their courtrooms, although six of them restrict coverage to civil trials or appellate arguments and eleven states grant individual defendant's the right to veto TV coverage if they like. Significantly, Federal courts still bar any form of TV coverage.

However, on January 26, 1981, the Supreme Court of the United States unanimously held in *Chandler* v. *Florida,** that the presence of cameras in a courtroom does not automatically jeopardize a defendant's right to a fair trial. The Supreme Court decision stemmed from the burglary conviction of two Miami Beach policemen who came to trial in 1977, just after Florida authorized a one-year experiment in courtroom broadcasting. Florida's rules permitted only one fixed television camera and one technician in the courtroom, and banned the use of artificial lights. Photographing the jury was not permitted and the judge could shut off the camera whenever he chose. Only two minutes and fifty-five seconds of the prosecution's case against Chandler was aired.

Although many journalists hailed the Florida decision as a significant victory for the press, the Court made it clear that it was only considering the Florida Supreme Court's authority to experiment and was not guaranteeing camera crews an unqualified right of access to our courtrooms. However, it is now clear that the states will be allowed to continue to experiment with TV coverage of court proceedings.

I am convinced that the intrusion of TV cameras into the courtroom creates special hazards that must be understood before any intelligent conclusion can be reached. Such a venture is an expedition into the unknown and danger to our judicial process lurks everywhere.

Since a free press safeguards all our other liberties, it has always enjoyed a preferred place in our hierarchy of constitutional values. The fulfillment of our ideals, aspirations and notions of self-worth in politics, religion and a host of other human concerns, depends directly upon our having access to the greatest possible amount of information relating to those paramount

* Editor's Note: Mr. Fahringer determined that his talk should be revised in light of the decision in the Chandler case.

social interests. The judicial branch of our government enjoys no special immunity from public scrutiny. The criminal justice system must be held to a high degree of accountability which can only be obtained by a vigorous and independent press. A criminal trial exposes the sub-structure of a government's interworkings and tells us whether the longer promises of a free society are being realized. The injustices that occur in many criminal trials; extortionate pleas, the mistreatment of certain classes of defendants, biased judges, as well as mediocre trial lawyers, must be publicized if correction is to be obtained.

No less significant, is an accused's right to a fair trial, perhaps the most cherished symbol in any system devoted to social equality.

An untamed press cannot be allowed to interfere with a trial's search for the truth. In addition to compromising the dignity of the proceedings by creating a circus side show effect, there is a real danger that the presence of this gawking mechanism will divert the litigation from its proper course. Television introduces a new constituency into the trial which could seriously reduce the reliability of the fact finding process. We don't allow the unconditional use of television cameras in the operating rooms of hospitals because the disruption may endanger the patient's life. The risks are just as high in a criminal trial when a person's freedom is at stake and therefore the analogy applies.

The principle virtues of any judicial system, detachment and objectivity, are imperiled by an inordinate amount of publicity. Surveys have shown that people who lose their anonymity are more likely to yield their personal convictions for those which are more socially acceptable. Frequently, even the most controversial public trials are poorly attended. Television will enlarge the trial's audience enormously and will effectively destroy the natural solitude of most judicial proceedings.

This inquisitive red-eye, snooping about the courtroom, will scan the jurors faces and tell the world who they are. Friends and neighbors will be tempted to talk to them. This unexpected celebration will have a severe impact upon their neutrality and independence. In *United States* v. *Barnes, et al.*, 604 F.2d 121 (2d Cir. 1979), the Second Circuit, in an electrifying decision which stunned the defense bar, upheld a judge's refusal to release the trial jurors addresses. The Court's well intended decision was based upon the need to protect the jurors from any possible influence or intimidation. The same reasoning applies to cameras in the courtroom. In addition, jurors will also find it harder to obey a judge's admonition to refrain from watching newscasts which may feature them.

State judges, who must run for reelection, are also not immune from the pressures of public opinion. In criminal cases they are often forced to make unpopular decisions. Whatever else may be said of the quality of the judges who preside over our lower criminal courts, many have displayed a fine in-

stinct for avoiding unpopular positions. Being "on camera" will not curb that instinct but rather may encourage further dereliction of duty.

