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Constitutional Law: Access to Trials: States Have the Authority to Experiment with Media Coverage of Their Criminal Trials Without the Defendant's Consent. Chandler v. Florida, 101 S. Ct. 802 (1981).

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propriate judicial policy in this area.[69]

V. CONCLUSION

In finding that section 6010 of the Developmentally Disabled Act does not create in favor of the mentally retarded any substantive rights to appropriate treatment in the least restrictive environment, the Supreme Court not only ignored a large body of lower court cases but avoided deciding the constitutional issues involved.

Backlash against deinstitutionalization may develop as economy cuts make it difficult to provide more and better services for the mentally disabled.[70] The *Pennhurst* decision will be viewed by many as an abdication of the judiciary's responsibility to protect the rights of this vulnerable and powerless group.

FAYE L. CALVEY

CONSTITUTIONAL LAW — Access to Trials — States Have the Authority to Experiment With Media Coverage of Their Criminal Trials Without the Defendant's Consent. *Chandler v. Florida*, 101 S. Ct. 802 (1981). The United States Supreme Court unanimously[1] decided in *Chandler v. Florida*[2] that Florida's program[3] which allowed electronic media coverage[4] of criminal

69. Schoenfeld, *A Survey of the Constitutional Rights of the Mentally Retarded*, 32 S.W.L.J. 605 (1978).

70. Friedman, *supra* note 29.

1. Justice Stevens did not participate in this decision.

2. 101 S. Ct. 802 (1981).

3. In *In re* Post-Newsweek Stations, Florida, Inc., 347 So. 2d 402 (Fla. 1977), the Florida Supreme Court revised *In re* Post-Newsweek Stations, Florida, Inc., 327 So. 2d 1 (Fla. 1976) which had required the participants' consent so as to allow a one year experiment in which the electronic media could televise and photograph judicial proceedings without the consent of participants. Florida's revised Canon 3A(7) was the ultimate result of this experiment. The Florida Supreme Court established guidelines for standards of conduct and technology to govern electronic media coverage of court proceedings in *In re* Post-Newsweek Stations, Florida, Inc., 347 So. 2d 404 (Fla. 1977).

4. The ruling in Chandler v. Florida, 101 S. Ct. 802 (1981) included television,

proceedings without the defendant's consent, was not a violation of a defendant's due process rights.[5] The Court held that without a showing of prejudice of constitutional dimension, it had no authority to interfere with a state's experiment in this area[6] and that such experimentation was not unconstitutional.[7] After considering the risks to a fair trial created by electronic media coverage, the Court ruled that "an absolute constitutional ban on broadcast coverage of trials cannot be justified . . . ."[8] However, this was not intended to be a judicial endorsement or mandate of such coverage.

I. THE DECISION

The *Chandler* defendants were convicted of conspiracy to commit a felony burglary, grand larceny and possession of burglary tools.[9] Under Florida's Code of Judicial Conduct Canon 3A(7),[10] parts of the trial were televised live locally. During the trial, the defendants challenged this canon on the ground that such coverage prevented a fair trial. The challenges were overruled, and requests to exclude live television coverage were denied, as were requests to sequester the jury. The Florida District Court of Appeal affirmed the conviction, but refused to consider the validity of Canon 3A(7),[11] certify-

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radio, and still photographic coverage. For the purpose of this article these will be referred to as electronic equipment.

5. Due process rights are provided by the fourteenth amendment to the United States Constitution which states, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

6. 101 S. Ct. at 813-14.

7. *Id.*

8. *Id.* at 810.

9. Chandler v. State, 366 So. 2d 64 (Fla. Dist. Ct. App. 1979).

10. Florida's Code of Judicial Conduct, Canon 3A(7) was promulgated in the following series of court decisions: *In re* Post-Newsweek Stations, Florida, Inc., 327 So. 2d 1 (Fla. 1976), *modified,* 337 So. 2d 804 (Fla. 1976), *modified,* 347 So. 2d 402 (Fla. 1977), *modified,* 347 So. 2d 404 (Fla. 1977). Ultimately Canon 3A(7) was reviewed, modified, and made a permanent rule. *In re* Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764 (Fla. 1979). The appendices following the most recent decision in the case give the specific guidelines for such coverage and background information on the current state of this rule in other jurisdictions. *Id.* at 783-94.