Investigations have also shown that the presence of this electronic wonder provokes unpredictable forms of human behavior. Some witnesses might become exceedingly nervous and a jury would be hard pressed to decide whether that resultant lack of composure is attributable to the television camera or the defense lawyer's cross-examination. Thus, a witness' credibility could easily be misjudged. Other witnesses, aware that they are being watched by a larger audience, might become inhibited. Revealing the truth is often uncomfortable. Increasing the number of spectators could make it more difficult for a witness to admit certain facts. For instance, the embarrassment facing a rape victim is heightened by a larger viewing audience. And finally, many witnesses will resist coming to court if they know their testimony will be viewed by hundreds of thousands of people.

But perhaps even more dangerous is the witness who enjoys the additional attention that comes with television, and therefore will tend to talk more, exaggerate and "show boat". The eccentric behavior patterns, instigated by cameras in the courtroom, will have a detrimental effect upon the trial's fidelity. These concerns are not present with the unobtrusive news reporter who, more often than not, goes unrecognized in the courtroom.

Television's influence on society is staggering. Today this stump of a monster, with a child's brain, occupies 98% of American homes. The average family spends 6.9 hours a day under its spell. In contrast, a 1977 survey showed that only 23% of the American people bought a morning newspaper and only 31% purchased an evening paper.

The influence of television is tremendous and cannot be fully measured. One example illustrates television's forceful grip on the American people. David Halberstram, in his book *The Powers That Be*, explains how Richard Nixon lost the presidential election to John Kennedy because of their famous television debate. When Nixon arrived at the television studios he was asked whether he wanted to wear makeup. He was told Kennedy was not wearing any and likewise declined. However Kennedy, who had spent a lot of time in the sun, sported a deep tan. Nixon's sallow complexion and heavy beard made him appear sinister (a trait later confirmed by history). Media experts found that his malevolent appearance contributed to Nixon's losing the debate and ultimately the election. While that result caused some people to rejoice, admittedly appearance alone is a poor basis for choosing a candidate.

Television news programs are doomed to telling their story quickly and in order to survive the rating wars must attempt to gain the largest possible audience. Consequently, they concentrate on the sensational. This leads to professional promiscuity. Most T.V. journalists lust for the spectacular. They don't want "talking heads" but search for the melodramatic. The

clenched faces of jurors, a lawyer's perspiring brow, or the witness' shifting eyes are captured and magnified in a million homes. The focusing on random but theatrical details combined with the hideous cackle of the newscaster's reporting the case's most garish details, leads to gross distortion. This form of sensation mongering is what has pushed the television industry to the brink of madness. The misrepresentation of combustible facts is bound to detonate the public's worst prejudices, as well as those of the jurors, who will no doubt be watching the newscast. The result is clear. The trial ends in calamity and the defendant is found listed among the first casualties.

The idea that these evils can be avoided by concealing the elaborate T.V. apparatus from the trial participants is like rearranging the deck chairs on the Titanic. Everyone will soon know they are being televised and all of our worst fears will be realized.

The public is being adequately informed about criminal prosecutions by newspaper coverage and the filming outside the precincts of the courtroom. Journalists have always been free to report the most minute details and events of a trial. Excluding cameras from the courtroom will not infringe upon the public's right to know about criminal prosecutions.

An acceptable solution might be permitting the use of cameras on the outskirts of criminal trials and on the higher slopes of appellate courts. Televising certain pre-trial proceedings and appellate arguments may be informative, as well as educational, and will not threaten the equity of the fact finding process. It is a matter of proportions. However, each of these steps must be approached with caution. I am uncertain of much in this tangled legal territory, but of one thing I am sure, once cameramen set foot in our courtrooms, there may be no end to the disparagement of the quest for truth in criminal trials. Once inside we may never get them out.

Thank you very much.

JUDGE THOMPSON: Well, thank you, Herald. We have something in issue, we have something in issue. Of course, all of this is related to the invasion of privacy concerning which we have had a number of meetings heretofore.

And if, under the First Amendment, a defendant is entitled to a fair public trial, is or is not that right impaired by a television broadcast or the like?

Mr. Fahringer has said that he agrees, arraignments should be televised. But when the day comes that you are on a jury and you must say guilty or not guilty, should that be impaired by the camera or any other influence?

You and I know, and I've been a trial judge for thirty-one years, how difficult it has been, those of you who are judges, to tell that jury, listen to me and to what I say. You may not, you cannot under any circumstances read, write, hear, listen or see anything with respect to this trial. And if you

write anything, give it to me. I'll decide whether you can use it in the jury room.

These are very, very important circumstances because it's the last date, the last moment, the going over the finishing line. They're going to decide, win or lose, at that point. It must be decided by that jury, unimpaired, fair-minded, without influence one way or the other.

Well, I think it's been wonderful that we have these two advocates here tonight. They are truly great people in their forte, in what they stand for. We have never had so large an audience of people who appreciate what they have to say. And I deem it a privilege not only to have been associated with them, but to preside at this debate tonight.

Those of you who are members of the American Judicature Society know that the American Bar Association in Hawaii this year, at which I participated in another facet of appellate oral argument, had as a primary subject, this question of TV court coverage. I won't tell you what they agreed upon. You can read that in their publication. But I have it here, *Chandler vs. Florida* is before the United States Court, and it will be decided by them within a very, very short time. And we have been privileged, you and I, on a number of occasions heretofore to make up our minds before the very questions are decided by the Supreme Court.

And now I call upon you and give you the opportunity, to ask questions. Our two advocates are here to answer you.

Are there any questions?

Questioner: I want to address my question to Mr. Goodale.

Is this advocacy of television and the right to know a part of the present trend in consumerism which is part of a phenomenon which not only involves the legal profession but also medicine, engineering and every other profession? In other words, all our secrets are supposed to be open to the public, to the consumer, so that he might judge on the basis of what he sees and what he hears; is that part of our commitment or the commitment of those who favor television in the courtroom?

JUDGE THOMPSON: I guess you might call this part of the Sunshine Law, Mr. Goodale?

MR. GOODALE: Let me say, first of all, that I really don't want to agree with the way you used "consumerism" though I will agree, after I make this condition. I don't think that if we are to accept this as a form of consumerism—I'll go on to that in a moment—that necessarily that means that there are secrets and that everyone must know everything about everyone else. I don't accept that premise.

It seems to me there are reasonable zones of privacy that relate not only to judicial proceedings, but to the Judges' own lives. And accordingly, that's why I took the position that, if you're going to have access to the courts, that position would not be an absolute one.

There are exceptional circumstances to protect privacy generally within the judicial process.

Two, do I think it's a form of consumerism, with a capital "C"? Well, I suppose I do. I think that I would say, however, that it is a manifestation of a society that is much larger and more complicated than early societies. And I would suppose that at least consumers in New York believe that there was always a form of knowing in earlier years.

My point is simply this: You can't know, really, in the society that we have constructed now, for better or for worse, on mass communications, without using the mass communications as a media for having that knowledge. And accordingly, I will accept your use of "consumerism" as so modified.

Questioner: I would like to address my question to Mr. Goodale.

Basically in the argument I would agree with you that the courts are somewhat archaic and shadowed by the judiciary and that the public does not know the operation of the courts. But in your own argument you pointed up some factors, that witnesses and jurors would be distracted by the TV cameras in the courtroom.

If the public's right to know about the court operation means it should be exposed to the public, is there not an alternative whereby the public, could have—we have actors and such today—could have mock trials, et cetera, to show the public how a court does operate, but at the same time protect that defendant's rights, which to me, seems to be No. 1. A man's life could be at stake, and if there is any chance at all that a witness or a juror or a judge or anyone is going to make a decision because there is television in the courtroom, are you now taking away his rights, and shouldn't we find an alternative?

MR. GOODALE: Well, I don't think it's an unreasonable suggestion, but I don't think it really is an alternative to provide TV tape, as it were, of what goes on.

I think basically the issue that you raise is that with television in the courtroom you are increasing the risk to the defendant because we're dealing with an unknown situation.