11. The Florida Supreme Court had revised Canon 3A(7) of the Code of Judicial Conduct (A.B.A. 1972), which had generally prohibited the electronic media from live coverage of judicial proceedings. *In re* Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, 781 (Fla. 1979); Florida's revised Canon 3A(7) provided: "Subject at all times

ing the question of its constitutionality to the Florida Supreme Court. The Florida Supreme Court denied review, holding that the appeal involved a moot issue because of its recent decision in *In re Post-Newsweek Stations, Florida, Inc.*[12] which amended Canon 3A(7)[13] to allow electronic media coverage of courtroom proceedings. Certiorari was granted by the United States Supreme Court to determine whether such coverage over defendants' objections violated due process rights.

The United States Supreme Court's majority felt this to be a case of first impression[14] because *Estes v. Texas*[15] did not establish that electronic media coverage of criminal proceedings was unconstitutional.[16] In separate concurring opinions in *Chandler,* Justices Byron White and Potter Stewart differed from the majority, arguing that *Estes* did establish a constitutional prohibition against electronic media coverage of trials and therefore had to be expressly overruled.

The prime concern in *Chandler* was assuring the defendant's right to a fair trial.[17] The Court was concerned that electronic media coverage could create general psychological prejudice,[18] "adversely affect the conduct of the participants,"[19] and increase the number of appeals.[20] The Court was particularly sensitive to the potential of denying a fair trial because the Florida experiment allowed such coverage without

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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 case, 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."

12. 370 So. 2d 764 (Fla. 1979).

13. *See* note 11 *supra.*

14. 101 S. Ct. at 809.

15. 381 U.S. 532 (1965).

16. 101 S. Ct. at 809.

17. *Id.*

18. The Court was concerned with the possibility that the mere presence of the press and their equipment could create a prejudicial atmosphere. *Id.* at 810.

19. *Id.* at 811. The Court was concerned that "awareness by the accused of the coverage and contemplated broadcast" would prejudicially affect the participants' conduct and thus the fairness of the trial.

20. By adding a new basis for reversal the Court postulated appeals might be increased. *Id.*

the defendant's consent.[21] However, the Court said these risks and concerns cannot justify "an absolute constitutional ban on broadcast coverage."[22] A defendant's due process rights were safeguarded by pre-trial hearing procedures,[23] a record for appellate review,[24] and carefully delineated guidelines for the press and the trial judge.[25]

In addition, the Court held that the defendants' due process rights had not been violated because "[n]othing of the 'Roman circus' or 'Yankee Stadium' atmosphere, as in *Estes*, prevailed here, . . . nor have appellants attempted to show that the unsequestered jury was exposed to 'sensational' coverage, in the sense of *Estes* or of *Sheppard v. Maxwell* . . . ."[26]

II. Historical Background

In *Chandler*, the Supreme Court was confronted with the narrow issue of whether Florida's rule allowing electronic media coverage of criminal proceedings regardless of defendant's objection was unconstitutional. A consideration implicit in making that judgment was the problem of safeguarding the defendant's sixth amendment[27] right to a fair trial, a right which has been found to apply to state judicial actions

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21. Florida is one of the few states which does not require the defendant's consent to broadcast coverage, and therefore potentially presents unique problems. *Id.*

22. Based on the *possibility* that prejudice of the jury may sometimes occur due to broadcast coverage, the Court held that an absolute ban was not justifiable. *Id.* at 810.

23. A pre-trial hearing provides a forum for the defendant's objection and allows the trial court to establish procedures to minimize or eliminate prejudice to the defendant. *Id.* at 811.

24. A record for appellate review is created by Florida's rule which requires that a defendant's objections to coverage be placed on the trial court's record. *Id.*

25. *Id.* Special precautions are taken to protect vulnerable witnesses like children in accordance with the following standard:

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

In re Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, 779 (Fla. 1979).

26. 101 S. Ct. at 813.

27. The sixth amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ."

through the fourteenth amendment.[28]

The simultaneous achievement of a fair and open trial often involves a conflict between the potential prejudice of trial publicity[29] and the press' and public's right of access.[30] Underlying the press' right of access are first amendment rights,[31] which, though not directly addressed by the *Chandler* Court, are essential to any understanding of this case and, with the sixth amendment's guarantee of a public trial, secure the public's right of access to judicial proceedings.[32]

Historically, the sixth amendment has been viewed as requiring open civil and criminal proceedings.[33] Whether this right reaches constitutional dimensions has often been debated.[34] The desire to educate and inform the public of the court's proper functioning[35] must be balanced against protecting and guaranteeing fair treatment of the accused.[36] Central to the sixth amendment is the concern that secret tribunals would be instruments of oppression[37] and that denial of public and press access would constitute censorship.[38]

The issue of whether a defendant's due process rights have been violated has often revolved around whether the causal link between prejudice and publicity must actually be proven or whether it can be inferred.[39] In *Chandler,* the Court placed

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28. *See* note 3 *supra.*

29. *See* Bell v. Patterson, 279 F. Supp. 760 (D. Colo.), *aff'd,* 402 F.2d 394 (10th Cir. 1968), *cert. denied,* 403 U.S. 955 (1971).