Do I think it's worth taking that risk? Yes, I do, for the reasons indicated. It seems to me that if you look at the history of communications, every time there has been an invention in communications, there has been a reaction, perhaps an appropriate one, by the public to that invention. And the public, historically, never wants to take the new risks that are involved with that new invention. But after a while the public adjusts to it and accepts it.

Certainly when the rotary press, that we now know about and that delivers our newspapers today, was invented in England, the reaction of

the public was pretty much the same as the reaction to this subject; namely, it was a unique event, and many rules grew up in England whereby the rotary press and mass publication were restrained. Indeed, the law of prior restraint comes out of the England of this period.

My point is this: Television, for most of us in this room, is a new invention, and we are very worried about making adjustments to it. The Supreme Court in '65 was the same way. Perhaps even the members of this Court, who grew up in the pre-television era, will still have the same reaction. But essentially, the bottom line is, I think we're all going to get used to it, and the risk really isn't very much.

JUDGE THOMPSON: Judge Kapelman, Administrative Justice.

JUDGE KAPELMAN: I'm very much interested in judicial independence, and I would know, of course, that the television industry would not be conducting these proceedings *pro bono publico*, because I remember when the Presidential Inauguration was commercially sponsored.

The question that I put to you is this: In a court proceeding, who would call the order of the proceedings, the justice presiding or the director who appears there for the television company?

(Applause.)

MR. GOODALE: The TV director, of course.

(Laughter.)

MR. GOODALE: I think the answer to that is that in the best of all worlds, where we are dealing with unobtrusive TV paraphernalia, if I could call it that, I don't see why the presence of the broadcast media would be any more noticeable or controlling to the presiding judge than the presence of the print press. And the two would blend. And what we do now to control procedures with respect to print would be just what you do with respect to the broadcast media.

JUDGE KAPELMAN: May I just point out one thing? I know that I and my colleagues on the bench are exceedingly mindful of the physical capacity that one has to imbibe drinking matter, and it requires a certain recess, either every hour and a quarter or an hour and a half during the proceedings when we allow the ladies and gentlemen of the jury and the lawyers, and even the judge, to depart for those private rooms.

What I would question is, who's going to make the determination when the adjournment is going to be held? Because I don't think that the directors for television are as sensitive to the needs as the judges who are presiding for so long.

(Laughter and applause.)

MR. BARON: I want to direct a question to Mr. Fahringer. If you recall, he was another member of the debate. Mr. Fahringer, you spoke

approvingly, I think, of TV and print press probing under the First Amendment of those other two arms of our Constitutional Government, and that is the Legislature and the Executive.

MR. FAHRINGER: Yes.

MR. BARON: But now that the media and the print press have an enormous segment of power, you do object to the intrusion of the power of the media, in your own field of competence, and superb confidence? Those of us who are more journalist about it view the power of the media as having penetrated, or about to be the third of the tripod of our Constitution; and is it your feeling that the pitiless, ruthless and largely, but not entirely commercially motivated interest here may be moving into this third area, simply demoralizes our Government to the point where the awesome power you describe with respect to TV, combined with the other means of communication may, on the part of some, seem to be threatening the very viability of our political democracy, so that you are exceptionalizing your views as against those of us who feel that the media ought to be curbed constitutionally with respect to all three branches of the Government?

MR. FAHRINGER: Very well said. My real concern in making an exception—and if I didn't make this clear before, let me repeat it—is that I have misgivings about television cameras in other branches of our Government in some areas as well. But, of course, the decision that is critical in the Judicial Branch—and I don't see any parallel in the other branches of Government; that is to say, the common council, the Congress, the Senate—is that if there's a man on trial who may be executed or may go to prison for the rest of his life or for any period of time, this forum of exposure jeopardizes; and so that's where I really draw my exception.

I'm as concerned as you are about the concentration of power in the press and in the media. It's alarming to me, I must tell you this. However, I would rather have a strong monopolistic press than no press at all.

MS. GELBER: I studied acting for a number of years, and the question I want to put before Mr. Goodale is this:

There is a difference between the theater and a courtroom. A courtroom becomes a theater when it's on camera. When people get up to act in acting class and they're new students, new at it, their behavior is very unlike their real behavior. Therefore it would be inevitable that people in a courtroom would behave unlike they would in reality, because they are not in the theater—not in the courtroom, they are on stage. And the real question is your priorities, as to which is more important, the trial being like a court trial, or the exposure to the public of the trial.

MR. GOODALE: I think your major point would apply to a wit-

ness, whether that witness was on television or not, since the experience of being a witness before any courtroom audience, after all, is not unlike the example that you're setting out. So I think that what we're talking about when we reach the heart of your question is a difference of degree, since it's going to be a strange experience to the typical witness whether there is a television camera there or not. And then you are required to make some judgment as to what the dimensions of the difference are as balanced against the benefit to the public.

From my own point of view, I find that a very hard balance to make when we don't know, from an evidentiary perspective, what the dimensions of that difference are. The proponents of keeping television out of the courtroom, as indeed my opponent indicated, would say that the dimensions are enormous. Facing the camera or not facing the camera, he claims, makes all the difference in the world.

I don't know what the evidence is for that claim. My point of view is that I'm not persuaded by it. Even if I were persuaded by it ten years ago, it would seem to me that ten years hence, as the television generation comes of age, the dimensions of the difference would become less and less.

In short, I find that when you balance those possible differences against the benefits I see to the general public, you have to come out in favor of television in the courtroom.

JUDGE CHANANAU: Judge Thompson, there are several of us here tonight who served in the Legislature before and after television was introduced in the Assembly, including the former speaker, and some of my other colleagues.

Now, what happened when television was introduced to the Assembly was quite startling. Legislators were seen talking to each other while somebody was debating, others were seen drinking coffee or a glass of water, others were seen walking around the Assembly room, others were seen sleeping at their desks, various things like that. But even more important, a debate that should have taken thirty minutes or an hour, which should have encompassed meaningful, telling arguments, became a forum for running for re-election back home, because everybody knew that the television was going to be showing it back home. So what should have taken a half hour or an hour on an important issue took five or six hours or seven hours, and the debate was on arguments that would play a role for the Legislator or the Assemblyman — fortunately the Senate had more sense than to permit this — but the content of the debate or the discussion was what will find favor at home.

Now, I'm not saying that they're going to find the judge drinking a cup of coffee or a lawyer with his feet up on the desk, but I can see

where if the public thinks badly of what they are told goes on in the courtroom, that some of the things that can be portrayed improperly will create an even more dangerous impression, a more insidious impression in the minds of the Legislature, in the minds of the public.

But there is one question I would like to pose to Mr. Goodale. Would the trial have to be televised in toto?

MR. GOODALE: The question is, does the proposal for the television in the courtroom mean that such television would amount to the full trial and not a part of it. And the answer is no. The proposal would be that if you're going to permit television in the courtroom, you would permit those who televise trials to edit the proceedings, just as the print press does.

JUDGE CHANANAU: All right. Now what's going to happen is this: They are going to take — the television director, in his effort to get some sensationalism out of it or to make a story, is going to pick up one question, one answer, one explosive answer from a witness somewhere that's going to convict the man, or what's going to free the defendant, not based on what happened in the courtroom or the whole testimony, but based on that one particular thirty second or forty-five-second answer.

MR. GOODALE: The statement was that one edited part will convict a defendant. Well, in order to reach that point, you have to assume the jury is going to disobey the Court's instructions. I mean, that's the real issue, and it really poses a problem.

I think the earlier question is, from the American public's point of view, is it appropriate to have an edited tape available in order to inform the public? I think that's a tough question to answer, but I believe the answer is yes.

JUDGE STEUER: The question is addressed to Mr. Goodale. You remarked about the beneficial effect of televising the arguments before the Court of Appeals of this State. Am I correct in that?

MR. GOODALE: Yes.

JUDGE STEUER: What the people that saw that broadcast learned was to hear the arguments. And when the arguments were completed, to hear the presiding justice say, thank you, gentlemen, decision is reserved. They never learned how the arguments came out. They never learned how the cases were decided.