30. *Compare* Gannett Co. v. De Pasquale, 443 U.S. 368 (1979) *with* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

31. The first amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

32. Note, *The Public, The Media and The Criminal Defendant: Access to Courtrooms Prevails Over Fears of Prejudicial Publicity,* 83 W. VA. L. REV. 245, 252 (1981).

33. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577-78 (1980); Gannett Co. v. De Pasquale, 443 U.S. 368, 385 (1979).

34. *Compare* Gannett Co. v. De Pasquale, 443 U.S. 368 (1979) *with* Craig v. Harney, 331 U.S. 367 (1947).

35. State v. Schmid, 109 Ariz. 349, ___, 509 P.2d 619, 624 (1973); *In re* Hearings Concerning Canon 35, ___ Colo. ___, 296 P.2d 465, 469 (1956); Lyles v. State, 330 P.2d 734, 742 (Okla. Crim. App. 1958).

36. 381 U.S. 532, 538-39 (1965).

37. *Id.* at 539.

38. *See* Great Falls Tribune v. District Court, ___ Mont. ___, 608 P.2d 116, 119 (1979).

39. *Compare* Rideau v. Louisiana, 373 U.S. 723 (1963) *and* Estes v. Texas, 381 U.S. 532 (1965) *with* Murphy v. Florida, 421 U.S. 794 (1975).

the burden of proving actual prejudice upon the defendant,[40] because few jurors can be found today who are ignorant of celebrated cases. Technological advances in news dissemination have reduced juror ignorance.[41] However, the mere existence of any such knowledge does not rebut the presumption of juror impartiality or establish prejudice.[42]

Although the press enjoys no constitutional right of special access to information,[43] the Court noted in *Craig v. Harney* that "[a] trial is a public event. What transpires in the courtroom is public property. . . . There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."[44] The press must be given the same access rights as the general public to criminal proceedings. To make these rights meaningful in the case of the electronic media,[45] photographers and television representatives should have the same courtroom privileges as other members of the press.[46] This view is central to the *Chandler* decision.

III. The Court's Decision

Chandler is the most recent in a series of Supreme Court cases which balance the defendants' right to a fair trial with the potential prejudice created by public and press access to judicial proceedings.[47] Central to the Court's decision is an analysis of *Estes v. Texas*.[48] Estes was found guilty after a trial of great notoriety which was televised and broadcast over the defendant's objection. The Supreme Court held that the

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40. 101 S. Ct. at 810, 813.

41. *See, e.g.*, Murphy v. Florida, 421 U.S. 794 (1975); Great Falls Tribune v. Dist. Ct., etc., 608 P.2d 116 (Mont. 1979).

42. Murphy v. Florida, 421 U.S. 794, 800 (1975); Irvin v. Dowd, 366 U.S. 717, 723 (1961); State v. Schmid, 109 Ariz. 349, 509 P.2d 619, 622 (1973).

43. Branzburg v. Hayes, 408 U.S. 665, 684-85 (1972).

44. 331 U.S. 367, 374 (1974).

45. *See* Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (including motion pictures in "press"); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938). There can be no doubt that "press" includes the electronic media.

46. Lyles v. State, ___ Okla. at ___, 330 P.2d at 741.

47. This conflict has been variously denominated as the fair trial - free press conflict or the first versus sixth amendment as applied to the states through the fourteenth amendment.

48. 381 U.S. 532 (1965).

televised coverage of criminal proceedings violated the defendant's due process rights[49] on three grounds:

> (1) that the televising of trials diverts the trial from its proper purpose in that it has an inevitable impact on all the trial participants; (2) that it gives the public the wrong impression about the purpose of trials, thereby detracting from the dignity of court proceedings and lessening the reliability of trials; and (3) that it singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others.[50]

The Court made this decision without a showing of actual prejudice even though the jury was sequestered and a change of venue was granted.[51] Although forbidding courtroom television impinged on the states' rights,[52] the Court held that the electronic media did not have a constitutional right to cover judicial proceedings.[53] In fact, it said such coverage violated "the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment."[54] The only relevant constitutional consideration was that the accused be given a fair trial.[55] The Court found that television detracts from that right because of its effect on trial participants even when its equipment is relatively unobtrusive.[56]

Justice Harlan, in a concurring opinion, maintained that even though television coverage had violated Estes' due process rights, it was not unconstitutional *per se*.[57] Harlan noted that at that time television was a novelty and still in the developmental stage.[58] As its technology improved and the public became more accustomed to its usage, the impact of television on both the participants in the trial and the trial itself might be lessened.[59] Thus, Harlan left the door open for the Court to reevaluate the position taken in *Estes* at a later

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49. *Id.* at 543-44.
50. *Id.* at 565 (Warren, C.J., concurring).
51. *Id.* at 535, 544, 549.
52. *Id.* at 587 (Harlan, J., concurring).
53. *Id.*
54. *Id.*
55. *Id.* at 589.
56. *Id.* at 588-90.
57. *Id.* at 590-91, 595.
58. *Id.* at 595.
59. *Id.*

date.[60] Since Harlan's concurrence fell short of establishing a constitutional rule on electronic media coverage, the *Chandler* Court aligned Harlan's opinion with the four dissenting justices in *Estes* and held that *Estes* did not establish a constitutional ban.[61] Therefore, the Court said *Estes* need not be overruled, and that, as long as such coverage did not violate due process, the states should be free to experiment.[62]

Another significant recent case in the Court's recognition of the press right to access to judicial proceedings was *Nebraska Press Ass'n v. Stuart*.[63] In this case, the Court held that a protective order which prohibited the press from publishing or broadcasting stories of confessions or admissions made by the accused was unconstitutional[64] as a prior restraint.[65] By allowing prior restraint, a court would be elevating sixth amendment rights above first amendment rights, a priority some argue was not envisioned in the drafting of the Constitution.[66]

Moreover, prior restraint places the judge in a censorship role,[67] which is intolerable especially when alternatives exist.[68] Although refusal to allow cameras in the courtroom is not truly a prior restraint, because media coverage, including electronic media reporters without their equipment, is still permitted, the effect is quite similar. Without the right to pictoral coverage, it can be argued that television loses much of its effectiveness. It only differs from newspapers in being a visual and oral recitation rather than a written one.[69]

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60. *Id.* at 595-96.

61. 101 S. Ct. at 809.

62. *Id.* at 813-14.

63. 427 U.S. 539 (1976).

64. *Id.* at 541.

65. "A prior restraint is an order not to publish, while a closure order is an order not to attend." Note, *Public Trials and a First Amendment Right of Access: A Presumption of Openness*, 60 NEB. L. REV. 169, 187 (1981). There is a presumption against the constitutional validity of prior restraint. *See, e.g.*, U.S. v. Washington Post Co., 403 U.S. 713 (1971); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931); U.S. v. Columbia Broadcasting System, Inc., 497 F.2d 102 (5th Cir. 1974).

66. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976).

67. *Id.* at 607 (Brennan, J., concurring).

68. Some of these alternatives to prior restraint are a change of venue, postponement of the trial, careful questioning of prospective jurors, clear jury instructions, and jury sequestration. *Id.* at 563-64.

69. *But see* 381 U.S. at 590 (Harlan, J., concurring).

Two other recent Supreme Court cases regarding closed courtrooms were not affected by *Chandler*, but they help flesh out its parameters. In *Gannett v. DePasquale*,[70] the Court held that pre-trial hearings were separate and distinct from the trial itself[71] and a press and public right of access did not extend to them.[72] The Court maintained that the sixth amendment's guarantee of a public trial was personal to the accused and did not confer any rights upon the press.[73] This decision can be read narrowly to apply only to criminal pre-trial hearings[74] and, therefore, did not have to be considered in *Chandler*.

Richmond Newspapers v. Virginia[75] attempted to clarify *Gannett* insofar as it addressed trials themselves.[76] In *Richmond Newspapers*, the Court held that an interference with access to criminal trials abridges first amendment rights[77] and defeats many of the goals of a public trial.[78]

Because of the changing nature of society, today's population generally does not glean information by first-hand observation; rather, people are dependent upon the media for information.[79] Therefore, the *Richmond Newspapers* Court found that denying the press access to criminal trials effectively denies the public's right to information.[80] The Court said, "[T]he First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors . . . ."[81]

Chandler reflects this view, not only by recognizing first amendment guarantees but by refusing to summarily close the

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70. 443 U.S. 368 (1979).

71. *Id.* at 387-91.

72. *Id.*

73. *Id.* at 385-86.

74. *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 62, 65-66 (1979).

75. 448 U.S. 555 (1980).