Now, if you want to carry your proposition to its proper conclusion, you must want to include the discussion had by the judges in order to reach their decision.

Now, I can tell you from many years of experience and many arguments on appellate matters, that that would be an entirely impractical proposition. You do not learn, or you cannot learn how decisional

processes are arrived at by televising those proceedings without materially affecting, and in my opinion, ruining them. There are many cases which raise no question at all in the opinion of the judge, but may in the opinion of the public, who heard the argument, think there was something to it.

If you opt for that, the process of decision would take so long that it's doubtful if the first case that is argued after the decision is televised is decided in time or if you live that long to get to it.

(Laughter.)

The same thing would apply to the jurors' discussion on the case and how you could limit their freedom of discussion, and you certainly would limit it if it were televised.

Naturally I'm here to ask a question. The question is: Would you extend television coverage to those parts of the legal process?

MR. GOODALE: Okay, the answer is no.

JUDGE THOMPSON: That's a categorical answer. You won that case.

(Applause.)

JUDGE FRANK: This is addressed to Mr. Fahringer.

As a former Justice of the Court, and as a lawyer of fifty-two years' experience as a trial lawyer, I have formed certain opinions of what occurs in a courtroom. And it's my opinion that the right of a defendant is very seriously affected very often by the presiding justice. He's a human being, he has certain inclinations and certain tendencies.

Now, if that judge is on camera, it would seem to me that the defendant would receive a fairer trial if he was constrained, and not permitted to exhibit his bias, his prejudice, and his attitude, and he would have to deal more fairly and more even-handedly with the defendant, who appears before him.

Now what have you got to say about that?

MR. FAHRINGER: My answer is — I'm not saying this to flatter you, I think that's an incisive observation, because I do believe it could have that impact. But what concerns me is it's unpredictable.

I have a feeling that a judge sitting on a case where there's a very unpopular defendant, and the public is up in arms, the Berkowitz trial or a Black Panther's trial, may, on the other hand, realizing that everything that is being said is being watched by everybody in New York City, conceivably be influenced the other way, and as long as there's that danger that he will behave in a fashion that's not natural to him, my answer to you is, I would rather have the sanctity of the courtroom preserved, and I'll take my chances with that, because I think in more cases than not his decision will be a fair one.

(Applause.)

JUDGE THOMPSON: Thank you very kindly. (Whereupon the proceedings were concluded.)

POSTSCRIPT

On January 26, 1981 in the landmark case of *Chandler v. Florida*, a unanimous Supreme Court finally acknowledged the point many of us have been making for years; namely that The Supreme Court has now held that not only can you have television in the courtroom, you can have it there without the defendant's consent! The court has accordingly, for all intents and purposes, overruled its previous decision in this area of 16 years ago, *Estes*. As a consequence, state courts can now permit television without fear that it will make the proceedings presumptively unconstitutional.

This decision, although limited in scope, is a revolutionary one for the Burger court. The Chief Justice is on record as opposing television in *his* courtroom, and the Burger court has not been known for decisions expanding press freedoms. Yet here that same court says that television is O.K.

Is there a catch? In a minor sense, one could say yes. The Supreme Court held that a controlled experiment in Florida without the consent of the defendant is acceptable under the circumstances of *this* case. The Court did not decide that an experiment under any circumstance without consent is going to pass muster. Furthermore, the Court said nothing about television in the federal courts; only that it will permit experimentation in the state courts.

Yet big trees out of little seedlings grow. It is inevitable, in my view, that there will soon be television in all courts throughout the country now that the Supreme Court has said it is O.K.

Here in New York, the Court of Appeals has already announced its intention, effective January 1st, 1981, to permit the televising of appellate arguments and, at least on a one-year experimental basis, the televising of civil trials. Elaborate procedural safeguards regarding both have already been issued. Obviously the next step must be to develop a workable set of guidelines for coverage of criminal trials here to afford the public an opportunity to observe and study those judicial proceedings. It is to this latter task that both proponents and opponents of television in the courtroom must now turn.

James C. Goodale