76. Denniston, *Photo Finish*, THE QUILL 20, 21 (1981).

77. 448 U.S. at 583 (Stevens, J., concurring).

78. Among the goals achieved by a public trial are the discouragement of perjury, participant misconduct, and decisions based on secret bias or partiality. *Id.* at 569.

79. *Id.* at 573.

80. The Court noted that "[i]nstead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public." *Id.* at 573.

81. 448 U.S. at 576.

courtroom doors to the electronic media.

IV. CRITIQUE

Chandler is based on the analysis that *Estes* did not find electronic media coverage of criminal judicial proceedings *per se* unconstitutional.[82] The *Chandler* Court held that the presence of electronic media in the courtroom would not always violate a defendant's due process rights and was not such a violation in this case. Florida's Code of Judicial Conduct, Canon 3A(7) left the door open for a defendant to prove such a violation by showing that the media's coverage compromised the jury or judge's ability to judge him fairly, or that it adversely affected trial participants.[83] Built into the Florida program were rules which provided a record for appellate review and pretrial hearings on the question of excluding the electronic media.[84] These safeguards helped to insure a defendant's rights. However, the burden of establishing prejudice rests with the defendant.[85] This may be difficult to substantiate because, as the Court noted, empirical data has not demonstrated conclusively that broadcast coverage has an effect on the judicial process.[86]

The Court neither endorsed nor invalidated Florida's experiment,[87] but affirmed the state's right to experiment,[88] thus reflecting a growing judicial trend towards a more traditional federalism.[89] Consistent with this view of government, a state is not required to admit cameras into the courtroom.

As established in the Florida experiment[90] and envisioned by the *Chandler* Court, the trial judge would have wide discretion in controlling which participants are filmed and which judicial proceedings are closed.[91] The possibility exists that

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82. 101 S. Ct. at 809.

83. *Id.*

84. *Id.* at 811.

85. *Id.* at 813.

86. *Id.* at 812; *see* Netteburg, *Does Research Support the Estes Ban on Cameras in the Courtroom?*, 63 JUDICATURE 467 (1980) for a study on Wisconsin's experiment.

87. 101 S. Ct. at 813.

88. *Id.* at 814.

89. *Id.* at 812. The Court said: "This concept of federalism, echoed by the states favoring Florida's experiment, must guide our decision."

90. *In re* Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764 (Fla. 1979).

91. *Id.* at 782.

the judge could abuse this discretion, regardless of how well-behaved the camera and sound crews may be, and bar their access to the court.[92] Judges may make this decision based on what the electronic media does with its tapes, thus extending a judge's domain and influence beyond the courtroom doors.[93] This action can be rationalized as an attempt to gauge the impact of broadcast coverage on the trial participants before the bench,[94] but can also be viewed as a serious infringement on first amendment rights.

Still to be answered is the impact television will have on the courts and the legal system.[95] There can be no doubt that electronic media coverage has had a tremendous impact in other areas: "[i]t has reshaped politics, changed the nature of sports and business, and transformed family life and the socialization of children . . . ."[96]

Quite possibly, the Court's decision was partially motivated by recent political events, such as the Watergate fiasco, which have increased public skepticism of the democratic and judicial processes. This erosion of public confidence may have made an open judicial system even more important. As Justice Larsen said in a concurring opinion in *Commonwealth v. Hayes:*

> Human institutions have a tendency toward corruption; only when certain checks and balances are permitted and/or imposed does this tendency become neutralized. The tendency of corruption in the judiciary becomes greatest when the public and the media (the public's eyes and ears) are excluded from judicial proceedings. . . . [T]he right of the public and of the media to attend court proceedings must be absolute.[97]

Although this decision allows the states to experiment freely, "cameras remain banned from all trials in federal courts, under rules which the United States Judicial Confer-

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92. Denniston, *Photo Finish,* THE QUILL 20, 21 (1981).

93. *Id.* at 22.

94. *Id.*

95. Gerbner, *Trial by Television: Are We at the Point of No Return?,* 63 JUDICATURE 417, 418 (1980).

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

97. 489 Pa. 419, ___, 414 A.2d 318, 328 (1980) (Larsen, J., concurring).

ence (with Chief Justice Burger as chairman) reaffirmed only last September."[98] Thus the *Chandler* ruling appears limited in impact to state courts although it "will accelerate moves to allow cameras in the 22 states that forbid coverage by electronic media . . . ."[99]

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98. Denniston, *Photo Finish*, THE QUILL 20, 21 (1981).
99. *Cameras in the Courtroom*, 67 A.B.A.J. 277 (March, 1981).